

**Before the
COPYRIGHT OFFICE,
LIBRARY OF CONGRESS
Washington, DC**

Mass Digitization Pilot
Program; Request for
Comments
(FR Doc. 2015-14116;
Copyright Office Docket
Number 2015-3)

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**COMMENTS OF THE
NATIONAL WRITERS UNION
(UAW LOCAL 1981, AFL-CIO) AND
SCIENCE FICTION AND FANTASY
WRITERS OF AMERICA, INC.**

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The National Writers Union (UAW Local 1981, AFL-CIO) and the Science Fiction and Fantasy Writers of America, Inc. (SFWA) welcome the opportunity to submit these comments in response to the Notice of Inquiry by the U.S. Copyright Office, “Mass Digitization Pilot Program; Request for Comments,” FR Doc. 2015-14116, Copyright Office Docket Number 2015-3, published at 80 *Federal Register* 32614-32615 (June 9, 2015).

The National Writers Union (NWU) is a national labor union that advocates for freelance and contract writers. The NWU includes local chapters as well as at-large members nationwide and abroad. The NWU works to advance the economic conditions of writers in all genres, media, and formats. NWU membership includes, among others, book authors, journalists, business and technical writers, website and e-mail newsletter content providers, bloggers, poets, novelists, playwrights, editors, and academic writers. The NWU is a national amalgamated union (Local 1981) of the United Auto Workers, AFL-CIO.

Science Fiction and Fantasy Writers of America (SFWA) is a membership organization of over 1,800 commercially published writers of science fiction, fantasy, and related works. Its membership includes writers of both stand-alone works and short fiction, novels, screenplays, and other works. Of particular note, SFWA's membership includes a significant number of authors' estates, and SFWA's Estate Project has a long record of identifying authors' estates and helping publishers contact those estates. It is neither difficult nor onerous to do so. The project helps defend against those who would infringe on those estates' rights for their own profit.

SFWA is not a subsidiary of any other entity, and is entirely owned by its membership. SFWA has no subsidiaries or other ownership interest in any other organization that may be affected by this Inquiry. SFWA is not a union.

Through this proceeding, the Copyright Office is seeking comments regarding the possible drafting by that office of proposed "legislation that would establish a legal framework known as extended collective licensing for certain mass digitization activities that are currently beyond the reach of the Copyright Act."

The NWU and SFWA strongly oppose this proposal, for the reasons discussed below. While we have included responses to several specific questions in the Copyright Office notice of inquiry regarding "operational aspects of the pilot program" for extended collective licensing (ECL) for mass digitization, we do not believe that Congress should enact any such ECL law. While the proposal for ECL for mass digitization may be well-intentioned on the part of some of its nonprofit proponents (if not their would-be for-profit "partners"), it gravely threatens writers' rights and livelihoods, and would have many of the same defects as the misguided "orphan works" legislation also being proposed by the Copyright Office.¹

1. Overview of writers' objections to ECL for mass digitization

Many NWU and SFWA members and other writers are actively involved in digitizing our own works and exploiting our rights to digital distribution of our works, including "backlist" works previously published on paper in books, periodicals, or ephemera, and potentially held by libraries or archives in those paper formats or editions.

¹ See NWU comments to the Copyright Office on "orphan works" and mass digitization (February 4, 2013), available at <<http://www.nwubook.org/NWU-orphan-works-4FEB2013.pdf>>, NWU reply comments on "orphan works" and mass digitization (March 6, 2013), available at <<http://www.nwubook.org/NWU-orphan-reply-comments-6MAR2013.pdf>>, SFWA comments on orphan works (February 4, 2013), available at <http://copyright.gov/orphan/comments/noi_11302012/SFWA.pdf>, SFWA reply comments on orphan works and mass digitization (March 6, 2013), available at <http://copyright.gov/orphan/comments/noi_11302012/SFWA.pdf>, and SFWA reply comments on the round tables on orphan works and mass digitization (May 21, 2014), available at <[http://copyright.gov/orphan/comments/Docket2012_12/Science-Fiction-and-Fantasy-Writers-of-America\(SFWA\).pdf](http://copyright.gov/orphan/comments/Docket2012_12/Science-Fiction-and-Fantasy-Writers-of-America(SFWA).pdf)>.

Many of these new digital editions and formats are not – and currently cannot be – included in library catalogs, bibliographic databases, or Copyright Office records. Many of them are self-published by writers who are commercially exploiting the rights to some or all of our own works, rather than seeking to sell or license them to or through third parties.

Our primary concern is that any "extended collective licensing" (ECL) for mass digitization of library or archival holdings will, regardless of any attempted limitations on the included works or authorized uses and any "opt-out" provisions or nominal "royalty" payments, inevitably result in the granting of licenses for new digital editions that will compete unfairly with, and cannibalize larger potential revenues from, our own digital editions of our work.

Digitization and distribution of digital copies, often in new and different formats from the original editions, is the primary source of potential revenues from most "backlist" and previously-published or archived works, and a growing source of income for working writers.

Despite the benign intentions of some of its proponents among noncommercial librarians and archivists unfamiliar with writers' new digital business models, legislation to authorize ECL for mass digitization would be a direct attack on writers' abilities to earn our fair share of the revenues from new digital uses of our work.

For almost twenty years, the NWU and SFWA have been concerned about the effect on writers' incomes of a variety of "mass digitization" proposals and projects to scan collections of written works and distribute them in electronic form, without first obtaining permission from the authors of these works. We've been involved in litigation and lobbying on this issue, and have tried to initiate dialogue with the supporters of these schemes.

Many librarians and archivists think it wouldn't be feasible to obtain permission from millions of individual writers, although the experience of "crowdsourced," peer-to-peer, decentralized platforms for the distribution and sharing of content from millions of individual providers suggests that they are wrong.

Some proponents of mass digitization schemes are oblivious of writers' new digital and self-publishing business models and the growing revenues writers are earning from a variety of new (authorized) digital editions of our personal "backlists". Others realize the negative impact that unauthorized mass digitization would have on writers' earnings, but think that writers' livelihoods would be acceptable collateral damage in their pursuit of the holy grail of a universal digital library, by any means necessary. Internet companies hope to "partner" with libraries, archives, and/or print publishers to profit from the publication of digital editions of backlists and paper collections of books and journals that are out of print in their original editions — even though writers are often making these available on our own websites, as self-published e-books, etc.

Both US copyright law and the Berne Convention copyright treaty generally prohibit copying without permission. Exceptions to this requirement are permitted as "fair use" or by the Berne "three step test" only if they don't interfere with the "normal commercial exploitation" of the work being copied. So determining whether mass digitization without permission is allowed by US law or international treaty requires an understanding of the new norms of commercial exploitation of written work in the digital age. These include self-published e-books, advertising-supported (often anonymous) personal websites, written content distributed in the form of smartphone or tablet apps, and many others. Most of these new formats are easy to

self-publish, aren't included in library catalogs or bibliographic databases, and aren't on the radar screens of most librarians or archivists – or, it appears, the Copyright Office.

The NWU and SFWA have consistently recommended, and reiterate in response to this inquiry, that the Copyright Office, Congress, WIPO (the international copyright treaty organization), other international entities such as the European Union, and counterparts of the Copyright Office in other countries such as the UK Intellectual Property Office, start their inquiries into digital copyrights by consulting writers about our new business models, before they begin considering new copyright legislation that might impact our livelihoods.²

As a result of the failure to conduct this essential prerequisite inquiry, proposal after proposal has been brought forward for unauthorized mass digitization schemes that would interfere with writers' revenues from our own digitization efforts, and thus violate both the Berne Convention and the principles of "fair use". These proposals include both the Copyright Office draft legislation to exempt certain uses of so-called "orphan works" from penalties for copyright infringement, and this proposal for legislation to authorize ECL for mass digitization.

Like the draft "orphan works" legislation proposed by the Copyright Office, legislation to authorize ECL for "out-of-commerce" works would sweep in digitization rights to many works which are being actively, commercially, and often profitably exploited by their authors, or whose authors would have been able to earn much more through other modes of exploitation of their digital rights than by default ECL licensing at default royalty rates.

2 See e.g., "Preservation and Reuse of Copyrighted Works", written testimony of the NWU before the Subcommittee on Courts, Intellectual Property and the Internet, Committee on the Judiciary, U.S. House of Representatives (April 9, 2014), available at <<http://www.nwubook.org/NWU-testimony-reuse-9APR2014.pdf>>; and "Public Consultation on the review of the E.U. copyright rules", NWU submission to the European Commission (March 5, 2014), available at <<http://www.nwubook.org/NWU-EU-copyright-5MAR2014.pdf>>.

2. The legality and appropriateness of collective licensing for digital rights

“Collective licensing” refers to systems through which a would-be user can obtain licenses to many writers’ (or other creators’) work through a single intermediary to which creators have assigned those licensing rights. Many stock-photo agencies, for example, work this way. For written work, writers (or other rightsholders, if they actually hold the relevant rights) can and often do assign rights to photocopying, “offprint”, or other specified and typically secondary uses to a collective licensing agency such as the Copyright Clearance Center (CCC). The CCC collects payments from users and distributes them (minus its service fee) to the individual writers or other rightsholders. It can be easier for a user — for example, a publisher of coursebooks containing articles originally published in many different books and journals — to deal with one licensing agency than with many individual writers.

The NWU and SFWA have supported collective licensing systems, and certain secondary uses of many NWU and SFWA members’ work are available for licensing through the CCC or other such agencies. (There are problems, however, when print publishers purport to grant licenses to CCC for exploitation of rights that those publishers don’t hold, and that are actually owned by the writers.) In 1997, the NWU tried to set up our own system for collective licensing of NWU members’ work, the “Publication Rights Clearinghouse”. But we lacked the resources to develop the system without greater uptake by licensees. Unfortunately, potential licensees of digitization rights to our written work largely ignored the possibility of licensing, and undertook their own mass digitization without permission, as they continue to do with *de facto* legal impunity today.³

3 For some of the problems faced by writers in enforcing our rights, including digital rights, against large, sophisticated, deep-pocketed mass infringers, see the NWU response to the recent Copyright Office public inquiry concerning “Remedies for small copyright claims”: NWU comments to the Copyright Office (January 16, 2012), available at <<http://www.nwubook.org/NWU-copyright-small-claims.pdf>>; NWU reply comments to

“Extended Collective Licensing” (ECL) refers to a system in which an organization grants a “license” for copying of a body of work, even though the organization doesn’t actually have permission to represent all of the creators or other holders of the rights it is purporting to license. The theory is that if the organization is sufficiently representative of most of the members of the class, it should be allowed to act as though it were an authorized representative of all of them. Under an ECL scheme, a licensing organization is allowed to set prices and issue licenses for an entire body of works, or for all works of a particular type. Once it receives licensing fees, it has a duty to try to track down the individual creators or other rightsholders and pay each of them their share of the licensing revenues it has received for their work.

Currently, US copyright law does not allow any extended collective licensing of written or graphic work. In the US, a licensing agency needs explicit permission in advance from each writer or rightsholder it represents, and can grant licenses only for works to which it has been specifically assigned rights.

Laws in some other countries permit extended collective licensing for certain uses of written work, such as photocopying of individual pages or articles from books or journals. A local “reproduction rights organization” (RRO) , such as one of the members of the International Federation of Reproduction Rights Organizations (IFRRO) is designated to receive a per-page fee for these copies, and anyone who wants to photocopy pages from any book or journal is allowed to do so if they pay the RRO this fee. The RRO then has a legal duty to try to identify the holders of the photocopying rights to the copied pages, and pay them their share of the licensing fees. If the RRO can’t identify or locate the individual writers or other rightsholders,

the Copyright Office (April 12, 2013), available at <http://www.nwubook.org/NWU-copyright-small-claims-reply-12APR2013.pdf>; and NWU testimony at the Copyright Office public roundtables in New York and Los Angeles (November 2012), available at <http://www.copyright.gov/docs/smallclaims/transcripts/>.

the RRO pays their share of the licensing fees to organizations that work to advance the general interests of all writers. The NWU, SFWA, and many of our members receive money from these ECL schemes for photocopying in foreign countries of books, articles, etc. by US writers.

The test for the legality of these ECL schemes is whether they interfere with the normal commercial exploitation of writers' rights to our "backlist" works. Very few US writers are actively exploiting the rights to photocopying in foreign countries of editions of their work that were previously published in books, periodicals, or journals. And photocopies made in foreign countries are unlikely to make their way back into the US to compete with other editions of the same works. So ECL revenues for foreign photocopying are typically secondary and incremental. They add to, rather than detracting from, whatever revenues US writers are earning from new (perhaps self-published) US print or e-book editions of our previously published works, or from ads on our personal websites where we have posted our older work.

On the other hand, ECL schemes for digitization, rather than photocopying, fail the same test. Digital copies made under ECL licenses directly compete with, and divert readers and revenues from, other authorized digital editions.

Many writers are actively exploiting our digital rights, including our rights to works previously published on paper in books, periodicals, or ephemera, and potentially held by libraries or archives in these formats. The *primary* source of continuing revenues from the rights to most "backlist" written works previously published in books, printed journals, ephemera, or other printed formats, and included in library or archival collections, is not photocopying or the publication of new hardcopy editions but the distribution of new digital editions. These new

digital editions, often self-published, take the form of e-books, paid PDF downloads of digital “offprints”, content on our own revenue-generating websites, smartphone app content, etc.

Someone who reads a digital copy of one of our previously-published works made under an ECL scheme doesn’t pay to download a PDF offprint or self-published new e-book edition, and doesn’t click on any of the ads on the pages of our website on which we have republished all or parts of the work (or of a new edition of it).

In a world where most revenues for Web publishing come from advertising, clickstream diversion deprives writers of revenues and interferes directly with the normal commercial exploitation of digital rights.

Extended collective licensing for digitization would, in this way, deprive writers of income and violate the Berne Convention. ECL may be appropriate for photocopying and perhaps some other secondary rights, but not for digital copying or digital format conversion (scanning) rights — the primary and most valuable rights to most backlist works.

We don’t think most nonprofit librarians or archivists want to deprive writers of our livelihoods. But we don’t think most librarians or archivists understand the potential impact of their mass digitization schemes on this growing component of our incomes.

The Copyright Office proposal for ECL for mass digitization is the same thing that was tried before, illegally, by Google and its library partners, in a scheme opposed by the NWU, SFWA, and many other writers, illustrators, photographers, and other creators of visual works. The Copyright Office should take due note of the widespread opposition by writers in the US and around the world to what was, in effect, an ECL scheme for mass digitization proposed as a settlement of one of the lawsuits against the Google Books digitization program. Most of the

objections to the proposed Google Books settlement raised by the NWU, SFWA, and other US and foreign writers apply equally to the ECL legislation contemplated by the Copyright Office. The Copyright Office should not propose legislation modeled on a scheme which was vehemently opposed by most working writers, and which was rejected by the courts as unfair.⁴

3. Specific questions asked by the Copyright Office about ECL for mass digitization

In addition to the general comments above, which respond to the Copyright Office's final request in its Notice of Inquiry for comments concerning "any additional issues that the Copyright Office may wish to consider in developing draft ECL legislation," the NWU and SFWA have the following comments on specific questions posed by the Copyright Office in its Notice of Inquiry:

(a) "Should collections that include commercially available works be eligible for ECL, or should the program cover only out-of-commerce works?"

It's difficult to answer this question without knowing what the Copyright Office means by "commercially available" or "out of commerce". Neither of these terms is defined in the Notice of Inquiry, and attempting to define them only highlights the problems in the entire concept of ECL for digitization or other primary rights.

We presume that the statutory definitions of "commercially available" and "out of commerce" would refer to or be based on some underlying definition of "normal" channels for making works available.

⁴ See <<https://nwu.org/book-division/google-books-lawsuits/>>.

But what are those normal channels for writers in the new digital age? As we have noted above, neither the Copyright Office nor Congress has yet conducted any inquiry into the "new normal" of digital distribution channels and business models for writers, or has the necessary factual knowledge on which to base a definition of "normal" digital commerce.

It would be essential to base any finding that a *work* is "out of commerce" on the status of availability of the work in *any edition*, not on the basis of whether some particular previous edition is in or out of print. It would be particularly inappropriate to base the inclusion of *digital rights* in any ECL or other licensing scheme on the status of availability in hardcopy of an earlier *print* edition, without regard to the possible availability of new but perhaps very different-looking digital editions.

Existing Copyright Office procedures for recording of documents – the only mechanism currently available for officially recording information about new digital editions of previously-copyrighted works – are prohibitively expensive for most writers and, in any case, not transposed back into Library of Congress catalog entries or other bibliographic references about earlier editions that include all or part of the same works.

If a work is included in library or archival holdings in some unpublished (paper) format or in some (paper) edition of a book, periodical, journal, or ephemera that is out of print in that original edition, but is currently commercially available, that is most likely because the author, as holder of the digital rights, has made a new digital edition available. These new digital editions take many forms: excerpts, full text, or updated and enhanced versions (with hyperlinks to references, etc.) posted on author's websites or elsewhere online; text incorporated into

smartphone or tablet apps (a travel guidebook reissued as a travel guide app, for example); downloadable PDF copies or other e-books or digital "offprints"; and many others.

Most of these new digital editions of writers' "out of print" (in their original editions) backlist works are self-published, many are self-distributed on a peer-to-peer basis (such as through authors' own websites) rather than through third-party distributors, and few of them are included in any library catalog or database. These works would be deemed "orphan works" or "out of commerce" despite being actively and commercially exploited by their authors.

Just as the only way to find out to whom a writer has assigned which rights to her work is to ask the writer, the only way to find out if a work is commercially available is to ask the writer. That's exactly what readers typically do. If they see references to a work that they can't find in a digital edition, but want to read in that format, they search online for the author, and then search the author's website or email the author: "Is there a way I can get a digital copy of this article/story/book/poem you wrote that I found in this out-of-print paper edition?" If enough people ask, the writer will decide that it's worth her time to make a digital copy available.

We urge libraries, including the Library of Congress, to open their catalogs to information crowdsourced from individual writers. This will help readers find these already existing new digital editions, and will be an essential (although not sufficient) step toward making it possible for third parties to determine if backlist or archival works are already commercially available.

Writers should be allowed to augment bibliographic databases and library catalog listings for paper holdings of "out of print" editions to provide URLs or other pointers to new digital editions which reproduce or incorporate all or parts of these works, such as self-published new e-book editions or authors' websites where articles are available.

It's hypocritical and a disservice to both readers and writers for librarians to claim they can't find us, or need to digitize our work themselves because our work is "out of print" (in the original paper editions) or "out of commerce", while refusing to allow us to provide library patrons with pointers to the new (and perhaps updated and improved) digital editions of these same works that we have already created and made available – and which may, through revenue channels such as download licensing fees or advertising, be contributing to our incomes.

Digital storage is cheap and easy. Libraries' core expertise and added value over mere data warehouses is in cataloging, indexing, and helping readers find information. Writers are eager to work with libraries to help library patrons find our new digital editions of works held by libraries in paper formats. We urge the Library of Congress to take the lead on this, and to begin moving library catalogs into the digital worlds of self-publishing and peer-to-peer distribution.

(b) "Please describe any appropriate limitations on the end-users who should be eligible to access a digital collection under a qualifying mass digitization project. For example, should access be limited to students, affiliates, and employees of the digitizing institution, or should ECL licensees be permitted to provide access to the general public?"

Access restrictions would not rescue the illegality and inappropriateness of ECL for digital rights. It doesn't matter whether an ECL scheme is limited to libraries or educational organizations, or if the organization digitizing its collection tries to restrict access to students or library patrons. Students and library patrons who want to read a book or article in electronic form would, in the absence of a new ECL copy, visit the author's website, and might pay for a PDF

offprint or click on ads. Even copying by nonprofit entities, and digital distribution for noncommercial use, diverts clicks and interferes with revenues from other normal modes of exploitation of digital rights – and would thus violate the Berne Convention three-step test.

(c) Distribution of Royalties. To ensure that rightsholders receive compensation within a reasonable time, the Office has recommended that the legislation or regulations establish a specific period within which a CMO [Copyright Management Organization] must distribute royalties to rightsholders whom it has identified and located.... In the United States, there is some industry precedent for distributions by CMOs on a quarterly basis. What would be an appropriate time frame for required distributions under a U.S. ECL program?

Most digital distribution of text is in the form of Web content, and most revenues for digital distribution are in the form of advertising, whether paid on a per-page-view or per-click basis. The standard reporting and payment period for online advertising revenue is monthly.⁵ Given that automated accounting allows online advertising brokers to track visits and clicks on billions of Web pages in real time, and remit payments to millions of Web publishers monthly, any ECL licensee or RRO licensed to operate an ECL scheme for digital rights should be required to do likewise. Delayed reporting and quarterly or less frequent reporting and payment of revenue shares is a technologically obsolete vestige of print publishers' legacy business models, and should have no place in digital rights management and digital revenue sharing.

5 See e.g. Google AdSense, "Payment timelines", <<https://support.google.com/adsense/answer/1709893?rd=1>>: "The AdSense payment cycle is monthly. You'll accrue estimated earnings over the course of a month, and then at the beginning of the following month your earnings are finalized and posted to your balance on your Payment history. If your balance exceeds the payment threshold and you have no payment holds, you'll be issued a payment on or around the 21st of the month. "

(d) "Diligent Search. The Office has recommended that a CMO be required to conduct diligent searches for non-member rightsholders for whom it has collected royalties. The Office believes that this obligation should include, but not be limited to, maintaining a publicly available list of information on all licensed works for which one or more rightsholders have not been identified or located. What additional actions should be required as part of a CMO's diligent search obligation?"

It's unclear what is meant in this question by "identified" or "located". As we discussed in detail in the NWU comments to the Copyright Office concerning "orphan works", finding the current holder(s) of particular rights to a work requires three discrete tasks: attributing authorship to a specific person, adjudicating the current status of the chain of assignments of rights and the boundaries of those rightsholdings, and contacting the suspected rightsholder(s).

Author-publisher contracts aren't public documents, and many licensing agreements contain confidentiality clauses forbidding their publication or disclosure to third parties. Library catalogs and bibliographic databases contain information about publication history, not rightsholdings. As a result of this, only the author knows whether, and if so to whom, she has assigned which, if any, rights. So without consulting the author, it's impossible for any third party to say whether they have identified or found the holder(s) of particular rights to a particular work. But if the author can be consulted, the author can decide whether or not to authorize copying or a new edition in a new format, and no new ECL or "orphan works" law is needed.

At a minimum, any genuinely diligent search for rightsholders must be required to begin with a diligent search for the writer(s) as the only people able to say which, if any, rights have been assigned, and if so to whom they have been assigned. Such a search should rely on the usual tools of person finding as well as on online searches for text strings from the work. But the best way to "find" writers would be through crowdsourcing, as discussed above, that allows writers to add their own contact information to the Library of Congress catalog, so that would-be readers or licensees can contact writers directly to obtain copies of our works, or for permissions for publication of new editions or other uses of our works.

(e) "Other Issues. Please comment on any additional issues that the Copyright Office may wish to consider in developing draft ECL legislation."

Our primary concern, as discussed earlier, is that legislation authorizing ECL for mass digitization would interfere with writers' own efforts to digitize, make available, and commercially exploit rights to our "backlist" works previously published only in "out of print" hardcopy editions, or previously unpublished, in violation of the Berne Convention.

Even if ECL were a legal or appropriate framework for digitization or other primary rights, there are several additional problems that would need to be addressed:

Opt out: The Notice of Inquiry suggests that "Copyright owners would have the right to ... opt out of the system altogether." We agree that this is essential. The Copyright Office, as a neutral body not subject to capture by any of the rival stakeholder or rights claimant groups and subject to the protections of the Administrative Procedure Act, should maintain a master opt-out list on which any writer (or third-party rightsholder) can list herself.

Rightsholders should be allowed to annotate the Library of Congress catalog and the catalog of any collection subject to ECL with their authorship or rights claims. All work attributable to or claimed by any such party should be exempt from any ECL.

Many author-publisher contracts permit sub-licensing or reprinting without notice to the author, and grant the publisher authority over titles and other labels that might identify the work. A writer has no way to know whether a publisher may have reprinted her work with a new title, sub-licensed inclusion of excerpts in anthologies or periodicals (including, e.g., through a newspaper syndicate that may have further sub-licensed the publication of those excerpts in numerous publications, each of which may have selected its own title or headline), or authorized a translated edition with a different title.

For these reasons, it's impossible for most writers to produce a comprehensive list of the editions, titles, or formats in which their work has been published. To be meaningful, any opt-out from ECL must be available on a per-writer (or per-rightsholder) basis.

It's even more obviously impossible for a writer to know or list all the library or archival collections in which any of her published or unpublished work might be held. And it would be grossly and unnecessarily burdensome for a writer to have to search the catalog of each collection subject to ECL to try to find whether any of her work is included. Meaningful ability of writers or other rightsholders to opt out of ECL requires a single opt-out list applicable to all ECL schemes.

Anonymity: The possibility of advertising revenue from anonymous self-published websites, and anonymous or pseudonymous online payment platforms for downloads or subscriptions for digital content, has made anonymous commercial self-publication far easier

than ever before, and has led to whole new categories and genres of anonymous commercial publishing.

Like "orphan works" schemes, ECL schemes would sweep in most anonymous work, and make it impossible for writers to opt out or claim royalties without outing themselves. Rights to anonymously self-published works would be forfeited and effectively confiscated.

Anonymous writing and publishing should not be limited to those writers who can use a third-party publisher as an anonymizing proxy, or who are willing to give their work away.

We are deeply disappointed that librarians, who on other policy issues have been among the strongest advocates for the rights to anonymity of both writers and readers, are advocating "orphan works" and ECL schemes without recognizing that these default licenses would force writers to choose between anonymity and trying to make a living from their writing.

There are good reasons for anonymous publication in many genres. The possibility of publishing anonymously, and of earning a living by doing so, encourages and enables writers to devote time and resources to creating works that benefit readers and the public at large.

Muckrakers, whistleblowers, leakers, and writers on controversial topics or in stigmatized genres may prefer to keep this work anonymous, even while they try to make a living from it.

Anonymous self-publication allows writers to share personal and insider stories, and give readers the benefit of their insights, without breaching their own or their subjects' privacy.

A family blogger can discuss family dynamics and events without naming or identifying herself or her family members. A medical professional can, with care, share stories that inform the public about professional practices without naming or identifying herself or her patients. A workplace blogger can educate the public about employment and labor issues, or about what

goes on behind the scenes of an industry, without naming or identifying herself, her employer, or her co-workers or customers or other contacts. Readers benefit from availability of these works.

In cases like these, a writer may be making her best efforts to ensure that her identity cannot be found by even the most diligent search, at the same time that she is actively exploiting, and perhaps successfully earning a living from, that anonymous work. Digital distribution and revenue platforms have enabled an explosion of new creation of works that might not have been created but for the possibility of anonymous commercial self-publication. This is a good thing which should be supported, not undermined, by librarians, the Copyright Office, and Congress.

Royalties: The Copyright Office has asked for comments about methods for resolving disputes between RROs or CMOs and would-be licensees. But the Notice of Inquiry fails to consider or ask for comments concerning the much more likely and problematic issues of disputes about royalties (a) between rival claimants to the digitization rights and the division of revenues to the same work, and (b) between writers (or other rightsholders) and RROs or CMOs as to the appropriate royalty amount or license price.

With respect to the first of these disputes, the present inquiry by the Copyright Office follows almost twenty years of litigation – in which the NWU and its members have often been participants – between writers, print publishers (of books, newspapers, journals, and other periodicals), and digitizers and would-be digitizers of backlist written works. It should be apparent to anyone familiar with this history that the digital rights to most backlist works previously published in hardcopy formats and held by libraries in those formats and editions are or may well be claimed both by writers and by the former print publishers or their successors.

It would be folly to enact ECL legislation without anticipating these inevitable (and preexisting) disputes and providing a fair and adequate method for adjudicating them.

Based on publishers' conduct to date, we expect that if an ECL scheme is enacted, publishers will claim to hold digitization rights to all of their backlists of works they previously published in hardcopy formats, regardless of whether they ever held, or still hold, those rights.

Writers will be forced to dispute each of these claims from each of our former publishers, or forfeit our rights, revenues, and control over the digital distribution of our work.

It will also be necessary to resolve these disputes to decide whether it is the writer or the former print publisher who is entitled to make the decision of whether to opt out of ECL.

As we have noted in the NWU's written submissions and in-person testimony at the public roundtables during the recent Copyright Office inquiry concerning "Remedies for small copyright claims", writers are at an enormous structural disadvantage in disputes such as these with large, sophisticated, deep-pocketed publishing conglomerates.⁶

Current law provides no effective remedy for writers against the rights grabs that are likely to be made against us through false claims by former print publishers that they alone hold digitization rights to our backlist works.

At a minimum, the mechanisms for adjudicating disputes over rightsholdings should presume, in accordance with the defaults in the Copyright Act, that the creator of a work is the holder of all rights to the work, including digital rights. The burden of proof should be on any third-party claimant against the creator to establish a currently valid chain of assignment by the creator of the specific rights being claimed.

⁶ See references at Note 3, *supra*.

There are also likely to be disputes between writers and ECL entities concerning valuations of digitization rights and the appropriate licensing prices or royalties.

In practice, libraries and archives are likely to have far higher ranking in search-engine results than writers' own websites. Once a copy of a work is available on a library or archive website, it is likely to divert most Web visitors (and the associated potential clickstream revenue) away from any version of the work available through or authorized by the author.⁷

For this reason, Web publication by a major library or archive under an ECL license effectively deprives the writer of most potential revenue from digital distribution of the work. The ECL license should be priced as a *de facto* purchase of almost all digital rights. But the library or archive is likely to want its license priced as a license for "one-time" use.

Any ECL law will need to provide a fair and adequate method for resolving these disputes. Since a default license of primary rights without consent is in effect a usurpation (taking) of those rights, we believe that the starting point for discussion of pricing for such taking would be the procedures for establishing the value of other property taken by eminent domain.

Other ways to help solve the problem: In our comments in response to the Copyright Office inquiry concerning "orphan works",⁸ and in our meetings with librarians, we have already suggested several other steps that libraries, the Copyright Office, and Congress could take to enable more backlist works to be made available in digital formats and to help would-be readers find the legitimate digital editions of these works – mainly self-published – that already exist.

⁷ Consider, for example, the behavior of readers searching for content formerly published on the Web, but no longer available at the original URL. The original license for Web publication may have been time-limited and have expired, or have been limited to the now-defunct website. The author may well have made the work available on her own or some other site. But readers often search for unlicensed bootleg copies distributed by Archive.org rather than looking for possible legitimate copies from the author. Even though Archive.org doesn't charge for copies, its distribution of digital copies interferes with writers' ability to exploit rights to these works.

⁸ See references at Note 1, *supra*.

As discussed above, libraries – starting with the Library of Congress – should begin to move into the new digital age of self-publishing, peer-to-peer distribution, and crowdsourcing by allowing writers to add URLs or other pointers to library catalogs and databases to indicate where library patrons and other readers can find digital editions of these works.

And as discussed in our previous comments to the Copyright Office, the works which writers are not currently allowed to digitize and make available again are mainly those to which rights are or were held by former publishers that have gone out of business. Accordingly, Congress should reform Section 203 of the Copyright Act to provide for automatic reversion to the author or creator of rights held by a publisher or third party if that rightsholding entity goes out of business. This would enable the writer to release the work in a new edition or format or to license it to a new publisher.

The Copyright Office has asked for comments from the public (including from writers and other creators) about the form that an ECL law to permit mass digitization should take. We think there should be no such law at all, for the reasons discussed above.

We continue to urge that the Copyright Office, the Library of Congress, and Congress consider the alternatives we have suggested to make it easier for readers to find the digital editions of our work that we are making available (which would require no new legislation), and to enable us to reclaim rights held by out-of-business former publishers, so that we can make them available in new forms.

Finally, we again urge the Copyright Office and Congress to go back to the drawing board and start their inquiries over by consulting writers about the new ways we are earning money from our copyrights in the digital age, to lay the groundwork for any new laws.

Respectfully submitted,

/s/

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