

May 6, 2008

The Honorable Patrick J. Leahy
Chairman
U.S. Senate Committee on the Judiciary
433 Russell Senate Office Building
Washington, D.C. 20510

The Honorable Arlen Specter
Ranking Member
U.S. Senate Committee on the Judiciary
711 Hart Senate Office Building
Washington, D.C. 20510

The Honorable Orrin G. Hatch
104 Hart Senate Office Building
Washington, DC 20510

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

Dear Chairman Leahy, Ranking Member Specter, and Senator Hatch:

Public Knowledge is pleased to support S. 2913. We appreciate your efforts and the efforts of your staff in introducing this bill. “The Shawn Bentley Orphan Works Act of 2008” would restore much needed balance to copyright law by freeing up for use by follow on creators so-called orphan works. The bill would achieve this laudable goal by allowing users who conduct a “qualifying search” for a copyright owner to use a work without fear of crippling statutory damage awards if the owner cannot be located.

S. 2913 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.

We also appreciate that you and your staffs have not included in S.2913 certain provisions present in H.R. 5889 that would greatly limit the effectiveness of that bill in promoting use of orphan works: 1) a notice of use archive; 2) a “useful articles”

exemption; and 3) a value premium for registered works when a court considers reasonable compensation. With respect to the “notice of use archive,” S. 2913 already contains other provisions 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 obviates any need for such an archive. By not including a useful articles exemption, S. 2913 also avoids the bad precedent of treating certain uses as more valuable than others under copyright law. By not including a registration premium, your bill also does not allow for the possibility of rewarding owners who do not maintain their copyright registrations. We thank you for diligently maintaining the relative simplicity of your bill, which will be more effective in promoting uses of orphan works.

Lastly, we would urge you to consider one minor change to the bill’s 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.

We are extremely excited about S.2913, “The Shawn Bentley Orphan Works Act of 2008.” We look forward to working with your staff in addressing the minor 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 U.S. Senate Committee on the Judiciary