



**DEPARTMENT OF COMMERCE
United States Patent and Trademark Office
National Telecommunications and Information Administration**

Docket No. 130927852-3852-01

**Response of the Library Copyright Alliance to the Request for Comments on
Department of Commerce Green Paper, *Copyright Policy, Creativity, and Innovation in
the Digital Economy***

The Library Copyright Alliance (LCA) welcomes this opportunity to respond to the Department of Commerce’s Request for Comments (RFC) on the Green Paper on Copyright Policy, Creativity, and Innovation in the Digital Economy. LCA consists of three major library associations—the American Library Association, the Association of College and Research Libraries, and the Association of Research Libraries—that collectively represent over 100,000 libraries in the United States employing over 350,000 librarians and other personnel.

I. Statutory Damages

The RFC asks several questions concerning statutory damages in the context of individual file sharers and secondary liability. The RFC implicitly recognizes that the potential statutory damages in these contexts may be disproportionately large relative to the harm caused. One of the drivers of these disproportionate damages also applies to libraries: the flawed limitation on statutory damages in situations involving innocent infringement.

Simplification of the innocent infringement provisions would go a long way to mitigating the problems with the statutory damages framework.

Currently, there are two categories of innocent infringement under 17 U.S.C. § 504(c)(2). First, if the infringer demonstrates that he or she was not aware and had no reason to believe that his or her acts constituted infringement, the court has the discretion to reduce the award of statutory damages from \$750 to \$200 per work infringed. However, under 17 U.S.C. § 402(d), statutory damages cannot be mitigated for innocent infringement if a copyright notice was properly affixed to the copy accessed by the infringer. This suggests that even if the infringer had a reasonable good faith belief that his or her action might fall within an exception or the terms of a license, a court cannot reduce the statutory damages if a notice was affixed to the work. Thus, this limitation is almost useless.

Second, a court must remit statutory damages for infringement by a nonprofit educational institution, library, archive, or public broadcasting entity, or its employees, where the infringer believed and had reasonable ground for believing that his or her use was a fair use under section 107. In addition to applying solely to a good faith belief that the use was permitted by section 107, and not by any other exception to the Copyright Act, this remission is available to educational institutions, libraries, and archives only with respect to infringements of the reproduction right; and to public broadcasting entities only with respect to performances of nondramatic literary works or the reproduction of a program embodying a performance of such work. However, a use in the digital networked environment almost always implicates more than just the reproduction right. Posting a document on a website, for example, can implicate the public display and distribution rights as well as the reproduction right. Therefore, this remission is of little benefit to libraries in the Internet age. Likewise, the

remission provides virtually no relief to public broadcasting entities because nondramatic literary works represent a small fraction of the works they transmit.

Both categories of innocent infringement would be rendered far more useful if they were replaced with a simple provision that permitted a court to reduce or remit statutory damages if the court found that the infringer believed and had reasonable grounds for believing that his or her use did not infringe. In such a situation, the infringer could still be liable for actual damages. This simplification of the innocent infringement defense would benefit nonprofit institutions, individual file sharers, and secondary infringers alike. Accordingly, the Internet Policy Task Force should recommend amendment of 17 U.S.C. § 504(c)(2) in this manner.

II. Online Licensing

A. The Impact of Licensing Platforms on Fair Use

Question 20 asks whether a central, online licensing platform for high-volume, low-value uses would be a useful endeavor in the United States. LCA believes not. Such a platform would inevitably be used by rights-holders to argue against fair use. They would contend that the availability of a license tilts the fourth fair use factor, the effect of the use upon the potential market for or value of the copyrighted work, against a fair use determination. From a policy perspective, granting rights-holders license fees for the kinds of uses now permitted by fair use—for example, quotations—would represent a windfall profit for the rights-holders without incentivizing more creative activity. It would also undermine fair use’s role as one of the Copyright Act’s “built-in First Amendment accommodations.” *Golan v. Holder*, 132 S. Ct. 873, 890 (2012).

Many of the uses engaged in by libraries and educational institutions could be described as high-volume and low-value. In the litigation concerning Georgia State University's electronic reserve system, *Cambridge University Press v. Becker*, 863 F. Supp. 2d 1190 (N.D. Ga. 2012), the publishers argued that the availability of licenses such as those offered by the Copyright Clearance Center (CCC) defeated Georgia State's fair use claim. The court rejected this contention, finding that for most of the works at issue, a license for a digital use of an excerpt in fact was not available. But as online licensing platforms become more robust, rights-holders will argue even more vigorously that courts should reject the assertion of fair use in cases involving high-volume, low-value uses by libraries and education institutions.¹ LCA strongly believes that such uses often are transformative and that when a use is transformative, a rights-holder "does not suffer market harm due to the loss of license fees." *Bill Graham Archives, Dorling Kindersley Ltd.*, 448 F.3d 605, 615 (2d Cir. 2006). This is because a rights-holder may not preempt a transformative market. *Id.* at 614. Moreover, the Supreme Court recognized that fair use "affords considerable latitude for scholarship and comment," *Golan*, 132 S. Ct. at 890, precisely the purposes of the uses enabled by libraries and educational institutions. Nevertheless, the mere existence of online licensing platforms may encourage rights-holders to allege market harm in infringement actions, thereby imposing significant litigation costs on libraries and educational institutions.

B. Collective Rights Organizations

Making matters worse for libraries, the online licensing platform may be operated by a collective rights organization (CRO), which would have a financial incentive to bring

¹ Rights-holders could also use these online licensing platforms to argue against fair use in cases involving remixes, another topic raised by the RFC.

enforcement actions. Indeed, the CCC paid half of the publishers' litigation expenses in the *Georgia State* case.²

The RFC asks generally how the government can support the development of the online licensing environment. The Copyright Office has offered collective licensing as a possible solution for the obstacle copyright law places in the path of new uses of works enabled by innovative technologies.³ Collective licensing does have the potential to reduce transaction costs when a large number of works are licensed to a large number of users, thereby benefiting both rights holders and users. However, the track record of CROs reveals that they often fail to live up to that potential. Although there are a wide variety of CROs operating under divergent legal frameworks, many unfortunately share the characteristic of serving their own interests at the expense of artists and the public.

² Over the past ten years, CCC has collected and paid out over \$1.4 billion in royalties to rights holders, including a record \$188.7 million in fiscal year 2013. "CCC Paid a Record \$188.7 Million in Royalties in 2013," *Publishers Weekly*, Oct. 28, 2013, http://www.publishersweekly.com/pw/by-topic/digital/copyright/article/59732-ccc-paid-a-record-188-7-million-in-royalties-in-2013.html?utm_source=Publishers+Weekly&utm_campaign=67be6dff95-UA-15906914-1&utm_medium=email&utm_term=0_0bb2959cbb-67be6dff95-304621253.

³ See United States Copyright Office, *Legal Issues in Mass Digitization: A Preliminary Analysis and Discussion Document* (2011), available at http://www.copyright.gov/docs/massdigitization/USCOMassDigitization_October2011.pdf ("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"); Pamela Samuelson, *Legislative Alternatives to the Google Book Settlement*, 8136 Colum. J. L. & Arts 1, 12 (2011), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1818126 ("If Congress wanted to authorize the creation of an [institutional subscription database] of in-copyright, out-of-print books, such as that contemplated in the [Google Book Search] settlement, without the necessity of clearing rights on a book by book basis, one option would be to adopt an extended collective licensing (ECL) regime akin to those authorized in several Nordic countries"); David Hansen, *Orphan Works: Mapping the Possible Solution Spaces* 16 (Berkeley Digital Library Copyright Project White Paper No. 2, 2011), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2019121 ("[S]ome suggest that ECL regimes can be adapted to specifically allow for the mass digitization initiatives that are required to bring about large online digital libraries").

The CROs often are well-organized and highly profitable, and have succeeded in promoting themselves and the collective licensing model.⁴ A recent article co-authored by the undersigned tells the other side of the story, thereby providing balance to any policy discussion that addresses collective licensing and CROs.⁵ Even experts who tout the benefits of collective licensing in the abstract often include the caveat that in practice these bodies require a “well-developed structure and culture of collective management.”⁶ The episodes recounted in the article reveal a long history of corruption, mismanagement, confiscation of funds, and lack of transparency that has deprived artists of the revenues they earned. At the same time, CROs have often aggressively sought fees to which they were not legally entitled or in a manner that discredited the copyright system. While properly regulated CROs in some circumstances may enhance efficiency and advance the interests of rights holders and users, the Task Force should be aware of CROs’ mixed history as it considers the appropriateness of CROs as a possible solution to copyright problems in general and the obstacles relating to online licensing in particular.

⁴ See, e.g., the many interventions of the International Federation of Reproduction Rights Organizations in national and international policymaking processes. Position Papers | IFRRO, <http://www.ifrro.org/content/position-papers> (last visited January 4, 2013).

⁵ Jonathan Band and Brandon Butler, “Some Cautionary Tales About Collective Licensing,” *forthcoming in Michigan State International Law Review*, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2149036.

⁶ Johan Axhamn & Lucie Guibault, *Instituut Voor Informatierecht, Cross-border extended collective licensing: a solution to online dissemination of Europe’s cultural heritage?* viii (2011). See also, *id.* at 41 (“[ECL] presupposes the existence of a representative CMO with a sound culture of good governance and transparency”); Samuelson, *supra* n. 2, at 24 (noting that the unfamiliarity of ECLs may be a barrier to their adoption in the U.S.); Tarja Koskinen-Olsson, *Collective Management in Nordic Countries*, in *Collective Management of Copyright and Related Rights* 283, 306 (Daniel J. Gervais ed., 2010) (“[The system of ECLs in Nordic countries] presupposes that the ‘copyright market’ is well organized and disciplined.”). Experts have suggested that the United States has a copyright culture that would be less favorable to a broader role for CROs. See, e.g., Daniel J. Gervais, *The Landscape of Collective Management Schemes*, 34 *Colum. J.L. & Arts* 423, 424 (2011) (explaining that “the fundamentally *economic* model under which [CROs] operate in the United States, and the worldview that informs it, are likely to limit” the role that CROs play in the copyright ecosystem in the U.S.).

C. Contractual Restrictions on Copyright Exceptions

The RFC implicitly assumes that the development of an online licensing environment is a wholly positive objective. The RFC fails to consider, however, a possible negative consequence of the proliferation of licensing: the use of contract terms to circumvent limitations in the Copyright Act. This is a serious problem confronting libraries, which license access to e-books and electronic databases of journals.⁷ Publishers frequently include terms in their licenses that restrict libraries' ability to exercise their rights under sections 107 (fair use), 108 (library exceptions), and 109(a) (first sale doctrine). This problem will only get worse as publishers distribute more of their materials solely in digital formats.

Courts have considered a variety of legal theories for refusing to enforce contractual restrictions on copyright exceptions in the mass-market license context. These include questioning whether a consumer manifested assent sufficient to form a contract, preemption under Section 301(a) of the Copyright Act, and constitutional preemption. No consensus has emerged on any of these theories, in part because of variations in the facts of these cases in terms of the nature of the contract, the nature of the relationship between licensor and licensee, and the nature of the work. Further, it is unclear how courts would apply these theories in the library context.

Congress and other legislatures frequently restrict the waiver by contract of protections provided by statute.⁸ Indeed, in the Copyright Act itself, Congress provided that a termination of a grant of copyright “may be effected notwithstanding any agreement to the

⁷ Research libraries already spend two-thirds of their acquisition budget on licenses to electronic resources.

⁸ For a list of examples of statutory limitations on contractual waivers of rights in various jurisdictions, see Jonathan Band and Deborah Goldman, *Restrictions on the Waiver of Rights*, <http://www.arl.org/focus-areas/copyright-ip/2871-restrictions-on-the-waiver-of-rights>. Restrictions on “contracting out” are also included in the legislative proposals of the UK Intellectual Property Office, the Irish Copyright Review Committee, and the Australian Law Reform Commission.

contrary.” 17 U.S.C. § 203(a)(5). Congress included this provision to protect authors from publishers who might take advantage of their bargaining strength to force authors to waive their termination rights.

As the Task Force examines online licensing, it should assess the adverse impact of the potential replacement of the public law of copyright with the private law of contract, both on libraries and the public at large.⁹ This assessment could very well lead to the conclusion that the government role in “improving the online licensing environment” is not to encourage the growth of the online licensing marketplace but to limit its possible excesses. This regulatory role is more appropriate for government than the direct or indirect subsidization of one particular business model. Accordingly, LCA strongly urges the Task Force to advise Congress to adopt restrictions on the enforcement of contractual terms that attempt to limit exceptions to the Copyright Act such as first sale or fair use. Likewise, the Task Force should recommend greater oversight of CROs.

Respectfully submitted,



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⁹ The Register of Copyrights, Maria Pallante, identified this issue when she observed that “Congress may not want a copyright law where everything is licensed and nothing is owned.” Maria Pallante, *The Next Great Copyright Act*, at 18.