Attn:

U.S. Copyright Office, Library of Congress

101 Independence Avenue, SE, Washington, DC 20559

RE: Copyright Protection for Certain Visual Works

Massachusetts Institute of Technology (MIT) comments on Federal Register Document 2015-09575

Submitted by: Chris Bourg, Director of Libraries, on behalf of MIT Libraries (including MIT Press) & MIT Office of Digital Learning

Massachusetts Institute of Technology

Cambridge, MA

The Massachusetts Institute of Technology (MIT) appreciates the opportunity to respond to the Notice of Inquiry on Photographs, Graphic Artworks, and Illustrations (April 23, 2015). MIT is a community actively engaged in both the creation and use of copyrighted visual works, and members of the MIT community from a wide array of disciplines make, use, reuse, and remix visual works to convey and advance understanding in fields as diverse as aeronautics, architecture, art, biology, earth/atmospheric/planetary sciences, mechanical engineering, media arts, urban planning, and many others. These visual works – both historical and those newly created on campus -- are foundational to MIT's education and research. Thus MIT has a strong interest in how such works are handled under the Copyright Act, and particularly in the challenges and frustrations for those who wish to make legal use of visual works (Subjects of Inquiry questions 4 and 5). We direct our comments towards those issues, and respond from the perspective of a community whose mission is to educate the citizens of the world, especially in science and technology, and to bring research and scholarship to bear on the key problems

facing humanity. Copyright law has the potential to support -- or to impede -- MIT's success in this mission, and our comments reflect the tenet that to maximize its utility, copyright law should be seen through the lens of its origin: as a means of contributing to the public good.

To improve the ability for MIT and for universities and cultural institutions to make productive and appropriate uses of visual works, thereby contributing to cultural advancement and productive innovation, we address three key intersections with copyright law. These are *copyright mechanisms (including registration, licensing and dispute resolution processes); copyright term; and fair use.*

Copyright mechanisms: Registration, licensing schemes, and dispute resolution:

Ineffective search mechanisms for registration and renewal records create uncertainty and impede reuse. The current registration process is difficult to search and navigate on the Copyright Office website. We call upon the Copyright Office to provide a mechanism to search visual works, not just by title, but *visually*, by providing format-appropriate technology solutions: for example, a reverse image search (currently offered via Google) is desperately needed. Including visuals as part of the search results -- more reliably and consistently -- would also improve the ability to research ownership.

Similarly, difficulties searching prior registration and renewal information have the unfortunate result that there is no conclusive way to know if a work is registered, or if registered, renewed. Without this information, universities and libraries find themselves working without solid information in making determinations about sharing works in library collections, or sharing works through increasingly important digital learning systems. Given these uncertainties about sharing, the same 'safe' works (e.g. pre 1923 or government works) tend to be shared repeatedly, while important visual works remain locked away. Thus the inaccessible registration and renewal information reduces the scope of use and sharing of works – even works that were never intended by their creators to be revenue-producing.

Micro- and collective licensing schemes as currently modeled do not offer effective solutions for universities. Collective licensing and micro-licensing schemes have been proposed as mechanisms to ensure rights holders are appropriately compensated. But these systems present significant flaws from the point of view of scholarly and educational creators and repurposers of visual works. Under micro-licensing schemes it is too easy for visual works that should be openly available to be inappropriately padlocked. Collective licensing schemes that have been proposed will invariably miss the majority of works that matter to universities, and are not relevant to the unique works in their collections, so do not solve the access problems that universities have when wanting to productively use these works. In addition, even if collective licensing schemes could provide a margin of safety for universities in using some limited range of works, in the absence of successful examples they seem unlikely to achieve the goal of efficiently compensating rightsholders, who would be unknown and unreachable in many cases. Experience with collective agencies in Europe suggests that these agencies may not be motivated to try sufficiently hard to find the copyright holder—so establishing this kind of model is likely to simply create a new stakeholder to monitor. For these reasons, collective rights agencies are in our view not likely to result in the stated goal of direct compensation for copyright holders, as Jonathan Band demonstrated in his recent examination of licensing societies.[1]

Creative Commons licensing is a model to support and extend. There are fruitful licensing models, however, that should be promulgated. Creative Commons (CC) licensing, for example, offers a technical and machine-readable infrastructure that promotes responsible reuses. The ability to search via Google and Flickr for CC-licensed works offers the kind of model technical solution that we need: mechanisms that leverage the power of the digital realm to address the very issues it raises.

[1] Jonathan Band, "Cautionary Tales about Collective Rights Organizations" (September 19, 2012). Available at SSRN: http://ssrn.com/abstract=2149036 or http://dx.doi.org/10.2139/ssrn.2149036

The Copyright Office's academic partnerships are a practical and positive approach. Another practical solution, the Copyright Office's partnership with the Stanford Law School, is the kind of project needed to support effective licensing of copyrighted visual works. The 2014-15 project to "assemble information concerning marketplace resources for the licensing of photographs and the data standards relied upon by copyright owners and licensees to engage in such transactions"[2] is commendable. Academic partnerships like this one between the Copyright Office and campuses have the potential to advance the goals of all stakeholders and show us a positive path toward efficient and effective copyright and licensing practices.

Proposed small claims dispute resolution process will burden universities. On the other hand, the CO's proposal regarding an alternative copyright dispute resolution process for claims with low economic value[3] raises significant concerns for MIT. While there are legitimate problems for small-scale photographers in pursuing copyright infringement complaints and we support the development of new mechanisms to address the problem, the Small Claims Court solution is not workable. It would be highly problematic for universities to be required to appear in a small claims court on a regular basis to defend uses of individual photographs. The process would undoubtedly be seen as a source of revenue, with the likelihood that trolls would move to make money off of this process. Particularly as a user-funded entity, the small claims court would be subject to this and other dysfunctional pressures. It is essential that in trying to address the problem of smaller rights holders who cannot invest in litigation, we do not set new problems in motion.

Copyright rules should not be set to advantage current creators over the public good of historical and educational access and use. A university's perspective on use of copyrighted works tends to be very long-term: The MIT Libraries and Archives collect, preserve, and make available historical works that are

[2] http://copyright.gov/about/special-programs/partnerships.html
[3] http://copyright.gov/docs/smallclaims

primary sources for current teaching and research at MIT, including in emerging digital instructional models and systems. In addressing the needs of current creators, it is essential that we not devise forward-looking rules that inadvertently restrict use of the rich history of our cultural inheritance. A process that may seem productive to protect current interests could, as an unintended consequence, lock down uses of historical collections of visual works, making them inaccessible despite the promise of the digital age to democratize access to information. Universities like MIT typically have vast stores of photographs whose copyright ownership is unknown and essentially undeterminable. For many of these works, it is tremendously problematic to determine whether or not they have ever been published. These characteristics present significant barriers for use, barriers that could easily be unintentionally exacerbated by rules intended to protect current creators. If new rules are devised that apply only to newly created works, there is potential for significant confusion over which rules apply to which works and in the future, older works could still end up being over protected.

Copyright term:

The current copyright term of life of the author plus 70 years locks down uses of the many works that have never been, or are no longer, monetized or revenue-producing. The Register of Copyrights has recently called for moving back to a term of author's life plus 50 years, with a possible extension for the limited cases. The Register called for "alleviating some of the pressure and gridlock brought about by the long copyright term…by reverting works to the public domain after a period of life plus fifty years unless heirs or successors register their interests with the Copyright Office."[4] Such a move would open up treasure troves of cultural materials that could be productively used for academic inquiry,

[4] http://judiciary.house.gov/_files/hearings/113th/03202013/Pallante%20032013.pdf

scholarship, and teaching, for the betterment of society, without reducing incentives to creators. MIT strongly supports such a change.

Fair Use:

Universities, their libraries, and cultural institutions have been able to navigate the "gridlock" of lengthy terms and lack of access to registry and renewal information in part through fair use. Fair use can provide a foundation for universities and their libraries to lawfully offer access to works that are otherwise hidden and unused. Such access not only advances science, education, and culture, but serves to increase the value of the works themselves, by allowing those who view the works to provide needed information about them. Thus providing access under fair use can not only increase the range of material available, but enhances the value of the works that are made available.

University libraries have a sound understanding of consensus practices in fair use regarding visual works, through recent best practices documents. The Association of Research Libraries *Code of Best Practices in Fair Use for Academic and Research Libraries*[5] offers several relevant principles to guide universities and their libraries in considering whether to digitize and share visual works, as do the recent *Code of Best Practices in Fair Use for the Visual Arts,* put out by the College Art Association,[6] and the *Code of Best Practices in Fair Use for OpenCourseWare,* produced by universities offering open educational resources.[7] These guides demonstrate the thoughtful consideration universities, colleges, and their libraries are making in employing fair use, and provide helpful guidance to these entities -- as well as reassurance to content owners -- regarding community consensus.

[5] http://www.arl.org/storage/documents/publications/code-of-best-practices-fair-use.pdf
[6] http://www.collegeart.org/fair-use/
[7] http://www.cmsimpact.org/ocw

These best practice documents emphasize the importance of sufficient attribution, which, while not part of copyright law, is highly important to both content creators and content users. The importance of attribution as a cornerstone of best practice intersects with fair use, in that if ownership is not known, as is so commonly the case with photographs, it can have a negative impact on the ability to employ fair use in accordance with community standards. The unlawful stripping of rights metadata and citation/attribution information (mentioned in the NOI) is something university libraries as well as rightsholders are negatively affected and constrained by. While a recent court case reinforced that corporations cannot strip attribution and reuse photographs simply because they are available on the internet[8], abuses continue. These abuses, while unfortunate and problematic, should not be conflated with the exercise of legitimate fair use, which provides an essential cultural safety valve, allowing for uses that are the lifeblood of a free and dynamic society: scholarship, education, research, and innovation.

MIT extends its thanks for this opportunity to comment on these matters of keen importance to MIT, to universities, and to our democracy. We look to the Copyright Office to carefully weigh instituting systems that may seem to address immediate rightsholder concerns but exact too high a social cost, impeding access, innovation, and scientific and cultural advancement.

[8] http://www.pbs.org/mediashift/2013/01/who-really-owns-your-photos-in-social-media-updated-2013-edition025/