

March 25, 2005

Proceedings before the US. Copyright Office
Notice of Inquiry on "Orphan Works"

Submitted by:

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On behalf of:

SAVE THE MUSIC

Roman Ajzen, Co-CEO

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CREATIVE COMMONS

Mia Garlick

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Comments of:

CREATIVE COMMONS AND SAVE THE MUSIC

SAVE THE MUSIC and CREATIVE COMMONS welcome this opportunity to provide comments to the Copyright Office, and, ultimately, to the U.S. Congress, on the problem posed by Orphan Works¹ and to submit the attached proposal.

¹ As discussed in greater detail in Part A(II) *infra*, SAVE THE MUSIC and CREATIVE COMMONS define an “Orphan Work” as any copyrighted work that is out-of-print or otherwise not commercially exploited, and where the rightsholder is difficult, after reasonable efforts, or impossible to find.

SAVE THE MUSIC, a group that wants to archive a mostly orphaned genre of music, and CREATIVE COMMONS, an organization that provides tools for copyright owners to signal what rights they reserve and what uses they approve, strongly believe the Orphan Works problem is a serious one—one that impedes productive uses of works and merits a legislative response. We believe that our experiences with Orphan Works allow us to offer relevant and useful insight into the problem the current system poses and why it cannot be solved without a change in the law. We believe that there is a workable, fair solution to this problem that may readily be implemented without threatening either the interests of copyright owners who wish to prevent use of their work, or the compliance of the United States with its treaty obligations.

* * *

I. INTERESTS OF SAVE THE MUSIC AND CREATIVE COMMONS IN THIS PROCEEDING

A. SAVE THE MUSIC < <http://savethemusic.com/> >

1. SAVE THE MUSIC’s Mission

SAVE THE MUSIC (STM) is a project of the Internet Development Fund, a California 501(c)(3) non-profit organization dedicated to the preservation of Jewish cultural music through its digitization and placement on the Internet. Daniel and Roman Ajzen founded STM in 1998 as a result of research conducted for a high school family history project. In just seven years, STM has become the leading collector of Yiddish LP's in the world, archiving over 8,000 records. Upon receipt, STM re-masters the recordings and makes them available for streaming through its website, where it also provides historical information, lyrics, translations, sheet music, and other resources. STM complements its archivist activities with forums for current artists and a virtual

bulletin board to announce performances and recent releases. STM also occasionally sponsors concerts and other activities.

STM does not charge for access to the content on the web site and depends entirely upon donations for all its activities. STM has received donations of records, labor, and money from every continent and has volunteer representatives in nineteen cities worldwide.

2. SAVE THE MUSIC’s Experience of the Orphan Works Problem

STM repeatedly encounters problems identifying the appropriate rightsholder for many of the works it would like to make publicly available. For example, as stated, along with the recordings themselves, STM has considerable copyrighted non-audio holdings such as music sheets, lyrics, books, drawings, letters, and newspapers. Practically all of these materials were produced within the last 75 years. Many were produced by small publishers who can no longer be found and from whom clearance cannot be obtained. STM would like to use these materials to provide the background knowledge and history necessary to properly understand the music. Many of these primary sources frame the issues and context of the music far better than any explanation or description drafted by STM can and are essential to STM’s mission.

Another problem STM faces is that most of the recordings and materials it wishes to archive were produced overseas. For example, the vast majority of the musical recordings in STM’s holdings are foreign works that were published before 1970 and were free of U.S. copyrights—until the Uruguay Round Agreements Act of 1994 removed these works from the public domain and “restored” them to copyright. Many of these musical recordings were issued by small foreign labels that have since disappeared. As a result, many of these works are Orphan Works and are essentially unusable.

STM is a small organization with a very small budget for its archiving work. Because of its reliance on donations, STM does not have the financial capacity to retain an attorney to investigate the copyright history of each of its thousands of songs.² The efforts of lay volunteers are constantly stymied because many of the record companies that issued Yiddish-language recordings in the past have long since gone out of business and there is no way to determine who currently holds those copyrights. In other words, STM often faces the unenviable choice to either spend a large sum on an attorney hoping she can find the copyright owners or to forgo obtaining rights entirely, thereby exposing itself to crushing liability if it uses the work. The complexity of the process has forced STM to effectively postpone the digitalization of a large percentage of its holdings. Thus the problem of Orphan Works has hindered STM’s mission of documenting, preserving, and spreading Jewish cultural music and other materials and denies the public the benefit of the cultural value of these works.

To illustrate these points, we offer these specific examples of works that STM would like to make available, but for which it has not been able to locate the rightsholder:

- *Yiddishe Lider* – (“Yiddish Songs”). *Yiddishe Lider*, a book written in Yiddish and published in Argentina soon after the Second World War, contains first-hand accounts of life in the Nazi concentration camps. Some of these narratives are truly masterful pieces and are a testament to the indestructibility of the human spirit. STM would like to use some of the narratives to illustrate the range of emotions experienced by prisoners in the camps. However, despite STM’s best efforts, it has been unable to locate the rightsholder

² STM is submitting these comments jointly with CREATIVE COMMONS with generous and one-off *pro bono* assistance. Given the number of orphan works STM encounters and their complex and often international copyright history, it is not feasible for STM to secure *pro bono* assistance each and every time it needs to investigate the copyright history of songs it wishes to preserve.

for this work: the publishing house is defunct and STM could not locate any records indicating who, if anyone, now holds the rights to the book. As a result, STM has been unable to share its contents with the world and because of similar problems with other works from that time-period, development of the Holocaust section of STM’s website is on hold.

- *The Partisan’s Hymn*. STM would like to pair the accounts of concentration camp life in *Yiddishe Lider* with perhaps the most important Yiddish song of all time, *Zog nit Kayn Mol* (*Never Say or The Partisan’s Hymn*). According to scholars, *The Partisan’s Hymn* was the anthem and rallying cry of the Jewish resistance during WWII and is an affirmation of the Jewish will to survive:

Never say that you are going on your last way
Though leaden clouds may be concealing skies of blue -
Because the hour we have hungered for is near;
And our marching steps will thunder: We are here!
Because the hour we have hungered for is near;
And our marching steps will thunder: We are here!

Even today *The Partisan’s Hymn* is played at funerals of Jewish martyrs and retains a fundamental position in Jewish culture. Sixty years after the end of WWII, at a time when the Jewish people are again facing serious threats from the rise of anti-Semitism and Islamic fundamentalism, STM believes its message of resistance, perseverance, and hope remains as important and relevant as ever.

STM envisions an entire section dedicated to this song, its performers, and its history. The proposed section will contain numerous musical versions, lyrics, music sheets, and considerable historical background. It will be the anchor of STM’s Holocaust content. As one would expect for such an important song, many different versions have been recorded over the years. Dozens of these were published overseas and are thus

subject to copyright protection under the Uruguay Round Agreements Act. In particular, STM plans to use a version sung by the Polish Army Orchestra and produced by the Lira Record Company in Poland just after the end of World War Two. STM possesses none of the accompanying materials for this record, such as the album cover or slip sheet, and consequently has very limited information with which to find the copyright owner. STM has unsuccessfully conducted Internet and library searches for additional information, and has been unable to even find another copy. Though it is possible additional copies exist in Poland, STM does not have the resources to investigate further. This record is significant because it was one of the few conciliatory efforts after the war between Jews and Poles and demonstrates the relationship between each group's resistance efforts. But the prospect that STM will obtain clearance for this work and many others like it is not good, for in addition to the normal difficulties attendant to obtaining copyright clearance, STM now has to go through the process of identifying rightsholders in countries all over the world. The cost, both in money and time, of locating far-flung rightsholders makes pursuing clearance prohibitively expensive. Currently, only the largest and best funded organizations can even afford to attempt to track down the copyright owners; for a non-profit organization like STM, it is practically impossible.

- *Ludwig Satz Sings His Most Famous Yiddish Theatre Classics*. STM's mission is not only to preserve Jewish music, but also to make clear its importance to today's culture--thereby ensuring its future relevance. To this end, STM plans a section to illustrate Yiddish music's influence on general American culture. *Ludwig Satz* is an anthology of songs from Yiddish musicals in the 1940's, 50's, and 60's. Many of these songs later served as inspirations for songs in Broadway musicals and many of the writers,

composers, and singers went on to work in Broadway. By tracing the careers of those involved in *Ludwig Satz*, STM hopes to show the breadth of Yiddish culture and its relevance to wider American culture.

The Greater Recording Company published this recording in the United States in 1973; it is thus under copyright protection. However, despite STM’s best efforts, it has been unable to locate the rightsholder for this recording. After failing to find any trace of the Greater Recording Company or the rightsholder, STM attempted to find some leads in the property’s title history, but it was to no avail. STM also spoke with several performers who were active during the company’s existence to see if they had any information, but that too proved unsuccessful. At this point, STM was confronted with the choice between hiring a professional or simply not using the songs. Unfortunately, STM had no real choice but the latter. The difficulties STM has encountered in obtaining copyright clearance for this and similar works have led it to postpone development of its section on the intertwining of Yiddish and American culture.

3. The Current System Frustrates Both SAVE THE MUSIC’s Creative Vision and Copyright’s Purpose

STM is participating in this proceeding to urge the Copyright Office and Congress to amend the current system so that the organization can make these valuable and disappearing cultural resources available without fear that it will be sued. STM has experienced the difficulties posed by Orphan Works and strongly believes that a more user-friendly system must be developed. STM’s encounters with Orphan Works arise because its collection was mainly produced by small, independent recording companies. Many of them moved in and out of the marketplace quickly and did not leave clues regarding what happened to them or their copyrights. Nevertheless, works created by these companies do not lose their cultural value

simply because their owner cannot be located. The current system deprives creators and archivists like STM of the opportunity to reintroduce them to the world. With the advent of the Internet, resuscitating old songs and introducing them into popular consciousness is now possible but the complexities of the law prevent STM from sharing some of the bright lights of Jewish culture. STM would happily secure permission to use these works if it could find the owners. It is very frustrating for STM to have a specific creative vision and realizable goals yet be restrained from pursuing them by copyright rules that benefit neither the rightsholder nor the public at large. STM has learned that the current rules for Orphan Works impede its ability to share its content despite its best efforts and intentions.

B. CREATIVE COMMONS <<http://creativecommons.org>>

1. The Mission of CREATIVE COMMONS

CREATIVE COMMONS, a 501(c)(3) nonprofit based in San Francisco, offers from its website to the general public a set of technical and legal tools, free of charge, that empower creators to signal how they want their works used beyond the one-size-fits-all rules built into current copyright law, and enable users to find works where the creator has signaled that certain uses are permitted.

One tool is a suite of standardized copyright licenses that authors, artists, and publishers can use to virtually “stamp” their online works with an alternative copyright notice. In contrast to the traditional copyright notice – “(c) 2005. All rights reserved.” -- the CREATIVE COMMONS copyright notice reads “(cc) 2005. Some rights reserved.” As the language implies, the CREATIVE COMMONS form of notice is meant to draw the average Internet user’s attention to the fact that the stamped work is available on terms somewhat less restrictive than

current copyright law would otherwise impose. The notice itself contains a hyperlink that leads to a short summary of the legal terms associated with the stamped work: “Anyone is free to copy my photograph,” for example, “provided they give me credit as the artist, and provided they do not profit from their use.”³

This “human-readable” legal summary then links to a fuller, more traditional – and legally binding – copyright license, drafted by CREATIVE COMMONS and lawyers from the Silicon Valley law firms Wilson Sonsini Goodrich & Rosati and Cooley Godward LLP. The “lawyer-readable” license spells out in detail what freedoms the user enjoys and what conditions govern that use.

The CREATIVE COMMONS “Some Rights Reserved” notice also contains mark-up language that, though invisible to the human eye, acts as a *technological* notice to search technologies. This “machine-readable” version of the copyright notice, which is expressed at the source-code level of the web page, facilitates the proper functioning of CREATIVE COMMONS’ second free tool: the CC smart search engine

<<http://search.creativecommons.org>>.⁴

This engine scours the web for pages marked with the (cc) virtual stamp, indexes them, and then lists results by (1) file format type, (2) keyword, and (3) the legal freedoms and restrictions the copyright holder has associated with the work. Type “Eiffel Tower” into the

³ CREATIVE COMMONS’ tools offer creators the ability to construct a license with a range of different attributes. The main attributes are: Attribution or no Attribution, Commercial or Non-commercial Use, Sampling or No Sampling, Derivatives or No-Derivatives and Share-Alike (where the derived work is required to be licensed under the same terms as the original).

⁴ The CC search engine is available at CREATIVE COMMONS’ home page and also via a special search box in the Firefox Internet browser. Yahoo! has also recently released a customized search engine to enable users to easily locate CREATIVE COMMONS-licensed works according to their specific criteria. <<http://search.yahoo.com/cc>>

dialog box, for example, specify “image” format, and click the “noncommercial use” button, and the user sees a list of all the CREATIVE COMMONS-licensed photographs of the Eiffel Tower available under a noncommercial license.

The one-two punch of the machine-readable copyright licenses, on the one hand, and smart copyright search engines, on the other, vastly reduces unnecessary transaction costs between producers who want to share some uses of their content and consumers looking for royalty-free content and who are willing to accept certain restrictions on their use.

CREATIVE COMMONS’ marking and searching technologies have unearthed an unmet demand far larger than even the organization anticipated. CREATIVE COMMONS first made the CC licenses available in December of 2002. One year later, there were over 1 million web pages carrying the “(cc) Some Rights Reserved” notice and license, according to a Yahoo! link-back search. Today, there are over 10 million web pages under the CC licenses. What this shows is that a large number of creators do not believe that the restrictions that current copyright law imposes are appropriate for their particular works. Creators that choose a CC license are signaling that something less than full-bore copyright is best for them. And this demand for “Some Rights Reserved” licenses is not limited to the United States. CREATIVE COMMONS has built an international network of lawyers in over 50 countries; today it offers the CC licenses in 12 different languages, adapted to the laws of 15 different jurisdictions. Adopters of the licenses include authors and producers as varied as the Massachusetts Institute of Technology, Rice University, the Public Library of Science, Flickr.com (home to over half a million CC-licensed photographs), musicians David Byrne and the Beastie Boys, Brazilian Minister of Culture Gilberto Gil, filmmaker Robert Greenwald, federal appeals court judge Richard Posner, and more.