

Calendar No. 738

110TH CONGRESS
2D SESSION**S. 2913**

To provide a limitation on judicial remedies in copyright infringement cases involving orphan works.

IN THE SENATE OF THE UNITED STATES

APRIL 24, 2008

Mr. LEAHY (for himself and Mr. HATCH) introduced the following bill; which was read twice and referred to the Committee on the Judiciary

MAY 15, 2008

Reported by Mr. LEAHY, with an amendment

[Strike out all after the enacting clause and insert the part printed in *italic*]

A BILL

To provide a limitation on judicial remedies in copyright infringement cases involving orphan works.

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 “Shawn Bentley Orphan
5 Works Act of 2008”.

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:

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

8 “(a) **DEFINITIONS.**—In this section, the following
 9 definitions shall apply:

10 “(1) **MATERIALS AND STANDARDS.**—The term
 11 ‘materials and standards’ includes—

12 “(A) the records of the Copyright Office
 13 that are relevant to identifying and locating
 14 copyright owners;

15 “(B) sources of copyright ownership infor-
 16 mation reasonably available to users, including
 17 private databases;

18 “(C) industry practices and guidelines of
 19 associations and organizations;

20 “(D) technology tools and expert assist-
 21 ance, including resources for which a charge or
 22 subscription fee is imposed, to the extent that
 23 the use of such resources is reasonable for, and
 24 relevant to, the scope of the intended use; and

25 “(E) electronic databases, including data-
 26 bases that are available to the public through

1 the Internet, that allow for searches of copy-
2 righted works and for the copyright owners of
3 works, including through text, sound, and
4 image recognition tools.

5 “(2) NOTICE OF CLAIM FOR INFRINGEMENT.—

6 The term ‘notice of the claim for infringement’
7 means, with respect to a claim for copyright in-
8 fringement, a written notice that includes at a min-
9 imum the following:

10 “(A) The name of the owner of the in-
11 fringed copyright.

12 “(B) The title of the infringed work, any
13 alternative titles of the infringed work known to
14 the owner of the infringed copyright, or if the
15 work has no title, a description in detail suffi-
16 cient to identify it.

17 “(C) An address and telephone number at
18 which the owner of the infringed copyright may
19 be contacted.

20 “(D) Information from which a reasonable
21 person could conclude that the owner of the in-
22 fringed copyright’s claims of ownership and in-
23 fringement are valid.

24 “(3) OWNER OF THE INFRINGED COPYRIGHT.—

25 The ‘owner of the infringed copyright’ is the legal

1 owner of the exclusive right under section 106, or
 2 any party with the authority to grant or license such
 3 right, that is applicable to the infringement.

4 “(4) REASONABLE COMPENSATION.—The term
 5 ‘reasonable compensation’ means, with respect to a
 6 claim for infringement, the amount on which a will-
 7 ing buyer and willing seller in the positions of the
 8 infringer and the owner of the infringed copyright
 9 would have agreed with respect to the infringing use
 10 of the work immediately before the infringement
 11 began.

12 “(b) CONDITIONS FOR ELIGIBILITY.—

13 “(1) CONDITIONS.—

14 “(A) IN GENERAL.—Notwithstanding sec-
 15 tions 502 through 505, and subject to subpara-
 16 graph (B), in a civil action brought under this
 17 title for infringement of copyright in a work,
 18 the remedies for infringement shall be limited
 19 in accordance with subsection (c) if the in-
 20 fringer—

21 “(i) proves by a preponderance of the
 22 evidence that before the infringement
 23 began, the infringer, a person acting on be-
 24 half of the infringer, or any person jointly

1 and severally liable with the infringer for
2 the infringement—

3 “(I) performed and documented
4 a qualifying search, in good faith, for
5 the owner of the infringed copyright;
6 and

7 “(II) was unable to locate the
8 owner of the infringed copyright;

9 “(ii) provided attribution, in a manner
10 that is reasonable under the circumstances,
11 to the owner of the infringed copyright, if
12 such owner was known with a reasonable
13 degree of certainty, based on information
14 obtained in performing the qualifying
15 search;

16 “(iii) included with the use of the in-
17 fringing work a symbol or other notice of
18 the use of the infringing work, in a man-
19 ner prescribed by the Register of Copy-
20 rights;

21 “(iv) asserts in the initial pleading to
22 the civil action the right to claim such limi-
23 tations;

24 “(v) consents to the jurisdiction of
25 United States district court, or such court

1 holds that the infringer is within the juris-
2 diction of the court; and

3 “(vi) at the time of making the initial
4 discovery disclosures required under rule
5 26 of the Federal Rules of Civil Procedure;
6 states with particularity the basis for the
7 right to claim the limitations, including a
8 detailed description and documentation of
9 the search undertaken in accordance with
10 paragraph (2)(A).

11 “(B) EXCEPTION.—Subparagraph (A)
12 does not apply if, after receiving notice of the
13 claim for infringement and having an oppor-
14 tunity to conduct an expeditious good faith in-
15 vestigation of the claim, the infringer—

16 “(i) fails to negotiate reasonable com-
17 pensation in good faith with the owner of
18 the infringed copyright; or

19 “(ii) fails to render payment of rea-
20 sonable compensation in a reasonably time-
21 ly manner.

22 “(2) REQUIREMENTS FOR SEARCHES.—

23 “(A) REQUIREMENTS FOR QUALIFYING
24 SEARCHES.—

1 “(i) IN GENERAL.—For purposes of
2 paragraph (1)(A)(i)(I), a search is quali-
3 fying if the infringer undertakes a diligent
4 effort to locate the owner of the infringed
5 copyright.

6 “(ii) DETERMINATION OF DILIGENT
7 EFFORT.—In determining whether a
8 search is diligent under this subparagraph,
9 a court shall consider whether—

10 “(I) the actions taken in per-
11 forming that search are reasonable
12 and appropriate under the facts rel-
13 evant to that search, including wheth-
14 er the infringer took actions based on
15 facts uncovered by the search itself;

16 “(II) the infringer employed the
17 applicable best practices maintained
18 by the Register of Copyrights under
19 subparagraph (B); and

20 “(III) the infringer performed
21 the search before using the work and
22 at a time that was reasonably prox-
23 imate to the commencement of the in-
24 fringement.

1 “(iii) LACK OF IDENTIFYING INFOR-
2 MATION.—The fact that a particular copy
3 of phonorecord lacks identifying informa-
4 tion pertaining to the owner of the in-
5 fringed copyright is not sufficient to meet
6 the conditions under paragraph
7 (1)(A)(i)(I).

8 “(B) INFORMATION TO GUIDE SEARCHES;
9 BEST PRACTICES.—

10 “(i) STATEMENTS OF BEST PRAC-
11 TICES.—The Register of Copyrights shall
12 maintain and make available to the public,
13 including through the Internet, current
14 statements of best practices for conducting
15 and documenting a search under this sub-
16 section.

17 “(ii) CONSIDERATION OF RELEVANT
18 MATERIALS AND STANDARDS.—In main-
19 taining the statements of best practices re-
20 quired under clause (i), the Register of
21 Copyrights shall, from time to time, con-
22 sider materials and standards that may be
23 relevant to the requirements for a quali-
24 fying search under subparagraph (A).

1 “(3) PENALTY FOR FAILURE TO COMPLY.—If
 2 an infringer fails to comply with any requirement
 3 under this subsection, the infringer is subject to all
 4 the remedies provided in section 502 through 505,
 5 subject to section 412.

6 “(e) LIMITATIONS ON REMEDIES.—The limitations
 7 on remedies in a civil action for infringement of a copy-
 8 right to which this section applies are the following:

9 “(1) MONETARY RELIEF.—

10 “(A) GENERAL RULE.—Subject to sub-
 11 paragraph (B), an award for monetary relief
 12 (including actual damages, statutory damages,
 13 costs, and attorney’s fees) may not be made
 14 other than an order requiring the infringer to
 15 pay reasonable compensation to the legal or
 16 beneficial owner of the exclusive right under the
 17 infringed copyright for the use of the infringed
 18 work.

19 “(B) FURTHER LIMITATIONS.—An order
 20 requiring the infringer to pay reasonable com-
 21 pensation for the use of the infringed work may
 22 not be made under subparagraph (A) if the in-
 23 fringer is a nonprofit educational institution,
 24 museum, library, or archives, or a public broad-
 25 casting entity (as defined in subsection (f) of

1 section 118) and the infringer proves by a pre-
2 ponderance of the evidence that—

3 “(i) the infringement was performed
4 without any purpose of direct or indirect
5 commercial advantage;

6 “(ii) the infringement was primarily
7 educational, religious, or charitable in na-
8 ture; and

9 “(iii) after receiving notice of the
10 claim for infringement, and after con-
11 ducting an expeditious good faith inves-
12 tigation of the claim, the infringer prompt-
13 ly ceased the infringement.

14 “(C) EXCEPTION TO FURTHER LIMITA-
15 TION.—Notwithstanding the limitation estab-
16 lished under subparagraph (B), if the owner of
17 an infringed copyright proves, and a court
18 finds, that the infringer has earned proceeds di-
19 rectly attributable to the use of the infringed
20 work by the infringer, the portion of such pro-
21 ceeds attributable to such infringement may be
22 awarded to the owner.

23 “(2) INJUNCTIVE RELIEF.—

24 “(A) GENERAL RULE.—Subject to sub-
25 paragraph (B), the court may impose injunctive

1 relief to prevent or restrain any infringement
2 alleged in the civil action.

3 “(B) EXCEPTION.—In a case in which the
4 infringer has prepared or commenced prepara-
5 tion of a work that recasts, transforms, adapts,
6 or integrates the infringed work with a signifi-
7 cant amount of the infringer’s original expres-
8 sion, any injunctive relief ordered by the
9 court—

10 “(i) may not restrain the infringer’s
11 continued preparation or use of that new
12 work;

13 “(ii) shall require that the infringer
14 pay reasonable compensation to the legal
15 or beneficial owner of the exclusive right
16 under the infringed copyright for the use
17 of the infringed work; and

18 “(iii) shall require that the infringer
19 provide attribution, in a manner that is
20 reasonable under the circumstances, to the
21 owner of the infringed copyright, if re-
22 quested by such owner.

23 “(C) LIMITATIONS.—The limitations on in-
24 junctive relief under subparagraphs (A) and (B)
25 shall not be available to an infringer if the in-

1 fringer asserts in the civil action that neither
2 the infringer or any representative of the in-
3 fringer acting in an official capacity is subject
4 to suit in the courts of the United States for an
5 award of damages to the legal or beneficial
6 owner of the exclusive right under the infringed
7 copyright under section 106, unless the court
8 finds that the infringer—

9 “(i) has complied with the require-
10 ments of subsection (b); and

11 “(ii) has made an enforceable promise
12 to pay reasonable compensation to the
13 legal or beneficial owner of the exclusive
14 right under the infringed copyright.

15 “(D) RULE OF CONSTRUCTION.—Nothing
16 in subparagraph (C) shall be construed to au-
17 thorize or require, and no action taken under
18 such subparagraph shall be deemed to con-
19 stitute, either an award of damages by the
20 court against the infringer or an authorization
21 to sue a State.

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

1 law, protects the infringer from being subject to
 2 suit in the courts of the United States for an
 3 award of damages to the legal or beneficial
 4 owner of the exclusive right under the infringed
 5 copyright under section 106.

6 “(d) PRESERVATION OF OTHER RIGHTS, LIMITA-
 7 TIONS, AND DEFENSES.—This section does not affect any
 8 right, limitation, or defense to copyright infringement, in-
 9 cluding fair use, under this title. If another provision of
 10 this title provides for a statutory license that would permit
 11 the infringement contemplated by the infringer if the
 12 owner of the infringed copyright cannot be located, that
 13 provision applies instead of this section.

14 “(e) COPYRIGHT FOR DERIVATIVE WORKS AND COM-
 15 PILATIONS.—Notwithstanding section 103(a), an infringer
 16 who qualifies for the limitation on remedies afforded by
 17 this section with respect to the use of a copyrighted work
 18 shall not be denied copyright protection in a compilation
 19 or derivative work on the basis that such compilation or
 20 derivative work employs preexisting material that has been
 21 used unlawfully under this section.”.

22 (b) TECHNICAL AND CONFORMING AMENDMENT.—
 23 The table of sections for chapter 5 of title 17, United
 24 States Code, is amended by adding at the end the fol-
 25 lowing:

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

1 **SEC. 3. DATABASE OF PICTORIAL, GRAPHIC, AND SCULP-**
2 **TURAL WORKS.**

3 (a) **ESTABLISHMENT OF DATABASE.—**

4 (1) **IN GENERAL.—**The Register of Copyrights
5 shall undertake a certification process for the estab-
6 lishment of an electronic database that facilitates
7 the search for pictorial, graphic, and sculptural
8 works that are subject to copyright protection under
9 title 17, United States Code.

10 (2) **PROCESS AND STANDARDS FOR CERTIFI-**
11 **CATION.—**The process and standards for certifi-
12 cation of the electronic database required under
13 paragraph (1) shall be established by the Register of
14 Copyrights, except that certification may not be
15 granted if the electronic database does not contain—

16 (A) the name of all authors of the work, if
17 known, and contact information for any author
18 if the information is readily available;

19 (B) the name of the copyright owner if dif-
20 ferent from the author, and contact information
21 of the copyright owner;

22 (C) the title of the copyrighted work, if
23 such work has a title;

24 (D) with respect to a copyrighted work
25 that includes a visual image, a visual image of
26 the work, or, if such a visual image is not avail-

1 able; a description sufficient to identify the
2 work;

3 ~~(E)~~ one or more mechanisms that allow for
4 the search and identification of a work by both
5 text and image; and

6 ~~(F)~~ security measures that reasonably pro-
7 tect against unauthorized access to, or copying
8 of, the information and content of the electronic
9 database.

10 (b) **PUBLIC AVAILABILITY.**—The Register of Copy-
11 rights—

12 ~~(1)~~ shall make available to the public through
13 the Internet a list of all electronic databases that are
14 certified in accordance with this section; and

15 ~~(2)~~ may include any database so certified in a
16 statement of best practices established under section
17 ~~514(b)(5)(B)~~ of title 17, United States Code.

18 **SEC. 4. EFFECTIVE DATE.**

19 (a) **IN GENERAL.**—With respect to works other than
20 pictorial, graphic, and sculptural works, the amendments
21 made by section 2 shall apply to infringements that com-
22 mence on or after January 1, 2009.

23 (b) **PICTORIAL, GRAPHIC, AND SCULPTURAL**
24 **WORKS.**—With respect to pictorial, graphic, and sculp-
25 tural works, the amendments made by section 2 shall—

1 (1) take effect on the earlier of—

2 (A) the date on which the Copyright Office
3 certifies under section 3 at least 2 separate and
4 independent searchable, comprehensive, elec-
5 tronic databases, that allow for searches of
6 copyrighted works that are pictorial, graphic,
7 and sculptural works, and are available to the
8 public through the Internet; or

9 (B) January 1, 2011; and

10 (2) apply to infringing uses that commence on
11 or after that effective date.

12 (c) PUBLICATION IN FEDERAL REGISTER.—The
13 Register of Copyrights shall publish the effective date de-
14 scribed in subsection (b)(1) in the Federal Register, to-
15 gether with a notice that the amendments made by section
16 2 take effect on that date with respect to pictorial, graph-
17 ic, and sculptural works.

18 (d) DEFINITION.—In this section, the term “pic-
19 torial, graphic, and sculptural works” has the meaning
20 given that term in section 101 of title 17, United States
21 Code.

22 **SEC. 5. REPORT TO CONGRESS.**

23 Not later than December 12, 2014, the Register of
24 Copyrights shall report to the Committee on the Judiciary
25 of the Senate and the Committee on the Judiciary of the

1 House of Representatives on the implementation and ef-
2 fects of the amendments made by section 2, including any
3 recommendations for legislative changes that the Register
4 considers appropriate.

5 **SEC. 6. STUDY ON REMEDIES FOR SMALL COPYRIGHT**
6 **CLAIMS.**

7 (a) **IN GENERAL.**—The Register of Copyrights shall
8 conduct a study with respect to remedies for copyright in-
9 fringement claims by an individual copyright owner or a
10 related group of copyright owners seeking small amounts
11 of monetary relief, including consideration of alternative
12 means of resolving disputes currently heard in the United
13 States district courts. The study shall cover the infringe-
14 ment claims to which section 514 of title 17, United States
15 Code, apply, and other infringement claims under such
16 title 17.

17 (b) **PROCEDURES.**—The Register of Copyrights shall
18 publish notice of the study required under subsection (a),
19 providing a period during which interested persons may
20 submit comments on the study, and an opportunity for
21 interested persons to participate in public roundtables on
22 the study. The Register shall hold any such public
23 roundtables at such times as the Register considers appro-
24 priate.

1 (c) REPORT TO CONGRESS.—Not later than 2 years
2 after the date of the enactment of this Act, the Register
3 of Copyrights shall prepare and submit to the Committee
4 on the Judiciary of the Senate and the Committee on the
5 Judiciary of the House of Representatives a report on the
6 study conducted under this section, including such admin-
7 istrative, regulatory, or legislative recommendations that
8 the Register considers appropriate.

9 **SEC. 7. STUDY ON COPYRIGHT DEPOSITS.**

10 (a) IN GENERAL.—The Comptroller General of the
11 United States shall conduct a study examining the func-
12 tion of the deposit requirement in the copyright registra-
13 tion system under section 408 of title 17, United States
14 Code, including—

15 (1) the historical purpose of the deposit require-
16 ment;

17 (2) the degree to which deposits are made avail-
18 able to the public currently;

19 (3) the feasibility of making deposits, particu-
20 larly visual arts deposits, electronically searchable by
21 the public for the purpose of locating copyright own-
22 ers; and

23 (4) the impact any change in the deposit re-
24 quirement would have on the collection of the Li-
25 brary of Congress.

1 (b) **REPORT.**—Not later than 2 years after the date
 2 of the enactment of this Act, the Comptroller General shall
 3 submit to the Committee on the Judiciary of the House
 4 of Representatives and the Committee on the Judiciary
 5 of the Senate a report on the study conducted under this
 6 section, including such administrative, regulatory, or legis-
 7 lative recommendations that the Comptroller General con-
 8 siders appropriate.

9 **SECTION 1. SHORT TITLE.**

10 *This Act may be cited as the “Shawn Bentley Orphan*
 11 *Works Act of 2008”.*

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

14 (a) **LIMITATION ON REMEDIES.**—Chapter 5 of title 17,
 15 *United States Code, is amended by adding at the end the*
 16 *following:*

17 **“§ 514. Limitation on remedies in cases involving or-**
 18 **phan works**

19 “(a) **DEFINITIONS.**—*In this section, the following defi-*
 20 *initions shall apply:*

21 “(1) **MATERIALS.**—*The term ‘materials’ in-*
 22 *cludes—*

23 “(A) *the records of the Copyright Office that*
 24 *are relevant to identifying and locating copy-*
 25 *right owners;*

1 “(B) sources of copyright ownership infor-
2 mation and, where appropriate, licensor infor-
3 mation, reasonably available to users, including
4 private databases;

5 “(C) technology tools and expert assistance;
6 and

7 “(D) electronic databases, including data-
8 bases that are available to the public through the
9 Internet, that allow for searches of copyrighted
10 works and for the copyright owners of works, in-
11 cluding through text, sound, and image recogni-
12 tion tools.

13 “(2) NOTICE OF CLAIM OF INFRINGEMENT.—The
14 term ‘notice of claim of infringement’ means, with re-
15 spect to a claim of copyright infringement, a written
16 notice sent from the owner of the infringed copyright
17 or a person acting on the owner’s behalf to the in-
18 fringer or a person acting on the infringer’s behalf,
19 that includes at a minimum—

20 “(A) the name of the owner of the infringed
21 copyright;

22 “(B) the title of the infringed work, any al-
23 ternative titles of the infringed work known to
24 the owner of the infringed copyright, or if the

1 *work has no title, a description in detail suffi-*
2 *cient to identify that work;*

3 “(C) *an address and telephone number at*
4 *which the owner of the infringed copyright or a*
5 *person acting on behalf of the owner may be con-*
6 *tacted; and*

7 “(D) *information reasonably sufficient to*
8 *permit the infringer to locate the infringer’s ma-*
9 *terial in which the infringed work resides.*

10 “(3) *OWNER OF THE INFRINGED COPYRIGHT.—*
11 *The ‘owner of the infringed copyright’ is the owner of*
12 *any particular exclusive right under section 106 that*
13 *is applicable to the infringement, or any person or*
14 *entity with the authority to grant or license such*
15 *right on an exclusive or nonexclusive basis.*

16 “(4) *REASONABLE COMPENSATION.—The term*
17 *‘reasonable compensation’ means, with respect to a*
18 *claim of infringement, the amount on which a willing*
19 *buyer and willing seller in the positions of the in-*
20 *fringer and the owner of the infringed copyright*
21 *would have agreed with respect to the infringing use*
22 *of the work immediately before the infringement*
23 *began.*

24 “(b) *CONDITIONS FOR ELIGIBILITY.—*

25 “(1) *CONDITIONS.—*

1 “(A) *IN GENERAL.*—Notwithstanding sec-
2 tions 502 through 506, and subject to subpara-
3 graph (B), in an action brought under this title
4 for infringement of copyright in a work, the rem-
5 edies for infringement shall be limited in accord-
6 ance with subsection (c) if the infringer—

7 “(i) proves by a preponderance of the
8 evidence that before the infringement began,
9 the infringer, a person acting on behalf of
10 the infringer, or any person jointly and sev-
11 erally liable with the infringer for the in-
12 fringement—

13 “(I) performed and documented a
14 qualifying search, in good faith, to lo-
15 cate and identify the owner of the in-
16 fringed copyright; and

17 “(II) was unable to locate and
18 identify an owner of the infringed
19 copyright;

20 “(ii) provided attribution, in a man-
21 ner that is reasonable under the cir-
22 cumstances, to the legal owner of the in-
23 fringed copyright, if such legal owner was
24 known with a reasonable degree of cer-

1 *tainty, based on information obtained in*
2 *performing the qualifying search;*

3 “(iii) *included with the public dis-*
4 *tribution, display, or performance of the in-*
5 *fringing work a symbol or other notice of*
6 *the use of the infringing work, the form and*
7 *manner of which shall be prescribed by the*
8 *Register of Copyrights, which may be in the*
9 *footnotes, endnotes, bottom margin, end*
10 *credits, or in any other such manner as to*
11 *give notice that the infringed work has been*
12 *used under this section;*

13 “(iv) *asserts in the initial pleading to*
14 *the civil action eligibility for such limita-*
15 *tions;*

16 “(v) *consents to the jurisdiction of*
17 *United States district court, or, in the ab-*
18 *sence of such consent, if such court holds*
19 *that the infringer is within the jurisdiction*
20 *of the court; and*

21 “(vi) *at the time of making the initial*
22 *discovery disclosures required under rule 26*
23 *of the Federal Rules of Civil Procedure,*
24 *states with particularity the basis for eligi-*
25 *bility for the limitations, including a de-*

1 tailed description and documentation of the
2 search undertaken in accordance with para-
3 graph (2)(A) and produces documentation
4 of the search.

5 “(B) *EXCEPTION.*—Subparagraph (A) does
6 not apply if the infringer or a person acting on
7 behalf of the infringer receives a notice of claim
8 of infringement and, after receiving such notice
9 and having an opportunity to conduct an expeditious good faith investigation of the claim, the
10 infringer—

12 “(i) fails to engage in negotiation in
13 good faith regarding reasonable compensa-
14 tion with the owner of the infringed copy-
15 right; or

16 “(ii) fails to render payment of reason-
17 able compensation in a reasonably timely
18 manner after reaching an agreement with
19 the owner of the infringed copyright or
20 under an order described in subsection
21 (c)(1)(A).

22 “(2) *REQUIREMENTS FOR SEARCHES.*—

23 “(A) *REQUIREMENTS FOR QUALIFYING*
24 *SEARCHES.*—

1 “(i) *IN GENERAL.*—A search ordinarily
2 qualifies under paragraph (1)(A)(i)(I) if the
3 infringer, a person acting on behalf of the
4 infringer, or any person jointly and sever-
5 ally liable with the infringer for the in-
6 fringement, makes use of the materials and
7 otherwise undertakes a diligent effort to lo-
8 cate the owner of the infringed work. A dili-
9 gent effort will ordinarily be based on best
10 practices, as applicable, and any other ac-
11 tions reasonable and appropriate under the
12 facts relevant to that search, including fur-
13 ther actions based on facts uncovered during
14 the initial search, and be performed before,
15 and at a time reasonably proximate to, the
16 infringement.

17 “(ii) *LACK OF IDENTIFYING INFORMA-*
18 *TION.*—The fact that a particular copy or
19 phonorecord lacks identifying information
20 pertaining to the owner of the infringed
21 copyright is not sufficient to meet the condi-
22 tions under paragraph (1)(A)(i)(I).

23 “(iii) *USE OF RESOURCES FOR*
24 *CHARGE.*—A qualifying search under para-
25 graph (1)(A)(i)(I) may include use of re-

1 *sources for which a charge or subscription*
2 *fee is imposed, to the extent that the use of*
3 *such resources is reasonable for, and rel-*
4 *evant to, the scope of the intended use.*

5 “(B) *INFORMATION TO GUIDE SEARCHES;*
6 *BEST PRACTICES.—*

7 “(i) *STATEMENTS OF BEST PRAC-*
8 *TICES.—The Register of Copyrights shall*
9 *maintain and make available to the public,*
10 *including through the Internet, at least 1*
11 *statement of best practices for each category,*
12 *or, in the Register’s discretion, subcategory*
13 *of work under section 102(a) of this title,*
14 *for conducting and documenting a search*
15 *under this subsection, which will ordinarily*
16 *include reference to materials relevant to a*
17 *search. The Register may maintain more*
18 *than 1 statement for each category or sub-*
19 *category, as appropriate.*

20 “(ii) *CONSIDERATION OF RELEVANT*
21 *MATERIALS.—The Register of Copyrights*
22 *shall, from time to time, update or modify*
23 *each statement of best practices at the Reg-*
24 *ister’s discretion and should, in maintain-*
25 *ing and updating such statements, consider*

1 *materials and any relevant guidelines sub-*
2 *mitted to the Register that, in the Register’s*
3 *discretion, are reasonable and relevant to*
4 *the requirements of a qualifying search, and*
5 *databases for pictorial, graphical, and*
6 *sculptural works, where appropriate and*
7 *reasonably available for a given use.*

8 “(3) *PENALTY FOR FAILURE TO COMPLY.—If an*
9 *infringer fails to comply with any requirement under*
10 *this subsection, the infringer is not eligible for a limi-*
11 *tation on remedies under this section.*

12 “(c) *LIMITATIONS ON REMEDIES.—The limitations on*
13 *remedies in an action for infringement of a copyright to*
14 *which this section applies are the following:*

15 “(1) *MONETARY RELIEF.—*

16 “(A) *GENERAL RULE.—Subject to subpara-*
17 *graph (B), an award for monetary relief (includ-*
18 *ing actual damages, statutory damages, costs,*
19 *and attorney’s fees) may not be made other than*
20 *an order requiring the infringer to pay reason-*
21 *able compensation to the owner of the exclusive*
22 *right under the infringed copyright for the use of*
23 *the infringed work.*

24 “(B) *FURTHER LIMITATIONS.—An order re-*
25 *quiring the infringer to pay reasonable com-*

1 *compensation for the use of the infringed work may*
2 *not be made under subparagraph (A) if the in-*
3 *fringer is a nonprofit educational institution,*
4 *museum, library, archives, or a public broad-*
5 *casting entity (as defined in subsection (f) of sec-*
6 *tion 118), or any of such entities' employees act-*
7 *ing within the scope of their employment, and*
8 *the infringer proves by a preponderance of the*
9 *evidence that—*

10 *“(i) the infringement was performed*
11 *without any purpose of direct or indirect*
12 *commercial advantage;*

13 *“(ii) the infringement was primarily*
14 *educational, religious, or charitable in na-*
15 *ture; and*

16 *“(iii) after receiving a notice of claim*
17 *of infringement, and having an opportunity*
18 *to conduct an expeditious good faith inves-*
19 *tigation of the claim, the infringer prompt-*
20 *ly ceased the infringement.*

21 *“(2) INJUNCTIVE RELIEF.—*

22 *“(A) GENERAL RULE.—Subject to subpara-*
23 *graph (B), the court may impose injunctive re-*
24 *lief to prevent or restrain any infringement al-*
25 *leged in the civil action. If the infringer has met*

1 *the requirements of subsection (b), the relief*
2 *shall, to the extent practicable and subject to ap-*
3 *plicable law, account for any harm that the re-*
4 *lief would cause the infringer due to its reliance*
5 *on subsection (b).*

6 “(B) *EXCEPTION.—In a case in which the*
7 *infringer has prepared or commenced prepara-*
8 *tion of a new work of authorship that recasts,*
9 *transforms, adapts, or integrates the infringed*
10 *work with a significant amount of original ex-*
11 *pression, any injunctive relief ordered by the*
12 *court may not restrain the infringer’s continued*
13 *preparation or use of that new work, if—*

14 “(i) *the infringer pays reasonable com-*
15 *ensation in a reasonably timely manner*
16 *after the amount of such compensation has*
17 *been agreed upon with the owner of the in-*
18 *fringed copyright or determined by the*
19 *court; and*

20 “(ii) *the court also requires that the*
21 *infringer provide attribution, in a manner*
22 *that is reasonable under the circumstances,*
23 *to the legal owner of the infringed copy-*
24 *right, if requested by such owner.*

1 “(C) *LIMITATIONS.*—*The limitations on in-*
2 *junction relief under subparagraphs (A) and (B)*
3 *shall not be available to an infringer if the in-*
4 *fringer asserts in the action that neither the in-*
5 *fringer nor any representative of the infringer*
6 *acting in an official capacity is subject to suit*
7 *in the courts of the United States for an award*
8 *of damages for the infringement, unless the court*
9 *finds that the infringer—*

10 “(i) *has complied with the require-*
11 *ments of subsection (b); and*

12 “(ii) *has made an enforceable promise*
13 *to pay reasonable compensation to the*
14 *owner of the exclusive right under the in-*
15 *fringed copyright.*

16 “(D) *RULE OF CONSTRUCTION.*—*Nothing in*
17 *subparagraph (C) shall be construed to authorize*
18 *or require, and no action taken under such sub-*
19 *paragraph shall be deemed to constitute, either*
20 *an award of damages by the court against the*
21 *infringer or an authorization to sue a State.*

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

1 *protects the infringer from being subject to suit in*
2 *the courts of the United States for an award of*
3 *damages.*

4 “(d) *PRESERVATION OF OTHER RIGHTS, LIMITATIONS,*
5 *AND DEFENSES.—This section does not affect any right, or*
6 *any limitation or defense to copyright infringement, includ-*
7 *ing fair use, under this title. If another provision of this*
8 *title provides for a statutory license that would permit the*
9 *use contemplated by the infringer, that provision applies*
10 *instead of this section.*

11 “(e) *COPYRIGHT FOR DERIVATIVE WORKS AND COM-*
12 *PILATIONS.—Notwithstanding section 103(a), an infringer*
13 *who qualifies for the limitation on remedies afforded by this*
14 *section shall not be denied copyright protection in a com-*
15 *pilation or derivative work on the basis that such compila-*
16 *tion or derivative work employs preexisting material that*
17 *has been used unlawfully under this section.*

18 “(f) *EXCLUSION FOR FIXATIONS IN OR ON USEFUL AR-*
19 *TICLES.—The limitations on remedies under this section*
20 *shall not be available to an infringer for infringements re-*
21 *sulting from fixation of a pictorial, graphic, or sculptural*
22 *work in or on a useful article that is offered for sale or*
23 *other distribution to the public.”*

1 (b) *TECHNICAL AND CONFORMING AMENDMENT.*—*The*
 2 *table of sections for chapter 5 of title 17, United States*
 3 *Code, is amended by adding at the end the following:*

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

4 (c) *EFFECTIVE DATE.*—

5 (1) *IN GENERAL.*—*The amendments made by*
 6 *this section shall—*

7 (A) *take effect on the later of—*

8 (i) *January 1, 2009; or*

9 (ii) *the date which is the earlier of—*

10 (I) *30 days after the date on*
 11 *which the Copyright Office publishes*
 12 *notice in the Federal Register that it*
 13 *has certified under section 3 that there*
 14 *exist and are available at least 2 sepa-*
 15 *rate and independent searchable, elec-*
 16 *tronic databases, that allow for*
 17 *searches of copyrighted works that are*
 18 *pictorial, graphic, and sculptural*
 19 *works, and are available to the public;*
 20 *or*

21 (II) *January 1, 2013; and*

22 (B) *apply to infringing uses that commence*
 23 *on or after that effective date.*

24 (2) *DEFINITION.*—*In this subsection, the term*
 25 *“pictorial, graphic, and sculptural works” has the*

1 *meaning given that term in section 101 of title 17,*
2 *United States Code.*

3 **SEC. 3. DATABASES OF PICTORIAL, GRAPHIC, AND SCULP-**
4 **TURAL WORKS.**

5 *The Register of Copyrights shall undertake a process*
6 *to certify that there exist and are available databases that*
7 *facilitate a user’s search for pictorial, graphic, and sculp-*
8 *tural works that are subject to copyright protection under*
9 *title 17, United States Code. The Register shall only certify*
10 *that databases are available under this section if such data-*
11 *bases are determined to be effective and not prohibitively*
12 *expensive and include the capability to be searched using*
13 *1 or more mechanisms that allow for the search and identi-*
14 *fication of a work by both text and image and have suffi-*
15 *cient information regarding the works to enable a potential*
16 *user of a work to identify or locate the copyright owner*
17 *or authorized agent.*

18 **SEC. 4. REPORT TO CONGRESS.**

19 *Not later than December 12, 2014, the Register of*
20 *Copyrights shall report to the Committee on the Judiciary*
21 *of the Senate and the Committee on the Judiciary of the*
22 *House of Representatives on the implementation and effects*
23 *of the amendments made by section 2, including any rec-*
24 *ommendations for legislative changes that the Register con-*
25 *siders appropriate.*

1 **SEC. 5. STUDY ON REMEDIES FOR SMALL COPYRIGHT**
2 **CLAIMS.**

3 (a) *IN GENERAL.*—*The Register of Copyrights shall*
4 *conduct a study with respect to remedies for copyright in-*
5 *fringement claims by an individual copyright owner or a*
6 *related group of copyright owners seeking small amounts*
7 *of monetary relief, including consideration of alternative*
8 *means of resolving disputes currently heard in the United*
9 *States district courts. The study shall cover the infringe-*
10 *ment claims to which section 514 of title 17, United States*
11 *Code, apply, and other infringement claims under that title.*

12 (b) *PROCEDURES.*—*The Register of Copyrights shall*
13 *publish notice of the study required under subsection (a),*
14 *providing a period during which interested persons may*
15 *submit comments on the study, and an opportunity for in-*
16 *terested persons to participate in public roundtables on the*
17 *study. The Register shall hold any such public roundtables*
18 *at such times as the Register considers appropriate.*

19 (c) *REPORT TO CONGRESS.*—*Not later than 2 years*
20 *after the date of the enactment of this Act, the Register of*
21 *Copyrights shall prepare and submit to the Committee on*
22 *the Judiciary of the Senate and the Committee on the Judi-*
23 *ciary of the House of Representatives a report on the study*
24 *conducted under this section, including such administra-*
25 *tive, regulatory, or legislative recommendations that the*
26 *Register considers appropriate.*

1 **SEC. 6. STUDY ON COPYRIGHT DEPOSITS.**

2 (a) *IN GENERAL.*—The Comptroller General of the
3 United States shall conduct a study examining the function
4 of the deposit requirement in the copyright registration sys-
5 tem under section 408 of title 17, United States Code, in-
6 cluding—

7 (1) *the historical purpose of the deposit require-*
8 *ment;*

9 (2) *the degree to which deposits are made avail-*
10 *able to the public currently;*

11 (3) *the feasibility of making deposits, particu-*
12 *larly visual arts deposits, electronically searchable by*
13 *the public for the purpose of locating copyright own-*
14 *ers; and*

15 (4) *the impact any change in the deposit require-*
16 *ment would have on the collection of the Library of*
17 *Congress.*

18 (b) *REPORT.*—Not later than 2 years after the date
19 of the enactment of this Act, the Comptroller General shall
20 submit to the Committee on the Judiciary of the Senate and
21 the Committee on the Judiciary of the House of Representa-
22 tives a report on the study conducted under this section,
23 including such administrative, regulatory, or legislative
24 recommendations that the Comptroller General considers
25 appropriate.

Calendar No. 738

110TH CONGRESS
2^D SESSION

S. 2913

A BILL

To provide a limitation on judicial remedies in copyright infringement cases involving orphan works.

MAY 15, 2008

Reported with an amendment