

Library of Congress  
U.S. Copyright Office

## Notice of Inquiry on Orphan Works and Mass Digitization

Docket No. 2012-12

### Comments of the Recording Industry Association of America, Inc. May 21, 2014

The Recording Industry Association of America, Inc. (the “RIAA”) welcomes the opportunity to submit these comments in response to the above-referenced Notice of Inquiry (“NOI”)<sup>1</sup> concerning Orphan Works and Mass Digitization.

The RIAA is the trade organization that supports and promotes the creative and financial vitality of the major music companies. Its members are the music labels that comprise the most vibrant record industry in the world. RIAA members create, manufacture and/or distribute approximately 85% of all legitimate recorded music produced and sold in the United States. In support of this mission, the RIAA works to protect the intellectual property and First Amendment rights of artists and music labels; conduct consumer, industry and technical research; and monitor and review state and federal laws, regulations and policies.

While the public roundtables hosted by the Copyright Office in March<sup>2</sup> covered a wide range of issues regarding orphan works and mass digitization, we would like to focus on just a few broad concepts, beginning with the subject of orphan works. First, the NOI asked whether “improved search tools and database technologies have mitigated the orphan works problem.”<sup>3</sup> Since Congress last considered orphan works legislation in 2008, increasingly robust online resources have become available that enable users to more easily discover the owner of a sound recording. Audio recognition software, including commercial applications such as Shazam, has also come a long way and can assist users in discovering information regarding the recordings they wish to use.

Given these new resources and advances in technology, we question whether orphan works legislation is, in fact, still necessary, at least with regard to sound recordings. However, if the Office nonetheless should determine that legislation is required, the RIAA believes that at a minimum such legislation must retain the “reasonably diligent search” requirements and other provisions largely consistent with those in the 2008 Sean Bentley Act.<sup>4</sup>

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<sup>1</sup> Orphan Works & Mass Digitization Request for Additional Comments and Announcement of Public Roundtables, 79 Fed. Reg. 7706, 7707 (Feb. 10, 2014) (hereinafter “NOI”).

<sup>2</sup> Copyright Office Public Roundtables on Orphan Works & Mass Digitization (Mar. 10–11, 2014).

<sup>3</sup> NOI, *supra*, at 7707.

<sup>4</sup> Since 2008, the Copyright Office has initiated a study regarding the possible creation of a small claims copyright court. Copyright Office, Copyright Small Claims (Sept. 2013), *available at* <http://www.copyright.gov/docs/smallclaims/usco-smallcopyrightclaims.pdf>. While that study identified a number of potential obstacles to the creation of such a court, some participants at the roundtables suggested that it might make sense to delegate to such a court (were it ultimately created) the task of determining “reasonable compensation” in cases where a copyright owner surfaces after their work was deemed an orphan and used by a third party. Given the complexity of the issues likely to come up during such litigation – such as fair use claims and

The NOI and the roundtables also asked whether existing exceptions such as fair use, as interpreted in recent court decisions, affect the need for legislation in this area.<sup>5</sup> Of course, fair use is a fundamental concept in copyright law, intended to apply to purposes such as criticism, comment, news reporting, teaching, scholarship, and research. The RIAA and its member companies are believers in those purposes and support fair use when the four-part statutory test is properly applied in light of its purposes on a case-by-case basis. In fact, as users of copyrighted works, our members frequently engage in their own case-by-case fair use analyses. Notwithstanding the above, the suggestion that fair use be applied *ex ante* to effectively immunize all uses of orphan works regardless of the nature of the work, the nature of the intended use, the impact on the market for that work, or the amount of the work that is used *perverts* the purpose of the exemption (*i.e.*, to provide individualized exceptions to owners' exclusive rights). Suggesting that fair use solves the orphan works problem effectively eliminates three of the four statutory fair use factors, leaving a single factor that automatically resolves in the user's favor by wrongly presupposing that the intended use has no "effect . . . upon the potential market for or value of the copyrighted work." There may be both actual and potential markets for copyrighted works, whether orphan or not.

To be clear, our position is not meant to negate the application of fair use in appropriate circumstances. But fair use must not be converted into an automatic free pass; it must remain, as intended, an affirmative defense to an individual owner's assertion of its exclusive right(s).

Next, we would like to address the issue of mass digitization. As many of the roundtable panelists noted, some questions in the NOI seemed to conflate mass digitization and orphan works, or at least imply that addressing one necessarily implicates the other. In fact, these are two very distinct concepts that require independent review and response.<sup>6</sup> An orphan works regime focuses on determining the ownership status of individual works; the mass digitization problem focuses on facilitating permission to use large numbers of works, most of which have readily locatable owners. Allowing the existence of a small number of orphans among a large group of works with identified or identifiable owners to justify unlicensed mass digitization is an overbroad and inappropriate approach that is harmful to the vast majority of copyright owners who are known or identifiable.

We also have serious concerns about the efforts of those who seek to formulate what amounts to a *de facto* royalty-free blanket license in the context of mass digitization under the guise of an expanded fair use exemption. The notion that entities wishing to undertake mass digitization projects should be exempted from seeking permission from copyright owners is equivalent to suggesting that the more works a user wants to use, the less obligation he has to track down the owners. Or, in the words of the Hathitrust plaintiffs, "it is permissible to steal the goods if it is too expensive to buy them."<sup>7</sup> Just because someone seeking to use *multiple* works simultaneously finds it time-consuming, costly, or simply hard to (a) seek permissions from known/knowable copyright owners, (b) conduct "reasonably

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the reasonableness of the user's search for the owner – we question whether a small claims court would be an appropriate venue for such claims, even if Constitutional issues with its creation could be overcome.

<sup>5</sup> NOI, *supra*, at 7707.

<sup>6</sup> *See, e.g.*, Initial Comments Filed in Response to NOI by RIAA, No. 79, at 4, ASCAP, No. 9, at 9, MPAA, No. 67, at 9, National Writers Union, No. 71, at 14, Copyright Alliance, No. 28, at 5, Magazine Publishers of America, No. 63, at 2, and SESAC, Inc., No. 83 at 4.

<sup>7</sup> *Authors Guild, Inc. v. Hathitrust*, 902 F. Supp. 445 at 463-464 (S.D.N.Y. Oct. 10, 2012) (quoting Plaintiffs' Motion for Summary Judgment).

diligent searches” for the owners of potentially orphaned works, or (c) conduct work-by-work fair use analyses, does not mean that the user can vitiate the rights of the owners by bypassing those reviews. The fair use doctrine was never intended to provide users with a shortcut around obtaining permissions from copyright owners under any circumstances whatsoever. (For those who look to the *Google*<sup>8</sup> and *Hathitrust* cases for guidance here, we wish to emphasize that they are both district court decisions that are currently on appeal to the Second Circuit and are likely to be appealed all the way to the Supreme Court. As such, they cannot and should not form the foundation of such an important matter of copyright legal policy.)

This is not to say that there can or should be no mass digitization. On the contrary, we believe that mass digitization projects are frequently worthwhile and that many are commercially viable. Indeed, the music industry is replete with examples of commercial mass digitization projects that have been brought to market under voluntary licenses from sound recording copyright owners. These “projects” include, but are far from limited to, such household names as iTunes, the Amazon mp3 store, Spotify, Rhapsody and Beats. Given the existence of a vibrant licensing market for such services, we see absolutely no justification either for broadening fair use or creating some other, new kind of statutory exception to facilitate such projects. If the Copyright Office really wants to promote the licensing of mass digitization projects, we encourage it to examine competition law policy to determine whether there are mechanisms that might facilitate collective marketplace negotiations in a manner consistent with antitrust laws.

Finally, the NOI and the roundtables asked whether mass digitization lends itself to extended collective licensing (“ECL”). As we have stated in a variety of fora, the free market is always the best mechanism for establishing licensing rates and terms. While we feel strongly that most mass digitization projects involving sound recordings can be accomplished through such a voluntary marketplace system (*i.e.*, without any government intervention), we recognize that there could be limited instances in which marketplace failure may occur. Should such instances arise, we would be open to considering alternatives such as ECL, provided that the alternatives do not interfere with the ability of copyright owners to receive fair market value for the use of their works. Like the free market, any such system must recognize copyright ownership as the basis for making licenses available, and must include practical opt-out capabilities that are not burdened by formalities.

Again, we would like to thank the Copyright Office for facilitating these roundtables and the NOI. These are important issues that have real-world consequences for participants and it is necessary for all of us to ensure that the solutions are practical, fair, and thoughtful.

Recording Industry Association of America, Inc.

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<sup>8</sup> *Authors Guild, Inc. v. Google Inc.*, Case No. 05 Civ. 8136 (DC), 2013 WL 6017130, \*26 (S.D.N.Y. Nov. 14, 2013) (“*Google II*”).