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In the Matter of	)
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Orphan Works	)
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REPLY COMMENTS OF
NATIONAL MUSIC PUBLISHERS' ASSOCIATION, INC.
AND THE HARRY FOX AGENCY, INC. CONCERNING
THE JANUARY 26, 2005 NOTICE OF INQUIRY

The National Music Publishers' Association, Inc. ("NMPA") and The Harry Fox Agency, Inc. ("HFA") submit these reply comments to supplement our initial comments, which we submitted on March 25, 2005 ("Initial Comments"), in response to the Copyright Office's Notice of Inquiry examining issues raised by "orphan works" dated January 26, 2005 (the "Notice"). 70 Fed. Reg. 3,739. NMPA and HFA greatly appreciate the opportunity to make recommendations to the Copyright Office concerning the orphan works issue and, specifically, to assist in formulating a pragmatic and workable resolution to the limited problems posed by orphan works with respect to the musical work copyright.

The comments submitted in response to the Notice, while raising several legitimate issues, confirm that the problem of orphan works with respect to the musical work copyright is minimal and does not justify any limitations — whether the loss of copyright or limitation of a copyright owner's remedies — on the musical work copyright. As our Initial Comments demonstrated, Congress has established a statutory framework to ensure that musical works are widely available to the public. Moreover, any person who wishes to obtain a compulsory license for a musical work for which the

copyright owner cannot be found can do so under the Copyright Act by submitting a notice of intention to obtain a compulsory license to the Copyright Office. 17 U.S.C. § 115(b)(1); 37 C.F.R. § 201.18. Thus, any orphan works issues presented can be resolved through existing provisions of the Copyright Act and, with respect to uses not already covered by the compulsory license, through the proposed limited licensing scheme discussed in our Initial Comments.

I. NMPA's and HFA's Reply to Comments Submitted to the Copyright Office

With respect to the comments submitted to the Copyright Office, we note as an initial matter that many of the expressed concerns may be addressed by providing better access to information about musical works and where to locate owners of musical works. We thus believe that initiatives by the Copyright Office to educate potential users about copyright law and relevant rights organizations would be useful in addressing the orphan works issue. For example, would-be users should have increased access to information concerning how to license musical works, including through links to publicly available databases containing information about copyrighted works and their owners.

With respect to orphan musical works, we support a carefully tailored solution that does not erode existing copyright protections. Save the Music/Creative Commons' proposal undermines copyright law and is an attempt to circumvent the Supreme Court's decision in *Eldred* v. *Ashcroft*, 537 U.S. 186 (2003), upholding the Copyright Term Extension Act of 1998, as well as prior term extensions and Congress' abolition of the copyright renewal requirements and other formalities. Save the Music's proposal to amend existing copyright law and require copyright owners to register their works within a 25-year period following publication is inconsistent with prior copyright

term extensions. The term extensions granted by Congress and upheld by the Supreme Court are particularly important with respect to the musical work copyright.

As we explained in our Initial Comments, songwriting has always been a profession characterized by a high degree of failure, a low probability of success, constant threats to rights, and, in most cases, little — and frequently delayed — remuneration. A song may be created and exist for some time before it is given life in a commercially successful sound recording, and may be given renewed life in subsequent recordings. Many musical works are exploited late in their copyright term. For example, after being featured in the 1987 film, "Good Morning, Vietnam," Louis Armstrong's 1968 recording of the song, "What A Wonderful World," written by George David Weiss and Bob Thiele, again became a popular hit and enjoyed renewed commercial success.

Similarly, Herbie Hancock wrote and recorded "Cantaloupe Island" in 1962. Thirty years later, in 1993, Us3 released its first major hit, "Cantaloop," featuring a sample from Hancock's "Cantaloupe Island." Sheryl Crow's recent hit single is a cover of the Cat Stevens classic "The First Cut is the Deepest," written originally in the late 1960s. In fact, "The First Cut is the Deepest" has had two commercial revivals: the first in a 1976 Rod Stewart release and the second in Crow's release. In some cases, a song that never makes it onto a commercial release is "discovered" and becomes a hit. Robert Hazard wrote and recorded a demo of "Girls Just Want to Have Fun" in 1979. The song was never released, but in the 1980s, Cyndi Lauper covered the song, which became an enormous hit and pop perennial.

The songwriters and their music publishers would be severely prejudiced under any scheme, like the one proposed by Save the Music, that effectively requires that works be recognized and exploited early in their copyright term in order to be protected.

Experience shows that the copyright owners — typically the music publishers — have the greatest economic incentive to invest in promoting and exploiting their mature musical repertory precisely because of their ability to earn royalties by licensing such works. A scheme that would impose registration obligations on copyright owners would perversely encourage publishers to abandon works rather than invest in their exploitation. This would diminish rather than enhance the musical domain.

In addition, we believe that the reintroduction of formalities (by imposing obligations on copyright owners to register or renew their works, among other things) would undermine the current copyright scheme. The 1976 Act specifically eliminated certain formalities in an effort to broaden the scope of copyright protection. The reintroduction of such formalities would unfairly deny protection to creators of musical works, especially those without resources to comply with formalities. Moreover, the reintroduction of formalities would violate the United States' international copyright obligations under the Berne Convention and TRIPs Accord, which prohibit the imposition of formalities as a precondition to copyright protection.

Furthermore, many proposals suggest making unpublished works available by expanding the definition of "orphan works" to encompass unpublished works. But we believe that to do so would be inconsistent with existing compulsory license provisions and Supreme Court precedent (*see Harper & Row, Publishers, Inc.* v. *Nation Enters.*, 471 U.S. 539 (1985)), not to mention an invasion of copyright owners' rights. Copyright owners have long held the exclusive rights to determine whether, and how, to commercially exploit their works or otherwise make them publicly available. Maintaining the copyright owners' control and the right of first publication secures important economic and privacy interests. Alternatively, making unpublished works

available as orphan works would deprive copyright owners of their right to withhold their expression from commercial exploitation.

Finally, we note that archivists and librarians, among others, have raised legitimate concerns about facilitating academic pursuits and research by digitizing their collections. While we agree that any solution to the orphan works problem should accommodate the goal of making rare works available over the Internet for academic purposes, we believe that this issue might be addressed through existing provisions of the Copyright Act. For example, Section 108, which permits educational institutions, libraries and archives to reproduce, distribute, display or perform copyrighted works, as well as other provisions concerning the digitization of archival material and the creation of backup copies, could be amended and broadened to encompass musical works, provided that such use of musical works could be appropriately limited to educational and archival purposes.

Whatever solution is developed, the Copyright Office should be mindful that access to these works currently is controlled by location, requirements of secure physical access, membership in the research community and/or other formal and informal measures in order to best protect the integrity of the copyright in the works. We believe that the Copyright Office must carefully consider the risks that digitizing and making copyrighted musical works easily and electronically available, and potentially accessible for unauthorized copying, pose to the integrity of the copyrights at issue, and ensure that such actions are not taken without safeguarding the works. The making available of digitized, copyrighted musical works through Internet-accessible libraries or archives must be for legitimate research purposes only. Such uses cannot be allowed to compete

with, or substitute for, commercial uses such as the nascent subscription music services now being offered on some college campuses as an alternative to illegal file-sharing.

II. NMPA's and HFA's Proposed Solution

Many of the identified orphan work issues can be resolved through NMPA's and HFA's proposed licensing mechanism set forth in our Initial Comments. Our proposal: (1) provides a licensing mechanism that does not otherwise affect the duration of the musical work copyright or the subsistence of any exclusive rights granted pursuant to the Copyright Act; (2) is consistent with the current statutory scheme for licensing musical works; (3) provides fair compensation for the uses sought in order to both comply with treaty obligations and compensate the owner if he or she becomes commercially active again; and (4) importantly, maintains the rights of the copyright owner to control first publication.

As set forth in our Initial Comments, creators and would-be users should make efforts to identify and locate the owners of copyrighted musical works by taking at least the following steps: (1) a search of registrations in the Copyright Office and the Copyright Office archives; (2) a search of various publicly accessible databases maintained by HFA, ASCAP and BMI (indeed, millions of musical works are included in the extensive databases maintained by HFA, ASCAP, BMI and others as part of their administration of their various licenses, which contain the titles and licensing information for domestic and foreign musical works in the organizations' repertoires, and the writers and music publishers behind them); (3) review of copyright notices on and label copy of sound recordings of such musical works; and (4) making reasonable efforts to contact any owners (and their successors-in-interest, heirs or assigns, as the case may be) identified

through the searches listed in steps (1), (2) and (3) above, either directly or through their authorized agents.

Moreover, musical works should not be available for licensing unless they have been published and until a certain period of time has passed. After that period, those who wish to use previously published musical works for which owners cannot be located without violating otherwise valid copyrights would register the musical work and their desired use, along with evidence of such work's orphan status, *e.g.*, certification of the requisite searches, and obtain a license from an agent designated for this purpose. Potential users would also need to certify the source of and published status of the musical work for which a license is sought. Licensed uses would be posted on a public database so owners would have an opportunity to assert their ownership interest and reclaim licensing of their works.

There remain, however, several issues that must be considered before our proposal could be implemented. So that the Copyright Office may properly consider our proposal, we note a number of them here:

- Any solution must be administratively feasible. NMPA's and HFA's proposal should be implemented on an experimental basis at first to best evaluate and gauge its feasibility.
- The licensing mechanism we outline must be funded properly in light of the fact that many of the uses sought may not generate significant licensing income. Funding would be necessary for both the initial development costs of the licensing system and for ongoing maintenance. In addition to royalties, transactional fees sufficient to fund the licensing system once it was developed could be charged to those who wished to

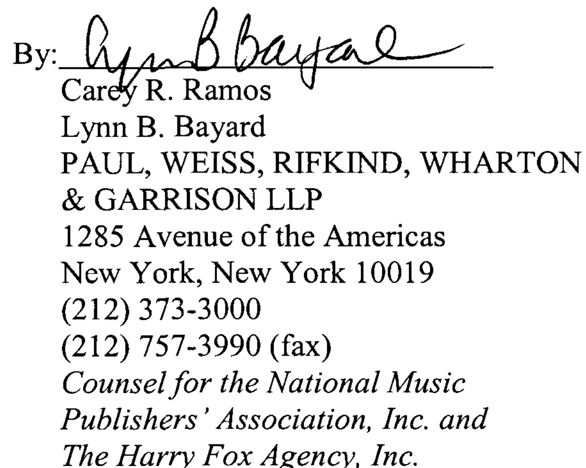
use orphan musical works. After three years (congruent with the statute of limitations for copyright infringement actions), the designated agent should be able to transfer royalties back into the system to help subsidize maintenance costs if no owner has claimed the musical work.

- The designated agent must be protected from any liability resulting from its role as designated agent, including through certain exemptions from liability under federal and state laws, including any otherwise applicable antitrust limitations.
- Users must satisfy the due diligence requirements with respect to the age and published status of the work and their attempts to identify and locate copyright owners, as set forth above, and certify their compliance with such requirements.
- Orphaned works would be licensed only to the requesting user with no limitation on the copyright of the work. Each subsequent potential licensee would need to comply with all of the search and certification requirements. Licenses would be for limited terms and renewable so long as the work remained unclaimed.
- For compulsory uses, the compulsory rate should apply. For noncompulsory uses, the designated agent should be empowered to set royalty rates for licenses, consistent with the prevailing market rates for such uses. The designated agent should also set the term of the license and other conditions appropriate for the intended use. In setting rates, the designated agent should consider the intended use and whether it is noncommercial, such as for academic purposes.

- With respect to the claims process, there should be a procedure to validate copyright owners and to redress false claims of ownership. A confirmed copyright owner should be able to reclaim the ability to license the musical work from the designated agent on a going-forward basis.
- Congress or the Copyright Office should consider whether users should be subject to penalties for false certifications and whether licenses granted should be invalidated or revoked.

As demonstrated both above and in our Initial Comments, allowing a designated agent to issue licenses for orphan works would maintain the integrity of the copyright laws by keeping orphan musical works under copyright protection for their full terms while also providing for their exploitation and use. In addition, allowing a designated agent to issue licenses for orphan works would eliminate potential users' exposure to liability for copyright infringement. For these reasons, we believe that our above proposal would address any limited orphan works issues that may exist with respect to the musical work copyright.

Dated: May 9, 2005



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