**Before the**
**COPYRIGHT OFFICE**
**LIBRARY OF CONGRESS**
**Washington, D.C.**

# COMMENTS OF RECORDING ARTIST GROUPS ON ORPHAN WORKS

## Executive Summary

The undersigned recording artist groups hereby respond to the Copyright Office notice regarding Orphan Works published at 70 Fed. Reg. 3739 (January 26, 2005) ("Notice").

The United States should adopt a modified version of the Canadian Unlocatable Copyright Statute to allow creators and the public to use copyrighted works that are unavailable because the Copyright owner is either unidentifiable or unlocatable (hereinafter "orphan works"). In order to ensure compliance with the Berne Convention and International Law, and to avoid the possibility of works accidentally falling into the public domain, the legislation should be based on a case-by-case approach rather than a system that imposes formalities. Uncollected royalties should be used to finance a Heritage Fund that will advance the preservation of copyrighted materials for the cultural and public good. The Copyright Office should also issue a notice of inquiry examining out-of-print sound recordings.

## Comments

### 1. The Inability to Use Orphan Copyrights Impedes New Music Creation

Recording artists, songwriters and producers deal with copyright clearances on a regular basis. Sometimes, however, despite their best efforts, they or their representatives are unable to identify or contact the particular copyright owner. As a result, each year, many creators are forced to abandon projects that include orphan works. This is not only a loss for those creative individuals but also for the public and our collective culture.

The use of samples exemplifies how this problem impacts the recording community. As we all know, "samples" are a key ingredient in hip-hop, electronic, and dance music. Even rock

artists have included samples in their recordings. "From falling rain to gunshots, the range of audible sounds that can be borrowed from other sources and incorporated into a new recording is limitless."[1] Although they are a vibrant source of creativity, the artist must obtain the consent of the underlying copyright owners to use a sample.

When Judge Kevin Duffy of the United States Court for the Southern District issued his ruling in *Grand Upright v. Warner* in 1991,[2] it marked an important turning point in the legal and cultural history of hip-hop because this case established that there were severe penalties in equity and law, and perhaps even criminal liability, for the use of unauthorized samples.[3] The use of samples has been further complicated by the recent decision in *Bridgeport Music vs. Dimension Films.*[4] In this case, the United States Court of Appeals for the Sixth Circuit ruled that, at least within its own jurisdiction, there can be no de minimis sampling of a sound recording copyright.[5]

As never before, creators must pay strict attention to their use of samples. What happens, for example, when a producer or DJ finds a so-called "dope beat" or a sound recording of a compelling musical nature but is unable to contact the owner of the sound recording copyright (and perhaps the underlying musical work)? He or she must abandon the project. This may not

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[1] Michael Ashburne, Sampling In The Music Industry 1 (Law Offices of Michael Ashburne) (1994).

[2] 780 F.Supp. 182 (S.D.N.Y. 1991)

[3] Robert Christgau, Adventures in Information Capitalism: Gilbert O'Sullivan Meets Biz Markie, Village Voice, Jan. 21, 1992.

[4] Bridgeport Music, Inc. v. Dimension Films, 2004 U.S. LEXIS 18810 (6th Cir. Sept. 7, 2004).

[5] Id.

be a common occurrence, but it happens enough that very few active producers have not had this experience.

For years, attorneys and managers have pleaded with their clients to keep accurate and detailed logs of whatever outside materials are used in their recordings. In this way, the creators' representatives can use their expertise in the marketplace to negotiate with any third party copyright owners (nothing is worse than losing a project because someone has used materials whose source cannot be identified).

Once the copyrighted materials have been identified, recording artists and producers have several options to determine the owners of said copyrights. First, they should answer some important questions: what is the title of the original record and what is the name of the recording artist; what is the name and address of the record company (and the music publisher of the underlying musical work, if necessary); and what is the length and content of the sample (for example, if it is used as the "hook" or chorus of the new recording). The creators can then have one of their own representatives attempt to locate and, hopefully, negotiate a licensing agreement or they can hire any of several firms that specialize in copyright clearance.[6] The databases of ASCAP, BMI, SESAC, SoundExchange, and the United States Copyright Office (and their foreign analogues) are all useful in discovering the copyright owners. Internet and university databases can also be helpful sources of information. Copyright clearance firms also may have their own proprietary information based upon their experience in the area.

Identifying the copyright owner is only one step in the process. After the copyright owner is identified, the owner must be located, which may prove difficult or impossible, especially when the work is old, obscure or foreign.

[6] See Ashburne at 7.

## 2. Orphaned Works and Solutions

An orphan work should be defined as a copyright that has an owner that cannot be identified or located after reasonable efforts. We strongly advocate that the United States adopt a modified version of Section 77 of Canadian Copyright Act[7] for all copyrightable subject matter regardless of whether the term of the particular work is unknown or uncertain. Thus, the license would be non-exclusive and limited to the jurisdiction of the United States. Section 77 can be a useful model for the United States. Since 1990, Canada has issued one and hundred and forty-three license for such works.[8] The Copyright Board of Canada can also be an extremely valuable source of information regarding administration and international compliance issues. We also strongly reject the so-called "Formal Approach" as it might violate the ban on formalities that is fundamental to the Berne Convention[9] and could result in works accidentally falling into the public domain because of simple oversight.

The United States Copyright Office should administer and publish filings of requests to use orphan works in the same way that it currently does for notices of intent to enforce restored copyrights. The Copyright Office should establish a "best practices" criteria to identify and locate copyright owners, and any applicant for a license to use an orphan work should be required to demonstrate that he or she has undertaken those efforts, thereby completing their due diligence requirements. The applicant can document her or his efforts according to the steps mentioned earlier in this filing. Although directories of authors or artists are valuable sources of

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[7] Copyright Act, R.S., c 77 (2005)

[8] Copyright Board of Canada, Unlocatable Copyright Owners, Licenses Delivered by the Board (2005).

[9] Paul Goldstein, International Copyright 19-28 (Oxford University Press) (2001). The requirements of section 512(c)(2) of the Copyright Act of 1976 do not contain formalities that conflict with the Berne Convention.

information, forcing applicants to consult inheritance records or archives may introduce onerous requirements that would frustrate the purpose of any new legislation.

While obscure and older works may be orphaned more often than newer, well-known works, obscurity and age per sé should not be considered when determining whether a work is orphaned as those characteristics are not directly related to the identifiability and locatability of the copyright owner. Therefore, there should be no presumption that a work has entered into a period in which it can be recognized as an orphan work. Such presumption is not warranted and may impose unwanted formalities. Furthermore, the status of "orphan works" should only apply to published works to preserve the right of first publication recognized in *Harper & Row v. Nation Enterprises*.[10]

For those who wish to exercise rights in the orphaned work in a non-derivative manner, the duration of the government granted non-exclusive license to use the orphan work should be consistent with the duration of the remaining copyright term of the underlying work. In the event that the copyright owner comes forward, any license that has been granted would remain in effect until the copyright owner submits notice to the Copyright Office requesting termination of the license. Upon receipt of the notice, the license would remain in effect for an additional two years. Of course, since the license would include a payment to the copyright owner, (s)he will be receiving compensation for the exploitation of the work during all of this time. For the inclusion of the orphan work in a newly created derivative work, the government granted license to use the orphan work must be for the entire duration of the copyright term of the new derivative work. Any such license could not be terminated, but the copyright owner of the orphan work could apply for a reconsideration of the royalty determination (subject to the dispute mechanisms established by the Copyright Office) after a period of two years. Critically, new copyrightable

[10] 471 U.S. 539 (1985).

derivative works which contain orphan works must enjoy protection against copyright infringement for the entire duration of their copyright.

We would also recommend that adoption of the Canadian approach, so that the Copyright Office would establish and collect the non-exclusive license fees and other terms for the use of the orphan work. The most difficult part of this equation would be the determination of royalties. Certainly, the valuation of an audio-visual copyright would be substantially different from that of an architectural work. Only through a case-by-case analysis could proper valuation be achieved. There are any number of well-intentioned individuals as well as academic studies that could help the Copyright Office achieve the fairest results when this system is implemented. Again, the experience of the Canadian Copyright Board could prove edifying in this area, although we would not suggest that their highly effective efforts to date should serve as precedent here in the United States.

Finally, we would like to offer one additional provision modeled after the existing Canadian system. After the Canadian Copyright Board has established a reasonable royalty, if the copyright owner does not collect the money within five years, the monies escheat into general revenues of the Copyright Board.[11] Many commentators have suggested that these sums should be returned to those who applied for and ultimately paid such royalties.[12] We believe the U.S. should use such uncollected funds for a greater and more constructive public good. It is our recommendation that after five years these sums should go into a heritage fund (the "Heritage Fund") that would be established for the preservation of copyright materials and their subsequent archiving by the Library of Congress. Since the uncollected money actually belongs to creators, what better way to use it than to preserve the creations?

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[11] Copyright Act, R.S., c. 77(3) (2005).

12 David Vaver, Essentials of Canadian Law: Copyright Law 226 (Irwin Law) (2000).

### 3. Request for the Copyright Office to Issue a Notice of Inquiry Examining Out-of-Print Sound Recording Copyrights

We would also like to bring one final matter to the attention of the Copyright Office. Although we applaud the Office's efforts to raise the issue of orphaned works, we believe that there is another highly compelling issue that must be addressed at this moment in the history of our nation's Copyright Law. We urge the Copyright Office to issue a Notice of Inquiry examining the treatment of "out-of-print" works in the United States. One cannot broach the subject of an orphan work without noticing the plight of its cousin, the commercially unavailable copyright.

Most recording artists in the United States have transferred their copyrights in the sound recordings to their record labels. Due to the rapid consolidation of the media and copyright industries throughout the world, each year more and more copyrighted works become unavailable to the public. What was six major recording companies only a few years ago, has now become four and soon may become three. As Warner Brothers has decided to make an Initial Public Offering, it has slashed costs by dropping artists and deleting titles.

Because recording artists routinely transfer their copyrights in their recording agreements, there are many recording artists who want to exploit their works but cannot do so because another party controls the underlying rights, namely, their current or former record labels. Having the physical recording available for sale is often necessary for artists to obtain live performance engagements.

Although digital delivery technology may eventually allow record labels to obviate this situation to some extent, we believe that there should be a system in place that will allow the original authors to reclaim their works without prejudice or harm to the transferee. In fact, we believe that our proposal would generate significant income for the record labels. In much the

same way that many technology companies have been able to reinvigorate themselves by licensing the underutilized components of their patent portfolios, we are convinced that all record companies, as well as artists, would be highly rewarded if a compulsory license was implemented which would generate income through the underutilized components of their copyright portfolios. Such a license also supports the public policy that underlies copyright, i.e., the dissemination of works.

At this time, there are thousands of records that are commercially unavailable because record labels have decided no longer to manufacture and distribute them. When a label refuses to release an album or takes it out of print, no one benefits --neither the label nor the artist. Recording artists are being denied audiences, and the public is unable to purchase desired music. If the Sonny Bono Copyright Extension Act was enacted to encourage dissemination of copyrighted works, as has been widely claimed (particularly when the Act was proposed and passed and the *Eldred* case was litigated and adjudicated), then what social purpose does permitting copyright to waste away while culturally important sound recordings go unavailable and unused? Copyright was never intended to become a warehouse to capture culture and make it unavailable. This must not be allowed to continue.

The artists would benefit from a compulsory license by making money and being able to release a part of their history and share it with the public. Most importantly, however, the public would benefit because it would have access to the recordings. In this age of consolidation, record labels increasingly make decisions of what to distribute based on quantity expected to be sold, and many recordings still have significant public demand, but not large enough for the labels to think it worthwhile to keep the product in print. In addition, a part of the illegitimate peer to peer audience is searching for and downloading works that are no longer in print. The public has no other way to get this music, and neither the artist nor record company make any

money when the work is distributed through illegitimate services. By providing the artist with a right to exploit their recordings when the label is not exploiting them, the public will have a legitimate way to get this music, and the artist and label will be compensated.

We propose a compulsory license that would work as follows: If a record label does not press and sell physical copies of a sound recording copyright through normal retail channels in the U.S. for a period of two years (whether or not the recording has been commercially released and distributed in the past), the recording artist who created the recording would be able to apply for such a license. The license would grant the artist an exclusive license to manufacture and commercially distribute the sound recording copyright in physical format and a non-exclusive license for all other rights.

Basically, the record labels and the artist will switch positions, so the record label would not have any costs or liabilities. The artist would undertake the costs traditionally borne by the labels -- manufacturing, distributing and promoting, as well as all other obligations flowing from the distribution of the recordings (e.g., payment to the songwriter(s) and union obligations for the session musicians and vocalists) -- and would pay the copyright owner (i.e., the record label) a portion of the profits.

There are compelling practical and economic arguments for this type of compulsory license. A compulsory license for out-of-print sound recordings would provide "found money" for everyone involved, and the proceeds would serve commercial and cultural purposes. Moreover, this would generate new income for a recording industry that has complained continually about falling income and for many artists who never were, or are no longer, superstars. We also think that it would fruitful for those who work in the other copyright industries to comment on how commercial unavailability impacts their livelihood and the nation's good.

There are no losers in this proposal, only winners.

Thank you for allowing us to participate in this important process. The efforts of the Copyright Office in this matter further demonstrate its commitment to serving the needs of the public.

Respectfully submitted,

**FUTURE OF MUSIC COALITION**

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