July 23, 2015

Maria Pallante
Register of Copyrights
Library of Congress
Copyright Office
101 Independence Avenue, S.E.
Washington, D.C. 20559-6000

RE: "Copyright Protection for Certain Visual Works" Notice of Inquiry,
Docket No. 2015-01

Dear Ms. Pallante:

The Society of American Archivists (SAA), North America's largest professional archival association, welcomes the opportunity to submit comments regarding the vitally important issues of access and use of images contained in our collections. Archival repositories in the United States manage billions of images as a part of our collections, including photo-graphs, graphic works, and illustrations. These images range from the family photographs that inspire individuals as they discover unknown branches on their family tree to those iconic photographs that can, at a glance, tell a story of a whole generation or a period of American history. The works held by archives are the fundamental building block of research and scholarship in our country. They contain the power to educate and inform, to move and inspire.

SAA heartily agrees with the Notice of Inquiry on the importance of photographs, graphic art works, and illustrations in our culture. However, their power cannot be realized if the preconditions for use impose unsustainable costs on repositories and users. We note with interest that you call out the "iconic importance of photographs like Dorothea Lange's 'Migrant Mother,' which epitomizes eras of American History." This particular image has gained its iconic status not only because of its power and humanity. Its stature is due also to the fact that as a work of the US government, it is in the public domain and thus freely available to be used by anyone without any legal repercussions. Furthermore, it has been carefully preserved at the Library of Congress. "Monetization" *per se* has little to do with "Migrant Mother"; it is its public domain status and its preservation in an archival collec-tion that has helped make it iconic.

SAA is concerned that in your effort to protect the traditional income of a small minority of creators, the Copyright Office may impose rules that close off access to graphic imagery found in archival repositories. Archivists respect the copyrights embodied in our collections while at the same time making the materials available for research use. Archivists balancing those two goals under current copyright laws risk incurring outsized monetary penalties that pervert their curatorial

17 NORTH STATE STREET, SUITE 1425 | CHICAGO, IL 60602-4061 USA
TEL 312.606.0722 | TOLL-FREE 866.SAA.7858 | FAX 312.606.0728 | WEB www.archivists.org

choices and keep visual resources from being shared. It is our users—the public at large—who are paying this heavy price.

If there is evidence that visual works are no longer being produced, it might be wise to revisit the incentives that copyright law can provide. But it appears to us that we live in an era of visual richness, with more visual works being produced and by more people than at any time in our history. We would be leery, therefore, of any change in copyright practices that would hamper the general ability of the public to access and use graphic material.

Monetization has not been a major issue for most archives. The major challenges that archives and our users face center on those works that are not in the public domain but are still protected by copyright. Our response, therefore, is limited to the fourth and fifth questions in the Notice of Inquiry.

4) What are the most significant challenges or frustrations for those who wish to make legal use of photographs, graphic art works, and/or illustrations?

Archival repositories in the United States collectively hold much of this nation's history and culture. Historically these repositories, many of which are public institutions and supported by public monies, were difficult to access because the materials had to be viewed and used on site. The Internet has improved this situation by providing the general public with a direct conduit to archival repositories. But the current Copyright Act hinders archivists' ability to make our holdings more accessible on the Internet. This is particularly frustrating because among the literally billions of visual works in archives, the vast majority, particularly photographs, were created for non-commercial purposes by authors with no expectation of monetary reward. A tiny percentage of the work is from creators who wish to monetize the work.

Archivists, and users of archives, have no desire to interfere with the market for works whose incentive for creation rested on monetary incentives; we would be happy to license their use. But it is often impossible to identify or locate the owner of a copyrighted work. There is often very little information about the work, even for those works that were once obviously commercial. Photo studios, for example, go out of business. It is often impossible to tell if a news photo was actually published and, if it was, whether copyright belonged to the paper or a free-lance photojournalist. The difficulties in identifying 1) whether a photograph is still copyrighted and 2) who is the owner of the copyright in the photo may be the greatest frustrations we face.

Archivists and archives users might be willing to risk using visual material of unknown origin if the penalties for doing so were not so high. It is impossible to know if a photograph has been registered for copyright because group registration of unpublished photographs and photos in databases is allowed. An archivist may make an otherwise unmarked photograph available, only to discover that it was part of a registered set and that the archives is now facing up to $30,000 in statutory damages and also attorney's fees for its allegedly infringing use. Rather than risk potential infringement, many archives and archives users avoid any work whose rights status cannot be clearly established, thus sharply restricting what portion of our cultural heritage can be accessed. Initiatives that are designed to make it easier for rights owners to pursue legal action will only increase the chilling effect of current copyright law.

The chilling effect of current copyright law on archives—and by extension on archives users—is real. In a recent study of the role of copyright in choices for digitization, archivists reported that copyright was a matter of concern when selecting material for digitizing, and that there is risk involved in the decision-making process (Jean Dryden, "The Role of Copyright in Selection for Digitization," *The American Archivis*t, April 2014, Vol. 77, p. 68). Half of respondents interviewed would remove material from consideration for digitizing if the material presented was going to be a copyright problem requiring identifying, locating, and contacting copyright holders (p. 72). Archivists and the users of archives need a copyright environment in which an archivist can have confidence in making a digital surrogate for an item in her or his collection widely available online for research purposes.

The Copyright Office has issued several reports that address what should be done about un-locatable copyright owners, but the proposed solutions are unworkable as far as visual materials are concerned. First, the vast numbers of images in any archival collection make conducting any sort of manual "diligent search" unworkable. An item-level search is not scalable or affordable for an archives that manages collections, any one of which may have thousands, if not millions, of items. One research project to identify and contact copyright holders of textual documents found that the cost of the search alone was $2,000 per identified item, yet the identified rights holders did not require any payment. (Maggie Dickson, "Due Diligence, Futile Effort: Copyright and the Digitization of the Thomas E. Watson Papers," *The American Archivist*, Spring/Summer 2010, Vol. 73, pp. 626-636.) This is not tenable for archives that would want to make their collections available for distance researchers and that face severe budget challenges and public scrutiny to use taxpayer dollars efficiently. Second, even if one were seeking clearance for a single item for an intensely commercial use, the absence of metadata with many visual works means that a so-called "diligent search" is likely to be fruitless.

<u>There is a solution to the frustrations faced by archivists and their users:</u> Image creators who wish to monetize or license their copyrights must have an affirmative duty to declare that intent by identifying the works that they own and providing contact information. The Copyright Office can assist by maintaining a visual database of all registered protected works. That database should be batch searchable via image search engines such as Google Images and TinEye so that an archives or its user could quickly and simply determine whether someone was seeking to monetize the image, even if there were no identifying marks associated with it.

5) What other issues or challenges should the Office be aware of regarding photographs, graphic artworks, and/or illustrations under the Copyright Act?

In our experience many individuals are not aware how visual works were treated under the 1909 Copyright Act. The further removed we become from that Act, the more individuals believe that the practices of the 1976 Act hold. It would therefore be extremely helpful to have a clear statement from the Office of how limited the extent of copyright could be for older works. Among the issues that could be addressed are:

- *The Work Made for Hire doctrine under the 1909 Act.* Specifically, it would be good to highlight that copyright in studio photographs belonged to the commissioning agent and not to the photographer unless specified otherwise in the commissioning agreement.
- *Publication by inclusion in a printed work.* A continuing source of confusion is whether the inclusion of a photograph in a book published with notice and renewed also protected the

photograph. If the photographer and not the publisher claimed copyright ownership, did the photo need a separate copyright infringement?

- *Publication by display.* Many copyright owners have forgotten that the public display of a work without restrictions on making reproductions could publish the work (if it had no notice on it).
- *The Pushman Doctrine.* Many current owners of visual works have forgotten that under the Pushman Doctrine, the sale of an original work transferred copyright with it. If the sale was public, it could constitute publication and raise the work into the public domain.
- *A searchable pre-1978 registry.* Members of the public should be afforded the protection of a reliable searchable database of pre-1978 copyright registries and renewals so that they can easily look up whether a copyright has expired.

A second service would be to require that any monetization system include copyright registration numbers that could be verified with the Copyright Office. A continuing problem with the other reproduction rights organizations is that they demand permission on works that have entered the public domain. Any new system endorsed by the Copyright Office should prevent this sort of fraud.

SAA urges the Copyright Office to consider that the mission of archives—to share culturally valuable images—is now unduly stifled by the threat of copyright penalties. Any new legislation should enhance rather than restrict the public's access to our shared visual heritage.

Sincerely,

Kathleen D. Roe
President, 2014 – 2015
president@archivists.org

cc: Nancy Perkin Beaumont, SAA Executive Director