

**Before the  
COPYRIGHT OFFICE  
LIBRARY OF CONGRESS  
Washington, D.C.**

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In the Matter of	)	
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Orphan Works and Mass Digitization	)	Docket No. 2012-12
	)	

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**COMMENTS OF THE NATIONAL MUSIC PUBLISHERS’ ASSOCIATION, INC., AND  
THE HARRY FOX AGENCY, INC.  
IN RESPONSE TO OCTOBER 22, 2012 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 October 22, 2012 (the “Notice”). 77 Fed. Reg. 64555.

**Introduction**

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 publishers and songwriters and has served as the leading voice of the American publishing industry in Congress and the courts. With over 2,800 members, NMPA represents both large and small music publishing firms throughout the United States.

HFA, which is solely owned by NMPA, provides licensing and administrative services to over 46,000 music publishing clients that, in turn, control over four million copyrighted musical works. On behalf of its affiliated publishers, HFA issues licenses for the use of music in both physical and digital formats, and collects and distributes royalties due pursuant to those licenses.

**I. Musical Works Would Not Be Appropriate Subject Matter for an Orphan Works System**

NMPA and HFA believe the problem of orphan musical works is minimal because Congress has already created a statutory framework in Section 115 of the Copyright Act to ensure that musical works, including those whose owners allegedly cannot be located, are widely available to the public. As a result, additional limitations of the musical work copyright beyond those set forth in the Section 115 compulsory license are not justified. *See* NMPA Orphan Works Comments dated March 25, 2005 (hereafter “NMPA Comments 1”) at 1. In addition, the music industry has extremely sophisticated, thorough, and constantly improving databases and other mechanisms to identify songwriters and publishers that are easily accessible by any user, thus allowing potential subsequent users to identify and locate copyright owners of musical works, making an orphan work system unnecessary when applied to musical works. *See* NMPA Comments 1 at 5. For example, ASCAP, BMI, and HFA all maintain frequently updated databases<sup>1</sup> allowing users to search for song titles and then provide information on the identity of songwriters, music publishers, mechanical rights organization and performing rights organization affiliation. *Id.* These database systems allow subsequent users of musical works to easily access identification information, making it extremely unlikely that a subsequent user would not be able to identify or locate the copyright owner of a musical work. *Id.*

In addition, the music industry remains committed to the ongoing creation of a comprehensive international database. A Global Repertoire Database is currently in development with the goal of providing “a single, comprehensive and authoritative

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<sup>1</sup> See <https://www.ascap.com/Home/ace-title-search/index.aspx>; <http://www.bmi.com/search/>; and <http://www.harryfox.com/songfile/public/publicsearch.jsp>.

representation of the global ownership and control of musical works” in the foreseeable future.<sup>2</sup> This database has support from and is being developed by a working group comprised of the European Composer and Songwriter Alliance, International Confederation of Music Publishers, International Confederation of Societies of Authors and Composers, Sony/ATV Music Publishing/EMI Music Publishing, Universal Music Publishing, Warner/Chappell Music, Australian Performing Right Association, Société des Auteurs, Compositeurs et Editeurs de musique, Apple and Google. The GRD database will provide an additional comprehensive source for subsequent users attempting to locate the owners of musical works, rendering an orphan works system for musical works unnecessary.

**II. Orphan Works Should Only Include Works Whose Owners Cannot Be Determined After Subsequent Users Have Fulfilled Specific and Rigorous Due Diligence Requirements**

Although NMPA and HFA are opposed to the inclusion of musical works into the subject matter of an orphan works system, if an orphan works system is adopted, it must protect the rights of copyright owners by ensuring that any subsequent user is required to engage in a rigorous due diligence search for the copyright owner, guided by a set of best practices developed by copyright owners, in coordination with the Copyright Office. *See* NMPA Comments 1 at 2. At a minimum, subsequent users must be required to take rigorous affirmative steps, as part of their due diligence requirement, to find copyright owners. *Id.* For the sake of clarity and ease of application, it is important that these steps be set forth in best practices, and are designed to ensure that subsequent users have fulfilled their due diligence requirements before they may use such a work. The creation of a system allowing subsequent users to use

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<sup>2</sup> <http://www.globalrepertoiredatabase.com/>.

works without completing a comprehensive search for the owner of such works would result in a system that strips away the rights granted to owners in the Copyright Act.

While NMPA and HFA acknowledge that there are very comprehensive and easy to use databases that would facilitate a due diligence search for most musical works that have been commercially exploited, this does not mean that the due diligence search standard should be limited to researching works that are already in pre-existing commercial databases, waiting to be uncovered. Rather, it is the smaller copyright owner, or the owner of works that have not been commercially exploited, that needs an especially strong due diligence search requirement to protect it from lost licensing income. If no strong due diligence search system is in place, the small copyright owner will be harmed the most – and this should not be the end result of any copyright law reform – especially one that turns the traditional ownership expectations on its head.

### **III. An Orphan Works System Should be Limited to Non-Commercial Uses by Non-Commercial Parties**

Commercial uses of copyrighted works should not be included in an orphan works system. While some parties contend that both non-commercial and commercial uses should be included in an orphan works framework, permitting the use of an orphan work can only be justified in cases in which using some or all of a copyrighted work is necessary to further public discourse or education. The profit motive of a third party distributor is not sufficient justification for encroaching on a copyright owner's exclusive rights. Even authorizing the non-commercial uses of orphaned musical works goes too far because such lines are difficult to draw and markets have developed for the licensing of educational and other uses of music for which the distributor

is a commercial, profit making enterprise. Moreover, as a general matter, most music is distributed by profit-seeking, commercial enterprises.

An examination of other countries adopting orphan works legislation is instructive. Existing legislation in the European Union suggests that an orphan works system must be outfitted with appropriate limitations on the scope of acceptable uses of such works. The goal of the creation of an orphan works system should be to fulfill the objectives of copyright law by creating a means for the public to access works for research, archival, or educational uses. Recently, the European Union issued a directive creating an orphan works framework that allows for only non-commercial uses of orphan works. Council Directive 2012/28/EU on certain permitted uses of orphan works [2012] OJ L299/5. The directive specifically states that these works may only be used by organizations with public-interest missions and that even these organizations are limited to using orphan works “to achieve aims related to their public-interest missions, in particular the preservation of, the restoration of, and the provision of cultural and educational access to, works and phonograms contained in their collection.” *Id.* at L299/8. Further, the only allowed commercial use of such a work is granted in a small exception for public-interest organizations generating revenue for the “exclusive purpose of covering their costs of digitizing orphan works and making them available to the public.” *Id.* at L299/10.

An orphan works system adopted in the United States should similarly focus on limiting orphan works to non-commercial uses only by non-commercial organizations. As stated above, the music industry is almost decidedly commercial in nature, with nearly every potential use of a musical work involving commercial gain. The most commonly cited “non-commercial” use for a musical work is in documentary filmmaking, which some could argue is a primarily non-profit educational endeavor. However, recent statistics regarding the gross revenue from

documentaries illustrate that these films often generate an extremely healthy financial return.<sup>3</sup> These documentaries cannot be properly categorized as non-commercial and are not an appropriate example of works that are purely educational, archival, or cultural. This anomaly highlights even more the necessity for an orphan works system adopted in the United States to carefully identify, and exclude, the commercial use of copyrighted works even if such use may appear at first blush to be “non-commercial” like documentaries released in a commercial market.

Some also argue that the lack of an orphan works system creates a chilling effect preventing subsequent users from making socially valuable uses of creative works because these uses are not for profit and provide no economic incentive to subsequent users. For music, however, there is little risk of a chilling effect because most potential secondary uses are commercial in nature, and for those that are non-commercial, approvals for use can usually be secured by approaching the songwriter or publisher requesting a nominal or gratis license.

#### **IV. An Orphan Works System Should Not Re-Implement Registration Requirements**

The implementation of an orphan works system must require that subsequent users of a work engage in a rigorous due diligent search to identify its owner rather than requiring copyright owners to formally register their works. In previous comments, some parties have suggested an orphan works scheme that requires copyright owners to register their works.<sup>4</sup> This

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<sup>3</sup> For example, *Fahrenheit 9/11*, a 2004 film by Michael Moore, is the highest grossing documentary in the United States and has grossed \$119 million, according to the Internet Movie Database.

[http://www.imdb.com/search/title?genres=documentary&sort=boxoffice\\_gross\\_us,desc](http://www.imdb.com/search/title?genres=documentary&sort=boxoffice_gross_us,desc).

<sup>4</sup> See Reply Comments of Save the Music and Creative Commons. (“All works that do not appear on the registry are treated as Orphan Works and will be accessible via payment of a statutorily-determined fee under a ‘default license,’ without the need to contact a hard-to-locate owner and ask permission. In contrast, works that appear in the registry are in the category of actively exploited works, and rightsholders in these works are not affected.”)

type of framework would place substantial burdens upon copyright owners and essentially create a statutory license system for all works that have not been registered. This approach unfairly reverses the current copyright regulatory scheme from an opt-out to an opt-in system, effectively overturning Congress' abolition of the copyright registration requirements, as it relates to registration of renewal rights (*See* 70 Fed. Reg. 3739 and 3741) and registrations of works and other formalities under the 1909 Act. *See* 3-9 Melville B. Nimmer & David Nimmer, *Nimmer on Copyright* §§ 9.02, 9.05 (2004).

Further, this approach would arguably 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). In order to avoid acting against Congress' express intent that copyright owners should not bear the responsibility of registering works, except to obtain certain additional rights, and creating complex issues involving international law, a potential orphan works regime should not place any additional registration burden on copyright owners. *See* NMPA Orphan Works Comments dated May 9, 2005 (hereafter "NMPA Comments 2") at 4.

**V. Content Owners in Each Creative Industry Must Create Best Practices for Due Diligence Search Requirements**

While it is important that the Copyright Office recognize that an orphan works system set a high standard for mandatory steps that must be taken for a subsequent user or creator to have fulfilled its due diligent search requirement, content owners across different industries should be allowed to participate in the process of creating best practices to determine what constitutes due diligence. Content owners in each creative industry are uniquely positioned to provide valuable input about practices that would be best suited for each particular industry. Each creative

industry has unique characteristics and business practices, making it difficult, if not impossible, to devise a system of best practices suited for every industry.

Copyright owners in the music industry are in the best position to provide input on the creation of “best practices” to determine what is required for a potential user to perform a due diligence search for a musical work. At a minimum, if an orphan works system is extended to musical works, NMPA and HFA – and other music stakeholders including music publishers and songwriter organizations - should be involved in the development of best practice standards to ensure that these standards are workable within the framework of the music industry and orphan works. Furthermore, the continuing input of music industry stakeholders should also be part of the ongoing review and re-appraisal process that should be part of ongoing orphan works development.

To that end, NMPA and HFA would suggest the following as prerequisites for orphan works users attempting to satisfy a rigorous due diligence search requirement and avoid liability for infringement. Without limitation, and for illustrative purposes only, subsequent users should be required to complete the following steps to identify and locate the owners of copyrighted musical works: (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 and other similar collecting societies or organizations; (3) review of copyright notices on, and label copy of, sound recordings of such musical works; (4) upon identifying individual or organizational owners of musical works, search databases maintained by relevant secretaries of state and courts to identify successors in interest, heirs or assigns as the case may be, and (5) undertake 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 through 4) above. *See* NMPA Comments 2 at 6.

**VI. Any Subsequent User Must Be Required to Submit the Details of Its Search and Notice of Its Intent to Use a Work to the Copyright Office**

Further, an orphan works system should implement a requirement that any subsequent user be required to provide to the Copyright Office both the details and results of its diligent search as well as notice of the use that the user intends to make of a work that has been determined to be an “orphan work.” Once again, the orphan works system adopted by the European Union is instructive on how the United States could adopt these sorts of requirements.

In the EU’s directive on certain permitted uses of orphan works, the European Parliament and the Council of the European Union establish mandatory steps that must be taken after any subsequent user has undertaken a diligent search. Council Directive 2012/28/EU on certain permitted uses of orphan works [2012] OJ L299/9. First, the directive requires that member states ensure that organizations making use of orphan works (1) maintain records of diligent searches, (2) provide results of diligent searches to the appropriate national authorities, (3) notify appropriate national authorities of any use these organizations make of orphan works, (4) notify the appropriate national authorities of any change of the orphan work status of works used, and (5) provide authorities with the relevant contact information. *Id.*

NMPA and HFA believe that an orphan works system endorsed by the Copyright Office must adopt similar requirements, including creation of an Orphan Works Notice of Use Registry. The maintenance of records and results of diligent searches as well as information regarding any use made of orphan works filed in this Registry will help ensure that subsequent users have taken the required steps before using a particular work. Further, contact information will provide the

Office and any copyright owner of a work with the necessary tools to locate subsequent users in order to ensure that the copyright owner may locate subsequent users of his work. With these goals in mind, NMPA and HFA support the inclusion of a provision mandating that any subsequent user file a Notice of Use with the Orphan Works Notice of Use Registry of the Copyright Office. The Notice should include, at a minimum, (1) details of the reasonably diligent search, (2) information regarding the planned use of an orphan work, and (3) the user's contact information, which must be updated as appropriate. Furthermore, copyright owners should use this as a resource and have the opportunity to access the database to determine whether their works are being used as an orphan work.

**VII. Copyright Owners Identified After Use of an Orphan Work Must Receive Reasonable Compensation**

An orphan works system must also anticipate situations in which a copyright owner is identified after a subsequent user has performed a diligent search and used an orphan work. In these situations, the original owner must be entitled to receive compensation for the use of his work. In some cases, a subsequent user and the missing owner may come to a mutually agreeable fee and settle without judicial interference. However, the Copyright Office must also recognize the possibility that the subsequent user and the missing owner will not settle, in which case the copyright owner should be entitled to demand that the use of the former orphan work cease.

**VIII. Owners of Copyrights Must Not Bear the Burden of Legal Fees Incurred Litigating Ownership Claims**

If the copyright owner and subsequent user are not able to come to a mutually agreeable settlement to set a reasonable fee, the copyright owner must have an effective legal mechanism to ensure fair compensation for prior use and cessation of the subsequent use. In addition, the

copyright owner should be entitled to recover any legal fees incurred if it is forced to turn to the courts to obtain fair compensation and to prevent a subsequent user from continuing to use his work. NMPA and HFA are concerned that copyright owners that are found after an orphan work has already been used will be discouraged from pursuing legal action to claim their rights if they must pay legal fees and other court costs. Without a legal fee remedy, copyright owners will find it difficult to retain legal counsel to prosecute their claims. If subsequent users are to be given a mechanism to use these works, copyright owners must be given the tools to effectively protect their rights.

### **Conclusion**

NMPA and HFA recognize that there are many important issues to be dealt with in the context of orphan works and appreciates the invitation to provide comments on these matters. NMPA and HFA offer the above comments to address some of these issues and looks forward to the opportunity to continue their involvement in the Copyright Office's inquiry into orphan works.

Dated: February 4, 2013

Respectfully submitted,



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