

BEFORE THE
COPYRIGHT OFFICE
LIBRARY OF CONGRESS

In the Matter of
Orphan Works

Docket No. _____

**REPLY COMMENTS OF THE AMERICAN SOCIETY OF COMPOSERS,
AUTHORS AND PUBLISHERS REGARDING ORPHAN WORKS**

The American Society of Composers, Authors and Publishers (“ASCAP”) respectfully submits reply comments pursuant to the Copyright Office’s Notice of Inquiry (“NOI”) dated January 21, 2005 for written comments on issues regarding “orphan works.” 70 Fed. Reg. 3739 (Jan. 26, 2005).

The Initial Comments include a spectrum of proposals to address alleged problems associated with orphan works. Some proposals recommend new formalities of extensive registration and renewal,¹ others would impose compulsory licensing,² and still others would limit the damages and attorneys fees recoverable by copyright owners.³ One common thread joins all of these proposal—they would limit the exercise and enjoyment of copyright owners’ exclusive rights. The Copyright Office should remain mindful that any future legislative or regulatory action that implements such proposals will encroach on the rights of copyright

¹ See, e.g., Creative Commons and Save the Music Initial Comments, at 16-19.

² See, e.g., Recording Artist Groups Initial Comments, at 4-6.

³ See, e.g., Glushko Samuelson Intellectual Property Law Clinic Initial Comments, at 3-5.

owners, and should not be taken without compelling policy reasons.⁴ Indeed, copyright serves its constitutional objective by giving the owner—not the user—the right to control the use of copyrighted works.⁵ Before recommending or taking action, the Copyright Office should carefully analyze the extent to which a genuine problem exists that current copyright law cannot address.

I. The Orphan Works Inquiry Should Consider the Uses and Types of Works

ASCAP agrees with a number of the Initial Comments that, in considering the issue of orphan works, not all works—and not all uses of works—should be treated the same. See, e.g., Motion Picture Association of America (“MPAA”) Initial Comments, at 2-3. Indeed, numerous exemptions and safe harbors within the Copyright Act differentiate between types and uses of works. See, e.g., 17 U.S.C. § 108(i) (reproduction by libraries and archives); 17 U.S.C. § 1201(a) (circumvention of copyright protection systems). The question of what is an orphan work, and how it is to be used, depends on the facts of each unique circumstance. A one-size-fits-all approach is unnecessary and inappropriate for uses or works where there are no significant difficulties in obtaining clearance information. This is true for musical works generally, and especially so for the nondramatic public performance of musical works.

The Initial Comments largely reaffirm that users of musical works face relatively little difficulty in obtaining rights and clearance information. See, e.g., Broadcast Music, Inc.

⁴ See Staff of the House Comm. on the Judiciary, 89th Cong., Copyright Law Revision Part 6: Supplementary Report of the Register of Copyrights on the General Revision of the U.S. Copyright Law: 1965 Revision Bill (Comm. Print 1965) (“the author’s rights should be stated in the statute in broad terms, and . . . the specific limitations on them should not go any further than is shown to be necessary in the public interest.”).

⁵ As the Supreme Court has stated: “Copyright is a right exercised by the owner during the term at his pleasure and exclusively for his own profit and forms the basis for extensive and profitable business enterprises. The advantage to the public is gained merely from the carrying out of the general policy in making such grants” Fox Film Corp. v. Doyal, 286 U.S. 123, 130 (1932).

(“BMI”) Initial Comments, at 1-2; National Music Publishers’ Association, Inc. and The Harry Fox Agency, Inc. Initial Comments, at 3-6; Recording Industry Association of America (“RIAA”) Initial Comments, at 2. The public has easy access to comprehensive and up-to-date resources that provide ownership and licensing information about the overwhelming majority of musical works.⁶ The PROs offer online access to their musical works databases, which contain information on millions of titles, including the identities of songwriters, names and contact information of publishers and administrators, and performers of commercial recordings. When information is not available online, users can contact ASCAP and BMI staff to obtain further information. ASCAP Initial Comments, at 3-4; BMI Initial Comments, at 2. HFA likewise maintains an extensive song database, which is available to the public and contains hundreds of thousands of titles. HFA Initial Comments, at 4. Together, these musical works databases are an invaluable and comprehensive resource for determining rights and clearance information. See, e.g., Recording Artist Groups Initial Comments, at 3.

Furthermore, the type of use is crucial to the inquiry. With regard to musical works, the Initial Comments reaffirm that, when the use is a nondramatic public performance, there is, for all intents and purposes, no orphan works problem. The bulk licenses offered by the musical works performing rights licensing organizations (“PROs”), whose repertoires span virtually all copyrighted musical compositions, eliminate the need for music users to determine the identities

⁶ A number of initial comments suggested that a search of existing registries, including those maintained for musical works, is an essential component of any diligent search to be done by users of copyrighted works. See Glushko Samuelson Intellectual Property Law Clinic Initial Comments, at 12; Center for the Study of the Public Domain (Orphan Works Analysis and Proposal) Initial Comments, at 9; Association of American Publishers et al. Initial Comments, at 3; Society of American Archivists Initial Comments, at 6; College Art Association Initial Comments, at 28. ASCAP agrees, to the extent the law might be amended to allow orphan works uses when copyright owners cannot be identified or located. Nevertheless, as discussed below, such a search requirement is largely moot, as there is no meaningful problem in obtaining clearance information for musical works.

of individual copyright proprietors. ASCAP Initial Comments, at 2-3; BMI Initial Comments, at 2. A music user can avoid any need for rights clearance information by simply taking the bulk licenses offered by the PROs. The Initial Comments do not indicate that music users face significant difficulties in licensing public performances. Accordingly, no justification exists to extend the definition of orphan works, or a solution to any orphan works problem, to nondramatic performances of musical works.

II. The Nature and Scope of the Orphan Works Issue

ASCAP agrees with a number of the Initial Comments that urge a careful analysis of the nature and scope of the orphan works issue. As a preliminary matter, orphan works should only be defined as those works for which a potential user, after most diligent research and investigation, cannot identify or locate the person or entity authorized to grant permissions or licenses. Orphan works, however, cannot be works whose users are able to locate copyright proprietors, but fail to obtain appropriate licenses. See, e.g., MPAA Initial Comments, at 2.

The extent of the alleged “problem” must also be carefully considered. A number of Initial Comments urge that the inability to identify or locate copyright proprietors imposes significant burdens, and point, anecdotally, to difficulties that individuals say they have encountered. See, e.g., Center for the Study of the Public Domain (Orphan Works Analysis and Proposal) Initial Comments, at 1-5; Creative Commons and Save the Music Initial Comments, at 3-8. No Initial Comments, however, have brought forward rigorous empirical proof that being “orphaned” significantly harms the further creation and dissemination of works generally, or the nondramatic public performance of musical works specifically. Anecdotal evidence—the “tyranny of the anecdote”—is no basis for undermining authors’ rights.

There is no evidence that a significant number of users have unsuccessfully tried to locate copyright owners after a diligent search, used the work, and then were threatened with suit or sued for infringement. Nor is there compelling evidence that any alleged orphan works “problem” is greater now than it was when the current statute was enacted. It may well be that the orphan works issue is more prominent now as solutions to the perceived problem seem closer. See Paul Goldstein and Jane Ginsburg Initial Comments, at 2 (“Among the possible reasons for the current attention to the orphan works issue are that (1) the problem has gotten worse, perhaps because of new digital uses; and/or (2) the solution to the problem may for the first time have become easier (e.g., because of new digital facilities).”). Users of copyrighted works have opportunities now as never before to obtain access to clearance information, for example, through the comprehensive works databases recently made available on the Internet. Market-based, entrepreneurial efforts will most likely continue to provide solutions to any orphan works problem. See, e.g., Creative Commons and Save the Music Initial Comments, at 9 n.4 (Yahoo! search engine now enables users easily to locate millions of royalty-free Creative Commons-licensed works). Ultimately, orphan works seem a problem more in theory than in practice.

The Copyright Office should also weigh the extent to which the existing law already shields users of works. Copyright does not protect ideas, but only their expression, 17 U.S.C. § 102, so the inability to identify or locate copyright owners does not prevent users from taking ideas from works. Fair use permits many uses made for criticism, comment, news reporting, reaching, scholarship, or research. 17 U.S.C. § 107. The statute of limitations reduces the risk of using orphan works; a copyright owner forfeits his or her claims if asserted more than three years after they accrued. 17 U.S.C. § 507(b). The equitable doctrines of abandonment, laches, and

estoppel also provide potential defenses for users of orphan works. Works now in the public domain are not subject to copyright and cannot be orphaned. By definition, orphan works can only include those works that fall outside of all these exemptions and defenses.

To the extent any individual users face real difficulties finding the owners of orphan works, ASCAP agrees with the suggestions of a number of initial comments, see, e.g., MPAA Initial Comments, at 3-4, that a measured and incremental approach is appropriate. This approach should preserve the rights of copyright owners, recognize the existing registries and databases that make clearance information available, avoid imposing unnecessary formalities or undue burdens on copyright owners, and remain compliant with international convention and treaty obligations. To that end, ASCAP is willing and would look forward to engage in voluntary roundtable discussions to identify any meaningful problems posed by orphan works, and discuss how further to enhance access to rights and clearance information using the existing works databases and registries. See, e.g., MPAA Initial Comments, at 4-5; RIAA Initial Comments, at 4.

III. Conclusion

In weighing issues involving orphan works, ASCAP urges that the Copyright Office remain mindful of the purpose of copyright protection—implementation of any orphan works legislation or regulation would inevitably erode authors’ rights. A careful analysis of the true extent and scope of any alleged orphan works “problem” must be made—specifically of the types of works and uses to be made. In ASCAP’s experience, and as the Initial Comments reaffirm, users of copyrighted works face no significant difficulties in obtaining rights and clearance information for musical works and their nondramatic public performance.

Respectfully submitted,

Dated: New York, New York
May 9, 2005

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