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In the Matter of	)
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Orphan Works	)
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COMMENTS OF
NATIONAL MUSIC PUBLISHERS' ASSOCIATION, INC.
AND THE HARRY FOX AGENCY, INC. CONCERNING
THE JANUARY 26, 2005 NOTICE OF INQUIRY

The National Music Publishers' Association, Inc. ("NMPA") and The Harry Fox Agency, Inc. ("HFA") submit these comments in response to the Copyright Office's Notice of Inquiry examining issues raised by "orphan works" dated January 26, 2005 (the "Notice"). 70 Fed. Reg. 3,739. Our comments address the following issues regarding "orphan works," with specific reference to the musical work copyright: (1) the proper definition of an "orphan work"; (2) the nature of the "orphan work" problem faced by subsequent creators and users; and (3) the effect of designating a musical work as an "orphan work."

The problem of orphan works faced by subsequent creators and users with respect to the musical work copyright is minimal because Congress has established a statutory framework to ensure that musical works, including those whose owners cannot be located, are widely available to the public, and that this limited problem does not justify any limitations, whether loss of copyright or limitation of remedies, on the musical work copyright. We do recognize, however, that certain issues do exist with respect to orphan works, and submit that existing licensing mechanisms can be adapted and expanded to resolve any concerns about orphan musical works. To this end, we propose

that the concerns raised in the Notice can be addressed with respect to orphan musical works by charging a designated agent with the responsibility of administering licensing for orphan musical works, and that HFA is well positioned to serve as the designated agent because of its extensive database of musical works and experience with mechanical licensing.

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NMPA, founded in 1917, is the principal trade association representing the interests of music publishers in the United States. As such, NMPA works to protect the interests of the music publishing industry and, for over eight decades, has served as the leading voice of the American music publishing industry in Congress and the courts. With over 600 members, NMPA represents both large and small music publishing firms throughout the United States.

HFA, the licensing affiliate of NMPA, acts as licensing agent for more than 27,000 music publishers, which in turn represent the interests of more than 160,000 songwriters. HFA provides an information source and clearinghouse service for licensing musical copyrights.

I. The Definition of Orphan Work

The designation of "orphan work" should apply only to a limited subset of works whose owners cannot be located after subsequent creators and users have taken diligent steps to identify the owners. To that end, creators and users should make efforts to identify and locate the owners of copyrighted musical works by taking at least the following steps: (1) a search of registrations in the Copyright Office and the Copyright Office archives; (2) a search of various publicly accessible databases maintained by HFA,

ASCAP and BMI; (3) review of copyright notices on and label copy of sound recordings of such musical works; and (4) making reasonable efforts to contact owners (and their successors-in-interest, heirs or assigns, as the case may be), either directly or through their authorized agents, identified through the searches listed in (1), (2) and (3) above.

Moreover, works that have been published within a specified number of years should not be eligible for designation as an orphan work even if their owners cannot be identified and located through the above steps.[1] Requiring a diligent search for the owner and limiting the definition of orphan works to those works in existence for a specified number of years balances the interests of the public in accessing and using musical works with those of the copyright owners. These requirements will ensure that the owner of the musical work truly cannot be found and that the incentive to create new musical works is preserved by guaranteeing a minimum time during which the owner may determine whether and how a work is used.

II. The Problem of Orphan Works With Respect to the Musical Work Copyright is Minimal

The problem faced by subsequent creators and users with respect to orphan musical works is limited. The Copyright Act already provides a mechanism for granting a mechanical license to use musical works for which an owner cannot be located. Any person who wishes to obtain a compulsory license for a musical work for which the copyright owner cannot be found can do so under the Copyright Act by

[1] In preparing these comments, NMPA and HFA did not have the opportunity to poll their respective members and publisher principals, or to seek the views of songwriters or other interested parties. We suggest that the Copyright Office seek further comment regarding the appropriate period of time before a work would be eligible for orphan status.

submitting a notice of intention to obtain a compulsory license to the Copyright Office. 17 U.S.C. § 115(b)(1); 37 C.F.R. § 201.18.

In addition, many exceptions to the grant of exclusive rights exist under the Copyright Act, such as the fair use defense recognized in Section 107, which we believe would resolve some of the examples of orphan work issues put forward, *e.g.*, certain proposed educational and scholarly uses. While we appreciate that the fair use defense involves a fact-specific inquiry, certain guidelines do exist to allow potential users, particularly in the educational and scholarly context, to make adequate judgments as to whether a proposed use likely will be deemed fair. *See* 17 U.S.C. § 107 (setting forth guidelines for educational uses of music).

Under the current statutory scheme, HFA acts as a licensing agent for music publishers to facilitate grants of compulsory licenses for the reproduction and distribution of musical works. HFA maintains an extensive song database, searchable by the public, resulting in the ready accessibility of musical works for reproduction and distribution by potential users. HFA also provides a licensing service to the general public for smaller quantities of phonorecords called *Songfile at* http://www.songfile.com. Currently, HFA has approximately 1.4 million musical compositions in its database.

Similarly, while NMPA and HFA are not speaking on behalf of the performing rights organizations ("PROs"), the PROs, including ASCAP and BMI, were created for the purpose of facilitating the performance rights licensing of copyrighted musical works, and license nondramatic public performance rights to any user who requests such a license. PROs act on behalf of copyright owners to license nondramatic public performances of their musical works on a blanket basis. Both ASCAP and BMI

also maintain searchable musical work databases, which are readily accessible online. ASCAP, *ACE on the Web*, *at* http://www.ascap.com/ace (last visited March 25, 2005); BMI, *BMI Repertoire*, *at* http://www.repertoire.bmi.com/startpage.asp (last visited March 25, 2005).

In sum, millions of musical works are included in the extensive databases maintained by HFA, ASCAP, BMI and others as part of their administration of their various licenses. Among other information, these databases contain the titles and licensing information for domestic and foreign musical works in the organizations' repertoires, and the songwriters, composers, and music publishers behind them. These extensive databases encourage the dissemination and exploitation of musical works while supporting a licensing scheme that preserves the rights of copyright owners. Moreover, because musical works have long lifespans and many musical works are licensed late in the copyright term, owners of these works are easier to identify and locate. Accordingly, we believe that there are few instances in which a subsequent creator or user of a copyrighted musical work would be unable to obtain a license or locate the copyright owner.

The availability of a license to reproduce and distribute recordings of musical works for which the owner cannot be located and of industry databases containing information about millions of musical works suggests that, with respect to orphan musical works, the limited issue is the manner in which to authorize uses of copyrighted musical works not already covered by the Copyright Act's existing compulsory license provisions, such as the "sampling" of existing musical works in new works. Thus, we recognize that limited instances of true orphan musical works do exist and that these issues should be resolved, while respecting Congress' decision that the

exclusive rights set forth in the Copyright Act are necessary to encourage the creation of new works.

III. The Solution

A. Maintaining Enforceable Copyrights for Musical Works Encourages the Creation and Widespread Distribution of Music

As Congress determined and the Supreme Court confirmed in upholding the Copyright Term Extension Act ("CTEA") in *Eldred* v. *Ashcroft*, 537 U.S. 186 (2003), it is critical that efforts to disseminate existing works and create new works not infringe on the exclusive rights of the copyright owner. Moreover, the experience of the music industry has been that musical works protected by copyright are more widely recorded and disseminated than works that have entered the public domain. As a result, we believe that any solution designed to address the issues of orphan works must preserve fully the rights of copyright owners and not impinge on these rights to any extent, including by loss of copyright or limitation of rights or remedies.

A strong, enforceable copyright for existing works is particularly important to songwriters and their heirs because songwriting has always been a profession characterized by a high degree of failure, a low probability of success, constant threats to rights, and, in most cases, little — and frequently delayed — remuneration. Indeed, many songwriters spend their entire lives struggling for a successful song — success that, in many instances, comes only posthumously. Likewise, many "hit" songs were written decades before achieving any financial recognition. Strong copyright protection is often essential for songwriters' heirs to realize adequate returns on their work. Congress heard extensive testimony to this effect before passing the CTEA in 1998.

In its Notice, the Copyright Office identifies several possible solutions to address the orphan works issue, which we believe are inconsistent with current copyright law. For example, the "Formal Approach" suggested by the Office — requiring affirmative registration by copyright owners to maintain their copyrights past a certain age — unfairly flips the current copyright regulatory scheme from an opt-out to an opt-in system, effectively reversing Congress' abolition of the copyright renewal requirements in 1976. *See* 70 Fed. Reg. 3,739, 3,741. It also adopts certain formalities that are inconsistent with Congress' abolition of the formalities of the 1909 Act. *See* Paul Goldstein, Copyright § 4.9 (2d ed. 2005); 3-9 Melville B. Nimmer & David Nimmer, Nimmer on Copyright §§ 9.02, 9.05 (2004).

In addition, formal registration requirements would necessarily, and unfairly, result in the loss of rights or remedies for copyright owners who may be prejudiced by their own inexperience and inadvertence — one of the very reasons underlying Congress' rejection of such formalities in adopting the 1976 Act. *See* 3-9 Melville B. Nimmer & David Nimmer, Nimmer on Copyright § 9.02 (explaining that, in deliberating the 1976 Act, Congress noted: "One of the worst features of the present copyright law is the provision for renewal of copyright. A substantial burden and expense, this unclear and highly technical requirement results in incalculable amounts of unproductive work [and can be] the cause of inadvertent and unjust loss of copyright.") (citation omitted).

Further, we believe that the adoption of such formalities would violate the Berne Convention's prohibition on formalities as a condition to obtaining copyright protection. *See* The Berne Convention for the Protection of Literary and Artistic Works,

Paris Act, July 24, 1971, 25 U.S.T. 1341, art. 5(2) (requiring that member countries grant copyright protection unconditioned by formalities of registration and notice); Paul Goldstein, Copyright § 4.9 at fn.9 (2d ed. 2005) (explaining that Congress' 1992 amendment to the 1976 Act, which eliminated the renewal registration requirement for works for which copyright was secured between January 1, 1964 and December 31, 1977, was "a further step in the direction of compliance with the Berne Convention").

B. Existing Licensing Mechanisms Can be Adapted and Expanded to Resolve Concerns About Orphan Works

Although the issues creators and users face with respect to orphan musical works are minimal, we acknowledge that in certain limited circumstances — namely, proposed uses not already covered by the compulsory licensing scheme and blanket performance licenses — orphan works do present challenges that require pragmatic solutions. We believe these concerns can be resolved by adapting existing licensing mechanisms to charge a designated agent with the responsibility of administering licensing for orphan musical works.[2]

A designated agent would ensure the availability of orphan musical works to subsequent creators and users in return for a reasonable license fee. Accordingly, those who wish to use orphan musical works without violating otherwise valid copyrights would register the musical work and their desired use, along with evidence of such work's orphan status, *e.g.*, certification of the requisite searches, and obtain a license to

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[2] Currently, Congress is contemplating possible statutory changes concerning digital phonerecord delivery ("DPD") licenses. NMPA has been engaged in discussions with the Digital Media Association and the Recording Industry Association of America regarding the licensing of DPDs by online subscription services in an effort to formulate solutions that we hope will ensure the availability of all musical works for licensing by subscription services and guarantee a level playing field for the determination of rates.

do so from a designated agent.[3] In this regard, we believe that HFA is best positioned to represent the music publishing industry as a central designated agent for the purposes of administering licenses for uses of orphan musical works.[4] While proposing that HFA act as designated agent for licenses to address the orphan works issue, we appreciate that, from an operational perspective, such a licensing mechanism involves complex procedures and issues which we have not yet had adequate time to consider and thus are not in a position to address at this time. We hope to provide more detail concerning our proposal in our reply comments to the Notice.

In sum, allowing a designated agent to issue licenses for orphan works would maintain the integrity of the copyright laws, including the CTEA, by keeping orphan musical works under copyright protection for their full terms while also providing for their exploitation and use. In addition, allowing a designated agent to issue licenses for orphan works would minimize potential users' transaction costs and exposure to liability for copyright infringement. For these reasons, we believe that our above proposal would address any limited orphan works issues with respect to the musical work copyright.

Dated: March 25, 2005

By: Lynn B. Bayard

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[3] Our proposed solution set forth above is on behalf of NMPA and HFA and does not include performance rights licenses which are granted by PROs, including ASCAP and BMI.

[4] Any such legislation or regulations must take into account the costs and risks incurred by the agent undertaking this task. NMPA and HFA are prepared to work with the Copyright Office in developing the appropriate legislative provisions.

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