

The Perils of Publication: Orphan Scores & Copyright Termination

A Women's Press is Born

While composers understandably seek publication of their music, they generally do so blind to the risk of losing control of their work should the publisher go out of business. So when publisher Clara Lyle Boone (1927-2015) responded with enthusiasm to some music I submitted to her for consideration, I was still a graduate student, thrilled at the prospect of seeing my music in print, and unworried about the press failing. Although my doctoral advisor and mentor, Gardner Read, warned me about publishing with a small press, he suggested no safeguards. So between 1975 and 1978, Arsis Press published the first three of nine pieces including most notably the *Fantasy for Piano*, beautifully engraved with a handsome photograph of abstract art on the cover, a hallmark of Arsis publications. There were no contracts for these first three pieces, and brief but binding contracts for the other six. The Copyright Office and BMI list Arsis Press as copyright owner of record for all nine.

Idealistic and politically active, Boone founded the press in 1974 after discovering rampant discrimination against women's music in the publishing industry. Her first imprints were of her own music, but as word spread, her mailbox filled with scores, and she began publishing the music of other women — on generous terms (20% royalties and, initially, 100 copies for personal use). In the 28 years she owned the press, she published 140 works by some 44 composers, including music by Vivian Fine, Emma Lou Diemer, and Ruth Crawford Seeger.

A Failed Successor Owner & Orphan Scores

In 2002, Clara Boone turned 75 and felt it was time to find a successor owner of the press. The plan that evolved was to turn the press over to a distributor based in California, Empire Publishing Services in Studio City, CA. For about the next sixteen years, Arsis composers continued to receive an annual accounting from Empire of sales of our music and 20% royalties from those sales plus our usual half of performance royalties from BMI or ASCAP. As contact person for the Arsis Press website and formerly associate editor of the press, I had received some complaints from buyers in the U.S., Germany, and elsewhere that orders were not filled promptly. But by 2018, orders were not being filled at all despite pleading emails and phone calls. Then the press website (arsispress.com) suddenly vanished and Jane Brockman, fellow webmaster and Arsis composer, discovered that Empire's check to pay for the website had bounced. (The website was soon restored but without reference to Empire.)

The result of Empire's sudden disappearance has been a disaster for us composers. Since no orders have been filled during the last two years, those in the catalog are unable to obtain copies of their own music for performers, are receiving no royalties on sales, and have no recourse for permissions if they have recording or other opportunities. Moreover, while doing nothing for Arsis composers, Empire continues to collect half of all our performance royalties from BMI and ASCAP, a situation that is both frustrating and infuriating. Our contact person at Empire, the person whom we understand to be the president of Empire, sometimes answers the phone. He says there

was a fire and variously claims he has our scores, or the opposite, that the scores were destroyed, that he will reprint our music but that he has no master copies. He has never officially notified those affected, or offered any explanation about the cessation of business, and refuses to give out an email address or even a mailing address, although it is clear that he receives mail at the old Studio City P.O. address.

Because BMI, ASCAP, and the Copyright Office list Arsis Press as owner of record for all 140 scores (with one exception to be detailed below), we—the creators of the music—may not legally make copies of our own work. Meanwhile, BMI continues, as they must, to send checks to Empire for half of our performance royalties.

The Copyright Office and others call these works of ours that remain in limbo “orphan scores” because the claimant is unknown. Orphan works remain under copyright for the standard term: the life of the author plus 70 years. Kathleen DeLaurenti, Head Librarian at the Arthur Friedheim Library of The Peabody Institute and Open Access Editor of the Music Library Association, contacted me after the library ordered some of my music published by Arsis Press and I replied with the disheartening story of the demise of the press. Her first words were “you would be surprised at how common your situation is!” She is working on a project to create licenses for composers to sell their works digitally so they are available for libraries and others to purchase. Of course, one has to own the copyright to participate.

Navigating the Copyright Termination Process

Beginning in 2018, several Arsis composers began discussing Empire’s failure to fill orders and started considering their options. Chief among those wishing to regain her copyrights was Judith Shatin who had four works at stake. She began consulting copyright attorneys, one of whom helpfully described an alternative to litigation or negotiation, namely a 5-year window of opportunity for copyright termination, 35 years after the original publication and copyright registration.

We soon realized that the expense for hiring an attorney, even if shared, would be prohibitive and began researching the correct way to do the eligible terminations ourselves. However, one composer, incensed at the injustice of the situation and impatient to control her own work (which was published in 1998 and thus ineligible for termination until 2033) did hire an attorney and paid Empire a substantial sum to immediately transfer her copyright. Others just began filling out forms themselves as time was of the essence for some scores, like my *Herstory II* published in 1982.

Hoping to discover contracts we had signed along with an agreement between Arsis Press and Empire Publishing Services, a small group of composers and friends assembled in June of last year in the Performing Arts Reading Room at the Library of Congress to peruse the Arsis Press Collection. The collection contains the business records and correspondence of the press from 1974 to 2012 and consists of 25 boxes, all of which were waiting for us when we arrived. We viewed every document in every box. To our surprise, several boxes contained the original master copies of scores that were later published, but to our disappointment, there were no contracts and no copy of an

agreement with Empire. We still don't know if Empire has a written agreement and, if so, what the agreement states.

Our first order of business in the termination process, then, was to ascertain exactly when an author is allowed to begin taking action. A website called rightsback.org enables a composer to fill out an interactive form in order to obtain the correct dates for notification of the publisher and potential dates for termination. As an example, my *Herstory II*, published and copyrighted in 1982, had a rapidly closing window of opportunity. The window for notifying the publisher was 2007-2020 and the effective termination, after notification, was 2017-2022 or at most, precisely 40 years from the publication date. I had already missed the window for the *Fantasy* and two other pieces mentioned earlier so needed to act soon.

Secondly, we needed to write termination notices to Empire that ticked all the boxes required by the Copyright Office: full title of the music, notice under Section 203 of Title 17 of the U. S. Copyright Act for music, publication date, contract date if known, copyright registration date and number (to be found on the Copyright Office website), and effective date of termination. Service by first class mail was acceptable and we used the address BMI had on file for Empire which was the old post office box number in Studio City, CA. (See details required for a publisher notification letter at <https://www.copyright.gov/title37/201/37cfr201-10.html>.)

Thirdly, we needed to fill out and mail the Notice of Termination Cover Sheet (TCS) to the Copyright Office, one for each work, along with a check to record the information, and a copy of the notice already mailed to the publisher. The \$185 fee can cover up to 10 works. (A blank TCS form and detailed instructions are provided on the Copyright Office website at <https://www.copyright.gov/recordation/termination.html>. For the fee structure, see #21 at <https://www.copyright.gov/title37/201/37cfr201-3.html>.)

Aftermath

For many composers in the Arsis catalog, copyright termination is not a very attractive prospect because the music was published in the mid-1990s or later so that the effective transfers wouldn't happen until 2030 or beyond. Another concern is for the music by the 15 composers in the catalog who are deceased. We have been able to contact only a few of the beneficiaries of these, though some, namely the sons of Anna Larson and Claire Polin and the daughter of Vivian Fine have either expressed determination to file for copyright terminations or have already done so. A further concern is that some of these deceased composers have quite a number of works in the catalog: Harriet Bolz (8), Anna Larson (3), Ruth Lomon (9), Claire Polin (3), Mary Jeanne Van Appledorn (17). That's a lot of music potentially left in limbo and out of reach of performers, not to mention, of course, the other 100 pieces of music by living composers that also remain orphan works.

Contract Vigilance & Copyright Reform

So, what are the solutions to the problem of orphan works besides copyright termination? Most important, composers can insist on contracts that prevent orphan works from happening in the first place. In retrospect, I and other composers should have known when we signed contracts that we could have requested a clause that provided for the return of the copyright to the author should the publisher cease operations.

Failing that foresight, a more global solution could be in proposed copyright reforms focused on five main measures: Introducing a limited liability scheme for use of orphan works; a new fair dealing exception for non-commercial quotation; amendments to library and archives exceptions; amendments to education exceptions; and streamlining the government's statutory licensing scheme. Unfortunately, such reform legislation languishes in Congress and does not appear to fully address the problem of orphan works for the composer.

For composers who have orphan works published in 1982 or later, they must act now before the window of opportunity closes in December of 2020. Those with music published later have more time. In summary, to accomplish a termination without doing all the research or hiring a lawyer, composers may refer to rightsback.org to ascertain the window of opportunity for termination and the Copyright Office website pages cited above for detailed instructions on publisher notification letters and Copyright Office Termination Cover Sheets. (A guide to the entire process is at: <https://www.authorsalliance.org/wp-content/uploads/2018/03/20180315-ToT-Templates.pdf>.)

Finally, we extend a heartfelt plea to anyone able to help the many composers still sorting out the intricacies of the termination procedure, particularly those for whom the window of opportunity has closed and those without the resources to sue or negotiate. The termination process can be intimidating and expert help welcome. So far there are about a dozen Arsis pieces with copyright terminations filed, but ideally, enough composers will terminate the copyrights on their orphan works so that another press can pick up that music and continue Clara Boone's dream and the Arsis Press example of beautiful publications of women's music. Meanwhile, Arsis Press composers can still be contacted through the press website (arsispress.com).

Notes:

An invaluable guide to copyright termination (Termination Transfer) can be found at: <https://www.authorsalliance.org/resources/termination-of-transfer>.

Templates for terminations can be found at: <https://www.authorsalliance.org/wp-content/uploads/2018/03/20180315-ToT-Templates.pdf>

Three quotes from the extensive 2015 Copyright Office report on orphan works shows how seriously the government takes the problem.

“This outcome [i.e. restrictions on orphan works] is difficult to reconcile with the objectives of the copyright system and may unduly restrict access to millions of works that might otherwise be available to the public.”

“There is a robust body of evidence indicating that the orphan works issue in the United States may be just as widespread [as in Europe]. That there is a domestic orphan works problem was confirmed by the Office’s 2006 Report and is a view shared widely among the stakeholders consulted for this Report, from creators to owners to users to academics.”

“In the public process leading up to this Report, many stakeholders (both copyright owners and organizations representing the public) acknowledged that the orphan works problem cannot be solved without amending the Copyright Act, and that limiting the liability exposure of good faith users is the most appropriate form of statutory change.”

See the full Copyright Office report on orphan works online at:

<https://www.copyright.gov/orphan/reports/orphan-works2015.pdf>.

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Kathleen DeLaurenti, Head Librarian at the Arthur Friedheim Library of The Peabody Institute and Open Access Editor of the Music Library Association, offered help when she heard of our orphan works. Her project for digital sales of music has much promise.

Judith Shatin took the time to discuss our problems with copyright lawyers and put us in touch with attorney Kenneth Crews who provided valuable information and a starting point for terminating our copyrights. Thanks also go to lawyers Robert Tyler and Brandon Butler at the University of Virginia for their clarification of the copyright termination process.

Jane Brockman, Arsis composer and co-webmaster of the Arsis Press website for 30 years, did some useful sleuthing regarding Empire, continues to support the website, and noted the recently increased fees for terminations.

Lori Laitman kindly gave permission to use her copyright termination story entailing an immediate transfer of rights.

Neil Gladd, mandolinist and longtime employee at the Copyright Office, suggested links to the Copyright Office report on orphan works.

Brianna Schofield, Executive Director of the Authors Alliance (which oversees the rightback.org website along with Creative Commons), was enormously helpful with the final details for this article. She pointed out an important issue regarding precise dates in the discussion of termination windows, noted the opportunity for termination of works contracted before 1978, and alerted us to the important resources on the Authors Alliance website that provide both a guide to and templates for terminations.

Dr. Vercoe is the author of the *Herstory* series of song cycles on texts by women as well as symphonic and chamber works. She is published by Certosa Verlag in Germany and Noteworthy Sheet Music and recorded on Navona, Capstone, Owl, Leonarda, and Centaur labels. She divides her time between coastal towns in Maine and Massachusetts.