



ASSOCIATION OF SOUTHEASTERN RESEARCH LIBRARIES

September 1, 2015

Maria A. Pallante, US Register of Copyrights and Director
US Copyright Office
Library of Congress
James Madison Memorial Building
101 Independence Avenue SE
Washington, DC 20540-1000

Dear Ms. Pallante:

The Association of Southeastern Research Libraries (ASERL) believes the Extended Cooperative Licensing (ECL) framework recently proffered by the US Copyright Office in its “Report on Orphan Works and Mass Digitization” (June 2015) would be a significant step backwards for libraries seeking to improve access to their collections. This framework proposes significant new burdens for libraries by adding technological complexities and creating new legal uncertainties with little public benefit as a result. Furthermore, this model will not resolve current copyright issues for items that are published overseas and protected under non-US copyright laws.

To begin, ASERL finds the concept of Extended Cooperative Licensing to be questionable at its core, as it proposes to create a new organization and empower it to establish and collect royalties for content for which it has no rights or authority. This new organization would disburse the funds they collect to rightsholders if and when rightsholders can be identified – and these rightsholders would have to accept the terms of those payments, regardless of the compensation they expected to receive. We are not aware of any other organization in the US with the authority to demand payments unilaterally from users and establish payments to owners, and we foresee myriad problems with this concept.

Moreover, implementing an ECL model would have a profound chilling effect on the efforts by libraries and other cultural heritage organizations to improve public access to their collections for research, teaching, and learning.

For example, the Arthur Scott Photograph Collection (http://sca.gmu.edu/finding_aids/scotta.html) owned by George Mason University includes photographs taken by Arthur Scott from his work from 1934-1974 on behalf of International News Photos (INP), Wide World Photos, the Washington Times, the Republican Senatorial Committee, and the Republican Policy Committee. The Scott Collection also includes photographs taken by other, unknown photographers, photos of published newspapers and art works, and correspondence to and from individuals.

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Similarly, the EU Pix Collection at Emory University (<http://pid.emory.edu/ark:/25593/cr2td>) contains a mixture of items, including:

- items published before 1923 (and therefore generally free of copyright),
- published items that have already entered the public domain,
- published and unpublished items for which the library holds the copyright,
- published or unpublished items for which the rightsholders are known and can be contacted to request usage, and
- published or unpublished items for which the rightsholders are unknown or hard to locate – so-called “orphan works.”

The proposed ECL model would require these and other libraries to invest huge amounts of time and effort to sort these kinds of complex collections item-by-item to determine the various types of content, identify what items would be eligible for cooperative licensing, and acquire and document such licensing for each of those items. Any items that would not be covered by ECL would be evaluated subsequently to determine whether the proposed use was within the boundaries of existing fair use principles. These new complexities would be burdensome and onerous for libraries, making digitization difficult if not impossible. As a result, students, researchers, and scholars would not have online access to the content troves amassed by the national investments in its libraries, limiting access to those who can have the resources to visit the countless libraries with the desired content in person.

The Copyright Office’s report also includes draft legislation regarding orphan works. If implemented, libraries would be required to conduct “diligent searches” for all content that would be included in a mass digitization effort. The diligent search process is not specified in the draft legislation; however it is clear this would also entail detailed, item-by-item investigations of the libraries’ large and complex collections to determine the copyright status of each item, and to document those investigations. When a library cannot identify a rightsholder for an item, the legislation mandates an additional seven-step process libraries would be required to undertake with the Copyright Office for each and every orphan work they intend to use. Failing an item-by-item investigation / documentation / notification process, the legislation requires libraries to pay unspecified usage fees for all items in the collection, even for those items for which the library has reuse rights. These fees would be a new and unreasonable financial burden for libraries and other educational organizations, and they would provide no benefit to the owners of orphan works. Because orphan works rightsholders typically cannot be located, the Copyright Office admits their proposed system for orphan works “would end up ultimately as a system to collect fees, but with no one to distribute them to, potentially undermining the value of the whole enterprise.” We also fear the proposed notice of intent to use requirement could create a new expectation among rightsholders that any use of any copyrighted item by a library would require some kind of notice prior to its use.

The Copyright Office proposals provide no methods for how these many requirements would be enforced, thereby introducing further legal uncertainties for librarians. The resulting fear, uncertainty, and doubt

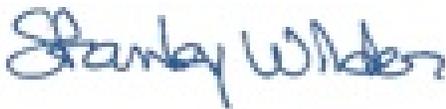
created by these proposals would contribute to libraries foregoing their digitization efforts in order to reduce the risk of possible legal entanglements.

In short, these proposals would result in libraries being unable to digitize collections that would, under current rules, never stretch the bounds of legally defined fair use. It is easy to imagine the eventual impacts: Without the ability to digitize library collections, access to a large body of content would be restricted. A student or researcher would not be able to benefit from the content held at the nation's research institutions without incurring the time and expense of traveling to each library in person. This would curtail American scientific and commercial innovation, limit our cultural and historical insights, and inhibit the growth of artistic knowledge. The results are incalculable.

Instead, ASERL members remain focused on the underlying purpose of copyright, "to promote the Progress of Science and useful Arts, by securing for a limited Time to Authors and Inventors the exclusive Right to their respective Writings and Discoveries." We believe libraries should continue to rely on the well-established principles of fair use as announced in the Copyright Act, 17 U.S.C. § 107. These principles have served libraries and interested copyright holders remarkably well over time. The current legal framework provides a fair and equitable means for resolving disputes relating to works that have been digitized and made available on the internet. Fair use has survived multiple legal challenges, ensuring libraries and other cultural heritage organizations can continue to provide improved access to the nation's intellectual and cultural output.

Libraries are in the business of supporting the continued development and dissemination of new scientific and creative knowledge, and pay millions of dollars to rightsholders every year to support this enterprise. For many years, ASERL and its member libraries have supported myriad efforts to ensure a balance between the desires of content creators and content users. We support the efforts of the Library Copyright Alliance, and believe the "Code of Best Practices in Fair Use for Academic and Research Libraries" provides a legally valid, thoughtful, and highly-principled approach to implement this balance. Furthermore, we strongly believe the proposed "solutions" from the Copyright Office will cloud the legal issues surrounding these efforts, and prove to be enormously onerous to libraries and their millions of users.

Thank you for your thoughtful consideration of our concerns regarding these important matters,



Stanley J. Wilder, Dean of Libraries, Louisiana State University

On behalf of the Board of Directors, Association of Southeastern Research Libraries, Inc.