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Office of the University Librarian

U.S. Copyright Office
[Docket No. 2015–01]
Copyright Protection for Certain Visual Works; Notice of Inquiry

July 22, 2015

Maria A. Pallante
Register of Copyrights
U.S. Copyright Office
101 Independence Avenue, S.E.
Washington. DC 20559-6000

Dear Ms. Pallante:

Thank you for the opportunity to submit comments in response to the April 24, 2015, Notice of Inquiry on Copyright Protection for Certain Visual Works. As you may know, UCLA is one of the nation's leading public research universities and takes very seriously its responsibility to serve the people of California, the U.S., and the world through its mission of education, research, and service.

Integral to that mission is the role of the UCLA Library in collecting, preserving, and making accessible scholarship and the cultural record. By making its holdings as broadly available as possible, the UCLA Library plays an essential role in furthering scientific discoveries, creating innovative solutions to pressing problems, and improving the lives and well-being of individuals and of society.

Complementing some eleven million volumes, journal subscriptions, and licensed databases in its general collections, the Library's special collections of manuscripts, rare books, and specialized archival materials contain unique and rare primary sources in the arts, music, humanities, life and physical sciences, and social sciences. Rare book holdings consist of more than 350,000 volumes, while non-book holdings comprise more than thirty thousand manuscripts, over five million photographs, and some 630,000 maps, music manuscripts, sheet music, sound recordings, art, architectural drawings, graphic arts, and ephemera. Like the broader Library, UCLA Library Special Collections are open to the general public for reference and research.

As one of the country's foremost public academic research libraries, the UCLA Library takes very seriously its responsibility to protect the intellectual property rights of creators and publishers represented in our collections. To that end we employ experts in intellectual property and U.S. and international copyright law,

draw on the expertise of university lawyers when appropriate, and routinely advise users on permissions requirements. Our comments below focus on ensuring that any contemplated changes to U.S. copyright law regarding visual works do not negatively impact our ability to make our collections broadly accessible in ways that fully serve UCLA's teaching, research, and public service mission.

We appreciate that the **Background** section of the Notice of Inquiry remarked on the impact of many visual works on American culture, including photographs, media art, and medical illustrations, all of which are essential in teaching and research at UCLA. That section cited Dorothea Lange's indelible photograph of a migrant mother, which has rightfully achieved its iconic status because of both its power as an image and its public domain status as a work of the federal government. It is also interesting that several media photographers' images of firefighters raising an American flag at the World Trade Center on September 11, 2001, were cited; the current litigation surrounding them demonstrates the strength and flexibility of fair use in protecting image creators and rightsholders.

In acting as a steward for the collections of the UCLA Library, we always bear in mind the U.S. Supreme Court's definition of the purpose and objective of copyright as the "means by which an important public purpose may be achieved…. The monopoly created by copyright…rewards the individual author in order to benefit the public".[1] Our public – UCLA students, faculty, and staff; the people of California for whom we hold our collections in trust; and the broader population, which benefits from scholarship and discoveries made at UCLA – relies on the Library to provide timely access to the content we collect and preserve. Our users, and similar users of academic and research libraries across the country, must be among the primary audiences whose needs the Copyright Office keeps foremost in mind when considering any changes to current copyright law regarding visual works.

Our comments below focus on the fourth question raised by 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?

Academic and research libraries house collections that may each contain hundreds or thousands of visual works, but the libraries often do not receive the copyright of the collections, nor is the copyright holder always ascertainable. The person who collected the materials, the donor, or the seller may not own the copyright and often has no information about the copyright status or owner. Historical visual works created for personal use, while often of unique research and teaching value, are frequently unsigned and unattributed or were created anonymously, making it practically impossible to identify and locate the copyright holder. For example, it would be very rare to find a family photo album, scrapbook, or collection of casual historical photographs that contain information regarding the original or subsequent creators, copyright status, or copyright ownership.

[1] *Harper and Row v Nation*, 471 U.S. 539, 549 6 (1985)

This challenge is not restricted to photographic prints made decades ago. The vast majority of contemporary mobile phone photographs are taken by individuals with no thought of commodification, but with their unique ephemeral view of day-to-day life, these photos comprise essential historical and cultural documentation. Research libraries and archives are increasingly collecting born-digital primary source materials like smartphone photos, but in aggregate these are even more voluminous in quantity than print photos and present similar challenges regarding identification of creator or copyright ownership once they're divorced from the physical phone itself.

Even in cases where authorship is identifiable, it can be difficult to locate creators or heirs, which is of course necessary for determining copyright ownership. Heirs or assignees may not know the copyright status, whether the item in question was a work for hire and therefore subject to ownership by another, or whether copyright was legally transferred.

Difficulties can also arise with visual works created outside the United States, since other countries have different laws that apply to visual works. In addition, works that fall into the category of traditional cultural expression – which includes such visual works as art, designs, signs and symbols, and architectural forms – are still subject to debate among copyright experts and so have uncertain status.[2]

There does not currently exist a comprehensive one-stop registry that can be used to easily locate owners of visual works that are protected by copyright, especially the types of non-commercial visual works that are a cornerstone of research library collections. Creating such a registry for commercial creators would address their concerns about protecting their economic interests and would not require a change in existing copyright law. However, this would not address research libraries' challenges, since many visual works in research library collections are typically created with no thought of their future archival value; it would simply never occur to the creator to register the work.

Among the countless visual works in archival and special collections at academic and research libraries, the vast majority was created for non-commercial purposes of documentation by creators with no intention or expectation of monetization, and their primary present-day use is to support instruction and scholarship. Though it may be tempting in its clarity, one-size-fits-all legislation focused on monetization, and designed to address the concerns of the small proportion of commercial image producers and rights holders who have lost income because their images were used illegally, will have a chilling effect on the use of visual works in library and archive collections. Existing copyright law provides legal remedies for those commercial creators. Imposing the burden of identifying the copyright owner of a visual work beyond the good-faith standard of a reasonably diligent search, requiring an entry in a registry before a visual work can be used, or weakening the fair use provision in its current form would severely limit the full educational and research use of these unique and valuable scholarly resources.

The UCLA Library, along with our colleagues at research institutions across the country, takes very seriously its stewardship of our archival collections, along with the rights of the creators of those collections' contents.

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[2] See WIPO's statement on Traditional Cultural Expressions at http://www.wipo.int/tk/en/folklore/

We take great care to protect those rights, including seeking permission when appropriate and following the *Code of Best Practices in Fair Use for Academic and Research Libraries*, which recommends a clear takedown provision for digitized materials, statements and examples of proper attribution wherever possible, and sensitivity to privacy issues. When the copyright status of a digitized visual work is unknown or the work is an orphan, due diligence is undertaken prior to providing educational and research discovery and access.

We urge you to consider the unique and important mission that academic and research libraries play in advancing education, increasing global knowledge, and supporting access to the cultural record when considering any changes to copyright law regarding visual works. Commercial photographers, graphic artists, and illustrators are not the only ones with a stake in this issue; the American people as a whole and, indeed, the entire world will gain or lose access to invaluable primary source materials depending on the actions of the U.S. Copyright Office in this matter.

Sincerely,

Virginia Steel
UCLA University Librarian

Cc: Kim S. Kovacs, Executive Director, Federal Relations, UCLA
Amy Blum, Senior Campus Counsel, UCLA