



American Association
of Independent Music

**U.S. Department of Commerce
United States Patent and Trademark Office
National Telecommunications and Information Administration
Washington, D.C. Docket No.: 130927852-3852-01**

Re: Request for Comments on the Department of Commerce Green Paper on Copyright Policy, Creativity, and Innovation in the Digital Economy-Comments by The American Association of Independent Music (“A2IM”) – November 13th, 2013

The American Association of Independent Music (“A2IM”) thanks the Commerce Department for this opportunity to respond to the Request for Comments on Department of Commerce Green Paper on Copyright Policy, Creativity, and Innovation in the Digital Economy, on behalf of the small and medium sized businesses that make up the American Association of Independent Music (“A2IM”) membership. Our members’ businesses, via the investment in and creation of musical intellectual property, are fueling commerce here and abroad and, via exports, improving America’s balance of trade and thus creating jobs in America.

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 32.6% of the music industry’s U.S. recorded music sales market in 2012 (and using the same source data, by our computation the Independent sector represents over 40 percent of digital album sales), 34.5% of sales for the first half of 2013 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 (SME’s) 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 and medium sized 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 because larger U.S. creator businesses, in many cases, no longer invest in the creation of the less mass market-driven uniquely American niche musical genres still invested in by our community.

A2IM’s members applaud and are in agreement with many of the goals and conclusions reached in the U.S. Copyright Office Green Paper on Copyright Policy, Creativity, and Innovation in the Digital Economy. For example, the Task Force call for Congress to enact legislation adopting the same range of penalties for criminal streaming of copyrighted works as now exists for their criminal reproduction and distribution. In addition the Task Force recommendation to urge Congress to enact legislation for a sound recording public performance royalty covering broadcasting is very important for our constituents so that our members, who have limited or no overseas domicile locations, can have reciprocal rights to collect overseas royalties when their sound recordings are broadcast overseas.

A2IM on Copyrights, the Internet and Innovation

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, new devices, 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, choose to give away free content to reward existing fans and cultivate new fans of their label's artists.

That said; our small and medium sized businesses that support the creation of musical Intellectual Property need to be compensated for the creation and promotion of their music to be able to continue to invest and create jobs. A2IM members support the statutory compulsory license mechanism and also license to services that are not covered by compulsory licenses. But our music label community needs to be able to decide which non-statutory services should have our music and at what fair price, and when it is appropriate to give away our music to super-serve our fans, to ensure on an overall basis that we still have viable music label business models.

A good, strong regime supporting copyright ownership also needs to support international commerce by U.S. businesses. In 2005 the U.S.'s share of the international music market was 34%. For 2012, the latest available data, the IFPI reported a U.S. share of worldwide wholesale recorded music revenues of only 27%. For our members, most sales traditionally have been in the U.S. market. However it is now clear that we must expand our reach and we need to look abroad to survive which is what the Administration's National Export Initiative (NEI) is all about, supporting SME's that can grow faster, like our music-loving Indie creators who invest in the music they love and make little in profits as they reinvest, and who can also create exports that can improve our balance of trade as they export American IP know-how. The overall effect is to improve the U.S. balance of trade and create jobs thus becoming a major growth engine for the U.S. economy.

Exports include physical recorded music, digital, mobile, touring, synchronization licenses, etc. with, again, music being that great economic multiplier that fuels areas like musical instrument purchases. We thank the U.S. Government, specifically U.S. Commerce Department ITA and the Small Business Administration for their support of the very successful SME music creator international trade initiatives that have supported A2IM members over the past 18 months.

Our comments in response the Request for Comments are:

Operation of the DMCA Notice and Takedown System:

Certain websites continue to consider it "legal" to allow unlicensed copyrighted content to be user-uploaded and posted on their sites while leaving the burden on the copyright owner to monitor these sites and issue "takedown notices" to the sites for each unauthorized posting when the copyright owner becomes aware of unauthorized activity. As the DMCA has currently been interpreted, this has required music labels to become 24/7 takedown notice servers, diverting resources from creating and marketing their artists' music. The harm is compounded by the fact that immediately after a copyright owner serves a takedown notice for Song X by Recording Artist Y, that very song by that very artist could be back up on the same website (this time listed as Song Xy by Recording Artist Yx) with the site still held blameless because they are not considered responsible for that which their users post. This is clearly a loophole that was unintended by those who wrote the DMCA, but is being abused by websites building user audiences and

substantial businesses on the backs of copyrighted creative works without the authorization from, or often compensation to, the copyright holders.

Until and unless these types of loopholes are closed there will remain an avenue for "legal" piracy under the guise of "user generated" material, when in fact the users are uploading copyrighted material for which they were not involved in the creation process. For independent creators to continue contributing great music for fans they must be fairly compensated and not be forced to spend their time playing Internet Cop under a copyright infringement "whack-a-mole" scenario.

Unfortunately, due to the ever-shrinking overall music market revenue base, A2IM member music labels like our members 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 unlicensed links to our musical copyrights. Our members have limited budgets and whatever revenues and profits they can make 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 to advance a worldwide enforceable regime for the protection of intellectual property copyrights online. This is one of the core pillars of U.S. economic competitiveness in the world, policies that enhance accountability at all levels of the online distribution chain and that deal effectively with unauthorized usages. We are open to discussions as to how to create enforceable best practice requirements and would welcome the opportunity for our membership to participate.

Government Facilitation of Further Development of On-Line Licensing:

As noted earlier, the Internet has transformed how consumers access music and as creators we have adapted to this change which has been a boon for Independents to reach an expanded and open audience eager to hear our music. In the monetization area, the changes in consumer consumption have presented financial challenges. The value of a copyright must be maintained for the music creation process to continue. We as Independents support the compulsory statutory licensing of music to services such as Pandora, iHeart radio, Sirius/XM and others under the Copyright Royalty Board ("CRB") process of rate setting. It ensures that all sound recording copyrights are created equally and should be paid equally.

This copyright valuation issue cuts directly to the core of A2IM's mission: insuring a fair marketplace for Independents where the value of a song or performance must not be determined by which music label creates or owns the song. If that differential is allowed to stand then Independent labels and artists will always be treated unfairly, as lesser, when there is ample proof that music fans want our music. This is witnessed by the Independent music label community overall market share and the Grammy awards won by our community, including the last five Album of the Year award winners being signed to Independent music labels. CRB rate-setting decisions and the resulting statutory rates ensure that the value of every creator's sound recording is equal, that our members' copyrights are worth as much as any other copyright!

Under an expanded compulsory statutory licensing regime, combined with the music industry development of a robust international rights database, online services will have access to use musical copyrights and be able to have access to a broad array of music and innovate without having to pay higher direct licensing fees, which will result in greater consumer access to music to the fans of our musical copyrights.

Application of Statutory Damages:

A2IM supports the Task Force's recommendation that Congress enact legislation adopting the same range of penalties for criminal streaming of copyrighted works as now exists for criminal reproduction and distribution. We believe that enforcement and the application of statutory damages should be best directed toward the online services that can implement more stringent access and use controls, using content filtering. These services instead are driving increased consumer traffic toward their websites so consumers can access unlicensed music content. As a result, these services are guilty of secondary liability. The goal of enforcement needs to be to stop unlicensed acquisition of music at its source and these services need to be assessed statutory damages that will impact their businesses. Monetary relief is essential to act as a deterrent for future unlicensed actions. To allow monetization by these services with unlicensed content will serve to undercut the licensed services that incentivize and compensate creators and thus create an unlevel playing field and financial disadvantages for licensed online services paying licensing fees, making it harder for those licensed businesses to survive.

For individual consumers we believe the Task Force-proposed public educational and outreach approach is the correct approach under a graduated response program with an emphasis on educational notice statements to individual infringers, culminating in internet access service interruptions and terminations for those individual repeat infringers who do not respond to the education notice statements.

Remixes/Orphan Works:

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 fair use 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, such as 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 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 commerce, for use in remixes or otherwise to create a profit. There are numerous existing databases which can be used to find and obtain the permission of creators. That exceptions or loopholes could also make it difficult for creators or owners of creative works to seek easy injunctive relief or, if enacted, would limit their ability to seek reasonable compensation for uses under Orphan Works. This would only further burden legitimate creators when it seems fair that the burden for such uses should rest with the user, not the creator. We do support the creation of licensing mechanisms where remixes can be created under a compulsory licenses, subject to the terms of the license and what musical copyrights are made available.

We note the Task Force's comments on Orphan Works and Mass Digitization noting that A2IM had previously expressed our members' concerns in a filing with the United States Copyright Office dated February 4, 2012 (Docket # 2012-12) where we expressed that, " We are concerned with any process that allows any distribution of our members' 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."

And related to mass digitization we noted that, "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.” In addition to noting the potential DMCA issues, noted in our above comments on the DMCA takedown process, “... 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 see this process as potentially nothing more 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.”

First Sale Doctrine:

In the current digital market place the first sale doctrine should not apply due to the ease of transfer of copyright which could potentially create a new unlicensed market with third parties selling musical copyrights for which they never had ownership.

In conclusion, we thank the Commerce Department for this opportunity to share our members’ thoughts on these most important Internet copyright issues. The Independent music label sector and our artists have aligned our community with new consumer models based upon music consumption using many different new technologies and devices. We embrace responsiveness to new ideas based upon consumer adoption of these technologies. However, given the state of the music industry economy compared to 1999, when unlicensed content became available to consumers on a mass basis, and the limited resources of our SME members to protect their copyrights, we welcome government support to ensure the rights of our community are protected from the criminal actions of those who are facilitating the illegal distribution of our music.

Intellectual Property has never been more vital to our national economy and we need to support and protect the creators of Intellectual Property, and those that invest in that creation, from those who wish to disregard compensating people for their work and investment. This will allow American artists and creators to both earn a living and continue to invest in the creative process. We request continued government support of copyright monetization and protection so as to ensure that the music creation process continues with the result of continued increased commerce and job creation.

Respectfully submitted,



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