

May 6, 2008

The Honorable Howard L. Berman
Chairman
Subcommittee on Courts, the Internet, and Intellectual Property
2221 Rayburn House Office Building
Washington, D.C. 20515

Honorable Howard Coble
Ranking Member
Subcommittee on Courts, the Internet, and Intellectual Property
2468 Rayburn House Office Building
Washington, D.C. 20515

Re: H.R. 5889, The Orphan Works Act of 2008

Dear Chairman Berman and Ranking Member Coble:

Public Knowledge thanks you for introducing H.R. 5889, “The Orphan Works Act of 2008.” This bill would restore much needed balance to copyright law by freeing up for use by follow on creators so-called orphan works. However, we are concerned that certain provisions of the bill would limit its effectiveness. We support H.R. 5889 with certain changes that address these concerns.

H.R. 5889’s monetary relief provisions would allow users who conduct a “qualifying search” for a copyright owner to use the work without fear of crippling statutory damage awards if the owner cannot be located. Thus, it would promote the use of orphan works. The bill also contains provisions that would help users in their search for copyright owners, such as the best practices provisions that would require the Copyright Office to be a central repository of information that would guide such searches. At the same time, the provisions maintain sufficient flexibility to account for the myriad types of uses and users. The legislation would also allow these guidelines to change over time taking into account changes in search technology. Similarly, the provision relating to electronic databases of visual works would facilitate users finding owners of visual works.

The injunctive relief provisions of the bill would limit any adverse effects of an injunction on users by providing that a court cannot order a user to stop the use, if the user incorporated into the orphan work a “significant amount” of his creative expression.

However, we are concerned with three provisions in the bill that we believe will discourage users, and particularly small and nonprofit users, from employing its protections. They are: 1) the “notice of use archive” provision; 2) the “useful articles” exemption provision; and 3) the provision that grants courts discretion to consider the value of copyright registration when considering reasonable compensation.

The notice of use archive provision would impose onerous filing requirements on users without providing any real benefits to owners. It would require users to submit summaries of their searches along with a notice of intended use. It would also give the Copyright Office the discretion to impose fees on users making such filings. The justification for the notice of use archive provision is that it would prevent abuse of the orphan works provision by users. However, H.R. 5889 already contains another provision that would prevent abuse by users by requiring them to provide a “detailed description and documentation” of their search efforts during initial discovery disclosures. This provision obviates the need for such an archive.

The bill also contains a “useful articles” exemption that would prohibit the use of orphan works on any article that blurs the lines between a piece of art and a commodity. Such an exemption sets a bad precedent by treating certain uses as more valuable than others.

H.R. 5889’s provision that grants courts discretion to take into account the value of copyright registration when considering reasonable compensation would increase, instead of decreasing, the uncertainty of risk associated with use of orphan works. The bill would require reasonable compensation to reflect a market place negotiation between a willing buyer and a willing seller. The fact of registration does not add any value to the work in such a negotiation. By introducing a registration premium, H.R. 5889 would only make it harder for the user to predict what compensation he would have to pay. Although designed to “reward” copyright owners for registering their works, the provision also rewards owners who fail to update the registration with current information.

We urge you to strike the notice of use archive provision, the useful articles exemption provision and the registration premium provision from H.R. 5889. In addition, we urge you to consider one minor change to the provisions relating to electronic databases of visual works. While this provision would certainly solve the problems owners of such works face in keeping ownership information associated with their works, it does not go far enough in ensuring that these owners can be found.

The electronic database provision requires the Copyright Office to certify databases that satisfy certain requirements. None of these requirements include free public access to the database or machine-readability. In the absence of such requirements, users would have to conduct multiple searches of multiple databases in order to find owners. Because these electronic databases essentially fulfill a failure of the formal Copyright Office registry - to provide a useable source of ownership information, they should be cost effective, open, and machine-readable. In addition, the bill would require that in order to be certified, the database provide “security measures that reasonably protect against unauthorized access...”. Such a provision would force current database providers who wish to offer their services, to alter their services even when security measures are counter to the wishes of the copyright owners. A change to the bill’s language giving the owner the option to have security measures employed rather than requiring all databases to contain them would address this concern.

H.R. 5889 is a step in the right direction in solving the orphan works problem. We appreciate the continued effort of you and your staff to bridge the divide between certain owners and the user communities. We look forward to working with your staff in addressing the concerns mentioned above.

Sincerely,

A handwritten signature in black ink, appearing to read "Gigi B. Sohn". The signature is fluid and cursive, with the first name "Gigi" being the most prominent.

Gigi B. Sohn
President

cc: Members of Subcommittee on Courts, the Internet and Intellectual Property