

Copyright Office - Orphan Works Comments

May 18, 2014

From: Tim Brooks
Chair, Copyright and Fair Use Committee
Association for Recorded Sound Collections
Annapolis, MD
www.arsc-audio.org

To: U.S. Copyright Office
Library of Congress
Washington, DC
www.copyright.gov/orphan

Subj: Comments Regarding Orphan Works and Mass Digitization

The Association for Recorded Sound Collections is a non profit organization founded in 1966 and dedicated to the preservation and study of sound recordings in all genres of music and speech, in all formats, and from all periods. ARSC holds an annual conference, presents preservation workshops, and publishes a peer-reviewed journal, among other activities. Approximately half of our members are professionals managing archives or working in associated fields, and half are scholars and other private individuals interested in historical audio. ARSC is unique in bringing together archives and their users to work on issues of common concern regarding recordings.

These comments have been endorsed by the Historical Recording Coalition for Access and Preservation (www.recordingcopyright.org), consisting of ARSC, The Music Library Association, The Society for American Music, and The Popular Culture Association/American Culture Association.

The lack of statutory protection for those wishing to use orphan works constitutes an impediment to the preservation of, and public access to, culturally important recordings. A significant number of sound recordings, particularly non-commercial recordings, have no identifiable owner. The archives we represent hold large numbers of such recordings. As an example, the director of The Archives of African American Music and Culture at Indiana University has documented how "the ambiguous nature of orphan works affects our ability to serve public and scholarly needs." She concludes, "publicly funded institutions should not be burdened with the threat of litigation when utilizing orphan works in a manner consistent with their mission of education, research, and preservation." (see attached letter)

We recognize and support the need for creators to have copyright protection in order that they can profit from their works. However this protection should not be

seemingly eternal,¹ nor should it be so sweeping that owners can literally do nothing to identify their works and yet be able to jump out of the shadows and sue for substantial damages if someone uses a work reasonably believed to be abandoned. While librarians, archivists, collectors and others might invest considerable time and financial resources in the preservation of a recording, the possibility that a rights owner might suddenly emerge and bring suit creates an unreasonable culture of fear that prevents many otherwise valuable projects from going forward. That is not balance. Both sides of the copyright equation, owners and users, are going to have to make some compromises and expend some effort if copyright is to work for everyone.

We will comment briefly on individual questions raised by USCO.

I. The Role of Private and Public Registries (Session 3).

While it may not be possible to legally require registration, due to treaty obligations, registration should be encouraged, facilitated, and legally incentivized, as is currently done, for example, to enable statutory recovery in lawsuits. Voluntary registries have worked well in many fields, for example SoundExchange (for digital streaming) and ASCAP and BMI (for music performance rights). If rights holders want to enforce their copyrights, and doing so individually is felt to be overly burdensome, the logical answer is to band together, through their associations (or a new one), and establish a public registry. Then, anyone wishing to use an unidentified work of any type could check this registry as part of a diligent search.

It should be noted that a root cause of the orphan works crisis is the complete absence of marking or registration requirements to copyright a work. In the years since this extraordinary provision was written into the Berne Treaty--only for copyright--it has had widespread and well documented negative effects on cultural preservation and access.² In recent years both the United States and the European Union have acknowledged the problem and made attempts to address it.³ The negative effects may well have been unintended consequences, however we believe that the United States, in international negotiations, should be a leader in urging revision of this damaging provision, not necessarily to eliminate it but rather to recraft it in such a way as to maintain reasonable protection for creators while not allowing "hidden" rights to give rise to problems such as orphan works.

¹ Rightly or wrongly, many users today feel that "perpetual copyright on the installment plan", as advocated by lobbyist Jack Valenti and congressman Sonny Bono, is a real possibility.

² See for example United States Copyright Office, "Report on Orphan Works," January 2006; Strategic Content Alliance and Collections Trust, "In From the Cold: An Assessment of the Scope of 'Orphan Works' and Its Impact on the Delivery of Services to the Public," April 2009 (at www.jisc.ac.uk/contentalliance).

³ European Commission Press Release, "Commissioner Michel Barnier welcomes trilogue agreement by Council and Parliament on the Orphan Works Directive," 6 June 2012. Accessed at http://europa.eu/rapid/press-release_MEMO-12-421_en.htm?locale=en

II. The Types of Works Subject to Any Orphan Works Legislation, Including Issues Related Specifically to Photographs (Session 4).

It is essential to include unpublished and broadcast recordings, as well as commercial recordings, in any solution. These comprise the greatest number of orphans in the field of sound recordings. Because recording media has been inexpensive and easily accessible to the public since the 1950s, and because they were not covered by federal law, or related registration requirements, sound recordings may be the medium most affected of all by the challenges in dealing with orphan works.

We will not comment in detail on photographs, except to say that the preservation of metadata is important, but that even absent metadata, digital matching technologies make unique identification of photographs much more feasible than it was a few years ago. The reasonable needs of photographic rights holders should be addressed, but should not be allowed to hold hostage progress on all other orphan works.

III. Defining a Good Faith "Reasonably Diligent Search" Standard (Session 2).

We urge that any standards "keep it simple," and not require attorneys which many small archives cannot afford. Rights holders justifiably object to an enforcement regime that is overly burdensome on the small creator. Likewise, it cannot be overly burdensome for the small user. We need a system that works for everyone, individual and institutional, and not just the large and well funded, whether they be rights holders *or* users.

We also believe that any proposal should include a mechanism to address "muddy" claims of ownership. That is, intellectual property claimants should not be able to simply assert their ownership, they must be required to prove it if challenged. We cannot speak for other types of IP, but due to the frequent sale and resale of recording catalogs over the years, there are many cases of early recordings whose asserted ownership has been questioned. Putative right holders frequently keep "proof" of their ownership secret until forced to divulge it in an expensive court action. The recent dispute between two small firms over who really owns the long-defunct 1920s Paramount Records catalog is one example of this.⁴ The subject is discussed at length in the publication *Survey of Reissues of U.S. Recordings*, which also suggests methods of tracing the probable ownership of a commercial recording, without resort to legal counsel.⁵

IV. The Types of Users and Uses Subject to Any Orphan Works Legislation (Session 5).

⁴ Odell, Jennifer, "Revenant and Jack White's Third Man Records Involved in Local Copyright Dispute," Offbeat.com, February 1, 2014. Accessed at <http://www.offbeat.com/2014/02/01/revenant-jack-white-third-man-records-copyright-infringement/>. There were also numerous other news stories about this dispute.

⁵ Brooks, Tim, *Survey of Reissues of U.S. Recordings*. Council on Library and Information Resources and Library of Congress, August, 2005, 23-26.

Legitimate uses must of course include preservation, but it is essential that public access be enabled as well. Without access it will be extremely difficult to obtain funding for preservation, and in addition scholarship will be greatly harmed.

V. Remedies and Procedures Regarding Orphan Works (Session 6).

If a legitimate, proven rights holder emerges after an orphan work has been used, there should be no penalty providing the user had made a reasonable search (see paragraph III). We support the notion that in such cases, the legitimate rights holder should be able to assert exclusive rights to the recording after a transitional period.

VI. Mass Digitization, Generally (Session 7).

Mass digitization is rapidly becoming the norm in the field of sound recordings. Thus clarification of the law regarding Orphan Works is urgently needed, in our view.

VII. Extended Collective Licensing and Mass Digitization (Session 8).

Collective licensing is not an desirable solution in our view. It establishes another layer of bureaucracy, multitudinous opportunities for treatment perceived to be unfair by one constituency or another, and places an unreasonable burden on archives, especially smaller ones.

VIII. The Structure and Mechanics of a Possible Extended Collective Licensing System in the United States (Session 9).

As noted above we do not recommend collective licensing, but if it were to be imposed it must be kept simple, with any fees adjusted to be appropriate to the scale of the user and the use. We must always bear in mind the thousands of smaller and specialized archives serving our population, not just large ones with resources.

Attachment



**ARCHIVES OF AFRICAN AMERICAN MUSIC AND
CULTURE**

March 5, 2014

Tim Brooks,
President, Association for Recorded Sound Collections

Dear Tim,

I'm writing in regards to the forthcoming Copyright Office hearings on Orphan Works. As a music archive based within a major state university, it is imperative that we are given the ability to preserve (through digitization), provide access to (via digital surrogates), and disseminate orphan works within reasonable limits. Let me provide just one example of how the ambiguous nature of orphan works affects our ability to serve public and scholarly needs.

At the Archives of African American Music and Culture, our most frequently referenced collections are those pertaining to Black-oriented radio. These collections include interviews with deejays, radio airchecks, photographs, and other memorabilia. Some of these materials are well-documented and include release forms, which has enabled their use in award winning radio documentaries, books, and exhibits. But the provenance of other materials—such as the radio airchecks from defunct radio stations, photographs without any attributes, and interviews with long deceased deejays, artists and producers—are not well documented. Many fall within the category of orphan works, and we must restrict access to onsite use for research purposes only.

Why are these materials so important to the study of American culture? Black radio has played an essential role in shaping and disseminating Black music and culture in the United States. For African Americans in the mid-twentieth century, radio was the most popular medium of mass-communication. Programs targeted specifically to Black audiences created a sense of community and forged a new Black urban identity.

Since its early days, disc jockeys—or deejays—have been an inseparable part of Black radio. These men and women were the stars of the airwaves. They played a wide range of music, sold products, discussed politics, and entertained audiences who often elevated them to the status of cultural icons.

By the late 1940s, Black deejays were developing their own unique styles and identities, and were as entertaining as the music they played. They rapped and rhymed—some spoke in street slang, others created their own vocabulary. All brought the Black oral traditions of storytelling, improvisation, and animated delivery to the radio—and are the forebears of contemporary hip hop.

For a long time, Black music was not played on mainstream network radio. Black radio stations became the key vehicle for integrating the airwaves, bringing blues, gospel, and especially rhythm and blues music to a wider audience. Deejays were extremely influential in launching the careers of Black artists—they chose which records to play and frequently brought musicians to the stations for live concerts, interviews, and promotional events. Some musicians even hosted their own radio shows, including B.B. King, Rufus Thomas, and Ike Turner.

The growth of all-Black radio stations also led to a deeper involvement in the community. Stations such as WDIA in Memphis, WERD in Atlanta, and KYOK in Houston supported community affairs programs and political debates. During the turbulent Civil Rights era, Black radio played a central role in spreading news, increasing political awareness, and promoting peace. The close relationship between Black radio and its audience extended beyond the airwaves. Stations organized record hops, music and dance contests, and raised funds for charities and scholarships. Deejays hosted these events, assuming the role of cultural programmers for the Black community.

By the late 1970s, the Top 40 program formats and the trend towards “more music, less talk” signaled the end of the golden age of Black personality radio. Thus the extant airchecks and related interviews and photographs from this period are now quite rare, and are increasingly sought by educators, scholars, producers, and the general public. Many of the interviews and airchecks also fall under the murky umbrella of pre-1972 unpublished sound recordings, which further impacts our ability to preserve and provide access to these materials.

We hope that progress can be made on crafting Orphan Works legislation that will allow for these important cultural heritage materials to be preserved, accessible, and usable—including licensing mechanisms to cover non-commercial as well as commercial uses. This would enable such materials to be utilized in publications and documentaries where they could enlighten and educate the broader public. For commercial uses, any liabilities should be limited to reasonable compensation for the use. For non-commercial uses, publicly funded institutions should not be burdened with the threat of litigation when utilizing orphan works in a manner consistent with their mission of education, research, and preservation.

Sincerely,

A handwritten signature in cursive script that reads "Brenda Nelson-Strauss".

Brenda Nelson-Strauss
Head of Collections
Archives of African American Music and Culture