

**Comments of the
Recording Industry Association of America
In Response to the Copyright Office Notice of Inquiry
Dated October 22, 2012 regarding Orphan Works**

The Recording Industry Association of America ("RIAA") welcomes this opportunity to respond to the Copyright Office's Notice of Inquiry on Orphan Works, 77 Fed. Reg. 204 (October 22, 2012) (the "2012 NOI").

Summary of RIAA Comments in Response to 2005 NOI

The RIAA previously submitted Initial and Reply Comments in response to the Copyright Office's March 25, 2005 Notice of Inquiry concerning orphan works (the "2005 NOI"). Our views in this matter have not changed materially since then and we incorporate those comments herein. For ease of reference, we have summarized the main points of our earlier comments below:

- Sound recordings released or distributed by the major record companies after 1972 almost invariably have been registered for copyright and commercially-released versions of those recordings list the copyright owner. Therefore, it is unusual to encounter an orphan problem for this category of works.
- In addition, databases containing copyright information for sound recordings are widely available and reasonably comprehensive, at least for works from the 1970's on, and tools exist for searching older works.
- RIAA members are not solely copyright owners but routinely use the copyrighted works of others. The most commonly-licensed category is musical works, for which owners can generally be located with sufficient diligence. Record companies also use other sorts of copyrighted works such as photographs, newspaper articles and video footage to create more vibrant commercial products and marketing materials for sound recordings. Our members may sometimes encounter problems locating the owners of these types of works.
- Our members support the concept of orphan works legislation that limits the remedies for infringement of an orphan work, provided the user makes a good faith, diligent search to find the owner and complies with any and all other requirements of the legislation.
- We do not support limiting the availability of the limitations on liability only to non-profit institutions or so-called non-commercial uses. We believe there are numerous legitimate uses of orphan works by commercial enterprises and do not want to exclude them.

- However, we also feel strongly that any such legislation spell out with precision the requirements for a diligent search. Because the resources available to research different categories of works varies greatly, the best practice for performing a good faith, diligent search necessarily will vary by industry.
- The RIAA also strongly supports the creation of an "intent to use" (ITU) database in which would-be users of orphan works are required to identify the work they intend to use and believe was orphaned. Such a database will allow copyright owners to exercise diligence to ensure that their works are not erroneously treated as orphaned – much as the trademark ITU program allows trademark owners to object to registrations before marks are used by third parties. An ITU database is the best and perhaps only way for copyright owners to police their rights in an orphan works regime. We believe it would substantially further the goal of avoiding orphan mistakes, to the benefit of both owners and users. We discuss this more below.
- The RIAA opposes the re-institution of formalities such as periodic registration or filings on the owners' part as a way of solving the orphan works problem.

Reactions to the Copyright Office Report on Orphan Works dated January 2006 (the “Report”)

After reviewing the nearly 850 submissions filed in response to the 2005 NOI, the Copyright Office published a comprehensive Report, cataloguing many of the issues concerning orphan works, its view on these matters and concluding with draft legislation. The Report is generally consistent with the views we expressed in our submissions. There are a few points, however, with which we do not agree. Although not formally requested in the 2012 NOI, the RIAA would like to take this opportunity to respond to some of the points of the Report with which we disagree or would like further study:

- We agree that voluntary guidelines concerning a reasonably diligent search are preferable to formal rulemaking by the Copyright Office but urge the Office to convene roundtable discussions under its auspices to ensure such guidelines are actually drafted. The Report seems to suggest that each industry might embark on this process on its own (see Report p. 108). We believe the Copyright Office must serve as a leader for this endeavor to be successful.
- We understand why the creation of an ITU database may have been impractical in 2005 – particularly if the user were required to upload an image of the work under consideration. Today the creation of a database with associated digital images, sound files or audiovisual files is quite simple and could be relatively easily accomplished. Other concerns about the database, that it would require publishers to reveal competitive information could be allayed by not requiring such detailed information about the nature of the proposed use. The key features of the database are the identification of the work and the user’s contact information. Once that

information is known, the copyright owner can contact the would-be user to inform him or her that the work must be licensed. The nature of the proposed use could be privately discussed at that point. Detailed use information is not necessary for the database to be effective. We therefore urge the Copyright Office to reconsider an ITU database as part of the orphan works regime.

- The draft legislation proposed by the Copyright Office excluded monetary remedies “where the infringement is performed without any purpose of direct or indirect commercial advantage.” The RIAA opposes this provision. We believe a case-by-case approach is more appropriate and consistent with the findings of the Report itself. Certain uses, though “noncommercial,” may nevertheless be typically secured with a license fee or other consideration, while other uses may not. As the Copyright Office recognized in the Report, it is the copyright owner’s burden to demonstrate what a reasonable license fee would have been. If it cannot do so, a monetary award would not be appropriate. But if a royalty is typically paid, even for a noncommercial use, there is no reason to treat such uses differently than commercial uses. Moreover, the commercial/noncommercial dichotomy has over the years since 2005 become more blurry as private individuals and online services can and routinely do distribute works without any seeming profit motive. While the problem of distinguishing between commercial and noncommercial uses exists elsewhere in the Copyright Act, there is no need to inject it into the orphan works area.

2008 Legislation on Orphan Works

The 2008 bills, S. 2913 and H.R. 5889, were substantially similar to the draft written by the Copyright Office as part of its Report except the specific provisions regarding the requirements of what would constitute a reasonably diligent search. We had the same objections to this legislation as to the Copyright Office draft. Specifically, we believe an ITU database should be part of any orphan works regime and do not feel it necessary to create a blanket exemption from all monetary damages for noncommercial uses. Apart from those issues, we generally supported the legislation.

Responses to the 2012 NOI

Changes Since 2008: The Copyright Office requested comment on whether the legal landscape has changed since orphan works legislation was introduced in 2008 and whether the framework established in the legislation continues to be viable. In the recorded music industry, the main change from 2008 to today is that ever more services exist that make both current and older music available to the public at very low cost. These services make it simple for those who wish to license sound recordings to locate the copyright owner. Therefore, any reasonably diligent search for a copyright owner should include searches of several of these databases. Similarly, audio fingerprinting software that matches sound recordings to known works is also readily available. Even if a user comes across a piece of music that has no identifying

information on it, there are resources available to identify the work and thereby discover the owner. Therefore, the passage of time has given our industry somewhat greater confidence that its works will not be erroneously treated as orphaned, provided the legislation requires users to consult these databases as part a diligent search.

As discussed above, the passage of time has also made the technology necessary for the creation and use of an ITU database more accessible. We therefore believe this concept should be incorporated into the orphan works regime.

The passage of time has also strengthened our view that special provisions for noncommercial uses are not appropriate, as discussed above.

Mass Digitization: The recorded music industry is sympathetic to the desire of various entities to digitize large bodies of copyrighted works. However, we believe orphan works legislation is not the right way to address this issue. We believe that any entity – whether commercial or noncommercial – should seek permission of copyright owners before making any use of copyrighted works beyond those uses permitted by Sections 107 and 108 of the Copyright Act. If, after a reasonably diligent search, the user cannot find the owner, it may treat the work as orphaned under the statute and proceed to use it.

Discussion of mass digitization in the context of orphan works seems to misunderstand the nature of the catalogs of works that various entities might seek to digitize. We presume that most works in such catalogs will have a readily-identifiable copyright owner; most will not be orphans. Therefore, the problem of mass digitization is not fundamentally one of organizations' being unable to locate owners but of not wanting the burden of having to locate owners and seek their permission to digitize. That is not a problem the orphan works legislation is or should be designed to address.

Permitting organizations to digitize large amounts of copyrighted material without seeking to discover the copyright owner and gain permission would stand the orphan works legislation on its head. As the Copyright Office noted in its Report (at p. 98), the purpose of any orphan works legislation is to give users the proper incentive to seek out and find owners and negotiate a reasonable license fee before using any copyrighted work, not to avoid contacting owners for a license. Allowing an organization to treat all works in its catalog as effectively already orphaned such that it need not seek the permission of each copyright owner to digitize would run exactly counter to the purpose of the orphan works legislation. Even more paradoxically, the only entities that would be entitled to treat copyrighted works this way are ones that sought to reproduce them *en masse* rather than one at a time – so that only users of vast amount of copyrighted works would be entitled to dodge the orphan works requirements while users of individual works would need to comply with them.

The Copyright Office has suggested in its 2012 NOI that Section 108 of the Copyright Act might be amended in various ways to permit mass digitization. While this may be true, we do not believe that the orphan works legislation is the proper place for any such amendment. As the Copyright Office is aware, there is a wholly separate inquiry currently ongoing with regard to possible changes to Section 108. The RIAA has participated extensively in those discussions to

date and will continue to do so. We fail to see the need to complicate the orphan works inquiry by marrying it together with the separate question of changes to Section 108.

Respectfully submitted,

Recording Industry Association of America
1025 F Street, NW
Washington, DC 20004

By: Jennifer L. Pariser
Senior Vice President, Litigation & Legal Affairs