



The Register of Copyrights of the United States of America

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May 6, 2008

Congresswoman Zoe Lofgren  
Subcommittee on Courts, the Internet,  
and Intellectual Property  
Committee on the Judiciary  
Congress of the United States  
102 Cannon House Office Building  
Washington, D.C. 20515-0516

Dear Representative Lofgren:

Thank you for your letter of May 1, 2008 requesting my views on certain provisions of H.R. 5889 (the "Orphan Works Act of 2008"), namely (1) the duties that the legislation places on the Copyright Office and (2) the ability of the Library of Congress and similarly situated libraries and museums to avail themselves of the bill's provisions, particularly with respect to the "safe harbor." I address these provisions below and, where appropriate, include drafting recommendations.

As a preliminary matter, I wish to express my gratitude to the Subcommittee for addressing orphan works legislation. There is strong support among a wide array of stakeholders for the general approach of the bill, which is to limit the exposure of good faith users who conduct and document a qualifying (but ultimately unsuccessful) search for the copyright owner. The Copyright Office recommended the same approach in its 2006 report.

### **Duties of the Copyright Office**

#### 1. Statement of Use: "The "Dark Archive"

By way of background, both H.R. 5889 and S. 2913 (the "Shawn Bentley Orphan Works Act of 2008") introduce several new conditions of eligibility that did not exist in H.R. 6052 ("The Copyright Modernization Act of 2006"). The new conditions that appear in both bills, and which I support, are:

- 1) a requirement that the user include a symbol or other notice of use on the work or in connection with the use to help copyright owners track uses;
- 2) a requirement that the user assert in the initial pleading of any suit brought by the owner the ability to claim orphan works limitations, rather than surprising a copyright owner by pleading it at a later date (such as during the remedies phase of a trial);
- 3) a requirement that the user consent to, or be held to be within, the jurisdiction of United States district court; and

