

109<sup>TH</sup> CONGRESS  
2<sup>D</sup> SESSION

# H. R. 5439

To amend title 17, United States Code, to provide for limitation of remedies in cases in which the copyright owner cannot be located, and for other purposes.

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## IN THE HOUSE OF REPRESENTATIVES

MAY 22, 2006

Mr. SMITH of Texas introduced the following bill; which was referred to the Committee on the Judiciary

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## A BILL

To amend title 17, United States Code, to provide for limitation of remedies in cases in which the copyright owner cannot be located, and for other purposes.

1 *Be it enacted by the Senate and House of Representa-*  
2 *tives of the United States of America in Congress assembled,*

3 **SECTION 1. SHORT TITLE.**

4 This Act may be cited as the “Orphan Works Act  
5 of 2006”.

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

3 (a) LIMITATION ON REMEDIES.—Chapter 5 of title  
4 17, United States Code, is amended by adding at the end  
5 the following new section:

6 **“§ 514. Limitation on remedies in cases involving or-**  
7 **phan works**

8 “(a) LIMITATION ON REMEDIES.—

9 “(1) CONDITIONS.—Notwithstanding sections  
10 502 through 505, in an action brought under this  
11 title for infringement of copyright in a work, the  
12 remedies for infringement shall be limited under  
13 subsection (b) if the infringer sustains the burden of  
14 proving, and the court finds, that—

15 “(A) before the infringing use of the work  
16 began, the infringer, a person acting on behalf  
17 of the infringer, or any person jointly and sev-  
18 erally liable with the infringer for the infringe-  
19 ment of the work—

20 “(i) performed and documented a rea-  
21 sonably diligent search in good faith to lo-  
22 cate the owner of the infringed copyright;  
23 but

24 “(ii) was unable to locate the owner;  
25 and

1           “(B) the infringing use of the work pro-  
2           vided attribution, in a manner reasonable under  
3           the circumstances, to the author and owner of  
4           the copyright, if known with a reasonable de-  
5           gree of certainty based on information obtained  
6           in performing the reasonably diligent search.

7           “(2) DEFINITIONS; REQUIREMENTS FOR  
8           SEARCHES.—

9           “(A) OWNER OF INFRINGED COPYRIGHT.—  
10           For purposes of paragraph (1), the ‘owner’ of  
11           an infringed copyright in a work is the legal or  
12           beneficial owner of, or any party with authority  
13           to grant or license, an exclusive right under sec-  
14           tion 106 applicable to the infringement.

15           “(B) REQUIREMENTS FOR REASONABLY  
16           DILIGENT SEARCH.—(i) For purposes of para-  
17           graph (1), a search to locate the owner of an  
18           infringed copyright in a work—

19                   “(I) is ‘reasonably diligent’ only if it  
20                   includes steps that are reasonable under  
21                   the circumstances to locate that owner in  
22                   order to obtain permission for the use of  
23                   the work; and

24                   “(II) is not ‘reasonably diligent’ solely  
25                   by reference to the lack of identifying in-

1           formation with respect to the copyright on  
2           the copy or phonorecord of the work.

3           “(ii) The steps referred to in clause (i)(I)  
4           shall ordinarily include, at a minimum, review  
5           of the information maintained by the Register  
6           of Copyrights under subparagraph (C).

7           “(iii) A reasonably diligent search includes  
8           the use of reasonably available expert assistance  
9           and reasonably available technology, which may  
10          include, if reasonable under the circumstances,  
11          resources for which a charge or subscription fee  
12          is imposed.

13          “(C)        INFORMATION        TO        GUIDE  
14          SEARCHES.—The Register of Copyrights shall  
15          receive, maintain, and make available to the  
16          public, including through the Internet, informa-  
17          tion from authoritative sources, such as indus-  
18          try guidelines, statements of best practices, and  
19          other relevant documents, that is designed to  
20          assist users in conducting and documenting a  
21          reasonably diligent search under this sub-  
22          section. Such information may include—

23                “(i) the records of the Copyright Of-  
24                fice that are relevant to identifying and lo-  
25                cating copyright owners;

1 “(ii) other sources of copyright owner-  
2 ship information reasonably available to  
3 users;

4 “(iii) methods to identify copyright  
5 ownership information associated with a  
6 work;

7 “(iv) sources of reasonably available  
8 technology tools and reasonably available  
9 expert assistance; and

10 “(v) best practices for documenting a  
11 reasonably diligent search.

12 “(b) LIMITATIONS ON REMEDIES.—The limitations  
13 on remedies in a case to which subsection (a) applies are  
14 the following:

15 “(1) MONETARY RELIEF.—

16 “(A) GENERAL RULE.—Subject to sub-  
17 paragraph (B), an award for monetary relief  
18 (including actual damages, statutory damages,  
19 costs, and attorney’s fees) may not be made,  
20 other than an order requiring the infringer to  
21 pay reasonable compensation for the use of the  
22 infringed work.

23 “(B) EXCEPTIONS.—(i) An order requiring  
24 the infringer to pay reasonable compensation

1 for the use of the infringed work may not be  
2 made under subparagraph (A) if—

3 “(I) the infringement is performed  
4 without any purpose of direct or indirect  
5 commercial advantage and primarily for a  
6 charitable, religious, scholarly, or edu-  
7 cational purpose, and

8 “(II) the infringer ceases the infringe-  
9 ment expeditiously after receiving notice of  
10 the claim for infringement,

11 unless the copyright owner proves, and the  
12 court finds, that the infringer has earned pro-  
13 ceeds directly attributable to the infringement.

14 “(ii) If the infringer fails to negotiate in  
15 good faith with the owner of the infringed work  
16 regarding the amount of reasonable compensa-  
17 tion for the use of the infringed work, the court  
18 may award full costs, including a reasonable at-  
19 torney’s fee, against the infringer under section  
20 505, subject to section 412.

21 “(2) INJUNCTIVE RELIEF.—

22 “(A) GENERAL RULE.—Subject to sub-  
23 paragraph (B), the court may impose injunctive  
24 relief to prevent or restrain the infringing use,  
25 except that, if the infringer has met the re-

1           quirements of subsection (a), the relief shall, to  
2           the extent practicable, account for any harm  
3           that the relief would cause the infringer due to  
4           its reliance on having performed a reasonably  
5           diligent search under subsection (a).

6           “(B) SPECIAL RULE FOR NEW WORKS.—In  
7           a case in which the infringer recasts, trans-  
8           forms, adapts, or integrates the infringed work  
9           with the infringer’s original expression in a new  
10          work of authorship, the court may not, in  
11          granting injunctive relief, restrain the infring-  
12          er’s continued preparation or use of that new  
13          work, if the infringer—

14                 “(i) pays reasonable compensation to  
15                 the owner of the infringed copyright for  
16                 the use of the infringed work; and

17                 “(ii) provides attribution to the owner  
18                 of the infringed copyright in a manner that  
19                 the court determines is reasonable under  
20                 the circumstances.

21          “(C) TREATMENT OF PARTIES NOT SUB-  
22          JECT TO SUIT.—The limitations on remedies  
23          under this paragraph shall not be available to  
24          an infringer that asserts in an action under sec-  
25          tion 501(b) that neither it nor its representative

1 acting in an official capacity is subject to suit  
2 in Federal court for an award of damages to  
3 the copyright owner under section 504, unless  
4 the court finds that such infringer has—

5 “(i) complied with the requirements of  
6 subsection (a) of this section;

7 “(ii) made a good faith offer of com-  
8 pensation that was rejected by the copy-  
9 right owner; and

10 “(iii) affirmed in writing its willing-  
11 ness to pay such compensation to the copy-  
12 right owner upon the determination by the  
13 court that such compensation was reason-  
14 able under paragraph (3) of this sub-  
15 section.

16 “(D) CONSTRUCTION.—Nothing in sub-  
17 paragraph (C) shall be deemed to authorize or  
18 require, and no action taken pursuant to sub-  
19 paragraph (C) shall be deemed to constitute, an  
20 award of damages by the court against the in-  
21 fringer.

22 “(E) RIGHTS AND PRIVILEGES NOT  
23 WAIVED.—No action taken by an infringer pur-  
24 suant to subparagraph (C) shall be deemed to  
25 waive any right or privilege that, as a matter of



1 law, protects such infringer from being subject  
2 to suit in Federal court for an award of dam-  
3 ages to the copyright owner under section 504.

4 “(3) REASONABLE COMPENSATION.—In estab-  
5 lishing reasonable compensation under paragraph  
6 (1) or (2), the owner of the infringed copyright has  
7 the burden of establishing the amount on which a  
8 reasonable willing buyer and a reasonable willing  
9 seller in the positions of the owner and the infringer  
10 would have agreed with respect to the infringing use  
11 of the work immediately before the infringement  
12 began.

13 “(c) PRESERVATION OF OTHER RIGHTS, LIMITA-  
14 TIONS, AND DEFENSE.—This section does not affect any  
15 right, limitation, or defense to copyright infringement, in-  
16 cluding fair use, under this title. If another provision of  
17 this title provides for a statutory license when the copy-  
18 right owner cannot be located, that provision applies in  
19 lieu of this section.

20 “(d) COPYRIGHT FOR DERIVATIVE WORKS.—Not-  
21 withstanding section 103(a), the infringing use of a work  
22 in accordance with this section shall not limit or affect  
23 the copyright protection for a work that uses the infringed  
24 work.”.

1 (b) CONFORMING AMENDMENT.—The table of sec-  
2 tions for chapter 5 of title 17, United States Code, is  
3 amended by adding at the end the following new item:

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

4 (c) EFFECTIVE DATE.—The amendments made by  
5 this section shall apply only to infringing uses that com-  
6 mence on or after June 1, 2008.

7 **SEC. 3. REPORT TO CONGRESS ON AMENDMENTS.**

8 The Register of Copyrights shall, not later than De-  
9 cember 12, 2014, report to the Committee on the Judici-  
10 ary of the House of Representatives and the Committee  
11 on the Judiciary of the Senate on the implementation and  
12 effects of the amendments made by section 2, including  
13 any recommendations for legislative changes that the Reg-  
14 ister considers appropriate.

15 **SEC. 4. INQUIRY ON REMEDIES FOR SMALL COPYRIGHT**  
16 **CLAIMS.**

17 (a) IN GENERAL.—The Register of Copyrights shall  
18 conduct an inquiry with respect to remedies for copyright  
19 infringement claims seeking limited amounts of monetary  
20 relief, including consideration of alternatives to disputes  
21 currently heard in the United States district courts. The  
22 inquiry shall cover infringement claims to which section  
23 514 of title 17, United States Code (as added by section  
24 2 of this Act), apply, and other infringement claims under  
25 title 17, United States Code.

1           (b) PROCEDURES.—The Register of Copyrights shall  
2 publish notice of the inquiry under subsection (a), pro-  
3 viding a period during which interested persons may sub-  
4 mit comments on the inquiry, and an opportunity for in-  
5 terested persons to participate in public roundtables on  
6 the inquiry. The Register shall hold the public roundtables  
7 at such times as the Register considers appropriate.

8           (c) REPORT TO CONGRESS.—The Register of Copy-  
9 rights shall, not later than 1 year after the date of the  
10 enactment of this Act, prepare and submit to the Com-  
11 mittee on the Judiciary of the House of Representatives  
12 and the Committee on the Judiciary of the Senate a report  
13 on the inquiry conducted under this section, including  
14 such recommendations that the Register considers appro-  
15 priate.

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