



American Association
of Independent Music

**UNITED STATES COPYRIGHT OFFICE
LIBRARY OF CONGRESS
Washington, D.C.**

Docket No. 2012-12

Response to Request for Additional Comments: Orphan Works and Mass Digitization
Comments by the American Association of Independent Music (“A2IM”) – May 21, 2014

The American Association of Independent Music (“A2IM”) thanks the Copyright Office for this opportunity to offer additional comments related to Orphan Works and Mass Digitization. These comments being offered are in addition to our original comments filed with the Copyright Office on February 4, 2012.

A2IM is a 501(c)(6) not-for-profit trade organization representing a broad coalition of over 325 independently owned U.S. music labels. Billboard Magazine, using Nielsen SoundScan data, identified the Independent music label sector as 34.6 percent of the music industry’s U.S. recorded music sales market in 2013 (and using the same source data by our computation approximately 40 percent of digital recorded music revenues). Independent music labels release over 90 percent of all music released by music labels in the U.S. so related to this Notice of Inquiry our segment of the music industry will be heavily impacted. Our Independent music label community is the big tent as, while all of our members are small and medium-sized music enterprises (SMEs), it is a very diverse group. A2IM’s independent community includes music labels of all sizes and staffing levels across the United States, from Hawaii to Florida, representing musical genres as diverse as our membership. All of our label members have one thing in common; they are small and medium business people with a love for music who are trying to make a living. A2IM members also share the core conviction that the independent music community plays a vital role in the continued advancement of cultural diversity and innovation in music both at home and abroad.

For our members, whose livelihoods depend on the ability to invest in and create music and distribute and license copyrights in a free market, it is essential to have government partners helping to advance a worldwide enforceable regime for the protection of intellectual property. A copyright protection regime that enhances accountability at all levels of the distribution chain and that deals effectively with any unauthorized usages is essential for our community. Without this copyright protection, A2IM’s members, as SME’s, a key economic growth engine, will be unable to continue investing in the process of musical intellectual property investment, investment that creates easily exportable IP products that improve the U.S. balance of trade, thus improving the U.S. economy and creating jobs at home in the U.S.

In preparing this NOI response, the A2IM staff had a discussion with the A2IM board and had additional conversations with other A2IM members of varying sized businesses with varying levels of staffing and business models, so as to properly represent our diverse community. Our views presented herein are based upon a consensus of our members thoughts with varying views noted.

In A2IM's initial Orphan Works filing in February 2012, we noted that A2IM has been following the debate on Orphan Works since 2006. In August 2008, A2IM was invited to and participated in a U.S. Small Business Administration roundtable discussion on Orphan Works in New York City. At the roundtable we expressed our concerns and we shared many of our thoughts from an A2IM position paper on our A2IM website, www.A2IM.org, with some of the same issues, and new issues, further outlined below. In March 2014, A2IM Board member Richard Burgess and A2IM Vice-President Jim Mahoney participated in a Copyright Office roundtable in Washington D.C. on the topics covered in this filing.

We understand, respect and support the objectives of the Copyright Office, to preserve and make available to the public the music that makes up our cultural heritage. A2IM is generally in agreement with the U.S. Copyright Office goals related to Orphan Works that are truly Orphan Works should be made accessible to the public. But in meeting those goals, we also need to protect creators, so that the future creation process can continue. We want to highlight some considerations that the Copyright Office might want to take into account related to the concerns we have heard from the SME's that A2IM represents.

Subjects of Inquiry:

- **The need for legislation in light of recent legal and technology developments:**

A2IM now supports the concept of Orphan Works legislation as long as it is subject to having unambiguous clear-cut rules and criteria set related to the process of defining what are Orphan Works, the Orphan Work clearance process and who should have access to these Orphan Works and for what purpose. **For our community of like-minded investors in and creators of music, the key issue is the trade-off between the very important areas of maintaining musical culture use and diversity and the preservation of America's musical heritage and protecting creators from those entities simply looking to exploit our musical works solely for commerce and profit.** Given recent technological developments, and the availability of deep music database data, the musical ownership history the database need to find current ownership information is generally available. Any legislation should clearly delineate between cultural use and commercial use and ensure that only legitimate Orphan Works are deemed as such and have safeguards in place to protect creators to ensure that fair compensation, including recovery of costs like legal fees, is received by creators for works deemed orphaned and later found to not be orphaned.

- **Defining a good faith "reasonably diligent search" standard:**

The criteria that will be created to define what good faith "reasonably diligent search" best practices standards are before a piece of music is declared to be an Orphan Work is very important and will need music creator community participation. We fear that there are a lot of "bad actors" who will infringe on copyrights while hiding behind the Orphan Works defense. We do not want the concept of Orphan Works to be added to the list of "grey areas" that support the infringing upon music copyright owner's music areas because our members, with their extremely limited resources, are unable to protect the Intellectual Property in which they have invested and end up in an untenable "whack-a-mole" type process, with limited results. As a result the procedures and required documentation of these searches need to be clearly defined and then monitored by the Copyright Office. As will be discussed below, we need to define what technologies need to be brought to bear and what databases need to be created.

- **The role of private and public registries:**

As the Copyright Office notes, neither the initial registration nor the subsequent recordation for ownership changes, licenses, and other transactions are required by the Copyright Office. A main consideration for our resource-challenged community, in terms of both staffing and financial resources, is the cost benefit trade-off of any regulatory proposal with a measurable benefit needed for compliance. As we noted in our filing in response to the Copyright Office Notice of Inquiry on the Strategic Plan for Recordation of Documents dated February 28, 2014 and at the New York City roundtable I attended on March 28, 2014, due to limited staffing and financial resources, a large number of our members do not do an initial registration of all of their copyrights or file a subsequent recordation document after licensing, purchasing, or gaining security interest in a copyright. As a result, while the Library of Congress database is clearly the starting point for any search it will not unearth all owned musical works. Additionally, as a result, all of our comments need to be taken with the cost of implementation and ongoing compliance taken into account. A2IM and its constituents would like to have input on the specifications and procedures that will be required to ensure they do not become data-heavy overkill beyond the key basic details needed for a viable system/registry.

While technology has improved, many of the available databases of organizations like SoundExchange or the PRO's like ASCAP, BMI and SESAC are not publically searchable databases and often are missing label ownership data. The solution, which will need advance planning to implement, is for the Copyright Office to help oversee the creation of a public registry database with clearly defined criteria for authorized creator input. This database should be created with a simple input/interface system and the ability to interface with other authorized music industry databases. This music registry must be created and it must combine all available sources and be easy to use. This music registry must be organized and comprehensive enough for the main purpose of identifying rights holders, so that musical works are not designated as Orphan if they are not, and so as not to be used as a default for other works to be classified as Orphan and available for use by third parties as fulfillment of the "diligent" search process. Creation of an easily searchable public registry database for any additions to the registry as newly Orphaned Works and a public notice process declaring additions to that database must be a requirement of any Orphan Works law. Users of Orphan Works must then be required to register any works they have added to the Orphan Works registry prior to any usage under any adopted rules.

Finally we believe the Orphan Works databases will be best facilitated by allowing Orphan Works to only be listed for legal, commercially created copies of the musical work. Illegal copies downloaded via P2P networks, bit torrent sites, or illegal unlicensed music services should not be eligible for Orphan Work status as these may be non-traceable or unauthorized versions or mash-ups created without any prior consent of the original owners/creators.

- **Types of works subject to Orphan Work legislation:**

Music Copyrights, whether audio or visual, should be subject to Orphan Works legislation.

- **The types of users and uses subject to any Orphan Works legislation**

A2IM sees the main purpose of Orphan Works as providing access to and preserving and providing access to America's rich musical heritage in terms of both culture and diversity. We support this need for preservation and archiving of the rich, diverse music created by our members and the goal that this

music is made available, but we believe it should be made available only for fair use for limited display and limited educational reproduction, as part of American cultural history. The best conduit for this is via bona fide not-for-profit organizations like public libraries, public museums, bona fide educational institutions, etc., with ongoing missions and histories of education.

We see good faith users of these Orphan Works being able to share this music digitally and all of them should compensate the music creators if they become known. We see these usages as productive and beneficial usages of music for consumers as well for those wishing to include music as part of the educational process, including research. However, there needs to be a verification of the authenticity of these not-for-profit entities. If a museum was created recently and suddenly exists online only for featuring musical works that others may link to, we would not support that type of entity.

A2IM's members are both creators and users of musical works. Based upon our firsthand experience in the finding and licensing of creative works, we question the need to allow exceptions or loopholes as they relate to finding and getting permission to use existing works for purposes of private commerce, or use in remixes or otherwise to create a profit by those looking only to exploit our musical works for commerce and profit. Any exceptions or loopholes could make it difficult for creators or owners of creative works to easily seek injunctive relief or, if enacted, could limit their ability to seek reasonable compensation for uses under Orphan Works. This would only further burden legitimate creators with having to fight infringements when it seems fairer that the burden for proving the legitimacy of such uses should rest with the user, not the creator.

- **Remedies and procedures regarding Orphan Works:**

As our members are both creators and users of musical works, who go the extra step as users to identify and locate copyright owners when using music for our own commerce, we question the need to allow potential users (who may be "bad actors" who are unwilling to do a diligent search of numerous existing music databases to find and get the permission of creators), to use music to create a profit. The limitation of liability included in prior proposed Orphan Works proposals now makes no sense, given the current proliferation of unauthorized/unlicensed usages of music. To remedy this, there must be a basis for a creator to obtain easy injunctive relief and reasonable compensation for infringements, including reimbursement of legal fees incurred to remedy these infringement situations. These remedies should be available whether the Orphan Works infringement is willful or not and should not apply to smaller infringements for non-commercial benefit. There is no need for punitive statutory damages unless the infringements are on a continual mass basis or the users are facilitating infringing use by other users.

A2IM member independent labels need this remedies recourse because, unfortunately, due to the ever-shrinking overall music market revenue base, A2IM member music labels as SME's simply do not have the financial means or resources to engage in widespread copyright monitoring and enforcement on the Internet. The time and capital investment required for our community of like-minded, but proudly independent small business people to monitor the web for usage and take subsequent legal action simply does not exist. A2IM member music labels do not have the financial means or resources to house a stable of systems people and lawyers to monitor the Internet and bombard users with notices for seemingly endless illegal links to our musical copyrights. Our members have limited budgets and whatever revenues and profits they can eke out are directed toward their primary goals-- music creation

by their music label's artists and then the marketing and promotion of this music to the American public--so they are able to finance the continuation of this creation process.

Remedies available to small creators should not be limited and should include statutory damages when dealing with infringers whose goal is to make a profit from exploitation of Orphan Works. Otherwise this will provide a disincentive for "bad actor" users to negotiate reasonably with small copyright owners who cannot afford to sue, especially if the Orphan Works rules do not include a provision for the awarding of attorney fees. For our members whose livelihoods depend on the ability to license and monetize copyrights in a free market, it is essential to have government partners helping to advance a worldwide enforceable regime for the protection of intellectual property online that enhances accountability at all levels of the online distribution chain and that deals effectively with unauthorized usages.

- **Mass digitization – generally**

Generally, Orphan Works usages should be done on a case-by-case basis to ensure that a thoughtful good faith "reasonably diligent search" standard is met as the concept of mass digitization very well may lead to an opposite approach by users, of asking for forgiveness instead of doing the work that would allow for permission. As noted earlier, given our community's limited resources, we are concerned that we would not immediately find out about every usage and then, when we do, we may not have the resources, or the ability to recover our legal costs, to either stop such usage or be fairly compensated for such usage, even prospectively. Mass digitization will compound the problem.

In the music industry, our members already deal with many services which infringe upon our members' copyrights on a mass basis, either via creating databases without a license or by promoting a user-uploaded service with no screening process in place to prevent the inclusion of unauthorized unlicensed content. The result is a very labor-intensive process that our members must follow to send DMCA notices, and in some cases legal letters, and pursuit of expensive business negotiations or litigation. As a result, we are very concerned about the potential abuses that could arise from allowing mass digitization of music by services that have not followed the potentially labor-intensive and expensive process of doing the required "reasonably diligent search" that should be required. We do not see this proposed mass digitization process as anything other than an attempt to make large amounts of music, some Orphan Works and some not, available for commercial use and profit as opposed to doing the required research and compensating the appropriate rights holders. While we support music preservation and archiving, we can't support a process that moves the work of verification of ownership from the user of the music to the creator of the music, with our smaller creators not having the resources to do numerous mass verifications, instead of requiring the diligent search and identification of owners, including obtaining clearances and negotiating compensation, to be done by those entities doing the mass digitization of the music.

Mass digitization also often leads to a lack of control over subsequent uses by additional parties using databases created by mass digitization of copyrights. We are concerned about any process that allows any unauthorized distribution of our member's musical copyrights for profit. Usage should be for only limited display and limited reproduction by a limited list of not-for-profit institutions who contribute toward the preservation of the music being made available. The Orphan Work should additionally not be made available for use as part of a derivative work with another musical work, such as a "mash-up",

which could result in a new musical work the original copyright owner might not approve, or used with a product the original creator did not approve, as these uses do not meet any “fair use” criteria.

- **Extended collective licensing and mass digitization**

For the reasons already explained earlier, A2IM is opposed to mass digitization involving Orphan Works as it appears to defeat the detailed procedures needed to verify that a work is in fact Orphaned. If a decision is made to allow mass digitization, to support the cultural and educational goals our community does support, we believe only not-for profits should be eligible to create these databases.

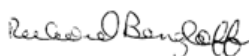
The definition of which not-for-profits might be allowed to use Orphan Works must be very narrow and include only libraries, museums and schools that meet certain strict definitions, with no political missions or profit motives related to the music, and the music should be allowed to be used for display access for educational purposes, again with secured access to the materials so no derivative copies are made using the Orphan Work.

- **The Structure & Mechanics of a Possible Extended Collective Licensing System in the United States**

While A2IM’s members are staunch supporters of compulsory statutory licenses with statutory rates, we are concerned about those rates extending to mass digitized usages of music. As the recorded music industry revenue base has shrunk dramatically over the past 15 years, it is getting harder and harder for small business music creators to make a living. Licensing of tracks, including syncs is more and more important to businesses’ economic viability. Mass digitalization under collective licenses will create easy access to a database of inexpensive music, either orphaned or otherwise. This might very well result in a race to the bottom, in which those collective licensing rates, often statutory rates, will probably reduce the amounts received by copyright owners that had opted-out of any collective licensing regime, creating overall market pricing decreases.

In conclusion, we support the overall direction of the Copyright Office’s proposals. A2IM and our members understand, respect and support the objectives that the Copyright Office enumerated related to Orphan Works and we support anything the Copyright Office does to preserve and make available to the public the music that makes up our cultural heritage. In meeting that goal we all also need to protect and support small and medium sized creators so that the future creation process can continue.

We thank the Copyright Office for the opportunity to comment on this NOI related to Orphan Works and Mass Digitization which is of great importance to our Independent music label community. Please do not hesitate to contact me with any questions you may have about our position.



Respectfully,
Rich Bengloff, President
American Association of Independent Music (“A2IM”)