July 23, 2015

Catherine Rowland
Senior Advisor to Register of Copyrights
U.S. Copyright Office
101 Independence Ave. S.E.
Washington, D.C. 20559-6000

RE: U.S. Copyright Office, Library of Congress [Docket No. 2015-1]: Copyright Protection for Certain Visual Works

Dear Ms. Rowland,

The Arts & Business Council of Greater Boston (A&BC) is submitting this comment on proposed changes to the Copyright Law on behalf of the community of artists we serve.

The A&BC's mission is to enhance the arts community by providing quality direct legal, business, and educational programs. Our flagship program, Volunteer Lawyers for the Arts, provides *pro bono* and reduced-cost legal services to artists and arts organizations throughout Massachusetts. Additionally, the A&BC has served the creative community for more than 30 years through business training for artists, nonprofit board service training and placement through Business on Board, fiscal agency, estate and legacy planning, human resources support, insurance programs, and corporate art lending partnerships.

We write today to express real concerns over the proposed legislative changes concerning Orphan Works and their negative impact on artists as content creators and rights holders. The proposed changes place an undue additional burden on artists to protect their work proactively and preemptively while reducing the remedies and benefits currently conferred upon them by law.

We recognize that Orphan Works pose an issue that may inhibit further creation and the dissemination of information and authored works. Indeed, the VLA receives inquiries every year from artists who want to use an expressive work but are not able to locate the rights owner. We appreciate those concerns and the uncertainty that

accompanies them. However, we receive a large number of calls and applications from artists whose work is being infringed. New technological advances have made it easier than ever for images to be copied and to circulate, often without any identifying information attached and with no knowledge of the content creator. There is too great a risk here of these visual artists' work being designated as Orphan Works and losing a substantial amount of the rights Copyright Law should protect.

Content creators are already at a distinct disadvantage. Looking only at the internet, the current rise of technology puts a device in everyone's hand that is capable of copying and disseminating the work of others with a few finger taps. More than that, the current landscape seems to have given rise to a population with little understanding or appreciation of intellectual property rights and an underlying belief that everything on the internet is free. Creative content is being devalued, not only by individuals but by companies. We have seen cases in the past year of blatant infringement by international companies that "should know better."

The new proposals reduce the benefits available to properties that become designated as Orphan Works. However, there are practical limitations on what an artist can do to protect their work from falling into that category. First, it places an undue administrative burden on artists to proactively promote and include their works in secondary registries so as to assert rights they already have, especially in those cases where the work has already been registered, for a fee, with the copyright office. Artists, it seems, would also have to spend additional time and effort patrolling the Notice of Use registries for signs of their work being infringed.

Second, there is far too little guidance offered on what would constitute a "reasonable search" by those seeking to use an artist's work. This is alarming given the proposed shield benefits provided to those who claim to have made a good faith search for the rights owner. We understand what a daunting task it can be and that the ease with which images can be copied with no accompanying attribution information can leave the trail cold. However, without clearer protections for artists and rights holders the ill-defined "reasonable search" improperly privileges parties seeking to use a work over those who actually created it.

The goal of copyright law is to incentivize artistic creation, and currently the law helps make it possible for an artist to make a living off of their creative endeavors by granting them exclusive rights to their creations and remedies to infringement under the law. Visual artists are already a demographic faced with difficult economic challenges. The VLA exists because there is a huge population of creative individuals who are not able to earn enough from their work to protect their legal interests on their own. *Orphan Works and Mass Digitization: A Report of the Register of Copyrights* (2015) asserts that with the remedy of "reasonable compensation," "[n]either actual nor statutory damages,

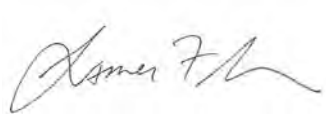
nor costs or attorneys' fees, would be available" because "incentives to litigate are obviated by the requirement that, once the owner files a Notice of Claim of Infringement, the user must negotiate for reasonable compensation. Because the costs of litigation can be avoided, there is no need to include the remedies of costs and attorneys' fees as part of the orphan works legislation." (63)

This stance fails to appreciate the actual position of the individual artist in this scenario and exposes the underlying suppositions that make the proposed Orphan Works changes so problematic. This language assumes that a) the content creator would have agreed to the use in the first place, and b) that the parties are equal and would have come to an easy equitable agreement but for their inability to connect.

Artists frequently contact Volunteer Lawyers for the Arts for help in entering conversations around negotiating fees, either for planned uses or after unauthorized uses. With commercial users, there is almost uniformly an imbalance of power between the artist and the user and the artist often needs assistance from an attorney to advocate effectively on their behalf for compensation that is in fact "reasonable." This does not address uses the artist would not have authorized in the first place had they had the option. It gives infringers a license to ask for "forgiveness" (with a cap on their financial risk) than to ask for permission. The personal, financial, and temporal costs associated with protecting and asserting their rights are real and often out of reach of the artists who most need the financial benefits conferred by registered copyright.

Copyright's "bundle of rights" has long given content creators control over how—and *whether*—to use their work. We respectfully ask you to reconsider the proposed copyright legislation and work with the creative community to find a better solution to protect artists. Thank you for your time and consideration.

Sincerely,



Jim Grace
Executive Director

Megan Low
Director of Legal Services