



American Association
of Independent Music

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

Docket No. 2012–12

In the matter of Orphan Works and Mass Digitization

Comments by The American Association of Independent Music (“A2IM”)- February 4, 2012

The American Association of Independent Music (“A2IM”) thanks the Copyright Office for this opportunity to comment on the Notice of Inquiry related to Orphan Works and Mass Digitization. A2IM is a 501(c)(6) not-for-profit trade organization representing a broad coalition of 300 independently owned U.S. music labels. Billboard Magazine, using Nielsen SoundScan data, identified the Independent music label sector as comprising more than 31% percent of the music industry’s U.S. recorded music sales market in 2012 (and by our computation over 39 percent of digital album sales) and well over 90 percent of all music released by music labels in the U.S. A2IM’s music label community includes small and medium-sized music enterprises (SMEs) of all types 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 smaller 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. But we need your help to remain economically viable as musical Intellectual Property, one of the core pillars of US economic competitiveness as music creates an economic multiplier effect as it is used in film, games, ads, television, etc. and is a vital export, has become difficult to protect in the digital age.

Independent music labels are not luddites and the Internet has been the great equalizer for us and our ability to create, market, promote, monetize and introduce new music. The Internet has opened up countless opportunities for us and we would not do anything to jeopardize this improved access to music consumers. Additionally, our members have embraced new business models that allow for efficient distribution of music, such as the licensing of free-to-the user streaming services and webcasting, one-price-per-month subscription services, bundled mobile services, etc. We honestly feel there is no other industry that has embraced new forms of economic and delivery models as completely as the music industry. Many of our members also, on their own terms, give away free content to reward existing fans and cultivate new fans of their label’s artists.

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 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 DMCA takedown 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 continue this creation process. For our members whose livelihoods depend on the ability to license copyrights in a free market, it is essential to have government partners helping 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.

We have been following the debate on Orphan Works since 2006, and 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.

We understand, respect and support the objectives of the Copyright Office enumerated in the NOI, to preserve and make available to the public the music that makes up our cultural heritage. In meeting that goal we also need to protect creators so that the future creation process can continue.

We see the Orphan Works issue as being two distinct issues:

-We support the 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 limited display and limited educational reproduction, as part of American cultural history. We see good faith users of this music being able to share this music digitally via bona fide educational institutions, public libraries and public museums, all of whom should compensate the music' creators.. We see these usages as productive and beneficial usages of music for consumers as well as 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 started recently and only suddenly exists online for featuring Orphan Works that others may link to, we would not support that type of entity.

- 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 maybe 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, especially if there is no basis for a creator to obtain easy injunctive relief and reasonable compensation for infringements.

With regard to the two specific issues raised in the Notice of Inquiry:

Orphan Works on an Occasional or Case-by-Case Basis

-We are concerned with any process that allows any 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 as with a product the original creator did not approve as these uses do not meet any fair use criteria.

-Given our community's limited resources, we are concerned that we would not find out about every usage and then, when we do, may not have the resources, or the ability to recover our legal costs, to either stop the usage or get fairly compensated for the usage, even prospectively. Remedies available to small creators should not be limited when dealing with infringers whose goal is to make a profit off of Orphan Works. Otherwise this will provide a disincentive for 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.

-The music industry, via numerous publishing and performance rights organizations, have numerous available databases as well as music label and distributor databases that can be searched by a prospective Orphan Works user. As a result there would need to be a rigorous definition of the diligent search process for any usage that is allowed. Any “reasonably diligent search” should include searches for distributors, music labels, featured artists, songwriters, UPC codes, and ISRC codes within databases. This will be best facilitated by allowing Orphan Works to only be created for legal, commercial 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.

-A music registry must be created and it must combine all available sources and be easy to use and 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 all other works to be classified as Orphan and available for use by third parties as full fulfillment of the diligent search process. A requirement of an easily searchable public notice database of additions to any Orphan Works usages should also be required of users to highlight titles newly deemed Orphan titles under any adopted rules.

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

Orphan Works in the Context of Mass Digitization

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 need to 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 the process should require. We do not see this 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.

We thank the Copyright Office for the opportunity to comment on this NOI of great importance to our Independent music label community related to Orphan Works and Mass Digitization. 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”)