

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

In the Matter of

Technical Measures: Public
Consultations

Docket No. 2021-10

**STATEMENT OF INTEREST OF ORCHESTRA MUSIC LICENSING
ASSOCIATION**

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Introduction

The Orchestra Music Licensing Association (“OMLA”), with the assistance and support of the League of American Orchestras, hereby respectfully submits its comments in the above-referenced proceeding. OMLA appreciates and thanks the Copyright Office for the opportunity to respond to the Office’s Notice of Inquiry (“NOI”) and participate in the related Public Consultations on technical measures to identify or protect copyrighted works online.

OMLA is a nonprofit trade association formed for the purpose of promoting the shared interest of America’s symphony orchestras with respect to music licensing and other copyright-related matters.

There are approximately 1,600 orchestras serving communities, large and small, throughout the United States. These orchestras create and increase public appreciation of classical and other orchestral music, not only through live performances but also through various educational and community outreach programs. The programs include pre-school learning, in-depth residencies in schools, afterschool partnerships in high-poverty communities, educational classes for seniors, and health and wellness programs. Orchestras also fund the creation of new musical works through direct commissions paid to composers and arrangers. Indeed, the market for classical and other orchestral musical works would eventually disappear if it were not for the efforts of the orchestras that commission, perform, and promote those works. In addition to commissioning, performing, promoting, and sometimes licensing musical works, many orchestras are also recordings artists and therefore the legal or beneficial owners of sound recording copyrights. Orchestras therefore have an inherently balanced perspective on many issues impacting the copyright ecosystem.

Orchestras also fuel local economies in all 50 states by creating jobs, engaging in commerce with local businesses, and spurring local expenditures on related goods and services (such as hotels, restaurants, parking, and more) by patrons attending orchestra

events. This economic impact in their local communities exceeds several times each orchestra's direct expenditures.

In providing all these cultural and economic benefits to the public, America's orchestras do much with little. Even prior to the devastating impact of COVID-19 on orchestra operations, approximately 66% of those orchestras had annual budgets below \$300,000, and another 25% had budgets under \$2 million. Given the significant expenses involved in employing the large number of highly skilled performing artists comprising an orchestra, no orchestra can possibly fund its operations solely from ticket sales. Instead, they rely heavily on private charitable contributions, investment interest, and other ancillary revenue sources to fund our operations. Many orchestras have years where they operate at a deficit.

Like many other sectors of the world's cultural, educational, and entertainment markets, orchestras have been hit hard by the COVID-19 pandemic and the associated lockdowns, restrictions, and other mitigation efforts necessitated by the pandemic. An informational document providing further details of that impact, prepared for OMLA by the League of American Orchestras, is appended hereto. One of the most crucial means by which many orchestras were able to survive the pandemic was a rapid shift to providing online access to concert performances – both archived and live. Although this online activity could not replace significant losses in ticket sales for in-person concerts, it did allow orchestras to continue serving the public and maintain some relationship with their patrons and local communities. It also allowed orchestras to provide some work for their talented musicians and – just as important – an outlet for the creativity and art during a dark time. Indeed, preliminary evidence indicates that these online activities helped orchestras reach a wider audience of at least some who had not typically attended an in-person concert in the past.

There was, however, a dark side to this otherwise positive online experience. Many orchestras needed to rely upon their official accounts on various social media platforms for these concert streaming activities. In doing so, they encountered repeated disruptions of their streaming due to obviously false copyright infringement claims

made by or on behalf of various record companies due to the various technical measures used on those platforms, which apparently trigger automated infringement notices without any human review or quality control. As explained further below, the technologies used to identify infringements of sound recordings appears to be highly inaccurate when it comes to classical and other orchestral music. Consequently, a particular orchestra's own live concert of, for example, a public domain classical work will often be flagged as infringing the sound recording copyright for one or more commercially released recordings of the same piece performed by another orchestra. Any human with the slightest bit of understanding of music or copyright would realize there was no infringement in these cases. But because no actual review or other human intervention apparently occurs, these false positives automatically trigger a false copyright infringement claim on the affected video. This, in turn, often leads to the video being blocked or muted. In the case of livestreamed events, this can occur in the middle of a live performance. And even after the impacted orchestra receives notice of the false infringement claim and submits a dispute of that claim, it can take up to a week or more for the record companies to release their claim so the content can go back up. This disruption, when it happens, is devastating to the orchestras, especially with respect to livestreamed events. OMLA has attempted to find a solution to this problem with several record companies that are the sources of most of these false infringement claims, but so far they have not come up with any effective solution to the problem.

Among many other things, Orchestras are also recording artists. They very much share the record companies' concerns regarding online infringement. However, the current technologies used to combat online infringement have significant flaws, at least when applied to orchestral music. These flaws are exacerbated by the absence of any human review before claims of infringement are issued. It seems that when policies regarding online copyright infringement, the DMCA safe harbors, and technical measures are discussed the focus is primarily on the big internet platforms and the big content owner companies like the record companies. The impact on others who may be caught in the crossfire – like the orchestras – seems to get lost in these policy debates. Thus, OMLA appreciates the opportunity to participate in the Copyright Office's public

consultations and study of these issues and believes it can provide a somewhat unique perspective that would otherwise not be heard or considered.

Request to Participate

OMLA wishes to participate in the Copyright Office's public consultations related to this proceeding, and believes the orchestras' recent experiences with respect to technical measures to identify and protect copyright online – as discussed further below – will provide a somewhat unique perspective on the issues under study. OMLA requests that its following representative be allowed to participate in the plenary session and any other sessions or meetings where the orchestras' perspectives would be relevant or helpful: Paul Fakler, Counsel for OMLA, Mayer Brown LLP, (212) 506-2441, pfakler@mayerbrown.com.

Answers to Applicable Questions

Question 3: How are orchestras affected by technologies implemented by rightsholders and service providers to identify or protect copyrighted works online?

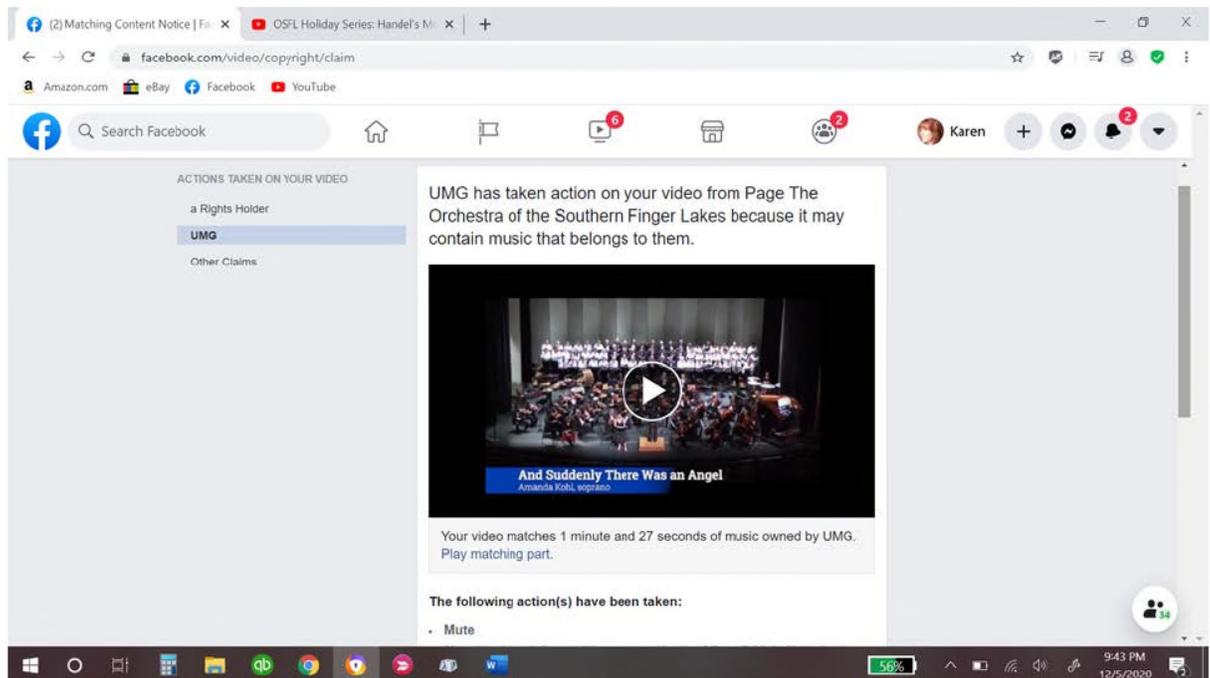
Current technologies implemented by rightsholders and service providers to identify or protect copyrighted works online have caused significant harm to orchestras. As noted above, many orchestras' sole means of reaching audiences during the pandemic has been by greatly increasing their use of online streaming via various social media platforms. Their use of online video streaming to maintain connections with their patrons and other members of the public during times when in-person concerts were impossible was crucial to those orchestras' very survival. These activities include livestreaming of orchestra concerts as well as on-demand access to archived videos of past concert performances. Even now, when in-person concerts have been resuming, orchestras' ability to reach an audience that may not yet be willing or able to return to the concert halls remains vitally important to these nonprofit cultural institutions. The unintended consequences of the use of these systems for identifying potential infringements and sending automated infringement claims have significantly disrupted the orchestras' abilities to provide access to their own performances online.

Although the technologies used to scan social media platforms for potentially infringing content may be reasonably accurate and reliable with respect to popular music, those technologies are very inaccurate when used to analyze classical and other orchestral music. The result of this inaccuracy is that when such systems analyze a video recording or an orchestra's concert performance, they often will falsely report that the video contains material copied from a record company's commercially released sound recording of a completely different performance of the same musical work.

For example, hundreds or thousands of different orchestras may have performed the same piece of classical music – such as Beethoven's Symphony No. 5 in C minor. That same public domain work has been recorded and commercially released countless times. No doubt every record company with a significant presence in the classical market has at least one recording of that iconic piece. But if an orchestra includes that work in a concert that is livestreamed or archived on the orchestra's own social media account, there is a significant chance that the stream will be blocked, muted, or monetized (potentially with advertising inserted into the video feed) because of automated claims of infringement issue by or on behalf of one or more record companies. The claims automatically issue because the technology used to locate potentially infringing material generates a false match with a commercially released sound recording of Beethoven's symphony performed by a completely different orchestra. And once a claim – whether true or false – issues, the identified video may immediately be blocked or muted. Then, it is up to the orchestra to dispute the claim, after which it often takes up to a week or more for the record company to agree that the claim was in error and release it so that the video may be restored. Sometimes the record companies never respond.

As a more concrete example, The Orchestra of the Southern Finger Lakes (“OSFL”) is a regional orchestra based out of Corning, New York. OSFL posted a video recording of their own performance of Handel's “And Suddenly There Was an Angel” on the orchestra's official Facebook account. It was clearly identified as a performance by OSFL of this public domain piece. Nonetheless, a portion of the video was muted after

Universal Music Group made a claim that the video infringed on its sound recording rights.



As one might imagine, having one minute and 27 seconds of the sound muted in a live concert performance destroys the beauty and utility of the entire video. Although OSFL disputed UMG's claim, it took several days before the audio was restored. In some instances, livestreams of concerts have been interrupted mid-concert by similar obviously false infringement claims triggered by false matches of sound recording content.

It is important to note that in these examples no rational record company representative – if they had actually reviewed the orchestra's video before claiming infringement – could possibly believe in good faith that it infringes the record company's sound recording copyright because the performances (and performers) are different. There is simply no possibility of infringement in these cases. Yet there is no recourse to an orchestra that has its streaming disrupted by the false claims. The only

option it so file a dispute and wait until the record company gets around to releasing the claim.

OMLA has attempted to work with several record companies to find a solution to this problem, but to date has received no relief. Although most were willing to discuss the matter – the notable exception being UMG, which failed to even respond to two letters from OMLA’s counsel – their overall response was a general view that this was not a serious problem. Given the nature of the problem and the obvious fact that orchestras are not infringing – and have no history of infringing – the record companies’ copyrights on the orchestras’ official social media accounts, OMLA suggested that the record companies allow the orchestras to identify their official social media accounts and be placed on a “safe” list of accounts that would be excluded from receiving automatic infringement notices. We understand that such a system is in place (as it presumably must be) for social media content that is licensed by the record companies. Unfortunately, none of the record companies have been willing to implement this – or any other – solution to the problem.

In the absence of any relief from the record companies, some orchestras have attempted to develop workarounds to mitigate the harm, such as privately streaming rehearsals of concerts to be livestreamed later or posting new archived videos on a private basis in advance of fully releasing the videos publicly, in order to draw the inevitable false infringement claim and hopefully dispute and resolve the false claim before the first public release of the videos. Such workarounds do not always work, and are very unwieldy. Moreover, as nonprofit cultural institutions with constantly strained budgets, orchestras do not have the resources necessary to constantly deal with these mitigation efforts, or otherwise to respond to improper and false copyright claims. OMLA respectfully suggests that, even if they had such resources, orchestras should not have to bear these burdens merely because rightsholders do not want to engage in even the slightest review of these infringement claims before they are sent out. If there is a necessary burden involved with these technologies, surely that burden should be borne by the rightsholders reaping the antipiracy benefits of these technologies and not innocent orchestras.

Although in-person concerts have begun to resume – even if at lower audience capacities – the need for orchestras to reach the public through online streaming of their own performances remains significant. Such online performances allow orchestras to reach an audience that includes many who have never attended a classical music concert and those who are housebound for any number of reasons. The abuse of content matching and automated infringement claim technologies continues to impede orchestras’ abilities to effectively utilize this crucial new medium, which will only grow in importance in the future.

Question 6: To what extent would the adoption and broad implementation of existing or future technical measures by stakeholders, including online service providers and rightsholders, be likely to assist in addressing the problem of online copyright piracy? What are the obstacles to adopting and broadly implementing such existing or future technical measures? Would the adoption and broad implementation of such existing or future technical measures have negative effects? If so, what would be the effects, and who would be affected?

As noted above, the current implementation of content matching and automated infringement claim technologies has caused significant harm and disruption to American orchestras because that technology does not work accurately when applied to orchestral music. If the use of such faulty technologies were expanded and even more broadly implemented, those harms would only increase. For example, right now orchestras at least have the option of hosting archived videos on their own websites to avoid these false infringement notices. This hardly suffices, because orchestras receive far more traffic on their social media accounts than they do on their websites. If these flawed technologies were even more broadly implemented, there would presumably be no options left – even poor options – to avoid the harm and disruption those technologies cause.

Question 7: Is there a role for government to play in identifying, developing, cataloging, or communicating about existing or future technical measures for identifying or protecting copyrighted works online? Can the government facilitate the adoption or implementation of technical measures and if so, how? Are there technical measures or other standards used to protect copyrighted works online of which the government should be aware when

Appendix

Prepared for Orchestra Music Licensing Association
February 7, 2022

Each orchestra is as unique as its community and is pivoting to address local needs while endeavoring to sustain its workforce amidst the COVID-19 pandemic.

- U.S. professional, community, and youth orchestras number more than 1,600, exist in all 50 states, and perform in virtually every community. Prior to the onset of the coronavirus, two-thirds of all orchestras had budgets under \$300,000. (Orchestra Facts 2016)
- Orchestras are essential partners in supporting local, state, and national recovery efforts during and after COVID-19. Orchestra expenses totaled more than \$2.1 billion in 2019. Their economic impact far exceeds that amount as orchestras create jobs, engage in commerce with local businesses, and spur local expenditures on related goods and services. (Based on 153 U.S. orchestras responding to the 2019 Orchestra Statistical report.)
- As orchestras are innovating to provide safe live arts experiences, online performances, and learning opportunities to their communities nationwide, decisions about operations during the pandemic are closely connected to local and state public health mandates and each orchestra's individual financial situation.

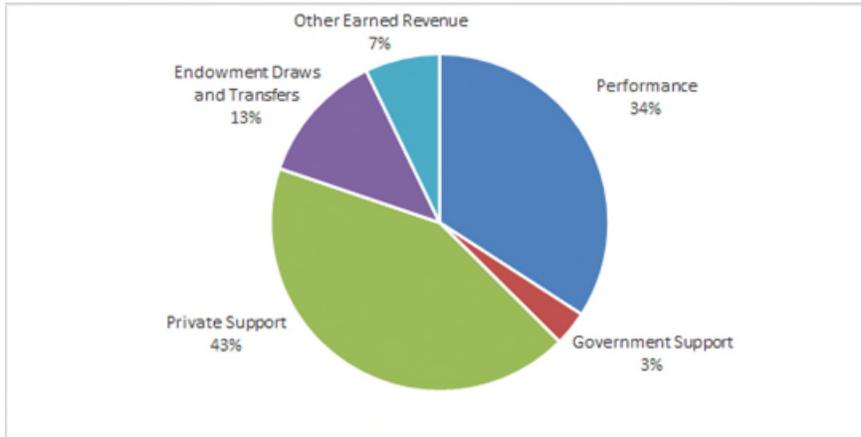
Throughout the loss and isolation of the COVID-19 crisis, individuals are turning to music to inspire us, strengthen us, and bring us together.

- At the height of COVID-19 restrictions on participation in live performance events, orchestras increased their offerings of music online. **Entering the 2020-21 season**, orchestras participating in a survey indicated that digital orchestra music was being delivered in the form of live-streamed concerts (81%), streaming of archival recordings (41%), and new creative content curated specifically for social media (59%) — much of it free of charge (64%). The League's [Symphony Spot](#) highlights this wealth of digital initiatives. (August 2020 League COVID-19 Impact Survey, 124 orchestras responding.)
- Orchestras are partnering with caregivers, schools, and community-based organizations to offer online opportunities for learners of all ages, with nearly three-quarters (72%) of responding orchestras creating new programs and partnerships amid the pandemic, and 61% livestreaming educational programs and events. (August 2020 League COVID-19 Impact Survey, 124 orchestras responding.)
- As the duration of the pandemic continues, orchestras are offering both live performance events, and continued online offerings. **At the start of the 2021-22 season**, 57% of orchestras reported that they were intending to stream (19% streaming all concerts, 38% streaming select concerts, with an additional 14% planning on streaming only if concerts with in-person audiences were cancelled). Of responding orchestras, 28% indicated they had no plans to stream any performances in the current season. Note that this data was collected before any changes to live events and streaming plans that would have followed the onset of the Omicron variant. (September 2021 League Quick Take survey, 202 orchestras responding.)
- Adapting to COVID-19 public health protocols, orchestras are performing safe in-person concert events, sometimes livestreamed simultaneously so an even larger audience can enjoy performances at home.

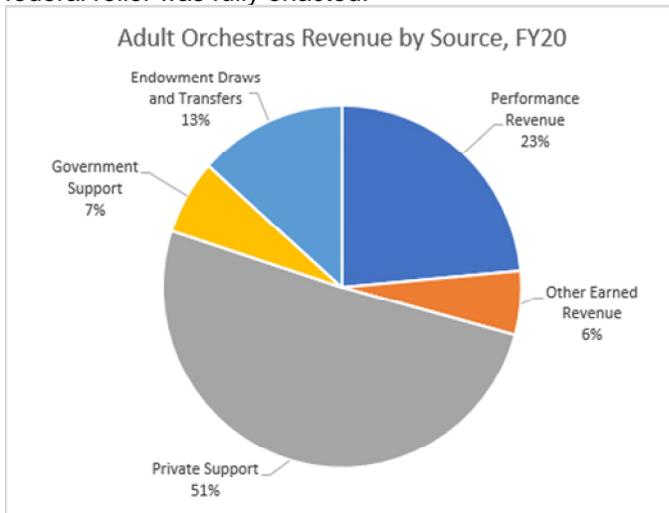
Orchestras are 501(c)(3) nonprofit organizations.

The impact orchestras create in communities nationwide is supported by a critical combination of public and private support, and not by ticket sales alone. As part of the nonprofit charitable sector, orchestras depend upon private philanthropy and civic support to fuel programs that serve community needs.

Adult Orchestras’ FY19 Revenues by Source (Source: the 154 orchestras completing the fiscal year 2019 OSR survey) The following conveys a pre-pandemic picture of revenue.



Adult Orchestras’ FY20 Revenues by Source (Source: the 151 orchestras completing the fiscal year 2020 OSR survey) Given the pace of orchestra fiscal years, many of which would have concluded in July of 2020, this data does not fully convey the impact of the pandemic and was gathered before most federal relief was fully enacted.



The League of American Orchestras leads, supports, and champions America’s orchestras and the vitality of the music they perform. Its diverse membership of more than 1,800 organizations and individuals across North America runs the gamut from world-renowned orchestras to community groups, from summer festivals to student and youth ensembles, from conservatories to libraries, from businesses serving orchestras to individuals who love symphonic music. Founded in 1942 and chartered by Congress in 1962, the League links a national network of thousands of instrumentalists, conductors, managers and administrators, board members, volunteers, and business partners.