BEFORE THE
COPYRIGHT OFFICE
LIBRARY OF CONGRESS

In the Matter of Orphan Works	Docket No. _____

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

The American Society of Composers, Authors and Publishers ("ASCAP") respectfully submits comments in response 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).

I. Interest of ASCAP

ASCAP is this nation's first and largest performing rights organization ("PRO"), with more than 200,000 writer and publisher members and a repertory of millions of copyrighted musical works. On behalf of its members, ASCAP licenses the nondramatic public performance rights in musical works to a wide range of users, including television and radio broadcasters, online services, background/foreground music services, hotels, nightclubs, and colleges and universities. ASCAP represents not only U.S. writers and publishers, but also hundreds of thousands of foreign writers and publishers through affiliation agreements with PROs in nearly 80 countries, by which the foreign repertories are licensed in the U.S., and the foreign PROs license the ASCAP repertory in their countries.

ASCAP's repertory spans decades and is as richly diverse as this country's history. ASCAP composers and lyricists write in nearly every musical genre including pop, jazz, symphonic and concert, film and television scoring, rock, country, new age, hip-hop, Latin, gospel, and rhythm and blues, and their works range from some of the most familiar standards to the latest top hits. As creators and owners of this vast array of musical works, ASCAP's writers and publishers have an important stake in ensuring that the copyright law continues to adequately protect their rights, both now and in the future.

II. Issues of Concern to ASCAP

A. Creators and Music Users Face No Significant Difficulties in Obtaining Rights and Clearance Information for Musical Works

The NOI requested comments on the "nature of the problems faced by subsequent creators and users." 70 Fed. Reg. at 3741. In ASCAP's experience, creators and music users do not face substantial difficulties in obtaining information about rights or clearances to publicly perform—and make other uses of—the vast majority of copyrighted musical works.

1. Musical Works Are Not "Orphaned" When Users Seek to Make Nondramatic Public Performances

Musical works cannot be considered "orphaned" when the clearance of nondramatic public performance rights is involved. With their vast repertories of millions of songs, ASCAP and the other U.S. PROs (BMI and SESAC) license nondramatic public performance rights in virtually every copyrighted musical work. ASCAP, like other U.S. PROs, licenses its repertory through bulk, collective licenses, which give access to the entire repertory for one fee. A bulk license provides numerous efficiencies and, importantly, music users need not contact individual copyright proprietors for permission to perform music. A music user who holds ASCAP, BMI, and SESAC licenses is certain to have cleared the nondramatic public performance rights to virtually all copyrighted musical works. Because creators and music users do not even need to

seek out clearance information, and face no difficulties in obtaining performance licenses—indeed, neither ASCAP nor BMI can refuse to grant licenses under the consent decrees which govern their operations—musical works licensed by the PROs cannot be "orphaned."

2. Musical Works Are Not "Orphaned" When Users Seek to Make Uses Other Than Performances

Despite the problems claimed by users in obtaining ownership or clearance information for "orphaned" copyrighted works, such problems are relatively rare in the context of musical works. In ASCAP's experience, creators and music users face no substantial difficulties in procuring clearance information for those uses of musical works which the PROs do not license—for example, dramatic performances, and synchronizing music with motion pictures or television shows (so-called "synch licenses"). Such ease of licensing exists because PROs and other music organizations maintain extensive databases of information about the musical works in their respective repertories, which creators and music users can freely access at any time and without charge to determine where to obtain rights and clearances.

ASCAP, for example, offers such information through its ACE database ("ACE"), located at http://www.ascap.com/ace. ACE is a database of all song titles licensed by ASCAP in the U.S. that have been performed and have appeared in any of ASCAP's domestic performance surveys,[1] and includes copyrighted arrangements of public domain works and foreign compositions licensed by ASCAP in the U.S. For each title, ACE maintains records of the identity of the ASCAP songwriters, including co-writers who are either affiliated with other PROs or not affiliated with any organization; the names, contact persons, addresses, and phone numbers of publishers or administrators of the works; and even the names of some of the

[1] ACE was introduced in 1993 and included surveyed titles prospectively. ACE will soon additionally include all works registered since 1990, whether surveyed or not.

performers who have made commercial recordings of the works. If a title or information is not available on ACE, creators and music users can contact ASCAP's Repertory Clearance staff by telephone, e-mail, or mail for additional information and assistance. Each year, ASCAP processes thousands of such requests, and in the substantial majority of cases, ASCAP is able to provide the information sought. ASCAP is continually innovating and enhancing its information database. For example, ASCAP members recently gained the ability to register their works and update their works' registration information online—further ensuring that the database remains reliable and up-to-date.

ASCAP and the other musical works databases are an invaluable resource for those who want to use musical works. Often the first stop for rights and clearance information, the PROs maintain information on virtually all copyrighted musical works, and up-to-date contact information for the substantial majority of works, allowing potential creators and music users to contact and seek appropriate licenses for any uses of musical works. Accordingly, the problem of "orphan works" simply does not exist in connection with musical works.

B. Definition of Orphan Works

The NOI sought comments as to the definition of "orphan works." 70 Fed. Reg. at 3741. ASCAP submits that any such definition should exclude musical works.

As discussed above, relatively few copyrighted musical works can be considered orphaned. By virtue of their bulk licenses, the PROs ensure that licensees can make nondramatic public performances of virtually all musical works without needing to contact and seek licenses from individual copyright proprietors. Thus, at the very least, none of the musical works licensed by the PROs can be considered orphaned. Moreover, the extensive musical works databases maintained by PROs and other organizations (including the Copyright Office, through

its registration system) are an invaluable resource for potential creators and music users who want to clear any other uses. As information about the overwhelming majority of copyrighted musical works is accessible through these databases, there is no substantial need to include musical works within the definition of orphan works.

C. The Effect of Designating Works as "Orphaned"

The NOI requested comments on the "effect of a work being designated 'orphaned.'" 70 Fed. Reg. at 3743. ASCAP welcomes efforts by all members of the copyright creator and user communities to engage in a dialogue about how best to enhance access to, and provide appropriate clearances for, copyrighted works. However, ASCAP opposes amendments to the Copyright Act that would forfeit rights or remedies of copyright owners whose works are deemed "orphaned," or that would impose undue burdens on copyright owners to maintain their rights or prevent their works from becoming "orphaned." ASCAP is concerned that any such changes would be a step backwards from the modern copyright system that Congress has enacted.

The earliest federal copyright statutes imposed a number of burdens on copyright owners to protect their works—including the formalities of notice, registration, and deposit. See, e.g., Act of May 31, 1790, §§ 1, 3, 1 Stat. 124; Act of Apr. 29, 1802, §§ 1-2, 2 Stat. 171; Act of Feb. 3, 1831, §§ 1-2, 4 Stat. 436. Typically, courts required exact compliance with these formalities in return for protection. Failure to comply often lead to harsh results: authors and proprietors often unintentionally forfeited their copyrights. See generally Benjamin Kaplan, Study No. 17: The Registration of Copyright, at 9-15, Comm. on the Judiciary Subcomm. on Patents, Trademarks, and Copyrights (Comm. Print 1958).

By the early 1900s, Congress recognized the need to relax the grip of formalities to avoid the unintended loss of rights. As the Register of Copyrights noted at the time, the formalities required should be commensurate with the rights granted:

> [A] system has gradually grown up under which valuable literary rights have come to depend upon exact compliance with these statutory formalities which have no relation to the equitable rights involved, and the question may very well be raised whether this condition should be continued.

Report on Copyright Legislation by the Register of Copyrights, at 25 (1904), quoted in Kaplan, Study No. 17: The Registration of Copyright, at 15. In the ensuing copyright revision, Congress abandoned registration and deposit as a precondition for protection, instead requiring publication with notice. Act of Mar. 4, 1909, § 9, 35 Stat. 1075, 1077.[2]

Problems with formalities persisted, however. Notice was one problem. Congress recognized "the need to avoid the arbitrary and unjust forfeitures now resulting from unintentional or relatively unimportant omissions or errors in the copyright notice." H.R. Rep. No. 94-1476 (1976), at 143, reprinted in 1976 U.S.C.C.A.N. 5659, 5759. As a consequence, Congress further eased the notice requirement in the 1976 Act, and eliminated it altogether in the Berne Convention Implementation Act ("BCIA"). Berne Convention Implementation Act of 1988, Pub. L. No. 100-568, 102 Stat. 2853.

The formalities required for renewal were especially troubling. According to Congress, the renewal provisions were a "substantial burden and expense," and "this unclear and highly technical requirement results in incalculable amounts of unproductive work. In a number of cases it is the cause of inadvertent and unjust loss of copyright. Under a life-plus-50 system the renewal device would be inappropriate and unnecessary." H.R. Rep. No. 94-1476 at 134,

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[2] Renewals, however, still had to be registered with the Copyright Office. Act of Mar. 4, 1909, § 24, 35 Stat. at 1080-81.

reprinted in 1976 U.S.C.C.A.N. at 5750. The 1976 Act replaced the mandatory renewal system with a term of life-plus-50 for most works.[3]

Thus, Congress has steadily reduced and eliminated formalities as a precondition for copyright protection. Returning to a system of protection predicated on formalities would undo decades of progress, and ignore the sound policy reasons underlying Congress's enactments. For one, requiring copyright authors and proprietors to take affirmative steps to ensure that works remain protected or that certain rights are preserved would, in effect, reestablish the renewal system that Congress has deliberately abolished. ASCAP is especially concerned that a mandatory orphan works registry would impose unfair burdens on its hundreds of thousands of writer and publisher members and affiliates. For example, a "registration or some sort of filing by copyright owners to maintain their copyrights past a certain age," 70 Fed. Reg. at 3742, would prejudice the ASCAP's members and affiliates, many of whom have already registered their works with the Copyright Office, and whose clearance information is freely available to the public through ASCAP's extensive databases. Such a burden is unwarranted especially, as discussed above, musical works are not orphaned with regard to nondramatic public performances licensed by the ASCAP and the other PROs.

D. International Implications

The NOI also requested comments on the "international implications" of proposed changes to the Copyright Act in connection with orphaned works. 70 Fed. Reg. at 3743. ASCAP is concerned about serious international repercussions—both for ASCAP members and the entire community of U.S. copyright owners—that would arise from orphan works legislation

[3] A 1992 amendment made renewals automatic for works first federally protected between January 1, 1964 and December 31, 1977. Copyright Renewal Act of 1992, Pub. L. No. 102-307, tit. I, 106 Stat. 264.

which reduces the rights of copyright owners, limits the terms of protection for copyrighted works, or imposes new burdens on copyright owners to maintain their rights.

Enactments regarding orphan works that require formalities would, we believe, violate U.S. obligations under the Berne Convention ("Berne") and the Agreement on Trade-Related Aspects of Intellectual Property Rights ("TRIPS"). Berne mandates that the "enjoyment and exercise" of copyright rights "shall not be subject to any formality." Berne Convention for the Protection of Literary and Artistic Works, art. 5(2) (Paris Text, 1971). Any requirement that authors and proprietors of foreign works satisfy certain formalities to avoid having those works deemed "orphaned" would violate Berne. Berne also generally sets the minimum term of protection at life-plus-50 years. Id., art. 7(1). Thus, shortening the life of non-U.S. works to under life-plus-50 would violate Berne's minimum term of protection. TRIPS incorporates Berne's articles governing formalities and terms of protection, and a limitation on rights or imposition of burdens on copyright owners would violate TRIPS as well. Agreement on Trade-Related Aspects of Intellectual Property Rights, arts. 9(1), 13.

Orphan works legislation that extends to foreign works may also have the unintended consequence of harming protection for U.S. works internationally. Foreign countries may implement similar legislation, possibly with the goal of curtailing protections for U.S. works. Congress recognized this "far from speculative" scenario in the BCIA when it exempted non-U.S. works from the pre-lawsuit registration requirement:

> Some foreign countries may, and no doubt will, adopt a variety of strategems in the future to frustrate copyright protection for works created by American authors. Were the U.S. to join Berne and retain section 411(a) in its current form, we would send the undesirable signal to current and future Berne members that registration procedures provide a legally unobjectionable method for achieving this goal. These countries could condition enforcement of copyright on the satisfaction of registration

> requirements tailored to minimize impact on domestic creators, while erecting obstacles to the protection of copyright in foreign works, a market category in which U.S. works are dominant in many foreign countries. Such strategems could be legitimized by the example of U.S. adherence to Berne, with provisions that are legally similar (even if practically quite different) and are left intact in our law.

S. Rep. No. 100-352, at 17-18 (1988), reprinted in 1988 U.S.C.C.A.N. 3706, 3722-23. At the very least, orphan work legislation overseas could impose extreme burdens on U.S. authors and copyright proprietors. While it could be comparatively straightforward for a foreign author or proprietor to ensure that a work is not orphaned within his or her own country, U.S. authors and proprietors can hardly be expected to satisfy, much less know, the legal requirements in each of the foreign countries that enacts orphan works legislation. The danger exists that U.S. orphan works legislation could open the door to reduced protection of U.S. works internationally.

III. Conclusion

By virtue of ASCAP's and other PROs' bulk licenses and publicly accessible works databases, musical works—virtually all of which are licensed for nondramatic public performance by ASCAP and the other PROs—are not "orphaned." Any definition of orphan works should exclude musical works. In considering the issue of "orphan works," the Copyright Office should be careful to avoid suggesting the imposition of undue and unnecessary burdens on copyright owners, and not to reverse the decades of progress made in eliminating formalities as a condition for copyright protection. Finally, the Copyright Office should recognize that orphan works legislation would have serious international implications, and could ultimately weaken the international protection of U.S. works.

Respectfully submitted,

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AMERICAN SOCIETY OF COMPOSERS, AUTHORS AND PUBLISHERS

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