

**BEFORE THE
U.S. COPYRIGHT OFFICE
LIBRARY OF CONGRESS
WASHINGTON, D.C.**

**In the Matter of Orphan Works
And Mass Digitalization**

Docket No. 2012-12

**COMMENTS OF SESAC, INC. REGARDING ORPHAN WORKS
AND MASS DIGITIZATION**

SESAC, Inc. (“SESAC”) respectfully submits these comments in response to the Copyright Office’s Notice of Inquiry (the “NOI”) dated October 22, 2012 soliciting written comments on the topics of orphan works and mass digitization.

SESAC is a performing rights organization (a “PRO”) that services both the creators and users of non-dramatic musical works (that is, musical compositions—songs—as distinct from sound recordings of songs) through licensing and royalty collection and distribution. It is one of the three domestic PROs recognized under the Copyright Act. Established in 1930, SESAC is the second oldest and fastest-growing PRO in the United States. SESAC licenses public performance rights in more than 250,000 songs on behalf of its many thousands of affiliated songwriters, composers, and music publishers.

SESAC acknowledged the so-called “orphan works” problem concerning copyrighted works whose owners cannot be located to obtain permission to use them. (As a matter of first principles, the Copyright Act generally provides that a copyright user must obtain permission before using a work.) However, SESAC believes that musical compositions represented by the PROs should not be within the ambit of any proposed legislation to address the issue.

Musical compositions cannot be considered “orphan works” (a term that, as generally used, incorrectly implies that in every instance its owner has effectively abandoned any interest in the work). Unlike other categories of copyrighted works, virtually all published musical compositions in the American repertory are represented by the three American PROs, including SESAC, all of which maintain databases identifying the copyright owners. This information can be obtained by simply contacting the PROs. In fact, the PROs maintain on-line websites with freely accessible databases containing owner information for such compositions. (The Harry Fox Agency also maintains a separate database containing owner information for a large percentage of published American compositions. Moreover, SoundExchange maintains an on-line database which, although not listing writer or owner information concerning musical compositions, does contain titles of musical compositions appearing on sound recordings recorded or owned by its members.)

Given the availability of such owner information, any musical composition listed in a PRO’s repertory cannot fairly be considered an orphan work; a reasonable diligent search in good faith will always locate the copyright owner. Simply put, musical compositions would not appear to be a category of copyrighted works creating the problems that proposed legislation presumably would attempt to remedy.

Even assuming theoretically that a user of musical compositions could establish a failed but reasonably diligent search in good faith, any statutory provisions providing reduced infringement compensation to copyright owners, as applied to public performances of musical compositions, would undermine the PROs’ licensing system that has been in place for over 90 years and would conflict with many decades of Federal court and statutory remedies. For example, previously proposed legislation would have provided that compensation for

unauthorized use of an “orphan work” be limited to the value “of the work” infringed. SESAC, however, does not license public performances on a composition-by-composition basis; most often, it grants blanket licenses authorizing the unlimited use of its entire repertory, which is valued as such.

In the performance rights industry, where blanket licensing of vast repertories is the legally and economically accepted norm, limiting compensation for infringement to the value of individual infringed works would provide a strong disincentive for users to obtain a license. Presumably, any infringer would prefer to pay after-the-fact for its unauthorized use of a limited number of individual compositions, instead of paying in advance for the unlimited use of a PRO’s vast repertory under penalty of statutory damages, as the law presently requires. Under such a provision, the inclusion of musical compositions within the ambit of “orphan works” legislation would provide infringers with a plausible avenue to circumvent statutory damages resulting from infringing performances. Permitting infringers to argue that they conducted a reasonable diligent search in good faith for compositions whose owners are readily identifiable, and greatly limiting potential infringement liability as previously proposed, would combine to create a gapping statutory loophole that would jeopardize the legal underpinnings for 90 years of public performance licensing, the efficiency of which has been repeatedly reiterated in congressional hearings.

For these reasons, musical compositions whose owner information is contained in freely available public databases maintained by the PROs and other organizations, or otherwise identified to the user by such organizations, should never be considered “orphan works” and should be excluded from the operation of any “orphan works” legislation that might be proposed. SESAC’s overarching concern is that any proposed solution, even if intended to act

as a shield to protect diligent users, not be able to serve instead as an unintended sword by infringers against these copyright owners.

Finally, regarding the second topic of inquiry, mass digitization, SESAC concurs with the contemporaneously filed comments of ASCAP and BMI, the other two U.S. PROs. SESAC also encourages the Copyright Office and Congress to address mass digitization in a separate inquiry because it raises distinct and complex issues that require distinct and complex solutions. At the least, regardless of any specific framework that is proposed, mass digitization of musical works should require the direct permission of the copyright owners.

SESAC appreciates the opportunity to comment on these topics and respectfully reserves the right to submit responsive comments concerning other submissions to the Copyright Office. Moreover, SESAC is prepared to assist the Copyright Office in drafting any proposed legislation and guidelines regarding best practices for reasonable, diligent good faith searches to obtain permission to use musical works from their owners.

Respectfully submitted,

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SESAC, INC.

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