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**Re: Reply Comments to Docket Number 2015-1, Copyright Protection for Certain Visual Works, 80 Fed. Reg. 23054 (April 24, 2015)**

Dear Ms. Rowland:

The University of Texas at Arlington (UT Arlington) Libraries is pleased to submit these Reply Comments in response to the Copyright Office Notice of Inquiry on Copyright Protection for Certain Visual Works. We thank the Copyright Office for undertaking this important inquiry.

UT Arlington was founded in 1895 and has grown to be the second largest university in the University of Texas System which consists of nine universities and six health institutions. It is in the center of the Dallas-Fort Worth-Arlington metro area, which is the fourth largest metro area in the United States. UT Arlington is ranked the fifth most racially diverse national university.<sup>1</sup> Recently, UT Arlington was recognized as a Hispanic Serving Institution by the US Department of Education.<sup>2</sup> Over 50% of our students work 20 or more hours per week. Our campus represents this educational shift as student body population become increasingly urban, working students.

The library supports approximately 50,000 students, approximately 10,000 faculty and staff members, public patrons of the Dallas-Fort Worth-Arlington metro area, and national and international researchers. The library supports traditional use of visual works by supporting faculty members as they reproduce visual works in their class lectures and scholarship and by providing access and preservation through format shifting to electronic mediums. Like many libraries, UT Arlington is trying to increase access to our unique collections through electronic mediums which includes, but not limited to, public access through mass digitization. UT

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<sup>1</sup> UT Arlington (2013). U.S. News Ranks UT Arlington Fifth Most Diverse National University [Press Release]. Retrieved from <https://www.uta.edu/news/releases/2013/09/U.S.-News-2014-rankings.php>

<sup>2</sup> UT Arlington (2014). The University of Texas at Arlington Becomes 'Hispanic Serving Institution'[Press Release]. Retrieved from <https://www.uta.edu/news/releases/2014/04/Hispanic-Serving-Institution.php>

Arlington Libraries holds a collection of more than 4 million photographs and other visual works, the library holds the copyright to some but not all.

Additionally, the library uses and reuses visual works in non-traditional ways as well. We support digital humanities projects which require the reuse of visual works as new technological tools allow UT Arlington affiliates to present information in new ways, like the DFW City Halls Project.<sup>3</sup> As this project moves forward, the digital exhibit may include information and works about the physical history of the building, architectural plans of the building, and history of the City Hall as an institution. We also support students and faculty who use our creation and makerspace (UT Arlington FabLab.) Our FabLab includes 3D printers, embroidery machines, laser cutters, and vinyl cutters. Our students are both creating visual works and reusing visual works as they use our FabLab for innovation, entrepreneurship, class assignments, and pleasure.

These reply comments respond to the Notice of Inquiry's fourth question, "What are the most significant challenges or frustrations for those who wish to make legal use of photographs, graphic art works, and/or illustrations?" and fifth question, "What other issues or challenges should the Office be aware of regarding photographs, graphic artworks, and/or illustrations under the Copyright Act?" We echo concerns by SAA and UCLA among others in the collegiate community about changes to the Copyright Code.

Below we share two challenges for the Office to consider that would benefit both creators and cultural heritage institutions such as UT Arlington Library by facilitating better communication about ownership of copyright in visual works.

### **1) Not all Creative Works Require Monetizing**

The Copyright Office's Notice of Inquiry and the Reply Comments assume that all works need copyright protection for the purpose of monetizing the work at a later date.<sup>4</sup> However, not all copyright creators want or need to monetize their works. There are over 882 million works licensed under a Creative Commons license.<sup>5</sup> More than half of those works allow for for-profit reuses.<sup>6</sup> UT Arlington and UT Arlington Libraries both use visual works that have a Creative Commons license and create visual works under a Creative Commons license. UT Arlington Library is one of many institutions and content creators who are proud to allow reuse of their work. We merely require that the user of the work attributes the image to the library and that the use of the work be non-commercial. The library has to take affirmative steps to allow others to use our work, which is an acceptable solution in the short term as the library does not have to pay to license our content.

If extended collective licensing were to take place, as discussed in both the Notice of Inquiry<sup>7</sup> AND the Orphan Works and Mass Digitization,<sup>8</sup> the library would have to take additional steps

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<sup>3</sup> <http://cityhall.omeka.net/>

<sup>4</sup> See, e.g., University of California, Los Angeles (2015). Comments of UCLA. Available at [https://www.library.ucla.edu/sites/default/files/US-Copyright-Office\\_visual-works-NOI-comments\\_UCLA-Virginia-Steel\\_072215.pdf](https://www.library.ucla.edu/sites/default/files/US-Copyright-Office_visual-works-NOI-comments_UCLA-Virginia-Steel_072215.pdf)

<sup>5</sup> Creative Commons. (2015). State of the Commons. Retrieved July 13, 2015.

<sup>6</sup> *Id.*

<sup>7</sup> Copyright Protection for Certain Visual Works, 80 Fed. Reg. 23054 (April 24, 2015).

to allow the public to use our works through registration and documentation. This would require the library to pay for both the registration and documentation fees for a total of \$170<sup>9</sup> for up to 750 photographs. All other intellectual property structures in the United States require a rights holder to register in order to monetize their work and have that work protected at the federal level. Copyright is the only intellectual property structure that presupposes a desire to monetize the work. For many users, requiring registration and documentation of photographs would be cost-prohibitive for works they have no interest in monetizing. Our students and faculty would not be able to afford to register and document their copyrights under a Creative Commons license at the Copyright Office.

## 2) Determining who is the Copyright Holder

The most challenging aspect of the use of visual works is determining who holds the copyright. The Notice of Inquiry seems to assume that the reason that the work is orphaned is because of poor rights management on behalf of the user and not because of metadata loss throughout the process.

### a. Works of Visual Arts Orphaned at the Time of Creation

Some works are orphaned at the time of creation. There are two identified reasons why this may occur, first, because of the nature of ephemeral photography or, second, because the author chooses to remain anonymous.

The first example is of a recent orphaned work photograph. My sister recently got married in mid-June and at her wedding, I handed my phone to someone to take a picture of my sister and myself in her wedding. The work became orphaned at the time of creation, and no one knows took the photograph (and is thus the rights holder). Library collections and modern photography contain many works of ephemeral photography<sup>10</sup> especially as photographic equipment has become inexpensive and readily available like with camera phones.

Additionally, street artists like Banksy chose to remain anonymous. Regardless of whether other areas of the law consider his work vandalism, copyright law clearly treats his street art as protected creative expression by being a work of visual art. While Banksy has a current contact email address on his website,<sup>11</sup> not all street artists have contact information and there is no guarantee that the contact information will exist for the same length of the copyright.

These works of visual arts do not need additional protection as considered by the Copyright's Notice of Inquiry.

### b. Works of Visual Arts which are Works Made for Hire

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<sup>8</sup> U.S. Copyright Office (2015). *Orphan Works and Mass Digitization Report: A Report of the Register of Copyrights*. Available at <http://copyright.gov/orphan/reports/orphan-works2015.pdf>

<sup>9</sup> 37 CFR §201.3 (2015) (\$65 for the group filing fee and \$105 recordation fee of our intention not to enforce our copyright.)

<sup>10</sup> Unknown (Photograph). (2012). [Beach family 09.jpg] [photograph]. Available at <https://cdr.lib.unc.edu/record/uuid:010f645d-7000-4d71-9545-085a3af30bca>

<sup>11</sup> [faq@banksy.co.uk](mailto:faq@banksy.co.uk) (documented from <http://banksy.co.uk/faq.asp>)

The copyright code has no requirement to document works made for hire or exclusive copyright transfers. Because of that lack of requirement, there is no transparency in the copyright scheme for many materials when the eventual copyright holder is an incorporated entity, as opposed to an individual. While the Berne convention may prohibit registration requirements, there is no such prohibition to require documentation of either works made for hire or exclusive copyright transfers.<sup>12</sup> Documentation of works made for hire or exclusive copyright transfers would help provide clarity and would allow end users to more clearly identify the rights holders and request permissions for use. As other researchers have documented, rights holders are not documenting copyright transfers, including transfer through intestacy,<sup>13</sup> in ways that provide clarity and transparency for eventual users of the copyrighted visual media.

c. Works of Visual Arts which are Works Made for Hire from now  
Out of Business Companies

There has been almost no discussion on orphaned works when the work was a work made for hire. The primary focus of orphan works has been on works created by individuals. There has been almost no discussion on works made for hire. These works are more in danger of being orphaned than works owned by individuals, because there is no legal heir to the work. While incorporated entities are responsible for disposing of their copyrights through relevant state<sup>14</sup> or federal law,<sup>15</sup> little work has been completed to determine whether incorporated entities are disposing of their copyrights the way the law requires.

Many photographers and visual artists have their work set up as a limited liability corporation or incorporated business. One example is the Donald Art Company, Inc., who distributed prints from the 1950s through the 1990s. By 1999, the company had gone out of business. Donald Art Company has over 1000 registrations at the Copyright Office.<sup>16</sup> When the business closed, the Donald Art Company did not transfer the registration to anyone, and now, there is no entity from which to obtain permission for digitization or licensing. While not every piece from their collection may have archival or historic interest, some do. One such example is their registration for “Do unto Others” by Norman Rockwell, which is registered as a work made for hire.<sup>17</sup> The company is out of business, so the library, a researcher, or teacher cannot ask or license from Donald Art Company. There is no transfer of the work. Finally, the Norman Rockwell estate presumably does not have a copyright interest in the work anymore, as it is documented as a work made for hire. The work is orphaned, because the corporation did not appear to transfer their copyrights as required by Florida state law at the time of the business closure.<sup>18</sup>

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<sup>12</sup> Pamela Samuelson et al., *Copyright Principles Project: Directions for Reform*, 25 BERKELEY TECH. L.J. 1175, 1200 (2010).

<sup>13</sup> See, e.g., Maggie Dickson. *Due Diligence, Futile Effort: Copyright and the Digitization of the Thomas E. Watson Papers*. *American Archivist* 73 (Fall/Winter 2010) 626-636

<sup>14</sup> See, e.g. West's F.S.A. § 605.0710 (2014)

<sup>15</sup> 11 USC 541 (2012)

<sup>16</sup> See, e.g., US Copyright Registration # VA0000172083 (1984); US Copyright Registration VA0000054981 (1988)

<sup>17</sup> US Copyright Registration VA0000071897 (1981).

<sup>18</sup> West's F.S.A. § 605.0710 (2014)

These works are prone to orphaning because lawyers in other areas are not disposing of copyrighted assets appropriately. Memory institutions are required to wade through this complicated legal structure of mismanaged copyrights of former businesses.

### **3) Despite Challenges the Current Response is Working**

Despite the challenges, the current law is working for most of the creators of copyrightable content and the users of copyrightable content. Libraries, educators, researchers, and students use a combination of strategies to aid decision making when creating or using content. For creators of works of visual arts, they have many options available to them. These creators can choose to monetize their work, and many do. Some creators choose not to monetize their work and release their work under a Creative Commons license or they grant permission on their own website granting generous use and reuse. UT Arlington and UT Arlington Libraries are able to rely on works in the public domain (including federally created materials like “Migrant Mother” by Dorothea Lange)<sup>19</sup>, takedown notices, fair use, creative commons materials, embedding and linking to copyrighted content, created content, library owned content, and library licensed content like Artstor in order to provide our students, faculty, and patrons with the knowledge of making good copyright decisions.

### **4) Conclusion**

The current system is working and major changes in the copyright would continue to make the legal use and reuse of copyright materials more difficult. If any changes were to be made to the copyright structure, it would be to eliminate registration and documentation fees for the millions of copyright holders who are disinterested in monetizing their works, so these copyright holders including UT Arlington Library can continue to increase the robust public domain and provide access to material for other institutions.

Thank you for considering these suggestions. We encourage you to contact UT Arlington Library with any questions.

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<sup>19</sup> Society of American Archivists (2015). Comments of the Society of American Archivists. Available at [http://www2.archivists.org/sites/all/files/Copyright%20Office\\_Protection%20for%20Certain%20Visual%20Works.pdf](http://www2.archivists.org/sites/all/files/Copyright%20Office_Protection%20for%20Certain%20Visual%20Works.pdf)

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