

Orphan Works

Reply Comments of
The Recording Industry Association of America (RIAA)

May 9, 2005

RIAA welcomes this opportunity to submit reply comments in this proceeding.

The relatively high volume of comments received in the initial round demonstrates the widespread public interest in this issue, and validates the Copyright Office's decision to examine it. Our review of the comments suggests that there appears to be widespread – indeed, almost unanimous – agreement that there is no serious orphan works problem with respect to commercially released sound recordings protected by federal copyright.¹ However, based on the submissions reviewed, the same may not be true with respect to other categories of works, including photographs, textual material, and some computer programs.

There is also widespread agreement, at least in general terms, on the proper approach for further study:

- A user of a work who, despite a reasonably diligent search, is unable to identify or locate the copyright owner, should benefit from reduced liability for otherwise infringing uses that she makes.
- A copyright owner who subsequently steps forward should not suffer any diminution of its exclusive rights with respect to future uses, with appropriate accommodation for ongoing uses initiated while the work was properly classified as an orphan.

A small group of submitters reject what can be called the “due diligence” approach, and instead use this proceeding to advocate for reinstatement of formalities as a pre-condition to a full term of copyright protection. The mandatory registration system called for by Creative Commons, Google, and some university libraries would essentially eliminate copyright protection for right holders who failed to comply with a new formality at a pre-determined point after the work's publication (or, perhaps, after creation or the author's death, in the case of certain unpublished works). *See* Creative Commons and Save the Music, No. 643; Google Inc., No. 681; Carnegie Mellon

¹As RIAA noted in its initial comments, pre-1972 U.S. sound recordings do not enjoy federal copyright protection, and thus fall outside the scope of this proceeding and should not be subject to orphan works treatment. Some earlier foreign sound recordings now enjoy federal copyright protection in the U.S. pursuant to 17 U.S.C. § 104A, and a handful of submissions indicate difficulty in identifying or locating copyright owners for these works. RIAA maintains its view that any U.S. orphan works regime should not apply, at least initially, to works created or first published outside the United States. *See* Recording Industry Association of America, Inc., No. 687, at 9.

University Libraries, No. 537.² These proposals differ from one another in a number of respects, including whether they would apply to all works; whether the divestiture of copyright would be complete or would apply only as to certain privileged users or uses; whether copyright protection would be irrevocably lost or could be reclaimed, at least in part, by a right holder; and in other ways. However, they all share a common and fundamental flaw: the ability to make an unauthorized (and otherwise infringing) use of a work would turn, not on whether the user had made a reasonably diligent effort to identify and locate the right holder, but on whether the right holder had filed specified information in a designated registry by a stated deadline. For failure to comply with this formality, the right holder would suffer the penalty of vitiation, in whole or in significant part, of its “enjoyment and exercise” of copyright protection.³ Such an approach not only flies in the face of the bedrock principle of formality-free protection enshrined in Article 5.2 of the Berne Convention, it also runs counter to the decades-old effort to rid U.S. copyright law of “traps for the unwary.”

RIAA believes that the purpose of this proceeding is to facilitate and promote voluntary licensing activity – freely negotiated terms and conditions for use of copyrighted materials. The inability to identify or locate the right holder is one obstacle – and, in some sectors at least, perhaps a significant obstacle – to such activity. The best outcome for this proceeding would be to identify ways to help remove this obstacle, and, where it cannot be removed, to consider accommodations to facilitate the desired use while protecting the interests of right holders. The mandatory registration systems proposed by these submitters would take this proceeding in the opposite direction. It would discourage voluntary licensing by giving users the ability – and indeed an overwhelming incentive – to decline to seek out any right holder who had failed to say the magic words, in the proper way, at the proper time, to the proper agency administering the registry. Indeed, such approaches would countenance unauthorized uses even when the identity and location of the right holder is actually known to the user, but, through no fault of the right holder, has not been recorded or kept up to date in a designated registry. This scenario exemplifies how far astray the mandatory registration model would take this inquiry.

Instead of proceeding further down this blind alley, we urge the Copyright Office to draw from the record of initial round submissions to sharpen the focus on some of the issues of how an orphan works regime based on “due diligence” or “reasonable efforts” ought to work. In this regard, RIAA would make the following observations.

² For the purposes of this memorandum we will use an abbreviated citation form identifying the comment submitter, the comment number as assigned by the Copyright Office (see Orphan Works Comments at <http://www.copyright.gov/orphan/comments/index.html>), and where appropriate, the page number of the particular comment.

³ Creative Commons repeatedly stresses that a right holders’ failure to register “does not vitiate copyright” or “would not remove the work’s copyright protection.” Comments of Creative Commons and Save The Music, No. 643, at 16, 17. But it never specifies just what rights remain to be “enjoyed or exercised” after a work “may be used without the need to ask permission, and for a nominal fee” paid, not to the right holder, but to a separate fund – especially when, as Creative Commons proposes, orphan status is irrevocable. *See id.*

1. There is widespread agreement among submitters that a “one size fits all” approach is inappropriate and unworkable.⁴ No single recipe could spell out just what steps a would-be user must take in all cases to identify and locate the right holder. This conclusion is not surprising, considering that the record of the initial round submissions suggests that the intensity of the orphan works problem is far greater with some types of works (e.g., photographs) than with others (e.g., sound recordings protected by federal copyright). However, there is considerable support for the development of “best practices” or a “checklist” of steps that ought to be fulfilled in seeking to identify or locate right holders. RIAA reiterates its proposal (echoed by some other submitters) for the convening of roundtables of interested parties to identify existing resources, on a sector-by-sector basis. *See, e.g.*, RIAA, No. 687, at 4; Motion Picture Association of America, No. 646, at 4; UCLA Film and Television Archive, No. 638, at 6. These roundtables could also identify where new voluntary registries of right holders would be useful tools for facilitating the identification and location of right holders.⁵

2. Most submissions would allow any user to take advantage of whatever accommodation is provided for orphan works. RIAA agrees with this approach, and opposes proposals (e.g., the ALOW model put forward by Stanford University Library) that would reserve this privilege to libraries, archives, and non-profit educational institutions. *See* Stanford University Libraries, No. 457. Certainly the record contains ample evidence that a wider range of users than this are encountering some problems with orphan works. We agree on this point with the CCI⁶ proposal (which was endorsed by a number of other submitters). Similarly, it is important that the orphan works regime generally apply to commercial as well as non-commercial uses of works, although we recognize that this breadth should not be unlimited, and may have repercussions, such as in the nature of accommodations (or remedial limitations) that apply once a work properly classified as orphaned is used in this way. It would also be important to identify an upper boundary beyond which unauthorized commercial uses would not be sheltered by an orphan works regime (e.g., uses that would destroy the future commercial value of the work, so that it would be impossible, in practical terms, for a later-emerging right holder to regain control over future uses).

3. There is considerable support for incorporating a requirement that users file a public notice of their intent to use a work which appears, after reasonably diligent efforts, to be orphaned. RIAA reiterates its support for such a requirement, and notes that it should be included as an essential step in recipes for due diligence in any sector. In fact, whatever inconvenience such a requirement would impose on users would be more than counter-balanced by its value in bringing users and right holders together for negotiation,

⁴ Once again, the advocates of mandatory registration seem to dissent from this consensus, which is another fundamental flaw in their approach.

⁵ A number of submitters also agree that providing online access to the Copyright Office’s complete registration and recordation databases would be a useful step to take to reduce the population of works whose owners cannot be found. *See, e.g.*, MPAA, No. 646, at 4; Kernochan Center for Law, Media and the Arts, No. 666, at 2.

⁶ The CCI proposal was submitted by the Glushko Samuelson Intellectual Property Law Clinic, No. 595.

and in protecting users against any claims that they had failed to take the necessary steps to try to identify and locate the right holder. If the orphan works regime is intended to facilitate and remove obstacles to voluntary licensing, rather than simply to provide an excuse for neglecting to seek permission altogether, an “intent to use” registry requirement seems indispensable. One of the more detailed proposals on this score was put forward by the Center for the Study of the Public Domain at Duke Law School. *See* No. 597. This deserves further consideration, as do the proposals which urge that this public registry include information on the steps a user has taken to try to identify and locate the right holder. *See, e.g.,* Comments of Association of Independent Video and Filmmakers et al, No. 663, at 5-6; Comment of the International Documentary Association, No. 686, at 3.⁷ This feature would make the registry more useful not only to right holders needing to be alerted to contemplated uses of their works, but also to other users who may in the future seek to find the right holder or, if they cannot, to invoke the orphan works accommodation. In this regard, we agree with CCI that a subsequent user has an “independent duty to satisfy himself or herself that ‘reasonable efforts’ ...have been made” to locate right holders. Glushko Samuelson, No. 595, at 11. In our view, this would require an independent search by the second user in all but exceptional cases. We strongly reject the views of FreeCulture.org and Public Knowledge that the second user could automatically piggyback on the first user’s claim to have conducted a duly diligent search. IDA, No. 686; Public Knowledge, No. 629, at 6. Such an approach virtually invites abuse.

We disagree with the few submitters who dismiss the idea of such a public registry of intended uses as “unworkable” or lacking any “useful purpose.” *See, e.g.,* North Carolina State University Libraries, No. 606, at 3; Association of American Publishers, Inc. et al, No. 605, at 7. While of course such a registry would be no panacea, we believe it will help to some extent to prevent works from being treated as orphaned when, in fact, it is possible to bring user and right holder together.⁸ A number of other submitters support the idea of voluntary user registries, and believe that there should be incentives to provide public notice, but stop short of requiring that this step be added to the due diligence recipe. RIAA urges them to overcome this hesitation, which may derive from a false premise of symmetry between the situation of users and right holders. While mandating right holder registration would violate the Berne Convention’s ban on formalities and undermine the purpose of an orphan works regime, mandating user registration of intended uses would contravene no international standard and would, in fact, enhance the overall regime by moving some works out of the orphanage before the

⁷ CCI’s proposal would require the user to document its search and preserve that documentation in case a dispute about its efforts arose. This is a sound idea and would be especially important if the notice registry did not incorporate public filing of such documentation.

⁸ For this reason, we would not support the Art Museums’ proposal that notice be filed concurrently with the use rather than before it. This approach would eliminate the preventive function of the notice process, and would complicate the issue of injunction determinations after the right holder steps forward. Some waiting period after notice and before use should be required.

use occurs. Conceivably, a strong incentive for users to participate⁹ could function nearly as well as a mandate in achieving this goal, so this issue is worth further study.

4. As noted above, many submitters agree that otherwise infringing uses made of a work during the period that it is properly considered orphaned should not be exposed to full liability to a right holder who subsequently steps forward. Basically, the submissions on this topic fall into two camps. Many submitters believe that the later-emerging right holder should not be able to gain any monetary recovery for these uses, or should be limited to a strictly nominal recovery.¹⁰ A smaller group proposes that the right holder be able to recover an amount equivalent to a reasonable license fee, either set in advance by the Copyright Office or another agency (i.e., the Canadian approach), or as set by the court “by reference to market practices.” *Association of American Publishers, Inc. et al*, No. 605, at 3; *Recording Artist Groups*, No. 669, at 1 (suggesting that the United States adopt a modified version of the Canadian model).

While RIAA noted in its initial comments that some liability limitation may be appropriate in these cases, we do not believe that the possibility of monetary relief should be eliminated altogether, or even reduced to a nominal fixed sum. Indeed, it would be hard to square such an approach with an orphan works regime that applies to virtually all uses, even commercial uses that may be quite lucrative.¹¹

We continue to believe that allowing recovery of a sum equivalent to a reasonable license fee has much to commend it and is indeed the best approach. This is the only way in which the marketplace model – in which uses are freely negotiated between the interested parties – can remain paramount. To the extent that any special regime is needed for orphan works, it is because the marketplace model has failed due to the inability of the licensee, despite reasonably diligent efforts, to identify or locate the licensor. Once the user has commenced using the orphan work and the right holder has stepped forward, the conditions are in place to restore the marketplace model, not only for future uses, but also, to the greatest extent possible, for the uses already underway. The parties should be encouraged to negotiate a license fee for the previous use, with the backstop that if they cannot agree, the fee will be set for them by a court (or perhaps by the Copyright Office in an expedited administrative proceeding). This mechanism puts the parties as closely as possible in the position that they would have been in had the marketplace model not temporarily failed them.¹² Neither the Canadian model – in which

⁹ Such incentives are endorsed by a number of initial round submitters, either in very general terms, see e.g., *Microsoft Corp.*, No. 695, at 2, or with more specificity, e.g., *Public Knowledge*, No. 629, at 6.

¹⁰ The CCI proposal, as endorsed by many other groups, proposes a ceiling of \$100 per work or \$500 for any group of works with a single owner. See *Glushko Samuelson*, No. 595, at 5. Candidly, RIAA sees little practical difference between this proposal and those (such as Google and CSPD) that would bar all recovery for use during the period of orphan status.

¹¹ In this regard, we note that many of the proponents of the “no recovery” option would also rule out commercial uses of orphan works.

¹² Of course, the restoration of the status quo ante position is incomplete, because the right holder no longer has an option to refuse to grant the license for the uses in question.

a government agency substitutes its judgment in advance for the likely marketplace results – nor the nominal ceiling on recovery can achieve this result.

We recognize that to some extent this proposal reduces certainty, but a user's certainty that it will have to pay nothing (or almost nothing) for uses of an orphan work made before the right holder steps forward is more a windfall than an entitlement. Under these circumstances, it is appropriate to trade off certainty for fairness to some degree. A user can also reclaim some certainty by depositing into escrow a sum that it believes in good faith constitutes a reasonable licensing fee, a step that would also, of course, protect the right holder's interests. We agree with AAP, see No. 605, at 5, that a user who in bad faith refuses to pay a reasonable royalty should be liable for attorneys' fees and costs. A similar disincentive should be provided to discourage bad faith estimations of the reasonable license fee to be paid into escrow.

5. RIAA notes general agreement from many submitters with its view that safeguards need to be in place to prevent abuse of an orphan works regime, whether from users who falsely assert that they have satisfied due diligence, or from those falsely claiming to be right holders. However, the approach laid out by CCI (and widely endorsed by other submitters) with regard to the first-mentioned danger may be incomplete because it seems to divide the universe between "reasonable efforts" searches, on one hand, and "shams" or "pretextual" claims, on the other. *See* Glushko Samuelson, No. 595, at 5. We believe there is a middle range here, of searches for the right holder that are conducted incompetently, incompletely, or too superficially to satisfy the proper "reasonable efforts" standard, but without any indicia of bad faith or dishonesty. While such searches are not "shams" or "pretexts," they still fall short of what is needed to justify the limitations on liability that would flow from orphan works status. Essentially, an orphan works claim should not be sustained in the face of evidence showing that the right holder could have been identified and located by a "reasonable efforts" search.

6. Finally, CCI would distinguish between "ongoing uses" undertaken under a valid claim of orphan works status, and "new uses." The latter would require authorization from the re-emerging right holder, while the former could continue without hindrance. This is the right approach, in our view, but the challenge will be to draw a bright line between them. We note that submitters take a variety of divergent and inconsistent approaches to this question. *See, e.g.,* Glushko Samuelson, No. 595, at 4; Public Knowledge, No. 629, at 7. The key is to carefully define the extent of reliance interests of the user that must be respected, and to craft mechanisms such as appropriate phase-out periods for uses that it would be unfair to terminate abruptly. RIAA notes that this problem may be ameliorated, though not entirely solved, if the user remains liable for a reasonable royalty or license fee for ongoing uses. Clearly, the right holder must argue for a very restricted definition of "ongoing uses" if he is not only powerless to stop them but also receives no compensation from them. By contrast, if the right holder is entitled to a fee from ongoing uses, it may often be possible to combine retrospective and prospective licensing arrangements in a single transaction. In this regard we commend the CSPD proposal, see No. 597, at 11, which contemplates payment of "royalties going forward" for ongoing uses, although we disagree that the level of those payments should

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be “predetermined,” as CSPD advocates, rather than being left for negotiation by the parties (or, ultimately, decision by the courts or in an administrative proceeding).

RIAA again commends the Copyright Office for undertaking this inquiry, and offers its assistance and support for further proceedings on this important topic.

Respectfully submitted,

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