

Comments from the Music Library Association Regarding Orphan Works and Mass Digitization

The Music Library Association (MLA) respectfully submits the following comments in response to the notice of inquiry, "Orphan Works and Mass Digitization: Request for Additional Comments" (79 FR 18932, Doc. 2012-12). The MLA is the professional association for music libraries and librarianship in the United States. Founded in 1931, it has an international membership of over 800 librarians, musicians, scholars, educators, and members of the book and music trades. Complementing the Association's national and international activities are eleven regional chapters that carry out its programs on the local level. The Music Library Association provides a professional forum for librarians, archivists, and others who support and preserve the world's musical heritage.

Our comments address the questions raised in the public roundtable sessions held in Washington, D.C. on March 10th and 11th, 2014.

1: The need for legislation in light of recent legal and technological developments:

The Music Library Association believes that recent jurisprudence regarding fair use as well as the development of best practices in fair use by user communities has clarified many issues that libraries have had with respect to orphan works.

Libraries and archives can also employ 17 U.S.C. Sec. 108(h) when published works

are in the last 20 years of copyright (pre-1972 sound recordings excluded), provided that such works are not commercially exploited.

Should Congress pursue a legislative solution, we recommend that such a solution be flexible, include a savings clause for fair use, and include a damage remission clause, similar to 17 U.S.C. Sec. 504(c)(2), which would instruct courts to remit statutory damages where the library or archives can show that it has made a reasonable effort to identify and locate the owner of the copyright. We would also request that 17 U.S.C. Sec. 108(h) be applied to unpublished works.

Session 2: Defining a good faith “reasonably diligent search” standard:

Music librarians and archivists, in working with orphan works (regardless of published or unpublished status), perform diligent searches for creators, copyright owners, and rights holders by using best practices created and endorsed by the library and archives community.¹ Our members regularly indicate that they sincerely wish to locate copyright holders of an orphan work when considering such items for digitization or other preservation projects. However, what constitutes a “reasonably diligent” search can vary from work to work. Defining a rigid set of standards is impossible given the widely varied nature of the works, and any attempt to do so would result in unsustainably costly requirements and therefore unusable law. It is important that legislation be flexible enough to allow for nuanced

¹ Examples include: Society of American Archivists, *Orphan Works: Statement of Best Practices*, Society of American Archivists, June 2009; Association of Research Libraries, *Code of Best Practices in Fair Use for Academic and Research Libraries*, Association of Research Libraries, January 2012.

interpretation over time, especially where the rate of new and iterative technologies in digitization and dissemination outpaces the rate of enacting law. We believe that the fair use doctrine currently provides that flexibility; however, an additional damage remission clause would add much needed flexibility on this topic by lowering the risk libraries and archives must take on in order to engage in their proposed use.

Should Congress decide to legislate a “reasonably diligent search,” we request that such legislation be flexible, simple, easy, and inexpensive for all institutions to follow without the need for consulting an attorney.

Session 3: The Role of private and public registries:

In the area of sound recordings, there are several private registries that music librarians can consult in order to help their patrons establish the correct copyright holder for a work (BMI, ASCAP, SoundExchange). Music librarians also consult the U.S. Copyright Office online registry as well as pre-1978 volumes of the *Catalog of Copyright Entries* for such information. However, these registries are not always accurate or comprehensive when searching for the rightful owner of an orphan work. For instance, unpublished works, such as personal documents and related media in an archival collection, do not appear in such registries. Lastly, as stated in the March 10th 2014 Roundtable on Orphan Works and Mass Digitization, there are

also private music industry registries that are not available to the public due to their proprietary nature.²

Two possible solutions would be: (1) for the U.S. Copyright Office to continue its efforts to update the online registry to include records from before 1978, and (2) for rights holders, in the interest of the public wishing to make lawful uses of their works, to collaborate on creating one registry, or at least a federated search, across commercial and private online registry databases.

Session 4: The types of works subject to any orphan works legislation, including issues related specifically to photographs:

We agree with other organizations such as the American Association of Publishers and the College Art Association that orphan works legislation should be broad-based and should apply to any work that is within the scope of federal copyright. In addition, any orphan works legislation should be broad enough to include historical sound recordings created prior to 1972, which are currently not subject to federal copyright in most cases.

Session 5: The types of users and uses subject to any orphan works legislation:

Any potential orphan works legislation should apply to any institution whose mission includes the preservation of our cultural heritage and provision of access to these works for the general public. It should also apply to individuals who would

² United States Copyright Office, "Orphan Works and Mass Digitization Roundtable" (transcript, Washington, D.C., March 10, 2014) 216.

like to use an orphan work in the creation of a new work. We would like for any potential legislation to address that non-commercial uses of orphan works and commercial uses be treated differently. In general, libraries and archives' uses of orphan works are non-commercial given the fact that our mission is to preserve our cultural heritage. For such non-commercial uses, we recommend that an additional damage remission clause, similar to 17 U.S.C. Sec. 504 (c)(2) apply to libraries and archives.

Session 6: Remedies and procedures regarding orphan works:

MLA believes that orphan works uses can be achieved under the Fair Use doctrine; however, any legislation should include a damage remission provision similar to the last sentence of 17 USC Sec. 504(c)(2) for libraries and archives that have performed a reasonably diligent search. Should a rights holder emerge and legitimately claim an orphan work as their own, libraries and archives should communicate with that rights holder to receive permission to use the work or take down the infringing work.³

Session 7: Mass digitization, generally:

Music libraries and archives need to be able to make digitization decisions on both the collection- and item-levels, depending on the nature of the works and the intended use. It is important that any potential legislation on orphan works have considerations for digitizing and preserving entire collections. Any legislation that

³ This is a recommended course of action in the Society of American Archivists' Statement of Best Practices. *Orphan Works: Statement of Best Practices*, 3.

does not allow for collection-level decisions would not have the needed benefit to society that would be the hoped-for goal of the legislation. The highly time-intensive nature of researching right holders for orphan works would present an intractable problem for even the best-funded institutions.

Session 8: Extended collective licensing and mass digitization:

We do not support extended collective licensing as a solution, in whole or in part, to the orphan works problem. We are concerned that such a requirement adds an unnecessary layer of bureaucracy and could create an environment that would threaten fair uses of copyrighted material. Additionally, the nature of orphan works is that right holders are unlikely ever to appear. As a result, any extended collective licensing would involve payment of royalties into escrow which would never be paid out. Such a regime would be a highly wasteful use of resources—many of which are public funds—that is inexcusable in a time when library resources are already scarce.

Session 9: Structure and mechanics of a possible extended collective licensing system in the United States:

Because we do not support an extended collective licensing system, we have no further comment on this particular issue.

Comments prepared by the Legislation Committee of the Music Library Association

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