

MASSACHUSETTS ARTISTS LEADERS COALITION

P.O. Box 382419 Cambridge MA 02238
<http://artistsunderthedome.org/malc/>
malc@artistsunderthedome.org

May 21, 2014

Maria Pallante, Register of Copyright
U.S. Copyright Office
Library of Congress

Re: Orphan Works and Mass Digitization
(FR Doc. 2014-02830; Copyright Office Docket Number 2012-12)

Dear Ms. Pallante:

I am writing on behalf of the Massachusetts Artists Leaders Coalition (MALC). MALC stands in solidarity with the National Writers Union and artists of all disciplines who want to retain both their moral and legal rights to their work(s)/intellectual property. MALC fully supports the National Writers Union's recommendations submitted in regard to Orphan Works and Mass Digitization. MALC opposes any "orphan works" legislation or any interpretation of "fair use" that permits use of any artist's work without their permission or restricts their remedies for copyright infringement because someone claims they were unable to identify or locate them or any person or entity they thought held certain rights to their work.

MALC was founded in July 2008 to bring together artists leaders of all disciplines and artist(s) run organizations, initiatives, and businesses around key issues facing Massachusetts artists working in all disciplines. MALC is committed to improving the social and economic position of all Massachusetts artists. The overall goal is to empower our community, support our artists leaders, and to mentor new artist leaders. We want to ensure that artists are at the policy making table. *MALC is the artist working group for our state's Creative Economy Council (CEC).*

MALC has very deep concerns regarding **any** changes to U.S. Copyright law regarding fair use and any changes to legal damages. We believe there will be many negative unintended consequences that will befall our community: artists of all disciplines who depend on controlling their moral and legal rights to their work protected under U.S. Copyright. Such changes will also negatively impacted the self employed, small nonprofits, and small businesses. The vast majority of artists of any discipline (or U.S. citizen for that matter) do not copyright their work for many reasons- mainly due to it being cost prohibitive and impossible in some cases due to the volume of work they create. Most artists will not be able to archive ALL of their work (visual artists and craft artists make high volumes of work and it will be next to impossible to archive all of their work digitally).

One of the other main reasons for the formation of MALC, was the 2008 federal battle over "Orphan Works". Several of MALC's cofounders, myself included, fought hard in 2008 to defeat those two pieces of federal legislation that would have destroyed the current, and needed, copyright and moral protections. We realized that we needed to work across disciplines to protect our livelihoods.

As you may recall in 2008, the proposed two 2008 Orphan Works pieces of legislation allowed for anyone to "infringe" who had done a search and the 2008 legislation also made no distinction from educational institution v.s. Commercial institution. (i.e. an advertising company could use your work under this proposed legislation if they searched and could not find you). Although there was some effort to minimize someone using the orphaned work for commercial purposes in the 2008

legislation, both pieces of legislation did not offer enough protection for artists of all disciplines or individuals for that matter.

There were other aspects of the 2008 legislation that were very troubling that were contained in both bills:

1) the pieces of legislation called for on-line databases or what would be also called registries to be certified by the Copyright office for visual artists to register their work with. No where in the legislation does it say they are to be free of charge to artists and although the law does not mandate you to register your work with these databases/registries- it is clear that these databases/registries will be a key tool for those to use searching for the copyright owners and a way for them to justify they did a search,

2) the amount of damages that could be retrieved by the copyright owner if they "surfaced" and find their work was deemed and used as an orphan work when in fact it was not orphaned were very problematic and unacceptable (legal fees need to be covered for example)

3) the legislation would essentially forced musicians, writers, visual artists, and others who want to protect their creative work to officially copyright their work to protect it-this will be too costly for most individuals and small businesses.

4) The legislation did not require the "infringer" to prove they obtained the orphaned work legally or that "the possessor obtained the legal rights of disposition".

5) The pieces of legislation called for on-line databases or what would be also called registries to be certified by the Copyright office for visual artists for to register their work with. No where in the legislation did it say they are to be free of charge to artists and although the legislation did not mandate visual artists to register their work with these databases/registries- it is clear that these databases/registries would have been a key tool for those to use searching for the copyright owners and a way for them to justify they did a search. Nor did legislation protect the artists from the private data base companies for using/selling their artwork/information, etc. The best answer would be to set up a free public archive for artists of all disciplines, but again it should be voluntary and NOT required. There will need to be a free program to help artists be able to put their work into the archive.

6) There needs to be a formal way for artists and advocates to easily work on a regular basis with the Copyright Office to monitor the current copyright law, ANY change in copyright law, and its impact on artists and the market. In other words the Copyright Office would be mandated to have regular meetings with artists advocates and small businesses advocates on their policies and regulations etc. It also needs to be mandated by the law and it needs to ensure transparency and accountability. (Note this occurs in health care policy on many levels).

7) The legislation did not require or mandate the Copyright office to conduct a national educational outreach campaign to alert the US public of this law change and of existing copyright law. There also needs to be federal funding allocated to do this needed outreach.

8) Most importantly the very real problem that works will be classified as orphaned works when in fact they are not orphaned.

MALC views orphan works as tool to deregulate the copyright "market" and that it will lead to widespread copyright infringement abuse. We honestly feel what happened to the most vulnerable people in the home mortgage market crisis will also happen in the copyright "market" to the vast majority of artists of all disciplines primarily due to fact that orphan works changes will in fact allow commercial interests to legally infringe copyright.

In our creative economy industry, artists of all disciplines send out work samples (music demo tapes, film shorts, jpegs/slides of their artwork, writing samples) in their effort to secure art shows, music/literary contracts, film deals, and/or jobs. Usually those materials are not returned to those who submitted the work- even if they provided the means to return their materials. Under current copyright law the holder of these materials can not legally infringe or use the work/copyright. Work samples, even those held by libraries, archives, educational institutions and other non profits should never be classified as Orphan Works.

We are especially concerned that any change to allow for use of orphan works will cause artwork to be "harvested" from student artists of all disciplines and those artists who come from underserved and low income populations (folk artists, Native American artists, artists of color, disabled artists, etc.) as the "infringer" will know that these artists will more than likely be hard to locate and that these artists will not have officially registered their work with the copyright office and/or "registered it" in the certified privately held databases/registries.

Also we need to point out the fact that in the Consignment of Fine Art market (think commercial galleries and craft galleries), artists are not told who has purchased their work and the purchaser is not given the artist's contact information (In 2006 it became the law in MA that artists must be given the contact information on who bought their art to enable the artist to better control their copyright). The same holds true for art auctions and art sold on the secondary art market. This makes it almost next to impossible for visual and craft artists to keep track of who has their work and to be able easily track their copyright, but thankfully under current copyright law their work can not be infringed.

In this day and age identity theft is a real and growing concern for all of us. The same theft does and can happen to art work of all disciplines via people downloading images, music, text from the internet or using technology "to take art work" (i.e. scan in someone's drawing from their sketch book). The 2008 orphan works legislation did not stipulate that the "infringer" must prove that they obtained the work properly and legally, and "that the possessor obtained the legal rights of disposition". Nor did it ask the infringer to disclose where and how they got the work (important information for advocates and the government to track trends-ie the person bought it at a student art fair, from a person in a homeless shelter). The 2008 Orphan Works Legislation would have more than likely fuel the black/stolen art market and would have created a new commercial market for derivative works created from "orphaned" works. Orphan works and mass digitization should not fuel the black/stolen art market.

We urge you to review this impact paper from the 2008 Orphan Works battle time period as it is very relevant:

http://www.kathleenbitetti.com/Pages/AF_OW_paper.html

Again, MALC opposes any "orphan works" legislation or any interpretation of "fair use" that permits use of any artist's work without their permission or restricts their remedies for copyright infringement because someone claims they were unable to identify or locate them or any person or entity they thought held certain rights to their work.

Sincerely,

Kathleen Bitetti
Artist

Co-founder of Massachusetts Artists Leaders Coalition

Email: MALC@artistsunderthedome.org

<http://artistsunderthedome.org/malc/>