BEFORE THE
LIBRARY OF CONGRESS
UNITED STATES COPYRIGHT OFFICE
WASHINGTON, D.C.

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ORPHAN WORKS NOTICE OF INQUIRY
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REPLY COMMENTS OF BROADCAST MUSIC, INC. ON ORPHAN WORKS

In response to the Notice of Inquiry issued by the U.S. Copyright Office ("Office") on January 26, 2005 concerning so-called "Orphan Works", 70 Fed. Reg. 3739 ("Notice"), Broadcast Music, Inc. ("BMI") hereby submit its reply comments, as follows:

I. Any Orphan Works Regime Should Exclude Licensing of Performing Rights In Musical Works

As BMI pointed out in its initial comments, alleged problems of licensing "orphan works" will be very rare with licensing performing rights in musical works as compared to licensing issues that may arise with other categories of works. The reason for this is that performing right licensing organizations (BMI, ASCAP and SESAC) (collectively, "PROs") have existed for many years to facilitate licensing of performing rights. Both individually and together these three licensing organizations have extensive databases of information identifying musical works and their copyright owners, and they can offer performing right licenses to anyone who wants to use music in their respective repertoires. ASCAP and NMPA/Harry Fox Agency made similar observations in their comments.

BMI has reviewed the comments filed by various music trade associations, music licensing entities and recording artists groups, and they confirm our belief that performing rights are not an

issue. Comments discussing musical works have concerned reproduction rights licenses. NMPA/The Harry Fox Agency, for example, state that the use of samples of musical works falls outside the ambit of the Section 115 mechanical compulsory license regime, and therefore licenses to reproduce samples in recordings could be the subject of "orphan works" practices. For those uses that are covered by Section 115, NMPA/HFA point out that Section 115 already has provisions governing mechanical licenses from unlocatable owners. Similarly, the Recording Industry Association of America ("RIAA"), while maintaining that few sound recordings are "orphaned" due to the diligent registration practices of record labels, nevertheless contends that reproduction of musical works in audiovisual programs (e.g. music videos) is outside scope of the mechanical compulsory license and could be the subject of an orphan works regime.

The Recording Artists Groups (FMC, AFTRA and AFofM) comments principally discuss the problems that recording artists, songwriters and producers occasionally have in identifying and/or contacting representatives of copyright owners for permission to use samples in hip-hop, electronic and dance music. The Recording Artist Groups also request that the Copyright Office consider the companion matter of whether recording artists should be able to recapture rights to their recordings assigned to labels when the labels have let the records go out of print.

As the above summary reveals, the problems identified all concern reproduction and distribution rights and there is no problem identified in licensing public performances of musical works, and therefore the Copyright Office should exclude public performing rights from the scope of any orphan works regime.

II. General Comments

BMI's review of many of the initial comments confirms the enormous complexity and scope of the issues presented by orphan works. It is clear that different categories of copyrighted works raise entirely distinct sets of concerns. In addition, distinctions can and should be made between different types of users of works as well as different proposed uses of works. For example, academic and scholarly research should be given greater consideration than purely commercial exploitations. It is true that the fair use provision in the Copyright Act already arguably protects academic uses, but the libraries (and others) contend that some academic uses of copyrighted works are of such little commercial value that it is impractical for the user to undertake the legal expense associated with asserting a fair use defense.[1]

The Motion Picture Association of America ("MPAA") proposes that the Copyright Office organize a series of public "roundtables" where participants in different industry groups can meet to discuss voluntary methods to improve the availability of authorship information, and to discuss what types of research should reasonably be performed by a user before a work is designated as an orphan work for its licensing purposes. BMI supports this proposal. Voluntary guidelines, similar to the Fair Use Guidelines for Educational Multimedia that were issued in 1996 by concerned industry groups, could be the first step.

The Directors Guild of America ("DGA") notes that licensing of motion pictures raises special issues. For example, directors and actors have contractual rights to be paid for exploitations of films that could be circumvented by an orphan works user who claims he or she cannot locate the film company (or its successor). DGA therefore contends that only directors or other participants should be allowed to authorize uses if the film's owner cannot be located. Works made for hire

[1] As to public performing right issues raised by educational uses, they are covered by a specific exemption in Section 110 and those rules should not be changed or expanded by an orphan works regime.

created by employees in the course of employment can also be difficult to license when companies go out of business and leave no record of assignment of the copyright. It is important to note that the public performing right in the copyrighted music used in films and other audiovisual works made for hire continues to be licensable through the company's PRO even if the company no longer operates.

The copyright for a creative work authored by a traditional "author" such as the writer of a book or composer of a musical work should be very strongly protected. Such writers can create works early in their careers, when they are not well-known or established, that do not achieve high value until years later. These writers may not have the resources to make periodic filings with "voluntary registries" or file "renewal notices" every time they change address. For creative works that may not be immediately successful when first published and do not achieve success until years later, the need to register may not be apparent early on to the copyright owner or his or her heirs. Sometimes, as in the case of many famous painters, the works do not achieve full popularity until after the artist's death. Accordingly, the Office should not place unrealistic registration burdens on creators or their heirs during early periods of the work's copyright that would effectively thrust the work into the netherworld of claiming small royalties from a government-administered compulsory license royalty fund.[2]

BMI agrees with the comments of ASCAP and many other parties that formalities (including periodic registration deadlines that have the effect of diminishing the market value of the copyright or requiring owners to periodically monitor "intent to use" databases at the risk of losing substantive rights) would run afoul of the Berne Convention for the Protection of Artistic and Literary Works, and be contrary to the trend in the copyright law toward more expansive protection

[2] Some of the more extreme and untenable compulsory-license proposals suggest creating a fund and putting the burden on the copyright owner to make its claims in Washington, D.C. to a small amount of royalties.

of creators.

Once the Office has developed appropriate standards and practices for designating works as orphaned for particular users/uses, BMI believes that a conditional and temporary limitation on available infringement remedies offers a potential way to protect users of orphan works from unforeseeable liability. If and when the copyright owner or his or her agent learns of the use, copyright should apply for future exploitations by that user. Any such limitations should protect only those users who have made the requisite research, and not to anyone else. BMI opposes the draconian alternative of a government administered compulsory license that is costly, bureaucratic and inefficient, and therefore inimical to the interests of the authors. In this regard, the UCLA Film and Television Archive recognized that "(g")overnment intervention or compulsory licensing schemes would likely slow, not speed, the broader dissemination of material to the public." Comments of UCLA Archive at p. 6. Licensing by private collectives is preferable.

Moreover, BMI believes that any regime concerning reproduction and distribution rights in musical works should apply only to published musical works, or those pre-1978 works that were distributed with authorization on a sound recording. BMI does not believe that unpublished musical works should be allowed to be used commercially without the author's consent. BMI also submits that the regime should apply only to works that are in the last 20 years of their copyright term. This is consistent with the current statutory treatment in Section 108(h)(1) of the Copyright Act concerning uses of published works by a library or archives. Users should not be able to circumvent the need to locate and license right from owners of copyright in recently published musical works.

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