

**Before the  
COPYRIGHT OFFICE  
LIBRARY OF CONGRESS  
Washington, D.C.**

**Orphan Works and Mass Digitization  
Docket N. 2012-12  
Notice of Inquiry, October 22, 2012**

**COMMENTS  
OF  
AMERICAN FEDERATION OF MUSICIANS OF  
THE UNITED STATES AND CANADA, AFL-CIO  
AND  
THE RECORDING ACADEMY**

The American Federation of Musicians of the United States and Canada, AFL-CIO (AFM) and The Recording Academy submit these comments in response to the Copyright Office's Notice of Inquiry dated October 22, 2012 regarding Orphan Works and Mass Digitization (NOI).

*Interests of the AFM and Recording Academy*

The American Federation of Musicians of the United States and Canada (AFM) is the largest union in the world representing professional musicians, with over 70,000 members in the United States and Canada. Musicians represented by the AFM record music for sound recordings, movie sound tracks, commercials, and television and radio programming. Among other activities, the AFM works to protect the intellectual property interests of its members and to give them a voice in cultural and policy debates that affect them at home and abroad.

Established in 1957, The Recording Academy is a membership organization of musicians, songwriters, producers, engineers and recording professionals. Internationally known for the GRAMMY Awards — the preeminent peer-recognized award for musical excellence and the most credible brand in music — The Recording Academy is responsible for groundbreaking professional development, cultural enrichment, advocacy, education and human services programs.

*NOI Question 1: Orphan Works on an Occasional or Case-by-case Basis*

The NOI refers back to the framework established in the 2008 proposed legislation, and asks how the legal landscape has evolved in the last four years. We submit these brief opening comments to note that there were issues of concern to recording artists and their fellow creators in 2008 that were unresolved in the 2008 legislative framework.

As the NOI notes, issues related to photographs presented “a significant percentage of the problem” that motivated the legislative effort. Sound recordings embodying the performances of recording artists and their fellow creators have not represented a significant part of the problem that the legislative effort sought to address; if sound recordings are to be included in any future legislation, then careful consideration must be given to the unique concerns of these creators so that they are not harmed by any new orphan works regime.

The authors of sound recordings (which may include, for example, featured artists, producers and background musicians and vocalists) are the creative forces behind the recording, but they typically do not retain ownership of their copyrights. Traditional contracts with recording companies require ownership to be conveyed to the recording companies.

This divergence of authorship from ownership as an industry norm creates unique problems when it comes to sound recordings that are “orphaned” in the sense that the company that owns the copyright cannot be found. In that situation, the true creators of the recording still have important interests that should be considered. AFM and the Recording Academy believe that such issues should be addressed before sound recordings are included in orphan works legislation. We offer the following non-exclusive list as examples of creators’ concerns that should be addressed.

***Creators Should Be Protected Even When a Work is Orphaned.*** Ideally, the creators of the recording who can be found should be put in the position of the missing owner of the copyright in the sound recording, so that where appropriate the creators can license or refuse to license the new use. In the alternative, the new user of the orphaned work should be responsible for making any payments to or on behalf of the creators that the copyright owner would have been required to make.

***Approval Rights for Creators.*** Creators who can be found should be protected from new uses of their recordings that would harm their integrity or their businesses. At a minimum, creators should retain whatever approval rights they enjoyed under their recording contracts.

***Search Standards Must Not Be Too Low.*** To the extent that the orphan works legislative framework remains one of limiting remedies applicable against users that have conducted “a reasonably diligent search,” creators have a strong interest in ensuring that searches for the owners of their copyrights will be required to meet a high standard. Possible means to ensure the utmost in diligence might be requirements to use professional search agencies, requirements to search available databases, a requirement to obtain approval of an independent agency, and/or a “best efforts” rather than a “reasonable efforts” standard.

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The AFM and The Recording Academy look forward to participating further in the discussion of this issue.

Respectfully submitted,

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February 4, 2013