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"Orphan Works" in Copyright Law

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Summary

This report surveys the findings and conclusions in the U.S. Copyright Office's *Report on Orphan Works* and legislation introduced to address the problem. Orphan works are copyrighted works whose owners are difficult or impossible to identify and/or locate. The goal of the Report was to elicit public comment and evaluate the extent of real or perceived problems that content users encounter in their efforts to use these works.

Orphan works are perceived to be inaccessible because of the risk of infringement liability that a user might incur if and when a copyright owner subsequently appears. Consequently, many works that are, in fact, abandoned by owners are withheld from public view and circulation because of uncertainty about the owner and the risk of liability.

The Report defines the problems it identified, and concludes that the problem is indeed real and should be addressed legislatively. It analyzes stakeholders' views on the issue and constraints on solutions imposed by the structure of U.S. copyright law and international copyright obligations. The Report sets forth a proposal to amend the Copyright Act by adding a provision that would limit liability for infringing use of orphan works when, prior to use, a user performs a reasonably diligent search for the copyright owner and provides attribution to the author and copyright owner, if possible. In some instances, when copyright infringement is made without commercial advantage and the user ceases infringement promptly after receiving notice thereof, no monetary relief would be available.

H.R. 5439, 109th Congress, 2d Sess. (2006), the Orphan Works Act of 2006, would, if enacted, implement a limitation on liability for specified infringement of orphan works. The bill adopts many of the suggestions of the Copyright Office, although it takes a more detailed approach in establishing requirements for a limitation on liability, such as articulating standards for a "reasonably diligent search." The bill would direct the Copyright Office to study and report on the implementation of the new orphan works amendment, and to study and make recommendations for a "small claims" procedure to address copyright infringement.

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"Orphan Works" in Copyright Law

Background. In response to recent requests by several Members of Congress, the U.S. Copyright Office agreed to examine issues surrounding "orphan works." Orphan works are copyrighted works whose owners are difficult or impossible to identify and/or locate. In January 2005, the Copyright Office issued a Notice of Inquiry requesting public comment from interested parties on the subject.[1] The Office accepted written comments and hosted public roundtable discussions on the topic. In January 2006, it issued its *Report on Orphan Works*, which includes proposed legislative language to address the problem identified.[2] On March 8, 2006, the House Subcommittee on Courts, the Internet, and Intellectual Property held a hearing on orphan works.[3] The Senate Judiciary Committee held a hearing on April 6, 2006.[4]

This report surveys the findings of the *Report on Orphan Works* and considers the Copyright Office's proposed amendment to the Copyright Act to address the issue.

Defining the Problems Associated with Orphan Works. The constitutionally authorized grant of a limited monopoly to copyright holders is intended "To promote the Progress of Science and useful Arts" by producing incentives for creative works and their dissemination to the public.[5] Ultimately, it is the public interest that supports allowing copyright holders to financially exploit the value of their creative efforts by controlling access to protected work. Someone who wants to exercise one or more of the copyright holder's exclusive rights in a copyrighted work must obtain permission to do so.[6] The terms for usage and recompense, if any, are negotiated and agreed to by the rights' holder and the prospective user.[7]

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[1] Copyright Office, *Orphan Works: Notice of Inquiry*, 70 FED. REG. 3739 (Jan. 26, 2005).

[2] The full report is available on the U.S. Copyright Office's website at [http://www.copyright.gov/orphan/orphan-report-full.pdf]. Additional material, including the *Notice of Inquiry* and proceedings from the roundtable meetings, are also available there.

[3] *See House IP Panel Chairman Pledges to Move Orphan Works Legislation in 'Coming Weeks,'* 71 BNA PATENT, TRADEMARK & COPYRIGHT J 521 (March 17, 2006).

[4] *Orphan Works: Proposals for a Legislative Solution: Hearing before the Senate Comm. on the Judiciary*, 109th Cong., 2d Sess. (2006) at [http://judiciary.senate.gov/hearing.cfm?id=1847].

[5] U.S. Constitution, Art. 1, § 8, cl. 8.

[6] 17 U.S.C. § 106.

[7] In some cases, the Copyright Act prescribes terms for usage through compulsory licensing, but alternatives to traditional negotiated terms of usage are not discussed herein.

When an owner cannot be identified or located, a protected work is an "orphan" work. Many believe that orphan work status renders a work inaccessible. The inaccessibility arises from the risk of liability that a user might incur for copyright infringement if and when a copyright owner subsequently appears:

> First, the economic incentive to create may be undermined by the imposition of additional costs on subsequent creators wishing to use material from existing works. Subsequent creators may be dissuaded from creating new works incorporating existing works for which the owner cannot be found because they cannot afford the risk of potential liability or even of litigation. Second, the public interest may be harmed when works cannot be made available to the public due to uncertainty over its copyright ownership and status, even when there is no longer any living person or legal entity claiming ownership of the copyright or the owner no longer has any objection to such use.[8]

This risk of infringement may be particularly burdensome when a creator incorporates protected work into a new adaptation or transformative work. How then is public policy best served by facilitating the public's access to and use of such a work? And how best to define what constitutes an orphan work for infringement purposes, to facilitate access to orphan works, and to promote their use without vitiating the copyright or unfairly appropriating the work into the public domain?

Obstacles to Obtaining Permission. Copyright law is the engine driving a vast private market of rights' holders and users. The structure of the law in many ways shapes the intellectual property (IP) marketplace for negotiations between owners and users, but it does not control all aspects of it. Notifying the public of ownership is the responsibility of the rights' holder. Determining whether a work is protected and identifying the actual owner of the copyright (who may or may not be the creator) is the responsibility of the prospective user. But the identification process can be extremely complicated, difficult, and in many cases, prohibitively costly. There are many components to the determination of whether something is likely to be covered by copyright.[9] The prospective user must first make a preliminary determination as to whether a work is indeed copyrighted or has passed into the public domain.[10] Changes to the term of copyright effected by repeal of the 1909 law and adoption of the 1976 Act, subsequent extensions to the term, and the abandonment of "formalities" (discussed *infra*), all work to complicate calculations of the likely subsistence of copyright, particularly with respect to works created prior to 1978.[11]

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[8] *Notice of Inquiry,* 70 FED. REG. at 3741.

[9] *See* U.S. Copyright Office, *Circular 22: How to Investigate the Copyright Status of a Work* at [http://www.copyright.gov/circs/circ22.html].

[10] A chart entitled *Copyright Term and the Public Domain in the United States,1 January 2006* at [http://www.copyright.cornell.edu/training/Hirtle_Public_Domain.htm] provides an illustration of factors, such as publication, copyright notice, and renewal, that might apply in determining whether a work has entered the public domain.

[11] *See* U.S. Copyright Office, *Circular 15A: Duration of Copyright* at [http://www.copyright.gov/circs/circ15a.html]; *Circular 15t: Extension of Copyright Terms*. at [http://www.copyright.gov/circs/circ15t.html].

A Universal Registry of Copyright Owners. Although registration with the U.S. Copyright Office is most authoritative, there is no universal copyright registry. Various registries or databases exist to allow identification of copyright holders in various industries or mediums, but they are essentially voluntary, so checking with a database may not be dispositive regarding copyright status and/or ownership.[12] Furthermore, because IP is indeed property, through sale, assignment, or bequest, over time, ownership rights may be transferred. Older works of minimal commercial value may essentially be neglected or abandoned. Finding a copyright owner for them can be challenging.

Formalities. Under the 1909 Copyright law, there were many specific actions, i.e., "formalities," that needed to be taken by the creator/owner in order to create a valid copyright. Failure to do so could void the copyright. Among the essential formalities were posting of a notice of copyright on a work and registration with the U.S. Copyright Office. At the expiration of the first 28-year term of copyright, a renewal had to be filed to extend protection for another 28-year term.[13] Observing formalities as a prerequisite to creating a valid copyright was abandoned under the 1976 Copyright Act. Under current law, a copyright is created automatically when the creative expression is fixed in tangible form. Copyright formalities were rejected in the 1976 law for several reasons. The legislative history notes the concern that rigid formalities put an undue burden on creators, who could lose copyright protection in its entirety for failure to comply with a formality requirement.[14] A primary goal, however, was to harmonize U.S. copyright law with international treaties and practice, where formalities are not a requirement for copyright protection.

Nevertheless, changes to U.S. law significantly complicated the process of identifying copyright holders. One consequence of the formalities requirements associated with copyright creation was notice and registration. A search of copyright registration records was more — though not definitively — likely to help a prospective user determine both copyright status and owner information.

Copyright Infringement Litigation and Damages. Under the current law for works created after 1978, an owner *may* register a work at any time during the subsistence of the copyright.[15] A work *must* be registered prior to the rights' holder

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[12] See, for example, online indices for a music performing rights organization (PRO) such as ASCAP at [http://www.ascap.com] or the Harry Fox Agency at [http://www.songfile.com], or photo clearing houses such as Photographers Index at [http://www.photographersindex.com/].

[13] *See* U.S. Copyright Office, *Circular 15: Renewal of Copyright* at [http://www.copyright.gov/circs/circ15.html].

[14] *See* H.Rept. 94-1476, 94th Cong., 2d Sess. 147 (1976) and S. Rept 94-473, 94th Cong., 2d Sess. 130 (1976). ("[The bill] takes a middle-ground approach in an effort to encourage use of a copyright notice without causing unfair and unjustifiable forfeitures on technical grounds.").

[15] 17 U.S.C. § 408.

bringing suit for infringement;[16] registration is also necessary in order for a owner to seek statutory damages for infringement.[17]

In the event that a court finds copyright infringement, it may issue an injunction to prevent or stop it,[18] and award monetary damages. Damages may be the actual value of lost profits, or damages set by statute, known as "statutory damages."[19] Statutory damages prescribe amounts that may be significantly higher than actual damages for lost profits — from $750 to $150,000. The amount of statutory damages may be increased in cases where a court finds that infringement was willful or, correspondingly, reduced when it finds the infringement was "innocent," i.e., the infringer was "not aware and had no reason to believe that his or her acts constituted an infringement," or the infringer had reasonable grounds to believe that the use was a fair use under § 107. A court may also award court costs and attorneys' fees.[20] In other words, registration, with its effect of creating a searchable record and thereby providing public notice of ownership, is not legally required to *create* a copyright, but to *enforce* it. The existence of statutory damages and the award of attorneys' fees facilitates enforcement of infringement liability by rights' holders when actual damages may not support the costs of litigation.

The *Report on Orphan Works*. By conducting stakeholder discussions and reviewing extensive submissions of comments, the U.S. Copyright Office's study considers the landscape surrounding orphan works.

At the outset, it sets forth what were *not* considered to be orphan work problems, namely, situations where a prospective user contacted the owner but did not receive permission to use the work.[21] The analysis also narrows the situations in which it views orphan works as presenting an insurmountable problem to prospective users. It delineates several provisions of the copyright law that might permit use of an orphan work (or any copyrighted work) absent an owner's permission:

- The "idea/expression" dichotomy, rooted in the First Amendment and codified at 17 U.S.C. 102(b), prohibits copyright protection for ideas, procedures, concepts, etc. that may otherwise be embodied in a copyright-protected work.[22] This jurisdictional limitation on

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[16] 17 U.S.C. § 411.

[17] 17 U.S.C. § 412.

[18] 17 U.S.C. § 502.

[19] 17 U.S.C. § 504.

[20] 17 U.S.C. § 505.

[21] Report on Orphan Works (hereinafter Report) at 2. "These include situations where the user contacted the owner, but did not receive permission to use the work, either because the owner did not respond to the request, refused the request, or required a license fee that the user felt was too high."

[22] Specifically, the "idea/expression" dichotomy, 17 U.S.C. § 102(b), prohibits copyright (continued...)

copyright protection may be especially useful to prospective users of works of non-fiction, and "utilitarian" works like computer programs, textbooks, manuals, etc.[23]

- Fair use, codified at 17 U.S.C. § 107, permits limited use of copyright-protected work for purposes such as criticism, comment, news reporting, teaching, scholarship, or research.

- Other express exemptions in the Copyright Act at §§ 108, 110, and 117 allow specified uses of copyrighted works associated with preservation, education, and religious activities.

The Report identifies many obstacles to identifying and locating copyright owners and assigns general categories of uses that appear to be most impacted by orphan works, namely, uses by "subsequent creators" who may create a derivative commercial work incorporating the orphan work; "large scale access uses" by institutions such as libraries that make available a wide body of work to the public; "enthusiast" uses by individuals who have an interest in a particular work, subject, or artist; and "private" uses, the most common illustration being someone who wishes to reproduce a family photograph or make a potentially infringing use of obsolete or orphaned computer software.[24]

The Report explains that the 1976 Copyright Act arguably exacerbated the orphan works problem by abandoning formalities such as renewal registration, and why the international copyright regime to which the United States is a signatory both precludes a re-adoption of formalities and limits the scope of permissible exemptions to the copyright holders' rights.[25]

The study reviews solutions proposed by those involved in the orphan works dialogue. It groups and considers them in four categories, described in the Report as follows:

• *Solutions that already exist under current law and practice*. These were usually noted only in passing; commenters (even commenters opposed to any orphan works provision) did not take the position that the existing law is sufficient to solve the orphan works problem.

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[22] (...continued)
protection for any idea, procedure, process, system, method of operation, concept, principle, or discovery.

[23] Report at 53, citing at note 123, Eldred v. Ashcroft, 537 U.S. 186, 219-21 (2003).

[24] *Id.* at 36-40.

[25] "In considering legislative solutions to the orphan works problem it is important to keep in mind the requirements of the international instruments to which the United States has agreed: exercise and enjoyment of a copyright right cannot be conditioned on a formality, any exceptions or limitations on copyright must conform to the three-step test [under international treaty obligations], and the effect on the owner's remedies must comply with the various remedy rules." *Id.* at 68.

> • *Non-legislative solutions.* An example of a solution in this category is a proposal for improved databases for locating owners of works. These solutions were also usually noted only in passing, and were not advanced as sufficient to fix the problem.
> • *Legislative solutions that involve a limitation on remedies when a user uses an orphan work.* The most substantive comments fell into this category, and most of the comments by professional organizations or academics fell into this category.
> • *Other legislative solutions.* Examples of proposed solutions in this category are deeming all orphaned works to be in the public domain, or changing the tax or bankruptcy codes to reduce the factors that cause orphan works to come into existence in the first place.[26]

It also considers several of the solutions proposed. For example, one approach might be that utilized by the Canadian Copyright Board, which reviews applications for use of orphan works and approves them prior to use. This method receives support by some for the certainty that it provides and opposition by others who view it as administratively cumbersome, expensive, and largely ineffective in promoting actual use of orphan works.

The Copyright Office's Recommendation. The Report concludes that the orphan work problem, though difficult to describe and quantify, is indeed real. Though some instances of non-infringing use of such works may be effected under other sections of the law, there are still many situations in which prospective users lack guidance on whether and how they may use orphan works, and authority to do so. The Report recommends statutory language to remedy the orphan works problem,[27] with a detailed supporting rationale.

The proposal takes the approach of limiting remedies for the copyright owner if a user satisfies new statutory requirements for use of an orphan work. The proposed language would add a new § 514 under chapter 5 of the Copyright Act, dealing with copyright infringement and remedies. One who uses an orphan work would be required to have performed "a good faith, reasonably diligent search" to identify the copyright holder and provide "attribution to the author and copyright owner of the work, if possible and appropriate." If the user of a orphan work who has satisfied the search and attribution requirements is subsequently sued by the rights' holder for infringement, the owner would be limited to "reasonable compensation for the use of the infringed work." When the infringement is made without commercial advantage and the user ceases infringement promptly after receiving notice thereof, no monetary relief would be available.

Injunctive relief, i.e., prohibiting continuing use of the infringing work, would *not* be available when the orphan work is incorporated into a derivative work that uses the protected work in a transformative manner, provided that the infringer pays reasonable compensation to the copyright owner and provides attribution to the protected work as reasonable. In all other cases, the court may impose injunctive relief to prevent the continuing infringement, but would be directed to consider the

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[26] *Id.* at 69.

[27] *Id.* at 127.

harm that relief would cause the infringer who has complied with orphan works requirements in making the infringing use.

The proposed language specifies that nothing in its provisions would affect other rights, limitations or defenses to copyright infringement, including fair use. The provision would sunset ten years after enactment.

The goal of the proposal is to promote the good-faith use of true orphan works by limiting damages available in the event that an owner appears and the user is subsequently charged with infringement. The proposed solution attempts to balance several competing interests:

Notice. Some content users complain about the lack of easy-to-use comprehensive sources of information identifying copyright owners. Easier access to ownership information would minimize mistakes by users in calculating whether a work is actually an orphan work. But a solution that imposes notice or identification requirements on rights' holders as a condition of protecting their copyright would violate both the Copyright Act and international treaty obligations if its effect was to reinstate formality requirements. While it is obviously in the interest of copyright holders to make the public aware of ownership, the proposal would not impose additional regulatory burdens on owners, or the government, by establishing new reporting mechanisms.

Certainty versus Flexibility. Many who promote access to orphan works seek a system that best assures potential users that they will be exempt from copyright infringement liability *prior* to usage. But any proposed orphan work exemption will potentially affect a vast array of industries and media, such as movies, music, books, and photographs. There are different physical characteristics, traditions, standards, and business practices which affect the ease of researching ownership and obtaining permissions for any given medium. Likewise, different users have different goals, such as nonprofit versus commercial usage.

The approach suggested is in many ways comparable to copyright's well-known "fair use" exemption in its breadth and flexibility.[28] Like fair use, the orphan work exemption would be a *defense* to copyright infringement. The proposal takes a case-by-case approach that would give a court discretion to consider behavior by both the user and claimant. Did the user perform a "reasonably diligent search" with proper attribution? Did the claimant decline to accept "reasonable compensation" for the identified infringement, which, under the proposal, becomes, in effect, a statutory cap on relief available? Arguably, it would share many of the strengths and weaknesses of fair use. Among the former is flexibility to accommodate a broad range of media and situations. Among the latter may be difficulty assessing the likelihood of the success of the defense, and costs that may be unintentionally incurred.

Standards. The proposal does not define terms such as "reasonably diligent search," although much discussion is provided. Best practices for media-specific

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[28] 17 U.S.C. § 107.

searches are likely to evolve over time through collaborative efforts and judicial interpretation. Likewise the notion of reasonable compensation is a fluid one, another factor that is viewed as advantageous or non-advantageous by different parties. Critics among users point to difficulties when the amount of liability exposure is uncertain. Critics among owners worry that courts interpreting the term may depress the value of "reasonable compensation," by valuing it at what the user proposes to pay absent negotiations. They fear that it may amount to a statutory royalty rate.

Damages. Because the proffered exemption is a defense to copyright infringement, the costs of litigation were considered in the discussion. Indeed, the Report spells out at great length the concerns expressed by both content owners and users on the burdens imposed by having to litigate a claim of or a defense to infringement. Users argue that the prospect of statutory damages has a chilling effect on their use of valuable historic material, for example, documentary film footage. But many owners assert that a limitation on the remedies for infringement would make enforcement impracticable. They simply cannot enforce their copyright if the enforcement costs more than recoverable damages.

Visual Arts. Photography and visual arts pose special challenges for copyright ownership identification generally, and, consequently, in connection with orphan works. By their very nature, they are difficult to source. Critics are concerned that the orphan work proposal would affect illustrations and photographs disproportionately because images are commonly published, by tradition or business practice, without identifying information. If a visual representation contains identifying information, it may be, and often is, easily removed. Verbal registries cannot adequately describe visual representations, e.g., "nine abstract dogs in an abstract garden."[29] Visual registries may contain prohibitively voluminous entries and be too difficult to search. They fear enactment of the orphan works proposal might interfere with commercial markets for visual work; that it could have the effect of "legalizing" infringement where ever the rights' holder cannot be identified or located; that it will put too great a burden on rights' holders to exercise diligence in monitoring infringing use; and that limiting recoverable damages will make enforcement actions economically unfeasible. The *de facto* result, they contend, would deprive visual artists of meaningful copyright protection.[30]

H.R. 5439, 109th Congress, 2d Sess., the Orphan Works Act of 2006. A bill incorporating many of the recommendations of the Copyright Office was introduced and reported by the House Subcomm. on Courts, the Internet, and Intellectual Property in May 2006.

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[29] Roy de Forest, *County Dog Gentleman,* 1972, San Francisco Museum of Modern Art.

[30] *See* statement of David P. Trust, CEO of Professional Photographers of America before the House Judiciary Committee (March 8, 2006), at [http://judiciary.house.gov/oversight.aspx?ID=221]; statement of Victor Perlman, General Counsel of the American Society of Media Photographers, and statement of Brad Holland, Founding Board Member, Illustrators' Partnership of America, before the Senate Judiciary Committee (April 6, 2006), at [http://judiciary.senate.gov/hearing.cfm?id=1847].

The bill would add a new § 514 to the Copyright Act entitled "Limitation on remedies in cases involving orphan works." It would essentially implement the Copyright Office's proposal to limit liability for an infringing use of an orphan work. As a prerequisite to qualifying for the limitation, the infringer must sustain the burden of proving that he or she performed and documented a reasonably diligent search in good faith but was unable to locate the owner. The infringing use must provide reasonable attribution to the author and owner "if known with a reasonable degree of certainty based on information obtained in performing the reasonably diligent search."[31]

The bill provides significantly greater detail than the Copyright Office's proposed language. H.R. 5439 sets forth standards to establish what is a "reasonably diligent search." Lack of identifying copyright information on the work, by itself, cannot support an assertion or finding of a diligent search. A search must include steps that are "reasonable under the circumstances" to locate an owner, which would include, at a minimum:

- review of information maintained by the Copyright Office; and
- use of expert assistance and available technology, which may include resources for which a charge or subscription fee is imposed, if reasonable under the circumstances.

Copyright Office Assistance. The Copyright Office currently provides some assistance in searching its records. It will conduct a search of its records for a fee.[32] And, it publishes general background information on conducting copyright searches.[33]

The bill significantly expands the scope of guidance that the Copyright Office must make available to the public to educate and assist in researching copyright ownership. Specifically, it is directed to provide information from "authoritative sources," such as industry guidelines and statements of best practices to assist users who conduct searches. Information may include the Copyright Office's own records, but should also address other sources of available copyright ownership information; methods to identify copyright ownership; sources of available technology and expert assistance; and, suggestions for best practices to document a search. The extent to which a user's reliance upon Copyright Office-provided guidance and information may satisfy the legal requirement that the user conduct a "reasonably diligent search" in possible infringement litigation is not addressed.

Limitations on Remedies. The heart of the bill is the limitation on monetary damages when the use of an orphan work is found to be infringing. Users who have satisfied statutory criteria will be required to pay "reasonable compensation" for the

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[31] Sec. 2 of H.R. 5439 adding a new § 514(a)(1)(B).

[32] *See* [http://www.copyright.gov/forms/search_estimate.html].

[33] *See*, *e.g.*, Circular 22, *How to Investigate the Copyright Status of a Work* at [http://www.copyright.gov/circs/circ22.html].

use of the infringed work, provided that they negotiate "in good faith" with the owner to determine compensation. The burden of proof to establish "reasonable compensation" falls upon the owner of the infringed copyright. The term means "the amount on which a reasonable buyer and a reasonable willing seller in the positions of the owner and the infringer would have agreed with respect to the infringing use of the work immediately before the infringement began."[34]

A user who infringes without any purpose of commercial advantage for a charitable, religious, scholarly, or educational purpose may be exempt from the requirement to pay compensation if he or she ceases the infringing use after receiving notice of the claim for infringement. Before a court awards injunctive relief, it is directed to take into account any harm that the relief would cause the infringer who has performed a diligent search. A court may not enjoin the infringing use of an orphan work when it is incorporated into a new work of authorship, so long as the infringer pays reasonable compensation and provides attribution to the owner of the infringed work.

Parties Not Subject to Suit. A party or entity that asserts that it is not subject to suit in federal court or liable for money damages for infringement under the Copyright Act may not avail itself of the limitations on remedies for infringing orphan works unless several conditions are met. A court must find that the party complied with diligent search requirements, made a good faith offer of compensation which was rejected by the copyright holder, and will assure the court of its willingness to pay reasonable compensation.

This provision appears to be directed at any state which may assert immunity against liability for copyright infringement in accordance with the U.S. Supreme Court's Eleventh Amendment jurisprudence.[35] The U.S. Supreme Court, in a series of decisions, has interpreted the Eleventh Amendment of the U.S. Constitution as limiting Congress's authority to abrogate state sovereign immunity. Consequently, a state may not be sued in federal court for copyright infringement.[36]

Reports to Congress. The bill directs the Register of Copyrights to report to Congress on the implementation and effects of the limitation of liability for orphan works, including any recommendations for change.

The Register is also directed to conduct an inquiry with respect to remedies for "small" copyright infringement claims, that is, those seeking limited amounts of money damages. This requirement appears to address the concerns of participants

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[34] Sec. 2 of H.R. 5439 adding a new § 514(b)(3).

[35] Seminole Tribe of Fla. v. Florida, 517 U.S. 44 (1996); Florida Prepaid Postsecondary Educ. Expense Bd. v. College Savings Bank, 527 U.S. 627 (1999) and College Savings Bank v. Florida Prepaid Postsecondary Educ. Expense Bd.527 U.S. 666 (1999). A detailed discussion of state immunity from copyright infringement litigation is beyond the scope of this report.

[36] *See, e.g.*, Chavez v. Arte Publico Press, 204 F.3d 601 (5th Cir. 2000); *see also* Pennington Seed Inc. v. Produce Exchange No. 299, 2006 U.S. App. LEXIS 20363, (Fed. Cir. Aug. 9, 2006)(holding that the University of Arkansas is immune from a patent infringement suit).

in the orphan works roundtables who expressed frustration at the expense of litigating a claim for copyright infringement. The Copyright Office is to invite public comment and conduct roundtables. At the conclusion, the Office will submit a report including such recommendations that the Register considers appropriate.

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