

October 8, 2015

Mass Digitization Pilot Program, Request for Comments, Submission of Boston Library Consortium

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October 8, 2015

Karyn Temple Claggett, Associate Register
U.S. Copyright Office
Library of Congress
James Madison Memorial Building
101 Independence Avenue SE
Washington, D.C. 20559-6000

Re: Mass Digitization Pilot Program: Request for Comments (Docket No. 2014-07)

Dear Associate Register Claggett,

The Boston Library Consortium (BLC) writes to comment on Question 5, “Other Issues”, and, in part, Question 1a. (“Qualifying Collections”), 1.b (“Eligibility and Access”), and Question 4, “Diligent Search.” We believe that the Extended Collective Licensing (ECL) framework proposed by the Copyright Office would not advance the goals of the system of copyright to “promote the Progress of Science and useful Arts”. The “nonprofit educational and research” users, who have no “purpose of direct or indirect commercial advantage,”¹ are exactly the users our libraries support.

The proposed ECL system would **(1) impose significant new burdens on libraries and archives, (2) limit access to and use of existing unused works, and (3) is strikingly unnecessary**, since libraries and archives, rightsholders, and users alike currently benefit from reliance on fair use and individual, careful judgment by libraries and archives.

¹ United States Copyright Office, “Mass Digitization Pilot Program; Request for Comments”, 80 *Federal Register* (“FR”) 32614 (June 9, 2015); amended by “Extension of Comment Period; Mass Digitization Pilot Program; Request for Comments”, 80 FR 45248 (July 29, 2015).

INTRODUCTION

The Boston Library Consortium (BLC) is an academic library consortium founded in 1970 to support resource sharing.² Today it includes 17 academic and research libraries in Massachusetts, Connecticut, and New Hampshire, including Boston College, Boston University, Brandeis University, the Marine Biological Laboratory and Woods Hole Oceanographic Institution, the Massachusetts Institute of Technology, Northeastern University, the State Library of Massachusetts, Tufts University, the University of Connecticut, the Universities of Massachusetts in Amherst, Boston, Dartmouth, Lowell, and the Medical School, the University of New Hampshire, Wellesley College, and Williams College.³ BLC focuses on resource sharing as well as professional support for the librarians and archivists in its member institutions.

Our member institutions house numerous research archives and special collections, and our members have collectively invested millions of dollars and thousands of hours in digitizing these collections. We write because the proposed ECL Framework, if applied broadly, would threaten new and ongoing digitization projects, and cast shade over existing and highly successful projects.

In these comments, we highlight projects from only two of our institutions, Boston College and the University of Massachusetts Amherst. We do this for reasons of space, but we could have discussed any number of the scores of digitization projects and initiatives that our institutions have developed.

Boston College Digitized Collections of Photographs and Scrapbooks.

BOSTON COLLEGE (“BC”) has digitized a number of collections of photographs and scrapbooks relating to Boston College history or alum. One such set of collections includes photographs of BC faculty and staff, buildings, athletic and other events.⁴ Most are twentieth century, with no information about the identity of the photographer or even

² “About Us,” Boston Library Consortium, <https://www.blc.org/about-us> (last visited October 8, 2015).

³ “Members,” Boston Library Consortium, <https://www.blc.org/members> (last visited October 8, 2015).

⁴ See “Boston College Athletic Photographs, 1889-2013,” at <http://hdl.handle.net/2345/3002> ; “Boston College Building and Campus Images, 1880-2012”, at <http://hdl.handle.net/2345/3218> ; “Boston College Faculty and Staff Photographs, 1872-2012”, at <http://hdl.handle.net/2345/3132>; and “Boston College Special Guests and Events Photographs, 1900-2006”, at <http://hdl.handle.net/2345/3087>.

publication history. They might have been taken by BC staff, contractors, or even unaffiliated photographers. Some of the works might be works made for hire and owned by BC; others might be long-forgotten works by photographers whose heirs theoretically could retain a legal interest in the works, depending on publication status and compliance with formalities. For many of these works there is no way to determine copyright status with any degree of certainty.

BC's collection of the Baltimore-based advertising and music firm, John Donnelly & Sons Records, includes a number of scrapbooks with "newspaper clippings, photographs, and correspondence related to the company's activities and to advertising in general", as well as awards, business and financial records, promotional materials, and photographs.⁵ Given the quantity and diversity of the materials in the scrapbooks, copyright assessment on an item-by-item basis would be difficult and time-consuming, and likely would be deemed to be "not worth it," relative to the value of the collection. Item-by-item analysis would also potentially destroy the holistic nature of the digitized work—if portions of the works were deleted or extracted, then the value of the whole (the scrapbook) would be significantly harmed. As whole works, the resources themselves are a study for historians of advertising, culture, and business; expurgated or redacted versions would, by comparison, be of little use. As with many special collections, digitization and providing electronic access to the digitized surrogate, serves also the purpose of preservation, since any handling fragile materials of disparate construction can damage them.

One final collection to note is BC's collection of the records of former Speaker of the House "Tip" O'Neill, certainly one of the most notable legislators of the twentieth century and a Boston College alum.⁶ The contents range from official portraits, whose provenance is unknown, to works that appear to be candid snapshots. Many of these likely are works of the federal government and in the public domain, but it would be difficult and in many cases impossible to ever document this with certainty. Without BC's careful curation and development of this collection, these materials would be lost to the public and to researchers of Massachusetts and United States political history alike. Were an ECL framework to be imposed on such collections, with the attendant costs proposed by the Copyright Office, BC would be significantly discouraged from doing this work.

⁵ "John Donnelly & Sons Records, 1884-1978", at <http://hdl.handle.net/2345/2675> (p.8).

⁶ "Thomas P. 'Tip' O'Neill, Jr., Photographs", available at http://dcollections.bc.edu/R/?func=collections-result&collection_id=1129.

University of Massachusetts, Amherst, W.E.B. Du Bois Digitization Project

The University of Massachusetts, Amherst's ("UMass") W. E. B. Du Bois digitization project was supported by the National Endowment for the Humanities, among other entities, and took five years and \$250,000 to complete. W. E. B. Du Bois was one of 20th century America's most prominent civil rights activists, scholars, and authors. The project digitized 150,000 pages of letters, essays, lectures, fiction, nonfiction writing, research notes, and photographs, creating the "largest freely available online archive of primary source materials for the study of twentieth century African American history."⁷ The contents include numerous unpublished works of or relating to W. E. B. Du Bois, many of which may well be in copyright.

The UMass Special Collections and University Archives (SCUA) carefully evaluated the collection as a whole to determine whether any individual items needed distinct treatment, and, most importantly, establishing procedures to handle any copyright concerns raised. Full item-by-item consideration of the sort envisioned by the Copyright Office's ECL proposal would have rendered completely infeasible this invaluable resource. The costs would have multiplied to many millions of dollars, stripping funds away from other projects, with no corresponding gains in benefits to any rightsholder, anywhere.

I. The Proposed ECL Framework Imposes Significant Burdens on Libraries and Archives.

The Proposed ECL Framework Applies to Most Library and Archival Collections.

The proposed ECL framework would impose significant burdens on libraries and archives. In Question 1.a., the Copyright Office "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."⁸

Those three categories collectively make up the vast majority of works held within libraries and archives. For instance, in the collections we described above, close to 100% of the collections comprised literary works, often with embedded pictorial or

⁷ University of Massachusetts Amherst, "W. E. B. Du Bois Digitization Project Proposal to the National Endowment for the Humanities, "on file with the author.

⁸ 80 FR 32614.

graphic works, and photographs. This is characteristic of many of the sorts of special collections housed in research libraries.

The Proposed “Digital Security Measures” Would Be Burdensome on Libraries and Users Alike, and Ineffective to Achieve the Desired Aims.

In Question 1.b., the Copyright Office invites inquiry into “appropriate restrictions on methods of access”, licenses that apply “only through onsite computer terminals”, and restrictions to use by “students, affiliates, and employees of the digitizing institution.”⁹ Answering its own question on “appropriate restrictions on methods of access,” the “[Copyright] Office has recommended that [Copyright Management Organizations] and users be required to include ... terms requiring the user to implement and reasonably maintain digital security measures to control access to the collection, and to prevent unauthorized reproduction, distribution, or display of the licensed works.”

These “digital security measures,” suggested by the Copyright Office to be *required* in an ECL, would impose burdens on libraries and archives with little evidence of any benefit to rightsholders. While technological protection measure requirements were in vogue in the 1990s,¹⁰ their implementation and use has proven to be both unwieldy and ineffective. It is surprising to see the Copyright Office recommending them in 2015, after almost twenty years of experience has demonstrated their ineffectiveness, difficulty in successful implementation, ease of misuse, and barriers to lawful and other uses.

The Digital Millennium Copyright Act is Exhibit A. The Copyright Office continues to consider, year after year, exemptions to the DVDCCA’s CSS¹¹ to accommodate legitimate users, including libraries, archives, and educational institutions, which are inconvenienced or placed at legal risk for making otherwise lawful uses. Yet users who are less burdened by legal concerns because their proposed uses are unlawful to begin with, have ready access to any number of software tools for circumventing the technological measures. Indeed, CSS is so easily circumvented that the popular, and succinct, deCSS code has been distributed on t-shirts and coffee mugs. The DVDCCA has long since given up attempting to stifle deCSS, except in the Copyright Office’s DMCA anticircumvention proceedings, where only legitimate users bother to testify to their continued inconvenience and legal risk.

⁹ 80 FR 32615.

¹⁰ “Technological measures”, proposed by Bruce Lehman et al in *Intellectual Property and the National Information Infrastructure: The Report of the Working Group on Intellectual Property Rights* (1995) and implemented in the Digital Millennium Copyright Act of 1998 (17 USC 1201); “technological measures”, 17 USC 110 (TEACH Act of 2002).

¹¹ DVD Copy Control Association (DVD CCA)’s Content Scramble System (CSS).

The TEACH Act's similarly strained requirements to install technological measures have led to the widespread acknowledgement by educators that the requirements are burdensome and difficult to meet. Many educators avoid reliance on the provisions of the TEACH Act altogether. This is not a model that the Copyright Office should seek to emulate.

In the case of libraries and archives, digitizing special collections, it is difficult to imagine what benefit rightsholders might gain from preventing access to archival contents by, for example, persons with disabilities, educators seeking to incorporate the work into their lectures, or others who have testified to the negative effects of technological measures. Rightsholders for these works are often unknown, elusive, or recognize that the value of their works lies more in the exposure they get in context of a curated collection rather than in restricting access via technological measures.

To *mandate* such requirements, thus requiring that rightsholders and libraries alike have to negotiate away from them, only heightens this entirely unnecessary and unproductive burden.

II. The Proposed ECL Framework Will Limit Access to and Use of Existing and Otherwise Unused Works.

It hardly needs saying that the proposed ECL framework will limit use of and access to existing works—the suggestions for licensing and technological measures make it clear that that is the intent of the proposal. Given the kinds of collections that libraries, archives, and special collections are digitizing, this is not just unnecessary to protect rightsholder interests, and harmful to libraries' missions, it is contra the very purpose of copyright.

As noted above, the Copyright Office's ECL proposal invites inquiry into "appropriate restrictions on methods of access", licenses that apply "only through onsite computer terminals", and restrictions to use by "students, affiliates, and employees of the digitizing institution."¹² The proposal to *require* the user to "implement and reasonably maintain digital security measures" again is established "to control access to the collection, and to prevent unauthorized reproduction, distribution, or display of the licensed works."

These proposed restrictions strike at the heart of the mission of libraries and archives, *to provide access to our collections*. Moreover, they undermine the ability of libraries and archives to digitize such collections at all. Libraries and archives most often digitize

¹² 80 FR 32615.

substantial collections with the financial support of government agencies, such as the National Endowment for the Humanities (NEH), or private foundations, such as the Andrew W. Mellon Foundation. These entities premise their digitization grants on libraries making these works accessible to the public. While funders could change their terms to allow only scholarly access, or access burdened by technological measures, it is difficult to imagine that they would find such limited access and use to be a worthwhile expenditure of funds. The Copyright Office's ECL proposal might well destroy the prospect of digitizing collections such as the Du Bois Collection.

In fact, the ECL proposal would likely hamper rightsholders' discovery of and augmentation to works. Heirs and descendants of rightsholders often have no knowledge that these works even exist, much less where they might be held. When a library digitizes a work, making it available to the broader public for the first time, it suddenly becomes "discoverable", meaning it is indexed by search engines. Heirs or descendants who discover works through search engines can and do contact the archives, to provide additional details about the work, context, historical background, or even additional collections to augment the original collection. This sort of increase in knowledge—connecting heirs, who might also be rightsholders, with the holders of the original artifacts and works—is only possible because the work was digitized. The heirs of creators stand to benefit in numerous ways from connections forged through digitization of material held in special collections, and the ECL proposal's limitations on access and discovery would harm the very rightsholders that it presumably was intended to benefit. The individuals depicted in the Boston College photography collections, as well as the numerous individuals whose works are represented in the University of Massachusetts, Amherst's Du Bois Collection, would be lost to history without these collections. The public, and scholars, would be the poorer, but so would those individuals' heirs and descendants.

III. The Proposed ECL Is Unnecessary, Since Careful Collection-Level Analysis and Item-Level Response Is Legally Sufficient, and Produces Enormous Benefits with Little Risk of Harm to Potential Claimants.

Perhaps the most striking aspect of the ECL proposal is how unnecessary it is in the context of special collections and archives, and how out of touch with the reality in today's libraries and archives. Libraries and archives have been successfully digitizing their unique and valuable collections over the last decades with virtually no significant problems.

Under Existing Law, Libraries and Archives Have a Proven Track Record of Developing Approaches to Digitization that Carefully Balance the Rights of Subjects and Potential Copyright Claimants with the Benefits to the Public of Digitization.

As the digital age developed, libraries and archives took a characteristically cautious and risk-averse approach to digitization of collections, carefully doing research into the copyright status of collections, the return on investment of trying to ascertain rightsholders, the potential liability risks, and numerous other potential avenues of risk and harm.¹³

Growing confidence in the profession's ability to discern potential areas of trouble, as well as an increasingly robust line of fair use cases, has led to many institutions feeling confident in digitizing and providing access to material potentially in copyright, and in establishing procedures to address any legitimate concerns.

This comfort level was well expressed in two recent "Best Practices in Fair Use," which examined the professional practices of librarians and archivists, and captured the conclusions of the profession based on its decades of experience.

In the *ARL Code of Best Practices*, librarians agree that fair use supports the use of materials from collections to create physical and virtual exhibitions, facilitating "public awareness and engagement" and "promot[ing] new scholarship" with these collections. The considered opinion of librarians and archivists is captured in provisos, such as recommending full attribution, appropriate levels of resolution or portions, curatorial

¹³ See, for example, Melissa Levine and Gail Clement, "Copyright and Publication Status of Pre-1978 Publications: A Content Analysis Approach", *Libraries and the Academy*, v.11, n.3 (July 2011), pp. 813-829 (available at <http://deepblue.lib.umich.edu/bitstream/handle/2027.42/100239/Clement%20Levine%20portal.pdf?sequence=1&isAllowed=y>); Peter B. Hirtle, Emily Hudson, and Andrew T. Kenyon, *Copyright and Cultural Institutions: Guidelines for Digitization for U.S. Libraries, Archives, and Museums*, Cornell University Library 2009 (available at https://ecommons.cornell.edu/bitstream/handle/1813/14142/Hirtle-Copyright_final_RGB_lowres-cover1.pdf?sequence=2); Menzi L. Behrnd-Klodt & Christopher J. Prom, editors, *Rights in the Digital Era*, Society of American Archivists, Chicago, 2015, for three of many resources and studies. Scholarly assessments of copyright concerns in the academic and professional literature have been published for at least 20 years, according to a search in the "Library, Information Science & Technology Abstracts" database.

context, and technological measures as appropriate, and cautioning against extending the rationale to support souvenir sales or other commercial uses.¹⁴

Exhibitions are a more limited use of collections, but the *ARL Code of Best Practices* also addressed wholesale digitization of entire collections.¹⁵ Here again the experiences of librarians and archivists were distilled into guidelines laying out circumstances which decades of experience have shown to affect the equities of use of the works, either through fair use of copyrighted works or substantive rights of subjects of works. Libraries and archives' attention to potential claimants' rights is demonstrated in the guidance that, "Libraries should also provide copyright owners with a simple tool for registering objections to online use, and respond to such objections promptly." While the relative lack of complaint suggests that libraries' curation and screening efforts are well-placed, the eagerness to address any such concerns further attests to the good faith efforts by which libraries and archives generally operate.

Most recently, the Best Practices in Orphan Works¹⁶ expanded on such questions in detail, providing additional clarity to concerns about, for example, public access, third-party use of collections, and quality of digitized artifacts. Other professional associations, such as the Society of American Archivists, have also issued reports and guidelines, providing context-specific guidance unlikely to be provided by rightsholders focused on commercial exploitation.¹⁷

The collective expertise of librarians and archivists in curating, managing, preserving, and providing access to these collections is guiding institutions in promoting scholarship and new works, the very purposes of copyright. Based on existing law, librarians and archivists are striking a balance that, as evidenced by any measure, is highly successful. It is no accident that the case law regarding copyright infringements by libraries and archives is exceedingly sparse, and virtually non-existent with respect to special collections. It is in fact a testament to the careful attention to the equities that librarians and archivists provide, as well as a reflection of the obvious fact that for many "orphan works," no claimants exist.

¹⁴ Association of Research Libraries, *Code of Best Practices in Fair Use for Academic and Research Libraries* ("ARL Code of Best Practices") (2012), pp. 15-17, available at <http://www.arl.org/storage/documents/publications/code-of-best-practices-fair-use.pdf>.

¹⁵ *ARL Code of Best Practices*, pp. 19-21.

¹⁶ Center for Media and Social Impact, *Statement of Best Practices in Fair Use of Collections Containing Orphan Works for Libraries, Archives, and Other Memory Institutions* (2014), available at <http://www.cmsimpact.org/fair-use/best-practices/statement-best-practices-fair-use-orphan-works-libraries-archives>.

¹⁷ Society of American Archivists, *Orphan Works: Statement of Best Practices* (Jan. 12, 2009; rev. June 17, 2009), available at <http://www.archivists.org/standards/OWBP-V4.pdf>.

The costs to libraries and archives of the proposed ECL system would be high, with little or no potential for benefit to anyone, and indeed, some significant downsides for the purported beneficiaries.

SUMMARY

In summary, the Copyright Office's ECL proposal would not serve the underlying purposes of copyright, which libraries so well support, to "promote the Progress of Science and Useful Arts." Nor would it advance the rights of potential rightsholders and claimants, who often cannot possibly know the existence of relevant works, much less their location. We strongly urge the Copyright Office to refrain from promoting measures, such as the technological protection measures and licensing requirements specified in the ECL proposal, that hamper the ability of libraries and archives to digitize and make available the works entrusted to us by the public and rightsholders themselves.

We appreciate the opportunity to weigh in on these important matters.

Sincerely,

A handwritten signature in black ink, appearing to read "Laura Quilter", with a stylized flourish at the end.

Laura Quilter, M.L.S., J.D.
Copyright and Information Policy Librarian
University of Massachusetts, Amherst

And on behalf of
Susan Stearns, Executive Director
Boston Library Consortium