

**COMMENTS OF FUTURE OF MUSIC COALITION IN RESPONSE TO THE
COPYRIGHT OFFICE'S NOTICE OF INQUIRY CONCERNING ORPHAN
WORKS AND MASS DIGITIZATION**

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Future of Music Coalition (FMC) is pleased to submit these comments to the Copyright Office in its Notice of Inquiry concerning Orphan Works and Mass Digitization.

FMC is a not-for-profit collaboration between members of the music, technology, public policy and intellectual property law communities. FMC seeks to educate the media, policymakers and the public about issues at the intersection of music, technology, policy and law while bringing together diverse voices in an effort to identify creative solutions to challenges in this space. FMC also aims to document historic trends in the music industry, while highlighting innovative and potentially rewarding business models that will empower artists and establish a healthier music ecosystem.

As FMC is a music organization, our comments will focus on the impact of any orphan works solution on musicians and composers. We do recognize, however, that potential legislation would also affect a broader set of rightsholders and authors. FMC is primarily concerned with creator compensation and the continued ability for artists to reach potential audiences. We also acknowledge the cultural benefits that proceed from access to expression, as well as the ability of artists to encounter and make new creative use of existing works. To this extent we are supportive of a legislative solution to orphan works, and encourage the Copyright Office to consider ways to include authors in any limited remedies. We will describe several possibilities in these comments.

FMC believes strongly that creators must be considered in the policy debates that affect their livelihood. We recognize and affirm the interests of copyright owners and potential new users, but also seek to advance creator concerns, especially when it comes to works that for one reason or another have fallen outside of their sphere of control.

The orphan works issue necessitates an understanding of the conditions under which authors transfer their copyrights to third parties. Creator contracts with copyright owners often require: 1) payment for uses; 2) the right to approve certain uses, especially advertising; and possibly, 3) the prohibition of certain uses. Previous legislative attempts to craft a comprehensive orphan works solution did not take into account these realities, and, at worst, may have deprived authors of explicit contractual rights.

The primary goal regarding an orphan works solution should be to balance the interests of copyright owners, authors and new users. We recognize that this balance is difficult to achieve, given the legal and marketplace complexities surrounding expressive works.

However, we do believe that it is possible to achieve orphan works legislation that takes into account the needs of creators in addition to those of other stakeholders.

We must also note that, while provisions in 17 U.S.C. § 108 as well as fair use precedent may be sufficient to protect some activities, including noncommercial archiving,¹ prior court rulings² may complicate the picture for orphaned musical works. Any legislative solution to orphan works should allow for the continued building upon musical expression by new artists. Legislation should also provide authors a means of redress should they become aware of infringement, but only in limited cases where the copyright owner cannot be located and does not come forward following a qualifying search by an infringing party. These remedies should not place an additional search obligation on the new user, and any limited remedies granted to the original author(s) should be superseded by any claim from the lawful copyright owner, should one appear within a designated term starting with the time of infringement. In subsequent sections, we will describe in further detail how such requirements might be structured.

A. Previous Attempts at an Orphan Works Solution

Previous legislative efforts to address orphan works — S. 2913 and H.R. 5889 — offered recourse to copyright owners whose works may be infringed by a new user. By placing limitations on damages and describing a means through which a use may be licensed, a balance was struck between the interests of the rightsholder and those seeking to use a work. Putting aside for a moment the difficulty in delineating what precisely constitutes a “diligent effort” “that is reasonable under the circumstances to locate the owner of the infringed copy,”³ previous legislation made an attempt to harmonize interests, with remedies ranging from attribution to “reasonable compensation” based on a willing seller, willing buyer criterion.

Unfortunately, prior legislation failed to consider the interests of original authors. This oversight is particularly acute in music. Typically, when artists sign contracts, they transfer their copyrights to a publisher and/or label, with certain restrictions and payments for use. Within a consolidating record industry, ownership can be a moving target. Sound recording copyrights are routinely bought and sold as labels merge, go out of business or are purchased by other entities. It’s not uncommon for a copyright to change hands several times in the course of it and its creator’s lifetime.

Earlier bills also failed to offer the original creators of a work any protections related to: 1) the right to make decisions about whether their work can be used; 2) payment; and 3) attribution. Going further, the legislation might have eliminated prior contractual terms between a creator and, say, a record label or publisher.

¹ See Jennifer Urban, “How Fair Use Can Solve the Orphan Works Problem”, 27 Berkeley Technology Law Journal __ (2012), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2089526.

² See, *Bridgeport Music, Inc. v. Dimension Films*, 410 F.3d 792 (6th Cir. 2005). Although this decision did not touch upon fair use, its admonishment to “get a license or do not sample” has certainly affected perceptions of what constitutes “fair” with regard to sound recordings.

³ Shawn Bentley Orphan Works Act of 2008, S.2913 (2008).

This means that, despite compensation obligations set forth in the contract that the creator made with the copyright holder, a new user might not have to pay the songwriter/performer until and unless the copyright owner brings an action or licenses the work. In addition, even in circumstances where the creator could collect damages, previous proposals do not provide for uses the creator objected to in advance.

We understand that establishing new copyright exceptions is a tricky proposition. Still, there is a need to consider closely whether the interests of authors are being served in existing orphan works proposals, and how those interests might be balanced with the desire to make available more works. The complexities of the recorded music industry do not lend themselves to easy solutions, but in the case of orphan works, present a rare opportunity to address the needs of creators as well as those of copyright owners.

B. Possible Solutions to Balance Interests

For composition and sound recording copyrights that are transferred from the original author to another party, exclusive rights, enforcement and relief are to a large extent determined by the contract between the artist and the record label and/or publisher. These comments are not intended as a critique of such arrangements, but rather underscore the need to include authors in limited remedies as well as decision-making regarding the conditions under which a use is permissible. Should a copyright owner not be locatable, but the author is known, we suggest that the author be eligible for relief under qualifying conditions.

Our recommendations should not be construed as an obligation for a new user to conduct a separate qualifying search to locate the author of an orphaned work. Instead, we propose that, if in the course of such a search, an author's identity becomes known, that the new user record the author's name along with any information required to demonstrate qualifying search for the copyright owner as put forth in the Recommended Practices as made available by the Copyright Office. This information would be provided in good-faith and require no additional search; the absence of an author name would not necessarily disqualify the new user from eligibility for limited liability if the criteria for a qualifying search for a copyright owner is met. However, in instances that the author's name is clearly known, the burden would be on the new user to record that information as part of their qualifying search.

For all uses of orphan works other than uses by a nonprofit entity, limited remedies offered to the copyright owner would be extended to an author if:

- The copyright owner does not come forward with an infringement claim within a set term (we propose 2-3 years)
- The author becomes aware of the infringement through means other than prior communication between infringer and author, or the new user is motivated to

contact the author following a qualifying search for the copyright owner and no such owner comes forward within a set term

- An author can demonstrate that they are the original creator of the work

If the copyright owner comes forward within the 2-3 year term of eligibility to claim infringement, the copyright owner is eligible for limited remedies, dependent on the following provisions:

- There is no prior compensation agreement between author and new user
- In the instance that a prior compensation agreement exists, the author's compensation is to be based on the terms of their contract with the copyright owner and calculated from the agreement between author and new user
- If the new user obtains permission from the author/performer and only uses the orphaned work in accord with that agreement, the copyright owner has no claim against the new user.
- An orphaned copyright owner is not entitled to compensation for any uses that were authorized by the author and take place before the copyright owner comes forward.

If a new user fails to comply with requirements regarding qualifying search, compensation and attribution, the author shall be permitted to file a copyright infringement action under 17 U.S.C. § 501 for statutory damages and/or injunction for use of the orphaned work with no obligation of copyright owner relief, regardless of whether the copyright owner comes forward.

It may be that a contract between author and a third party contains provisions regarding what uses are and are not permissible. We suggest that the author have the ability to approve the type of new use, except, as outlined in S. 2913, "in a case in which the infringer has prepared or commenced preparation of a new work of authorship that recasts, transforms, adapts, or integrates the infringed work with a significant amount of original expression" and compensation/attribution requirements are met. Should the copyright owner come forward within a described term, decisions based on future uses of a work would rest with the rightful owner, supplanting any non-contractually stipulated claim(s) by the author.

An author's eligibility for limited remedies should not be construed as a full and permanent transfer of rights back to the author ahead of the 35-year statutory term, but rather an opportunity to receive attribution and possible compensation within the unique circumstances surrounding the infringement of a work believed to be orphaned, and following a qualifying search for the owner of said work.

Our proposal for extending limited remedies to authors does not establish new rights or exceptions beyond those that are available to copyright owners under previous legislation. We recognize that these provisions could create copyright chimera such as an author exploiting their own work in a non-exclusive context alongside other users, but some tradeoffs may be unavoidable. To prevent rent-seeking, we suggest that any legislation set a term in which an author is eligible to claim remedies should they become aware of infringement. (Such a term might be measured against dated evidence of a qualifying search for the copyright owner that also includes the good-faith documentation of the author's name.)

Participation in limited remedies within an orphan works context will not affect the ability of an original author to recapture their rights following the conclusion of the full statutory term governing copyright transfers, and upon the filing of intent to terminate within the appropriate window(s). Upon successful termination, all rights will reside with the author and any future use of the work subject to the rules set forward in 17 U.S.C. §106-120.

We understand that such conditions are incredibly narrow. Still, they would offer creators the ability to be recognized, and in certain instances compensated, for new uses in circumstances where their authorship is known, without placing an additional burden on the new user to conduct a separate qualifying search. We understand that such a scheme may invite adjudication. Still, we believe that, absent the requirement for a full and separate secondary search for the original author, such cases would be limited — particularly given the good-faith recordation of an author's name. Likewise, by establishing a term in which the author is eligible for limited remedies, and an outline for how attribution and compensation should attach to author and/or rightsholder, potential conflict between the copyright owner and author would be limited. Should a copyright owner come forward during the term in which author remedies are available, any arbitration will be prejudiced to reflect terms set forth in the original contract.

CONCLUSION

FMC believes that an orphan works solution is not only desirable, but also achievable. Although existing copyright law does not afford protections to authors whose exclusive rights have been transferred to a third party (beyond whatever is contractually stipulated), the orphan works issue creates an opportunity to, in a limited capacity, readdress the balance between a creator and the exploiters of their work. By encouraging new users to recognize the contributions of artists, this balance is further stratified. Lastly, an opportunity to receive compensation within narrow circumstances would help rectify a long and troubling history of remedies that are rarely, if ever, shared with creators, such

as monetary awards from file-sharing lawsuits⁴ or monies from equity arrangements between content owners and digital music services⁵.

FMC appreciates the Copyright Office's ongoing efforts to consider solutions to orphan works, and look forward to its proposals for legislative action. We also offer ourselves as a resource with regard to these proposals and the creative community, and hope that these comments provide an opportunity to examine some of the issues around orphan works, musicians and songwriters.

Respectfully submitted,

FUTURE OF MUSIC COALITION

Casey Rae
Deputy Director
Future of Music Coalition
1615 L ST NW Suite 520
Washington, DC 20036

⁴ Barrett, Brian. "Money Won in Pirate Bay Convictions Won't Go Back to Artists Because Ugh (Updated)." *Gizmodo*. N.p., 29 July 2012. Web. 30 Jan. 2013.

⁵ Lindvall, Helienne. "Behind the Music: The Real Reason Why the Major Labels Love Spotify." *The Guardian*. Guardian News and Media, 17 Aug. 2009. Web. 30 Jan. 2013.