

Orphan Works

Comments of
The Recording Industry Association of America (RIAA)

In response to
Copyright Office Notice of Inquiry
70 Fed. Reg. 3739 (January 26, 2005)

March 25, 2005

The Recording Industry Association of America (RIAA) welcomes this opportunity to respond to the Copyright Office's Notice of Inquiry (NOI) on Orphan Works, 70 Fed. Reg. 3739 (January 26, 2005).¹ We commend the Office for undertaking an inquiry into this area, and look forward to working with the Office as this inquiry continues. In this inquiry, the goal should be to develop a system that will facilitate the use and public dissemination of copyrighted materials whose owners cannot be located (or in many cases even identified) despite a reasonable level of due diligence. At the same time, any new system should not serve as a substitute for diligent clearance efforts, and so must contain safeguards for the legitimate interests of copyright owners. RIAA believes that, with careful design and the input of representatives of both users and copyright owners, it should be possible to develop and implement such a system.

1. Nature of the Problems Faced

Whenever the connection between copyright owner and copyrighted work cannot be made, users are deprived of the opportunity to license the work and creators are deprived of the opportunity to reap the benefits of such licensing. Accordingly, the music industry generally works hard to avoid orphaning its works. Federal copyright subsists in sound recordings only if they were first recorded on or after February 15, 1972.² The labels and packaging materials for recordings issued since 1972 almost invariably identify the owner of copyright in the phonorecord, and the same information is contained in readily accessible metadata that accompany legitimate downloads of sound recordings made available online. As will be discussed in more detail below, databases concerning copyright in post-1972 sound recordings are relatively comprehensive and accessible, and there are other reference sources that are helpful in identifying copyright owners of sound recordings. Moreover, while we have not collected empirical data concerning this question, we perceive that, relative to other types of works, the copyrights in a high proportion of sound recordings are registered.

As a result, it is rare to encounter insurmountable difficulties in locating the owners of these copyrights to seek clearance for use of these recordings. We are certainly not aware that parties who wish to reproduce or distribute recordings often encounter undue difficulties in identifying, locating or communicating with parties who are in a position to grant permission to do so. Of course, permission is not always granted, but we emphasize that the fact that permission to use a work cannot be obtained does not make a work an "orphan." That term should be applied only when, after due diligence, the copyright owner cannot be located or even identified. By this definition, RIAA does not believe that post-1972 sound recordings released by its member

¹ The Recording Industry Association of America is the trade group that represents the U.S. recording industry. Its members create, manufacture and/or distribute approximately 90% of all legitimate sound recordings produced and sold in the United States.

² Since pre-1972 U.S. sound recordings are protected only under state law, we assume that questions concerning their "orphan works" status are outside the scope of this proceeding.

companies should qualify as “orphan works” except in unusual and isolated circumstances.

Of course, record companies are both owners of copyrighted works and users of copyrighted works. Record companies respect the copyrights of others, and work diligently to identify, locate and obtain necessary licenses from copyright owners for the products they release. The copyrights record companies most often need to license are copyrights in musical works. As in the case of sound recordings, it is usually possible for a user of a musical work, with due diligence, to identify and locate the copyright owner, although it can be more challenging to identify and locate copyright owners of musical works who are not actively engaged in music publishing than it is to identify and locate active music publishers. The bottom line is that, so far as music is concerned, it is not clear to us that there is a significant orphan works problem.³

However, RIAA members do sometimes encounter orphan works problems. A typical situation involves archival material that we wish to use, usually in conjunction with a re-issue of older recordings, but also sometimes in the issuance of new material. For instance, in preparing a re-issue of recordings from as early as the 1920s or 1930s, a label may wish to include in the packaging or accompanying booklet excerpts from contemporary newspaper or magazine articles, old photographs, images of posters for long-ago live performances by the featured artists, or other artwork from the era and region to which the music pertains. Much of the pictorial or graphic material is unsigned, and bylines for the text, if they exist at all, can be unreliable. Even if authors or artists can be identified with a reasonable degree of certainty, they or their heirs frequently cannot be located decades after the fact. Comparably effective substitutes that can be cleared are often not available.

This can create a significant roadblock to such a release. While there are exceptions, as a rule the market for re-issuance of older recordings is a relatively small one. Compilations or selections of these older recordings can never enjoy commercial success unless they are presented in a way that attractively situates the material in context for today’s audiences. At the same time, limited consumer demand for older recordings requires that costs must be held down as much as possible. When copyright owners cannot be identified and located with a reasonable level of diligence, a producer may be faced with the choice between the risk of liability for proceeding without having obtained clearances from all parties with a potential copyright interest and not using the material at all. The result is that producers must often release less appealing products because a copyright owner who could grant a license cannot be found.

A second and increasingly common category of problems involves audiovisual material, which can often be much more recent than the works discussed in the preceding example. One of the fastest growing formats for recording industry sales is DVD-Video,

³ We also note that the compulsory licenses provided by Sections 112, 114 and 115 of the Copyright Act have mechanisms for addressing orphan works, so current law permits a user to use an orphan work under those licenses.

in which sound recordings are enhanced with live concert footage, artist interviews, and a wide range of other documentary audiovisual material.⁴ Because this material may not originally have been targeted for commercial release, the sources from which it is available often failed to obtain all the needed clearances, and it may well be necessary to track down the original videographers or other authors of this material. This sometimes can be impossible, even when the footage is only a few years old.

Finally, although the copyright owner of a musical work is usually identifiable and locatable with due diligence, or the section 115 compulsory license can be relied upon to re-issue a sound recording, this is not always the case. It should also be noted that the section 115 compulsory license does not extend to all uses of musical works – for example, use in audiovisual materials or printing of lyrics in liner notes. Thus, RIAA members sometimes encounter orphan works problems with respect to musical works as well.

Given these experiences, we understand the frustrations of trying to identify and locate copyright owners of orphan works. Accordingly, we would be interested in development of a broadly-applicable regime to ensure that, in appropriate circumstances, the inability to identify or locate a copyright owner with due diligence need not stand in the way of public access to creative works, while at the same time safeguarding the legitimate interests of copyright owners.

2. Nature of “Orphan Works” – Identification and Designation

The NOI seeks comment on the use of databases or registers under which “copyright owners could indicate continuing claims of ownership,” on one hand, and users could “file an intent to use an unlocatable work,” on the other. RIAA believes that both categories of registers could play important roles in a balanced, workable system for addressing the orphan works problem.

Registers of Copyright Claims

On the copyright owner side, databases that have the effect of expressing “continuing claims of ownership” already exist, notably the registration and recordation records maintained by the Copyright Office. Record labels are heavy users of the registration and recordation systems, both as registrants and as searchers when we need to identify the owners of copyright in works we wish to use. Unfortunately, registration and recordation records prior to 1978 exist only in paper format and must be physically examined at the Copyright Office. If this proceeding were to facilitate the digitization of earlier registration and recordation records and their availability online, that by itself would be a valuable outcome that would reduce, though certainly not entirely eliminate, obstacles to identifying and locating copyright owners.

⁴ The dollar value of shipments of such DVD products in 2004 was over \$560 million, an increase of nearly 52% from 2003, and more than double the 2002 level. See <http://www.riaa.com/news/newsletter/pdf/2004yearEndStats.pdf>.

Many other relevant databases exist in the private sector, and increasingly these are becoming available to the general public, including those interested in using copyrighted works. For example, with respect to musical compositions, publicly accessible databases are maintained by the Harry Fox Agency (see http://www.songfile.com/limited_license_search.html), and by performance rights organizations (see, e.g., <http://repertoire.bmi.com/startpage.asp>), from which would-be users can seek to identify composers or music publishers. However, similar databases are less comprehensive, where they exist at all, for much of the non-musical material (e.g., graphic arts, audiovisual) which RIAA member companies are now unable to clear for use because the copyright owner cannot be identified or located.

The relevant issue for this proceeding is whether the databases or registers publicly available for particular types of works are sufficiently comprehensive to allow diligent users to identify and locate, in the vast majority of cases, the party from whom they can seek to obtain permission or a license for the use they wish to make of a work. The answer to this question will vary from one type of work to another. If the answer for a particular sector is “yes,” then consulting these databases may be considered an important factor in determining whether the user has exercised sufficient due diligence to warrant application of special rules that this proceeding may develop with regard to “orphan works.” For sectors where the answer is “no,” consideration should be given to the possibility of establishing a new register in which copyright owners could make themselves known, and which would-be users could consult as part of their due diligence inquiry.

Establishing and maintaining a new register, even in a single sector such as graphic works or audiovisual material, would be an ambitious undertaking and would raise many difficult questions about how to defray costs, ensure the reliability of data, and the like. Accordingly, RIAA suggests that the inquiry focus first on identifying and cataloging the relevant databases and other resources that either are already available to most would-be users, or that could be made available without creating any new registers (e.g., putting pre-1978 Copyright Office records online). Roundtables of interested parties could be convened, on a sector-by-sector basis, to survey the available resources and to work toward commonly accepted standards of what constitutes due diligence in the clearance process. RIAA would be eager to participate in such a roundtable process with respect to types of works for which our members encounter “orphan works” problems, as well as in a roundtable on sound recordings. While we believe that significant resources for identifying and locating copyright owners for post-1972 sound recordings already are – or could be made – available, the creation of a new voluntary “continuing claim of ownership” register may be appropriate if interested parties conclude that such a new database is needed for a comprehensive “due diligence” search by would-be users. For example, it may be reasonable for an organization such as SoundExchange—which already maintains a database of sound recordings for digital performance purposes—to serve as a “certified” voluntary database through which users could check the copyright ownership status of a sound recording. (The same organization

may also maintain a database for sound recording “intent to use” purposes, described below.)

It bears emphasis, however, that checking a single database should probably not be the only step that a would-be user would be expected to take in order to conduct a reasonably diligent search for a copyright owner. The roundtables should also be asked to examine other appropriate techniques to advance this goal. A number of such techniques are applicable to sound recordings, and are regularly used by record companies in their clearance efforts. For instance, where some identifying information about a work or its copyright owner is available, but it is out of date, reference sources can supply information such as the disposition of the catalog of a label that is no longer in business. When even the title of an instrumental recording is unknown, services are available that seek to match the aural or digital “fingerprint” of a particular recording with those in a comprehensive database. Consultation with an experienced musicologist may provide critical information in other cases. In developing common standards for what constitutes “due diligence” for any particular sector, the roundtables should look at the full range of use cases and available tools in an effort to determine which tools a would-be user should be expected to employ before concluding that a given work is “orphaned.” The entire exercise will be successful to the extent that it identifies the major tools for locating and identifying copyright owners, and gives users incentives to employ these tools, not excuses for failing to make a thorough search.

“Notice of Intent to Use” List

On the other side of the “orphan works” equation, RIAA strongly supports the concept of requiring a would-be user to file, in a publicly accessible database, a “notice of intent to use” a copyrighted work whose copyright owner she has been unable, after a duly diligent search, to identify or locate. Such a requirement would protect the interests of copyright owners, who need only monitor this database in order to determine whether a work which they own is in jeopardy of receiving “orphan work” treatment.

While a number of difficult questions would need to be resolved before such an “intent to use” register could become operative, RIAA believes that a model along the following lines would be worth consideration. In order to file in this new register, a would-be user would have to:

- identify the work in question as specifically as possible (which may require posting of the work, perhaps in the form of samples such as thumbnails, very short excerpts, etc.);
- state the use that it has a bona fide intention of making;
- certify that it has taken steps (meeting a standard of due diligence previously determined to be applicable to that type of work) to identify and locate the copyright owner, but without success; and
- provide (and keep current) its contact information, so that the undiscovered copyright owner could interpose an objection before the use or seek compensation later.

After the work has appeared in the register for a pre-determined time period, if no copyright claimant has stepped forward to contact the would-be user, the work would be considered to have attained “orphan” status as to the identified use and user. As discussed below, while use of such a work without permission of the owner would remain infringing, even after the waiting period, remedies for infringement could be curtailed.

As copyright owners, RIAA members believe that it would be essential to impose such prerequisites (including a waiting period) before a work is classified as an “orphan” that can be used without permission, subject to the possibility of limited liability to pay compensation to the copyright owner later. As would-be users of such works, we believe such prerequisites would be reasonable.

The model must also incorporate safeguards to prevent abuses or over-extension of the orphan works concept. For instance:

- A knowing material misrepresentation in a user’s submission to the register, including a false certification that the pre-established due diligence steps have been taken, should be an independent violation of law, much like the prohibitions on knowing material misrepresentations in the notice-and-takedown process under section 512 of the Copyright Act.
- There must be a simple mechanism for removing the work from the register as soon as a party claiming to be the copyright owner steps forward, whether during or after the waiting period. (Penalties for knowing material misrepresentations in such claims of ownership should also be considered.)
- The register should operate on a per-use and per-user, not a per-work basis; if user A has placed the work on the register for one use, user B would not be excused from exercising due diligence in searching for the copyright owner in order to make a subsequent use. Among other reasons for this rule, the goal of an orphan works policy should be to encourage improvements in the tools available to identify and locate copyright owners, so a later user employing these improved techniques may be able to negate the earlier conclusion of orphan status.⁵

Finally, a number of other thorny issues about an intent-to-use register would need to be resolved, among them:

- What would the user be required to submit to identify the work in question, particularly when the title of a work is unknown and the work may not lend itself to straightforward textual description (as in the case of an abstract artistic work or instrumental recording and its associated musical work)?

⁵ Or B may simply make a more competent search than A. This outcome should be encouraged, not discouraged by allowing B to piggy-back on A’s assertion of “orphan work” status.

- Who would operate the register, how would it be financed, and who would bear the risk of negligence or error in its operation?
- Should there be more than one such register and, if so, how would different registers be certified, supervised, and linked? How would the boundaries of their operation be set?

RIAA looks forward to participating in further discussions about the pros and cons of this approach.

3. Nature of “Orphan Works”: Age

Although works that could qualify as “orphaned” under the procedure set out above (*i.e.*, those whose copyright owners cannot be found through due diligence, and which have been posted to an “intent to use” register for a stated waiting period) would probably tend to be older rather than more recent, this correlation would certainly not be perfect. RIAA believes that it would not be wise to define “orphan works” solely by their age, but rather in a functional manner, as set out above.

4. Nature of “Orphan Works”: Publication Status

While it is true, as the NOI points out, that including unpublished works in any orphan works system risks eroding the author’s right of first publication, RIAA believes that inclusion of at least some unpublished works should be considered. Perhaps most important, where little information is available about a work, it may be unclear whether or not the work in question has been published. In addition, where works were created in a commercial context but simply not cleared for commercial release at the time (as might, for example, be the case for photographs of artists performing in a studio), the interest of an unlocatable copyright owner of such a work in controlling “first publication” is not really the same as that of an author of a literary work that has never seen the light of day or of a rehearsal “outtake” from a recording session never intended for release.

A more technical issue is that musical works embodied in sound recordings publicly distributed prior to 1978 may be deemed unpublished pursuant to 17 USC § 303(b), but a sound recording release would seem to blunt any concerns about control over “first publication.” Accordingly, a blanket rule against treating *any* unpublished works as “orphaned” may be inadvisable. Conversely, where an unpublished work is slated for commercial release, it would be inappropriate to allow unauthorized release prematurely through an orphan works system. For example, as a result of leaks at recording studios, sound recordings are sometimes released without authorization before an album is finished or before the official “street date” for sale. It is essential that this kind of unpublished material, whose release causes significant harm to the music industry, be specifically excluded from any orphan works regime.

5. Effect of a Work Being Designated “Orphaned”

RIAA considers it important to maintain a clear distinction between orphan work status and the public domain. A copyright owner should never forfeit its copyright in a work simply because the owner cannot be identified or located at a particular time.

However, if some form of the procedure outlined above were to be instituted, then it would make sense that qualification as an orphan work should confer a certain safe harbor status upon the party that uses the work after exercising due diligence in an unsuccessful search for the copyright owner, files in the intent to use register, and waits the prescribed time period. If, after this waiting period, the copyright owner emerges, limiting her remedies against the user for infringement should be considered. For example, the investment that the user has made, and its reliance upon the orphan status that the work has attained, should be respected, perhaps by limitations on the issuance or timing of injunctive relief. It may be appropriate to limit monetary remedies to actual damages, or to a sum intended to substitute for a reasonable license fee.

However, none of these limitations should be applicable in cases in which the user has abused the orphan works process (*e.g.*, by falsely certifying due diligence). Some presumption might be due the user’s certification of due diligence before submitting the work to the “intent to use” register, but if the copyright owner comes forward with evidence showing that a duly diligent search would have identified and located her, the user should be exposed to the full range of infringement remedies.

Another mechanism to strike the proper balance that should be considered is to require anyone filing an “intent to use” notice to pay into escrow a sum intended to compensate a copyright owner who asserts a successful infringement claim against the user of the work that is the subject of the notice. This would ensure that, at least to the extent of the deposit, the copyright owner could collect any damages judgment awarded. A variation on this approach would allow the user to reclaim the deposit if no infringement action has been initiated within a stated time period; this would give copyright owners an incentive to move as promptly as possible after discovering that their property had been classified as “orphaned.”

Finally, a sunset provision should be adopted for any solution to the orphan works issue. The Copyright Office or some other entity should be directed to examine how the new system has worked in practice, with respect to different categories of works, and to report prior to the sunset date on whether the system should be maintained, extended, modified, or abandoned.

6. International Implications

Many of the issues discussed in this submission become much more complex in an international environment. For instance, a keystone of the orphan works model described above is to reach general agreement that sufficient information resources are

adequately available to would-be users to allow a consensus on what constitutes “due diligence.” This may be harder to achieve with respect to foreign works, since few countries besides the U.S. have formal copyright registration systems, and none of them has as robust and comprehensive a system as the U.S. While many foreign authors do register their claims of ownership with the Copyright Office, many do not, and at least since 1988 one major incentive for doing so – the ability to bring an infringement action – is inapplicable to such authors. Furthermore, establishing a chain of title for foreign works is often much more complicated, and such works (unlike U.S. works) can even, under some circumstances, be restored to protection after having fallen into the public domain in the U.S. (see 17 USC § 104A). Accordingly, it would be prudent to apply the orphan works model – at least at first – only to works created in the U.S. or first published only here. Since these facts are not always determinable in the case of works whose authors are unidentified or unlocatable, some reasonable rule will need to be devised to handle these cases, including appropriate liability limitations for users who reasonably and in good faith (but mistakenly) believe that a particular orphan work has these ties to the U.S.

RIAA appreciates the opportunity to provide its perspectives and looks forward to participating further in this important proceeding.

Respectfully submitted,

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