



June 17, 2008

The Honorable Patrick J. Leahy
Chairman
Committee on the Judiciary
U.S. Senate
SD-224 Dirksen Senate Office Building
Washington, DC 20510-6275

The Honorable Orrin Hatch
U.S. Senate
SH-104 Hart Senate Office Building
Washington, DC 20510-4402

Re: Shawn Bentley Orphan Works Act of 2008, S. 2913

Dear Chairman Leahy and Senator Hatch:

The Library Copyright Alliance (LCA) consists of five major library associations: the American Association of Law Libraries, the American Library Association, the Association of Research Libraries, the Medical Library Association, and the Special Libraries Association. These five associations collectively represent over 139,000 libraries in the United States employing 350,000 librarians and other personnel. These five associations participate in the LCA to address copyright issues that have a significant effect on the information services libraries provide to their users. The LCA's mission is to foster global access to information for creative, research, and educational uses.

We write to express our appreciation for your continued leadership on S. 2913, which limits remedies in copyright infringement cases involving orphan works. We are very pleased that the Judiciary Committee reported favorably on the bill on May 15, and we look forward to the bill's adoption by the Senate in the near future. As the bill progresses, we will continue working with you and your staffs to fashion an effective framework that will encourage socially productive uses of culturally and historically significant works whose copyright owners cannot be identified or located.

The special collections in our libraries, museums, state and local historical societies, and archives include significant amounts of orphan works. These repositories of orphan works are not being made publicly available for fear of copyright owners coming forward and demanding unknown amounts of compensation. Despite extensive and costly searches to locate orphan work owners, without a legislative solution, the risk remains too high for our institutions to make these works publicly available.

Resolving the orphan works problem presents significant new educational opportunities because these works will be publicly accessible and available to students, scholars, and the public. Access to these resources supports and inspires new scholarship by making the works of previous generations more accessible and useful to current users.

We are encouraged by the progress S. 2913 has made in the short time since its introduction on April 24. However, we have a few remaining concerns with S. 2913 that need to be addressed for the legislation to be truly effective in solving the orphan works problem. The attached document outlines these concerns and possible solutions.

Once again, thank you for your leadership on this issue. We look forward to working with members of the Senate and their staffs so that orphan works legislation can be enacted this Congress.

Sincerely,



Mary Alice Baish
Acting Washington Affairs Representative
American Association of Law Libraries



Prudence S. Adler
Associate Executive Director,
Federal Relations and Information Policy
Association of Research Libraries



Emily Sheketoff
Executive Director
American Library Association Washington Office



Carla J. Funk
Executive Director
Medical Library Association



Doug Newcomb
Chief Policy Officer
Special Libraries Association

Attachments

cc: Members of the U.S. Senate

PROPOSED AMENDMENTS TO ORPHAN WORKS LEGISLATION

The nation's libraries, archives, museums, institutions of higher education, and public television stations hope this Congress will pass legislation that will provide meaningful relief to the orphan works problem. S. 2913 as reported out of the Senate Judiciary Committee, and H.R. 5889 as reported out of the House Subcommittee on Courts, the Internet, and Intellectual Property, move significantly towards this objective. While there are several areas of concern with the pending legislation, included below are suggested revisions that would resolve these remaining issues.

Qualifying Search

The entire legislation turns on the standards for a qualifying search for the absent copyright owner. The language relating to qualifying searches needs to be sufficiently clear concerning its flexibility so that the search provisions cannot be interpreted as requiring cultural institutions to follow specific procedures more appropriate to commercial uses. If the bill appears to impose threshold requirements that are too difficult for cultural institutions to meet, they simply will not take advantage of the legislation and orphan works will remain relatively inaccessible to the public. With some minor changes, language drafted by the Copyright Office (May 20) provides flexibility on the minimum standards, and does not place the best practices made available by the Copyright Office on a higher level than other statements of best practices.

Good Faith Negotiation

In both S. 2913 and H.R. 5889, a user's failure to negotiate in good faith with the copyright owner will lead to the user losing eligibility for the limitation on remedies. In an earlier version of the bill in the 109th Congress, H.R. 5439, the user faced only the penalty of paying the owner's attorneys fees. The new formulation in S. 2913/H.R. 5889 threatens to change dramatically the nature of the negotiations over compensation in a negative manner. It provides the owner with enormous leverage over the user; he can demand excessive compensation because the user will fear that failure to pay could result in a court finding that he did not negotiate in good faith, which in turn could lead to exposure to statutory damages. This will result in useless controversies about the legitimacy of negotiating tactics -- and, ultimately, in the provisions of the bill being unused by many whom it was designed to assist. The penalty for bad faith negotiation should be limited to the owner's attorneys' fees.

Sovereign Immunity

S. 2913 and H.R. 5889 limit injunctive relief in certain situations if the user pays the owner reasonable compensation. Copyright owners argue that because the sovereign immunity doctrine prevents the imposition of monetary damages on state governmental entities, the legislation might allow such state entities to avoid injunctive relief without paying reasonable compensation. Language on state sovereign immunity acceptable to public universities and copyright owners was included in H.R. 5439 -- the orphan works legislation considered during the 109th Congress. However, the wording of various provisions in S. 2913/H.R. 5889 has unintentionally re-opened the sovereign immunity issue. The current orphan works legislation needs to be modified to permit state entities, including public universities, to participate in the orphan works program on comparable terms with other participants, avoiding injunctive relief and paying reasonable compensation as appropriate without raising sovereign immunity issues. Language to accomplish these objectives has been developed by public universities through negotiations and consultations with copyright owners and the Copyright Office.

Safe Harbor

The safe harbor for non-commercial uses that appeared in H.R. 5439 (109th Congress) has been significantly narrowed to apply only to certain kinds of non-commercial entities. Given the narrowing of the safe harbor to these entities, the additional limiting language in subsections (c)(1)(B)(i) and (ii) – uses of a primarily educational, religious, or charitable nature without any purpose of direct or indirect commercial advantage -- is confusing and unnecessary. It could deter uses that involve sales of catalogues and DVDs on a cost recovery basis. These subsections should be stricken.

Moreover, in H.R. 5889, a user in the safe harbor will have to disgorge proceeds directly attributable to the infringement, even if the user promptly ceases the infringement upon receiving notice of a claim of infringement. This will discourage a wide range of socially beneficial uses by museums, libraries, educational institutions, archives, and public broadcasters. They will be reluctant to make any use that might necessitate cost recovery because they might have to disgorge that revenue. The effect will be to chill the willingness of the bill's intended beneficiaries to make use of it. In the context of the narrowly tailored overall bill, this erosion of user interests is inappropriate.

Notice of Use

Cultural institutions oppose the provisions relating to a Notice of Use filing (the “dark archive”) that appear in H.R. 5889. The dark archive requirements would be excessively burdensome for users, with little benefit to owners. Mandating that users file a notice of use with a government agency would drive up compliance costs significantly. For example, filings detailing qualifying searches would need to be carefully drafted and decisions about what facts the user knew “with a reasonable degree of certainty” would need to be made in light of a vague and undefined standard. Many institutions would require legal counsel to review the submissions prior to filing.



American Association of Law Libraries

MAXIMIZING THE POWER OF THE LAW LIBRARY COMMUNITY SINCE 1906

The American Association of Law Libraries (AALL) is a nonprofit educational organization with over 5,000 members nationwide. AALL's mission is to promote and enhance the value of law libraries to the legal and public communities, to foster the profession of law librarianship, and to provide leadership in the field of legal information and information policy. <http://www.aall.org/>
Contact: Mary Alice Baish (202-662-9200)



The American Library Association (ALA) is a nonprofit educational organization of over 65,000 librarians, library trustees, and other friends of libraries dedicated to improving library services and promoting the public interest in a free and open information society. <http://www.ala.org/>
Contact: Corey Williams Green (202-628-8410)



Association of Research Libraries

The Association of Research Libraries (ARL) is a nonprofit organization of 123 research libraries in North America. ARL's members include university libraries, public libraries, government and national libraries. ARL influences the changing environment of scholarly communication and the public policies that affect research libraries and the diverse communities they serve. ARL pursues this mission by advancing the goals of its member research libraries, providing leadership in public and information policy to the scholarly and higher education communities, fostering the exchange of ideas and expertise, and shaping a future environment that leverages its interests with those of allied organizations. <http://www.arl.org/>
Contact: Prudence S. Adler (202-296-2296)



The Medical Library Association (MLA), a nonprofit, educational organization, is a leading advocate for health sciences information professionals with more than 4,700 members worldwide. Through its programs and services, MLA provides lifelong educational opportunities, supports a knowledgebase of health information research, and works with a global network of partners to promote the importance of quality information for improved health to the health care community and the public. <http://www.mlanet.org/>
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The Special Libraries Association (SLA) is a nonprofit global organization for innovative information professionals and their strategic partners. SLA serves more than 11,000 members in 70 countries in the information profession, including corporate, academic and government information specialists. SLA promotes and strengthens its members through learning, advocacy and networking initiatives. <http://www.sla.org/>
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