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Legal Issues in Mass Digitization: A Preliminary Analysis and Discussion Document

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LEGAL ISSUES IN MASS DIGITIZATION: A PRELIMINARY ANALYSIS AND DISCUSSION DOCUMENT

OFFICE OF THE REGISTER OF COPYRIGHTS

OCTOBER 2011



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Maria A. Pallante
Register of Copyrights

October 31, 2011

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EXECUTIVE SUMMARY

This Preliminary Analysis and Discussion Document (the “Analysis”) addresses the issues raised by the intersection between copyright law and the mass digitization of books. The Copyright Office (the “Office”) has prepared this Analysis for the purpose of facilitating further discussion among the affected parties and the public – discussions that may encompass a number of possible approaches, including voluntary initiatives, legislative options, or both.

On March 22, 2011, the United States District Court for the Southern District of New York rejected a proposed settlement of the class action lawsuit brought by the Authors Guild and a related suit by book publishers against Google for the mass digitization of books in several large U.S. libraries. The court ruled that the class action settlement would have redefined the relationship between copyright law and new technology, and encroached upon Congress’s ability to set copyright policy with respect to orphan works. Subsequently, on September 12, 2011, the Authors Guild and several prominent authors sued five university libraries that participated in Google’s mass digitization project as well as a library consortium known as the HathiTrust after the universities announced their intention to offer access to some of the book scans Google had provided to them.

These developments have sparked public debate on the risks and opportunities that mass book digitization may create for authors, publishers, libraries, technology companies, the general public, and the corresponding legal framework. The questions are many: What mass digitization projects are currently underway in the United States? What are the objectives and who are the intended beneficiaries? How are the exclusive rights of copyright owners implicated? What exceptions or limitations may apply, to whom, and in what circumstances? To the extent there are public policy goals at issue, what could Congress do to facilitate or control the boundaries of

mass digitization projects? Would orphan works legislation help? Are efficient and cost-effective licensing options available? Could Congress encourage or even require new licensing schemes for mass digitization? Could it provide direction and oversight to authors, publishers, libraries, and technology companies as they explore solutions? Indeed, these stakeholders may be in the best position to find points of consensus and create strategies for the U.S. book and library sectors.

The issues discussed in this Analysis are complex and require public discussion. The Office recognizes that the Google Books proceeding, initiated more than six years ago, and the recently filed lawsuit involving the HathiTrust Digital Library will continue to influence the public debate over mass digitization. International developments may also contribute to the debate in the United States. Although the marketplace and the issues will continue to evolve, the Office believes there is sufficient information to undertake an intense public discussion about the broader policy implications of mass book digitization. By necessity, this discussion must address the relationship between the emerging digital marketplace and the existing copyright framework.

I. OVERVIEW

Earlier this year, a federal court rejected a proposed settlement in *Authors Guild v. Google Inc.*,¹ the copyright infringement litigation in which authors and publishers challenged the highly publicized “Google Books” project. In a much-anticipated opinion, the United States District Court for the Southern District of New York found that the settlement would inappropriately implement a forward-looking business arrangement granting Google significant rights to exploit entire books without permission from copyright owners, while at the same time releasing claims well beyond those presented in the dispute. The court also found that the proposed settlement encroached on Congress’s responsibility for setting copyright policy, which traditionally has been the exclusive domain of the legislative branch. As the court explained:

The question of who should be entrusted with guardianship over orphan books, under what terms, and with what safeguards are matters more appropriately decided by Congress than through an agreement among private, self-interested parties. Indeed, the Supreme Court has held that “it is generally for Congress, not the courts, to decide how best to pursue the Copyright Clause’s objectives.” [And the Supreme Court has] noted that it was Congress’s responsibility to adapt the copyright laws in response to changes in technology.²

The opinion echoed a number of concerns expressed about the proposed settlement agreement by both the Department of Justice (“DOJ”) and the Register of Copyrights.³ The

¹ *Authors Guild v. Google Inc.*, 770 F. Supp. 2d 666 (S.D.N.Y. 2011) (the “Google Books” case); see also *Am. Soc’y of Media Photographers, Inc. v. Google Inc.*, Civil No. 10-2977 (S.D.N.Y.) (companion suit filed by a consortium of visual artists for infringement of visual works in books).

² *Authors Guild*, 770 F. Supp. 2d at 677 (S.D.N.Y. 2011) (quoting *Eldred v. Ashcroft*, 537 U.S. 186, 212 (2003) and *Sony Corp. v. Universal City Studios, Inc.*, 464 U.S. 417, 429 (1984) (citations omitted)).

³ The Office worked closely with DOJ on the Statements of Interest filed in the Google Books case on behalf of the United States on September 18, 2009 and February 4, 2010 (“U.S. Statement of Interest”), which are available at <http://www.justice.gov/atr/cases/authorsguild.htm>. Former Register of Copyrights Marybeth Peters testified about the initial version of the settlement in a hearing before the House Committee on the Judiciary. See *Competition and Commerce in Digital Books: The Proposed Google Books Settlement, Hearings Before the House Comm. on the Judiciary*, 111th Cong. 1st Sess. (Sept. 10, 2009) (Statement of

court recognized the basic principles that exclusive rights afforded by copyright law should not be usurped as a matter of convenience, and that policy initiatives that redefine the relationship between copyright law and new technology are in the first instance the proper domain of Congress, not the courts.

At the same time, the court acknowledged that the digitization of books and the creation of a universal digital library could be beneficial for copyright owners and users alike. The opinion noted that digitization would make books more readily accessible to libraries, schools, researchers, and disadvantaged populations. It also noted that mass digitization could provide authors and publishers of older, out-of-print books with new audiences, markets, and sources of income for their works.⁴

The Office has been an active participant in the debate over the proposed settlements, and has followed the ongoing dispute over Google Books and similar mass digitization projects with great interest.⁵ Ten days after the court issued its decision in the Google Books case, the Librarian of Congress James H. Billington and then-Acting Register of Copyrights Maria A. Pallante provided Congress with a preliminary analysis of the decision and offered to assist in

Marybeth Peters, Register of Copyrights) (“Register’s Testimony”), *available at* <http://copyright.gov/docs/regstat091009.html>.

⁴ *Authors Guild*, 770 F. Supp. 2d at 670.

⁵ In September 2011, twenty individual authors and a number of organizations that represent U.S., Australian, Canadian, British, Norwegian, and Swedish authors asserted similar claims against HathiTrust and the board of regents for the University of Michigan, the University of California, the University of Wisconsin, Indiana University, and Cornell University. The suit alleges that the universities allowed Google to scan millions of books from their respective libraries, and then used those works to create a shared digital repository known as the HathiTrust Digital Library. The complaint alleges that the repository contains nearly 12 million works, that roughly 73% of those works are protected by copyright, and that the universities allow faculty, students, and patrons to view, print, and download full text copies of those works without permission. *See* First Am. Compl., *Authors Guild, Inc. v. HathiTrust*, Case No. 11 CIV 6351 (HB) (S.D.N.Y. Oct. 5, 2011) (“HathiTrust First Amended Complaint”).

exploring the potential implications of mass digitization.⁶ (A copy of the letter is set forth in Appendix A.) In light of the situation as it has developed thus far, with the Google Books project itself, the rejection of the settlement proposal, and the court's acknowledgement that Congress is responsible for formulating U.S. copyright policy, the question of how mass book digitization fits within the existing copyright framework is a timely one.

A key preliminary consideration regarding the digitization of books is the extent to which such projects are already underway, either on a mass scale or a more limited basis. Understanding the objectives of existing digitization projects and the feasibility of including copyrighted works is critical. Understanding practical experiences with such digitization projects (*e.g.*, by libraries, cultural institutions, government entities, and through partnerships with technology companies) is equally critical. This Analysis identifies a number of well-known projects, as well as some key differences among them. For example, some projects have focused only on books in the public domain, while others have been extended to include works that are clearly protected by copyright law.

Whether copyright owners are in a position to offer market solutions for mass digitization projects is an important part of the equation. It is possible that direct licensing, collective licensing, and other emerging business models will be capable of balancing the needs of user groups and the interests of copyright owners. This raises practical questions about how copyright owners should be compensated for the use of their works in mass digitization projects, and legal questions about the applicability of exclusive rights and limitations and exceptions under copyright law. Is the existing copyright framework sufficiently responsive to

⁶ Letters from James H. Billington, Librarian of Congress, and Maria A. Pallante, Acting Register of Copyrights to Chairman Patrick Leahy and Senator Charles Grassley of the Senate Judiciary Committee and Chairman Bob Goodlatte and Congressman Mel Watt of the House Subcommittee on Intellectual Property, Competition, and the Internet of the House Committee on the Judiciary (Apr. 1, 2011).

these concerns? If not, are there important public or private goals that might warrant legislative action in this area? Some stakeholders may suggest that Congress should facilitate mass digitization – and possibly dissemination – of books by creating a public registry that could simplify the process of obtaining prior permission from authors and other rights holders. Others may suggest that with guidance and encouragement from Congress, stakeholders could and should be encouraged to explore solutions within the marketplace, including private agreements or memoranda of understanding.

The questions raised in this Analysis are complex and will require additional review and deliberation. Section II provides a brief history of the Google Books dispute and its impact on the mass digitization discussion. Section III explores the current landscape for the digitization of books, including the stated goals and objectives for various digitization and distribution projects. Finally, Section IV examines current copyright law and licensing practices that may be implicated by these projects. The Appendices provide important information about domestic and international digitization projects, organizations involved in projects and discussions about the future of mass book digitization, and international legal developments.

II. A BRIEF HISTORY OF THE GOOGLE BOOKS DISPUTE

Prior to the Google Books project, libraries and other cultural or historical entities launched digitization projects that were varied in focus and limited in scope. Most of these projects avoided copyrighted works or limited themselves to noncommercial use. Examples include “Calisphere,” an online archive of primary source materials on California history intended for use by K-12 students,⁷ and the Wisconsin Historical Society’s online database of

⁷ See <http://www.calisphere.universityofcalifornia.edu/>.

historical images.⁸ Digitization of entire books began slowly and then developed on several tracks. Project Gutenberg began digitizing books in 1971 and now offers more than 36,000 books in dozens of languages in its digital collection. The nonprofit Internet Archive began digitizing public domain books in 1999 as part of its mission to build an online library.⁹

Google began leapfrogging the book digitization market in 2004. Working in close cooperation with several academic libraries,¹⁰ Google scanned and digitized more than 15 million books published both in the United States and abroad, and continues to scan books today.¹¹ Millions of these books were protected by copyright at the time they were scanned, but neither Google nor the participating libraries obtained permission from the relevant copyright owners. Google provided its library partners with digital copies of these works, and made them available to users for full-text searching.¹² This search service allows end-users to view “snippets” from books that are subject to copyright protection, and it allows end-users to

⁸ See <http://www.wisconsinhistory.org/whi/>.

⁹ See <http://www.gutenberg.org/wiki/Gutenberg>About>; see also <http://archive.org>.

¹⁰ Google’s U.S. partners include the University of Michigan, the University of California, the University of Wisconsin, Indiana University, and Cornell University, among others. As discussed above, a group of authors recently filed a separate lawsuit against five of these institutions. See Julie Bosman, *Lawsuit Seeks the Removal of a Digital Book Collection*, N.Y. TIMES, Sept. 12, 2011 at B7.

¹¹ Even before he started Google, the co-founder of the company, Larry Page, was intrigued by the idea of scanning every book ever published. In 2002 he set up a makeshift scanning device to see how many books the company could scan within an hour. The first book he selected was *The Google Book*, an illustrated children’s story by V.C. Vickers. See Miguel Helft, *Ruling Spurs Effort to Form Digital Public Library*, N.Y. TIMES, Apr. 3, 2011, at B1.

¹² Intellectual property owners have targeted Google – with varying success – for copyright infringement based on material made available through the company’s search engine in the United States and Europe. Compare *Perfect 10, Inc. v. Amazon.com, Inc. and Google Inc.*, 487 F.3d 701 (9th Cir. 2007) (holding that display of thumbnail images of copyright-protected images was a fair use protecting Google from copyright infringement liability) with *Editions du Soleil v. Google Inc.*, Tribunal de grande instance [T.G.I.] [ordinary court of original jurisdiction] Paris, Dec. 18, 2009 (holding that Google’s mass digitization of French-language books and posting excerpts online constituted copyright infringement under French law and ordering Google to pay 300,000 euros in damages), available at http://www.legalis.net/spip.php?page=jurisprudence-decision&id_article=2812.

view and download public domain books in their entirety. Google's search engine is free to users, but the company collects revenue from advertising that is presented with the search results, including pages that reproduce and display images from copyrighted books.¹³

Some authors and publishers objected to Google's actions. In 2005, the authors brought a class action lawsuit asserting that Google had committed willful infringement, and publishers raised similar claims. In response, Google asserted a fair use defense. The parties entered into a proposed settlement on October 28, 2008, and after DOJ and many others objected to the proposal, the parties filed a revised settlement proposal on November 13, 2009. DOJ urged the court to reject this settlement, citing concerns about copyright law as well as antitrust and class action problems. In addition, hundreds of private actors and the governments of France and Germany filed formal objections. A fairness hearing was held on February 18, 2010.¹⁴

The proposed settlement would have created a new business model for clearing the rights to copyrighted books that avoided the transaction costs of searching for and negotiating with copyright owners on a case-by-case basis. In effect, it would have created a private compulsory license requiring authors and other rights holders of out-of-print books to "opt out" of the settlement by objecting to the reproduction, distribution, and display of their works. If copyright owners failed to object, Google could continue to scan and digitize books, and could undertake new business arrangements not contemplated in the initial lawsuit, including selling subscriptions to its electronic books database, online access to individual books, and advertisements in connection with these services. In addition, the settlement would have

¹³ See generally Emily Anne Proskine, Note, *Google's Technicolor Dreamcoat: A Copyright Analysis of the Google Book Search Library Project*, 21 BERKELEY TECH. L.J. 213, 214-21 (2006).

¹⁴ See *Authors Guild*, 770 F. Supp. 2d at 671.

established a “Book Rights Registry” to administer the distribution of royalties among rights holders, including the owners of any orphan works that might be included in the database.¹⁵

DOJ noted that “[b]reathing life into millions of works that are now effectively dormant, allowing users to search the text of millions of books at no cost, creating a rights registry, and enhancing the accessibility of such works for the disabled and others are all worthy objectives.”¹⁶ DOJ cautioned, however, that the proposed settlement would “grant legal rights that are difficult to square with the core principle of the Copyright Act that copyright owners generally control whether and how to exploit their works during the term of copyright. Those rights, in turn, confer significant and possibly anticompetitive advantages on a single entity – Google.”¹⁷ In testimony before the House Judiciary Committee, former Register of Copyrights Marybeth Peters expressed similar concerns about the impact the proposed settlement would have on the exclusive rights of copyright owners. She noted that the proposed settlement would have imposed a *de facto* compulsory license on copyright owners by requiring them to “opt out” of Google’s forward-looking business arrangement. She explained that this “would encroach on responsibility for copyright policy that traditionally has been the domain of Congress,” and would effectuate a significant change in copyright policy without open, public deliberation or input from all affected stakeholders.¹⁸

¹⁵ *See id.* at 671-72.

¹⁶ U.S. Statement of Interest (Feb. 10, 2010), *supra* note 3 at 2.

¹⁷ *Id.*

¹⁸ Register’s Testimony, *supra* note 3 at 2, 5-6. In her testimony, the former Register expressed concern about the initial settlement proposal in the Google Books dispute, but as DOJ explained in the U.S. Statement of Interest, both the initial and amended proposals contained many of the same problems. *See* U.S. Statement of Interest (Feb. 10, 2010), *supra* note 3 at 2.

On March 22, 2011, the court rejected the proposed settlement. The court noted, however, that the concerns raised by the U.S. government and others “would be ameliorated if the [settlement agreement] were converted from an ‘opt out’ settlement to an ‘opt in’ settlement.”¹⁹ At a status conference held on September 15, 2011, the court adopted a scheduling order setting discovery and pretrial deadlines through July 2012,²⁰ encouraged the parties to resolve their dispute through settlement, and once again offered to assist the parties in their negotiations if necessary.²¹ Attorneys for the Association of American Publishers told the court that they “have made good progress toward a settlement” and that their clients were working to resolve their differences with Google.²² Attorneys for the Author’s Guild acknowledged that the publishers’ group has made more progress toward settlement than the authors’ group, and that the publishers could conceivably settle with Google while the authors continue to litigate.²³

III. THE LANDSCAPE FOR THE MASS DIGITIZATION OF BOOKS

This section describes the existing U.S. landscape for mass book digitization, including interested stakeholders, the nature of current digitization projects, and unresolved questions. As an initial matter, “mass digitization” is not a scientific term. In the context of books, it has

¹⁹ *Authors Guild*, 770 F. Supp. 2d at 686.

²⁰ The next major deadline in the case is for the plaintiffs’ motion for class certification, which is due on December 12, 2011.

²¹ Larry Neumeister, *Google, lawyers get more time for digital library*, SAN FRANCISCO CHRONICLE (Sept. 15, 2011), available at <http://www.sfgate.com/cgi-bin/article.cgi?f=/n/a/2011/09/15/national/a100826D35.DTL>.

²² *Judge Adopts Trial Schedule At Google Status Conference, but Settlement Talks Continue*, PUBLISHERS WEEKLY (Sept. 15, 2011), available at <http://www.publishersweekly.com/pw/by-topic/digital/copyright/article/48709-judge-adopts-pre-trial-schedule-at-google-status-conference-but-settlement-talks-continue.html>.

²³ *See id.*

come to mean large-scale scanning. It may also refer to a systematic methodology or approach. There seems to be a consensus that the Google Books project, which has scanned and digitized more than 15 million books from research libraries and continues to scan more at a rapid rate,²⁴ qualifies as a mass digitization. It is possible, however, that a project capturing far fewer books might also be considered mass digitization.

A. Mass Digitization Stakeholders

There are many stakeholders who may be affected by or interested in mass book digitization projects. These parties include copyright owners, such as authors, publishers, photographers, and other visual artists, libraries of all types (public, private, nonprofit, for-profit, academic, and lending), archives, museums, technology companies, educators, other users or consumers of copyrighted works, and the general public. (An overview of these stakeholder categories is set forth in Appendix B.)

Public, private, commercial, and noncommercial stakeholders are all contemplating, developing, and undertaking book digitization projects. These actors may have different goals and levels of resources to accomplish their objectives. At the same time, as described below, some digitization projects involve collaborations among multiple stakeholders with a variety of interests.

Nonprofit institutions and public lending entities often forge partnerships with commercial entities, seeking the support of technology companies or similar actors to fund or implement their projects, and entering into agreements that may allow their partners to use the digital collection – including, in some instances, works protected by copyright law – for commercial purposes. The nonprofit-commercial partnership concept is an established model

²⁴ See Helft, *supra* note 11.

for digitization that has been used for many private sector projects, such as the Google Books Library Project.²⁵ Many of these projects were purposely limited to public domain works because of the costs associated with clearing rights or the uncertainty of the application of limitations and exceptions under the law, including fair use. While the Google Books digitization project relies on a fair use analysis, other projects that scan copyrighted works have often been undertaken after obtaining permission from authors, publishers, or other rights holders.²⁶ In 2008 more than a dozen university libraries worked with Google, Microsoft, and the Internet Archive to digitize books, journals, and other literary works from their respective collections. The universities then created an online repository known as the HathiTrust Digital Library (“HathiTrust”) that contains more than three billion pages of scanned content which has been contributed by member institutions.²⁷

Public-private partnerships (which may or may not involve commercial entities) are also common in the United States and a number of foreign countries. For example, the nonprofit Internet Archive digitized some of the Library of Congress’s public domain books as well as works held by other federal government agencies, working in part with a grant from the Sloan Foundation. In Europe a consortium of governments working in partnership with various

²⁵ This project is distinct from the Google Books project that is the subject of pending litigation. Google works with a variety of public or nonprofit libraries, including domestic libraries at Columbia University, Harvard University, and the University of Michigan, as well as the New York Public Library, and foreign institutions such as Oxford University’s library, the University Library of Lausanne, and the Austrian National Library. The participants in the Library Project have been the source for some materials in the Google Books project, although the scope of individual library participation varies. *See* <http://www.google.com/googlebooks/library.html>.

²⁶ Another consideration is the treatment of orphan works. For example, the Internet Archive “has not knowingly digitized orphan works for inclusion in its text archive,” and noted that it “has been reluctant to include orphan works knowingly because the law regarding their use is unsettled and the Archive cannot responsibly risk liability for statutory damages.” *See* Mem. of Amicus Curiae The Internet Archive in Opp. to Settlement Agreement at 4, *Authors Guild v. Google Inc.*, Civil No. 05-8136 (S.D.N.Y. Sept. 8, 2009).

²⁷ For information on the HathiTrust Digital Library, *see* <http://www.hathitrust.org/about>.

private organizations created “Europeana,” an online service that aims to provide universal, digital access to Europe’s vast scientific and cultural resources.²⁸ It appears that many European countries view digitization of their cultural resources as an important national objective, and numerous national libraries and other cultural institutions throughout the continent have begun contributing to the Europeana database.²⁹

Congress may want to consider whether the nation’s federal cultural institutions – the Library of Congress, the Smithsonian Institution, and the National Archives – should have a specific role in developing a national framework for mass book digitization projects.³⁰ The Library of Congress is one of the largest repositories of copyright-protected materials in the world, and as a federal institution, is currently engaged in multiple, targeted scanning and digitization projects to address a variety of public goals. The Smithsonian Institution adopted a strategic plan for fiscal years 2010 through 2015 to digitize its collections and holdings, including text, images, and sound recordings, as well as accompanying descriptive and explanatory data.³¹ The Smithsonian plans to create an ongoing, sustainable digitization program. The National Archives developed a strategic plan for digitizing its holdings and, by using the Archival Research Catalog, plans to digitize and make fully available online its vast collection of historical U.S. government documents. The National Archives also preserves and

²⁸ For information on Europeana, *see* <http://www.europeana.eu/portal>.

²⁹ *See* Appendix C.

³⁰ Providing a leading role in mass book digitization for the nation’s federal cultural institutions would be similar to the prominent role several countries have given to their national libraries. For example, the French National Library, Bibliothèque Nationale de France, oversees Gallica, a website containing more than 1.5 million works, the British Library intends to make its collection available “to as wide a range of users as possible through digitisation,” and the National Library of China has launched a National Digital Library Project to digitally preserve resources relating to Chinese cultural heritage. *See* <http://www.nlc.gov.cn/newen/>.

³¹ *See* Smithsonian Institution, *Creating a Digital Smithsonian: Digitization Strategic Plan*, available at http://si.edu/Content/Pdf/About/2010_SI_Digitization_Plan.pdf.

provides access to U.S. government records born digitally; that is, those documents that exist only in electronic format.³² *See* Appendix C.

The Library of Congress has extensive experience with preservation issues, and it has provided both Congress and the public with access to numerous books and other materials that have been digitized from its extensive collections. Since 1994 the Library has digitized millions of public domain works, always in accordance with, and with respect for, longstanding principles of copyright law. For example, the American Memory project features digital images of more than 16 million items related to U.S. history and culture (organized into more than 100 thematic collections) and the Historic American Newspapers project provides digital access to 900,000 U.S. newspapers published between 1836 and 1922.³³ The Library has engaged in pilot projects involving the digitization of motion pictures with the copyright owner's permission, although these projects presented difficulties. In some cases, the studio agreed not to object to the digitization of a motion picture, but this proved to be of limited help because the studio did not control all the rights in the work and thus could not grant affirmative permission. Although this effort has been difficult and time consuming, it has provided the Library with valuable experience in determining the copyright status of a work and seeking permission to use it.

³² *See* <http://www.archives.gov/era/>.

³³ The Library's other major initiatives include: (1) the World Digital Library, a joint venture with UNESCO (<http://www.wdl.org/en/>); (2) World Culture and Resources, which presents bilingual digital collections from various media from different regions and countries around the world (<http://memory.loc.gov/intldl/intldlhome.html>); and (3) Prints and Photographs, which contains over 1.2 million digitized images (<http://www.loc.gov/pictures/>).

B. The Nature of Existing Mass Digitization Projects

This Analysis focuses on the purpose and objectives of digitization projects that involve copyrighted books, especially books that are available in the commercial marketplace. These objectives are likely to vary depending on the actor, and there may be more than one goal implicated in a particular project. Research libraries and other collecting institutions may digitize or collect works that already exist in digital formats to preserve cultural and historic artifacts in accordance with the institutions' missions.³⁴ Legal complexities aside, a digitization project that extends to public domain works may be an important first step, but over time, excluding copyrighted works from the collection may be at odds with the goal of providing a complete record for historic or cultural preservation purposes. Providing access is often a primary goal, although what form of access may depend in part upon the type of institution and its desire to engage in broad, public dissemination. Indeed, some actors have commercial motives for digitizing and may wish to publicly display, perform, or disseminate works for economic gain. The fact that a digitization project is intended to make money may not change the fact that it is beneficial to the public, but it may change the application of copyright law and the acceptable reach of limitations and exceptions.

As a preliminary step, this Analysis identifies certain digitization projects that have been launched in the United States, as well as the legal issues and business concerns that drive decision-making in this area. While a number of projects have been described briefly, a comprehensive request for information from stakeholders likely would identify many more. (A representative list of certain current digitization projects is set forth in Appendix C.)

³⁴ A related question that is beyond the scope of this Analysis is the state of development of digitization technologies and methods, and their effectiveness for achieving digitization goals such as preservation and conservation.

Examination of the current landscape also includes determining what categories of books are being digitized by what types of entities. Of particular interest are projects involving books published within the past 50 years or so that are likely to still be subject to copyright protection, especially if the authors and publishers of those works digitize their works or license others to do so.³⁵ The public is eager to obtain digitized versions of books and other literary works that can be used on electronic reading devices, computers, and mobile phones. In addition to newer works that are issued in “born digital” e-book formats, the public wants to quickly and easily obtain digitized versions of older works for use with these devices. At the same time, rights holders including authors and publishers want to make sure the mass digitization framework evolves in a way that allows the continued development of a thriving marketplace for digitized formats of their works.

Congress has enacted a long term of copyright protection in the United States that will affect many of these digitized works: 95 years for works published before 1978; life of the author plus 70 years for works created by a natural person after 1978; and 95 years from publication or 120 years from creation (whichever comes first) for works made for hire created after 1978.³⁶ While scanning and electronic dissemination of books could undermine the benefit of that term of protection, mass digitization and dissemination also may serve important public interest goals that justify restricting or limiting certain exclusive rights for works that are subject to a lengthy copyright term.

³⁵ Most books published within the past 50 years would likely fall within the term of copyright protection. Books published in the United States before January 1, 1964 were subject to a mandatory renewal requirement under the previous copyright law. If a U.S. author failed to comply with this requirement or other formalities imposed by U.S. law, his or her work may have fallen into the public domain.

³⁶ See 17 U.S.C. §§ 302(a), (c) and 304(a), (b).

C. Questions in the Current Digitization Landscape

Whether the U.S. copyright law requires modification to accommodate the mass digitization of books (or for that matter, photographs, music,³⁷ or other works) depends on whether there are public policy objectives that are not fully met by existing law. Current digitization goals are varied, in part because the digitization marketplace is constantly evolving. Once a book is digitized, it can be displayed on websites for K-12 education, scientific research, or inter-library lending, or it can be distributed through the commercial sector for general, consumer interest. Research libraries, archives, and museums have had the principal goals of preservation of cultural heritage, conservation of works that are not widely available in the marketplace, and restoration of fragile works. There is also increasing pressure on these institutions to disseminate works once they have been digitized.

Existing book digitization projects have highlighted numerous policy questions that deserve further discussion and consideration. Many of these questions involve the treatment of copyrighted books. To the extent that a digitization project captures such books, Congress may want to consider whether the purposes and objectives of these projects or possible future projects are sufficiently important to the nation to warrant possible changes to the copyright law.³⁸ In other words, is there a reason for Congress to encourage the digitization of

³⁷ For example, the Library of Congress, in cooperation with rights holders, recently launched a website that allows users to stream music, speeches, poetry, and comedy from a vast archive containing more than 10,000 pre-1925 recordings. See Justin Jouvenal, “Jukebox” gives voice to history, WASH. POST, May 11, 2011 at C6. Likewise, the Jazz Museum in Harlem recently acquired a “treasure trove” of recordings from radio broadcasts in the 1930s known as the Savory Collection. The Museum is planning to digitize the collection and to make the recordings publicly available at the museum and eventually online. See Larry Rohter, *Museum Acquires Storied Trove of Performances by Jazz Greats*, N.Y. TIMES, Aug. 16, 2010 at C1.

³⁸ Other nations are actively pursuing initiatives involving the mass digitization of printed works. For example, the British Library formed a partnership with Google in 2011 to scan out-of-copyright books published between 1700 and 1870 and to make those works available online. See Mark Brown, *British Library and Google Bring 19th Century Hippos to the Web* (June 20, 2011), available at <http://www.guardian.co.uk/books/2011/jun/20/british-library-google-digitisation-hippos>. France is planning to spend 750 million euros to scan French literary works and other materials in an effort to control the digitization of

copyrighted books by user groups, or should these activities be left to the marketplace and the copyright law as it currently exists?

Additional questions involve various digitization projects and stakeholder collaborations that implicate copyright owners' exclusive rights. For example, when should digitization require copyright owner's consent? Should the copyright law distinguish between nonprofit institutions or public agencies and private for-profit entities? If so, what limitations, if any, should be placed on the scanning and use of digitized content that results from nonprofit-commercial or public-private partnerships?

A more recent concern is how to apply the existing copyright framework to the capture, collection, and preservation of "born digital" works, such as electronic books ("e-books"), and the digital photographs and other visual art works that might be incorporated in those books. The number of these works available in the commercial marketplace has been expanding rapidly. For example, in 2007 the online retailer Amazon.com began challenging brick and mortar bookstores by offering electronic books for use with the Kindle and other mobile devices. Earlier this year Amazon announced that its sales of e-books now exceed its sales of hardback and paperback books combined.³⁹

Libraries and other cultural institutions have started programs addressing these materials. A principal example in this category is the Library of Congress's National Digital Information Infrastructure & Preservation Program ("NDIIPP"), which was authorized by

France's cultural history. The National Library of the Netherlands is attempting to digitize every Dutch book and periodical published since 1470. See Scott Sayare, *France to Digitize Its Own Literary and Historical Works*, N.Y. TIMES, Dec. 15, 2009, at A16; Robert Darnton, *A Digital Library Better than Google's*, N.Y. TIMES, Mar. 23, 2011, at A31. The National Library of Sweden is currently engaged in similar efforts. See <http://www.kb.se/english/about/news/Digital-task/>.

³⁹ Claire Cain Miller and Julie Bosman, *E-Books Outsell Print Books at Amazon*, N.Y. TIMES, May 19, 2011 at B2.

Congress in 2000. The program currently has more than 180 partners and is developing a national strategy to preserve the nation's cultural heritage by collecting and providing access to digital information, such as websites, maps, television broadcasts, and digital photographs.⁴⁰

The Office has addressed another aspect of the collection of born digital works by adopting an interim regulation governing the submission standards for online journals and other electronic publications that are subject to mandatory deposit with the Library of Congress.⁴¹ These projects are invaluable for many reasons, not the least of which is their ability to inform policy discussions relating to digital technology and copyright law.

IV. THE COPYRIGHT AND LICENSING FRAMEWORK FOR MASS DIGITIZATION

This section discusses the current copyright and licensing legal framework and how it affects mass book digitization initiatives. It also describes licensing options that could be explored to address gaps identified in the current framework. Questions to be considered include what part of digitization is or should be covered by fair use or library exceptions under copyright law, and whether stakeholders are able to provide, or could soon offer, efficient and cost-effective licensing options.

A. Exclusive Copyright Rights and Liability for Infringement

The Copyright Act secures to authors, publishers, and other copyright owners certain exclusive rights to their works for a period of time prescribed by law, including the rights to reproduce, display, distribute, and make derivative works from their books. 17 U.S.C. § 106. The Authors Guild and publishers sued Google, in part, because authors and publishers

⁴⁰ For information on the NDIIPP program, *see* <http://www.digitalpreservation.gov/>.

⁴¹ Mandatory Deposit of Published Electronic Works Available Only Online, 75 Fed. Reg. 3863 (Jan. 25, 2010), codified at 37 C.F.R. pt. 202.

frequently license and exploit digital rights (sometimes known as electronic rights) as part of their bundle of rights under the copyright law, and they wish to exercise control over whether, when, and how their works should be digitized. In a separate lawsuit, the Authors Guild and a number of individual authors and international author organizations raised similar concerns about the activities of some of Google's university library partners, claiming that the universities committed copyright infringement when they established the HathiTrust Digital Library and made their extensive collections available online to university students, faculty, and library patrons.⁴²

Electronic rights may implicate one or many of the exclusive rights available to copyright owners under Section 106 and they may be delineated by contract in a variety of ways. For example, an author may grant the exclusive right to distribute a book in all media throughout the world to an American publisher, who in turn may sublicense distribution of e-book formats and the creation of an audiovisual adaptation for release on DVD. Today, authors and publishers negotiate electronic rights as a routine matter. However, the question of whether the author or publisher retains the electronic rights for books published before the digital era has been the subject of intense debate. This could limit the digitization and distribution of out-of-print books when it is not clear whether the author or the publisher has the ability to scan the book or to license third parties to do so.⁴³

Under the current copyright framework, users must consider the potential for infringement allegations when they digitize copyrighted works and/or make their scans available for public access without permission. In cases involving works registered prior to the

⁴² See HathiTrust First Amended Complaint, *supra* note 5.

⁴³ DOJ outlined this problem in its second statement in the Google Books case. See U.S. Statement of Interest (Feb. 10, 2010), *supra* note 3 at 3.

commencement of infringement or within three months after publication, the Copyright Act allows copyright owners to seek attorney’s fees and statutory damages without requiring evidence of the monetary damage resulting from the infringement. *See* 17 U.S.C. §§ 412, 504(c), and 505. These are important tools for copyright owners, but in the current legal environment the risk-reward calculus may discourage users from engaging in mass digitization efforts unless the books at issue either are clearly in the public domain or easily licensed from the copyright owner. Specific statutory exemptions, namely Section 107 of the Copyright Act, which provides the affirmative defense of fair use, and Section 108, which allows certain reproductions by libraries and archives, may offer comfort to a mass digitizer in some limited instances for certain activities. These provisions, however, are unlikely to cover all facets of the book digitization projects that are currently planned or underway, have not been interpreted by the courts with respect to mass digitization of books, and in any event do not offer absolute protection from allegations of infringement.⁴⁴

B. Libraries and Section 108

Section 108 permits libraries and archives to make very limited reproductions and certain other uses of copyrighted works under specific circumstances without obtaining permission from copyright owners, such as preservation of unpublished works or for replacement when a book is damaged.⁴⁵ The Section 108 exception does not contemplate mass

⁴⁴ For example, the plaintiffs in Google Books argued that scanning books and making brief excerpts from those works available for online searching constituted copyright infringement. Google argued that displaying small portions of a book in response to a search request qualified as a fair use. But as the court observed, “[t]here was no allegation that Google was making full books available online, and the case was not about full access to copyrighted works.” *Authors Guild*, 770 F. Supp. 2d at 678.

⁴⁵ *See, e.g.*, 17 U.S.C. § 108 (a)-(c) (specifying the circumstances under which libraries may make up to three copies of a work, including for purposes of preservation and replacement).

digitization.⁴⁶ It was enacted in 1978 and was shaped by the technology and concerns of the pre-digital age, with the exception of a minor amendment adopted in 1998 that allows libraries and archives, in limited situations, to reproduce three digital copies that can only be shared on site, and to make expanded use of works in the last twenty years of the term of protection.⁴⁷

Any review of mass book digitization would need to consider, if not compare, the activities that currently are, or should be, permissible for libraries under Section 108. Any licensing schemes to implement mass digitization should not supplant the activities that have long been or should be covered legitimately by a copyright exception. This said, licensing is likely to be a part of the mass digitization equation for libraries. In addition, it is difficult to imagine an exception to copyright applying to the commercial partners of libraries.

Section 108 was the subject of a recent study that did not address mass digitization, but considered preservation and access, which are frequent objectives of mass digitization projects. In 2005 the Library's NDIIPP Program and the Office convened an independent study group with representatives from the library, scholarly, publishing, and entertainment communities in the public and private sectors to evaluate the continued relevance and effectiveness of Section 108, not only with respect to preservation but also for providing access. The study group gave the Librarian of Congress and the Register of Copyrights a report and recommendations in 2008 (the "Section 108 Report").⁴⁸ The Section 108 Study Group reached consensus on many issues relating to preservation, but did not do so on many subjects relating to access.

⁴⁶ See 17 U.S.C. § 108(g) (stating that the library and archive exception extends only to isolated and unrelated copying and does not extend to systematic reproduction of multiple copies).

⁴⁷ See 17 U.S.C. § 108(h)(1).

⁴⁸ See United States Copyright Office & National Digital Information Infrastructure and Preservation Program, *Section 108 Study Group Report* (2008), available at <http://www.section108.gov/docs/Sec108StudyGroupReport.pdf>. Among the primary recommendations of the

The Library of Congress has been an active participant in the worldwide discussion on preservation and access issues related to digitization of works, including discussions among governments and cultural institutions, authors and publishers, and technology companies. The next logical step for the Library and other leading U.S. public collecting institutions – subject to the availability of resources – is to move from a series of *ad hoc* projects to a strategic and comprehensive effort that includes prioritizing content, managing licenses with copyright owners, and coordinating navigation and points of access with other important institutions.

There is considerable interest in the concept of digital libraries, including proposals for a Digital Public Library of America.⁴⁹ There also appears to be evolving interest among foreign countries in using trusted government entities to build digital libraries, some of which may stem from foreign exceptions comparable to Section 108. As discussed above, the European Union is building “Europeana,” as well as a related entity called the European Digital Library, which will aggregate content from several Member States, including the German Digital Library. Similarly, the French National Library’s “Gallica” will offer digital materials reflecting French history and culture, and the National Library of China has undertaken the digitization of Chinese cultural heritage. *See* Appendix C. Many of these governmental institutions are studying the interplay of copyright law and technology, including the appropriate scope of library exceptions, the possible benefits of collective licensing regimes,

Study Group were the coverage of museums by section 108, a new exception allowing capture and reproduction of publicly available websites, and the elimination of the three-copy limit for replacement and preservation copying.

⁴⁹ The Berkman Center at Harvard and a group of researchers from the library, museum, and archive communities have formed a steering committee to encourage the creation and development of a Digital Public Library of America (“DPLA”). *See* <http://dp.la/>. In August 2011 the committee invited interested parties to identify prototypes, technical tools, user interfaces, and other concepts that potentially could be used to implement a national digital library. An independent panel composed of experts in the fields of library science and information technology selected nine of these proposals and invited the parties to present their ideas at a recent conference held at the National Archives. *See Public Conference to Showcase Innovative Ideas for the Digital Public Library of America* (Oct. 5, 2010), available at <http://cyber.law.harvard.edu/node/7117>.

and the challenge of orphan works. For example, one of Europeana’s major projects is the Accessible Registries of Rights Information and Orphan Works (“ARROW”), which aims to support the European Digital Library Project by finding ways to clarify the rights status of orphan works and out-of-print works, and to enhance the interoperability of rights information among rights holders, agents, libraries and users.⁵⁰

C. Fair Use (Section 107)

In the Google Books litigation, Google claimed that it was fair use⁵¹ to systematically digitize millions of copyrighted books removed from library shelves and to provide snippets of those books through its online search engine.⁵² The proposed class action settlement sidestepped the question of copyright infringement and the fair use defense by providing for compensation of rights holders (often after the fact) for the scanning, distribution, and display of their books. For out-of-print books, unless copyright owners opted out, the settlement would have allowed Google to engage in these activities before it received the copyright owners’ permission and it would have prevented Google from engaging in these activities only if the copyright owner emerged and objected. The court rejected this proposal, in part, because it “would grant Google the right to sell full access to copyrighted works that it otherwise would not have the right to exploit,” it “would grant Google control over the digital commercialization of millions of books, including orphan books and other unclaimed works,” and “it would do so

⁵⁰ See <http://www.arrow-net.eu/>.

⁵¹ When analyzing the fair use defense, courts review the four non-exhaustive factors set forth in Section 107 of the Copyright Act: (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes; (2) the nature of the copyrighted work; (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and (4) the effect of the use upon the potential market for or value of the copyrighted work.

⁵² See *Authors Guild*, 770 F. Supp. 2d at 678.

even though Google engaged in wholesale, blatant copying, without first obtaining copyright permissions.”⁵³

Whether mass digitization is fair use in the context of the Google Books litigation has not been and might not be decided on the merits, although the large scale scanning and dissemination of entire books is difficult to square with fair use. Indeed, the court predicted that “Google would have no colorable defense to a claim of infringement based on the unauthorized copying and selling or other exploitation of entire copyrighted books.”⁵⁴

Fair use decisions provide some guidance as to the parameters of the fair use determination, but also demonstrate the fact-specific nature of the inquiry. With respect to photocopying, which is, in some ways, a technological precursor to digitization, courts have taken divergent views about whether such conduct amounts to fair use. In *Williams & Wilkins Co. v. U.S.*,⁵⁵ the U.S. Court of Claims held that it was a fair use for a government library to photocopy articles for patrons engaged in scientific research. In a subsequent case, however, the Court of Appeals for the Second Circuit held that a corporation’s “systematic process of encouraging employee researchers to copy articles so as to multiply available copies while avoiding payment” was not a fair use.⁵⁶ The court ruled against the company, in part, because its employees photocopied scientific articles for their own convenience, and because the employees used these photocopies for the exact same purpose as the original articles. In other

⁵³ *Id.* at 678-79.

⁵⁴ *Id.* at 678.

⁵⁵ *Williams & Wilkins Co. v. U.S.*, 487 F.2d 1345, 1363 (Ct. Cl. 1973), *aff’d by equally divided court*, 420 U.S. 376 (1975).

⁵⁶ *See Am. Geophysical Union v. Texaco Inc.*, 60 F.3d 913, 920 (2d Cir.1994), *cert. dismissed*, 516 U.S. 1005 (1995).

words, the copies merely superseded the employees' need for the originals. The fact that the photocopying was systematic and routine – rather than an isolated and spontaneous occurrence – also weighed against a finding of fair use.⁵⁷ The court noted that the company used these copies for a commercial purpose because they contributed to the company's research activities to some extent, but acknowledged that it might have reached a different conclusion if the copies produced something of value that benefitted the broader public interest.⁵⁸ Finally, the court found that the company's activities interfered with the normal exploitation of these articles, in part, because the publisher routinely licensed its articles through the Copyright Clearance Center.⁵⁹

Two cases illuminate some other challenges of applying the fair use defense to mass digitization. In *Kelly v. Arriba Soft*,⁶⁰ the court held that a search engine's use of small "thumbnail" copies of larger images that appeared on various websites was a fair use, because it used those images for a different purpose than full-resolution versions of the same works.⁶¹ More recently, in *A.V. v. iParadigms, LLC*,⁶² the court held that scanning literary works – specifically student papers – for the purpose of creating a database of "digital fingerprints" of those works was a fair use, explaining that "the use was transformative because its purpose was to prevent plagiarism."⁶³ In both cases, the courts focused on the transformative nature of the

⁵⁷ *See id.* at 918-20.

⁵⁸ *See id.* at 922.

⁵⁹ *See id.* at 929-31.

⁶⁰ *Kelly v. Arriba Soft*, 336 F.3d 811 (9th Cir. 2003).

⁶¹ *See id.* at 819.

⁶² *A.V. v. iParadigms, LLC*, 562 F.3d 630 (4th Cir. 2009).

⁶³ *See id.* at 636.

defendants' use of the underlying copyrighted works, but no court has determined whether the mass digitization of books would qualify as a transformative use.

At this time, the outcome of a fair use defense for any mass book digitization project is uncertain. The motives for and methods of mass digitization may differ from project to project and among various actors. Moreover, the digital marketplace has provided copyright owners with new ways to exploit their books, including out-of-print books, drawing owners into potential conflict with the digitization activities of some users. All of these factors could (and might one day) affect a fair use analysis in one direction or the other. Fair use is also a doctrine unique to the United States. While the laws of some foreign countries include fair use (or fair dealing), they lack the long history of judge-made precedent that is so crucial to understanding and applying the provision in the United States. Therefore, for any mass digitization project that is global in nature, as a practical matter fair use may prove to be of limited utility.

D. Orphan Works

In the context of copyright law, the term “orphan work” means a work for which the copyright owner cannot be identified or located by a good faith user for the purpose of requesting permission to use the work.⁶⁴ The orphan works problem is not as extreme for books as it is for other forms of copyrighted works, because the title page of a book routinely identifies the author, publisher, and date of publication, and because books are frequently

⁶⁴ See United States Copyright Office, *Report on Orphan Works 1* (2006) (“Orphan Works Report”), available at <http://www.copyright.gov/orphan/orphan-report-full.pdf>. Generally speaking, an “orphan book” is, by definition, a book that is out-of-print, because books are rarely offered for sale in the United States unless the owner has granted publication and distribution rights to the publisher. The mere fact that a book is out-of-print, however, does not necessarily mean that it is an orphan work. In fact, a number of parties objected to the proposed settlement in the Google Books dispute because it would have allowed Google to scan out-of-print books – even if the owners of those works could be located through a reasonably diligent search. See *Authors Guild*, 770 F. Supp. 2d at 681 (“From Google’s point of view, [my grandfather’s memoir] is an ‘orphaned’ book” because the company “is likely to be unsuccessful in trying to locate the publisher, since the book was self-published and my grandfather is now deceased,” but “[f]rom my family’s point of view, [the memoir] is not orphaned at all. It is very clear who owns the copyright.”). The plaintiffs have made similar arguments in their lawsuit against the HathiTrust Digital Library. See HathiTrust First Amended Complaint, *supra* note 5.

registered with the Office. Nevertheless, this type of information merely provides a starting point for the investigation, because rights may be transferred through many mechanisms such as licensing, probate, and consolidation of corporate entities.

Under the existing legal framework, a third party that uses an orphan work without permission runs the risk that the copyright owner(s) may come forward and bring an infringement suit seeking actual damages and profits or an award of statutory damages and attorneys fees.⁶⁵ In 2006, the Office prepared a major report for Congress on orphan works (“the Orphan Works Report”), which provided detailed findings and recommendations to address this issue.⁶⁶ Legislation was introduced in both the 109th and 110th Congresses adopting many of the Office’s recommendations, and in 2008 Congress came very close to adopting a consensus bill.⁶⁷ Specifically, (1) the legislation would have limited remedies available under the Copyright Act when a user is unable to locate the copyright owner or other appropriate rights holder after conducting a diligent search; (2) the limitation would have applied on a case-by-case basis, meaning that users could not assume that an orphan work would retain its orphan status indefinitely; and (3) if the copyright owner or other rights holder

⁶⁵ For example, the Authors Guild and a number of individual authors and other author organizations sued Cornell University and the Universities of Michigan, California, Indiana, and Wisconsin, in part, because the universities planned to make full text copies of orphan works available through the HathiTrust Digital Library beginning on October 13, 2011. Although the plaintiffs have asked the court for injunctive relief and attorneys fees, they have not asked the court for an award of damages. *See* HathiTrust First Amended Complaint, *supra* note 5. After the complaint was filed HathiTrust suspended the release of digitized orphan works until the organization has improved its procedures for evaluating the copyright status of such works. *See* Andrew Albanese, *HathiTrust Suspends Its Orphan Works Release*, PUBLISHERS WEEKLY (Sept. 16, 2011), available at http://www.publishersweekly.com/pw/by-topic/digital/copyright/article/48722-hathitrust-suspends-its-orphan-works-release-.html?utm_source=Publishers+Weekly%27s+PW+Daily&utm_campaign=f8b3b12e85-UA-15906914-1&utm_medium=email.

⁶⁶ *See* Orphan Works Report, *supra* note 64.

⁶⁷ Proposed bills include the Shawn Bentley Orphan Works Act of 2008, S. 2913, 110th Cong. (2008), which was passed by the Senate; the Orphan Works Act of 2008, H.R. 5889, 110th Cong. (2008); and the Orphan Works Act of 2006, H.R. 5439, 109th Cong. (2006).

later emerged, he or she would be permitted to collect reasonable compensation from the user, but would not be entitled to demand statutory damages or attorneys fees. That legislation is a good starting point for the orphan works discussion, including what if any parts of the prior legislative proposal may require adjustment in 2011.

As the Office noted in its Orphan Works Report, the inability to identify and locate copyright owners discourages some beneficial uses of copyrighted works.⁶⁸ In developing legislation, Congress considered various models but embraced the concept of requiring potential users to undertake a diligent effort to locate copyright owners before making actual use of the works. The search would have included certain baseline requirements, *e.g.*, searching the online records of the Office, but also would have required user consultations on applicable best practices coordinated by the Register of Copyrights. The practices would have been tailored to specific genres and utilized technological tools available to the general public. These search requirements were designed to be flexible and were to be created through the participation of both copyright owners and copyright users, as well as public interest groups.

If adopted, the proposed legislation on orphan works would greatly improve access to copyrighted works. But at the time the Office conducted its study, stakeholders did not raise the issue of mass book digitization, and the proposed legislation did not squarely address the possibility of mass digitization projects. (A safe harbor was contemplated for certain nonprofits, including cultural organizations that were engaged in noncommercial activity and would have removed content if rights holders objected.)

⁶⁸ See Orphan Works Report, *supra* note 64 at 15; see also *The Copyright Office's Report on Orphan Works, Hearings Before the Subcomm. on Courts, the Internet, and Intellectual Property of the House Comm. on the Judiciary*, 109th Cong. 2nd Sess. (Mar. 8, 2006) (Testimony of Jule L. Sigall, Associate Register for Policy and International Affairs).

Going forward, Congress may want to explore orphan works in the context of large-scale digitization projects, addressing questions such as whether there should be more lenient or more stringent search requirements for these types of uses. If so, Congress would have to consider the potential impact on the exclusive rights of copyright owners, the parameters of copyright treaty obligations,⁶⁹ and the benefit to the public. The European Union and various countries are actively engaged in considering these questions, and they have adopted or proposed a number of legislative approaches.⁷⁰ (A brief description of orphan works initiatives around the world is set forth in Appendix D.)

As a point of comparison, the rejected settlement agreement proposed in Google Books did not incorporate a prior diligent search requirement for use of out-of-print works. Rather, it would have required copyright owners to claim their works through a registry as a condition for avoiding what would in effect be orphan status with respect to use by Google (although the term “orphan” was not used in the settlement to describe these unclaimed works). The settlement agreement presumably adopted this approach in part because identifying copyright owners and negotiating license agreements is costly and time consuming – at least in the context of mass scanning – and in part because some book publishing agreements from the pre-digital era are unclear as to the division of electronic rights as between authors and publishers. In rejecting the proposed settlement, the court recognized that “Congress has made

⁶⁹ National law exceptions to exclusive copyright rights must avoid the formalities prohibition and pass the “three-step test” for exceptions and limitations found in the Berne Convention and incorporated more broadly into other international copyright agreements. The three-step test permits signatories to allow reproduction of works in “certain special cases” as long as the “reproduction does not conflict with a normal exploitation of the work” and “does not unreasonably prejudice the legitimate interests of the author.” Berne Convention for the Protection of Literary and Artistic Works, Art. 9 (2), Sept. 9, 1886 (as revised at Paris on July 24, 1971 and amended in 1979), 828 U.N.T.S. 221; *see also* World Trade Organization’s Agreement on Trade-Related Aspects of Intellectual Property Rights, Art. 13; WIPO Copyright Treaty, Art. 10.

⁷⁰ *See supra* note 50.

‘longstanding efforts’ to enact legislation to address [the orphan books] issue” and expressly deferred to Congress on this matter, stating that the “question of who should be entrusted with guardianship over orphan books, under what terms, and with what safeguards, are matters more appropriately decided by Congress than through an agreement among private, self-interested parties.”⁷¹

As a practical matter, the issue of orphan works cannot reasonably be divorced from the issue of licensing. The premise of the orphan works dilemma is that a user wants to exploit a copyrighted work in a manner that requires permission from the rights holder. Because licensing on a case-by-case basis can be challenging, at least where many works are at issue, it may be helpful to consider whether other licensing models might be used – such as voluntary collective licensing, mandatory collective licensing, or even statutory licensing – at least for facilitating certain projects and transactions of interest and importance to the public. To this end, the stakeholders themselves may first need to evaluate, and discuss with each other, possible solutions of mutual interest – including, perhaps, private agreements between institutions or memoranda of understanding among copyright owners and users.

E. Licensing Options

Within the existing copyright regime, users have several options for obtaining the necessary rights to copyrighted books. As a general matter, direct license agreements negotiated between the user and the copyright owner provide copyright owners with the greatest control over their works. This approach, however, may not be a realistic option for mass digitization projects involving large numbers of books. Collective licensing may be an attractive option for user groups, provided that antitrust concerns can be alleviated or managed.

⁷¹ *Authors Guild*, 770 F. Supp. 2d at 677.

This is an area that might benefit from further discussions among stakeholder groups who may be best suited to tailor collective licensing solutions for mass digitization to the evolving digital marketplace. A more dramatic approach would be to create a mandatory or statutory licensing scheme. A mandatory licensing scheme would be a measure of last resort. Congress would need to conclude that there is a compelling public need and that the need is frustrated by market failure. It would also need to be sufficiently narrow to comply with treaty obligations of the United States. Each of these options is discussed below.

1. Direct Licensing

Perhaps the most basic licensing option is the use of voluntary agreements between digitizers and authors or publishers on an individual basis.⁷² These licenses offer security against infringement liability, and the Internet provides copyright owners and potential licensees with resources to find information on licensing works and to connect with each other to promote consensual exploitation of those works. Using individual voluntary license arrangements for a large number of works, however, may require a significant investment to identify, locate, and negotiate with copyright owners and to manage licensing arrangements. Each book may have multiple authors or authors' heirs, multiple exclusive licensees or successor companies, and – ultimately – the costs of clearing rights may far outweigh the

⁷² Google recently negotiated an agreement with the French publisher Hachette Livre, which allows Google to digitize tens of thousands of out-of-print French-language books. See Eric Pfanner, *After Much Ado, a Google Book Deal in France*, N.Y. TIMES (Aug. 7, 2011), available at <http://www.nytimes.com/2011/08/08/technology/internet/after-much-ado-a-google-book-deal-in-france.html?ref=googlebooksearch>. Shortly thereafter Google negotiated a similar agreement with the French publisher La Martiniere, which had prevailed against Google in an infringement lawsuit in 2009. See Heather Smith, *Google, La Martiniere End Legal Dispute on Scanning That Started in 2006* (Aug. 25, 2011), <http://www.bloomberg.com/news/2011-08-25/google-la-martiniere-agree-on-scanning-of-protected-works.html>. Likewise, the French publishers Albin Michel, Flammarion, and Gallimard recently dismissed their lawsuits against Google to engage in direct negotiations with the company. See Heather Smith, *Google Book-Scanning Lawsuit is Dropped by French Publishers*, WASH. POST (Sept. 8, 2011), available at <http://www.bloomberg.com/news/2011-09-08/google-book-scanning-lawsuit-is-dropped-by-french-publishers.html>.

benefits or it may be impossible to determine who owns the electronic rights that govern the digital reproduction, public display, or distribution rights required for the project.⁷³ One important question in the context of individual licensing is the extent to which copyright owners of books are engaging in digital publishing initiatives and therefore have an interest in and expectation for digital distribution. Moreover, copyright owners in the commercial marketplace may have views different from nonprofit publishers, who may not mind if libraries or other institutions provide access to their works in digital format.

2. Collective Licensing

Collective licensing may offer the same protection against infringement liability as direct licensing, but with fewer transaction costs. Under this approach, copyright owners authorize one or more third party organizations to administer the reproduction, distribution, and display rights in their respective works. These organizations negotiate licenses with user groups, collect royalties for those uses, and distribute the royalties among the respective copyright owners. In addition, copyright owners can authorize these organizations to monitor the use of their works, and if necessary, take legal action against user groups that failed to comply with their contractual obligations.

Generally speaking, there are three models for collective licensing. First, voluntary (or “opt-in”) collective licensing takes place when copyright owners authorize one or more organizations to negotiate licenses on their behalf. This approach is currently available in the United States for various types of works. Second, in the extended collective licensing approach

⁷³ Uncertainty over ownership of rights to works in formats that were unknown at the time the work was created has occurred with other types of copyrighted works. *Compare, e.g., Bourne v. Walt Disney Co.*, 68 F.3d 621, 630 (2d Cir. 1995) (grant to synchronize musical compositions to celluloid motion pictures includes video cassettes) with *Cohen v. Paramount Pictures Corp.*, 845 F.2d 851, 853-55 (9th Cir. 1988) (video cassette rights were unknown at time of original contract and thus composer had no opportunity to bargain for them).

the government passes legislation authorizing a collective organization to license all works within a category, such as literary works, for particular, limited uses, regardless of whether copyright owners belong to the organization or not. The collective then negotiates agreements with user groups, and the terms of those agreements are binding upon all copyright owners by operation of law. This approach is used in a number of foreign countries, but is not a feature of U.S. copyright law. Finally, statutory licensing is a government-mandated mechanism that operates in place of licensing arrangements that would otherwise be left to the open marketplace. Copyright owners often refer to statutory licenses as “compulsory” licenses, because they allow copyrighted works to be used without the copyright owners’ permission. The United States has some narrowly tailored statutory licenses to fill marketplace gaps, although they are not favored as a policy matter. Each of these options is discussed below.

a. *Voluntary collective licensing*

Voluntary collective licensing has been used to clear the reproduction, distribution, and display rights for literary works in the United States for more than a quarter-century. (A list of organizations that offer collective licensing for literary and other types of works in the United States and other countries is set forth in Appendix E.) In the United States, these services are currently offered for literary works through the Copyright Clearance Center (“CCC”), which is a nonprofit organization that represents U.S. publishers and authors of books, journals, magazines, newspapers, and other literary works. The CCC also represents foreign authors and publishers through its reciprocal relationships with collecting organizations in other countries. The CCC provides licensing services to companies of all sizes, including more than 400 of the Fortune 500, as well as academic institutions, law firms, healthcare organizations, and government agencies. Specifically, the CCC offers “Repertory” licenses, which give licensees

the non-exclusive right to use all of the works within its repertoire, as well as “Transactional” or pay-per-use licenses, which give licensees the right to use specific works within the repertoire for a specific purpose or a specific period of time.⁷⁴ The CCC operates on a voluntary basis, which means that rights holders are not required to license their works through this organization, and users are not required to use the CCC in order to obtain rights and permissions. There are additional voluntary collective licensing regimes in the United States for other types of works that could be examined for useful information about the potential operation of this form of licensing in the context of mass digitization. *See* Appendix E. For instance, the American Society of Composers, Authors and Publishers (“ASCAP”), Broadcast Music, Inc. (“BMI”), and SESAC, Inc. (“SESAC”) license musical work rights. Voluntary collective licensing does not require legislation, although it may benefit from government facilitation or oversight.⁷⁵

Voluntary collective licensing has advantages and disadvantages that might affect its suitability for the mass digitization market. One advantage is that a collective licensing organization may be able to provide transactional licenses that give copyright owners the ability to set prices and terms and conditions of use for specific types of licensees and for specific types of uses. This type of arrangement can help to address the anti-competitive criticism directed at collecting organizations that offer less flexible licensing options.⁷⁶ One

⁷⁴ For information on the CCC, *see* <http://www.copyright.com/content/cc3/en/toolbar/aboutUs.html>.

⁷⁵ For example, ASCAP and BMI have entered into antitrust consent decrees with DOJ that are designed to protect licensees from price discrimination or other anti-competitive behavior. Although the terms vary somewhat, under these consent decrees ASCAP and BMI administer the public performance right for their members’ musical works on a non-exclusive basis and offer the same terms to similarly situated licensees.

⁷⁶ *See* Glynn Lunney, *Copyright Collectives and Collecting Societies: The United States Experience*, in *COLLECTIVE MANAGEMENT OF COPYRIGHT AND RELATED RIGHTS* 341 (Daniel Gervais ed., 2010).

possible disadvantage of voluntary collective licensing is that it might not be able to offer all the rights that users want to license. For instance, the CCC's Repertory and Transactional licenses cover a discrete range of activities, such as photocopying an article from a newspaper, printing an article from a website, or republishing an article in a newsletter or on a website. It is not clear that the CCC would have the ability to license the works in its repertoire for a mass digitization project. In addition, voluntary collective licensing organizations might not be able to offer all the works that users want to license. Membership in these collective organizations is purely voluntary and no one organization may be able to license the exhaustive repertoire that would be needed to allow mass digitization of literary works. New organizations may not be inclined to fill any gaps, because the start-up costs and other funding challenges for establishing a new collective may be daunting, as U.S. authors and photographers can attest. For example, the Authors Guild and the American Society of Media Photographers have attempted to develop licensing registries for the benefit of their members and users, with varying degrees of success. *See* Appendix E.

b. *Extended collective licensing*

At the present time there are no extended collective licensing regimes in the United States, although a number of other countries have adopted this approach to clear the rights for certain uses of literary works.⁷⁷ (A list of the countries that follow this approach and a detailed overview of the laws that have been enacted are set forth in Appendix F.)

Extended collective licensing allows representatives of copyright owners and representatives of users to mutually agree to negotiate on a collective basis and then to

⁷⁷ Extended collective licensing originated in the Nordic countries in the 1960s. It is generally used in countries with uncommon national languages that are not spoken in other countries, such as Icelandic or Danish. In general, this model has not been applied to countries with national languages that are widely used in other countries, such as English or Spanish.

negotiate terms that are binding on all members of the group by operation of law. Strictly speaking, this is not a compulsory licensing system, because the parties or their representatives (rather than the government) negotiate royalty rates and terms of use. Extended collective licensing does, however, require a legislative framework and often involves some degree of government oversight.

Under this approach, after determining that rights holders and users want to participate in a collective licensing arrangement, the government authorizes a collective organization to negotiate licenses for a particular class of works (*e.g.*, textbooks, newspapers, and magazines) or a particular class of uses (*e.g.*, reproduction of published works for educational or scientific purposes). When the collective negotiates a license with a particular user that license is automatically extended – by operation of law – to all of the rights owners for those works, regardless of whether they belong to the collective organization or not. All copyright owners are entitled to receive a share of the royalties that the collective receives from its licensees. In some countries, copyright owners may be allowed to opt out of some uses of their works or demand individual remuneration if they believe that they are entitled to a larger share of the royalties for the use of their works. Copyright owners, however, are only allowed to file a complaint with the collective or the government agency that supervises the collective’s activities. Copyright owners cannot object to the rates that the collective negotiates and they cannot demand additional remuneration from licensees, even if they would prefer to administer their rights through direct negotiation.⁷⁸

⁷⁸ See Henry Olsson, *The Extended Collective License as Applied in the Nordic Countries* (Mar. 10, 2010), <http://www.kopinor.no/en/copyright/extended-collective-license/documents/the-extended-collective-license-as-applied-in-the-nordic-countries>.

In most countries where it exists, extended collective licensing only applies to limited types of works and uses, such as the use of published works for educational and scientific purposes, or the reproduction of works within an organization solely for internal use.⁷⁹ Applying extended collective licensing to a mass digitization project that provides access to a wide range of works would be a dramatic extension of the concept. Recently the European Commission asked a group of authors, publishers, and other stakeholders to develop a proposal for digitizing “out of commerce” (out-of-print) literary works – including orphan works – and for making these works available to the public for noncommercial use. On September 20, 2011, the group issued a memorandum of understanding that would allow national libraries and other cultural institutions to license books and journals from collective organizations that represent a substantial number of publishers and authors in each country. The proposal has been characterized by some as an extended collective licensing regime, because these licenses would apply to all of the books and journals published within a participating member state, although rights holders would be allowed to opt out of the system and withdraw their works from a particular project upon request.⁸⁰

The settlement proposed by the Authors Guild, book publishers, and Google also could be characterized as an extended collective licensing regime, because the settlement would have established a Book Rights Registry to collect and distribute royalties for the benefit of rights holders – regardless of whether rights holders authorized the Registry to act on their behalf.

⁷⁹ *See id.*

⁸⁰ *See Memorandum of Understanding: Key Principles on the Digitisation and Making Available of Out-of-Commerce Works, available at http://ec.europa.eu/internal_market/copyright/docs/copyright-info/20110920-mou_en.pdf; see also Dugie Standeford, *Breakthrough Gives EU Principles for Digitising Out-Of-Print Books*, INTELLECTUAL PROPERTY WATCH (Sept. 20, 2011), available at <http://www.ip-watch.org/weblog/2011/09/20/breakthrough-gives-eu-principles-for-digitising-out-of-print-books/>.*

One distinction from extended collective licensing regimes is that the settlement would have created a regime for a single user – Google – without any input from the legislative branch or ongoing oversight from the executive branch or the courts. The court rejected the settlement proposal in part because it would “implement a forward-looking business arrangement that would grant Google significant rights to exploit entire books, without permission of the copyright owners” and it would “give Google a significant advantage over competitors, rewarding it for engaging in wholesale copying of copyrighted works without permission, while releasing claims well beyond those presented in this case.”⁸¹

Further public discussion on this subject should explore the pros and cons of extended collective licensing for books or other digitized works, whether this model would be of interest or concern to authors, publishers, libraries, and other interested stakeholders, and whether it would create or remove obstacles to mass digitization projects. If Congress were to consider creating a framework for extended collective licensing, it would want to consider how to combine extended collective licensing with other licensing models in order to create the most effective regime to foster innovative and responsive licensing. That regime would need to address both the ability of rights holders to license works in different forms and the duration of the extended collective license. Any framework would also need to account for the interplay between extended collective licensing and the exceptions for fair use and libraries, codified in Sections 107 and 108 of the Copyright Act. In addition, any proposal for extended collective licensing would need to be carefully analyzed with respect to U.S. international treaty obligations for exceptions to exclusive copyright rights.

⁸¹ *Authors Guild*, 770 F. Supp. 2d at 669.

c. *Statutory licensing*

In some circumstances, the marketplace is unable to provide an effective or efficient mechanism for licensors and licensees to negotiate agreements on a voluntary basis. Over the years, Congress has addressed some of these market failures by creating narrow statutory licenses that provide users with access to certain types of works, under certain circumstances, in exchange for a statutorily or administratively set fee. Congress has enacted statutory licenses sparingly because they conflict with the fundamental principle that authors should enjoy exclusive rights to their creative works, including for the purpose of controlling the terms of public dissemination.⁸² (A brief description of the copyright statutory licenses that are currently in effect is set forth in Appendix G.) None of the existing licenses applies to literary works or to the mass digitization of such works. Historically, the Office has supported statutory licenses only in circumstances of genuine market failure and only for as long as necessary to achieve a specific goal.⁸³ In fact, Congress recently asked the Office for recommendations on how to eliminate certain statutory licenses that are no longer necessary

⁸² By its nature, a compulsory license “is a limited exception to the copyright holder’s exclusive right[s] . . . As such, it must be construed narrowly” *Fame Publ’g Co. v. Alabama Custom Tape, Inc.*, 507 F.2d 667, 670 (5th Cir. 1975) (referring to compulsory licenses in the Copyright Act of 1909). “[C]ompulsory licensing . . . break[s] from the traditional copyright regime of individual contracts enforced in individual lawsuits.” *Cablevision Sys. Dev. Co. v. Motion Picture Ass’n of Am., Inc.*, 836 F.2d 599, 608 (D.C. Cir. 1988) (describing limited license for cable operators under 17 U.S.C. § 111).

⁸³ See U.S. Copyright Office, *The Satellite Television Extension and Localism Act Section 302 Report* at iii, 9-10, & 14-16 (2011) (“Section 302 Report”) (recommending that Congress phase out the statutory licenses for the retransmission of broadcast television signals, and allow stakeholders to license programming content through marketplace negotiations); U.S. Copyright Office, *Satellite Home Viewer Extension and Reauthorization Act § 109 Report* at 219 (2008) (same); *Copyright Licensing in a Digital Age: Competition, Compensation and the Need to Update the Cable and Satellite TV Licenses, Hearing before the House Comm. on the Judiciary*, 111th Cong. (Feb. 25, 2009) (Statement of Marybeth Peters, Register of Copyrights) (“the Copyright Office is not in favor of a statutory license for the retransmission of broadcast signals over the Internet,” because it “would likely remove incentives for individuals and companies to develop innovative business models”).

now that marketplace transactions can be more easily accomplished using digital tools and platforms.⁸⁴

In the context of mass digitization, a statutory license would be a mechanism of last resort and would only be justified if and to the extent that mass digitization of copyrighted works – without regard to the usual control exercised by copyright owners – is an important national objective. Any statutory license would have to be narrowly tailored to address a specific failure in a specifically defined market without interfering with the rest of the digital book marketplace. In addition, any proposal for a statutory license would have to address the frequent complaint that statutory licenses do not necessarily provide copyright owners with compensation commensurate with the actual use of their works or the value of those uses.⁸⁵ Moreover, any proposed statutory license for mass digitization would need to be sufficiently limited in scope to comply with U.S. international treaty obligations.⁸⁶

IV. CONCLUSION

The marketplace for copyright owners of digital versions of copyrighted books is expanding rapidly, both for reproductions of books and e-books that are “born digital.” At the same time, libraries and others have made clear their intentions to mass digitize (or continue to mass digitize) their collections, sometimes for preservation, sometimes in order to provide access, and sometimes when those collections are protected by copyright law.

⁸⁴ Satellite Television Extension and Localism Act of 2010, Pub. L. No. 111-175, 124 Stat. 1218 (2010) (directing the Office to submit recommendations to Congress to phase out and eventually repeal Sections 111, 119, and 122 of the Copyright Act).

⁸⁵ *See, e.g.*, Section 302 Report, *supra* note 83 at 42-44 (noting criticism that the Section 111 and 119 licenses give copyright owners less than the fair market value of their works).

⁸⁶ *See supra* note 69.

The relationship between these projects and the existing copyright framework is complex, yet rich with promise. Issues about the intersection between copyright law and new technologies have been subject to intense debate in the Google Books case and would benefit from further discussions among all stakeholders. Among the pertinent questions are the following: the objectives and public policy goals of mass digitization projects, the interplay among library exceptions, fair use, and licensing, and the ability of public and private actors to work together. The Office is pleased to provide this Analysis for the benefit of the public, and looks forward to facilitating the nation's continuing discussion on mass digitization policy.

APPENDIX A

**LETTER FROM THE LIBRARIAN OF CONGRESS
AND THEN-ACTING REGISTER OF COPYRIGHTS
REGARDING THE GOOGLE BOOKS DISPUTE**



THE LIBRARIAN OF CONGRESS

April 1, 2011

Dear Chairman Leahy and Senator Grassley:

Last week, a federal judge rejected the pending settlement of *Authors Guild et al. v. Google Inc.*, the class action in which authors and publishers challenged Google for scanning millions of books for commercial purposes through agreements with several major research libraries. In the much-awaited opinion, Judge Denny Chin said that the settlement would inappropriately implement a forward-looking business arrangement granting Google significant rights to exploit entire books without permission of the copyright owners, while at the same time releasing claims well beyond those presented in the original dispute.¹ The decision provides an opportunity for us to share our own analysis of digitization and the legal framework, in case Congress would like to further explore the issues.

Judge Chin's opinion was very well received at the Library of Congress, as it reflects the significant concerns expressed about the proposed settlement by both the Department of Justice and the Copyright Office. Among these are the basic tenets that exclusive rights afforded by copyright law may not be usurped as a matter of convenience, and policy initiatives, including those that would redefine the relationship of copyright and technology, are the proper domain of Congress, not the courts.²

At the same time, Judge Chin acknowledged the potential benefits of Google's book project, noting that books would become more readily accessible to libraries, schools, researchers and disadvantaged populations. He noted the promise of new audiences, new markets and new sources of income for the authors and publishers of older, out-of-print books, in particular. And he openly observed that "the digitization of books and the creation of a universal digital library would benefit many." (Opinion at pages 1 and 3.)

The benefits cited by Judge Chin ring true for the Library of Congress because, in a number of ways, we have been working toward them for many years. Since 1994, we have implemented a variety of digitization projects, always in accordance with, and with respect for, longstanding principles of copyright law. For example, the American Memory project features digital images of more than 16 million items related to U.S. history and culture (organized into more than 100 thematic collections) and the Historic American Newspapers project provides digital

¹ No. 05-8136 (S.D.N.Y. March 22, 2011)(order denying motion for final approval of the amended settlement agreement), available at <http://www.nysd.uscourts.gov/cases/show.php?db=special&id=115>.

² The Copyright Office worked closely with the Department of Justice on both Statements of Interest filed on behalf of the United States on September 18, 2009 and February 4, 2010, respectively, available at <http://www.justice.gov/atr/cases/authorsguild.htm>. Former Register of Copyrights Marybeth Peters testified before the House Committee on the Judiciary on September 10, 2009. See *Competition and Commerce in Digital Books: The Proposed Google Book Settlement*, available at <http://judiciary.house.gov/hearings/pdf/Peters090910.pdf> ("Register's Testimony").

access to 900,000 U.S. newspapers published between 1836 and 1922.³ The natural next step for some of this work, subject to resources, is to move from a series of projects to a more strategic and comprehensive effort that includes prioritizing content, managing licenses with copyright owners, and coordinating navigation and points of access with other important institutions.⁴

Another Library program—the National Digital Information Infrastructure and Preservation Program (NDIIPP)—is dedicated to capturing and preserving valuable “born digital” materials, such as websites, maps, television broadcasts and digital photographs. Assessing and applying metadata and other standards is a critical aspect of this work. On a related front, we are working with publishers on submission standards for electronic journals and other publications disseminated electronically. Such projects are invaluable for many reasons, not the least of which is their ability to inform policy discussions relating to technology and copyright law.

As an active participant in policy discussions, the Library (and the Copyright Office in particular) is aware of the significant international interest in Judge Chin’s opinion. We are also aware of the related and evolving interest among foreign countries in using trusted government entities to build digital libraries. For example, the EU is building “Europeana,” as well as a related entity called the European Digital Library, an aggregator of content from several Member States, including the German Digital Library. Similarly, the French National Library’s “Gallica” will offer French history and culture and the National Library of China has undertaken the digitization of Chinese cultural heritage. Some projects include commercial partners, as appropriate. In each case, the government is also studying the interplay of copyright law and technology, including the appropriate scope of library exceptions, the possible benefits of collective licensing regimes, and the challenges of orphan works.⁵

Orphan works are a familiar issue in the United States. In 2006, the Copyright Office prepared a major study for Congress, entitled *Report on Orphan Works*. Both the 109th and 110th Congresses introduced legislation adopting the Office’s recommendations that (1) orphan works relief be limited to circumstances in which a good-faith user cannot locate the copyright owner or other appropriate rights holder after conducting a diligent search; (2) relief be applied on a case-by-case basis, meaning users could not designate or rely upon permanent orphan status with respect to any work; and (3) the copyright owner or other rights holder could collect reasonable compensation (from the user) if he later emerged.

³ The Library’s other major digitization initiatives include: (1) the World Digital Library, a joint venture with UNESCO; (2) World Culture and Resources, which presents bilingual digital collections from various media from different regions and countries around the world; and (3) Prints and Photographs, which contains over 1.2 million digitized images.

⁴ The Library has had discussions along these lines with the other leading public collecting institutions in the United States—the National Archives and Smithsonian Institution. On another track, the Berkman Center at Harvard has hosted meetings to discuss a “Digital Public Library of America.”

⁵ For example, one of Europeana’s major projects is the Accessible Registries of Rights Information and Orphan Works (“ARROW”), which aims to support the EC’s Digital Library Project by finding ways to clarify the rights status of orphan works and out-of-print works, as well as to enhance the interoperability of rights information between rights holders, agents, libraries and users. See <http://www.arrow-net.eu/>.

As a point of comparison, we note the rejected Google settlement agreement did not incorporate a prior diligent search requirement for out-of-print works. Rather, it would have required copyright owners to claim these works through a registry as a condition of avoiding orphan status, in part because the rights clearance process is costly and time consuming—at least in the context of mass scanning—and in part because many book publishing agreements from the pre-digital era are unclear as to the disposition of electronic rights, as between authors and publishers. Judge Chin deferred expressly to Congress on these issues, stating that the “question of who should be entrusted with guardianship over orphan books, under what terms, and with what safeguards, are matters more appropriately decided by Congress than through an agreement among private, self-interested parties.” (Opinion at page 23.)

As a practical matter, the issue of orphan works cannot reasonably be divorced from the issue of licensing. The premise of an orphan works situation is that a user wants to exploit a copyrighted work in a manner that requires permission of the rights holder. Because licensing on a case-by-case basis can be challenging, at least where many works are at issue, it may be helpful to consider whether the increased availability of collective licensing might be helpful—at least for facilitating certain projects and transactions of interest and importance to the public.⁶ To be clear, collective licensing can take several forms and may operate on either an “opt-in” or an “opt-out” basis.

In the United States, we have had some success in the music world with the “opt-in” model, albeit with some pricing problems. ASCAP, BMI and SESAC, for example, license the public performance of many musical works and collect royalties on behalf of copyright owners. (To address competition-related concerns, ASCAP and BMI operate under consent decrees monitored by the Department of Justice and enforced by the courts.) The Copyright Clearance Center has performed a similar function for reprographic rights for nonfiction books and more recently has moved into licensing for the broader publishing industry. In both cases, these organizations engage in reciprocal relationships with collecting organizations overseas on behalf of their members. Collective licensing of this kind does not require legislation, but may benefit from government facilitation or oversight. For new organizations, the start-up costs and other funding challenges may be daunting, as U.S. authors and photographers can attest.⁷

Some countries have legislated “opt out” models (known as *extended* collective licensing) in the context of library and educational uses.⁸ This model operates something like a class action settlement, in the sense that representatives of copyright owners and representatives of users negotiate terms that are binding on all members of the group by operation of law, e.g., all textbook publishers, unless a particular copyright owner opts out. The government or a trusted designee administers payments. It is not quite compulsory licensing in that the parties (rather than the government) negotiate the rates, but it requires a legislative framework.

⁶ See *Register's Testimony*. “The creation of a rights registry for book authors, publishers and potential licensees is a positive development that could offer the copyright community, the technology sector and the public a framework for licensing works in digital form and collecting micro-payments in an efficient and cost-effective manner.”

⁷ For example, both the Authors Guild and the American Society of Media Photographers have attempted to offer licensing registries for the benefit of their members and users, with varying degrees of success.

⁸ Denmark, Finland, Iceland, Norway, and Sweden have the most experience with this model.

The settlement proposed by the Authors Guild, book publishers and Google would have operated on an extended collective licensing (or opt-out) basis, but it would have done so only for one user (Google) and without the benefit of Congressional oversight as to goals, terms and conditions.⁹ If Congress wanted to consider the pros and cons of collective licensing for books and other digitized works, it might want to explore whether the opt-out model is of interest to these parties and other stakeholders legislatively (for example, to facilitate digital markets for out-of-print books).¹⁰ In doing so, Congress might also want to consider the interplay between collective licensing and fair use, as well as the library exceptions codified in Section 108.

Section 108 presents unresolved policy issues that could be reviewed now that Judge Chin has issued his opinion. In 2008, the Copyright Office and NDIIPP co-published an independent report on Section 108, presenting a variety of recommendations to update the law to better reflect digital technology and to ensure better preservation practices. The report also sets forth (but does not resolve) certain issues governing whether and how libraries should provide on-line access to copyrighted works. The study group that produced the report deliberated for almost three years and included representatives from the library, book publishing, motion picture, and government sectors, among others.¹¹ Stakeholders who were awaiting Judge Chin's decision in the Google settlement may be ready to revisit Section 108 at this time.

Finally, some proponents of the Google settlement observed that it might have provided unprecedented access to books for millions of Americans who are blind or have print disabilities. The Library of Congress has some experience with this population, as we have administered the National Library Service for the Blind and Physically Handicapped (NLS) since 1931. Today, the NLS circulates more than 24 million audio and Braille books and magazines to eligible patrons every year and administers a new Digital Talking Book service, based largely on an exception in the copyright law known as the Chafee Amendment (Section 121).

The Chafee Amendment is an important provision, but it is designed to operate as a safety net for people who cannot obtain access through mainstream libraries or the general market. Because digital technology has made access easier, the Copyright Office and other Library staff are collaborating on new initiatives to promote access for persons who are blind or print disabled—for example, by evaluating pilot projects that would allow for cross-border sharing of digital files between designated libraries under the guidance and permission of the publishers. We are also serving on a commission administered by the Department of Education charged with making recommendations to Congress to improve accessibility for print-disabled college students. In each case, we are working to better serve these communities by encouraging the creation of better technical standards, new digital products, and innovative agreements between libraries and publishers.

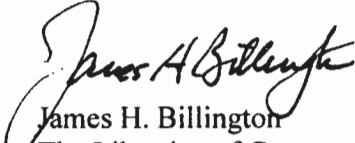
⁹ Unless Congress decides otherwise, Judge Chin has underscored voluntary licensing as a reasonable route to settle the litigation under current law. (“As the United States and other objectors have noted, many of the concerns raised in the objections would be ameliorated if the [settlement] were converted from an “opt-out” settlement to an “opt-in” settlement.”)(Opinion at page 46.)

¹⁰ See, e.g., Editorial, *Google's Book Deal*, N.Y. TIMES, Mar. 30, 2011 (stating Congress should consider both “giving all comers similar legal protection to that which Google got in its agreement,” and “promoting a nonprofit digital library”), available at <http://www.nytimes.com/2011/03/31/opinion/31thu2.html>.


¹¹ See United States Copyright Office & National Digital Information Infrastructure and Preservation Program, Section 108 Study Group Report (2008), available at <http://www.section108.gov>.

In closing, we note that the landscape of digitization projects, copyright law and public access is complex but rich with promise, and we are pleased to provide this report of the pertinent issues that may be of interest to the 112th Congress in the wake of Judge Chin's opinion. We thank you for your longstanding support of the Library of Congress and the Copyright Office and stand ready to assist you if Congress would like to review or further explore any of the developments we have presented here.

Sincerely yours,



James H. Billington
The Librarian of Congress



Maria A. Pallante
Acting Register of Copyrights

The Honorable Patrick Leahy
United States Senate
Senate Judiciary Committee
224 Dirksen Senate Office Building
Washington, DC 20510

The Honorable Charles Grassley
United States Senate
Senate Judiciary Committee
152 Dirksen Senate Office Building
Washington, DC 20510



THE LIBRARIAN OF CONGRESS

April 1, 2011

Dear Chairman Goodlatte and Mr. Watt:

Last week, a federal judge rejected the pending settlement of *Authors Guild et al. v. Google Inc.*, the class action in which authors and publishers challenged Google for scanning millions of books for commercial purposes through agreements with several major research libraries. In the much-awaited opinion, Judge Denny Chin said that the settlement would inappropriately implement a forward-looking business arrangement granting Google significant rights to exploit entire books without permission of the copyright owners, while at the same time releasing claims well beyond those presented in the original dispute.¹ The decision provides an opportunity for us to share our own analysis of digitization and the legal framework, in case Congress would like to further explore the issues.

Judge Chin's opinion was very well received at the Library of Congress, as it reflects the significant concerns expressed about the proposed settlement by both the Department of Justice and the Copyright Office. Among these are the basic tenets that exclusive rights afforded by copyright law may not be usurped as a matter of convenience, and policy initiatives, including those that would redefine the relationship of copyright and technology, are the proper domain of Congress, not the courts.²

At the same time, Judge Chin acknowledged the potential benefits of Google's book project, noting that books would become more readily accessible to libraries, schools, researchers and disadvantaged populations. He noted the promise of new audiences, new markets and new sources of income for the authors and publishers of older, out-of-print books, in particular. And he openly observed that "the digitization of books and the creation of a universal digital library would benefit many." (Opinion at pages 1 and 3.)

The benefits cited by Judge Chin ring true for the Library of Congress because, in a number of ways, we have been working toward them for many years. Since 1994, we have implemented a variety of digitization projects, always in accordance with, and with respect for, longstanding principles of copyright law. For example, the American Memory project features digital images of more than 16 million items related to U.S. history and culture (organized into more than 100 thematic collections) and the Historic American Newspapers project provides digital

¹ No. 05-8136 (S.D.N.Y. March 22, 2011)(order denying motion for final approval of the amended settlement agreement), available at <http://www.nysd.uscourts.gov/cases/show.php?db=special&id=115>.

² The Copyright Office worked closely with the Department of Justice on both Statements of Interest filed on behalf of the United States on September 18, 2009 and February 4, 2010, respectively, available at <http://www.justice.gov/atr/cases/authorsguild.htm>. Former Register of Copyrights Marybeth Peters testified before the House Committee on the Judiciary on September 10, 2009. See *Competition and Commerce in Digital Books: The Proposed Google Book Settlement*, available at <http://judiciary.house.gov/hearings/pdf/Peters090910.pdf> ("Register's Testimony").

access to 900,000 U.S. newspapers published between 1836 and 1922.³ The natural next step for some of this work, subject to resources, is to move from a series of projects to a more strategic and comprehensive effort that includes prioritizing content, managing licenses with copyright owners, and coordinating navigation and points of access with other important institutions.⁴

Another Library program—the National Digital Information Infrastructure and Preservation Program (NDIIPP)—is dedicated to capturing and preserving valuable “born digital” materials, such as websites, maps, television broadcasts and digital photographs. Assessing and applying metadata and other standards is a critical aspect of this work. On a related front, we are working with publishers on submission standards for electronic journals and other publications disseminated electronically. Such projects are invaluable for many reasons, not the least of which is their ability to inform policy discussions relating to technology and copyright law.

As an active participant in policy discussions, the Library (and the Copyright Office in particular) is aware of the significant international interest in Judge Chin’s opinion. We are also aware of the related and evolving interest among foreign countries in using trusted government entities to build digital libraries. For example, the EU is building “Europeana,” as well as a related entity called the European Digital Library, an aggregator of content from several Member States, including the German Digital Library. Similarly, the French National Library’s “Gallica” will offer French history and culture and the National Library of China has undertaken the digitization of Chinese cultural heritage. Some projects include commercial partners, as appropriate. In each case, the government is also studying the interplay of copyright law and technology, including the appropriate scope of library exceptions, the possible benefits of collective licensing regimes, and the challenges of orphan works.⁵

Orphan works are a familiar issue in the United States. In 2006, the Copyright Office prepared a major study for Congress, entitled *Report on Orphan Works*. Both the 109th and 110th Congresses introduced legislation adopting the Office’s recommendations that (1) orphan works relief be limited to circumstances in which a good-faith user cannot locate the copyright owner or other appropriate rights holder after conducting a diligent search; (2) relief be applied on a case-by-case basis, meaning users could not designate or rely upon permanent orphan status with respect to any work; and (3) the copyright owner or other rights holder could collect reasonable compensation (from the user) if he later emerged.

³ The Library’s other major digitization initiatives include: (1) the World Digital Library, a joint venture with UNESCO; (2) World Culture and Resources, which presents bilingual digital collections from various media from different regions and countries around the world; and (3) Prints and Photographs, which contains over 1.2 million digitized images.

⁴ The Library has had discussions along these lines with the other leading public collecting institutions in the United States—the National Archives and Smithsonian Institution. On another track, the Berkman Center at Harvard has hosted meetings to discuss a “Digital Public Library of America.”

⁵ For example, one of Europeana’s major projects is the Accessible Registries of Rights Information and Orphan Works (“ARROW”), which aims to support the EC’s Digital Library Project by finding ways to clarify the rights status of orphan works and out-of-print works, as well as to enhance the interoperability of rights information between rights holders, agents, libraries and users. See <http://www.arrow-net.eu/>.

As a point of comparison, we note the rejected Google settlement agreement did not incorporate a prior diligent search requirement for out-of-print works. Rather, it would have required copyright owners to claim these works through a registry as a condition of avoiding orphan status, in part because the rights clearance process is costly and time consuming—at least in the context of mass scanning—and in part because many book publishing agreements from the pre-digital era are unclear as to the disposition of electronic rights, as between authors and publishers. Judge Chin deferred expressly to Congress on these issues, stating that the “question of who should be entrusted with guardianship over orphan books, under what terms, and with what safeguards, are matters more appropriately decided by Congress than through an agreement among private, self-interested parties.” (Opinion at page 23.)

As a practical matter, the issue of orphan works cannot reasonably be divorced from the issue of licensing. The premise of an orphan works situation is that a user wants to exploit a copyrighted work in a manner that requires permission of the rights holder. Because licensing on a case-by-case basis can be challenging, at least where many works are at issue, it may be helpful to consider whether the increased availability of collective licensing might be helpful—at least for facilitating certain projects and transactions of interest and importance to the public.⁶ To be clear, collective licensing can take several forms and may operate on either an “opt-in” or an “opt-out” basis.

In the United States, we have had some success in the music world with the “opt-in” model, albeit with some pricing problems. ASCAP, BMI and SESAC, for example, license the public performance of many musical works and collect royalties on behalf of copyright owners. (To address competition-related concerns, ASCAP and BMI operate under consent decrees monitored by the Department of Justice and enforced by the courts.) The Copyright Clearance Center has performed a similar function for reprographic rights for nonfiction books and more recently has moved into licensing for the broader publishing industry. In both cases, these organizations engage in reciprocal relationships with collecting organizations overseas on behalf of their members. Collective licensing of this kind does not require legislation, but may benefit from government facilitation or oversight. For new organizations, the start-up costs and other funding challenges may be daunting, as U.S. authors and photographers can attest.⁷

Some countries have legislated “opt out” models (known as *extended* collective licensing) in the context of library and educational uses.⁸ This model operates something like a class action settlement, in the sense that representatives of copyright owners and representatives of users negotiate terms that are binding on all members of the group by operation of law, e.g., all textbook publishers, unless a particular copyright owner opts out. The government or a trusted designee administers payments. It is not quite compulsory licensing in that the parties (rather than the government) negotiate the rates, but it requires a legislative framework.

⁶ See *Register's Testimony*. “The creation of a rights registry for book authors, publishers and potential licensees is a positive development that could offer the copyright community, the technology sector and the public a framework for licensing works in digital form and collecting micro-payments in an efficient and cost-effective manner.”

⁷ For example, both the Authors Guild and the American Society of Media Photographers have attempted to offer licensing registries for the benefit of their members and users, with varying degrees of success.

⁸ Denmark, Finland, Iceland, Norway, and Sweden have the most experience with this model.

The settlement proposed by the Authors Guild, book publishers and Google would have operated on an extended collective licensing (or opt-out) basis, but it would have done so only for one user (Google) and without the benefit of Congressional oversight as to goals, terms and conditions.⁹ If Congress wanted to consider the pros and cons of collective licensing for books and other digitized works, it might want to explore whether the opt-out model is of interest to these parties and other stakeholders legislatively (for example, to facilitate digital markets for out-of-print books).¹⁰ In doing so, Congress might also want to consider the interplay between collective licensing and fair use, as well as the library exceptions codified in Section 108.

Section 108 presents unresolved policy issues that could be reviewed now that Judge Chin has issued his opinion. In 2008, the Copyright Office and NDIIPP co-published an independent report on Section 108, presenting a variety of recommendations to update the law to better reflect digital technology and to ensure better preservation practices. The report also sets forth (but does not resolve) certain issues governing whether and how libraries should provide on-line access to copyrighted works. The study group that produced the report deliberated for almost three years and included representatives from the library, book publishing, motion picture, and government sectors, among others.¹¹ Stakeholders who were awaiting Judge Chin's decision in the Google settlement may be ready to revisit Section 108 at this time.

Finally, some proponents of the Google settlement observed that it might have provided unprecedented access to books for millions of Americans who are blind or have print disabilities. The Library of Congress has some experience with this population, as we have administered the National Library Service for the Blind and Physically Handicapped (NLS) since 1931. Today, the NLS circulates more than 24 million audio and Braille books and magazines to eligible patrons every year and administers a new Digital Talking Book service, based largely on an exception in the copyright law known as the Chafee Amendment (Section 121).

The Chafee Amendment is an important provision, but it is designed to operate as a safety net for people who cannot obtain access through mainstream libraries or the general market. Because digital technology has made access easier, the Copyright Office and other Library staff are collaborating on new initiatives to promote access for persons who are blind or print disabled—for example, by evaluating pilot projects that would allow for cross-border sharing of digital files between designated libraries under the guidance and permission of the publishers. We are also serving on a commission administered by the Department of Education charged with making recommendations to Congress to improve accessibility for print-disabled college students. In each case, we are working to better serve these communities by encouraging the creation of better technical standards, new digital products, and innovative agreements between libraries and publishers.


⁹ Unless Congress decides otherwise, Judge Chin has underscored voluntary licensing as a reasonable route to settle the litigation under current law. (“As the United States and other objectors have noted, many of the concerns raised in the objections would be ameliorated if the [settlement] were converted from an “opt-out” settlement to an “opt-in” settlement.”)(Opinion at page 46.)

¹⁰ See, e.g., Editorial, *Google's Book Deal*, N.Y. TIMES, Mar. 30, 2011 (stating Congress should consider both “giving all comers similar legal protection to that which Google got in its agreement,” and “promoting a nonprofit digital library”), available at <http://www.nytimes.com/2011/03/31/opinion/31thu2.html>.

¹¹ See United States Copyright Office & National Digital Information Infrastructure and Preservation Program, Section 108 Study Group Report (2008), available at <http://www.section108.gov>.

In closing, we note that the landscape of digitization projects, copyright law and public access is complex but rich with promise, and we are pleased to provide this report of the pertinent issues that may be of interest to the 112th Congress in the wake of Judge Chin's opinion. We thank you for your longstanding support of the Library of Congress and the Copyright Office and stand ready to assist you if Congress would like to review or further explore any of the developments we have presented here.

Sincerely yours,


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The Librarian of Congress


Maria A. Pallante
Acting Register of Copyrights

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APPENDIX B LIST OF STAKEHOLDER CATEGORIES

Appendix B

Stakeholder Categories

Below is a list of categories of stakeholders that likely would be affected by the copyright issues associated with any mass book digitization initiative. This list could provide a starting point for stakeholder consultations.¹

I. AUTHORS AND VISUAL ARTISTS

There are numerous authors' groups that could aid Congress in determining how authors are affected by the copyright issues associated with book digitization projects. Some author groups are already involved in the Google Books case² and thus have previous experience exploring these issues. In addition to U.S. authors' groups, some active organizations of authors based outside the United States likely will be concerned about the impact of U.S. mass digitization projects on their works and could have helpful input.

As mentioned in the discussion document, a consortium of visual artists, including graphic artists and photographers, also sued Google regarding the inclusion of certain images in scanned books,³ and visual artists' organizations are likely to have views regarding mass digitization projects.

II. BOOK PUBLISHERS

Publishers could provide information on how their existing markets would be affected by the copyright issues involving book digitization projects, and the many publishers who provide digitized content might also provide information on the efficiency and economic viability of mass book digitization projects. Some publishers are already involved in the Google Books case, and are familiar with the issues surrounding mass digitization projects in that context.

Publishing entities with an interest in the copyright issues affecting mass book digitization include: trade associations (including those representing general publishers and academic or educational publishers); publishing houses; and entertainment companies with publishing divisions.

¹ Although any inquiry will focus on U.S. entities, consideration should be given to soliciting opinions from foreign entities with specific digitization expertise.

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

³ *Am. Soc'y of Media Photographers, Inc., et al. v. Google Inc.*, Civil No. 10-2977 (S.D.N.Y. Apr. 7, 2010).

III. LIBRARIES

Libraries are among the most obvious stakeholders in any discussion about the copyright issues affecting mass book digitization projects, as they are involved in preservation and conservation activities as well as providing access to materials for both the general public and specialized audiences. They have their own scanning initiatives, and the increasing availability of digitized materials could affect the activities of all types of libraries. In addition to U.S. libraries, foreign libraries that have begun their own digitization activities may have helpful insights.

Aside from the Library of Congress, the potential interested library parties are: trade associations; national libraries; regional library networks; state and public libraries; and academic and research libraries. There are also many libraries in private businesses and institutions.

IV. ARCHIVES

Archives likely have an interest in mass book digitization projects and the associated copyright issues because they have a wealth of information that would be subject to digitization, and some have already begun digital preservation processes. Archives are different from many libraries because they focus on collecting unique works, including primary materials in original formats, rather than works in published formats. Some archives also have significant collections of the works of visual artists, including photographs, and thus could contribute to the discussion of how to address the presence of those works within books. In addition to U.S. archives, foreign archives that have begun their own digitization activities may also have helpful insights.

Aside from the National Archives, examples of potential interested archive parties include trade associations and state archives.

V. MUSEUMS

Museums not only maintain and display numerous works – including historical books – they also provide grants to authors and publish certain literary materials. Accordingly, museums likely would have an interest in and insight into the intersection of copyright and the preservation, conservation and access goals of a book digitization project. Many museums also have significant special collections of the works of visual artists, including photographers, and thus could contribute to the discussion of how to address the presence of those works within books.

Aside from the Smithsonian Institutions, the potential museum entities that may be interested in these issues include: trade associations; national museums; for-profit museums; and specialized museums (*e.g.*, museums focused on a specific type of work such as photography).

VI. COLLECTIVE MANAGEMENT ORGANIZATIONS

As discussed in Appendix E, there are several U.S. collective management organizations that have experience with licensing book rights. These and other domestic and international collective management organizations may be able to provide information about copyright issues and the existing practical structure of their licenses and the potential application of these licensing schemes to mass book digitization projects.

VII. COMMERCIAL ENTITIES INCLUDING DIGITIZERS AND AGGREGATORS

A variety of technology companies and other commercial entities play key roles in mass book digitization projects and likely will have an interest in any assessment of the related copyright law framework. For example, commercial organizations that are currently engaged in mass digitization projects, or have attempted such projects in the past, and online book sellers likely will be interested in this issue and could have valuable input. Aggregators of collections of visual art, including photography, will also have an interest in mass digitization projects.

VIII. CIVIL SOCIETY GROUPS

Civil society groups have been involved in discussions of copyright issues related to digitization for many years and likely will want to continue their advocacy in this area. For example, there are several public interest groups that filed briefs in the Google Books case, and these entities likely will be interested in any review of copyright issues related to mass book digitization issues.

IX. SUBSCRIPTION DATABASE PROVIDERS

There are numerous subscription database services in the United States that provide access to digitized versions of literary works in return for the payment of fees. They likely would have an interest in copyright issues affecting digitization as their interests could well be affected by digitization projects that provide access to works.

APPENDIX C

**EXAMPLES OF CURRENT SIGNIFICANT
SCANNING PROJECTS**

Appendix C

Current Significant Scanning Projects

Current digitization projects can provide valuable lessons on digitization objectives and best practices, as well as how copyright law affects these projects. Below is a list of examples of representative digitization projects from the United States and worldwide. Many of these projects involve the digitization of public domain materials.

I. U.S. GOVERNMENT DIGITIZATION PROJECTS

A. Library of Congress

Since 1994 the Library of Congress has made digitized versions of collection materials available online, such as photographs, manuscripts, maps, sound recordings, motion pictures, and books, as well as “born digital” materials such as websites. Its digital collections are focused primarily on the Library’s unique and rare collections. Major initiatives include: American Memory, which has more than 9 million items on-line related to U.S. history and culture and organized into more than 100 thematic collections; Historic American Newspapers, which provides access to 900,000 U.S. newspapers published between 1836 and 1922; World Culture and Resources, which presents bilingual digital collections from various media from different regions and countries from around the world; Prints and Photographs, which contains over 1.2 million digitized images; and many others.¹

The Library of Congress’s National Digital Information Infrastructure and Preservation Program (“NDIIPP”), which was authorized by Congress in 2000 and currently has more than 180 partners, is building a network of partners dedicated to the collection and preservation of the nation’s cultural heritage in digital form through the development of a national strategy to collect, preserve and provide access to digital information.²

In addition, the World Digital Library, a joint venture of the Library of Congress and UNESCO, makes available high-quality digital items representing each UNESCO member’s cultural heritage.³

B. National Archives and Records Administration

In 2007, the National Archives and Records Administration (“NARA”) finalized its strategic plan for digitization of its holdings, entitled “Strategy for Digitizing Archival Materials for Public Access, 2007-2016.” Via the Archival Research Catalog (“ARC”),

¹ See <http://www.loc.gov/library/libarch-digital.html>.

² See <http://www.digitalpreservation.gov/>.

³ See <http://www.wdl.org/en/>.

NARA plans to digitize and make fully available online its vast collection of hard copy historical U.S. government documents, gathered from NARA's two Washington, D.C. facilities and fourteen regional archives, as well as the twelve (soon to be thirteen) presidential libraries under NARA operation. ARC currently offers over 153,000 digital copies of documents and descriptions of almost 70% of NARA's holdings.⁴

In addition, NARA's Electronic Records Archives ("ERA") preserves and provides access to U.S. government records born digitally; that is, those documents that exist only in electronic format.⁵

C. Smithsonian Institution

The Smithsonian Institution has adopted a strategic plan, entitled "Creating a Digital Smithsonian," for fiscal years 2010 through 2015, to digitize its collections and holdings, including text, images, and sound recordings, as well as any accompanying descriptive and explanatory data. The Smithsonian plans to create an ongoing, sustainable digitization program.⁶

II. OTHER U.S.-BASED DIGITIZATION PROJECTS

A. Internet Archive

The Internet Archive is a non-profit organization that offers permanent access for researchers, historians, scholars, people with disabilities, and the general public to historical collections that exist in digital format. Although the Internet Archive is primarily known for its vast collection of Internet websites and other "born digital" content, it also contains digitized versions of over 2.5 million books. The Internet Archive provides specialized services for adaptive reading and information access for the blind and other persons with disabilities.⁷

B. Project Gutenberg

Billing itself as the first producer of free electronic books, U.S.-based Project Gutenberg is a private-sector project offering over 33,000 texts, including literature and reference materials, all in the public domain, to the general public through e-book downloads to

⁴ See <http://www.archives.gov/digitization/strategy.html> and <http://www.archives.gov/research/arc/>.

⁵ See <http://www.archives.gov/era/>.

⁶ See http://www.si.edu/content/pdf/about/2010_SI_Digitization_Plan.pdf.

⁷ See <http://www.archive.org/>.

portable devices. It has partners in various countries, including Australia, Canada, the United Kingdom, and France, through which over 100,000 free e-books are available.⁸

C. Open Content Alliance

Conceived by the Internet Archive and Yahoo! in early 2005, the Open Content Alliance (“OCA”) is a collaborative effort of various cultural, technological, nonprofit, and governmental organizations that aims to build an archive of multilingual digitized text and multimedia material. The project was launched with materials from various participants, including the European Archive, the Internet Archive, O’Reilly Media, and the University of California. Although the OCA’s founding principles call for contributors to offer a certain minimum level of public access, copyright owners are permitted to define access parameters. In addition to materials contributed voluntarily by copyright owners, the archive contains a significant number of public domain works. In total, it currently contains approximately 1.6 million books.⁹

D. Google Book Search

Launched in 2004, the Google Book Search (“GBS”) project has scanned more than fifteen million books from more than one hundred countries in over four hundred languages. As originally conceived, the project aimed to create a digital card catalog of the world’s books, and make such books searchable. GBS provides full access to over a million public domain titles, and titles for which it has secured permission from applicable rights holders. Its “Partner Program” allows publishers and independent authors voluntarily to contribute works and make them publicly available to varying degrees based on the copyright owner’s preference. For other copyrighted works for which it has no agreement, GBS supplies only a short three-line “snippet” based on a user’s search query.¹⁰

E. California Digital Library

Founded by the University of California in 1997, the California Digital Library (“CDL”) has digitized thousands of books, images, and journals, and serves as a repository for over 422 million web files. Projects within CDL include Calisphere, an archive of primary source materials related to California history aimed primarily at K-12 students and educators; the Online Archive of California, a similar database aimed primarily at professional researchers; and UC Shared Images, a database of arts and humanities images designed for educators. CDL is comprised of numerous contributing partners and project members, including Google Books and the Internet Archive.¹¹

⁸ See http://www.gutenberg.org/wiki/Main_Page.

⁹ See <http://www.opencontentalliance.org/>.

¹⁰ See <http://books.google.com/>.

¹¹ See <http://www.cdlib.org/>.

F. HathiTrust Digital Library

The HathiTrust is a group of fifty-seven libraries, including the Library of Congress, whose goal is to “contribute to the common good” by providing a shared platform for making digital collections available to users. The initial focus of the trust was on preserving and providing access to digitized books and journals in collaboration with Google, the Internet Archive, Microsoft, and in-house digitization initiatives. Currently over five million books have been digitized.¹²

III. INTERNATIONAL AND NON-U.S.-BASED DIGITIZATION PROJECTS:

A. Universal Digital Library

The Universal Digital Library (“UDL”), sponsored by numerous representatives of universities, libraries, and governments throughout the United States, China, Egypt, and India, is an alliance of over fifty different scanning centers that as of 2007 had digitized and made available over the Internet more than one million books. The UDL publicly displays works in the public domain and those for which it has permission from the copyright owner, and limited portions of works that are subject to copyright protection, which the UDL believes are consistent with the fair use provisions of the U.S. Copyright Act. The UDL hopes to digitize ten million books within the next decade.¹³

B. Europeana

Launched in November 2008 based on the initiative of six European heads of state, Europeana runs services for the European Digital Library Project Foundation and has many partners including the Rijksmuseum in Amsterdam, the British Library in London and the Louvre in Paris. Europeana serves principally as a portal and search tool through which visitors can identify and locate digital resources contributed by member organizations. The database contains approximately ten million items in digital form, including images, sounds, texts, and videos, and aims to reach twenty-five million uploads, including both in- and out-of-print works, by 2014. The project is funded principally by the European Commission’s eContentPlus program and voluntary contributions by various European countries.¹⁴

One of Europeana’s major projects is the Accessible Registries of Rights Information and Orphan Works (“ARROW”), which aims to support the EC’s i2010 Digital Library Project by finding ways to clarify the rights status of orphan and out-of-print works, as

¹² See <http://www.hathitrust.org/>.

¹³ See <http://www.ulib.org/>.

¹⁴ See <http://www.europeana.eu/portal/>.

well as to enhance the interoperability of rights information between rights holders, agents, libraries and users.¹⁵

C. Gallica

Created by Bibliothèque nationale de France (“BnF”) in 1997, Gallica is a digital library comprised of existing library collections within BnF. These collections, which contain over 1.5 million documents focusing primarily on French culture and language, include books, periodicals, images, maps, manuscripts, musical scores, and sound recordings. Since 2008, Gallica has partnered with hundreds of publishers to offer contemporary content under copyright. In addition, Gallica provides access to collections of public partners such as libraries and research centers.¹⁶

D. China/Founder Group

The National Library of China (“NLC”) is undertaking a National Digital Library Project (“NDLP”). According to D-Lib, the Magazine of Digital Library Research, NLC launched NDLP in October of 2005 in order to collect and digitally preserve resources relating to Chinese cultural heritage in a comprehensive online database.¹⁷

Digital publishing solutions provider Founder Group is planning to build the largest digital library in China and expects digital publishing to account for twenty to thirty percent of its business in the near future. The expansion will take Founder’s Fanshu.com library from 500,000 scanned books to 1.8 million.¹⁸

E. British Digital Library

The British Library has established a Digital Library Programme to create an extensive mass of digital materials, by both digitizing physical content and obtaining new published works in digital form. The Library receives a copy of every printed work published in the UK and Ireland through legal deposit legislation. In 2003, the Legal Deposit Libraries Act extended this right to non-published materials. Over the past few years the Library has worked with external technology providers and funding bodies to allow for mass digitization.¹⁹ The Library currently delivers 25 million digitized pages including 100,000 19th century books and 10,000 hours of digitized sound recordings, all from British Library collections.²⁰

¹⁵ See <http://www.arrow-net.eu/>.

¹⁶ See <http://gallica.bnf.fr/?lang=EN>.

¹⁷ See <http://www.nlc.gov.cn/newen>.

¹⁸ See <http://www.founder.com/>.

¹⁹ See <http://www.bl.uk/aboutus/stratpolprog/digi/index.html>.

²⁰ See <http://pressandpolicy.bl.uk/content/default.aspx?NewsAreaId=312>.

F. National Library of Sweden

The National Library of Sweden (“KB”) is currently working with Fedora (Flexible Extensible Digital Object Repository Architecture), a software application that manages digital libraries. KB is utilizing the software to develop a technical infrastructure for a digital archive to include material digitized by the library as well as material received by the library in digital form. KB is working to digitize parts of the library’s collection that are at risk of deteriorating because of their age or because they are handled by library visitors at a higher rate than other materials. The library has digitized over 200,000 pages of text from both large and small newspapers, as well as the Codex Gigas, the legendary Devil’s Bible from the 1200s.²¹

G. The Saganet

The Saganet, a cooperative project of The National and University Library of Iceland and Cornell University, is comprised of “Icelandic family sagas,” Nordic mythology, and other materials relating to Nordic history and culture. The archive, which began in 1997 and opened publicly in 2001, presently contains about 240,000 manuscript pages that appear to be entirely in the public domain. The database also contains printed editions of manuscripts, where available, as well as translations and “relevant critical studies published before 1900.”²²

F. Project Runeberg

Based on the Project Gutenberg model, Project Runeberg makes public domain Nordic literature available free of charge via its website. The project began in 1992 and as of August 2010, the most recent year for which data are available, the database contained just over 639,000 pages.²³

²¹ See <http://www.kb.se/english/about/digitization/>.

²² See <http://www.saganet.is/>.

²³ See <http://runeberg.org/>.

APPENDIX D EXAMPLES OF FOREIGN TREATMENT OF
ORPHAN WORKS

Appendix D

Foreign Treatment of Orphan Works

A number of countries and the European Union have addressed or are exploring orphan works¹ issues in a variety of ways. Some of these approaches are summarized below.

I. CANADA

Section 77 of the Canadian Copyright Act permits users to file applications with the Copyright Board of Canada for the use of certain types of orphan works on a case-by-case basis. If an applicant demonstrates that it made a reasonable effort to locate the rights holder and the rights holder cannot be located, the Board will approve the request and issue a conditional non-exclusive license.² Based on informal discussions, we understand that in certain situations, the Board may also conduct its own search to assist with an applicant's attempt to locate a right holder and to cross-check any search conducted by the applicant. Applicants must make payments for use of orphan works by providing money to a copyright collective society covering the type of work. The rights holder has five years from the end of the license to collect the payment from the collective society.³

Pursuant to the Canada Copyright Act, the Copyright Board may issue licenses permitting the following uses of orphan works: reproduction, distribution, performance, publication, communication to the public, or any other exclusive right listed in Article 3 (Copyright in Works); communication to the public by telecommunication, public performance, fixation, reproduction of a fixation, and rental of a fixation of a performance under Article 15 (Copyright in performer's performance); first publication, reproduction, or rental of a sound recording under Article 18 (Copyright in Sound Recordings); and fixation, reproduction of a fixation, retransmission, or public performance of a broadcast under Article 21 (Copyright in Communication signals).⁴

¹ Orphan works are works that are protected by copyright but for which a potential user cannot identify or locate the copyright owner for the purpose of securing permission. See United States Copyright Office, *Report on Orphan Works* 1 (2006) ("Orphan Works Report"), available at <http://www.copyright.gov/orphan/orphan-report-full.pdf>; see also *Competition and Commerce in Digital Books: The Proposed Google Book Settlement, Hearing Before the House Comm. on the Judiciary*, 111th Cong. 8 (Sept. 10, 2009) (testimony of Marybeth Peters, Register of Copyrights).

² See Copyright Act §77 (R.S.C., 1985, c. C-42) (Can.) ("CCA"), available at <http://laws.justice.gc.ca/PDF/C-42.pdf>.

³ See *id.* § 77(3); see also *Unlocatable Copyright Owners: Brochure*, Copyright Board of Canada, available at <http://www.cb-cda.gc.ca/unlocatable-introuvables/brochure2-e.html>.

⁴ See CCA § 77(1).

II. DENMARK

Users may obtain permission to use orphan works in Denmark through extended collective licensing, as established in Articles 50-52 of the Danish Copyright Law.⁵ These provisions allow certain collective licensing organizations to license numerous works within a specific field of use, including works owned by rights holders who are not members of the organization and orphan works.⁶ However, unrepresented authors are allowed to claim individual remuneration even if such remuneration is not in the agreement of the collective licensing organization.⁷

III. EUROPEAN UNION

The European Commission took an early step towards addressing the problem of orphan works through its 2006 Commission Recommendation on the Digitization and Online Accessibility of Cultural Material and Digital Preservation.⁸ The Recommendation recognizes that licensing mechanisms may help decrease the impact of orphan works by facilitating the rights clearance process, and recommends that Member States create a mechanism to facilitate the use of orphan works and promote the availability of lists of orphan works.⁹ However, a majority of Member States did not adopt the Recommendation and the European Union continues to investigate solutions for the orphan works problem.¹⁰

Soon after issuing the Recommendation, the European Union commissioned a group to study the issue of the digitization of orphan works in the i2010: Digital Libraries High Level Expert Group – Copyright Subgroup. The final report was issued in June of 2008 and concludes that the digitization efforts of libraries, museums, and archives must

⁵ See Consolidated Act on Copyright 2010, art. 50-52, (Consolidated Act No. 202 of Feb. 27, 2010) (Den.), *available at* <http://www.kum.dk/Documents/English%20website/Copyright/Consolidated%20Act%20on%20Copyright%202010%5B1%5D.pdf>.

⁶ See *id.* §§ 50(3), 51.

⁷ See *id.* § 51(2).

⁸ See Commission Recommendation of 24 August 2006 on the Digitization and Online Accessibility of Cultural Material and Digital Preservation, 2006/585/EC (L 236/28) (EC) (“Recommendation”), *available at* <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2006:236:0028:0030:EN:PDF>.

⁹ See *id.* § 6(a), (c).

¹⁰ See European Commission, *Roadmap for the Legislative Initiative on “Orphan” Works for Digital Libraries 1* (2010), *available at* http://ec.europa.eu/governance/impact/planned_ia/docs/114 Markt_orphan_works_digital_libraries_en.pdf.

address the orphan works problem.¹¹ While the Final Report does not provide a specific solution, it recommends that any orphan works framework should consider the “need for interoperability and ...mutual recognition of national solutions;” it should provide “guidance on what constitutes diligent search required before the use of a work;” it should consider the possibility of a database of information on orphan works to facilitate their search and the development of a rights clearance procedure and center; and it should promote “improved inclusion of metadata... in the digital material.”¹² It also recommends that “due diligence [be] performed in trying to identify the rightsholders and/or locate them” before a non-rights holder may use an orphan work.¹³

The European Commission held a public hearing on orphan works in October 2009.¹⁴ While there was some disagreement about requiring reasonable payments and diligent searches, witnesses supported the creation of a registry of orphan works similar to the Accessible Registries of Rights and Orphan Works (“ARROW”).¹⁵ ARROW attempts to identify rights holders and clarify a particular work’s status to diminish the problem of orphan works, including through the creation of an orphan works registry.¹⁶

On May 24, 2011, the European Commission issued a final proposal for a Directive on certain permitted uses of orphan works. The solution is meant to “create a legal framework to ensure the lawful, crossborder online access to orphan works contained in online digital libraries or archives ... when such orphan works are used in the pursuance of the public interest mission of such institutions.”¹⁷ This directive requires a diligent search in the Member State in which the work was first published.¹⁸ On July 13, 2011, the Commission issued a Green Paper that, among other things, analyzes the impact of the orphan works issue (namely the difficulty involved in clearing rights to these works) on

¹¹ See i2010: Digital Libraries High Level Expert Group – Copyright Subgroup, Final Report on Digital Preservation, Orphan Works, and Out-of-Print Works 10-17 (2008) (EC) (“Final Report”).

¹² *Id.* at 10-11.

¹³ *Id.* at 12.

¹⁴ See European Commission Internal Market, *Public Hearing on Orphan Works* (2009), available at http://ec.europa.eu/internal_market/copyright/copyright-infso/copyright-infso_en.htm#Orphan.

¹⁵ *See id.*

¹⁶ For information about ARROW, see <http://www.arrow-net.eu/about-arrow>.

¹⁷ See Proposal for a Directive of the European Parliament and of the Council on certain permitted uses of orphan works, COM (2011) 289 final (May 24, 2011).

¹⁷ See Proposal for a Directive of the European Parliament and of the Council on certain permitted uses of orphan works, COM (2011) 289 final (May 24, 2011).

¹⁸ *See id.* at 1.

the online distribution of audiovisual works. The Paper is open for public comment through November 18, 2011.¹⁹

IV. FRANCE

The Commission sur les Oeuvres Orphelines du Conseil Supérieur de la Propriété Littéraire et Artistique (Superior Council on Literary and Artistic Property, Commission on Orphan Works) (“CSPLA”) studies orphan works and issued a report on the topic in 2008.²⁰

CSPLA concluded that for audiovisual works, film, and music the observed effects of orphan works are less egregious than other types of works and that there are sufficient existing legal mechanisms for dealing with the use of orphan works, including the system of recourse to the courts and collective licensing agreements.²¹ The orphan works problem is most pervasive in connection with images and literary works due to the quantity of those works (*i.e.*, a photographer may have thousands of images used without knowledge) and because of integration of images within text.²² Thus, the CSPLA Report calls for legislative reform to solve the orphan works problem plaguing mostly the literary and image sectors, and recommends a compulsory licensing mechanism.²³ This would be similar to the current practice of the collective management of reprographic rights in France.

The CSPLA Report also recommends creating a common portal of information for users of orphan works, including information about the necessary permits and collective organizations to be contacted, and it explains the qualifications that should be met before a user is permitted to use an orphan work, including a serious and proven qualifying search for the rights holder.²⁴ Finally, the CSPLA Report indicates that the Intellectual Property Code should be amended to define orphan works and to authorize their licensing through collective management organizations.²⁵

¹⁹ See Green Paper on the online distribution of audiovisual works in the European Union: opportunities and challenges towards a digital single market, COM (2011) 427/4 (July 13, 2011).

²⁰ See Conseil Supérieur De La Propriété Littéraire Et Artistique, Commission sur les Oeuvres Orphelines, *Rapport* [Superior Council of Literary and Artistic Property Commission on Orphan Works, *Report*] (March 19, 2008) (“CSPLA Report”).

²¹ See *id.* at 12-13.

²² See *id.* at 14.

²³ See *id.* at 14-15.

²⁴ See *id.* at 16, 17.

²⁵ See *id.*

Proposition 441 was introduced in the French legislature to address the problem of orphan works with respect to visual works (*i.e.*, photographs, illustrations, and art reproductions).²⁶ The provision would create a collective management organization to collect fees, to be held for a period of ten years, from users of orphan visual works.²⁷ If no rights holder claims ownership of the work in question at the conclusion of this period, the fees are to be used for the support and training of artists as specified under Article 3 of the bill.²⁸ The bill is currently pending in the French Senate.

V. GERMANY

Germany is studying possible solutions for the orphan works problem. The German Federal Ministry of Justice held a meeting on the topic in October 2010 where witnesses expressed uncertainty over whether the German orphan works solution should be a separate national solution or be established in cooperation with the European Union's efforts.²⁹ Witnesses expressed concern about whether a diligent search should be regulated by law, but agreed that a system of remuneration for rights holders of orphan works through payment to a collecting society should be established.³⁰ The German National Library, the German Librarian's Association, VG Wort (a collecting society), and the German Publishers Association are engaged in discussions regarding possible solutions and frameworks for orphan works.³¹

VI. HUNGARY

Hungary recently amended its Copyright Act to add section 57/A, which gives the Hungarian Intellectual Property Office ("HIPO") the right to grant licenses for the use of orphan works to applicants who carry out a documented diligent search and pay compensation for such use.³² Applicants must establish that they have concluded a search

²⁶ See Proposition de Loi, No. 441, Sénat, Session Ordinaire de 2009-2010 (May 2010), available at <http://www.senat.fr/leg/pp109-441.pdf>.

²⁷ See *id.* Art. 2.

²⁸ See *id.* Arts. 2, 3.

²⁹ See Karin Ludewig, *Hearing on Orphan Works at the Federal Ministry of Justice – A Report* (Oct. 14, 2010), available at <http://iuwis.de/blog/hearing-orphan-works-german-federal-ministry-justice-report>.

³⁰ See *id.*

³¹ See Thomas Jaeger, Deutsche National Bibliothek, *Orphan and Out-of-Print Works – the Situation in Germany, presentation at the 5th Meeting of the Member States' Expert Group on Digitisation and Digital Preservation* (Oct. 1, 2009), available at http://ec.europa.eu/information_society/activities/digital_libraries/doc/mseg/meetings/5th/presentations/jaeger_mseg_01-10-09_new.pdf.

reasonable under the circumstances and with regard to the type of work and mode of use expected, including by searching applicable databases, the Internet, and placing advertisements in national daily newspapers. Applicants must include proof of their searches with their applications.³³

HIPO's licenses indicate whether the use is expected to be commercial in nature or for non-profit purposes.³⁴ Applicants who wish to use an orphan work for non-profit purposes may defer payment of any compensation unless and until the author of the work in question becomes known. For-profit applicants must deposit the specified royalty amount with HIPO before use commences.³⁵ Authors may claim payment for uses under this section, and may collect any monies deposited with the office until five years from the expiry of a license. Any unclaimed sums will be transferred to the collective management organization that grants licenses for other works of the rights owner, or, if no such society exists, to the National Cultural Fund for "making cultural goods accessible."³⁶

HIPO maintains a registry of orphan works, which contains a list of orphan works for which use licenses were granted, the extent of the use licensed, and information related to the payment of compensation, including contact information about the licensed user, if authorized.³⁷ The registry is freely accessible and searchable.

VII. UNITED KINGDOM

The United Kingdom attempted to address its orphan works problem through the Digital Economy Act, which was introduced in early 2010. Clause 43 of the Act would have created a licensing mechanism in which a user paid a fee for the commercial use of works whose creators could not be identified. The photographers and other image rights holder communities were concerned about this licensing mechanism, arguing that the unfettered commercial licensing of their photographs and images would destroy their industries and present serious concerns with respect to privacy, exclusivity, and misrepresentation.

³² See Hungarian Copyright Act (Act No. LXXVI of 1999, on Copyright) (Hun.), Art. 57/A(1) ("HCA"), available at http://www.artisjus.hu/english/copyright_act_hungary_101111.pdf.

³³ See *id.*; see also Government Regulation on the Detailed Rules Related to the Licensing of Certain Use of Orphan Works (Decree 100/2009, V. 8 of 2009) (Hun.), Arts. 2(1), (2), 3 ("Government Regulation"), available at http://www.hipo.gov.hu/English/jogforras/100_2009.pdf.

³⁴ See Government Regulation, Art. 2(1); see also Gyenge, Aniko, *The Hungarian model of licensing orphan works*, Presentation at the ES Presidency conference on Digitization of cultural material, (Mar. 14, 2010), available at http://www.mcu.es/principal/docs/MC/PresidenciaUE2010/Aniko_Gyenge_presentation.pdf.

³⁵ See HCA Art. 57/A(2).

³⁶ *Id.* Art. 57/A(5).

³⁷ See Government Regulation Art. 8; Hungarian Intellectual Property Office, Orphan Works Registry, available at <http://epub.hpo.hu/e-kutatas/?lang=EN>.

Clause 43 was removed from the Digital Economy Act shortly before it was approved in April 2010.³⁸

In May 2011, Professor Ian Hargreaves issued a report on the state of intellectual property rights in the United Kingdom entitled, *Digital Opportunity: A Review of Intellectual Property Growth*. Professor Hargreaves urged the British government to draft and implement orphan works legislation that includes extended collective licensing and a clearance procedure for potential users. He also stated that “a work should only be treated as an orphan if it cannot be found by search of the databases involved in the proposed Digital Copyright Exchange.”³⁹ In its response to the Hargreaves Report, the UK government agreed and stated it would propose legislation in the fall of 2011 that would allow for “commercial and cultural uses of orphan works, subject to satisfactory safeguards for the interests of both owners of ‘orphan right’ and rights holders” to include diligent searches and a licensing scheme.⁴⁰ This fall the Business, Innovation and Skills Committee in Parliament will conduct an inquiry on both the Hargreaves Review and Response and collected comments from the public.

VIII. JAPAN

Article 67 of Japan’s Copyright Law permits potential orphan works users to apply for a compulsory license issued by the Commissioner of the Agency for Cultural Affairs.⁴¹ To obtain a license, the user must deposit compensation equal to the ordinary rate of royalty for use of the work, as set by the Commissioner, and must prove that it conducted an unsuccessful due diligence search for the copyright owner.⁴² Copies of works made under Japan’s orphan works provisions must bear notice that they have been licensed under this article.⁴³ In certain circumstances, applicants may use the orphan works in question while an application for a license is pending before the Commissioner of the Agency for Cultural Affairs if the applicant has already made a deposit of a security amount fixed by

³⁸ See Digital Economy Act, 2010 (2010 c. 24) (Eng.), available at <http://www.statutelaw.gov.uk/content.aspx?activeTextDocId=3699621>; see also Laurent, Oliver, *Digital Economy Bill: Behind the scenes as Clause 43 is dropped from controversial legislation (update)*, BRITISH JOURNAL OF PHOTOGRAPHY (LONDON) (Apr. 8, 2010), available at <http://www.bjp-online.com/british-journal-of-photography/news/1648192/digital-economy-bill-behind-scenes-clause-dropped-controversial-legislation-update>.

³⁹ Ian Hargreaves, *Digital Opportunity: A Review of Intellectual Property and Growth* 8 (May 2011), available at <http://www.ipo.gov.uk/ipreview-finalreport.pdf>.

⁴⁰ *The Government Response to the Hargreaves Review of Intellectual Property and Growth* 6 (Aug. 2011), available at <http://www.ipo.gov.uk/ipresponse-full.pdf>.

⁴¹ See Copyright Law of Japan (Law 48 of 1970, 2009) (Jap.), *unofficial translation* available at http://www.cric.or.jp/cric_e/clj/clj.html, Art. 67(1).

⁴² See *id.*

⁴³ See *id.* Art. 67(3).

the Commissioner.⁴⁴ The Commissioner, however, may not issue a license for the use of an orphan work where it is evident that the author has the intention to discontinue any exploitation of his or her work.⁴⁵ Additionally, the Commissioner must also give notice about the issuance of any licenses for the use of orphan works in the Official Gazette.⁴⁶

IX. REPUBLIC OF KOREA

Article 50 of the Korean Copyright Act grants the Ministry of Culture and Tourism the authority to issue licenses for the use of orphan works after (a) the user has conducted a “considerable effort” to search for the author, (b) the user indicates the intent of the use, and (c) the use is licensed with approval and meets other criteria specified by a Presidential Decree.⁴⁷ The Ministry posts information on such licenses in its information and communication network.⁴⁸

Korea defines a “considerable effort” to search for a rights holder to include inquiring within a collective management organization that manages the work in question (or two or more persons from collective management organizations that would be permitted to exploit the relevant work if the work is not registered with any organization in particular). If there is no answer, or an answer indicating no knowledge of a right holder, within one month from the inquiry, then the user may apply for a license from the Ministry of Culture. The user must also publish an announcement in a newspaper of general circulation or on the web page of the Ministry of Culture for ten days.⁴⁹

The Ministry of Culture must publish the content of an application for use of an orphan work in the Official Gazette for fifteen days.⁵⁰ The Ministry of Culture must also notify the applicant of, and publish in the Official Gazette, the approval of any license for the use of orphan works.⁵¹ It must also publish on its website the title and date of publication of the work, the name of the author or rights holder, the name of the applicant, conditions for approval of exploitation of the work, the period for exploitation, compensation money to

⁴⁴ See *id.* Art. 67bis(1).

⁴⁵ See *id.* Art. 70(4)(i).

⁴⁶ See *id.* Art. 70(6).

⁴⁷ See Copyright Act of Korea (Act No. 9785, July 31, 2009) (Kor.) (“CAK”).

⁴⁸ See *id.* Art. 50(4).

⁴⁹ See Enforcement Decree of the Copyright Act (Presidential Decree No. 22003, Jan. 27, 2010) (Kor.), Art. 18(2) (“Enforcement Decree”), available at http://www.wipo.int/wipolex/en/text.jsp?file_id=200937.

⁵⁰ See *id.* Art. 20(1)(1).

⁵¹ See *id.* Art. 21(1).

be paid, and the method and type of exploitation.⁵² A rights holder who objects to an application may submit the certificate of registration indicating that he or she is the author of the work, along with a copy of the work indicating his or her name or title.⁵³

The Ministry of Culture and Tourism defines compensation amounts for use of orphan works.⁵⁴ Users of orphan works must deposit these amounts in jurisdictions specified in the Enforcement Decree, and must notify the persons entitled to receive the deposit and announce the deposit, pursuant to an Ordinance of the Ministry of Culture.⁵⁵

⁵² *See id.* Art. 21(2).

⁵³ *See id.* Art. 20(3).

⁵⁴ *See* CAK Art. 50(1); Enforcement Decree, Art. 23.

⁵⁵ *See* Enforcement Decree Arts. 23(2)-(4).

APPENDIX E **EXAMPLES OF COLLECTIVE LICENSING ORGANIZATIONS**

Appendix E

Collective Licensing Organizations

There are numerous collective licensing and similar organizations in the U.S. and around the world that provide licensing services for a variety of works. Information on some of these organizations and related standard-setting organizations and how they operate is included below.

I. LITERARY WORKS

- A. Copyright Clearance Center**
<http://www.copyright.com/>
Location: Danvers, MA, USA.

The Copyright Clearance Center, Inc. (“CCC”) is a non-profit corporation established in 1978 by a consortium comprised primarily of publishers and librarians. The organization was created in response to the recommendations of Congress during the drafting of the Copyright Act of 1976, which called for a permissions process for photocopying of text-based copyright materials. The CCC conducts both repertory and pay-per-use voluntary licensing for photocopying, as well as for the digital use of materials on corporate and academic networks, and for limited Internet and e-mail dissemination. The CCC has evolved over the years to handle the permission and payments for journals, newspapers, websites, e-books, images, and blogs and in recent years has undertaken some work with authors and photographers. The CCC provides an online searchable database by which users may seek available permissions of the works of CCC members. The database is searchable by Publication Title, ISBN/ISSN Number, and Title. The CCC does not monitor the marketplace for use of its members’ work; rather, it relies on the good faith of users to come forward seeking permission for the uses it licenses. The CCC is a founding member of IFRRO, and has mutual agreements with RROs (Reprographic Rights Organizations) worldwide.

- B. IFRRO**
<http://www.ifrro.org/>
Location: Brussels, Belgium (Multinational).

The International Federation of Reproduction Rights Organisations (“IFRRO”) links RROs around the world, as well as national and international associations of rights holders. Since it began as a working group in 1980, IFRRO has become the federation that represents the interests of copyright management on behalf of its constituents before international bodies such as WIPO, UNESCO, the European Community, and the Council of Europe. IFRRO does not conduct licensing, but serves to connect and facilitate the activities of its member RROs. Information about IFRRO members, including details as to the various types of management they handle, is available at

<http://ifrro.org/RRO>. (Some examples are included in this Appendix: CCC in the United States, CLA in the United Kingdom, and CFC in France.)

C. Copyright Licensing Agency

<http://www.cla.co.uk/>

Headquarters: London, England.

The Copyright Licensing Agency (“CLA”) was created in 1983 to perform collective licensing on behalf of the UK-based societies Authors’ Licensing and Collecting Society Ltd. (“ALCS”) and Publishers’ Licensing Society Ltd. (“PLS”). ALCS and PLS have granted non-exclusive rights to CLA to issue blanket licenses permitting copying from books, journals, magazines and digital material published in the United Kingdom. Members of ALCS and PLS may opt out of the mandates given to CLA to issue these licenses, and CLA publishes a list of works specifically excluded by authors, including American and other foreign authors. It does not publish an inclusive list or database of works covered by its licenses. CLA conducts surveys and sampling on the basis of which ALCS distributes fees to individual rights holders. Through this process, non-member authors are identified and contacted by ALCS to receive fees. CLA has international repertoire exchange agreements with equivalent organizations in other countries to license overseas publications. In addition, an agency agreement with the Design and Artists Copyright Society Ltd. (“DACS”) allows CLA to include in its licenses pictorial works that are contained within books, journals and magazines that are copied. CLA offers a variety of blanket licenses for photocopying, scanning, and digital re-use (including internal emailing of copies and limited storage on a secure intranet) of up to a chapter, entire article or 5% of the publication, whichever is greater.

D. CFC

<http://www.cfcopies.com/>

Location: Paris, France.

Created in 1984, the Centre Français d’exploitation du droit de Copie (“CFC”) is a private non-profit French company owned by press publishers, book publishers, authors and authors’ societies. CFC has the exclusive mandate in France to license non-exclusive reprographic reproduction rights for all French and foreign books, periodicals and newspapers under a compulsory collective management system. Following changes to the intellectual property code in France, in 1996 the French Ministry of Culture granted its first approval of CFC, and subsequently has renewed that approval in 2001 and 2006. CFC is required to report annually on its activities. CFC also began in 2002 licensing digital reproduction rights on the basis of voluntary collective management. CFC administrative expenses represent 10% of the royalty fees collected. It is a member of IFRRO.

E. EDItEUR

<http://www.editeur.org/>

Location: London, England.

EDItEUR Limited, established in 1991, is a global trade standards organization for the book and serial supply chains. Its “ONIX” standards are designed to support computer-to-computer communication between parties involved in creating, distributing, licensing or otherwise making available intellectual property in published form, whether physical or digital. ONIX for Books was initially developed by EDItEUR jointly with Book Industry Communication (UK) and the Book Industry Study Group (US) and is now maintained under the guidance of an International Steering Committee including not only BIC and BISG but also national user groups in Australia, Belgium, Canada, Finland, France, Germany, Italy, The Republic of Korea, The Netherlands, Norway, Russia, Spain, and Sweden. Other ONIX standards include ONIX for Serials and ONIX for Publications Licenses, which includes the communication of rights and repertoire data between RROs. EDItEUR also manages the International ISBN Agency; develops and manages commercial communications standards; and engages in other standards activities on behalf of its various stakeholder communities. EDItEUR is a not-for-profit membership organization, with around 80 members in 18 countries.

F. Authors Registry

<http://www.authorsregistry.org/>

Location: New York, NY, USA.

The Authors Registry is a non-profit organization founded in 1995 by a consortium of U.S. authors’ organizations to distribute payments collected abroad by foreign authors associations for photocopying and similar reprographic acts. The founding organizations are the Authors Guild; The American Society of Journalists & Authors (“ASJA”); the Dramatists Guild of America; and the Association of Authors’ Representatives (“AAR”). The Authors Registry refers to itself as a “clearinghouse.” It passes foreign payments through to authors but does not calculate or generate payments or handle domestic payments. The Authors Registry is a member of the International Confederation of Societies of Authors and Composers (“CISAC”). It retains a 5% commission from all payments it distributes. Its database of authors and contact information is not made available to the public.

G. iCopyright

<http://info.icopyright.com/>

Location: Seattle, WA, USA.

Founded in 1998, iCopyright.com is a web-based copyright clearance service that allows authors and publishers to provide automatic copyright licensing and permissions of content published on the Internet. iCopyright does not license content; rather, it provides a platform of technological tools that allow online content users to reach rights owners directly, for transactional licenses and permission to use works in a variety of ways.

II. PICTORIAL WORKS

A. ARS

<http://www.arsny.com/index.html>

Location: New York, NY, USA.

Founded in 1987, the Artists Rights Society (“ARS”) is a licensing organization for visual artists in the United States. ARS represents the intellectual property rights interests of visual artists and their estates, including painters, sculptors, photographers, and architects from around the world, by direct representation of American artists and reciprocal relationships with affiliated arts organizations abroad. ARS is also a member of CISAC. Through reciprocal agreements, ARS represents the artist repertoires of its foreign sister societies in the United States, and they in turn represent the U.S. repertory of ARS in their territories. ARS offers transactional non-exclusive licensing services to its members on a case by case basis as well as through some blanket arrangements through which permission is assumed and payments are made pursuant to an agreed schedule of rates based on the size, resolution, and purpose of the use, and the scope of the distribution, *e.g.*, for art museum catalogs. ARS lists its members on its website, and also assists users wherever possible in seeking contact information for non-members. ARS does not register or catalog the works of its members.

B. Photographers Index

<http://www.photographersindex.com/>

Photographers Index is a search tool that was originally created by a photographer to support the corporate use of commercial and advertising photographers’ works by permitting users of photographic works to contact photographers whose work they wanted to publish. The Index has grown to include more than 20,000 photographers worldwide, and has become a popular directory for buyers looking for photographers for local photo assignments. The Index is supported by participating professional photographers, who sponsor the index or purchase enhanced listings with thumbnail images hot-linked to their websites. Photographers Index does not catalogue works and does not engage in licensing activities.

C. PLUS

<http://www.useplus.com/index.asp>

International Headquarters: Pasadena, CA, USA.

The Picture Licensing Universal System (“PLUS”) Coalition is an international non-profit initiative with the goal to facilitate the communication and management of pictorial rights. PLUS does not perform licensing functions or engage in price-setting, but instead provides a system of standards for the communication and management of image rights. The PLUS standards were approved on November 1, 2006 after a three-year development process, in which experts from over thirty countries participated. Participants first created the core standards in American English, and agreed to proceed with regional modifications and translations into twenty-one languages, forming regional

working groups charged with ensuring the accuracy of regionally-specific licensing terms and definitions included in the PLUS standards. The PLUS system uses ID codes to standardize license data, embed license reference codes in digital and printed images, monitor image use, and discourage claims of innocent infringement. The Board of Directors is made up of trade organization representatives from each of the following participating industry sectors: publishers, equipment manufacturers, picture archives, multi-industry, libraries, advertising agencies and advertisers, advertising and design, creators, museums and galleries, educational institutions, and application developers.

- D. VAGA**
<http://www.vaga.org/>
Location: New York, NY, USA.

The Visual Artists and Galleries Association (“VAGA”) was the first visual artists’ collecting society for visual creators established in the United States, but has a smaller repertoire than ARS. Founded in 1976, VAGA manages artists’ rights through various licensing models and strategies with publishers, museums and other image users. Through agreements with sister societies worldwide, VAGA is able to offer its members and the members of such societies representation and protection for both primary and secondary rights. VAGA’s core functions include: collecting and distributing funds to rights holders for the use of their imagery; pursuing and resolving copyright infringements; developing innovative practices in copyright management; educating rights holders and image users on copyright; and enhancing the strength of visual arts in the copyright community.

III. MUSICAL WORKS

- A. ASCAP**
<http://www.ascap.com/>
Principal Office: New York, NY, USA.

The American Society of Composers, Authors and Publishers (“ASCAP”) was established as a non-profit organization in 1914 to advocate for the public performance right for performance of musical works in public spaces. ASCAP offers voluntary collective licenses for public performances of musical works in the United States and distributes payments to its members based on performances, which it monitors by surveying the variety of media for which the music is licensed. ASCAP offers a non-exclusive repertoire (or “blanket”) license authorizing a music user to perform the organization’s entire repertoire of music for a set fee, regardless of the extent to which the user performs the covered music. One exception to ASCAP’s blanket licensing is its per-program television license, under which local stations submit monthly reports of the music content of all local and syndicated (non-network) programs, allowing fees to be based in part on specific performances. In 1941, the Department of Justice entered into a consent decree with ASCAP, which has subsequently been amended, stipulating that its licensing practices must be non-exclusive and that licensees and individual members should be allowed to contract directly with one another.

B. BMI

<http://www.bmi.com/>

Locations in Atlanta, London, LA, Miami, Nashville, New York, and Puerto Rico.

Broadcast Music, Inc. (“BMI”) was formed as a non-profit organization in 1939 by radio executives to provide an alternative to ASCAP in the field of voluntary collective licenses for the public performance of musical works in the United States. BMI issues blanket licenses and collects survey data to determine how royalties are divided among its members. BMI also offers a per-program television license, the fees for which are based in part on reports submitted by local stations containing cue sheets of specific performances. In 1941 the Department of Justice entered into a consent decree with BMI, which has subsequently been amended, stipulating that its licensing practices must be non-exclusive and that licensees and individual affiliates should be allowed to contract directly with one another.

C. CISAC

<http://www.cisac.org/>

Location: Headquarters in Paris, France (Multinational).

The International Confederation of Societies of Authors and Composers (“CISAC”) was founded in 1926 and is a non-governmental, non-profit organization. Its headquarters are in Paris, with regional offices in Budapest, Santiago (Chile), Johannesburg and Singapore. CISAC members deal primarily with music performance rights, but span a variety of media. Traditional reciprocal representation agreements in Europe are based on a model developed by CISAC, which has been the subject of what has been called the “CISAC case.” In January 2006, the European Commission sent a Statement of Objections to CISAC citing concerns that certain clauses of the CISAC model contract contained anticompetitive elements, such as membership restrictions that oblige authors to transfer their rights only to their own national collecting society, and territorial restrictions that oblige users to obtain licenses from domestic collecting societies. CISAC proposed a set of commitments to address these concerns, to which a majority of its members agreed to adhere. The Commission, however, concluded in July 2008 that the concerted practices were nevertheless anticompetitive, and required societies to further amend their representation agreements and practices. CISAC has removed clauses containing the problematic restrictions from its model contract, but the clauses remain in several member societies’ contracts.¹ CISAC awaits an appeal of the decision of the Commission.

¹ Europa Press Releases, “Antitrust: Commission prohibits practices which prevent European collecting societies offering choice to music authors and users – frequently asked questions” (July 16, 2008), *available at* <http://europa.eu/rapid/pressReleasesAction.do?reference=MEMO/08/511&form>.

D. DDEX

<http://www.ddex.net/index.htm>

Incorporated in Delaware, USA.

DDEX was established in 2006 to develop and encourage the adoption of standard XML message formats to facilitate the exchange of data between companies operating in the digital media content value chain. The standards enable the identification of the information required to provide digital media content to the consumer and report sales back to the content owning companies, as well as common ways for this data to be exchanged between companies. The standards are intended to benefit creators by facilitating royalty reporting and encouraging wider availability of repertoire. Work is now being undertaken to standardize messaging around specific business transactions and delivery of the content itself, among other technical expansions. DDEX is governed by twenty Charter Members, each appointing one member of the Board of Directors and paying annual membership dues of \$25,000. Current Charter Members include major record companies, digital and mobile service providers, rights societies, and other stakeholders. Additional members participate in decision making, and contribute fees according to revenue and participation level. Initially, DDEX focused on the digital music value chain, but it is now encouraging membership from stakeholders in any media sectors that overlap with music. Membership of DDEX is open to any organization with a business interest in the digital media content value chain.

E. SACEM

<http://www.sacem.fr/cms>

Location: Neuilly-sur-Seine, France.

The Société des Auteurs, Compositeurs et Editeurs de Musique (“SACEM”) is a non-profit membership organization based in France and responsible for the management of rights and royalties of authors, composers and publishers of musical works. Created in 1851, SACEM was the first society in the world to represent musical rights holders. Today it has over 137,000 members worldwide and manages 40 million works. SACEM collects fees from users based on the type of service rendered. For example, when music is essential to the business or show, SACEM collects a percentage of the revenues resulting from the use of the music; when the music’s role is secondary, SACEM collects a lump-sum fee. SACEM distributes collected sums to rights-holders according to data obtained from broadcasters, show organizers, and record, video and multimedia producers in the form of lists of works performed or reproduced. SACEM has set up branches in other European countries, and contributed to the development of other national societies of authors. It is a member of CISAC and has reciprocity agreements with other performance rights organizations throughout the world.

F. SESAC

<http://www.sesac.com/>

Location: Headquarters in Nashville, TN, USA.

SESAC, formerly known as the Society of European Stage Authors and Composers, was founded in 1930 to represent European stage authors and composers with respect to their American performance royalties. It has since grown to represent a wide variety of American songwriters and publishers. SESAC offers a blanket license for use of music in its repertoire, much like ASCAP and BMI. However, SESAC differs from ASCAP and BMI in several respects, including that it is a for-profit entity and it conducts a selection process before rights holders may become affiliates.

G. Harry Fox Agency

<http://www.harryfox.com/>

Location: New York, NY, USA.

The National Music Publisher's Association established the Harry Fox Agency ("HFA") in 1927. Among other activities, HFA issues mechanical licenses and collects and distributes mechanical royalties under section 115 of the Copyright Act for digital uses of music in the United States on CDs, digital services (including ringtones), records, tapes and imported phonorecords. HFA does not administer performance rights, and it does not offer blanket licenses.

IV. SOUND RECORDINGS

A. SoundExchange

<http://www.soundexchange.com/>

Location: Washington, D.C., USA.

SoundExchange is a non-profit performance rights organization that collects statutory royalties under sections 112 and 114 of the Copyright Act on behalf of sound recording copyright owners (record companies and performing artists) for the limited right of public performance of sound recordings via digital audio transmission. SoundExchange collects payments from satellite radio, Internet radio, cable TV music channels and similar platforms for streaming sound recordings. The Librarian of Congress has designated SoundExchange as the sole administrative entity for subscription services' statutory license fees. SoundExchange participates in periodic rate-making proceedings under the section 112 and 114 licenses, which may be resolved through voluntary multi-party settlements or proceedings before the Copyright Royalty Board.

V. AUDIOVISUAL WORKS

A. MPLC

<http://www.mplc.org/index.php>

Headquarters: Los Angeles, CA, USA.

The Motion Picture Licensing Corporation (“MPLC”) was formed to address the use of DVDs and home videocassettes for public performances in non-home facilities. In December 1986, the U.S. Department of Justice legally authorized the MPLC to issue blanket or “Umbrella” licenses, which allow an organization an unlimited number of showings of titles from all MPLC authorized producers for a flat, annual fee. The Umbrella License allows any organization to publicly perform videos produced by MPLC’s Member Licensors for a fee based on multiple factors, such as the type of facility where videos are shown, the number of exhibitions to be held throughout the year, and the number of attendees anticipated per exhibition. The license does not cover showings where admission is charged or where specific titles are publicly advertised.

VI. OTHER

There a number of organizations that work with large numbers of rights holders in the area of enforcement, which sometimes leads to licensing in the course of settling disputes. These include, for example, PicScout for images and Audible Magic for sound recordings.

APPENDIX F

**REPRESENTATIVE COUNTRIES WITH EXTENDED
COLLECTIVE LICENSING REGIMES**

Appendix F

Representative Countries with Extended Collective Licensing Systems

Several countries have legislated extended collective licensing (“ECL”) regimes, which enable these countries to manage the licensing process for the countries’ authors and third party users. Below are descriptions of representative examples of such systems.¹ The examples focus on Nordic countries because those are the systems for which the best documentation in English is available.

I. DENMARK

Denmark’s ECL system covers a variety of uses, including: (i) certain educational uses such as copying published works and recording works broadcast on radio and television; (ii) reproduction of select types of work by institutions, organizations, and business enterprises for internal use to advance their own activities; (iii) digital reproduction of articles from newspapers, magazines and composite works, as well as brief excerpts from published literary works and illustrations and music reproduced in connection with the text, by public libraries, and those libraries financed at least partially by public authorities; (iv) reproduction of sound or visual recordings broadcast on television or radio in a manner accessible to visually handicapped and hearing-impaired people by governmental, municipal and other social and nonprofit institutions; (v) reproductions of published works of art; (vi) broadcast of published works on radio or television by certain television stations; (vii) public access to television company productions at places and times selected by the viewer; and (viii) simultaneous retransmission on cable of works broadcast wirelessly on radio or television.²

In Denmark, organizations that manage the licensing of copyright protected materials must have a membership “comprising a substantial number of authors of a certain type of works [sic] which are used in Denmark.”³ Additionally, the Danish Minister for Culture

¹ This appendix provides information on established Nordic ECL regimes, but other countries may have experience with this type of licensing structure. Schemes similar to ECL are said to exist in Malawi, Zimbabwe, Czech Republic, Hungary, Latvia, Ukraine, and Russia. See Mario Bouchard, *Extended Collective Management as a Possible Solution to Current Copyright Dilemmas*, at 2, available at <http://competencesinculture.pl/static/documents/report.pdf>; International Federation of Reproduction Rights Organizations, *Introduction to Repography in Copyright Legislation*, available at <http://www.ifro.org/node/51>.

² Consolidated Act on Copyright 2010 (Consolidated Act No. 202 of Feb. 27, 2010) (Den.) (“DCA”), §§ 13, 14, 16b, 17(4), 24a, 30, 30a, 35, 50(1), available at http://www.wipo.int/wipolex/en/text.jsp?file_id=191420.

³ *Id.* § 50(1); see also Tarja Koskinen-Olsson, *Collective Management in the Nordic Countries*, in *COLLECTIVE MANAGEMENT OF COPYRIGHT AND RELATED RIGHTS 293* (Daniel Gervais ed., 2010) (hereinafter “*Collective Management*”).

must approve managing organizations before they may act on behalf of rights holders.⁴ Rights holders who are not members of approved managing organizations must be treated according to the same terms that apply to members.⁵ Unrepresented rights holders, however, may make claims to the managing organization for individual remuneration⁶ and appear to be able to opt out of some uses of their works. Danish law also provides for mediation in the case of disputes.⁷

II. FINLAND

Finland's ECL system covers "education, state and municipal administration, church administration, associations and business enterprises."⁸ Finnish ECL law allows several types of uses, including: (i) reproduction for scientific and educational use; (ii) copying articles (including illustrations) and allowing some transmission of these articles for internal use; and (iii) certain library, archival, and museum uses.⁹ Moreover, Finland's ECL system covers certain broadcasting uses, including mobile television transmissions.¹⁰ Finnish law requires that the Ministry of Education and Culture approve all managing organizations operating on behalf of rights holders under the ECL system.¹¹ These organizations must represent a substantial number of rights holders.¹²

III. ICELAND

In Iceland, the government must approve all organizations that represent rights holders in the ECL system.¹³ These organizations must represent a substantial number of Icelandic authors in the field negotiated by the organization.¹⁴ The managing organization also

⁴ DCA § 50(4); *Collective Management* at 296.

⁵ *See* DCA §§ 50(3), 51(1).

⁶ *See id.* § 51(2).

⁷ *See id.* § 52.

⁸ *Collective Management* at 299.

⁹ *See id.* at 299-300.

¹⁰ *See id.* at 296-97, 305-06.

¹¹ *See id.* at 296.

¹² *See id.* at 294.

¹³ *See id.* at 296; Iceland Copyright Act (Iceland) ("ICA"), Art. 15a, *available at* http://www.wipo.int/wipolex/en/text.jsp?file_id=223710.

¹⁴ *See* ICA Art. 15a.

distributes payments, and nonmembers have the same right to remuneration as members of the organization.¹⁵ ECL applies to several types of reproduction, including: (i) reproduction for business use; (ii) certain broadcast uses (including cable rebroadcast of direct or satellite broadcasts); and (iii) display of certain photographs of visual arts on television.¹⁶

IV. NORWAY

Norway has implemented ECL provisions for several areas, including: (i) reproduction for educational purposes, including some digital copying and use of broadcasts; (ii) certain reproduction by public and private institutions, organizations, and commercial enterprises for their own internal use; (iii) certain broadcast uses of published works; and (iv) some archival, museum and library uses of published works.¹⁷ The Norwegian government must approve all organizations that represent rights holders in the ECL system.¹⁸ Any managing organization must represent a substantial amount of authors whose works are used in Norway.¹⁹ The terms negotiated by the managing organizations are binding on nonmember rights holders, who must be treated the same as members.²⁰ Nonmembers, however, have the right to demand individual remuneration.²¹

V. SWEDEN

In Sweden, the ECL regime covers several types of works, including: (i) certain reproduction (including digital reproduction) for educational purposes; (ii) governmental, municipal, business and organization reprographic reproduction of published literary works (including works of fine art within such literary works) for internal purposes; (iii) archival and library use to provide works to the public; and (iv) certain retransmission of broadcasts.²² Managing organizations must represent “a substantial number of Swedish

¹⁵ *See id.*

¹⁶ *See id.* Arts. 15a, 23, 23a, 25, 45a.

¹⁷ *See* Act No. 2 of May 1961 Relating to Copyright in Literary, Scientific and Artistic Works, etc., With Subsequent Amendments, Latest of 22 Dec. 2006 (Norway) (“NCA”), §§ 13b, 14, 16a, 30, 32, 34, *unofficial translation available at* <http://www.kopinor.no/en/copyright/copyright-act>; *Collective Management* at 300.

¹⁸ *See Collective Management* at 296.

¹⁹ *See* NCA § 38a.

²⁰ *See id.* § 37.

²¹ *See id.*

authors in the field concerned.”²³ Sweden is the only Nordic country that does not require the government to approve managing organizations.²⁴ Non-represented rights holders must be treated like nonmember authors regarding remuneration, although nonmembers are able to demand individual remuneration for third party use of their works.²⁵ Additionally, non-represented rights holders can prohibit most uses of their works.²⁶

²² See Act on Copyright in Literary and Artistic Works (as amended up to Apr. 1, 2009) (Sweden) (“SCA”), Arts. 42b-42f, available at http://www.wipo.int/wipolex/en/text.jsp?file_id=241513; see also *Collective Management* at 300, 301.

²³ SCA Art. 42a; see also *Collective Management* at 294.

²⁴ See *Collective Management* at 296.

²⁵ See SCA Art. 42a; *Collective Management* at 294, 295.

²⁶ See *Collective Management* at 294.

APPENDIX G **CURRENT U.S. COPYRIGHT STATUTORY LICENSES**

Current U.S. Copyright Law Statutory Licenses

Code Section	License	Beneficiary	Rate Setting Mechanism	Administrator of Royalties	Notes
111	<i>Cable Retransmission</i> Public performance of broadcast programming	Cable operators § 111(d)	Statutory rate per § 111(d)(1) subject to CRB adjustment per § 801(b)(2). Distribution determined by CRB §§ 111(d)(3); (4)	Copyright Office §§ 111(d)(2); (3)	§ 111(d)(6) provides copyright owners with an audit right.
112	<i>Ephemeral Recordings</i> Recordings which facilitate digital performances of sound recordings	"Transmitting organizations" licensed to make public performances of sound recordings under § 114. § 112(e)(1)	Copyright Royalty Board §§ 112(e)(3); 801(b)(1)	Third-Party Agent	§ 112(e)(2) expressly permits the designation of a common agent to negotiate rates and collect royalties, notwithstanding the antitrust laws.
114	<i>Digital Transmissions</i> Public performance of sound recordings	Qualifying non-interactive digital transmissions § 114(f)	Copyright Royalty Board §§ 114(f)(1), (2); 801(b)(1) Distributions prescribed by statute § 114(g)	Third-Party Agent	§ 114(e)(1) expressly permits the designation of a common agent to negotiate rates and collect royalties, notwithstanding the antitrust laws.
115	<i>Phonorecordings</i> Reproduction of musical works	Anyone distributing phonorecordings (or digital phonorecords) of nondramatic musical works, provided the primary purpose is to distribute them to the public for private use. § 115(a)(1)	Statutory (for phonorecords) § 115(c)(2), subject to CRB adjustment per § 801(b)(1). Determined by CRB (for DPD) § 115(c)(3)(A)	Direct to copyright owner; notice filed with Copyright Office if owner cannot be located. § 115(b)(1)	§ 115(c)(3)(B) expressly permits the designation of a common agent to negotiate rates and collect royalties, notwithstanding the antitrust laws.
118	<i>Public Broadcasting</i> Reproduction, performance, and display of musical, pictorial, graphical, and sculptural works	Public broadcasting entities § 118(b)	Copyright Royalty Board §§ 118(b)(4); 801(b)(1)	Undefined in statute. § 118(b) permits copyright owners to "designate common agents to negotiate, agree to, pay, or receive payments."	§ 118(b) expressly permits copyright owners to jointly negotiate royalty rates and terms, notwithstanding the antitrust laws.
119	<i>Satellite Retransmission</i> Public performance of broadcast programming	Satellite operators § 119(a)	Statutory obligation to negotiate in good faith to reach a voluntary agreement which, after appropriate notice, will be adopted by the Librarian of Congress. §§ 119(c)(1)(B)-(D). Absent a voluntary agreement, statute provides for compulsory arbitration. § 119(c)(1)(F)	Copyright Office §§ 119(b)(1); (3)	§ 119(b)(2) provides copyright owners with an audit right.
122	<i>Satellite Retransmission (local into local)</i> Public performance of broadcast programming	Satellite operators § 122(a)(1)	Statutory (no royalty fee for local-into-local) § 122(c)	Not applicable	
Chapter 10	<i>Digital audio recording devices</i>	Owners of copyrights in musical works and sound recordings that are embodied in publicly distributed recordings or transmissions. § 1006(a)	Statutory rate § 1004 Distributions determined by CRB § 1007	Copyright Office § 1005	§ 1003(c)(2) provides an audit right.

