

**Before the  
UNITED STATES COPYRIGHT OFFICE  
Washington, D.C.**

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

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**COMMENTS OF SCREEN ACTORS GUILD-AMERICAN FEDERATION OF  
TELEVISION AND RADIO ARTISTS**

Screen Actors Guild-American Federation of Television and Radio Artists (“SAG-AFTRA”) respectfully submits the following comments in response to the Copyright Office’s Notice of Inquiry (NOI), seeking comment on Orphan Works and Mass Digitization.<sup>1</sup>

SAG-AFTRA is a national labor union representing more than 165,000 actors, announcers, broadcasters, recording artists, background vocalists, and other media professionals. SAG-AFTRA members are the faces and voices that entertain and inform America and the world. SAG-AFTRA exists to secure the strongest protections for media artists in motion pictures, television, sound recordings and most other forms of media, including all forms of digital media. SAG-AFTRA’s members consist of both creators and performers who derive their livelihood and benefits from the continuing use of creative works, particularly as those works are released in different media.

We appreciate the Copyright Office’s initiation of this inquiry to examine how orphan works should be viewed in the current digital environment. In this inquiry, the Copyright Office seeks comments on whether developments since 2008 require any changes to its original legislative proposal, and whether recent mass digitization efforts impact an orphan works solution.

Since the last inquiry, advances in digital reproduction and popularity of online access to creative works have spurred major commercial entities to take on digitization projects to scan and allow access to hundreds of millions of copyrighted works. The wholesale digitization of collections of both foreign and U.S. works and the resulting negative impact on authors’ and copyright owners’ rights have been highlighted in recent legal proceedings, raising concerns on the part of creators and copyright owners in all creative industries. These concerns have also been echoed by the Copyright Office<sup>2</sup> as well as many others.<sup>3</sup> While the projects to date have primarily

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<sup>1</sup> 77 Federal Register 64,555 (October 22, 2012).

<sup>2</sup> *Authors Guild, Inc. v. Google Inc.*, 770 F. Supp. 2d 666 (S.D.N.Y. 2011) (“Google Books”); *Am. Soc’y of Media Photographers, Inc. v. Google Inc.*, Civil No. 10-2977 (S.D.N.Y. 2010) (A companion suit filed by a group of

impacted the rights holders in the book publishing sector, SAG-AFTRA is gravely concerned with the unintended consequences of similar digitization efforts affecting our members and other performing artists, including sound recording artists who have termination rights as authors under the Copyright Act. Large scale digitization projects, if permitted through an orphan works regime, could be devastating to recording artists and actors who create and perform in copyrighted works.

As the digital distribution of creative works, like music, movies, television programs, and other media, become more prevalent, it is also increasingly important that we curtail the potential abuses of these works by those who would improperly characterize them as orphan works to the detriment of artists and copyright owners. Providing commercial users a vehicle to exploit creative works that are not truly “orphaned,” without the proper safeguards in place, will significantly diminish the value of these works in the marketplace and, as a result, the incomes and benefits of SAG-AFTRA members will suffer.

While SAG-AFTRA could support an orphan works system for the limited purpose of historical archiving, cultural preservation, and other public interest and altruistic purposes, anything broader would have a severely negative impact on our members. A circumscribed approach is a solution more likely to address the needs of good faith users involved in archival, preservation, educational and research missions where the copyright owner cannot not be identified or located for permission. International developments that provide a limited use of orphan works by libraries, archival, preservation, and cultural institutions may be more reasonable in resolving the issue at hand.

With these new developments, it is essential that any orphan works proposal strike the proper balance between and among all interests, including those of sound recording artists as authors of creative works, as well as actors and other performing artists who are entitled to downstream compensation from the results of their labors.

## **I. The Legislative Proposal of 2008 Has a Negative Impact on the Contractual and Economic Rights of Artists.**

In its Notice of Inquiry, the Copyright Office first asks whether any recent developments necessitate changes to the proposed legislative framework introduced in 2008 to address the occasional or isolated use of orphan works. Notwithstanding the legal and international developments involving the mass digitization of orphan works, a reintroduction of a proposal similar to the 2008 legislation permitting even a onetime use of an orphan work would implicate and negatively impact important rights of recording artists, actors and various other performers, including those who are not SAG-AFTRA members.

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photographers and illustrators); *see also*, *Authors Guild, Inc. v. HathiTrust*, No. 11-6351 (S.D.N.Y. 2011) (“HathiTrust”).

<sup>3</sup> *See Competition and Commerce in Digital Books: The Proposed Google Books Settlement*, Hearing Before the House Committee on the Judiciary, 111th Congress, 1st Session, 1-2, 5 (September 10, 2009) (Statement of Marybeth Peters, Register of Copyrights; *see also*, U.S. Copyright Office, *Legal Issues in Mass Digitization: A Preliminary Analysis and Discussion Document*, (October 2011).

The vast majority of SAG-AFTRA recording artists and audiovisual performers hold ongoing contractual interests in the exploitation of copyrighted motion pictures and television programming as well as sound recordings and underlying musical compositions. The ongoing revenue stream from the lawful licensing and sales of sound recordings and audiovisual works is vital to the financial well-being of our members. These contractual interests are established through individual agreements and industry-wide union collective bargaining agreements. Many of the artists represented by SAG-AFTRA invest their entire lives in building their professional careers. While most may never be “famous,” the contractual rights and protections for their work, and the manner by which their works are exploited and used, hold a significant commercial and intrinsic value.

Although SAG-AFTRA commends the Copyright Office’s significant efforts in developing the 2008 legislative proposal, the union continues to be troubled by the devastating harm that a refreshed orphan works proposal will have on recording artists, actors, and other performers who create and work in the entertainment and media industries, if changes are not made to limit the definition and scope of orphan works.

***A. The 2008 proposal did not require a user to seek or negotiate with the author of an orphan work.***

Copyright protection provides key benefits to creators and society. Copyright protects the fundamental interest of the creator in earning a living from his or her work. Copyright also provides an incentive to the author to create. An orphan works regime that would allow a prospective unlicensed user to pre-empt the contractual rights and economic interests of creators in these works causes harm on both counts.

The proposed framework in 2008 permitted a prospective user of a copyrighted work who was unable to locate the copyright owner after conducting a “good faith, reasonably diligent search” to exploit the work. In addition, a user would only remain liable for infringement in an action later instituted by the copyright owner to the extent reasonable compensation would be due to the *owner*. Although the proposal still allowed an owner who later emerged a legal right to damages, it absolved the user of any liability to the author or any artist who was contractually entitled to compensation or other rights arising out of the work’s exploitation. A new user essentially could ignore the economic damage to an author, or anyone, who held an enforceable contractual right to compensation from a missing owner.

A potential user of a copyrighted work, should not be able to avoid paying use-based royalties, residuals or any other negotiated compensation simply because the copyright owner is now lost or the owner’s business is bankrupt or closed. Small and independent record labels and film production companies regularly go out of business and as a consequence, it is not uncommon for the copyright owner (i.e., the company) to be lost or missing. On the other hand, others who hold rights in the project, including authors of sound recordings who have termination rights, are often readily locatable and could preserve the property interest in the creative work. The author who created the original copyrighted work should be entitled to receive reasonable compensation and attribution for the use of the work, even where the absence of a record label renders the work “orphaned.” Furthermore, SAG-AFTRA members, including actors and other performers, who

are entitled to residuals or other fees for their performance in a film or television program, or royalties or other compensation from performing on a song, should be compensated for any future commercial exploitation of the “orphaned work” in accordance with the terms of a collective bargaining or other written agreement with the missing copyright owner. In the case of film and television properties, it takes little more effort than a simple online search<sup>4</sup> or call to SAG-AFTRA to determine if the performing artists on a particular work were covered by a collective bargaining agreement.

***B. The 2008 proposal did not account for the future interest of authors as copyright owners.***

Termination of rights falls squarely within the scope of this discussion. In 2008, the Copyright Office did not consider the right of termination established for authors under the U.S. Copyright Act in developing this framework. As authors of their works, recording artists and songwriters have important legal rights as owners of future interests in copyright in addition to any contractual interests. Despite a lifetime of effort spent cultivating value and popularity in their recordings, these authors stand to lose all of their future rights to these recordings if the 2008 orphan works system is imposed. For a number of recording artists, regaining the rights to their recordings will provide an important stream of income which could support them and their families as well as provide an important incentive to create new songs.

Beginning this year, authors - including sound recording artists and songwriters who assigned or transferred their rights to a copyrighted work in 1978 - will be able to regain a valuable ownership interest in their creative works. Special consideration must be given to authors who can exercise a right to termination to protect future interests in their works. It is therefore imperative that any orphan works regime require a potential new user to locate the owner of an unvested termination right, or an author where there is a missing owner, in the course of conducting a good faith due diligence search. In that instance, the author should be treated in all respects as the owner of the orphan work, and all rights and obligations of the missing owner should inure to the author. Similar to a copyright owner, the author would have the right to negotiate a license with the new user, and to have the option to stop the usage, to prevent any unintended harm that may result from the new user.

***C. The 2008 proposal voided artists’ rights of integrity established in their individual and collective bargaining agreements.***

Lastly, the 2008 legislative proposal failed to address the far-reaching implications of voiding recording artists’ contractual rights to approve or deny any potentially disparaging or damaging use of their sound recordings. For recording artists, the commercial misuse of their recordings could be devastating to their careers and livelihood. For actors, the irreversible harm caused by the repurposing of their works in unanticipated ways is evidenced by the recent “Innocence of

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<sup>4</sup> SAG-AFTRA and other entertainment industry unions maintain publicly accessible, searchable databases of collective bargaining agreement covered works in accordance with the provisions of 28 U.S.C. §4001(a)(2)(B)(i).

Muslims” controversy.<sup>5</sup> While many performing artists will never be famous, or even recognizable, the value in their works will continue long after their death, providing an important source of income for their families and beneficiaries. These individuals and their beneficiaries rely on these contractual protections to protect against the misappropriation of their works and performances.

Recording artists have fought hard for years to secure licensing approval rights in their recording contracts over uses of their music or performance in such ways as in a pornographic, violent, or misogynistic movie, television show or game. If a record label disappears and cannot be found, and the sound recording is deemed an orphan work, the artist loses these important contractual protections. Similarly, SAG-AFTRA’s collective bargaining agreements provide contractual rights to actors who work in film and television, relating to the reuse of their performances in future works. These rights and protections would be severely diminished under the 2008 orphan works proposal.

Most uses of orphan works will never cross the line of propriety with respect to use in an offensive context. But an author only has one career and one reputation. It is unacceptable for a new user to have an unfettered right to harm the integrity of the performer or creator. A performer’s reputation, and indeed, career, should not be subject to ruin because of a missing owner.

Accordingly, the Copyright Office should seriously consider the implications of any orphan works proposal on recording artists and actors to ensure that these important rights granted to both SAG-AFTRA members and other performers in both the music and audiovisual industries are not compromised.

## **II. Recent Developments in Mass Digitization Efforts May Have Devastating Consequences for Artists**

The Copyright Office further seeks information regarding how recent developments involving mass digitization implicate orphan works. The unintended consequences of an orphan works regime that is too broadly defined are magnified when dealing with users involved in large scale digitization of entire collections of music, motion pictures and television programs, as well as other copyrighted works.

While textual works and photographs tend to be primarily used for archival or educational purposes, music and audiovisual works like motion pictures and television programs are at a

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<sup>5</sup> In September 2012, the controversial motion picture, “Innocence of Muslims,” was released on YouTube triggering violent anti-American demonstrations in the Middle East. An actress appearing in this distorted version of the motion picture filed a lawsuit against the producer for, among other counts, fraud, false light invasion of privacy and slander. *See*, Complaint, *Garcia v. Basseley, et al.*, No. CV 12-8315 (C.D. Cal. Sept. 26, 2012). She alleges that producers represented that the film would be an “adventure” film and described her character as a concerned mother and benign historical figure. *Id.* at 14, paragraphs 65-67. Instead, the film was turned into an anti-Islam propaganda film and the actress was depicted in a manner contrary to her original intent. *Id.* at 2, paragraphs 8-10.

greater risk of being exploited for purely commercial purposes. For instance, the use of digital samples in other songs, or for third party ancillary uses in movies, commercials and games will become easier and more widespread, and a broad scope orphan works law will exacerbate the problem. If mass digitization efforts of alleged orphan works are not circumscribed, the long-standing rights of creators and performers to share in the commercial benefits from the exploitation and licensing of these copyrighted works will be greatly diminished, if not altogether eliminated.

The *Google Books* litigation<sup>6</sup> reveals the greater risk of harm to artists where millions of works were being included in a massive digital library Google was building for public access. The Google Books Project was a commercial endeavor. In 2005, Google was sued by publishers and the Authors Guild, among others, for willful copyright infringement in reproducing and allowing access to millions of books through its digital library.<sup>7</sup> The proposed settlement offered in 2009 was very controversial and would have allowed Google to usurp the rights of hundreds of creators in books that it had improperly categorized as orphan works. Under the proposed terms, if an author or copyright owner had not exercised his or her right to “opt-out,” Google could have reaped the proceeds from any exploitation of the work into the future. In rejecting the proposal, Judge Chin, advised the parties to use an opt-in approach to protect the rights of creators. While the major publishers reached a settlement with Google in October 2012, the Authors Guild action is still pending and the case has not been resolved on the merits. SAG-AFTRA is especially concerned with the impact of these digitization projects, not only on its member recording artists and actors, but also on other performers who create and work in these industries, where the ultimate motive of these commercial users is to have the unencumbered right to build a profitable business model without proper compensation to the creators of such works. SAG-AFTRA urges the Copyright Office to be vigorous in assuring that the commercial motives of prospective users not overstep creators’ rights, such as recording artists and actors, who earn a living from the exploitation of their works.

“A copyright owner’s right to exclude others from using his property is fundamental and beyond dispute.”<sup>8</sup> Creativity cannot flourish and thrive without giving creators an incentive to create. While a solution should be discussed to address the orphan works issue for libraries, and other similarly situated institutions, we must not simply cast aside the legal rights of creators established under the Copyright Act and international treaties. Without strong assurances that creators’ rights will be protected, a broadly drafted orphan works regime would undermine fundamental rights under the copyright law and, in effect, would give anyone free rein to exploit the works of creators.. For creators and performers, who heavily rely on the digital distribution and sale of their works, the concern is great. For instance, if commercial users are allowed to enter the market by creating large scale digital libraries of music and movies, it dilutes the market for artists, whose rights would otherwise be licensed, further diminishing an important income stream for artists.

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<sup>6</sup> *Google Books*, *supra*, 770 F. Supp. 2d 666.

<sup>7</sup> *Id.*

<sup>8</sup> *Id.* at 681.

The *HathiTrust* case<sup>9</sup> involved a partnership between and among several university libraries and Google to digitally reproduce and provide access to all the works in their collections. Unlike Google Books, this matter has bona fide educational and preservation components and reflects an effort to provide online access to the collections by patrons. The court did not reach the merits of the orphan works issues, but the case nonetheless illustrates the huge scope of the impact of mass digitization, given that the collective number of works was nearly 10 million digital volumes.

International regimes like the recently approved directive by the European Union<sup>10</sup> (“EU Directive”) may be worthwhile to examine, in addition to the Canadian model providing access to orphan works that has been in existence for a number of years. The EU Directive is narrowly tailored to “facilitate the digitization of and lawful cross-border online access to orphan works contained in the collections of libraries, educational establishments, museums, archives, audiovisual heritage institutions and public service broadcasting organizations” with the goal of preserving the cultural heritage of the member countries. Both models may provide a more balanced approach for copyright owners, creators and future users. While there may be solutions to resolve how educational, archival and preservation institutions and libraries access orphan works for their specific purposes, SAG-AFTRA does not support a broad overarching orphan works proposal which fundamentally changes the existing, careful balance between users and creators under the U.S. copyright laws.

### **III. Conclusion**

In sum, SAG-AFTRA urges the Copyright Office to tread carefully in assessing any solution that limits the important legal rights of performing artists who are authors or who have contractual interests in the exploitation of their work. If the Copyright Office decides to resume development of an orphan works legislative solution, SAG-AFTRA continues to assert that sound recordings should be categorically excluded, particularly in light of the recording artist/author’s right of termination exercisable beginning this year. Furthermore, appropriate safeguards must be included for works subject to a collective bargaining agreement that would give actors and other performers, contractual protections and downstream compensation. Should that not be viable, SAG-AFTRA requests, in the alternative, that any legislative solution to address orphan works be narrowly drafted to support the digitization goals of libraries, archives and other educational and cultural institutions, while also protecting the interests of performers and creators. In light of recent developments implicating orphan works in mass digitization efforts, SAG-AFTRA further urges the Copyright Office to ensure that any solution involving orphan works does not extend greater rights to a random new user at the risk of eroding the legal and contractual rights granted to copyright owners and creators, who are uniquely affected by an orphan works regime.

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<sup>9</sup> *Authors Guild, Inc. v. HathiTrust*, No. 11-CV-6351, 2012 U.S. Dist. LEXIS 146169 (S.D.N.Y. October 19, 2012).

<sup>10</sup> *Directive of the European Parliament and of the Council on Certain Permitted Uses of Orphan Works* (approved October 4, 2012).

We welcome further discussion on this matter, and stand ready to assist the Copyright Office as it continues to explore the orphan works issue.

Respectfully submitted,

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