



Future of Music Coalition on Orphan Works

FMC FACT SHEET

Orphan works are copyrighted works whose owners are hard or impossible to identify or locate.

They belong to someone, but it's hard to tell to whom. Many creative works fall into this category because (a) corporate sales, mergers and consolidations make it difficult to track ownership, (b) copyright protection now begins automatically upon creation, and (c) the length of copyright terms is longer than in previous eras. Because copyright owners, and not creators, have the right to license new uses of their works, many works become orphaned when the corporate copyright holder is not identifiable/locatable, even if the creator is locatable.

Under current copyright law, if you make a recording, that work is automatically protected from the moment of its creation until 70 years after your death.¹ If you sign a record label contract in which your copyrights are transferred to the label (which is the typically the case), the record label owns your copyrights for the term of life + 70 years, if you do not exercise your termination rights. If someone else wanted to license or re-release your recording during that time, he/she would need to identify and locate you – or your record label – to ask permission. After the life +70 years term, your work moves into the public domain, in which no permission is needed to use your work.

In the past, copyrights had to be renewed after their original term expired in order to retain copyright protection. If they didn't, the work entered the public domain. The new copyright term is one longer length of time, with no renewals. Under the new term, copyright owners retain control and must grant permissions to use their works. This makes it exceedingly difficult to engage in cataloging efforts, since the vast majority of created works – books, music, and other media – are protected from reproduction under the life+70 copyright term, even if they are currently out of print or unavailable to the public.

Orphan works probably comprise the majority of the creative works of 20th century. They exist in a purgatory of sorts, not able to be used in new creative efforts or made available to the public due to uncertainty over the status of their ownership.

Why is it important?

There are two primary reasons why orphan works is an important issue for the music community. First, a number of recordings are no longer commercially available to the public because of confusion about ownership. Second, current copyright law also makes it difficult for musicians to license or use older works in new songs or recordings. Creators of new works are often forced to abandon projects that include orphan works. This is not only a loss for creative artists, but also for the public and our collective culture.

¹ Assuming it's not a work for hire, which makes the term 90 years from publication or 120 years from creation, whichever is shorter.



Accessing out-of-print works

Tens of thousands of recordings are commercially released every year, but only a handful of them end up being viable enough to be kept in print for decades. The vast majority of releases fade from the stores and mailorder catalogs as the labels and retailers make space for new product. When the recordings are no longer commercially viable enough for the label to continue manufacturing the albums/CDs, they tend to fall “out of print.”

Despite their limited commercial value, the labels maintain ownership of the copyrights for these releases. But think about the number of record labels that have shut down, merged, or sold their assets to another record label – often repeatedly – and you can see how this problem manifests itself. In many cases, the labels themselves don’t even know what they own. Oftentimes the cost of finding the owner is so high that creators of new works – or those who are interested in re-releasing out of print records – can’t use or license orphan works, even when they’d be willing to pay to get them back in print.

The challenge for using older works

A similar problem exists for today’s musicians interested in licensing or sampling older works. Imagine you are a musician who is recording a new album to be released next year. You remember hearing a great piece of music at your friend's house and decide that a sample of it placed into one of your new songs would add just the right vibe.

Copyright law requires that you gain permission to use someone else's work.² This means you'll have to identify and locate both the copyright owner of the piece of music (the publisher) *and* copyright owner of the recording (the label) you want to use in your new work. You should search, among other things, the online databases of ASCAP, BMI and SESAC, the US Copyright Office, and the internet for the answers. If you are able to identify and locate the copyright owners, you can then work together on an agreement about the use of the sample in your song/recording.

But what if you can’t find the owners?

If you have searched without being able to identify and locate the copyright owners, this song/recording may be an orphan work. The music business is fluid, and ownership of any given song/recording might pass through many hands over a short period of time because of legal contracts and record label mergers and acquisitions. If the song/recording you want to sample is an orphan work, there is currently no way for you to legally use it.

Efforts to fix orphan works

In 2005, the US Copyright Office examined issues raised by orphan works. The Copyright Office received hundreds of comments in this proceeding, which was followed up by roundtable discussions and the

² Unless it’s a case of fair use, which is a very different issue.



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release of a full report in January 2006 that concluded:

1. The orphan works problem is real.
2. The orphan works problem is elusive to quantify and describe comprehensively.
3. Some orphan works situations can be addressed by existing copyright law, but many cannot.
4. Legislation is necessary to provide a meaningful solution to the orphan works problem as we know it today.

Proposed Legislation

In April 2008, Senators Hatch and Leahy and Congressman Berman introduced S. 2913/H.R. 5889, the Sean Bentley Orphan Works Act of 2008. The proposed bill allows for use of works for which the copyright holder can't be found and limits liability for those users who perform and document "a qualifying search, in good faith, for the owner of the infringed copyright."

While the legislation provides a remedy for users of orphan works, the bill doesn't treat copyright owners and creators equally. Creators often transfer their copyrights to a publisher or label as part of signing a contract, generally with certain restrictions on use. Under the proposed legislation, the copyright owner or an exclusive licensee are the only stakeholders, and if they are not identifiable/locatable, the work would be considered orphaned and could still be used, even if the author objected.

Under the proposed legislation, the rights the creator negotiated – such as approval for use in a commercial or payment of a portion of the licensing fees – might be overridden. For example, a company using music in a commercial might use an orphaned song or recording even if the songwriter/performer is locatable and would object strongly to, and have the right to prevent, any commercial use of his or her work. The proposed law would permit new users to do things that even the copyright owner couldn't permit.

Also, the proposed legislation requires attribution of the orphaned work, a form of moral rights. However, unlike the previous version of the legislation, it only requires attribution of the copyright owner and not the author. For example, if a new user wants to use an orphaned blues recording, the user would have to give attribution to the copyright owner, presumably the record label, but not to the legendary blues artist. The author created the work and deserves attribution.

The 2008 legislation failed to pass the House, stalling any movement on orphan works for a few years. Currently, the Copyright Office is soliciting comments from the public in advance of what many believe will be another set of legislative recommendations.

What musicians can do

Musicians who are interested in orphan works legislation that would make more older recordings and songs available should support changes to the copyright law that would limit liability for those who undertake and document "a qualifying search, in good faith" to find the copyright owner. If legislation



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passes, the Copyright Office will determine what constitutes a qualifying search. Musicians can assist the Copyright Office in crafting best practices that ensure that a qualifying search is as thorough as possible. Additionally, musicians who are concerned about protecting creator's rights should demand that any legislation give the creator the *same rights* as the copyright owner of the orphaned work would have to license or refuse to license the use of the work, and to be paid for the use.

Musicians should also take actions to ensure that their works don't become orphaned. Musicians should register their works with the Copyright Office and register their songs with a performance rights organization (ASCAP, BMI or SESAC). It's also a good idea to post the recording titles, ownership, recording dates and contact information for all recordings on the artist's webpage and any webpages associated with their releases. Musicians should also keep track of the ownership of their works, so if contacted by a potential user, the musician will be able to direct them to the copyright owner.

RESOURCES

US Copyright Office's Orphan Works page

<http://www.copyright.gov/orphan/>

US Copyright Office Report on Orphan Works (January 2006)

<http://www.copyright.gov/orphan/orphan-report-full.pdf>

FMC filed joint comments with other recording artists groups in the Orphan Works proceeding in 2003:

<http://www.futureofmusic.org/news/orphanworks.cfm>

And again in 2013:

<http://futureofmusic.org/filing/fmc-orphan-works-filing-us-copyright-office>

Copyright Issues Relevant to Digital Preservation and Dissemination of Pre-1972 Commercial Sound Recordings by Libraries and Archives

Council on Library and Information Resources (Dec 2005)

<http://www.clir.org/pubs/reports/pub135/contents.html>

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