

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

**March 06, 2013**

Future of Music Coalition (FMC) is pleased to submit these reply 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.

In our original comments<sup>1</sup>, we stated that a primary goal regarding an orphan works solution should be to balance the interests of copyright owners, authors and new users. Those comments outlined potential ways in which authors could avail themselves of limited remedies afforded to copyright owners in instances where the original creator is locatable (or known), but the copyright holder is not.

Our reply comments will underscore the need to address orphan works within a federal framework to establish a balance between making available more works while maintaining protections and creating new opportunities for authors. The case for an orphan works solution has been made to a large extent previously, but arguments advanced in this Inquiry suggest that some groups and individuals believe that the orphan works problem has subsided, or that concerns are being addressed through other means. While there are indeed encouraging developments at the intersection of copyright and digital technology, the issue of orphan works is not one that can be wholly resolved by court rulings or marketplace and technical advances, as we aim to briefly elucidate.

## **Registries and Databases are Important but not a Panacea**

FMC has gone on record in support of voluntary global copyright registries and/or authentication databases as a means to reduce frictions in the digital music marketplace

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<sup>1</sup> Casey Rae. Comments in Response to the Copyright Office's Notice of Inquiry Concerning Orphan Works and Mass Digitization. U.S. Copyright Office [2012]. Web. 04 February 2013. <[http://www.copyright.gov/orphan/comments/noi\\_10222012/Future-Music-Coalition.pdf](http://www.copyright.gov/orphan/comments/noi_10222012/Future-Music-Coalition.pdf)>

and more efficiently compensate creators for various uses of their work.<sup>2</sup> We understand the complexities of harmonizing standards across territories, as well as challenges in governance to ensure that the independent sector can also avail themselves of such systems. We agree with comments in this Inquiry from MPAA, NMPA and others that existing registries — such as those maintained by performing rights organizations, as well as forthcoming voluntary global databases — are fundamental to enumerating which copyrights belong to whom. However, these systems do not address the problem of copyrights whose owners are known but not locatable due to other reasons, such as a company going out of business or insufficient records regarding the transfer of rights in mergers and acquisitions. In such circumstances, it is doubtful that existing or future databases would have records of the rightful copyright owners, or else these works would not be of an orphan status.

With regard to one voluntary registry initiative, the Global Rights Database (GRD), the MPAA states, "...the GRD's goal is to provide, for the first time, a single, comprehensive and authoritative representation of the global ownership and control of musical works. The GRD will provide a centralized, once-only registration mechanism for claims to musical works, agreements, and repertoire mandates. Music publishers and performing rights societies are collaborating with music service providers and several global associations to drive this project forward. A parallel effort, the Global Recording Database, sets out similar objectives with respect to sound recordings."<sup>3</sup> Setting aside issues of governance, standards and accessibility, we agree that such a database would be useful in helping to streamline licensing and other activities essential to a functional 21st-century music ecosystem. In addition to global databases, we think this ecosystem would be further enhanced by basic rules to address the unique challenges presented by orphaned copyrighted works.

NMPA and HFA, in their joint comments, state: "a Global Repertoire Database is currently in development with the goal of providing 'a single, comprehensive and authoritative representation of the global ownership and control of musical works' in the foreseeable future... 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."<sup>4</sup>

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<sup>2</sup> Silver, Joe. "In Pursuit of a Global Music Registry." *In Pursuit of a Global Music Registry*. Future of Music Coalition, 27 June 2012. Web. 04 Mar. 2013.

<sup>3</sup> O'Leary, Michael. Comments of the Motion Picture Association of America. U.S. Copyright Office [2012]. Web. 04 February 2013. <[http://www.copyright.gov/orphan/comments/noi\\_10222012/Motion-Picture-Association-America-Inc.pdf](http://www.copyright.gov/orphan/comments/noi_10222012/Motion-Picture-Association-America-Inc.pdf)>

<sup>4</sup> Rosenthal, Jay, and Badavas, Christos P., Comments of the National Music Publishers Association and Harry Fox Agency in Response to October 22, 2012 Notice of Inquiry. U.S. Copyright Office [2012]. Web. 04 February 2013. <[http://www.copyright.gov/orphan/comments/noi\\_10222012/National-Music-Publishers-Association-Harry-Fox.pdf](http://www.copyright.gov/orphan/comments/noi_10222012/National-Music-Publishers-Association-Harry-Fox.pdf)>

Again, we reiterate our support for an effort that includes stakeholders from many different areas of today's marketplace. We believe that some of these stakeholders could also come to consensus on how best to address the problem of orphaned copyrights, hopefully in a way that gives authors recourse within the limited remedies described in previous legislative proposals.

### **A Best-Worlds Scenario for Copyright Identification**

It is important that either one of these goals not be used to frustrate progress on the other. Over the past decade, FMC has heard it said that a global database for music is "2-5 years away." Again, we understand the complexities of enacting such a system, but we are concerned when initiatives such as the GRD are described as obviating the need for an orphan works solution, particularly when the goalposts seem to be continually in motion.

If functional global databases and an orphan works solution were pursued in tandem, we are confident that American musical culture would ultimately benefit and its commercial and noncommercial participants would be provided with needed assurances that their activities are lawful and consistent with both marketplace and moral conventions. In fact, we suggest that parties redouble efforts to reach mutually agreeable solutions to both concerns. FMC would be happy to offer our insights based on many years of direct conversation and engagement with musicians and composers.

Reducing the number of orphaned works is a goal that many share. Improving existing registries and implementing accessible voluntary global databases can accomplish some of this; establishing a framework to address new uses of works under copyright that are not, for various reasons, represented in registries or databases is the other side of the coin. We believe that addressing both concerns would result in a more smoothly functioning copyright environment for creators, rightsholders, archivists, new users and the public. Even if at some point an orphan works solution becomes less relevant due to more sophisticated and robust systems for copyright ownership identification, this would only mean that orphan works provisions are invoked far less frequently, an outcome that many in the rightsholder community would likely welcome. In the meantime, many participants in this ecosystem would benefit from greater confidence around what is required with regard to certain uses.

We applaud the organizations cited above for their efforts to establish a more accessible, transparent and functional system for copyright identification, as we do the Copyright Office's own ongoing work in updating and improving its informational resources. We encourage the Office and the communities with which it intersects to continue these efforts alongside those appropriate to achieving an orphan works solution.

Respectfully submitted,

## **FUTURE OF MUSIC COALITION**

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