

**SUBCOMMITTEE AMENDMENT IN THE NATURE OF
A SUBSTITUTE TO H.R. 5889**

**(As ordered reported by the Subcommittee on Courts, the
Internet, and Intellectual Property on May 7, 2008)**

Strike all after the enacting clause and insert the
following:

1 SECTION 1. SHORT TITLE.

2 This Act may be cited as the “Orphan Works Act
3 of 2008”.

**4 SEC. 2. LIMITATION ON REMEDIES IN CASES INVOLVING
5 ORPHAN WORKS.**

6 (a) LIMITATION ON REMEDIES.—Chapter 5 of title
7 17, United States Code, is amended by adding at the end
8 the following:

9 **“§ 514. Limitation on remedies in cases involving or-**
10 **phan works**

11 “(a) DEFINITIONS.—In this section, the following
12 definitions shall apply:

13 “(1) MATERIALS AND STANDARDS.—The term
14 ‘materials and standards’ includes—

15 “(A) the records of the Copyright Office
16 that are relevant to identifying and locating
17 copyright owners;

1 “(B) sources of copyright ownership infor-
2 mation reasonably available to users, including
3 private databases;

4 “(C) industry practices and guidelines of
5 associations and organizations relevant to each
6 category of works under section 102(a) of this
7 title;

8 “(D) technology tools and expert assist-
9 ance, including resources for which a charge or
10 subscription fee is imposed, to the extent that
11 the use of such resources is reasonable for, and
12 relevant to, the scope of the intended use; and

13 “(E) electronic databases, including data-
14 bases that are available to the public through
15 the Internet, that allow for searches of copy-
16 righted works and for the copyright owners of
17 works, including through text, sound, and
18 image recognition tools.

19 “(2) NOTICE OF CLAIM FOR INFRINGEMENT.—
20 The term ‘notice of the claim for infringement’
21 means, with respect to a claim for copyright in-
22 fringement, a written notice that includes at a min-
23 imum the following:

24 “(A) The name of the owner of the in-
25 fringed copyright.

1 “(B) The title of the infringed work, any
2 alternative titles of the infringed work known to
3 the owner of the infringed copyright, or if the
4 work has no title, a description in detail suffi-
5 cient to identify it.

6 “(C) An address and telephone number at
7 which the owner of the infringed copyright may
8 be contacted.

9 “(D) Information from which a reasonable
10 person could conclude that the owner of the in-
11 fringed copyright’s claims of ownership and in-
12 fringement are valid.

13 “(3) OWNER OF THE INFRINGED COPYRIGHT.—
14 The ‘owner of the infringed copyright’ is the legal
15 owner of the exclusive right under section 106 that
16 is applicable to the infringement in question, or any
17 person or entity with the authority to grant or li-
18 cense that right on an exclusive or non-exclusive
19 basis.

20 “(4) REASONABLE COMPENSATION.—The term
21 ‘reasonable compensation’ means, with respect to a
22 claim for infringement, the amount on which a will-
23 ing buyer and willing seller in the positions of the
24 infringer and the owner of the infringed copyright
25 would have agreed with respect to the infringing use

1 of the work immediately before the infringement
2 began.

3 “(b) CONDITIONS FOR ELIGIBILITY.—

4 “(1) CONDITIONS.—

5 “(A) IN GENERAL.—Notwithstanding sec-
6 tions 502 through 505, and subject to subpara-
7 graph (B), in a civil action brought under this
8 title for infringement of copyright in a work,
9 the remedies for infringement shall be limited
10 in accordance with subsection (c) if the in-
11 fringer—

12 “(i) proves by a preponderance of the
13 evidence that before the infringement
14 began, the infringer, a person acting on be-
15 half of the infringer, or any person jointly
16 and severally liable with the infringer for
17 the infringement—

18 “(I) performed and documented
19 a qualifying search, in good faith, for
20 the owner of the infringed copyright;
21 and

22 “(II) was unable to locate the
23 owner of the infringed copyright;

1 “(ii) before using the work, filed with
2 the Register of Copyrights a Notice of Use
3 under paragraph (3);

4 “(iii) provided attribution, in a man-
5 ner that is reasonable under the cir-
6 cumstances, to the owner of the infringed
7 copyright, if such owner was known with a
8 reasonable degree of certainty, based on in-
9 formation obtained in performing the
10 qualifying search;

11 “(iv) included with the use of the in-
12 fringing work a symbol or other notice of
13 the use of the infringing work, in a man-
14 ner prescribed by the Register of Copy-
15 rights;

16 “(v) asserts in the initial pleading to
17 the civil action the right to claim such limi-
18 tations;

19 “(vi) consents to the jurisdiction of
20 United States district court, or such court
21 holds that the infringer is within the juris-
22 diction of the court; and

23 “(vii) at the time of making the initial
24 discovery disclosures required under Rule
25 26 of the Federal Rules of Civil Procedure,

1 states with particularity the basis for the
2 right to claim the limitations, including a
3 detailed description and documentation of
4 the search undertaken in accordance with
5 paragraph (2)(A).

6 “(B) EXCEPTION.—Subparagraph (A)
7 does not apply if, after receiving notice of the
8 claim for infringement and having an oppor-
9 tunity to conduct an expeditious good faith in-
10 vestigation of the claim, the infringer—

11 “(i) fails to negotiate reasonable com-
12 pensation in good faith with the owner of
13 the infringed copyright; or

14 “(ii) fails to render payment, in a rea-
15 sonably timely manner, of any reasonable
16 compensation agreed upon by the owner of
17 the infringed copyright and the infringer.

18 “(2) REQUIREMENTS FOR SEARCHES.—

19 “(A) REQUIREMENTS FOR QUALIFYING
20 SEARCHES.—

21 “(i) IN GENERAL.—For purposes of
22 paragraph (1)(A)(i)(I), a search is quali-
23 fying if the infringer undertakes a diligent
24 effort to locate the owner of the infringed
25 copyright.

1 “(ii) DETERMINATION OF DILIGENT
2 EFFORT.—In determining whether a
3 search is diligent under this subparagraph,
4 a court shall—

5 “(I) consider whether—

6 “(aa) the actions taken in
7 performing that search are rea-
8 sonable and appropriate under
9 the facts relevant to that search,
10 including whether the infringer
11 took actions based on facts un-
12 covered by the search itself; and

13 “(bb) the infringer per-
14 formed the search before using
15 the work and at a time that was
16 reasonably proximate to the com-
17 mencement of the infringement;
18 and

19 “(II) give deference to, and con-
20 sider whether the infringer employed,
21 the applicable best practices main-
22 tained by the Register of Copyrights
23 under subparagraph (B).

24 “(iii) LACK OF IDENTIFYING INFOR-
25 MATION.—The fact that a particular copy

1 or phonorecord lacks identifying informa-
2 tion pertaining to the owner of the in-
3 fringed copyright is not sufficient to meet
4 the conditions under paragraph
5 (1)(A)(i)(I).

6 “(B) INFORMATION TO GUIDE SEARCHES;
7 BEST PRACTICES.—

8 “(i) STATEMENTS OF BEST PRAC-
9 TICES.—The Register of Copyrights shall
10 maintain and make available to the public,
11 including through the Internet, a current
12 statement of the best practices applicable
13 to each category of works under section
14 102(a) of this title or subcategory thereof,
15 for conducting and documenting a search
16 under this subsection.

17 “(ii) CONSIDERATION OF RELEVANT
18 MATERIALS AND STANDARDS.—In main-
19 taining the statements of best practices re-
20 quired under clause (i), the Register of
21 Copyrights shall, in its sole discretion,
22 from time to time, consider materials and
23 standards submitted to, and determined to
24 be reasonable by, the Register of Copy-
25 rights, that may be relevant to the require-

1 ments for a qualifying search under sub-
2 paragraph (A).

3 “(3) NOTICE OF USE ARCHIVE.—The Register
4 of Copyrights shall create and maintain an archive
5 to retain the Notice of Use filings under subsection
6 (b)(1)(A)(ii). Such filings shall include—

7 “(A) the type of work being used, as listed
8 in section 102(a) of this title;

9 “(B) a description of the work;

10 “(C) a summary of the search conducted
11 under paragraph (1)(A)(i)(I);

12 “(D) the owner, author, recognized title,
13 and other available identifying element of the
14 work, to the extent the infringer knows such in-
15 formation with a reasonable degree of certainty;

16 “(E) a certification that the infringer per-
17 formed a qualifying search in good faith under
18 this subsection to locate the owner of the in-
19 fringed copyright; and

20 “(F) the name of the infringer and how
21 the work will be used.

22 Notices of Use filings retained under the control of
23 the Copyright Office shall be furnished only under
24 the conditions specified by regulations of the Copy-
25 right Office.

1 “(4) PENALTY FOR FAILURE TO COMPLY.—If
2 an infringer fails to comply with any requirement
3 under this subsection, the infringer is subject to all
4 the remedies provided in section 502 through 505,
5 subject to section 412.

6 “(c) LIMITATIONS ON REMEDIES.—The limitations
7 on remedies in a civil action for infringement of a copy-
8 right to which this section applies are the following:

9 “(1) MONETARY RELIEF.—

10 “(A) GENERAL RULE.—Subject to sub-
11 paragraph (B), an award for monetary relief
12 (including actual damages, statutory damages,
13 costs, and attorney’s fees) may not be made
14 other than an order requiring the infringer to
15 pay reasonable compensation to the legal or
16 beneficial owner of the exclusive right under the
17 infringed copyright for the use of the infringed
18 work.

19 “(B) FURTHER LIMITATIONS.—An order
20 requiring the infringer to pay reasonable com-
21 pensation for the use of the infringed work may
22 not be made under subparagraph (A) if the in-
23 fringer is a nonprofit educational institution, li-
24 brary, museum, or archives, or a public broad-
25 casting entity (as defined in subsection (f) of

1 section 118), or an employee of such institution,
2 library, museum, archives, or entity, acting
3 within the scope of his or her employment, and
4 the infringer proves by a preponderance of the
5 evidence that—

6 “(i) the infringement was performed
7 without any purpose of direct or indirect
8 commercial advantage,

9 “(ii) the infringement was primarily
10 educational, religious, or charitable in na-
11 ture, and

12 “(iii) after receiving notice of the
13 claim for infringement, and after con-
14 ducting an expeditious good faith inves-
15 tigation of the claim, the infringer prompt-
16 ly ceased the infringement,

17 except that if the legal or beneficial owner of
18 the exclusive right under the infringed copy-
19 right proves, and the court finds, that the in-
20 fringer has earned proceeds directly attributable
21 to the infringement, the portion of such pro-
22 ceeds so attributable may be awarded to such
23 owner.

24 “(C) EFFECT OF REGISTRATION ON REA-
25 SONABLE COMPENSATION.—If a work is reg-

1 istered, the court may, in determining reason-
2 able compensation under this paragraph, take
3 into account the value, if any, added to the
4 work by reason of such registration.

5 “(2) INJUNCTIVE RELIEF.—

6 “(A) GENERAL RULE.—Subject to sub-
7 paragraph (B), the court may impose injunctive
8 relief to prevent or restrain any infringement
9 alleged in the civil action except that, if the in-
10 fringer has met the requirements of subsection
11 (b), the relief may account for any harm that
12 the relief would cause the infringer due to the
13 infringer’s reliance on having performed a
14 qualifying search under subsection (b).

15 “(B) EXCEPTION.—In a case in which the
16 infringer has prepared or commenced prepara-
17 tion of a work that recasts, transforms, adapts,
18 or integrates the infringed work with a signifi-
19 cant amount of the infringer’s original expres-
20 sion, any injunctive relief ordered by the
21 court—

22 “(i) may not restrain the infringer’s
23 continued preparation or use of that new
24 work;

1 “(ii) shall require that the infringer
2 pay reasonable compensation to the legal
3 or beneficial owner of the exclusive right
4 under the infringed copyright for the use
5 of the infringed work; and

6 “(iii) shall require that the infringer
7 provide attribution, in a manner that is
8 reasonable under the circumstances, to the
9 owner of the infringed copyright, if re-
10 quested by such owner.

11 “(C) LIMITATIONS.—The limitations on in-
12 junctive relief under subparagraphs (A) and (B)
13 shall not be available to an infringer if the in-
14 fringer asserts in the civil action that neither
15 the infringer or any representative of the in-
16 fringer acting in an official capacity is subject
17 to suit in the courts of the United States for an
18 award of damages to the legal or beneficial
19 owner of the exclusive right under the infringed
20 copyright under section 106, unless the court
21 finds that the infringer—

22 “(i) has complied with the require-
23 ments of subsection (b); and

24 “(ii) has made an enforceable promise
25 to pay reasonable compensation to the

1 legal or beneficial owner of the exclusive
2 right under the infringed copyright.

3 “(D) RULE OF CONSTRUCTION.—Nothing
4 in subparagraph (C) shall be construed to au-
5 thorize or require, and no action taken under
6 such subparagraph shall be deemed to con-
7 stitute, either an award of damages by the
8 court against the infringer or an authorization
9 to sue a State.

10 “(E) RIGHTS AND PRIVILEGES NOT
11 WAIVED.—No action taken by an infringer
12 under subparagraph (C) shall be deemed to
13 waive any right or privilege that, as a matter of
14 law, protects the infringer from being subject to
15 suit in the courts of the United States for an
16 award of damages to the legal or beneficial
17 owner of the exclusive right under the infringed
18 copyright under section 106.

19 “(d) EXCLUSION FOR FIXATIONS IN OR ON USEFUL
20 ARTICLES.—The limitations on monetary and injunctive
21 relief under this section shall not be available to an in-
22 fringer for infringements resulting from fixation of a work
23 in or on a useful article that is offered for sale or other
24 distribution to the public.

1 “(e) PRESERVATION OF OTHER RIGHTS, LIMITA-
2 TIONS, AND DEFENSES.—This section does not affect any
3 right, limitation, or defense to copyright infringement, in-
4 cluding fair use, under this title. If another provision of
5 this title provides for a statutory license that would permit
6 the infringement contemplated by the infringer if the
7 owner of the infringed copyright cannot be located, that
8 provision applies instead of this section.

9 “(f) COPYRIGHT FOR DERIVATIVE WORKS AND COM-
10 PILATIONS.—Notwithstanding section 103(a), an infringer
11 who qualifies for the limitation on remedies afforded by
12 this section with respect to the use of a copyrighted work
13 shall not be denied copyright protection in a compilation
14 or derivative work on the basis that such compilation or
15 derivative work employs preexisting material that has been
16 used unlawfully under this section.”.

17 (b) TECHNICAL AND CONFORMING AMENDMENT.—
18 The table of sections for chapter 5 of title 17, United
19 States Code, is amended by adding at the end the fol-
20 lowing:

“514. Limitation on remedies in cases involving orphan works.”.

21 **SEC. 3. DATABASE OF PICTORIAL, GRAPHIC, AND SCULP-**
22 **TURAL WORKS.**

23 (a) ESTABLISHMENT OF DATABASE.—

24 (1) IN GENERAL.—The Register of Copyrights
25 shall undertake a certification process for the estab-

1 lishment of an electronic database to facilitate the
2 search for pictorial, graphic, and sculptural works
3 that are subject to copyright protection under title
4 17, United States Code.

5 (2) PROCESS AND STANDARDS FOR CERTIFI-
6 CATION.—The process and standards for certifi-
7 cation of the electronic database required under
8 paragraph (1) shall be established by the Register of
9 Copyrights, except that certification may not be
10 granted if the electronic database does not contain—

11 (A) the name of all authors of the work,
12 and contact information for any author if the
13 information is readily available;

14 (B) the name of the copyright owner if dif-
15 ferent from the author, and contact information
16 of the copyright owner;

17 (C) the title of the copyrighted work, if
18 such work has a title;

19 (D) with respect to a copyrighted work
20 that includes a visual image, a visual image of
21 the work, or, if such a visual image is not avail-
22 able, a description sufficient to identify the
23 work;

1 (E) one or more mechanisms that allow for
2 the search and identification of a work by both
3 text and image; and

4 (F) security measures that reasonably pro-
5 tect against unauthorized access to, or copying
6 of, the information and content of the electronic
7 database.

8 (b) PUBLIC AVAILABILITY.—The Register of Copy-
9 rights—

10 (1) shall make available to the public through
11 the Internet a list of all electronic databases that are
12 certified in accordance with this section; and

13 (2) may include any database so certified in a
14 statement of best practices established under section
15 514(b)(5)(B) of title 17, United States Code.

16 **SEC. 4. EFFECTIVE DATE.**

17 (a) IN GENERAL.—With respect to works other than
18 pictorial, graphic, and sculptural works, the amendments
19 made by section 2 shall apply to infringements that com-
20 mence on or after January 1, 2009.

21 (b) PICTORIAL, GRAPHIC, AND SCULPTURAL
22 WORKS.—With respect to pictorial, graphic, and sculp-
23 tural works, the amendments made by section 2 shall—

24 (1) take effect on the earlier of—

1 (A) the date on which the Copyright Office
2 certifies under section 3 at least 2 separate and
3 independent searchable, comprehensive, elec-
4 tronic databases, that allow for searches of
5 copyrighted works that are pictorial, graphic,
6 and sculptural works, and are available to the
7 public through the Internet; or

8 (B) January 1, 2013; and

9 (2) apply to infringing uses that commence on
10 or after that effective date.

11 (c) PUBLICATION IN FEDERAL REGISTER.—The
12 Register of Copyrights shall publish the effective date de-
13 scribed in subsection (b)(1) in the Federal Register, to-
14 gether with a notice that the amendments made by section
15 2 take effect on that date with respect to pictorial, graph-
16 ic, and sculptural works.

17 (d) DEFINITION.—In this section, the term “pic-
18 torial, graphic, and sculptural works” has the meaning
19 given that term in section 101 of title 17, United States
20 Code.

21 **SEC. 5. REPORT TO CONGRESS.**

22 Not later than December 12, 2014, the Register of
23 Copyrights shall report to the Committee on the Judiciary
24 of the Senate and the Committee on the Judiciary of the
25 House of Representatives on the implementation and ef-

1 facts of the amendments made by section 2, including any
2 recommendations for legislative changes that the Register
3 considers appropriate.

4 **SEC. 6. STUDY ON REMEDIES FOR SMALL COPYRIGHT**
5 **CLAIMS.**

6 (a) **IN GENERAL.**—The Register of Copyrights shall
7 conduct a study with respect to remedies for copyright in-
8 fringement claims by an individual copyright owner or a
9 related group of copyright owners seeking small amounts
10 of monetary relief, including consideration of alternative
11 means of resolving disputes currently heard in the United
12 States district courts. The study shall cover the infringe-
13 ment claims to which section 514 of title 17, United States
14 Code, apply, and other infringement claims under such
15 title 17.

16 (b) **PROCEDURES.**—The Register of Copyrights shall
17 publish notice of the study required under subsection (a),
18 providing a period during which interested persons may
19 submit comments on the study, and an opportunity for
20 interested persons to participate in public roundtables on
21 the study. The Register shall hold any such public
22 roundtables at such times as the Register considers appro-
23 priate.

24 (c) **REPORT TO CONGRESS.**—Not later than 2 years
25 after the date of the enactment of this Act, the Register

1 of Copyrights shall prepare and submit to the Committee
2 on the Judiciary of the Senate and the Committee on the
3 Judiciary of the House of Representatives a report on the
4 study conducted under this section, including such admin-
5 istrative, regulatory, or legislative recommendations that
6 the Register considers appropriate.

7 **SEC. 7. STUDY ON COPYRIGHT DEPOSITS.**

8 (a) IN GENERAL.—The Comptroller General of the
9 United States shall conduct a study examining the func-
10 tion of the deposit requirement in the copyright registra-
11 tion system under section 408 of title 17, United States
12 Code, including—

13 (1) the historical purpose of the deposit require-
14 ment;

15 (2) the degree to which deposits are made avail-
16 able to the public currently;

17 (3) the feasibility of making deposits, particu-
18 larly visual arts deposits, electronically searchable by
19 the public for the purpose of locating copyright own-
20 ers; and

21 (4) the impact any change in the deposit re-
22 quirement would have on the collection of the Li-
23 brary of Congress.

24 (b) REPORT.—Not later than 2 years after the date
25 of the enactment of this Act, the Comptroller General shall

1 submit to the Committee on the Judiciary of the House
2 of Representatives and the Committee on the Judiciary
3 of the Senate a report on the study conducted under this
4 section, including such administrative, regulatory, or legis-
5 lative recommendations that the Register considers appro-
6 priate.

