July 23, 2015

Maria Pallante
Register of Copyright
U.S. Copyright Office
Library of Congress
101 Independence Ave. S.E.
Washington, DC 20559-6000

RE: Notice of Inquiry, Copyright Office, Library of Congress Copyright Protection for Certain Visual Works (Docket No. 2015-01)

Dear Ms. Pallante & U.S. Copyright Office Staff:

These comments are submitted on behalf of the Massachusetts Artists Leaders Coalition (MALC). 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 artist leaders, and to mentor new artist leaders. We want to ensure that artists are at the policy making table. One of the main reasons for the formation of MALC was the 2008 federal battle over "Orphan Works". Several of MALC's co-founders fought hard in 2008 to defeat those two pieces of federal legislation that would have destroyed needed copyright and moral protections for intellectual property of all kinds. We realized that we needed to work across disciplines to protect our livelihoods. MALC is also the artist working group for our state's Creative Economy Council. Please be aware that MALC sent in Comments in May 2014 for Re: Orphan Works and Mass Digitization (FR Doc. 2014-02830; Copyright Office Docket Number 2012-12).

Our letter will outline our general concerns (A-F) with the United States Copyright Office's (USCO) June 2015 proposal and will also answer the five questions listed in the call for comments by the Copyright Office: *1. What are the most significant challenges related to monetizing and/or licensing photographs, graphic artworks, and/or illustrations? 2. What are the most significant enforcement challenges for photographers, graphic artists, and/or*

illustrators? 3. What are the most significant registration challenges for photographers, graphic artists, and/or illustrators? 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? 5. What other issues or challenges should the Office be aware of regarding photographs, graphic artworks, and/or illustrations under the Copyright Act?

MALC has very deep concerns regarding the Copyright Office's proposed changes to the current U.S. Copyright law. We firmly 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 current U.S. Copyright. Such changes will also negatively impact the self employed, small nonprofits, and small businesses. **The vast majority of artists of any discipline (or U.S. citizens 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). Nor will they have the time or the resources needed to monitor to see if their work is "infringed". The current U.S Copyright Law puts the burden on those who want to infringe to find the copyright and get permission to use the work in question, while the USCO's proposal changes that and essentially allows the "infringer to infringe" and shifts the burden to the creator of the intellectual property to find out if they have been infringed.**

MALC views orphan works as a tool to deregulate the copyright "market" by and that it that will lead to widespread copyright infringement abuse. 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 these USCO recommendations will in fact allow commercial interests to legally infringe with very little, if any, consequences.

Some of our general concerns with the USCO's proposal:

A) 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 are very problematic and unacceptable (ALL legal fees need to be covered for example).

B) It does not address the problem of search engines and other online entities stripping out the identifying embedded metadata/tags, watermarks, copyright symbols, etc. This needs to be addressed and made illegal. Steep fines need to be imposed for those

entities that do this practice (they are in fact creating orphaned works and are preventing people from protecting their intellectual property).

C) It does not require the "infringer" to prove they obtained the so-called orphaned work legally or that "the possessor obtained the legal rights of disposition" as required in the antiquity and fine art market. USCO needs to require the establishment the right of provenance system to track where people are getting their "orphan works from". With out these requirements, these proposed change to U.S. Copyright law, will more than likely fuel the black/stolen art market and will created a new commercial market for derivative works created from "orphaned" works. Orphan works and mass digitization should not fuel the existing black/stolen art market or created a new one of digital works.

i) The theft of intellectual property must be stopped. The USCO proposal does little to prevent this. 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 artwork 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). It is key to require that the "infringer" must prove that they obtained the work properly and legally and "that the possessor obtained the legal rights of disposition". The infringer must be made to disclose where and how they got the work (important information for advocates and the government to track trends - i.e., the person bought it at a student art fair, from a person in a homeless shelter).

ii) Any change to allow for use of orphan works with out this requirement 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 privately-held databases/registries.

iii) There needs to be strict regulations governing private sector (and public sector) image storing databases and this should be part of any legislation filed to change U.S. Copyright Law. Like banks, these databases are storing people's assets (i.e., their intellectual property). Safeguards must be put in place to protect the owner of the intellectual property stored in these databases: 1) these data bases should not be allowed not increase or charge new interest, fees, fines without at least three months notice to those storing their images 2) Nor can they charge a customer fee/interest or anything of the like if someone wants to remove their intellectual property from their

database. 3) Under no circumstance should the intellectual property stored in the database **ever** become the property of the database owner. 4) No agreement or contract should be allowed to undo #3) (suggested language: *Any provision of a contract or agreement whereby the image rights holder waives their rights, transfers their rights, to or grants usage of their work/intellectual property to the database owner is void*.). 5). "The digital images need to be destroyed when the rights holder of the intellectual property wants to stop storing their work with the database entity or if a rights holder abandons their "property"(note: it will need to be clearly defined as to what constitutes abandonment).

D) It does not create a formal, legislatively mandated way for the public, artists, and advocates to easily work on a regular basis with the Copyright Office to monitor the impact of the new proposed copyright law. In other words, the Copyright Office should be mandated to have regular public meetings that are accessible with new technology tools (ie phone conferencing, webinars) with artists' advocates and small businesses advocates on its policies and regulations, etc. This will help to ensure transparency and accountability. (Note, this occurs in health care policy on many levels).

E) It does not require the Copyright Office to conduct a national educational outreach campaign to alert the U.S. public, self employed and small businesses of this law change and there also needs to be substantial federal funding allocated to do this needed outreach.

F) It needs to include the provision that work samples may never be allowed to be infringed under ANY circumstance. 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.

MALC's answers to USCO questions 1-5

1. What are the most significant challenges related to monetizing and/or licensing photographs, graphic artworks, and/or illustrations?

i) In general, people don't want to pay artists for their work and if they do, it is not a living wage. See MALC's "Fair Trade Means Fair Trade" short document:

http://artistsunderthedome.org/malc/fair-trade/

ii) Entities forcing artists to sign over their digital rights.

iii) Work-for-hire contacts for independent contractors and all rights publishing contracts need to be made illegal.

iv) Lack of royalty income and royalty income from sales in secondary markets for artists in all disciplines.

v) It needs to be acknowledged that not everyone wants to monetize or license their artwork/images, thus their work should not be infringed or used under any circumstance. (example: family photographs, artwork that is one of a kind work, limited edition works, or the creator does not want to digitize their work as it would undermine the work's value/integrity, etc.)

vi) There is a need for a federal law governing the Consignment of Fine Art. In the Consignment of Fine Art market (think commercial art 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 (this includes not allowing the selling of digital images of their work for any purpose).

2. *What are the most significant enforcement challenges for photographers, graphic artists, and/or illustrators?*

i) Lack of funds to cover legal fees when their work is infringed.

ii) Lack of time to spend pursuing infringement cases or searching to see if their work was infringed (many artists and small businesses can not spend the time to go to court for cases especially if their legal fees are not covered).

iii) The USCO's 2015 proposal to change existing copyright law will make it very hard for our community to enforce/protect their intellectual property from theft or misuse.

3. What are the most significant registration challenges for photographers, graphic artists, and/or illustrators?

i) Cost. It is too expensive to do so for so many artists and small businesses.

ii) Amount of work that would need to be registered (due to the volume of work created).

iii) Lack of time needed to register the work.

iv) Lack of technology and high speed internet access needed to register the work.

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?

Under current "fair use", most artists have not had difficulty with this issue. As suggested in the past, an expansion of **fair use** to aid our documentary film makers and those wishing to preserve work for clearly defined educational and scholarly use, should be explored while making it illegal to commercially infringe work.

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

If this USCO proposal is put into effect as written, it will clearly undermine the Visual Artists Rights Act of 1990 and the needed protections under our current copyright laws. This was a key law that put our country in compliance with international law and treaties. The moral rights of an artists are just as important as the legal and economic rights.

Concluding remarks:

"Intellectual Property is the oil of the 21st century. Look at the richest men a hundred years ago; they all made their money extracting natural resources or moving them around. All of today's richest men have made their money out of intellectual property. (Mark Getty, "Blood and Oil," The Economist (March 4, 2000), p. 68)*

The current proposal from the USCO will have negative unintended consequences for individual artists of all disciplines and small businesses who create intellectual property. MALC cannot support the USCO proposal as it is now written. It will benefit

those who wish "to extract and move around" this intellectual property for no or little cost at the expense of those who created it in the first place.

MALC one again suggests amending the fair use section of the copyright law to clearly define true orphaned works. Amend it to allow our accredited cultural partners and allies to use the true orphaned works they have in their collections for educational and scholarly purposes only (as well as amend it for photo-retouching for a clearly defined personal use, and for our documentary film makers), and at the same time explicitly ban ALL commercial use of orphaned work. Gone would be the need for private visual databases, for the paperwork to infringe orphaned work, and small claims court, while at the same time it would not undermine needed copyright protection, the moral rights of artists of all disciplines, and our current commercial market.

Thank you for your time and attention to our concerns and suggestions.

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