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COPYRIGHT LAW—UNFAIR USE: UNIONIZING CONTENT CREATORS THROUGH LEGISLATION TO SOLVE THE PROBLEM OF MASS DIGITIZATION

*Timothy A. Rucki**

Mass digitization is the way of the future. Universities, businesses, and private collectors alike are taking entire libraries, scanning them onto computers, and making them into searchable documents. This makes out-of-print works accessible to brand-new audiences, gives researchers new tools for studying language usage over time, and allows passages from books to be found in search engine results.

Google and the Authors Guild just finished a decade-long court battle in the Second Circuit over whether Google's "Google Books" project—an undertaking which has mass digitized thirty million books to date without getting prior permission from individual authors—is a legally permissible endeavor. Google won. But that's not the end of this story. The Second Circuit determined that Google Books was permissible under the fair use doctrine, but this decision did not and cannot adequately serve as the final authority on mass digitization projects. This decision disrespects the needs of authors, which in turn disrespects the needs of the public. Congressional legislation must be enacted to regulate mass digitization. It is the only way we can ensure that authors, mass digitizers, and the public alike have their interests represented.

This Note argues that Congress should pass legislation utilizing a framework already formulated by the Copyright Office. Legislation would create Copyright Management Organizations, which would negotiate directly with mass digitizers on behalf of individual copyright holders for licensing fees to use their works. Congressional action would warm the frosty climate that stifles digitization efforts. This Note will prove this assertion by examining the success of similar schemes both domestically and internationally.

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in both the public and private sectors.

INTRODUCTION

Over twenty-two centuries ago, Pharaoh Ptolemy I hatched a plan to compile the world's written works into a singular, accessible collection in the Great Library at Alexandria.¹ Motivated by a great hunger for knowledge, Ptolemy I and his sons generously funded this project, and would search each ship that arrived at the port of Alexandria for new manuscripts to duplicate.² Over 100 scribes worked to translate and copy these texts.³ Upon completion of each scroll, the library often retained the original, and a copy was sent to the original owner.⁴ With an estimated 500,000 scrolls, the Great Library held "between 30 and 70 percent of all books in existence."⁵ Tragically, with nearly all the world's books under one roof, unknown perpetrators burned the Great Library to the ground.⁶

With the destruction of the Great Library, humanity's last concerted effort to centralize the world's knowledge ended.⁷ This dream has drifted into a state of impossibility over the last two millennia, as the sheer volume of new information being generated has far outpaced our ability to process, compartmentalize, and archive it.⁸

In the summer of 2015, librarians in Berkley, California, went through the process of painstakingly selecting forty thousand books to remove from the shelves to save space.⁹ Not all of these books were sent off to the recycling center.¹⁰ Many were donated to nonprofits or given a second home elsewhere.¹¹ But this provided little comfort for throngs of protesters, who balked at the restriction of society's collective access to

1. See Brian Haughton, *What Happened to the Great Library at Alexandria?*, ANCIENT HIST. ENCYCLOPEDIA (Feb. 1, 2011), <http://www.ancient.eu/article/207/> [<https://perma.cc/RS2Z-HJJ4>].

2. *Id.*

3. *Id.*

4. *Id.*

5. Kevin Kelly, *Scan This Book!*, N.Y. TIMES MAG., May 14, 2006, PROQUEST, Doc. No. 215466243.

6. Haughton, *supra* note 1.

7. See Kelly, *supra* note 5.

8. See *id.*

9. Daniel A. Gross, *Weeding the Worst Library Books*, NEW YORKER (Apr. 26, 2016), <http://www.newyorker.com/books/page-turner/weeding-the-worst-library-books> [<https://perma.cc/GJJ4-JRUH>].

10. *Id.*

11. *Id.*

information.¹² Library officials call the process “weeding,” and assert that it is a practical, well-researched practice, with medieval origins.¹³ Further, Berkeley librarian Mary Kelly reasoned that “public libraries aren’t designed to preserve unusual texts ‘There are places where you want to hang on to the weird stuff of our culture. That’s in museums and archives.’”¹⁴

Maybe Kelly has a point. Perhaps the odds and ends of the world’s cultures do not belong in the limited shelf space of the nation’s libraries, whose financial situations are “at best, furiously treading water.”¹⁵ However, solutions to a library’s limits on shelf space should not inherently condemn thousands of books to dusty, seldom-traveled archives. Libraries are intended to better communities and serve the public good, and Kelly’s outlook on what to do with surplus literature overlooks an avenue more convenient and practical to serve these interests—the digitization of these works to one online medium with endless available space.¹⁶

Much like the ancient Egyptians, Google has undertaken the mission of curating every book that has ever been published—all 129 million, spanning over 480 different languages.¹⁷ However, instead of 100 scribes translating scrolls onto papyrus, Google is employing an armada of lightning-fast scanners and converting print pages into computer documents at a rate of 6000 pages per hour.¹⁸ Instead of sailing ships on the high seas to faraway lands, Google has negotiated contracts with major universities and public libraries for usage of their books.¹⁹

12. *Id.*

13. *Id.*

14. *Id.*

15. Michael Kelley, *The New Normal: Annual Library Budgets Survey 2012*, LIBR. J. (Jan. 16, 2012), <http://lj.libraryjournal.com/2012/01/funding/the-new-normal-annual-library-budgets-survey-2012/> [https://perma.cc/7KWK-KA5N].

16. Joab Jackson, *Google: 129 Million Different Books Have Been Published*, PCWORLD (Aug. 6, 2010, 1:20 PM), http://www.pcworld.com/article/202803/google_129_million_different_books_have_been_published.html [https://perma.cc/S9F8-CB6L].

17. *See id.* The 129 million figure is an estimate reached through analyzing cataloging methods such as International Standard Book Numbers (ISBN). *Id.* The 480 language figure accounts for languages encountered thus far, and even includes works written in languages derived from fiction, such as Klingon. *Id.*

18. *See* Stephen Heyman, *Google Books: A Complex and Controversial Experiment*, N.Y. TIMES, Oct. 28, 2015, PROQUEST, Doc. No. 1727707444.

19. *See generally UC Libraries Mass Digitization Projects*, CAL. DIG. LIBRARY (Mar. 20, 2015), <http://www.cdlib.org/services/collections/massdig/faq.html> [https://perma.cc/7QQN-F8KY].

Google has begun a process called mass digitization.²⁰ Mass digitization is defined as “the conversion of [written] materials on an industrial scale . . . of whole libraries without making a selection of individual materials.”²¹ Despite the vocal and almost universal support for the concept of mass digitization, Google’s project has faced uncertainty and controversy since its incarnation.²²

The uncertainty in the project is two-fold. First, mass digitization traditionally has relied upon the questionable practice of appropriating books into projects without first obtaining a license from the respective copyright holders.²³ Mass digitizers rationalize this practice under the fair use doctrine, but this doctrine alone is inadequate to monitor or protect mass digitization projects.²⁴

Second, no governmental body with the authority to make binding rules regarding mass digitization is currently willing to do so.²⁵ The Copyright Office does not have adequate authority and courts defer to Congress, but Congress has not even begun to explore its options.²⁶ The closest thing to a rule that exists is a single decision by the Second Circuit Court of Appeals in *Authors Guild v. Google, Inc.*, which held, in a highly specific fact pattern, that Google’s mass digitization project is permissible under the fair use doctrine.²⁷ This decision will be discussed

20. Karen Coyle, *Mass Digitization of Books*, 32 J. ACAD. LIBRARIANSHIP 641, 641 (2006).

21. *Id.*

22. *See, e.g.*, Statement of Interest of the United States of America Regarding Proposed Amended Settlement Agreement at 1, *Authors Guild, Inc. v. Google Inc.*, 770 F. Supp. 2d 666 (S.D.N.Y. Mar. 22, 2011) (No. 05 Civ. 8136) [hereinafter U.S. Statement of Interest]; *see also Where We Stand, Authors Guild v. Google*, AUTHORS GUILD <https://www.authorsguild.org/where-we-stand/authors-guild-v-google/> [<https://perma.cc/A26T-KJW3>].

23. *Authors Guild, Inc. v. Google Inc.*, 954 F. Supp. 2d 282, 286 (S.D.N.Y. 2013).

24. *See id.* at 289–90; U.S. COPYRIGHT OFFICE, ORPHAN WORKS AND MASS DIGITIZATION: A REPORT OF THE REGISTER OF COPYRIGHTS 40–41 (2015), <https://www.copyright.gov/orphan/reports/orphan-works2015.pdf> [<https://perma.cc/A3WH-5967>].

25. *See, e.g.*, *Eldred v. Ashcroft*, 537 U.S. 186, 212–13 (2003); Transcript of Oral Argument at 28, *Authors Guild v. Google, Inc.*, 804 F.3d 202 (2d Cir. 2015) (No. 05 Civ. 8136) (on file with the Authors Guild) [hereinafter Transcript of Oral Argument]. During oral arguments, presiding Judge Chin remarked, “[i]s anything done in Congress these days? How long would it take reasonably for this to be resolved in Congress? Even the issue of orphan books has been percolating in Congress for years and years.” Transcript of Oral Argument at 28.

26. *See Authors Guild v. Google Inc.*, 770 F. Supp. 2d 666, 677 (S.D.N.Y. 2011); U.S. COPYRIGHT OFFICE, *supra* note 24, at 128; *see also* Transcript of Oral Argument, *supra* note 25, at 28.

27. *Authors Guild v. Google, Inc.*, 804 F.3d 202, 229 (2d Cir. 2015).

and analyzed at length throughout this Note.

Since there is currently insufficient statutory, common law, or regulatory guidance on the topic, it is imperative that Congress pass legislation that solves the mass digitization problem. Specifically, this Note will argue that Congress should implement an extended collective licensing model overseen by the Copyright Office, which would permit Copyright Management Organizations to negotiate on behalf of all creators of a certain type of written work.

Part I of this Note will introduce the background of copyright law, explain its history from the sixth century up through the modern day, and introduce mass digitization—both the technology and digitizers' intentions. Then, it will discuss the problems that mass digitization is facing conceptually, through the lenses of individual stakeholders, Congress, the Judiciary, mass digitizers, content creators, and content consumers. Finally, Part I will conclude by outlining the fair use doctrine and applying it to mass digitization.

Part II of this Note argues for a legislative solution to the mass digitization problem and begins by describing the necessity for legislation. Additionally, Part II will demonstrate how the fair use doctrine is inefficient, and provide three possible legislative solutions: direct licensing, voluntary collective licensing, and extended collective licensing. Ultimately, this Note argues that an extended collective licensing model is the best legislative solution.

Part III will then discuss the compatibility of collective licensing models with creative works. Therein, parallels are drawn between extended collective licensing legislation and the activities of the American Society of Composers, Authors, and Publishers. Further, similarities with international programs, both private and public, that serve similar purposes to the proposed legislation will be examined. Lastly, Part III will address counterarguments and reaffirm the necessity for this proposed legislation.

I. BACKGROUND OF COPYRIGHT LAW

Part I of this Note aims to highlight ancient and present-day conflicts in copyright systems, both in the United States and abroad. These disagreements set the stage for illuminating what the place of mass digitization is within the context of copyright law, and why mass digitization is a contentious issue.

A. *History and Makeup of the Copyright System*

In modern America, the copyright system operates through a combination of congressional legislation and judge-made case law.²⁸ Our copyright system, where two bodies of law share governance, can be clunky at times, and can be susceptible to undue corporate influence.²⁹ However, our system boasts comparative peacefulness and rigidity as compared to the models—or lack thereof—in the Middle Ages, largely thanks to the efforts of the founding fathers near the time of the United States' birth.³⁰

1. Copyright Wars

In the middle of the sixth century, two would-be canonized saints went to war against one another.³¹ Saint Columba, who studied under Saint Finian, secretly got his hands on one of Saint Finian's most prized books.³² This book was the first Latin translation of the Bible to reach Ireland.³³ Saint Columba, a transcriber by profession, secretly copied the entirety of the holy text for his own use.³⁴ Saint Finian, enraged upon discovering what his pupil had done, took the matter to King Diarmait mac Cerbhiail, the High King of Ireland, for arbitration.³⁵ “[Saint] Finian's argument was simple: My book. You can't copy it. . . . [I]f anyone *was* going to copy it . . . it should be done through certain procedures and certainly not in secret under [my] own roof.”³⁶ Saint Columba argued that copying the book caused no damage.³⁷ “‘It is not right,’ he asserted, ‘that the divine words in that book should perish, or that I or any other should be hindered from writing them or reading them or spreading them among the tribes.’”³⁸ Saint Columba believed that if

28. See generally Lawrence Lessig, *Make Way for Copyright Chaos*, N.Y. TIMES (Mar. 18, 2007), <http://www.nytimes.com/2007/03/18/opinion/18lessig.html>.

29. See generally *id.*; see also *infra* Section I.A.2.

30. *Infra* Section I.A.3.

31. Ruth Suehle, *The Story of St. Columba: A Modern Copyright Battle in Sixth Century Ireland*, OPENSOURCE.COM (June 9, 2011), <https://opensource.com/law/11/6/story-st-columba-modern-copyright-battle-sixth-century-ireland> [<https://perma.cc/MGT9-GCG9>].

32. *Id.*

33. Greg McMullen, *The History of Copyright, Part 1: The Battle of the Book*, ASCRIBE (Mar. 9, 2015), <https://www.ascribe.io/our-radar/the-battle-of-the-book/> [<https://perma.cc/6FAF-37GU>].

34. Suehle, *supra* note 31.

35. *Id.*

36. *Id.*

37. *Id.*

38. *Id.*

one owns knowledge through books, they have an obligation to spread that knowledge, and to do otherwise is to commit a worse offense than his unlicensed copying.³⁹

The King disagreed, and reasoned that, “[t]o every cow belongs its calf; to every book its copy.”⁴⁰ Saint Columba rejected this ruling, gathered an army, and led a rebellion against the King.⁴¹ The Battle of Cúl Dreimhne—The Battle of the Books—ensued.⁴² Over 3000 of the rebellion’s men died at the hands of the King, and the defeated Saint Columba was sent into exile.⁴³ Not only did Saint Columba lose the physical battle, he also lost the philosophical battle against the concept of copyright.⁴⁴ While contemporary copyright disputes do not end up on the battlefield, the same tensions run deep with stakeholders, who either desire to have control and the value of their work protected, or wish to see distribution of all intellectual works among the masses.⁴⁵

2. Early American Copyright Law, the Framers’ Intent, and its Effects on Mickey Mouse and the Present Day

The Framers first sought to strike a balance between the interests of copyright holders and the general public by drafting copyright language into the Constitution.⁴⁶ The selected language, first proposed by James Madison, reads “The Congress shall have [p]ower [t]o . . . promote the [p]rogress of [s]cience and useful [a]rts, by securing for limited [t]imes to [a]uthors and [i]nventors the exclusive [r]ight to their respective [w]ritings and [d]iscoveries.”⁴⁷ Thomas Jefferson proposed placing a provision in the Bill of Rights, rather than codifying copyright protections in Article I.⁴⁸ Jefferson’s suggested language reads,

39. *See id.*

40. *Id.*

41. McMullen, *supra* note 33.

42. *Id.*

43. *Id.*; Suehle, *supra* note 31.

44. *See* Suehle, *supra* note 31.

45. McMullen, *supra* note 33.

46. *See Copyright Timeline: A History of Copyright in the United States*, ASS’N RESEARCH LIBRARIES, <http://www.arl.org/focus-areas/copyright-ip/2486-copyright-timeline> [https://perma.cc/9CSK-T3GQ].

47. U.S. CONST. art. I, § 8, cl. 8; *see also* Thomas B. Nachbar, *Patent and Copyright Clause*, HERITAGE FOUND., <http://www.heritage.org/constitution/#!/articles/1/essays/46/patent-and-copyright-clause> [https://perma.cc/29VM-VX8V].

48. *From Thomas Jefferson to James Madison, 28 August 1789*, FOUNDERS ONLINE, <http://founders.archives.gov/documents/Jefferson/01-15-02-0354> [https://perma.cc/5LCP-BEX4] [hereinafter FOUNDERS ONLINE].

“[m]onopolies may be allowed to persons for their own productions in literature and their own inventions in the arts for a term not exceeding [undecided] years but for no longer term and no other purpose.”⁴⁹ The difference between these two provisions is that Jefferson’s version would provide—had the specific number of years been decided upon—an exact term length for a copyright.⁵⁰

Madison’s version, which was included in the Constitution, left the language more ambiguous, and gave Congress deference to decide—and potentially later change—the length of a copyright.⁵¹ Had Jefferson’s proposed language been used, it would have required the passage of a constitutional amendment in order to change the length of a copyright.⁵² To be proposed, a constitutional amendment requires a two-thirds majority vote in both houses of Congress, or two-thirds of state legislatures to call for a constitutional convention.⁵³ This level of support is rare, and as a result, there have only been seventeen amendments passed since the Bill of Rights was ratified.⁵⁴

Over time, the duration of a basic copyright has steadily increased.⁵⁵ In 1790, a copyright term lasted fourteen years with an optional additional fourteen-year renewal.⁵⁶ Over a century later, upon the passage of the Copyright Act of 1909, the term had doubled to twenty-eight years with an optional additional twenty-eight-year renewal.⁵⁷ Shortly after, a character named Steamboat Willy emerged for the first time and found his way into the hearts of Americans over the next half century, with his moniker changing to a more recognizable name: Mickey Mouse.⁵⁸

Under the terms of the 1909 Act, Mickey Mouse’s copyright term

49. *Id.*

50. Compare U.S. CONST. art. I, § 8, cl. 8, with FOUNDERS ONLINE, *supra* note 48.

51. See U.S. CONST. art. I, § 8, cl. 8.

52. See *Constitutional Amendment Process*, NAT’L ARCHIVES, (Aug. 15, 2016), <https://www.archives.gov/federal-register/constitution> [https://perma.cc/BV5X-8BWR] [hereinafter NAT’L ARCHIVES].

53. *Id.* None of the 27 amendments to the Constitution have been proposed by constitutional convention. *Id.*

54. *Id.*

55. See Steve Schlackman, *How Mickey Mouse Keeps Changing Copyright Law*, ARTREPRENEUR (Oct. 18, 2017), <https://artpreneur.com/how-mickey-mouse-keeps-changing-copyright-law/> [https://perma.cc/QP56-THUC].

56. *Id.*

57. *Id.*

58. *Id.*

was set to expire in 1984.⁵⁹ Disney owned the Mickey Mouse copyright and feared its cash cow's release into the public domain, which would occur at the end of its copyright term.⁶⁰ For this reason, the corporation put forth a substantial lobbying campaign that urged for an extension of copyright length.⁶¹ In 1976, an updated Copyright Act passed, and the term for corporate copyrights was extended from fifty-six years to seventy-five years.⁶² This kept Mickey Mouse safe until Disney's new copyright expiration date of 2003.⁶³

As 2003 approached, Disney kept at their lobbying efforts, and five years before Mickey Mouse's release into the public domain, the Sonny Bono Copyright Term Extension Act of 1998 passed.⁶⁴ Today, copyrights for corporations are safe for ninety-five years, and Disney can rest easy until Mickey Mouse's next expiration date in 2023.⁶⁵

This string of events highlights the difference between the Madison model and Jefferson model of copyright protection. Given the difficulty of passing a Constitutional amendment, it is unlikely that even a corporation as powerful as Disney could have influenced two-thirds of Congress or two-thirds of state legislatures into passing the multiple Constitutional amendments needed to extend the copyright protection term as long as it did.⁶⁶

Similarly, the United States currently finds itself facing another copyright conundrum—the choice being action or inaction through legislation.⁶⁷ Like the language differences between the Madison and Jefferson models, this fork in the road will have serious implications on the future of copyright law.

59. *Id.*

60. *See id.*

61. *Id.*

62. *Id.*

63. *Id.*

64. *Id.*

65. *See id.* It was never explicitly stated by Congress that Disney's efforts were responsible for any of the copyright term extensions. *Id.* However, due to Disney's lobbying efforts, the public's perception was that Disney was responsible. *Id.* The Sonny Bono Copyright Term Extension Act of 1998 was nicknamed the "Mickey Mouse Protection Act." Lawrence Lessig, *Copyright's First Amendment*, 48 UCLA L. REV. 1057, 1065 (2001).

66. *See* NAT'L ARCHIVES, *supra* note 52.

67. *See The Authors Guild's Top Legislative Priorities-2015*, AUTHORS GUILD, 1–2 (2015), <https://www.authorsguild.org/wp-content/uploads/2015/05/2015-AG-Top-Legislative-Priorities.3.23.15.pdf> [<https://perma.cc/FX9X-62L5>].

3. Federal Copyright Protection and Litigating Copyright Claims

“The necessity of extending to the creator of literary works a suitable reward for his labors has long been recognized and cannot seriously be questioned.”⁶⁸ As such, literary works fall under the safeguard of federal copyright protection.⁶⁹ Owners of the copyright of literary works have the exclusive rights to reproduce, sell, distribute, or prepare derivative works of their copyrighted material.⁷⁰ Further, “[a]nyone who violates any of the exclusive rights of the copyright owner . . . is an infringer of the copyright.”⁷¹ The law clearly aims to establish protections for authors so they can continue to write, while remaining protected from others infringing on their work for monetary gain.⁷²

From this protection, it naturally follows that the process for copyright holders to seek redress for copyright infringement should be both accessible and straightforward. However, this is not the case when a copyright infringer is using a fair use defense.⁷³ Fair use consists of “four broad factors which guide whether the permission-less use of a copyrighted work is fair. This means that fair use can evolve and change over time; it also means that the only real way to find out if something is ‘fair use’ is to ask a federal court.”⁷⁴ The Copyright Office seems to agree, stating, “[t]he distinction between what is fair use and what is infringement in a particular case will not always be clear or easily defined.”⁷⁵ Indeed, “[t]he costs of obtaining counsel and maintaining a copyright cause of action in federal court effectively precludes most individual copyright owners whose works are clearly infringed from being able to vindicate their rights and deter continuing violations.”⁷⁶

68. Darrell L. Peck, *Copyright-Infringement of Literary Works—An Elemental Analysis*, 38 MARQ. L. REV. 180, 180 (1955).

69. 17 U.S.C. § 102(a)(1) (2012).

70. 17 U.S.C. § 106(1)–(3) (2012).

71. 17 U.S.C. § 501(a) (2012).

72. See *The Authors Guild’s Top Legislative Priorities-2015*, *supra* note 67, at 1.

73. See Robinson Meyer, *After 10 Years, Google Books Is Legal*, ATLANTIC (Oct. 20, 2015), <http://www.theatlantic.com/technology/archive/2015/10/fair-use-transformative-level-google-books/411058/> [<https://perma.cc/2AA5-3VV7>].

74. *Id.*

75. David Kravets, *Fair Use Prevails as Supreme Court Rejects Google Books Copyright Case*, ARS TECHNICA (Apr. 18, 2016, 11:17 AM), <http://arstechnica.com/tech-policy/2016/04/fair-use-prevails-as-supreme-court-rejects-google-books-copyright-case/> [<https://perma.cc/M6WM-BLTS>].

76. *The Authors Guild’s Top Legislative Priorities-2015*, *supra* note 67 at 1.

B. Mass Digitization

This section of the Note examines both the technology and the intentions behind mass digitization.⁷⁷ Continued technological advancement encourages and challenges mass digitizers to increase productivity, and in turn increase the humanitarian benefit associated with digitizing.⁷⁸

1. The Technology

For bulk home scanning, a Canon imageFormula DR-C225 was *PC Magazine's* editor's choice in 2014.⁷⁹ For \$449, one can obtain this device, which scans at a maximum rate of twenty-five pages per minute.⁸⁰ While this may sound fast, Google's mass digitizing machines are faster—four times faster.⁸¹ Google's mass digitizing machines can scan books at a breathtaking speed of 6000 pages per hour.⁸²

Before Google patented a new system for scanning books, the process of mass digitizing was tedious and often destroyed the book being scanned.⁸³ Mass digitizers had two options.⁸⁴ They could press the book flat using a glass plate, but this process is time consuming and inefficient.⁸⁵ Alternately, they could remove the binding from the book—effectively destroying it.⁸⁶ Google's process utilizes air blowers that turn pages, while infrared cameras take pictures of the pages.⁸⁷ The picture is then run through software that calculates the angle from which the photograph was taken.⁸⁸ Optical Character Recognition (OCR) software then makes the text on the page of the book searchable by a

77. See *infra* Section I.B.1; see also *infra* Section I.B.2.

78. See *infra* Section I.B.1; *infra* Section I.B.2.

79. M. David Stone, *Canon imageFormula DR-C225*, PC MAG. (Nov. 24, 2014, 11:38 AM), <http://www.pcmag.com/article2/0,2817,2472494,00.asp> [<https://perma.cc/AY55-7FQ5>].

80. *Id.*

81. See Heyman, *supra* note 18.

82. *Id.*

83. Maureen Clements, *The Secret of Google's Book Scanning Machine Revealed*, NPR (Apr. 30, 2009, 10:31 AM), http://www.npr.org/sections/library/2009/04/the_granting_of_patent_7508978.html [<https://perma.cc/TZS4-JHBM>].

84. *Id.*

85. *Id.*

86. *Id.*

87. Jeff Blagdon, *Google Engineer Builds \$1,500 Page-Turning Scanner Out of Sheet Metal and a Vacuum*, VERGE (Nov. 13, 2012, 12:10 AM), <http://www.theverge.com/2012/11/13/3639016/google-books-scanner-vacuum-diy> [<https://perma.cc/EZN5-7BH6>].

88. Clements, *supra* note 83.

computer user.⁸⁹ Once the entire book has been scanned, a copy of the book is completed, and a worker can place the next book in line on the machine to be scanned.⁹⁰

2. The Intentions

Conceptually, a universal library is a utopian concept.⁹¹ A universal, *digital* library is “even better than any earlier thinker could have imagined, because every work would be available to everyone, everywhere, at all times.”⁹² However, not every mass digitizer intends to operate on such a large scale.⁹³ Mass digitization projects range in size, from more than twenty-five million scanned works currently in the Google Books collection,⁹⁴ to projects with less than one percent of Google Books scanned works.⁹⁵

JSTOR, for example, takes a far more nuanced and careful approach to mass digitizing than Google does.⁹⁶ JSTOR’s primary focus is to digitize the full run of journals, in some cases dating as far back as the nineteenth century.⁹⁷ Their approach is methodical: JSTOR sources physical copies of journals from multiple libraries in order to ensure that damaged or missing pages are accounted for.⁹⁸

Similarly, in 2002, Stanford University undertook a mass digitization effort.⁹⁹ Stanford aimed to mass digitize all public domain

89. *Id.*

90. *Id.*

91. See, e.g., Peter Singer, *Google: A Universal Library?*, AL JAZEERA (Apr. 15, 2011), <http://www.aljazeera.com/indepth/opinion/2011/04/2011414112947284656.html> [https://perma.cc/DSN9-XBXF].

92. *Id.*

93. See Coyle, *supra* note 20, at 642.

94. See Heyman, *supra* note 18.

95. See Coyle, *supra* note 20, at 642. Microsoft will scan 100,000 “out-of-copyright works for the British library.” *Id.*

96. JSTOR is a large digital library used by universities, public libraries, and private individuals across the country. *Mission and History*, JSTOR, <http://about.jstor.org/about> [https://perma.cc/3Y7B-JW87]; see also Coyle, *supra* note 20.

97. See Coyle, *supra* note 20, at 642.

98. *Id.* This approach is far more nuanced than Google’s. *Id.* There are online Internet communities dedicated to uncovering and sharing Google’s various blunders and mistakes in books that have undergone the mass digitization process. Kenneth Goldsmith, *The Artful Accidents of Google Books*, NEW YORKER (Dec. 4, 2013), <http://www.newyorker.com/books/page-turner/the-artful-accidents-of-google-books> [https://perma.cc/B4R2-ZZQT]. “In addition to hands and fingers, I found pages scanned through tissue paper, pages scanned while mid-turn, and fold-out maps and diagrams scanned while folded The examples were everywhere.” *Id.*

99. Coyle, *supra* note 20, at 642.

books in its university library as such books are not protected under copyright law.¹⁰⁰ Stanford made use of both robotic scanners and manual scanners in this endeavor, with the former being capable of scanning 1500 pages per hour, and the latter merely 350 pages per hour.¹⁰¹ Google absorbed this project in 2004, and the mission was altered to include all of the books in the Stanford library—even those with copyright protections—thus claiming fair use of their works.¹⁰²

C. *The Problem of Mass Digitization*

There are two distinct issues facing mass digitization—logistics surrounding the operation of digitizing efforts and consensus between stakeholders.¹⁰³ The following section discusses the factors that have contributed to the existence of each issue.¹⁰⁴

1. Mass Digitization as a Concept

The collision of three factors create the perceived problem with mass digitization. First, mass digitization efforts involve a staggering number of books.¹⁰⁵ According to the United States Copyright Office, inherent in the term “mass digitization” is the implication that the “digital copying is so extensive as to make the individual clearance of rights a practical impossibility.”¹⁰⁶ Second, in order to get a license to use a copyrighted work, direct contact with the copyright owner is required.¹⁰⁷ This is not always a simple process, especially if the owner of a copyright is not readily accessible, or it is not apparent who the copyright owner even is.¹⁰⁸ Third, mass digitization is a popular idea.¹⁰⁹

100. *Id.*

101. *Equipment*, STANFORD LIBRARIES, <https://library.stanford.edu/research/digitization-services/labs/digital-production-group/equipment> [<https://perma.cc/6C28-EP2M>].

102. *Google Books*, STANFORD LIBRARIES, <https://library.stanford.edu/projects/google-books> [<https://perma.cc/5UL3-9TQY>].

103. *See infra* Section 1.C.1; *infra* Subsections 1.C.2.a–e.

104. *See infra* Section 1.C.1; *infra* Subsections 1.C.2.a–e.

105. *See* Heyman, *supra* note 18. It is estimated that the number of scanned volumes exceeds 25 million. *Id.*

106. U.S. COPYRIGHT OFFICE, *supra* note 24, at 73.

107. *Can I Use Someone Else's Work? Can Someone Else Use Mine?*, U.S. COPYRIGHT OFFICE, <http://www.copyright.gov/help/faq/faq-fairuse.html#permission> [<https://perma.cc/XG4X-F6J6>].

108. *Id.* If a copyright was registered, renewed, or transferred before 1978, a manual search of the Copyright Office's records is required in order to determine ownership. *See id.* The person seeking the copyright can either do it themselves in person or pay a fee for the Copyright Office to conduct the search for them. *See id.*

109. *See* Heyman, *supra* note 18.

In the *Google* case, the Department of Justice submitted an amicus brief stating 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 . . . and enhancing accessibility of such works for the disabled and others are all worthy objectives.”¹¹⁰ In essence, the sum of these factors is that mass digitization is a necessary process, but currently lacks any sort of appropriate, surefire means of legal operation.¹¹¹

2. The Stakeholders

For the purpose of this discussion, stakeholders can be broken down into five distinct groups: Congress, the judiciary, mass digitizers, content creators, and content consumers.¹¹² Unifying the conflicting voices that emanate from each of the various stakeholders constitutes the crux of moving forward with mass digitization.¹¹³

a. Congress

Congressional inaction and gridlock negatively impact mass digitization and the state of copyright law as a whole.¹¹⁴ Despite Congress’s constitutional requirement to create and regulate copyright law,¹¹⁵ it has shown no sign of looking into the mass digitization problem.¹¹⁶ This is problematic because the longer Congress waits to act, the longer the uncertainty regarding the state of the law will loom.¹¹⁷

b. The judiciary

The judicial system has a long history of not wanting to get involved in settling points of ambiguity within copyright law.¹¹⁸ Unsurprisingly, the temperament of the courts is no different regarding mass digitization.¹¹⁹ In *Eldred v. Ashcroft*, the Supreme Court reasoned

110. See U.S. Statement of Interest, *supra* note 22, at 1.

111. See U.S. COPYRIGHT OFFICE, *supra* note 24, at 72.

112. See generally, U.S. COPYRIGHT OFFICE, *supra* note 24.

113. See *id.* at 74–75.

114. Transcript of Oral Argument, *Authors Guild v. Google*, 804 F.3d 202, 229 (2d Cir. 2015) (on file with the Authors Guild).

115. U.S. CONST. art. I, § 8, cl. 8.

116. Transcript of Oral Argument, *supra* note 25, at 28.

117. See U.S. COPYRIGHT OFFICE, *supra* note 24, at 77.

118. See, e.g., *Eldred v. Ashcroft*, 537 U.S. 186, 212 (2003); see also *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 424 (1984).

119. See *Authors Guild v. Google Inc.*, 770 F. Supp. 2d 666, 677 (S.D.N.Y. 2011).

“that it is generally for Congress, not the courts, to decide how best to pursue the Copyright Clause’s objectives.”¹²⁰ This was made evident in the seminal mass digitization case, *Authors Guild v. Google Inc.*¹²¹

In 2005, the Authors Guild commenced litigation against Google’s mass digitization project, Google Books.¹²² The Authors Guild was unhappy that copyright holders were not being paid licensing fees or receiving royalties for their works made available on Google Books.¹²³ When the United States District Court for the Southern District of New York ruled on the case, the opinion made clear that “courts should encroach only reluctantly on Congress’s legislative prerogative to address copyright issues presented by technological developments: ‘[s]ound policy, as well as history, supports our consistent deference to Congress when major technological innovations alter the market for copyrighted materials.’”¹²⁴ Eventually, in 2015, the Second Circuit Court of Appeals held that the Google Books project fell within the protection of the fair use doctrine.¹²⁵ This opinion made no mention of judicial deference, but was written by Judge Leval, who is known for a renowned law review article that advocated for expanding the fair use doctrine.¹²⁶

c. *Mass digitizers*

Above all, mass digitizers want certainty in the law.¹²⁷ The Google Books litigation lasted ten years, and during that time, Google slowed its efforts to mass digitize every book because of the unstable state of the law.¹²⁸ Google would be engaging in mass digitization whether they had to pay licensing fees to authors or not.¹²⁹ In fact, in 2008, Google attempted to settle with the Authors Guild and enter into a scheme whereby authors would receive royalties and licensing payments for

120. *Eldred*, 537 U.S. at 212.

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

122. *Where We Stand, Authors Guild v. Google*, *supra* note 22.

123. *Id.*

124. *Authors Guild*, 770 F. Supp. 2d at 680 (quoting *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 431 (1984)).

125. *Authors Guild v. Google, Inc.*, 804 F.3d 202, 230 (2d Cir. 2015).

126. Meyer, *supra* note 73; *see also* Pierre N. Leval, *Nimmer Lecture: Fair Use Rescued*, 44 UCLA L. REV. 1449, 1449 (1997).

127. *See* Jackson, *supra* note 16.

128. *See id.*

129. *See Authors Guild*, 770 F. Supp. 2d at 672.

usage of their books.¹³⁰ The court's rejection of this settlement was the only factor keeping this arrangement from becoming a reality.¹³¹

Although the District Court disallowed the proposed settlement, Circuit Judge Denny Chin believed conceptually in the Google Books project.¹³² Judge Chin has commented on Google's vision, stating that "all society benefits."¹³³ Ultimately, Google, and all other mass digitizers alike, seek clarity in the law outside of the Second Circuit in order to deliver a product that is beneficial to the greater good.¹³⁴

d. *Content creators*

Content creators wish to be compensated for the use of their works in mass digitization projects.¹³⁵ The Authors Guild explains:

Authors rely on licensing revenues . . . to support their ability to write; and, in the case of Google Book Search, authors are not only losing fees that Google should be paying for copying and making their works available, but they are also losing immeasurable income from lost sales. This is because researchers can usually find all they need from a book through Google Book Search.¹³⁶

Writers have been making their living writing professionally for several hundred years.¹³⁷ It naturally follows that with such a time-honored tradition, a new advancement like mass digitization—which uses an author's work without compensation—would be met with skepticism by authors.¹³⁸ In a very real sense, the livelihood of authors depends upon precedent set by the treatment of their works as society transitions into the digital age.¹³⁹ Many authors are excited by the prospect of their out-of-print works being exposed to new audiences through mass digitization, but if a mass digitization solution is not

130. *Id.*

131. *See id.* at 686.

132. Claire Cain Miller & Julie Bosman, *Siding with Google, Judge Says Book Search Does Not Infringe Copyright*, N.Y. TIMES, Nov. 14, 2013, <http://www.nytimes.com/2013/11/15/business/media/judge-sides-with-google-on-book-scanning-suit.html> (last visited Mar. 4, 2018).

133. *Id.*

134. *See id.*

135. *See The Authors Guild's Top Legislative Priorities-2015*, *supra* note 67, at 1.

136. *Id.*

137. Pat Rogers, *The First Professional Author*, N.Y. TIMES, Jan. 24, 1988, at A.12, PROQUEST, Doc. No. 426711230.

138. *See generally The Authors Guild's Top Legislative Priorities-2015*, *supra* note 67.

139. *See id.* at 2.

carefully implemented by Congress, it could do more harm than good to authors.¹⁴⁰

e. *Content consumers*

Content consumers are the clear beneficiaries of any mass digitization project.¹⁴¹ Google Books allows readers to find literature that they otherwise would not find.¹⁴² Approximately eighty-five percent of the books available on Google Books are now out of print.¹⁴³ Courts that handled the *Google* litigation, the Department of Justice, the Authors Guild, and Google itself all feel that the Google Books project is of great public utility.¹⁴⁴

One concern that the Authors Guild raises about the Google Books venture is that it feels that the project represents a “redistribution of wealth from the creative sector to the tech sector.”¹⁴⁵ In other words, society is ignoring the needs of authors in favor of technological advancement.¹⁴⁶ The Authors Guild warns that if authors are not fairly compensated for their written works, it could create a chilling effect on the production of new works in the future.¹⁴⁷ If this happens, content consumers will lose out in the long run because fewer works will be created.¹⁴⁸

D. *The Fair Use Standard*

1. What is Fair Use?

Fair use is defined as the “reproduction [of a copyrighted work] . . . for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research.”¹⁴⁹ If secondary usage falls into one of these categories, it is not an infringement on the copyright.¹⁵⁰ These terms are broad, but they

140. *See id.*

141. *See* Adam Liptak & Alexandra Alter, *Challenge to Google Books Is Declined by Supreme Court*, N.Y. TIMES (Apr. 18, 2016), <https://www.nytimes.com/2016/04/19/technology/google-books-case.html>.

142. *Id.*

143. Jackson, *supra* note 16.

144. *See Where We Stand, Authors Guild v. Google*, *supra* note 22.

145. *Id.*

146. *Id.*

147. *See id.*

148. *Id.*

149. 17 U.S.C. § 107 (2015).

150. *Id.*

are qualified by a further balancing test that takes the interests of both secondary users and copyright holders into account.¹⁵¹

In determining whether a “criticism, comment, news reporting, teaching, scholarship, or research” usage is fair use, courts examine four factors.¹⁵² First, courts examine the purpose and nature of the use.¹⁵³ Courts are more likely to deem nonprofit or educational purposes to be fair use as opposed to commercial use.¹⁵⁴ Second, courts look at the “nature of the copyrighted work.”¹⁵⁵ Novels and fictional universes being utilized by someone without the copyright stand a lesser chance at surviving a fair use analysis than a factual piece or news article.¹⁵⁶ Third, courts examine the “amount and substantiality of the portion used in relation to the copyrighted work as a whole.”¹⁵⁷ If a court sees “a large portion of the copyrighted work” being appropriated into the secondary use, it is less likely to be deemed fair use.¹⁵⁸ Fourth, courts look at the effect on the market value of a copyrighted work if a secondary usage is to be allowed.¹⁵⁹ If a use will hurt the market for the existing piece, the court will be more likely to object to allowing the new usage under the fair use doctrine.¹⁶⁰ In addition to these four factors, courts look at whether a usage is transformative.¹⁶¹ If a new user adds a new element that alters the work in a way that gives it new life or usefulness, the court may find that the use is fair.¹⁶²

2. Transformative Use and the Google Books Litigation

After acknowledging that there was no Congressional input on the subject, the Second Circuit held in *Google* that the Google Books project was a transformative use under the fair use doctrine.¹⁶³ “Transformative uses are those that add something new, with a further purpose or different character, and do not substitute for the original use of the

151. *See More Information on Fair Use*, U.S. COPYRIGHT OFFICE, <http://www.copyright.gov/fair-use/more-info.html> [<https://perma.cc/7STD-P9G3>].

152. *Id.*

153. *Id.*

154. *Id.*

155. *Id.*

156. *Id.*

157. *Id.*

158. *Id.*

159. *Id.*

160. *Id.*

161. *Id.*

162. *See id.*

163. *See Authors Guild v. Google, Inc.*, 804 F.3d 202, 212 (2d Cir. 2015).

work.”¹⁶⁴ One key component of the Google Books project is that through OCR technology, the text is made searchable.¹⁶⁵ A user can run a search on the Google website, and yield results from the contents of books available on Google Books.¹⁶⁶ However, the result will be a “snippet” of text from the book, as the entire book is not viewable.¹⁶⁷

In deciding that this system constituted transformative use under the fair use doctrine, the Second Circuit looked to an earlier decision involving the same issues: *Authors Guild, Inc. v. HathiTrust*.¹⁶⁸ The project in *HathiTrust* was a mass digitization endeavor similar to Google Books.¹⁶⁹ The court held that it is fair use “to create a full-text searchable database of copyrighted works and to provide those works in formats accessible to those with disabilities.”¹⁷⁰ One would assume that *stare decisis* would be applicable here; however, the distinguishing factor between *HathiTrust* and *Google* is that in *HathiTrust*, the mass digitizers were a conglomerate of nonprofit universities.¹⁷¹ Google, of course, is a for-profit corporation.¹⁷²

For this reason, when arguing against the Google Books project, the Authors Guild attempted to claim that, “Google is profit-motivated and seeks to use its dominance of book search to fortify its overall dominance of the Internet search market, and that thereby Google indirectly reaps profits from the Google Books functions.”¹⁷³ However, Google has structured Google Books in such a way whereby it does not make any profit directly from the project.¹⁷⁴ The court was not swayed by these commercialism arguments though, citing prior Supreme Court precedent that, “the more transformative the new work, the less will be the significance of other factors, like commercialism, that may weigh against a finding of fair use.”¹⁷⁵ Here, the indirect commercialism was

164. *More Information on Fair Use*, *supra* note 151.

165. *Authors Guild*, 804 F.3d at 216.

166. *Id.* at 207.

167. *Id.*

168. *Id.* at 216–17; *see also* *Authors Guild, Inc. v. HathiTrust*, 755 F.3d 87, 97 (2d Cir. 2014).

169. *HathiTrust*, 755 F.3d at 97.

170. *Id.* at 105.

171. *Authors Guild*, 804 F.3d at 217.

172. *Id.*

173. *Id.* at 218.

174. *Id.* at 207.

175. *Id.* at 219 (quoting *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 578 (1994)).

not able to trump the transformative nature of searchable snippets.¹⁷⁶

II. CONGRESSIONAL LEGISLATION TO RECONCILE THE NEEDS OF STAKEHOLDERS

A legislative solution is needed to bring mass digitization projects fully into the mainstream culture of the United States.¹⁷⁷ This part of the Note addresses three potential legislative models and examines, through case studies, their level of applicability to the United States.¹⁷⁸ Evidence compels the conclusion that legislation mirroring an extended collective licensing model is the best way forward for mass digitization.¹⁷⁹

A. *A Legislative Solution to the Mass Digitization Problem*

The mass digitization problem will not gracefully resolve itself if left to the discretion of courts.¹⁸⁰ The Supreme Court has denied the Authors Guild's writ of certiorari in the *Google* case.¹⁸¹ This eliminates any possibility of binding judicial authority uniformly issuing a set of rules for mass digitization projects.¹⁸² Congress is the only other body with the authority to regulate copyright law, and the only body expressly allowed to do so by the Constitution.¹⁸³ Thus, setting out rules governing mass digitization is an appropriate and necessary duty within the purview of Congress.¹⁸⁴ Courts have been insistent about Congress taking on this responsibility; however, so far, Congress is not even examining passing a bill addressing mass digitization.¹⁸⁵ The legislative branch has gained a reputation for its inaction in the realm of copyright law—most strikingly regarding orphan works.¹⁸⁶ In order for mass digitization projects to reach their fullest potential, Congress must work

176. *Id.*

177. See U.S. COPYRIGHT OFFICE, *supra* note 24, at 72.

178. See *infra* Section II.A.2.

179. See U.S. COPYRIGHT OFFICE, *supra* note 24, at 83; *infra* Subsection II.A.2.c.

180. See U.S. COPYRIGHT OFFICE, *supra* note 24, at 77; see also *infra* Subsection II.A.2.c.

181. Authors Guild v. Google, Inc., 136 S. Ct. 1658, 1658 (2016).

182. See U.S. COPYRIGHT OFFICE, *supra* note 24, at 77.

183. U.S. CONST. art. I, § 8, cl. 8.

184. See U.S. COPYRIGHT OFFICE, *supra* note 24, at 72.

185. *Id.* at 128.

186. See Transcript of Oral Argument, *supra* note 25, at 28. “Is anything done in Congress these days? How long would it take reasonably for this to be resolved in Congress? Even the issue of orphan books has been percolating in Congress for years and years.” *Id.* Orphan works are copyrighted material whose owner is unknown or impossible to identify or contact. U.S. COPYRIGHT OFFICE, *supra* note 24, at 1.

to pass governing laws.¹⁸⁷

1. The Insufficiency of the Fair Use Doctrine

In June of 2015, the United States Copyright Office issued a report on mass digitization, laying out recommendations for potential solutions that address the wants and needs of stakeholders in mass digitization projects.¹⁸⁸ One solution that the report addresses is for Congress to *not* act.¹⁸⁹ Skeptics of legislation, such as the Library Copyright Alliance, argue that the fair use doctrine is a sufficient defense for mass digitizers.¹⁹⁰ Indeed, if usage falls into one of the categories of the fair use doctrine, as previously defined, that usage is not an infringement of copyright.¹⁹¹

However, this is not a sufficient system. Google wishes to mass digitize every book in existence.¹⁹² Only about twenty percent of the world's books are in the public domain.¹⁹³ This means "the vast majority of all titles" are still under copyright.¹⁹⁴ Since Google does not negotiate licensing terms with any individual authors, roughly eighty percent of their digital collection is unlicensed.¹⁹⁵ With so many unlicensed works, the lion's share of Google Books' relevance depends upon the fair use doctrine.¹⁹⁶ This is a tenuous position for any mass digitizer, and currently, only the Second Circuit has a touchstone holding in place to give mass digitizers an idea as to where they stand.¹⁹⁷ However, the decisions of the Second Circuit are in no way binding on other district or circuit courts outside of the Second Circuit, and definitely not the Supreme Court.¹⁹⁸ This leaves mass digitizers from different circuits without binding guidance.¹⁹⁹

187. See U.S. COPYRIGHT OFFICE, *supra* note 24, at 76.

188. See *generally id.*

189. *Id.* at 76.

190. *Id.*

191. 17 U.S.C. § 107 (2015).

192. Heyman, *supra* note 18.

193. Jackson, *supra* note 16.

194. *Id.* "About [ten] to [fifteen] percent of these books are [still] in print." *Id.* The rest are out of print, and Google Books is working to make them accessible once more. *Id.* This is perhaps the most significant public policy reason for encouraging mass digitization projects. See *id.*

195. See *id.*

196. See *id.*

197. See *generally* Authors Guild v. Google, Inc., 804 F.3d 202 (2d Cir. 2015).

198. See *Precedent*, BLACK'S LAW DICTIONARY (10th ed. 2014).

199. See *id.*

In the *Google* case, the search giant's mass digitization project ultimately prevailed on fair use grounds.²⁰⁰ However, it took Google a decade, untold millions of dollars, and several appeals to achieve that verdict.²⁰¹ Further, the *Google* decision was extremely fact specific, and such decisions "do not extend to the wider dissemination of copyrighted works without permission or compensation."²⁰² There is an inherent cost, risk, unpredictability, and time commitment involved with any fair use defense, and this shaky legal ground results in the deprivation of art for the public.²⁰³

Additionally, fair use as a defense for mass digitizers ignores the interests of content creators.²⁰⁴ As discussed previously, authors rely upon licensing revenues in order to survive.²⁰⁵ Because of this, from a public policy standpoint, the system for mass digitization should "[allow] authors to control use of their works and obtain compensation for the use as an incentive to write."²⁰⁶

Mass digitizers tend to be large corporations or universities, whereas authors are generally individuals with far more modest means.²⁰⁷ Not only are mass digitizers better positioned to pay license fees, they are also *choosing* to become a part of this industry, whereas authors' works *become* digitized without their prior consent.²⁰⁸ It would be fundamentally unfair to force average authors to yield potential revenue streams to corporations and universities.²⁰⁹ In a settlement agreement that the court later rejected in *Google*, the Authors Guild and Google agreed upon a scheme in which Google would pay licensing fees to authors.²¹⁰ This shows mass digitizers' willingness to pay fees for the copyrighted books that compose their digital library, and represents a

200. *Authors Guild*, 804 F.3d at 202.

201. *See Where We Stand, Authors Guild v. Google*, *supra* note 22.

202. *See* U.S. COPYRIGHT OFFICE, *supra* note 24, at 76.

203. *See* *Golan v. Holder*, 565 U.S. 302, 356 (2012). In a majority opinion discussion on orphan works, Justice Brennan highlights the negative effects of the fair use defense without an accompanying legislative aid for curators. *Id.* "[The] Los Angeles Public Library has been unable to make its collection of Mexican folk music publicly available because of problems locating copyright owners, [and] a Jewish cultural organization has abandoned similar efforts to make available Jewish cultural music and other materials . . ." *Id.*

204. *Where We Stand, Authors Guild v. Google*, *supra* note 22.

205. *See The Authors Guild's Top Legislative Priorities-2015*, *supra* note 67, at 1.

206. *Id.*

207. *Id.* at 2.

208. *See id.*

209. *See id.*

210. *Authors Guild v. Google Inc.* 770 F. Supp. 2d 666, 682 (S.D.N.Y. 2011).

fair compromise between stakeholders.²¹¹

Another point of concern regarding fair use in mass digitization cases is that it “turn[s] copyright on its head.”²¹² Traditionally, “while copyright is a system of ex ante permissions, mass digitization comes with a compelling demand to revert copyright into an opt-out regime.”²¹³ In copyright law, the copyright holder ordinarily has the right to choose who can make use of their work.²¹⁴ Instead, under the fair use defense, mass digitizers take copyright from an ex post perspective.²¹⁵ Authors are forced to take their own affirmative steps if they wish to contest use by mass digitizers.²¹⁶ This, the court in *Google* reasoned, is “incongruous with the purpose of the copyright laws.”²¹⁷ Rather than expand the fair use doctrine, which subverts the norms of copyright law, allowing Congress to legislate is the more sensible option.²¹⁸

Overall, the fair use doctrine is wide-ranging and could provide some protection for mass digitizers²¹⁹—after all, it ultimately protected Google Books²²⁰—however, “any rule that privileges flexibility necessarily produces unpredictability.”²²¹ The Copyright Office agrees, as evidenced in its July 2015 report, and given these factors, advocates for a legislative solution to the mass digitization problem in addition to the existing fair use defense.²²²

2. Picking a Legislative Solution

The Copyright Office sees the compelling public policy benefits of mass digitization.²²³ Moving forward, the office envisions a statutory system where mass digitizers can curate their collections and creators

211. *See id.* at 672.

212. *See, e.g.*, U.S. COPYRIGHT OFFICE, *supra* note 24, at 74 (quoting MAURIZIO BORGHI & STAVROULA KARAPAPA, COPYRIGHT AND MASS DIGITIZATION: A CROSS JURISDICTIONAL PERSPECTIVE 2 (2013)).

213. *Id.*

214. *See id.*

215. *See Authors Guild*, 770 F. Supp. 2d at 682.

216. U.S. COPYRIGHT OFFICE, *supra* note 24, at 74.

217. *Authors Guild*, 770 F. Supp. 2d at 682.

218. *Id.* at 680.

219. *See, e.g.*, Jane C. Ginsburg, *Fair Use for Free, or Permitted-but-Paid?*, 29 BERKELEY TECH. L.J. 1383, 1410 (2014).

220. *Authors Guild v. Google, Inc.*, 804 F.3d 202, 206 (2d Cir. 2015).

221. U.S. COPYRIGHT OFFICE, *supra* note 24, at 74.

222. *Id.* at 78.

223. *Id.* at 73–74.

can be appropriately compensated for the use of their works.²²⁴ In their June 2015 report, the Copyright Office compares three different models in making its recommendation.²²⁵ These models are direct licensing, voluntary collective licensing, and extended collective licensing.²²⁶

a. *Direct licensing*

A direct licensing model is a statutory framework that would require mass digitizers and authors to negotiate, or otherwise agree upon, licensing rates.²²⁷ For example, authors often elect to utilize direct licensing when listing their works for sale on Amazon.²²⁸ The popular “Look Inside the Book” feature allows authors to permit Amazon to display portions of the book as a scanned document to potential consumers before purchase.²²⁹ A digital portion of the book is only displayed if the author permits it.²³⁰ This amounts to a direct license given to Amazon by authors to digitize an author’s work for promotional purposes.²³¹

From a practical standpoint, direct licensing could not viably transition to mass digitization.²³² The Copyright Office defines mass digitization as “projects in which the scale of digital copying is so extensive as to make the individual clearance of rights a practical impossibility.”²³³ In the case of “Look Inside the Book,” Amazon is individually clearing rights.²³⁴ With twenty-five million scanned works—and a portion of them being orphan works where the copyright holder is unable to be located—this is an unfeasible avenue for larger digitization projects like Google Books.²³⁵

224. *Id.*

225. *See id.* at 79–82.

226. *Id.*

227. *See Look Inside the Book (LITB) Program*, AMAZON, <https://www.amazon.com/gp/feature.html?docId=1001119971> [<https://perma.cc/UK3C-2GC3>] (follow link to print book FAQ).

228. *See id.*

229. *See id.*

230. *Id.*

231. *See id.*

232. U.S. COPYRIGHT OFFICE, *supra* note 24, at 73.

233. *Id.*

234. *See Look Inside the Book*, *supra* note 227.

235. Heyman, *supra* note 18 (Google has digitized twenty-five million books); Michael Hiltzik, *Copyright Boon or Bane? Google Books Survives Another Legal Challenge*, L.A. TIMES (Oct. 20, 2015, 2:55 PM), <http://www.latimes.com/business/hiltzik/la-fi-mh-google-books-survives-another-legal-challenge-20151020-column.html> [<https://perma.cc/3WXW-5Y66>] (stating that a portion of these twenty-five million books are orphan works); *see*

b. *Voluntary collective licensing*

A voluntary collective licensing model (VCL) differs from a direct licensing model because in a VCL model, individual users rely upon a Copyright Management Organization (CMO) to handle licensing and royalties for content creators.²³⁶ Under a VCL model, an individual copyright holder can request that a management organization protect their work.²³⁷ CMOs are comprised of many copyright owners, and all copyright owners pay a fee to fund their particular umbrella organization.²³⁸ For purposes of mass digitization, the most efficient system would involve a CMO for each particular medium that would make deals with mass digitizers on behalf of all their members.²³⁹ This would ensure that authors are paid licensing fees; however, the model hinges on the authors making the affirmative decision to become a member of a management organization.²⁴⁰

Therefore, the downfall of a congressionally mandated opt-in scheme is that many, if not most, authors would either not know or simply not go through the process of opting-in.²⁴¹ Ultimately, this greatly limits the scope of works available for mass digitization projects.²⁴² Inherent in the term “mass,” the quantity of materials is king in these projects.²⁴³ Thus, voluntary collective licensing falls short as an optimal legislative solution.

c. *Extended collective licensing*

Ultimately, an extended collective licensing (ECL) system is the best statutory framework for the United States copyright system.²⁴⁴ In an ECL system:

[T]he government [would] authorize[] 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.*,

Jackson, *supra* note 16 (discussing why it is infeasible for Google Books to individually negotiate licensing terms with authors).

236. See Meghan Dougherty, *Voluntary Collective Licensing: The Solution to the Music Industry's File Sharing Crisis?*, 13 J. INTELL. PROP. L. 405, 415 (2006).

237. See *id.* at 409.

238. *Id.*

239. U.S. COPYRIGHT OFFICE, *supra* note 24, at 81.

240. *Id.* at 80.

241. *Id.* at 82.

242. *Id.* at 80.

243. See Heyman, *supra* note 18.

244. U.S. COPYRIGHT OFFICE, *supra* note 24, at 82.

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.²⁴⁵

An ECL model is desirable over a voluntary collective license model because rather than the VCL's requirement to opt-in, ECL requires authors to opt-out—meaning they are automatically involved unless the copyright holder individually objects.²⁴⁶ This guarantees strength in numbers for the purpose of bargaining with mass digitizers, while at the same time ensuring the maximum pool of works for mass digitizers to draw from.²⁴⁷

Overall, an ECL model is an optimal compromise between major stakeholders.²⁴⁸ This is evidenced by the proposed *Google* settlement, which closely mirrored an ECL system.²⁴⁹ Under the terms of the settlement, the Authors Guild would represent the interests of copyright holders in licensing negotiations with Google—including all authors who did not affirmatively opt-out of the arrangement.²⁵⁰

Because of the actors involved in this proposed settlement, the terms of the proposed settlement are a significant indicator of what stakeholders want.²⁵¹ “The Authors Guild is the nation’s oldest and largest professional organization for writers.”²⁵² Alphabet, which owns Google, is the second largest company in the world.²⁵³ These two parties, who found themselves diametrically opposed in a decade-long court battle, came to the mutual consensus that an ECL model is in both

245. U.S. COPYRIGHT OFFICE, LEGAL ISSUES IN MASS DIGITIZATION: A PRELIMINARY ANALYSIS AND DISCUSSION DOCUMENT 35 (2011), https://www.copyright.gov/docs/massdigitization/USCOMassDigitization_October2011.pdf [<https://perma.cc/4KTW-KP2G>].

246. *Id.* at 36.

247. *See About Us*, AM. SOC’Y COMPOSERS, AUTHORS, & PUBLISHERS, <http://www.ascap.com/about> [<https://perma.cc/9WDV-XF37>]; *see also* LEGAL ISSUES IN MASS DIGITIZATION, *supra* note 245, at 35.

248. *See* Authors Guild v. Google Inc., 770 F. Supp. 2d 666, 677 (S.D.N.Y. 2011).

249. *See* U.S. COPYRIGHT OFFICE, *supra* note 24, at 83.

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

251. *See* U.S. COPYRIGHT OFFICE, *supra* note 24, at 83.

252. *Who We Are*, AUTHORS GUILD, <https://www.authorsguild.org/who-we-are/> [<https://perma.cc/6QH5-AJ3T>].

253. *Top Companies in the World by Market Value 2017*, STATISTA, <https://www.statista.com/statistics/263264/top-companies-in-the-world-by-market-value/> [<https://perma.cc/QU4G-GQZ9>].

of their best interests.²⁵⁴

B. *The Compatibility of Collective Licensing Models with Creative Works*

There is longstanding precedent for voluntary collective licensing providing protection from infringement in creative industries.²⁵⁵ VCL is analogous to ECL, which the Copyright Office recommends for mass digitization when it comes to the enforcement of copyright.²⁵⁶ The only difference is that VCL is an opt-in model rather than an opt-out model;²⁵⁷ however, members in either model would still enjoy increased collective bargaining and copyright enforcement strength.²⁵⁸ Therefore, examining the copyright enforcement strength of already-implemented VCL models is informative as to the effectiveness of ECL models.²⁵⁹ This section will reference successful VCL models to achieve such an end.

1. The American Society of Composers, Authors, and Publishers as a Model

The American Society of Composers, Authors, and Publishers (ASCAP) is a VCL organization in the music industry.²⁶⁰ ASCAP collects licensing fees on behalf of over 700,000 music-industry members directly from radio stations, bars, theme parks, and other organizations that use ASCAP members' works.²⁶¹ It is a very efficient organization—despite an overhead large enough to support hundreds of thousands of members—eighty-eight cents of every dollar goes directly

254. See *Authors Guild*, 770 F. Supp. 2d at 677. In the end, the court denied this settlement. *Id.* at 678. It was rejected primarily because the court felt uncomfortable allowing private parties to come to an agreement that had a direct effect upon authors who were not a part of the suit. *Id.* at 677. The court felt that the proposed settlement would give an unfair competitive advantage to Google, and create a limited monopoly. *Id.* at 685.

255. See *About Us*, *supra* note 247; *About*, BROADCAST MUSIC, INC., <http://www.bmi.com/about> [<https://perma.cc/35GH-PT2Z>] (founded in 1939); *About*, COPYRIGHT CLEARANCE CTR., <http://www.copyright.com/about/> [<https://perma.cc/F5CN-RN5B>] (founded in 1978).

256. *Authors Guild*, 770 F. Supp. 2d at 682.

257. *Id.* at 79–82.

258. *Id.* at 79.

259. See *id.*

260. *About Us*, *supra* note 247.

261. *ASCAP Payment System*, AM. SOC'Y COMPOSERS, AUTHORS, & PUBLISHERS, <http://www.ascap.com/members/payment/whocollect.aspx> [<https://perma.cc/DM3E-CNYQ>].

back to members.²⁶²

Due to the size and strength of ASCAP, the organization is able to use the legal system to collect money for individual artists in ways that most artists would be unable to accomplish alone.²⁶³ Broadcast Music Inc., a rival performance rights organization to ASCAP, files between 75 and 125 copyright infringement lawsuits annually, while ASCAP often files triple that figure.²⁶⁴ Performance rights organizations (PMOs), like ASCAP, send out demand letters seeking compensation, and most businesses opt to comply and pay licensing fees rather than face these lawsuits in court.²⁶⁵ These are services sorely needed by professional authors.²⁶⁶

In describing the lives of professional authors, the Authors Guild says, “[m]ost of our members live on the edge of being able to keep writing or find other paying work.”²⁶⁷ Authors themselves generally do not have the necessary funds to fight for their rights against copyright violators;²⁶⁸ the Authors Guild has been responsible for filing both major court cases involving mass digitization projects—*HathiTrust* and *Google*.²⁶⁹

However, sometimes this protection is taken too far. ASCAP has proven itself so effective in upholding the rights of their members that it has a reputation as being draconian.²⁷⁰ The zealotry of privatized,

262. *ASCAP Advantage*, AM. SOC’Y COMPOSERS, AUTHORS, & PUBLISHERS, <http://www.ascap.com/about/ascapadvantage.aspx> [https://perma.cc/VZW2-9Q6V].

263. *See id.*

264. *See id.*

265. *See, e.g., 11 Questions About Music Licensing*, NAT’L RESTAURANT ASS’N, <http://www.restaurant.org/Manage-My-Restaurant/Operations/Regulatory-back-office/11-questions-about-music-licensing> [https://perma.cc/Q4VF-BEJY].

266. *See* U.S. COPYRIGHT OFFICE, *supra* note 24, at 83.

267. *Id.* at 2.

268. *See Second Circuit Leaves Authors High and Dry*, AUTHORS GUILD (Oct. 16, 2015), <https://www.authorsguild.org/industry-advocacy/2nd-circuit-leaves-authors-high-and-dry/> [https://perma.cc/SF4W-R99C]. “Most full-time authors live on the perilous edge of being able to sustain themselves through writing as a profession[.]” *Id.*

269. *See* Authors Guild v. Google, Inc., 804 F.3d 202, 202–03 (2d Cir. 2015); Authors Guild, Inc. v. HathiTrust, 755 F.3d 87, 97 (2d Cir. 2014).

270. *See, e.g., Ari Herstand, ASCAP, BMI and SESAC Force Local Coffee Shop to Shut Down Live Music*, DIGITAL MUSIC NEWS (Oct. 29, 2014), <http://www.digitalmusicnews.com/2014/10/29/ascap-bmi-sesac-force-local-coffee-shop-shut-live-music/> [https://perma.cc/HA27-6VAC]. This article chronicles a small Missouri coffee shop that held around twelve open-mic concerts annually. *Id.* While proceeds from these events were donated mostly to charity, and no admission was charged, PMOs demanded licensing fees be paid for the use of their artists’ songs. *Id.* Ultimately, the shop was faced with the choice of paying \$2100 in

non-government regulated rights organizations can violate public policy and upset people.²⁷¹ Perhaps most famously, ASCAP solicited licensing fees from the Girl Scouts of America for songs they sang at camp.²⁷²

The format of ASCAP is distinguishable from an ECL model in a way that ensures this kind of zealotry would not come to pass.²⁷³ CMOs would neither act like, nor be perceived as, ravenous draconian rights organizations.²⁷⁴ This is because inherent in a statutory ECL model is government oversight.²⁷⁵ The Copyright Office itself would oversee all CMOs, and ensure “standards of transparency, accountability, and good governance in [their] operations.”²⁷⁶ ASCAP, as a private limited liability corporation, has no such oversight in place,²⁷⁷ and thus, would be less concerned by public image because their existence does not depend upon favorability.²⁷⁸ In addition to oversight by the Copyright Office over CMOs, the finances and operations of the CMOs would be subject to auditing by rights-holders.²⁷⁹ CMOs would experience pressure from the top-down as well as from the bottom-up.²⁸⁰ The resulting effect would be equilibrium between the interests of CMOs in retaining their status, and the interest of rights-holders in being delivered the licensing fees they deserve.²⁸¹

2. The Success of Collective Licensing Internationally

This section of the Note examines case studies of different licensing

licensing fees to three PMOs, or cease live music events. *Id.* The shop no longer holds concerts. *Id.*

271. *Id.*

272. Elisabeth Bumiller, *ASCAP Asks Royalties from Girl Scouts, and Regrets It*, N.Y. TIMES, Dec. 17, 1996, at 1, PROQUEST, Doc. No. 430710696.

273. See U.S. COPYRIGHT OFFICE, *supra* note 24, at 91 (explaining that CMOs would be checked by government oversight and adhere to high transparency standards).

274. *Id.*

275. *Id.* at 92.

276. *Id.* at 90.

277. N.Y. DEPT. OF STATE, DIV. OF CORPS. ENTITY INFO., ASCAP ENTERPRISES, LLC, https://appext20.dos.ny.gov/corp_public/CORPSEARCH.ENTITY_INFORMATION?p_token=7631844C71A767FD8FD0FC043DB3CB5D10F64792D798AFD3B2AECB2BCE167E89996E8AB4339C9D5BAC8FB8DC9958540C&p_nameid=ED9AA2B522E27542&p_corpid=39C38C4464209C86&p_captcha=19539&p_captcha_check=87B579FFB959DA65&p_entity_name=Ascasp%20enterprises%20LLC&p_name_type=A&p_search_type=BEGINS&p_srch_results_page=0 [https://perma.cc/LE3Y-K6CB].

278. *Id.*; see also Bumiller, *supra* note 272. Stakeholders in the music industry refer to ASCAP as “an obnoxious foe”; however, the organization remains the largest music licensing entity in the world. *Id.*

279. U.S. COPYRIGHT OFFICE, *supra* note 24, at 92.

280. *Id.* at 91–92.

281. See *id.*

models used internationally.²⁸² These case studies supplement the prior discussion of ASCAP in demonstrating the effectiveness of an extended collective licensing model.²⁸³

a. *Authors' Licensing and Collecting Society*

The Authors' Licensing and Collecting Society (ALCS) is a private VCL organization in the United Kingdom that collects licensing fees on behalf of authors across Europe.²⁸⁴ This organization has been successful throughout its forty year history, and has collected over £450,000,000 for its members.²⁸⁵ ALCS is based upon a VCL model, but it contains elements of ECL.²⁸⁶ The ALCS trawls to collect licensing fees on behalf of nonmembers, and their website has a search feature so authors can see if the ALCS is holding onto licensing fees from one of their titles.²⁸⁷ If an author wishes to collect on their earnings and is not a member, the author can pay a one-time fee of thirty-six pounds to become a member.²⁸⁸ The success of this model speaks volumes for the potential success of ECL in the United States, because it has the same goal—remuneration for authors—and utilizes a quasi-opt-out system of achieving that end.²⁸⁹

The proposed American ECL model would be distinguishable from the ALCS model in the way that membership fees are handled.²⁹⁰ ALCS has authors pay a fee up-front for membership, whereas ECL would *deduct* fees from royalty payouts.²⁹¹ As ECL is an opt-out model, this prevents authors uninterested in mass digitization from having a new tax levied against them in the form of a CMO membership fee.²⁹² It is also an attempt to ensure that authors are paying fees proportional to the amount of royalties that their works are generating.²⁹³ The ALCS's VCL model, while not completely compatible with mass digitization, provides

282. *See infra* Subsections II.B.2.a–b.

283. *See* U.S. COPYRIGHT OFFICE, *supra* note 24, at 98–99.

284. *See How ALCS is Run*, AUTHORS' LICENSING & COLLECTING SOC'Y, <https://www.alcs.co.uk/how-alcs-is-run> [<https://perma.cc/6U7D-X4X7>].

285. *See id.*

286. *See id.*

287. *Royalty Search*, AUTHORS' LICENSING & COLLECTING SOC'Y, <https://www.alcs.co.uk/royalty-search> [<https://perma.cc/J5ZK-KXUB>].

288. *Terms and Conditions of Membership*, ALCS, <https://www.alcs.co.uk/terms-and-conditions-of-membership>.

289. *What We Do*, ALCS, <https://www.alcs.co.uk/what-we-do>.

290. *See* U.S. COPYRIGHT OFFICE, *supra* note 24, at 98–99.

291. *See id.*

292. *See id.* at 93, 98–99.

293. *See id.* at 99.

a guiding light to the burgeoning American ECL model.²⁹⁴

b. *Extended collective licensing internationally*

At least twenty countries currently employ mass licensing ECL models,²⁹⁵ generally “to facilitate uses that are considered socially beneficial but for which the costs of obtaining rights on an individual basis may be prohibitively high.”²⁹⁶ France and Germany both have CMOs overseen by government agencies, which collectively license out-of-print books.²⁹⁷ These initiatives are particularly relevant to mass digitization because almost eighty-five percent of all works digitized by Google Books are out of print, and thus would be covered by the French and German legislation.²⁹⁸

In Nordic countries, ECL models have been used for several decades.²⁹⁹ Their ECL models do not apply specifically to published books, but rather fields such as radio, television, educational materials, photocopying, and visual arts.³⁰⁰ CMOs in these countries negotiate licensing schemes directly with archives.³⁰¹ Mass digitization efforts function as an archive, thus a Nordic CMO representing a published literary work would have the government-sponsored authority to negotiate with mass digitizers.³⁰² In fact, in a country such as Hungary, the mediums legally allowed to form CMOs are not limited in any capacity.³⁰³ Should the need arise, these countries could elect to implement ECLs for authors of literary works at any point.³⁰⁴

C. *Addressing Counterarguments to American ECL*

This section serves to address common counterarguments for legislating to facilitate mass digitization. Specifically, the ability for authors to opt out, the security standards of digitized documents, and the misconception that mass digitizers will suffer from legislation because of

294. *See id.* at 18.

295. *Id.* at 22 (citing Kerstin Herlt, *ACE Survey on the Implementation of the Orphan Works Directive*, FORWARD (Apr. 3, 2015), <http://project-forward.eu/2015/04/03/ace-survey-on-the-implementation-of-the-orphan-works-directive/>).

296. *See* U.S. COPYRIGHT OFFICE, *supra* note 24, at 19.

297. *See id.* app. F, at 4–5.

298. *See* Jackson, *supra* note 16.

299. U.S. COPYRIGHT OFFICE, *supra* note 24, at 18.

300. *See id.* app. F, at 7–8.

301. *See id.* at 19.

302. *See* Coyle, *supra* note 20.

303. *See* U.S. COPYRIGHT OFFICE, *supra* note 24, app. F, at 6.

304. *See id.*

the imposition of licensing fees.

1. Compulsory Participation

Skeptics of ECL legislation fear the consequences for authors who wish to negotiate with potential licensees themselves, rather than being represented through a CMO.³⁰⁵ An essential provision to this legislation would be the ability for any author to opt out—meaning participation in ECLs would not be compulsory.³⁰⁶ The inclusion of an opt-out provision ensures that authors can negotiate for themselves instead of using a CMO.³⁰⁷ This proposed legislation utilizes an opt-out model so that mass digitizers have the largest possible pool of works to draw from, but the system would not be reliant on every author remaining a part of their CMO.³⁰⁸ Most authors would be happy getting *any* licensing fees, as the fair use doctrine currently allows mass digitizers to withhold royalties entirely.³⁰⁹ Further, many authors would welcome the collective bargaining strength that would come with being part of a CMO.³¹⁰ So long as an intuitive opt-out provision exists, no author's rights or interests will be infringed by this proposed legislation.³¹¹

2. Wariness Towards Mass Digitization Due to Document Security Concerns

Skeptics, such as June Besek at the Kernochan Center, are concerned about the security of mass digitized collections.³¹² The illegal downloading and subsequent distribution of mass digitized documents are a valid concern.³¹³ If digitizers are not diligent in implementing adequate security measures in their collection, artists may face real harm in the form of lost revenue.³¹⁴ This is a legitimate threat, as illegal downloading and file sharing on the Internet is still on the rise.³¹⁵

305. See U.S. COPYRIGHT OFFICE, *supra* note 24, at 93.

306. *Id.*

307. *Id.*

308. *Id.*

309. See *Second Circuit Leaves Authors High and Dry*, *supra* note 268.

310. See, e.g., Jordan Melnick, *Think Twice Before Pushing Play*, QSR <https://www2.qsr magazine.com/articles/exclusives/1209/copyright-1.phtml> (last visited Oct. 3, 2016).

311. See U.S. COPYRIGHT OFFICE, *supra* note 24, at 93.

312. *Id.* at 75 n.305.

313. See *id.*

314. See *id.*

315. Robert Steele, *If You Think Piracy Is Decreasing, You Haven't Looked at the Data . . .*, DIGITAL MUSIC NEWS (July 16, 2015), <http://www.digitalmusicnews.com/2015/07/>

However, there is a sense of futility involved with attempting to protect any media that the public desires, and the examples are plentiful.³¹⁶ The Oscar-winning film *The Revenant* was leaked online days before it was even released in theaters.³¹⁷ J.D. Salinger's *Three Stories* includes a sought-after tale chronicling the early lives of characters from *The Catcher in the Rye*.³¹⁸ It was not to be released until 2051 but was leaked as a perfect-quality scanned digital document.³¹⁹ It seems, in a way, that no media is safe from the clutches of a motivated digital pirate.³²⁰

The best that an ECL model can strive for is to *increase* document security standards, and this is exactly what the (proposed) legislation would accomplish.³²¹ Right now, no statutes or other mandatory rules govern mass digitization procedures.³²² An ECL statute would include a requirement that mass digitizers agree to uphold reasonable security measures.³²³ This is not a perfect solution to end document piracy, but it *is* a baseline standard that mass digitizers would be accountable for adhering to.³²⁴ Therefore, legislation would be a step in the right direction for the security of mass-digitized documents.

3. Mass Digitizers Would Suffer Undue Harm Due to Legislation

An ECL model would not unduly cripple organizations interested in becoming mass digitizers. Opponents of an ECL model argue that many works in mass digitization projects are orphan works, so their unknown authors would never collect on the licensing fees that a CMO negotiates for them.³²⁵ Because of this, they allege it would place an undue burden

16/if-you-think-piracy-is-decreasing-you-havent-looked-at-the-data-2/ [https://perma.cc/QUG8-4C74].

316. *See id.*

317. Andrew Blake, *Movie Pirate Hit with \$1.2 Million Fine for Leaking 'The Revenant' Prior to Film's Release*, WASH. TIMES (Sept. 30, 2016), <http://www.washingtontimes.com/news/2016/sep/30/movie-pirate-hit-with-12-million-fine-for-leaking/> [https://perma.cc/Y6PS-57RU].

318. Jamie Condliffe, *Read These 3 Unpublished JD Salinger Stories That Just Leaked Online*, GIZMODO (Nov. 28, 2013, 5:00 AM), <http://gizmodo.com/read-these-3-unpublished-jd-salinger-stories-that-just-1473100222> [https://perma.cc/YF8M-PGGF].

319. *Id.*

320. *See generally id.*; *see also* Blake, *supra* note 317.

321. U.S. COPYRIGHT OFFICE, *supra* note 24, at 98.

322. *See* 17 U.S.C. § 107 (2012).

323. *See* U.S. COPYRIGHT OFFICE, *supra* note 24, at 98.

324. *See id.*

325. Jeff Kaplan, *Our Comments on Copyright Office Recommendations for Mass Digitization: No Extended Collective Licenses, Please*, INTERNET ARCHIVE BLOGS (Oct. 8, 2015), <https://blog.archive.org/2015/10/08/our-comments-on-copyright-office->

on mass digitizers to pay for use of these works.³²⁶ Small-time digitizers such as libraries and niche web communities would be forced to pay licensing fees to a CMO, which may not even give the money back to the authors.³²⁷ Rather than do this, opponents argue these organizations would be deterred from engaging in mass digitization at all.³²⁸

This viewpoint is overblown. Fair use would not be eliminated as a result of this legislation—fair use would simply be *supplemented* by it.³²⁹ If a mass digitizer is able to make a clear case to a CMO whose collection they want to digitize from, their work falls under the fair use doctrine and the license fee would be low or non-existent.³³⁰ Larger mass digitizers, such as Google Books, who do not discriminate whatsoever in the content of their collection, would end up paying the largest proportion of licensing fees.³³¹

CONCLUSION

Humanity lost the world's first Great Library to the fires of war.³³² Thousands of years later, we have been graced with a second chance. We must not emulate the sins of our ancestors and allow this great digital library to escape us.

Congressional legislation dealing with mass digitization would provide a solution that considers the interests of authors, mass digitizers, and the public alike. Specifically, an ECL model gives authors remuneration for their challenging work, mass digitizers legal certainty, and the public digital access to millions of literary works. An ECL's potential for success is seen domestically with ASCAP, and seen abroad through private VCL and other public ECL initiatives.³³³

While the United States does not have the same history of statutory ECL models that many European nations do, this evolution is necessary to foster the growth of technology that provides such boundless benefit to society. This congressional action represents more than a green light for mass digitizers—to act is to choose to endow authors with the right

recommendations-for-mass-digitization-no-extended-collective-licenses-please-2/
[<https://perma.cc/X2VY-GR6X>].

326. *Id.*

327. *Id.*

328. *Id.*

329. U.S. COPYRIGHT OFFICE, *supra* note 24, at 101.

330. *Id.*

331. *See id.*

332. Haughton, *supra* note 1.

333. *See supra* Subpart I.B.

to be justly compensated for their contributions to society.