



Museum of Fine Arts Boston

Office of the Director

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01 February 2013

Ms. Maria A. Pallante
Register of Copyrights
U.S. Copyright Office
101 Independence Ave., SE
Washington, DC 20559-6000

Re: *Copyright Office Notice of Inquiry Concerning Orphan Works and Mass Digitization, [77 F.R. 64,555] [Docket No. 2012-12]*

A handwritten signature in black ink that reads "Maria A. Pallante,".

The Museum of Fine Arts, Boston (MFA), respectfully submits these comments in response to your request for public comments regarding how the uncertainty surrounding the treatment of orphan works, particularly with regard to mass digitization, is detrimentally affecting our mission.

The MFA is a not-for-profit encyclopedic art museum that has welcomed the public through its doors since 1876. Its ever expanding collection of over 500,000 works originates from all 6 populated continents and includes a wide variety of mediums from paintings to musical instruments. The MFA prides itself on working each day to fulfill its mission to provide broad public access to its collection and continually works to meet "The Museum's ultimate aim ... to encourage inquiry and to heighten public understanding and appreciation of the visual world." In fulfillment of this mission, the MFA's online collections database has become a critical resource to provide access to our collection. While our collection includes over 450,000 works of art, physical space, conservation concerns, and other restrictions prevents the MFA from being able to publically display the vast majority of our collection in its physical galleries at any one time.¹ Furthermore, the realities of the digital world we live in means that the MFA is expected to serve a community that reaches far beyond geographical borders. In short, like most internet users, the global art community expects reliable, instant access to our collections and the MFA is actively working to meet the demands of our evolving audience.

¹ As of January 29, 2013, the MFA had just under 8,000 works of art from its permanent collection on display in its physical galleries.

The most significant obstacle to providing meaningful access to our collections database are copyright restrictions that limit our ability to share visual information to our online visitors through the posting of our digital photography of works in our collection. In order to meet the expectations of our virtual visitors and respect the rights of artists whose works we are honored to have in our collections, the MFA spearheaded a copyright initiative over a decade ago in order to reach out to artists and rights holders in order to license and arrange permissions for the MFA to engage in a variety of museum uses, including the display of such works in our online collections database. Through this initiative, which is significantly supported by the hard work of trained interns and volunteers, we reach out to galleries, museums, artist rights groups, and individuals in order to track down rights holders. To date, the MFA is proud to have cleared rights for over 17,000 works in its collection.

Despite the progress made through this initiative, there are thousands of works in our collection for which we are unable to locate and/or identify a rights holder for a variety of reasons, many of which are related to the burden of having to track down the path of ownership for copyright through the decades due to the lengthy duration of copyright protection. They include, but are not limited to, works where despite our best curatorial efforts we are unable to identify the artist, works that were created by lesser known and hobby artists for which limited if any biographical information is available, and works by artists who passed without any discernible rights holder or close relatives. This is a complicated obligation placed on the MFA and other museums that have very limited resources to devote to it.

Because of the lack of any type of safe harbor for those who, despite a good faith effort, are unable to locate a rights holder for an orphan work, the MFA is faced with limited options with regard to how to treat these works: (1) minimize its exposure to risk and restrict these images from distribution or digital display which in most cases will result in the total restriction of the public from these works, or (2) accept the risk of potential liability resulting from providing digital access to these works. These are unacceptable options for any cultural heritage institution to be forced to weigh and do little if anything to serve the purpose of the copyright system.

The MFA, like many in its industry, takes copyright seriously and respects the balance the laws attempt to strike between protecting the rights of copyright holders while safeguarding the public's interest in accessing creative works. As such, it has implemented responsible rights policies to manage the use of photography of its collection and devoted a reasonable amount of resources into clearing rights. Unfortunately, despite its best efforts, the MFA struggles to meet the expectations of the public to have digital access to its extensive collection because the legal

framework we are working within embodies "outmoded assumptions about technology, behavior, professional practices, and business models."²

As people, communities, and countries become increasingly interconnected, it follows that demand increases for intercultural access. Museums and their collections, thus, need to enter the digital realm to increase dissemination of cultural artifacts and information. Through online publication of their collections, museums like the MFA are able to further their missions to provide widespread public access as digital publication enables virtual patronage. Under the status quo, however, this level of accessibility proves challenging and in the case of orphan works, risky. If crafted as a safe harbor for those who have done their due diligence, not a license to ignore the U.S.'s copyright system, responsible orphan works legislation can bridge the gap between copyright law modeled around an analog world and the reality of our increasing dependence on digital technology.

Thank you for the opportunity to share our concerns and thoughts with you on this important matter.



Malcolm Rogers
Ann and Graham Gund Director

² As recognized by the Section 108 Study Group's Executive Summary <http://www.section108.gov/docs/Sec108ExecSum.pdf>