

October 6, 2015

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

Dear Mr. Amer:

The American public would greatly benefit from the creation of digital libraries that could enable broad public access to the cultural heritage of humankind.¹ That goal is now technically achievable. Although mass digitization is costly, the public benefits of enhanced access to knowledge are so substantial that investments in mass digitization would be worthwhile. The Copyright Office has proposed legislation to create a pilot program aimed at overcoming copyright obstacles to achieving mass digitization projects.² The Office recognizes that transaction costs of rights clearances for in-copyright materials on a work-by-work basis for such projects would be prohibitive.³ It is commendable that the Office has initiated a conversation about whether an extended collective license (ECL) regime would enable libraries and other nonprofit entities to expand public access to in-copyright works. As commendable as the goal is, the specific proposal the Office recommends is not a viable solution for the United States. This Comment explains several reasons for this conclusion and offers some alternative approaches for consideration.⁴

¹ See, e.g., Robert Darnton, *Can We Create a National Digital Library?*, N.Y. REV. BOOKS, Oct. 28, 2010, <http://www.nybooks.com/articles/archives/2010/oct/28/can-we-create-national-digital-library/>.

² U.S. COPYRIGHT OFFICE, REPORT ON ORPHAN WORKS AND MASS DIGITIZATION (June 2015) ["OWMD Report"].

³ *Id.* at 80.

⁴ This Comment addresses some of the questions posed in the U.S. Copyright Office, Notice of Inquiry, Mass Digitization Pilot Program, Docket 2015-3, 80 FED. REG. 32614 (June 9, 2015) ["NOI"]. However, the Comment is structured to focus on certain issues not addressed in the report or the NOI.

1. Who Owns e-Book Rights?

The OWMD Report referred to the proposed settlement⁵ of the *Authors Guild v. Google Inc.* (also known as the Google Books) litigation as inspiration for the ECL regime it envisions to enable libraries, among others, to display the contents of mass-digitized literary works to the public.⁶ However, one essential feature of that proposed settlement is missing from the Office's proposal. The OWMD Report failed to recognize, address and resolve the ambiguities about who, as between publishers and authors, owns the right to display the contents of literary works online if the applicable publication agreements did not clearly allocate electronic rights.⁷ This is an unsettled issue in the law.⁸

Attachment A to the proposed Google Book settlement offered a compromise under which authors of books published before 1987 would have a larger (65%) share than publishers (35%) of revenues from Google's commercialization of the books, on the theory that e-books were not in contemplation when contracts were negotiated before then; authors and publishers of books published after 1986 would split revenues from commercialization evenly.⁹ Attachment A also resolved several other contentious issues as between authors and publishers and provided a dispute resolution mechanism for contested rights.¹⁰

Without conclusive resolution of the ownership issue, any prospective licensee under the OWMD Report's proposal may have to negotiate licenses with multiple collective management organizations (CMOs)—none of which currently exists—to get extended licenses that would cover: whatever rights the authors had in their works, whatever rights the publishers had, any rights that illustrators or graphic designers might have in book inserts, and any rights in photographs included in the works being licensed. There would

⁵ See Settlement Agreement, *Authors Guild, Inc. v. Google, Inc.*, No. 05 CV 8136 (Oct. 28, 2008), <http://www.thepublicindex.org/filings/ag-v-google/original-settlement>; Amended Settlement Agreement, *Authors Guild, Inc. v. Google, Inc.*, No. 05 CV 8136 (DC) (S.D.N.Y. Nov. 13, 2009), http://www.thepublicindex.org/filings/ag-v-google/amended_settlement ["ASA"].

⁶ OWMD Report, *supra* note 2, at 83. If the Office did not intend for all computer software and databases to be included in the ECL regime it envisions, it will need to refine the categories of proposed subject matters more precisely. The Copyright Act of 1976 defines "literary work" so broadly that software and databases qualify. 17 U.S.C. § 101.

⁷ See, e.g., Pamela Samuelson, *The Google Book Settlement as Copyright Reform*, 2011 Wisc. L. Rev. 479, 498-501 (identifying four reasons for the ambiguity about ownership of e-book rights).

⁸ See, e.g., *Random House v. Rosetta Books*, 150 F. Supp. 2d 613 (S.D. N.Y. 2001), judgment aff'd, 283 F.3d 490 (2d Cir. 2002) (affirming denial of preliminary injunction because authors likely retained e-book rights given language of the contract); *HarperCollins Publishers v. Open Road Integrated Media*, 7 F. Supp. 3d 363 (S.D. N.Y. 2014)(concluding publisher owned e-book rights based on differences in contract language from *Rosetta Books*).

⁹ ASA, *supra* note 5, Att. A at 9.

¹⁰ See, e.g., *id.*, Att. A, art. III (Classification of Books), art. IV (Author-Controlled Determination), art. VII (Disputes).

be no “one-stop” shopping for ECL licenses to literary works, as there is in Norway.¹¹ For libraries and other nonprofit heritage institutions to reach mutually satisfactory agreements on prices and other terms with multiple CMOs, each of which would presumably want to maximize revenues for its members, would be difficult indeed. The nonprofit institutions that the Office expects to be licensees under the regime it has proposed may find these negotiations to be too onerous to undertake, especially since the infrastructure for CMO licensing is not just weak; it’s non-existent.

2. Who Will Pay for Creation of CMO Infrastructure?

Another feature of the proposed Google Book settlement missing from the OWMD Report is a plan about who will pay for the creation of new collective management organizations. The Google Books settlement plan envisioned that Google would provide \$35 million to establish a new collecting society, the Book Rights Registry (BRR), to represent the interests of authors and publishers in books that Google would have commercialized under the quasi-ECL that the settlement would have granted to Google.¹² Setting up a CMO is expensive and complicated. The funds to do this (and do it well) must come from somewhere, and the OWMD Report does not provide guidance or ideas about this.

The OWMD Report seems to assume that some CMOs would emerge to take on this new role. But it underestimates the expense and complexities of creating the infrastructure that would be necessary to make an ECL regime viable. The report mentions the Authors Registry as a possible CMO for ECL purposes,¹³ but that group is not a CMO at present and does not manage the rights in any works. The Registry receives some funds from European CMOs, which the Registry then distributes to authors whose works were subject to levies

¹¹ See, e.g., Roger Josevold, *A National Library for the 21st Century*, Aug. 2015 (manuscript on file with the author). This article was published in *ALEXANDRIA: THE JOURNAL OF NATIONAL & INT’L LIBRARY & INFO. ISSUES*, Aug. 7, 2015, http://www.ingentaconnect.com/content/manup/alex/pre-prints/content-MUP_ALX_0037.

¹² See, e.g., Jonathan Band, *The Long and Winding Road to the Google Books Settlement*, 27 *JOHN MARSHALL REV. INTELL. PROP. L.* 227, 264, n.358 (2009). The Google Book settlement would have, in effect, granted ECL rights to Google, but the BRR would not have had power to issue any ECLs to third parties. The role of the BRR under the settlement would have been to distribute funds from Google to its members. The BRR might eventually have become a one-stop shop for licensing rights in its members’ works, but that was not what the proposed settlement anticipated. The BRR would only have had the power to license its members’ works to third parties if owners of the relevant rights had authorized it to do so. See, e.g., Pamela Samuelson, *Legislative Alternatives to the Google Book Settlement*, 34 *Colum. J. L. & Arts* 697, 708 (2011).

¹³ OWMD Report, *supra* note 2, at 91. The Copyright Clearance Center, which the OWMD Report mentions, *id.*, may distribute funds to copyright owners for certain uses of their works, but it is not a CMO.

in Europe.¹⁴ The Authors Registry does not even have members as such, let alone represent authors in the manner that CMOs do in Europe.¹⁵

The BRR did not actually exist when the Google Book settlement was proposed, so it could not initially have had any members, but the settlement, if approved, would have provided two incentives for authors to become BRR members. One incentive for authors to join was to get the \$60 per book settlement amount for Google's uses of their books. A second was to qualify for future payouts from Google's commercializations of books.

The Authors Registry, even assuming its leadership was inclined to change its mission to become a CMO that could apply for authority to negotiate ECLs, is unlikely to have the funds with which to make this substantial change, especially given that the Office proposes only a five year pilot program, which might well not be renewed. The Registry would not be able to offer the same kinds of incentives to authors to become members, and until it attained a very substantial membership, it could not claim to be qualified to be a CMO that could issue any ECLs. It might very well take five years just to establish a viable CMO, and no revenues would be flowing into its coffers until the CMO had actually negotiated licenses with qualified organizations and began receiving funds from its uses of the works covered by the ECLs.

Even if it became a CMO, that Registry could only issue an ECL that covered uses that a prospective licensee would make of their members' works and works of non-member authors, not of any rights that publishers, graphic designers, or photographers might own in literary works. New CMOs may have to be established for each of these groups. That is a steep investment to make when the OWMD Report recommends that the "pilot program" would be authorized for only a five year period.¹⁶ Even if such an investment was made, the OWMD Report does not address how it would evaluate the success or failure of any ECL a CMO might have issued.

¹⁴ The Registry's mission is stated on its website: <http://www.authorsregistry.org/>.

¹⁵ The OWMD Report indicates that the Authors Registry has paid funds to 10,000 persons, OWMD Report, *supra* note 2, at 91. Those 10,000 authors are not members of the Registry and the Registry does not have authority to negotiate new licenses on those authors' behalf. But even if the 10,000 authors who have received payouts were members, the Registry would still represent a very small proportion of authors. Without considerable information about their publications, it would be difficult to judge how representative they might be of the interests of authors of books and other literary works that prospective licensees would want to mass digitize for the purposes of establishing a viable CMO.

¹⁶ OWMD Report, *supra* note 2, at 102.

3. Which CMOs Would Be Fair Representatives of Non-Members?

The success of the ECL model in Nordic countries has been based “on the presumption of existence of a representative CMO in the intended field of use.”¹⁷ ECL regimes work well because the CMOs that issue such licenses have sufficiently substantial memberships that they can plausibly claim to be fair representatives not only of their members, but also of non-member authors’ interests when licensing specific uses of works covered by extended licenses.¹⁸

Fair representation of non-members is exceedingly important to the legitimacy of ECLs.¹⁹ This will be more difficult to achieve in the U.S. than in countries that have well-established CMOs. The Authors Guild has sometimes held itself out as representatives of all authors of books, as in the Google Book litigations.²⁰ But its claims to represent the interests of all authors have not found receptive audiences in the courts. Judge Chin ruled against approval of the Google Book settlement, for instance, in part because he was persuaded that the Guild had not adequately represented the interests of academic authors in negotiating the settlement agreement.²¹ The Second Circuit Court of Appeals reversed a ruling in favor of class certification in the *Authors Guild v. Google Inc.* lawsuit so that the fair use issue could be tried, saying that Google’s argument that the Guild and its members were not fair representatives of the class of all authors of books that Google scanned from research library collections as “not without force.”²²

One obvious candidate licensee for an ECL would be HathiTrust, the digital library that is the repository of millions of books that Google scanned from partner research library

¹⁷ Johann Aximm & Lucie Guibault, Cross-Border Extended Collective Licensing: A Solution to Online Dissemination of Europe’s Cultural Heritage, Final Report for EuropeanaConnect, Institute for Information Law Research Paper 2012-19 at 71, Aug. 2011, http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2001347.

¹⁸ See, e.g., *id.* at 25-44.

¹⁹ *Id.* at 70-71.

²⁰ A copy of the complaint in *Authors Guild v. Google Inc.* can be found at <https://www.authorsguild.org/industry-advocacy/authors-guild-v-google-settlement-resources-page/>. The Authors Guild claimed to have associational standing to represent the interests of authors because protection of authors’ interests is “germane, indeed central” to the mission of the organization. Class Action Complaint, *Authors Guild v. Google Inc.*, No. 05-CV-8136, (S.D.N.Y. Sept. 20, 2005), at 5. The complaint mentioned that the Guild has 8000 members. *Id.* The complaint did not mention the restrictive rules that the Guild has established for anyone seeking to become a member. See criteria set forth on the Authors Guild website, <https://www.authorsguild.org/join/eligibility-criteria/>.

²¹ *Authors Guild v. Google Inc.*, 770 F. Supp.2d 666, 679-80 (S.D.N.Y. 2011).

²² *Authors Guild v. Google Inc.*, 721 F.3d 132, 134 (2d Cir. 2013). The Second Circuit also affirmed a lower court ruling in a related case that the Authors Guild lacked standing to represent authors of works in which it owned no copyright. *Authors Guild v. HathiTrust*, 755 F.3d 87, 94 (2d Cir. 2014).

collections.²³ The Second Circuit ruled that the digitization of these books to create a full-text searchable database, to enable print-disabled access to their contents, and to preserve the books was fair use.²⁴ HathiTrust did not claim that displaying contents to all users affiliated with its member institutions would be fair use. HathiTrust does, however, display the full contents of public domain works, and it presumably wants to allow users to read the full texts of all digitized books in this library, but copyright is an obstacle to this goal. HathiTrust would thus seem to be an ideal candidate for an ECL. With the right license, it could turn on the lights for all of the books in its collection.

From whom might HathiTrust get a license? The overwhelming majority of the books in the HathiTrust corpus are non-fiction books largely written by academic authors.²⁵ Very few of the authors of the scholarly books in the HathiTrust digital library would likely qualify to be members of the Authors Guild.²⁶ So it would be difficult for the Authors Guild to show that it was an adequate representative of academic authors. Even if the Authors Guild changed its membership criteria, its leadership would likely continue to carry on policies the organization had previously adopted. Some academics may have accepted payments from the Authors Registry for uses made of their works in European countries with levy regimes, but that doesn't mean the Authors Registry could be considered to be a fair representative of their interests more generally.

Representativeness is a key issue for legitimacy of an ECL regime that must be given due attention.²⁷

The diversity of interests of authors makes fair representativeness of non-member interests especially challenging to achieve.

Archives and historical societies, many of whom want to digitize their collections and make the contents available on the Internet, would likely be stymied in trying to make reasonable assessments about with whom to negotiate with for an ECL given that most of their

²³ The Office seemed to contemplate that its ECL proposal would be of interest to HathiTrust. OWMD Report, *supra* note 2, at 87 (fair use would not allow full text display of in-copyright books in HathiTrust digital library).

²⁴ *HathiTrust*, 755 F.3d at 97-104.

²⁵ See, e.g., Brian Lavoie & Lorcan Dempsey, *Beyond 1923: Characteristics of Potentially In-copyright Print Books in Library Collections* 4-5, D-LIB MAG., Nov.-Dec. 2009, <http://www.dlib.org/november09/lavoie/11lavoie.html> (reporting that over 93% of the titles in research library collections are nonfiction works, and 78% are aimed at a scholarly audience). Approximately half of these books were published before 1977 and one-third before 1964.

²⁶ See *supra* note 20 concerning the Authors Guild restrictive membership policies.

²⁷ See, e.g., Tarja Koskinen-Olsson, *Collective Management in the Nordic Countries*, in COLLECTIVE MANAGEMENT OF COPYRIGHT AND RELATED RIGHTS 293 (Daniel Gervais, ed. 2010).

collections are of historical or cultural significance and were never commercially active in the marketplace. CMOs typically issue licenses for works that are commercially active.²⁸ CMOs would have a very difficult time to establish prices or set terms for works that have never been commercially exploited.

4. Other Issues

Unpublished Works: The OWMD Report takes an unnecessarily narrow view about the desirability of enabling mass-digitization and public display of the contents of unpublished works.²⁹ Many documents and photographs in the special collections of libraries, archives, historical societies, and the like are “unpublished” in the sense that copies have not been commercially distributed in the U.S. marketplace, but these materials are often available for public viewing in institutional settings. Both Congress and the U.S. Supreme Court have made clear that uses of unpublished works may sometimes qualify as fair uses.³⁰ Special collection and archival materials may be important sources of information for historical and other research purposes. It would be desirable for the contents of many of these works to be mass-digitized and posted online. Even if an ECL regime was established for other kinds of uses, an ECL does not seem appropriate for these kinds of materials insofar as they have not participated in the commercial marketplace. In any event, no CMO exists that could properly issue a license for these kinds of materials, and given the difficulties of knowing what interests their authors would have, representativeness problems would plague efforts to establish such a CMO.

In-Commerce Works: The OWMD report and the NOI do not take a stance on whether an ECL regime should include in-commerce, as well as out-of-commerce, works.³¹ The NOI asked for comments on whether to include in-commerce works within the pilot program.³² The inclusion of in-commerce works would be desirable for some types of prospective licensees (e.g., public libraries), but the inclusion of such works would likely raise the price of the ECL considerably, as the license would compete with the sales of individual copies

²⁸ CMOs in Europe have sometimes tried to stop members from making their works available under Creative Commons or other open licenses. They presume that commercial exploitation and full proprietary rights are in their members’ best interests. Commercialization is, of course, also seems to be in the best interests of the CMOs, which take a percentage cut from fees they collect for members in order to pay administrative expenses.

²⁹ OWMD Report, *supra* note 2, at 84-85.

³⁰ Pub. L. No. 102-492, 106 Stat. 3145 (1992) (amending 17 U.S.C. sec. 107 to clarify that fair use may be available as to unpublished works); *Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 550-55 (1985) (rejecting argument that fair use is never available as to unpublished works).

³¹ OWMD Report, *supra* note 2, at 86-87.

³² NOI, *supra* note 4, at 32614.

of these works. Many authors and publishers of in-commerce works may decide to opt-out of an ECL that included in-commerce works.³³ Because an ECL may promise a revenue stream for works that are not currently enjoying one, authors may be less likely to opt-out of an ECL as to out-of-commerce works.

The Office should require any CMO that might issue an ECL for literary works (narrowly construed) to publicly disclose identifying information as to all opt-outs so that prospective licensees can make an assessment as to whether the value they would get from an ECL is worth the price being asked.³⁴ If the Office chooses not to require a list of opt-outs, it should require the CMO to indemnify licensees who obtained ECLs on the understanding that the license was supposed to extend to all in-copyright works of that kind.

Security Measures: The OWMD Report discusses the importance of security measures as responsibilities that prospective licensees would have to commit to undertake to qualify for an ECL. Setting standards and procedures for security measures was an important feature of the proposed Google Book settlement.³⁵ As important as these measures may be for mass-digitization projects, the Office should be aware that neither it nor prospective CMOs may have the technical expertise to set the standards and procedures that would need to be adopted or to assess the capabilities of prospective licensees in these respects. There is a risk that security measures will create barriers to entry that will impede the success of any pilot program. Investing in high standards of security measures will also increase the overall cost of participating in an ECL regime for nonprofit libraries, archives, historical societies, and similar institutions, the very types of organizations that the Office seems to hope will find ECLs desirable.

Privacy Issues: There is, finally, the issue of privacy protections for personal data about uses being made of works covered by an ECL that the CMOs may hold, which the OWMD Report does not address. The proposed Google Book settlement called for gathering considerable quantities of data about the uses that licensees would make of books subject to the licensing regime the settlement would have created.³⁶ Numerous organizations and individuals filed objections to the proposed settlement because it did not contain

³³ See *infra* note 43 and accompanying text concerning data about likely opt-outs of the UK ECL regime.

³⁴ This is already required by article 16(6) of the UK Copyright and Rights in Performances (Extended Collective Licensing) Regulations 2014, (SI 2014/2588) Oct. 1 2014,

http://www.legislation.gov.uk/ukxi/2014/2588/pdfs/ukxi_20142588_en.pdf.

³⁵ See, e.g., ASA, *supra* note 5, at 115-30 (Art. VIII).

³⁶ See, e.g., *id.* at 86-90.

provisions about how the personal data being collected would be handled and protected.³⁷ Security measures to ensure the protection of personal data should be required not only of licensees, but also of CMOs insofar as they might gather, process, and make other uses of the data to enable the CMO to determine the amounts due to authors and publishers from the licensees' uses. Some of these objections articulated key features of a privacy-respecting licensing regime.³⁸

Public Review of CMO Applications: The OWMD Report does not indicate whether it would make public the full texts of any applications it might receive from CMOs seeking authorization to issue ECLs and whether it would provide an opportunity for persons or organizations to object to the qualifications of the CMOs or to articulate concerns about representativeness, terms of prospective licenses, or other matters of concern to them as prospective licensees. Especially because the U.S. has no experience with ECL regimes, it would be especially important for there to be close scrutiny of the qualifications and terms under which CMOs and ECLs would be operating.

5. Alternatives to the Office's Proposed ECL Regime

The OWMD Report cited developments in the UK, France, and Germany as demonstrating the "growing international acceptance" of ECL regimes.³⁹ Each of these countries has adopted legislation providing alternative models for licensing of in-copyright materials for mass-digitization projects, but only one of them—the UK—has authorized the establishment of a true ECL regime. This section will discuss those models as well as some that the Office's OWMD Report did not discuss.

The ECL regime which the OWMD Report anticipates would provide the most "useful guidance" for an ECL regime that the U.S. might create was that which the UK recently

³⁷ See, e.g., Privacy Authors and Publishers' Objection to Proposed Settlement, Authors Guild, Inc. v. Google Inc., No. 05 CV 8136 (Sept. 9, 2009), <http://www.thepublicindex.org/wp-content/uploads/sites/19/docs/objections/eff.pdf>; Electronic Privacy Information Center (EPIC) Motion to Intervene, Authors Guild, Inc. v. Google Inc., No. 05 CV 8136 (Sept. 4, 2009), <http://www.thepublicindex.org/wp-content/uploads/sites/19/docs/letters/epic.pdf>; Brief *Amicus Curiae* of the Center for Democracy & Technology in Support of Approval of the Settlement and Protection of Reader Privacy, Authors Guild, Inc. v. Google Inc., No. 05 CV 8136 (Sept. 4, 2009), http://www.thepublicindex.org/wp-content/uploads/sites/19/docs/letters/cdt_amicus.pdf.

³⁸ See, e.g., Privacy Authors and Publishers' Objection to Proposed Settlement, Authors Guild, Inc. v. Google Inc., No. 05 CV 8136 (Sept. 9, 2009), <http://www.thepublicindex.org/wp-content/uploads/sites/19/docs/objections/eff.pdf>.

³⁹ OWMD Report, *supra* note 2, at 83.

adopted.⁴⁰ However, no ECLs have as yet been issued under that regime,⁴¹ so it cannot provide guidance yet. There are, moreover, some reasons to doubt that this regime will be successful.⁴² In 2014 the Ministry of Copyright Cultural and Creator's Assets (a UK consultancy agency) conducted a survey among authors: 83% felt ECL would have a negative impact on their work and 69% stated they would opt out of ECL.⁴³

The OWMD Report also points to the novel regime adopted by the French legislature a few years ago.⁴⁴ Under it, the French National Library was directed to publish a list of books in its collection that were no longer commercially available from which publishers could identify works first published before 2000 that they wanted to republish. Publishers could then seek licenses from a relevant CMO unless the work's rights holder objected and opted out.⁴⁵ The fact that authors have to opt out from (or be bound by) this collective licensing scheme has been highly controversial in France. The mandatory opt-out arguably violates the Berne Convention for the Protection of Literary and Artistic Works.⁴⁶

The French initiative is an interesting experiment. However, the OWMD report is mistaken in characterizing the French law as creating an ECL regime because, among other things, the licenses that the CMOs are authorized to grant are on a work-by-work basis, not on an extended basis, and the CMOs do not have to show representativeness as to non-members' works.⁴⁷ Even if the U.S. adopted French-like legislation—which seems very unlikely—

⁴⁰ *Id.*

⁴¹ Email communication with Hamza Elahi, UK Intellectual Property Office, Oct. 6, 2015.

⁴² Several objections have been lodged against it. See, e.g., Dinusha Mendis & Victoria Stabo, *UK: Extended Collective Licensing*, Kluwer Copyright Blog, Dec. 3, 2014, <http://kluwercopyrightblog.com/2014/12/03/uk-extended-collective-licensing/>; M. O'Flanagan, *Copyright Reform: A Modernisation or the Start of the Death of Copyright for Photographers? Part 2*, COMMUNICATIONS LAW 2015-20(1) at 23-24. In an email communication, Sept. 17, 2015, Benjamin White, Head of Intellectual Property for the British Library, questioned how useful the UK ECL regime will be for library mass digitization, given "the complexity of the application process, the requirement for reapplication in five and then three years,...and the economics of mass digitization from the library side." In an email communication with Hamza Elahi, *supra* note 41, Elahi indicated that "significant representation may be a difficult barrier for a collecting society to jump, and for this reason ECL may not be a viable tool for every mass digitization initiative." Elahi also noted that "some cultural institutions feel that the initial authorization period for ECL schemes is too short." *Id.*

⁴³ The Ministry of Copyright Cultural and Creator's Assets, 'Copyright and Rights in Performances (Extended Collective Licensing) Regulations 2014', 16 July 2014, available at: http://themoca.co.uk/site/wp-content/uploads/2014/08/ECL-SI-MOCA-JULY-2014_Final-1-1.pdf.

⁴⁴ OWMD Report, *supra* note 2, at 25-27 (describing the French legislation).

⁴⁵ *Id.*

⁴⁶ See e.g., Franck Macrez, *L'exploitation numérique des livres indisponibles: que reste-t-il du droit d'auteur?*, Recueil Dalloz 2012-12, at 9, available at http://franck.macrez.net/wp-content/uploads/2012/04/Chron12_Mise-en-page-1.pdf.

⁴⁷ *Id.*

such a regime would do little or nothing to enable mass digitization, as the French approach would grant licenses to republish specific individual works on a work-by-work basis.

The French legislation has, moreover, been challenged as violating the European Information Society Directive.⁴⁸ In particular, the legislation is claimed to infringe articles 2 and 5 of that Directive, which requires member states to grant authors the exclusive right to authorize or prohibit reproduction of their works, a right which can only be limited by specific exceptions, none of which arguably applies to the French out-of-commerce works regime.⁴⁹ This challenge is presently pending before the Court of Justice of the European Union (CJEU), no date has been set for the hearing yet.⁵⁰

The OWMD Report also mentions the mass-digitization licensing regime established by German legislation.⁵¹ This law does not, however, create an ECL regime, although it is more ECL-like than the French legislation. The German law authorizes the national library to represent German public libraries in negotiations with German CMOs for a license to make available digital copies of books, scientific journals, newspapers, magazines, or other writings that were published in Germany before January 1, 1966 and are located in the collections of libraries.⁵² Under this regime, German libraries can submit an application for a license for up to 1000 books they want in their digital collections. For works published prior to 1920, the requesting library can obtain a license to digitize and make works available for a one-time fee of 5 euros per work, which goes up to 10 euros per work for those published in the 1920s and 1930s and up to 15 euros per work for those published in the 1940s and up until 1965.⁵³ Rights holders can opt out of this regime if they wish.⁵⁴

⁴⁸ Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society, L 167/10 O.J. 22.6.2001.

⁴⁹ Ministerie van Buitenlandse zaken, C-301/15 *Soulier et Doke*, available at <http://www.minbuza.nl/ecer/hof-van-justitie/nieuwe-hofzaken-inclusief-verwijzingsuitspraak/2015/c-zakenummers/c-301-15-soulier-et-doke.html>.

⁵⁰ Further information will become available on the Court of Justice of the European Union's webpage dedicated to the case (Case C-301/15, *Soulier and Doke*):

<http://curia.europa.eu/juris/liste.jsf?language=en&jur=C%2cT%2cf&num=c-301/15&td=ALL>.

⁵¹ OWMD Report, *supra* note 2, at 27.

⁵² An English-language summary of the legislation can be found at :

http://www.vgwort.de/fileadmin/pdf/allgemeine_pdf/German_legislation_on_orphan_and_out-of-commerce_works.pdf. Much of the information in this paragraph comes from Katharina Schoneborn of the German National Library at a workshop held on Sept. 6-7, 2015 at the National Library of Israel.

⁵³ Email communication from Katharina Schoneborn, Sept. 11, 2015.

⁵⁴ There have been no objections from rights holders to the German scheme so far. Email communication from Katharina Schoenborn, Oct. 6, 2015.

The German regime is very interesting, and worthy of consideration as an alternative to the ECL regime proposed by the Office. There is no requirement in the German law for the CMO to search for the copyright owners in the works, and the CMO can pay out sums collected from this license to their members, even if the members do not own rights in any of the books for which the revenues were received.⁵⁵ So the German law does not authorize the creation of an ECL at all.

Curiously, the OWMD Report did not mention or discuss a significant case decided by German courts and the CJEU, which presents another alternative to the ECL proposed by the Office.⁵⁶ The library of the Technical University of Darmstadt digitized a book from its collection published by Eugen Ulmer and made it available for viewing on the premises of the library. Users could also print out material from the digitized copies and even download it. Eugen Ulmer sued the university for copyright infringement, claiming this displaced sales of an e-book version that it was willing to license, and lost.⁵⁷ The CJEU held that the Information Society Directive had authorized member states to adopt exceptions that allowed the library to digitize in-copyright works in their collections and to allow patrons to view the digital copies on the library's premises, and Germany had adopted exceptions that enabled these acts.⁵⁸ The CJEU ruling would also allow patrons to print out or download materials, although only if rights holders obtained fair remuneration for these acts. The fact that a publisher, such as Eugen Ulmer, offered to license library digitization and display did not change the outcome.⁵⁹

Like European legislatures, the U.S. Congress could adopt an exception that would allow nonprofit libraries to digitize works in their collections and make them available on library premises for research purposes. This would be less costly to administer than the ECL regime that the Office has proposed and more appealing to libraries (which, after all, have made substantial investments in purchasing and maintaining long-term access to these

⁵⁵ *Id.*

⁵⁶ Technische Universitat Darmstadt v. Eugen Ulmer, KG, Case C-117/13, (CJEU Sept. 2014), <http://curia.europa.eu/juris/document/document.jsf?docid=157511&doclang=EN>. Upon remand, the German courts upheld TUD's claim. *See, e.g.*, Eleanora Rosati, German Federal Court Says that Libraries Have a Right to Digitise Their Collections, IPKat blog, April 24, 2015, <http://ipkitten.blogspot.com/2015/04/german-federal-court-says-that.html>.

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ *Id.*

works for the benefit of the public). The restriction to library premises would limit public access significantly, but it would be an advance over the present state of affairs.

Another alternative model that the OWMD report did not discuss is the ECL regime for literary works in Norway,⁶⁰ which is the most successful use of an ECL regime that enables public access to in-copyright literature in the collections of a national library.⁶¹ Under legislation enacted in Norway, the national library was authorized to negotiate an ECL agreement with CMOs under which the library can digitize works in its collection published in Norway in Norwegian up to the year 2000 and display the full texts of those works to all persons having a .no address.⁶² The national library pays a fee to Kopinor for this license, but members of the public can access the contents of the national digital library for free. The national library is digitizing all 250,000 titles for its digital library, along with 860,000 editions of newspapers, 1.3 million radio broadcasts, and other works.⁶³ The most recent data on its use indicates that 180,000 people use this digital library per month, that more than 80 percent of the books in the digital library collection have been accessed by members of the public, that usage of the physical national library premises has not fallen off, and perhaps surprisingly, that sales of books have not fallen either.⁶⁴ The national library pays for use of the in-copyright materials in its collection on a per-page per-year usage basis, which under the current ECL, comes to one-third of a euro per resident of Norway.⁶⁵

As attractive as the Norwegian ECL regime may be as a model for enhanced public access to literature of the twentieth century, this approach is likely infeasible in the U.S., in part because the U.S. lacks a trusted one-stop shop for such licensing. More significantly, the cost of scaling such a regime to the quantity of U.S.-authored books in the Library of Congress and the much larger U.S. population would likely make this approach prohibitively expensive.⁶⁶

⁶⁰ The Office mentioned Norway as having ECL regimes for some uses of in-copyright materials in an appendix.

OWMD Report, *supra* note 2, App. F at 8. But it did not discuss the Norwegian National Library's ECL arrangement.

⁶¹ Josevold, *supra* note 11.

⁶² *Id.* at 1-3.

⁶³ *Id.* at 3-6.

⁶⁴ *Id.* at 6.

⁶⁵ *Id.* at 4.

⁶⁶ See, e.g., Peter Hirtle, *Norway, Extended Collective Licensing, and Orphan Works*, March 21, 2014, <http://blog.librarylaw.com/librarylaw/2014/03/norway-extended-collective-licensing-and-orphan-works.html> (estimating that a similarly priced license for public access to American-authored works for the U.S. population would cost \$6.254 billion).

Professor Tim Wu has recently suggested another alternative model for making in-copyright materials more widely available to the public, which he calls the “Big Bang” license. He says that “Congress should allow anyone with a scanned library to pay some price—say, a hundred and twenty-five million dollars—to gain a license, subject to opt-outs, allowing them to make those scanned prints available to institutional or individual subscribers.”⁶⁷ Those millions could be “divided equally among all rights holders who came forward to claim it in a three year window—split fifty-fifty between authors and publishers.”⁶⁸ Wu admits it is a “crude, one-time solution,” but claims “it would do the job” and mean that an online library could be created “within this lifetime.”⁶⁹ Wu seems to regard Google and HathiTrust as likely entities that would seek and obtain such a license.

Wu offers an interesting proposal, which has some features in common with the proposed Google Book settlement and some with the German legislation, but he does not address the ownership of e-book issue or how the distribution of funds to copyright owners would be handled. Google could, of course, easily afford this sort of Big Bang license; it is less clear that HathiTrust could do so. Yet, HathiTrust is the entity that has the institutional mission of making as much of the contents of its library available to a wider public. The question is: how can this be accomplished in a manner that is respectful of copyright and yet also in a manner that comports with the interests of the authors whose works constitute the overwhelming majority of the contents of the HathiTrust library? More generally, how can a mass digitization solution be structured to keep barriers to entry low enough to ensure competition among multiple digital libraries? Alternatively, if one comprehensive digital library is sufficient, how can we ensure that it is operated in the public interest?

While the ECL regime the Office proposes may be one way to make the contents of books and photographs more broadly accessible to members of the public, this is not the only possibility for increasing public access to in-copyright out-of-commerce works whose terms of protection have yet to expire. A number of commentators have suggested that fair use could provide a way to enable public access to commercially inactive copyrighted works that are in the late years of copyright terms.⁷⁰ The Authors Alliance, a nonprofit organization that represents the interests of authors who want their works to be widely

⁶⁷ Tim Wu, *Whatever Happened to Google Books?*, NEW YORKER, Sept. 11, 2015.

⁶⁸ *Id.*

⁶⁹ *Id.*

⁷⁰ See, e.g., William F. Patry & Richard A. Posner, *Fair Use and Statutory Reform in the Wake of Eldred*, 92 CALIF. L. REV. 1639, 1650-52 (2004). See also Justin Hughes, *Fair Use Across Time*, 50 UCLA L. REV. 775, 799 (2003); Joseph P. Liu, *Copyright and Time: A Proposal*, 101 MICH. L. REV. 409, 412 (2002).

available to promote the public good, has published a guide to help authors to get some or all of their rights back from publishers, so that they can make their works more widely available.⁷¹ Some authors, such as Harvard historian and Authors Alliance member Robert Darnton, are motivated to seek rights reversions in order to make their older books available on an open access basis.⁷²

Another creative idea for increasing public access to in-copyright works would be to use tax incentives to encourage authors to make some of their works available under Creative Commons licenses or to shorten the term of copyright.⁷³ Institutional policies favoring open access licensing or requiring public access to federally sponsored research are becoming more common and offer promise to scholars and researchers whose main motivation is to share the knowledge embodied in their works.⁷⁴

In a previous article,⁷⁵ I proposed that Congress should enact legislation to enable broader public access to the knowledge embedded in books in the collections of research libraries. It would have broadened copyright privileges to digitize books for preservation purposes from the collections of nonprofit libraries; established privileges to make non-expressive uses of copyrighted works (e.g., datamining) and to display snippets of in-copyright works; opened up access to the Google Book corpus to other search engines; opened up access to orphan works; resolved the author-publisher e-book controversy; updated library privileges; improved access to books for print-disabled persons; established privacy protections for users of digital libraries; and provided safe harbors for institutions that had good faith beliefs that works displayed in a digital library were orphans or in the public domain.

⁷¹ See NICOLE CABRERA, ET AL., UNDERSTANDING RIGHTS REVERSIONS (2015). It can be downloaded from the authorsalliance.org website: <http://authorsalliance.org/wp-content/uploads/Documents/Guides/Authors%20Alliance%20-%20Understanding%20Rights%20Reversion.pdf>.

⁷² See, e.g., Robert Darnton, *Robert Darnton and Authors Alliance: A Rights Reversion Success Story*, Sept. 11, 2015, <http://www.authorsalliance.org/2015/09/11/robert-darnton-and-authors-alliance-a-rights-reversion-success-story>.

⁷³ See, e.g., Edward Lee, *Copyright, Death and Taxes*, 47 WAKE FOREST L. REV. 1, 25-31 (2011) (proposing tax as a policy lever for increasing public access to copyrighted materials). The “beauty of the tax fix is that it completely bypasses Berne.” *Id.* at 28.

⁷⁴ See, e.g., Office of Scholarly Communication, University of California, UC Open Access Policy, <http://osc.universityofcalifornia.edu/open-access-policy/>. See also National Institutes of Health, Public Access Policy, <http://publicaccess.nih.gov/policy.htm>.

⁷⁵ See, e.g. Pamela Samuelson, *Legislative Alternatives to the Google Book Settlement*, 34 COLUM. J. L. & ARTS 697 (2011).

The Second Circuit's *HathiTrust* decision has made some parts of my earlier proposal unnecessary, as that court ruled that digitization for purposes of creating a full-text searchable database and enhanced access for print-disabled persons was fair use.⁷⁶ If that same court affirms a lower court ruling that Google's provision of snippets from in-copyright books is fair use,⁷⁷ that part of my legislative proposal would be rendered unnecessary as well. But coupled with strategies for increased public access to books I have suggested above, it is possible to craft legislation that would provide broader public access to in-copyright materials that are no longer commercially active. This could provide inestimably large benefits to current and future generations and promote the progress of science more significantly than the ECL regime that the OWMD Report proposes.

Sincerely,

A handwritten signature in black ink, appearing to read "Pamela Samuelson", with a long horizontal flourish extending to the right.

Pamela Samuelson
Richard M. Sherman Distinguished Professor of Law
Berkeley Law School

⁷⁶ *HathiTrust*, 755 F.3d at 97-104. The Second Circuit remanded the case to the district court on the issue of whether digital versions could be used as replacements, and the parties settled out of court. See Krista Cox, *Authors Guild v. HathiTrust Litigation Ends in Victory for Fair Use*, ARL POLICY NOTES (Jan. 8, 2015), <http://policynotes.arl.org/?p=837>.

⁷⁷ *Authors Guild v. Google*, 954 F. Supp. 2d 282 (S.D.N.Y. 2013), *argued*, No. 05 CV 8136-DC (2d Cir. Dec. 3, 2014).