

agreed to en bloc, and the motions to reconsider be laid upon the table.

The PRESIDING OFFICER. Without objection, it is so ordered.

The resolutions (S. Res. 686 and 687) were agreed to.

The preambles were agreed to.

The resolutions, with their preambles, read as follows:

S. RES. 686

Whereas, the United States Department of Justice is conducting an investigation into improper activities by lobbyists and related matters;

Whereas, the Office of Senator Christopher S. Bond has received a request for records from the Department of Justice for use in the investigation of a former employee;

Whereas, by the privileges of the Senate of the United States and Rule XI of the Standing Rules of the Senate, no evidence under the control or in the possession of the Senate can, by administrative or judicial process, be taken from such control or possession but by permission of the Senate; and

Whereas, when it appears that evidence under the control or in the possession of the Senate is needed for the promotion of justice, the Senate will take such action as will promote the ends of justice consistent with the privileges of the Senate: Now therefore, be it

Resolved, That the Office of Senator Christopher S. Bond is authorized to provide to the United States Department of Justice records requested for use in legal and investigatory proceedings, except where a privilege should be asserted.

S. RES. 687

Whereas, in the case of *People of the State of Michigan v. Sereal Leonard Gravlin* (Case No. 08-007750), pending in, the Sixth Judicial Circuit Court (Oakland County, Michigan), the prosecuting attorney has subpoenaed testimony from Ruth Gallop, an employee in the office of Senator Debbie Stabenow;

Whereas, pursuant to sections 703(a) and 704(a)(2) of the Ethics in Government Act of 1978, 2 U.S.C. §§288b(a) and 288c(a)(2), the Senate may direct its counsel to represent employees of the Senate with respect to any subpoena, order, or request for testimony relating to their official responsibilities;

Whereas, by the privileges of the Senate of the United States and Rule XI of the Standing Rules of the Senate, no evidence under the control or in the possession of the Senate may, by the judicial or administrative process, be taken from such control or possession but by permission of the Senate;

Whereas, when it appears that evidence under the control or in the possession of the Senate may promote the administration of justice, the Senate will take such action as will promote the ends of justice consistent with the privileges of the Senate: Now, therefore, be it

Resolved, That Ruth Gallop and any other employee of Senator Stabenow's office from whom testimony may be required are authorized to testify in the case of *People of the State of Michigan v. Sereal Leonard Gravlin*, except concerning matters for which a privilege should be asserted.

SEC. 2. The Senate Legal Counsel is authorized to represent Ruth Gallop and any other employee of the Senator from whom evidence may be required in the action referenced in section one of this resolution.

AUTHORIZING TESTIMONY

Mr. WHITEHOUSE. Mr. President, I ask unanimous consent that the Senate proceed to the immediate consider-

ation of S. Res. 688 which was submitted earlier today.

The PRESIDING OFFICER. The clerk will report the resolution by title.

The legislative clerk read as follows:

A resolution (S. Res. 688) to authorize testimony in *United States v. Max Obuszewski*, et al.

There being no objection, the Senate proceeded to consider the resolution.

Mr. REID. Mr. President, this resolution concerns a request for testimony in a criminal misdemeanor action in Superior Court for the District of Columbia. In this action, protesters have been charged with disruption of Congress for loudly chanting slogans during Senate debate on or about the afternoon of March 12, 2008. A trial is scheduled to commence on September 29, 2008. The prosecution has subpoenaed a doorkeeper of the Senate who witnessed the charged conduct. The Senate Sergeant at Arms would like to cooperate by providing testimony from that employee. This resolution would authorize that employee to testify in connection with this action.

Mr. WHITEHOUSE. Mr. President, I ask unanimous consent that the resolution be agreed to, the preamble be agreed to, the motions to reconsider be laid upon the table, and that any statements be printed in the RECORD.

The PRESIDING OFFICER. Without objection, it is so ordered.

The resolution (S. Res. 688) was agreed to.

The preamble was agreed to.

The resolution, with its preamble, is as follows:

S. RES. 688

Whereas, in the case of *United States v. Max Obuszewski*, et al., Case No. 2008-CMD-5824, pending in the Superior Court for the District of Columbia, the prosecution has subpoenaed testimony from Justin Beller, an employee in the Office of the Senate Sergeant at Arms;

Whereas, by the privileges of the Senate of the United States and Rule XI of the Standing Rules of the Senate, no evidence under the control or in the possession of the Senate may, by the judicial or administrative process, be taken from such control or possession but by permission of the Senate;

Whereas, when it appears that evidence under the control or in the possession of the Senate may promote the administration of justice, the Senate will take such action as will promote the ends of justice consistent with the privileges of the Senate: Now, therefore, be it

Resolved, That Justin Beller is authorized to testify in the case of *United States v. Max Obuszewski*, et al., except concerning matters for which a privilege should be asserted.

AUTHORIZING THE PRINTING OF A REVISED EDITION OF THE SENATE RULES AND MANUAL

Mr. WHITEHOUSE. Mr. President, I ask unanimous consent that the Senate proceed to the immediate consideration of S. Res. 689 which was submitted earlier today.

The PRESIDING OFFICER. The clerk will report the resolution by title.

The legislative clerk read as follows:

A resolution (S. Res. 689) to authorize the printing of a revised edition of the Senate Rules and Manual.

There being no objection, the Senate proceeded to consider the resolution.

Mr. WHITEHOUSE. Mr. President, I ask unanimous consent that the resolution be agreed to, the motions to reconsider be laid upon the table, and that any statements related to this item be printed in the RECORD.

The PRESIDING OFFICER. Without objection, it is so ordered.

The resolution (S. Res. 689) was agreed to, as follows:

S. RES. 689

Resolved, That—

(1) the Committee on Rules and Administration shall prepare a revised edition of the Senate Rules and Manual for the use of the 110th Congress;

(2) the manual shall be printed as a Senate document; and

(3) in addition to the usual number of documents, 1,500 additional copies of the manual shall be bound, of which—

(A) 500 paperbound copies shall be for the use of the Senate; and

(B) 1,000 copies shall be bound (550 paperbound; 250 nontabbed black skiver; 200 tabbed black skiver) and delivered as may be directed by the Committee on Rules and Administration.

SHAWN BENTLEY ORPHAN WORKS ACT OF 2008

Mr. WHITEHOUSE. Mr. President, I ask unanimous consent that the Senate proceed to the immediate consideration of Calendar No. 738, S. 2913.

The PRESIDING OFFICER. The clerk will report the bill by title.

The legislative clerk read as follows:

A bill (S. 2913) to provide a limitation on judicial remedies in copyright infringement cases involving orphan works.

There being no objection, the Senate proceeded to consider the bill, which had been reported from the Committee on the Judiciary, with an amendment to strike all after the enacting clause and insert in lieu thereof the following:

SECTION 1. SHORT TITLE.

This Act may be cited as the "Shawn Bentley Orphan Works Act of 2008".

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

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

"§514. Limitation on remedies in cases involving orphan works

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

"(1) *MATERIALS.*—The term 'materials' includes—

"(A) the records of the Copyright Office that are relevant to identifying and locating copyright owners;

"(B) sources of copyright ownership information and, where appropriate, licensor information, reasonably available to users, including private databases;

"(C) technology tools and expert assistance; and

"(D) electronic databases, including databases that are available to the public through the Internet, that allow for searches of copyrighted works and for the copyright owners of works,

including through text, sound, and image recognition tools.

“(2) NOTICE OF CLAIM OF INFRINGEMENT.—The term ‘notice of claim of infringement’ means, with respect to a claim of copyright infringement, a written notice sent from the owner of the infringed copyright or a person acting on the owner’s behalf to the infringer or a person acting on the infringer’s behalf, that includes at a minimum—

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

“(B) the title of the infringed work, any alternative titles of the infringed work known to the owner of the infringed copyright, or if the work has no title, a description in detail sufficient to identify that work;

“(C) an address and telephone number at which the owner of the infringed copyright or a person acting on behalf of the owner may be contacted; and

“(D) information reasonably sufficient to permit the infringer to locate the infringer’s material in which the infringed work resides.

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

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

“(b) CONDITIONS FOR ELIGIBILITY.—

“(1) CONDITIONS.—

“(A) IN GENERAL.—Notwithstanding sections 502 through 506, and subject to subparagraph (B), in an action brought under this title for infringement of copyright in a work, the remedies for infringement shall be limited in accordance with subsection (c) if the infringer—

“(i) proves by a preponderance of the evidence that before the infringement began, the infringer, a person acting on behalf of the infringer, or any person jointly and severally liable with the infringer for the infringement—

“(I) performed and documented a qualifying search, in good faith, to locate and identify the owner of the infringed copyright; and

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

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

“(iii) included with the public distribution, display, or performance of the infringing work a symbol or other notice of the use of the infringing work, the form and manner of which shall be prescribed by the Register of Copyrights, which may be in the footnotes, endnotes, bottom margin, end credits, or in any other such manner as to give notice that the infringed work has been used under this section;

“(iv) asserts in the initial pleading to the civil action eligibility for such limitations;

“(v) consents to the jurisdiction of United States district court, or, in the absence of such consent, if such court holds that the infringer is within the jurisdiction of the court; and

“(vi) at the time of making the initial discovery disclosures required under rule 26 of the Federal Rules of Civil Procedure, states with particularity the basis for eligibility for the limitations, including a detailed description and documentation of the search undertaken in accordance with paragraph (2)(A) and produces documentation of the search.

“(B) EXCEPTION.—Subparagraph (A) does not apply if the infringer or a person acting on be-

half of the infringer receives a notice of claim of infringement and, after receiving such notice and having an opportunity to conduct an expeditious good faith investigation of the claim, the infringer—

“(i) fails to engage in negotiation in good faith regarding reasonable compensation with the owner of the infringed copyright; or

“(ii) fails to render payment of reasonable compensation in a reasonably timely manner after reaching an agreement with the owner of the infringed copyright or under an order described in subsection (c)(1)(A).

“(2) REQUIREMENTS FOR SEARCHES.—

“(A) REQUIREMENTS FOR QUALIFYING SEARCHES.—

“(i) IN GENERAL.—A search ordinarily qualifies under paragraph (1)(A)(i)(I) if the infringer, a person acting on behalf of the infringer, or any person jointly and severally liable with the infringer for the infringement, makes use of the materials and otherwise undertakes a diligent effort to locate the owner of the infringed work. A diligent effort will ordinarily be based on best practices, as applicable, and any other actions relevant to that search, including further actions based on facts uncovered during the initial search, and be performed before, and at a time reasonably proximate to, the infringement.

“(ii) LACK OF IDENTIFYING INFORMATION.—The fact that a particular copy or phonorecord lacks identifying information pertaining to the owner of the infringed copyright is not sufficient to meet the conditions under paragraph (1)(A)(i)(I).

“(iii) USE OF RESOURCES FOR CHARGE.—A qualifying search under paragraph (1)(A)(i)(I) may include use of resources for which a charge or subscription fee is imposed, to the extent that the use of such resources is reasonable for, and relevant to, the scope of the intended use.

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

“(i) STATEMENTS OF BEST PRACTICES.—The Register of Copyrights shall maintain and make available to the public, including through the Internet, at least 1 statement of best practices for each category, or, in the Register’s discretion, subcategory of work under section 102(a) of this title, for conducting and documenting a search under this subsection, which will ordinarily include reference to materials relevant to a search. The Register may maintain more than 1 statement for each category or subcategory, as appropriate.

“(ii) CONSIDERATION OF RELEVANT MATERIALS.—The Register of Copyrights shall, from time to time, update or modify each statement of best practices at the Register’s discretion and should, in maintaining and updating such statements, consider materials and any relevant guidelines submitted to the Register that, in the Register’s discretion, are reasonable and relevant to the requirements of a qualifying search, and databases for pictorial, graphical, and sculptural works, where appropriate and reasonably available for a given use.

“(3) PENALTY FOR FAILURE TO COMPLY.—If an infringer fails to comply with any requirement under this subsection, the infringer is not eligible for a limitation on remedies under this section.

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

“(1) MONETARY RELIEF.—

“(A) GENERAL RULE.—Subject to subparagraph (B), an award for monetary relief (including actual damages, statutory damages, costs, and attorney’s fees) may not be made other than an order requiring the infringer to pay reasonable compensation to the owner of the exclusive right under the infringed copyright for the use of the infringed work.

“(B) FURTHER LIMITATIONS.—An order requiring the infringer to pay reasonable compensa-

tion for the use of the infringed work may not be made under subparagraph (A) if the infringer is a nonprofit educational institution, museum, library, archives, or a public broadcasting entity (as defined in subsection (f) of section 118), or any of such entities’ employees acting within the scope of their employment, and the infringer proves by a preponderance of the evidence that—

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

“(ii) the infringement was primarily educational, religious, or charitable in nature; and

“(iii) after receiving a notice of claim of infringement, and having an opportunity to conduct an expeditious good faith investigation of the claim, the infringer promptly ceased the infringement.

“(2) INJUNCTIVE RELIEF.—

“(A) GENERAL RULE.—Subject to subparagraph (B), the court may impose injunctive relief to prevent or restrain any infringement alleged in the civil action. If the infringer has met the requirements of subsection (b), the relief shall, to the extent practicable and subject to applicable law, account for any harm that the relief would cause the infringer due to its reliance on subsection (b).

“(B) EXCEPTION.—In a case in which the infringer has prepared or commenced preparation of a new work of authorship that recasts, transforms, adapts, or integrates the infringed work with a significant amount of original expression, any injunctive relief ordered by the court may not restrain the infringer’s continued preparation or use of that new work, if—

“(i) the infringer pays reasonable compensation in a reasonably timely manner after the amount of such compensation has been agreed upon with the owner of the infringed copyright or determined by the court; and

“(ii) the court also requires that the infringer provide attribution, in a manner that is reasonable under the circumstances, to the legal owner of the infringed copyright, if requested by such owner.

“(C) LIMITATIONS.—The limitations on injunctive relief under subparagraphs (A) and (B) shall not be available to an infringer if the infringer asserts in the action that neither the infringer nor any representative of the infringer acting in an official capacity is subject to suit in the courts of the United States for an award of damages for the infringement, unless the court finds that the infringer—

“(i) has complied with the requirements of subsection (b); and

“(ii) has made an enforceable promise to pay reasonable compensation to the owner of the exclusive right under the infringed copyright.

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

“(E) RIGHTS AND PRIVILEGES NOT WAIVED.—No action taken by an infringer under subparagraph (C) shall be deemed to waive any right or privilege that, as a matter of law, protects the infringer from being subject to suit in the courts of the United States for an award of damages.

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

“(e) COPYRIGHT FOR DERIVATIVE WORKS AND COMPILATIONS.—Notwithstanding section 103(a), an infringer who qualifies for the limitation on remedies afforded by this section shall not be denied copyright protection in a compilation or derivative work on the basis that such compilation or derivative work employs preexisting material

that has been used unlawfully under this section.

“(f) EXCLUSION FOR FIXATIONS IN OR ON USEFUL ARTICLES.—The limitations on remedies under this section shall not be available to an infringer for infringements resulting from fixation of a pictorial, graphic, or sculptural work in or on a useful article that is offered for sale or other distribution to the public.”

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

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

(c) EFFECTIVE DATE.—

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

(A) take effect on the later of—

(i) January 1, 2009; or

(ii) the date which is the earlier of—

(1) 30 days after the date on which the Copyright Office publishes notice in the Federal Register that it has certified under section 3 that there exist and are available at least 2 separate and independent searchable, electronic databases, that allow for searches of copyrighted works that are pictorial, graphic, and sculptural works, and are available to the public; or

(II) January 1, 2013; and

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

(2) DEFINITION.—In this subsection, the term “pictorial, graphic, and sculptural works” has the meaning given that term in section 101 of title 17, United States Code.

SEC. 3. DATABASES OF PICTORIAL, GRAPHIC, AND SCULPTURAL WORKS.

The Register of Copyrights shall undertake a process to certify that there exist and are available databases that facilitate a user's search for pictorial, graphic, and sculptural works that are subject to copyright protection under title 17, United States Code. The Register shall only certify that databases are available under this section if such databases are determined to be effective and not prohibitively expensive and include the capability to be searched using 1 or more mechanisms that allow for the search and identification of a work by both text and image and have sufficient information regarding the works to enable a potential user of a work to identify or locate the copyright owner or authorized agent.

SEC. 4. REPORT TO CONGRESS.

Not later than December 12, 2014, the Register of Copyrights shall report to the Committee on the Judiciary of the Senate and the Committee on the Judiciary of the House of Representatives on the implementation and effects of the amendments made by section 2, including any recommendations for legislative changes that the Register considers appropriate.

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

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

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

(c) REPORT TO CONGRESS.—Not later than 2 years after the date of the enactment of this

Act, the Register of Copyrights shall prepare and submit to the Committee on the Judiciary of the Senate and the Committee on the Judiciary of the House of Representatives a report on the study conducted under this section, including such administrative, regulatory, or legislative recommendations that the Register considers appropriate.

SEC. 6. STUDY ON COPYRIGHT DEPOSITS.

(a) IN GENERAL.—The Comptroller General of the United States shall conduct a study examining the function of the deposit requirement in the copyright registration system under section 408 of title 17, United States Code, including—

(1) the historical purpose of the deposit requirement;

(2) the degree to which deposits are made available to the public currently;

(3) the feasibility of making deposits, particularly visual arts deposits, electronically searchable by the public for the purpose of locating copyright owners; and

(4) the impact any change in the deposit requirement would have on the collection of the Library of Congress.

(b) REPORT.—Not later than 2 years after the date of the enactment of this Act, the Comptroller General shall submit to the Committee on the Judiciary of the Senate and the Committee on the Judiciary of the House of Representatives a report on the study conducted under this section, including such administrative, regulatory, or legislative recommendations that the Comptroller General considers appropriate.

Mr. LEAHY. Mr. President, in January 2005, Senator HATCH and I wrote to the Register of Copyrights out of a concern that the length of copyright terms was having an unintended consequence of creating a class of “orphan works”—works that may be protected by copyright, but whose owners cannot be identified or located. Creative works are collecting dust because those who would like to bring them to light are respectful of the copyright laws and will not use those works if they cannot locate the owners. This unfortunate situation is keeping creative and cultural works from the public, and does not advance the purpose of the copyright laws.

Today, the Senate completes work on legislation I introduced along with Senator HATCH to remedy this situation. The Shawn Bentley Orphan Works Act of 2008 is designed to enable use of works whose copyright status and ownership is uncertain without the user facing prohibitive statutory damages.

The act does not dramatically restructure current copyright law—it does not impose new registration requirements, nor does it provide for a transfer of copyright ownership or rights. The bill simply provides for a limitation on remedies in discrete, limited circumstances in which, among other things, the owner of the work is not locatable. Any infringer who wishes to use an orphan works limitation on remedies must perform a diligent search in good faith, document that search, and, in the event that the owner emerges, negotiate with the copyright owner in good faith regarding reasonable compensation. If any of these conditions, or others set forth in the bill, is not met, the limitation on remedies is unavailable and an in-

fringer faces the full statutory damages as well as costs and attorney's fees.

At its core, the bill seeks to unite users and copyright owners, and to ensure that copyright owners are compensated for the use of their works. It does not create any orphans, and it does not create a license to infringe. By providing an incentive to search, in the form of a limitation on remedies, more users will find more owners; more works otherwise hidden will be used; and more copyright owners will receive compensation. The Shawn Bentley Orphan Works Act will thus allow the public to enjoy works that are currently left unseen and unused. I hope the House can take up this measure, and send it to the President for signature.

Mr. HATCH. Mr. President, I rise today to express my continued support for the Shawn Bentley Orphan Works Act of 2008, S. 2913, which I introduced with Senate Judiciary Committee chairman PATRICK LEAHY. This bill represents years of hard work and collaboration by the Senate, industry stakeholders, and U.S. Copyright Office officials. Passing S. 2913 is long overdue.

I want to thank Chairman LEAHY for naming S. 2913 as the Shawn Bentley Orphan Works Act of 2008. It honors my long-time staffer and former colleague, Shawn Bentley. As many of you may remember, Shawn worked for the Judiciary Committee for a decade and worked on several important pieces of landmark intellectual property legislation. In fact, he initiated what we have now introduced as an orphan works bill. Many in this body were greatly saddened by Shawn's untimely death at 41. He was a one-of-a-kind individual. I believe this bill is a fitting way to acknowledge his continuing contributions to intellectual property law.

Countless artistic creations around the country are effectively locked away in a proverbial attic and unavailable for the general public to enjoy because the owner of the copyright for the work is unknown. These are generally referred to as orphan works.

Unfortunately, it is not always easy to identify an owner of a copyrighted work, and in many cases, information about the copyright holder is not publicly known. To make matters worse, many are discouraged from using these works for fear of being sued should the owner eventually step forward.

Many libraries, museums, State and local historical societies, and archives across the country that have significant amounts of orphan works, which are not currently available publicly.

Think of the new educational opportunities that will be opened to students, scholars, and the public alike when these works become accessible. The potential for learning, scholarship, and enjoyment of the works of previous generations are unlimited.

Without doubt, passage of S. 2913 addresses the orphan works problem.

Yesterday, Marybeth Peters, Register of the Copyrights, wrote the following about the importance of orphan works legislation:

The legislation is sensible: it would ease the orphan problem by reducing, but not eliminating, the exposure of good faith users. But there are clear conditions designed to protect copyright owners. A user must take all reasonable steps, employ all reasonable technology, and execute the applicable search practices to be submitted to the Copyright Office by authors, associations, and other experts.

The user must meet other hurdles, including attaching an orphan symbol to the use, to increase transparency and the possibility that an owner may emerge. If an owner does emerge, the user must pay 'reasonable compensation' or face full liability. Reasonable compensation will be mutually agreed by the owner and the user or, failing that, be decided by a court; but it must also reflect objective market values for the work and the use. This framework would facilitate projects that are global (think rare text in the hands of a book publisher) as well as local (think family portraits in the hands of a photo finisher), while preserving the purpose and potential of copyright law. It would not inject orphan works prematurely into the public domain, create an automatic exception for all uses, or create a permanent class of orphan works. Nor would it minimize the value of any one orphan work by mandating a government license and statutory rate.

Ms. Peters continues by stating:

Some critics believe that the legislation is unfair because it will deprive copyright owners of injunctive relief, statutory damages, and actual damages. I do not agree.

Let me repeat, The Register of Copyrights does not believe the legislation is unfair, or that it will deprive copyright owners of injunctive relief, statutory damages, and actual damages.

With 43 years of experience working in the Copyright Office, 14 of them as the Register, I trust that Ms. Peters knows a few things about copyright law. And I want to take this opportunity to thank her and her staff and the many other stakeholders for their tremendous assistance in crafting this important legislation.

I also want to thank my counsel Matt Sandgren and Aaron Cooper, Senator LEAHY's counsel, for their perseverance and hard work on this initiative.

In my view, a solution to the orphan works problem is achievable and the pending legislation is both fair and responsible. I urge my colleagues to pass S. 2913 without further delay.

Mr. WHITEHOUSE. Mr. President, I ask unanimous consent that the Kyl amendment at the desk be agreed to; the committee-reported amendment, as amended, be agreed to; the bill, as amended, be read the third time and passed; the motions to reconsider be laid upon the table; and that any statements be printed in the RECORD.

The PRESIDING OFFICER. Without objection, it is so ordered.

The amendment (No. 5669) was agreed to, as follows:

(Purpose: To modify provisions relating to diligent efforts, guide searches, recommend practices, imitations on injunctive relief, and for other purposes)

On page 19, line 21, strike all through page 20, line 12.

On page 20, line 13, strike "(2)" and insert "(1)".

On page 21, line 10, strike "(3)" and insert "(2)".

On page 21, line 16, strike "(4)" and insert "(3)".

On page 23, line 15, insert "and" at the end.

On page 23, strike lines 16 through 20.

On page 23, line 21, strike "(vi)" and insert "(v)".

On page 25, line 1, strike all through page 27, line 7 and insert the following:

"(i) IN GENERAL.—A search qualifies under paragraph (1)(A)(i)(I) if the infringer, a person acting on behalf of the infringer, or any person jointly and severally liable with the infringer for the infringement, undertakes a diligent effort that is reasonable under the circumstances to locate the owner of the infringed copyright prior to, and at a time reasonably proximate to, the infringement.

"(ii) DILIGENT EFFORT.—For purposes of clause (i), a diligent effort—

"(I) requires, at a minimum—

"(aa) a search of the records of the Copyright Office that are available to the public through the Internet and relevant to identifying and locating copyright owners, provided there is sufficient identifying information on which to construct a search;

"(bb) a search of reasonably available sources of copyright authorship and ownership information and, where appropriate, licensor information;

"(cc) use of appropriate technology tools, printed publications, and where reasonable, internal or external expert assistance; and

"(dd) use of appropriate databases, including databases that are available to the public through the Internet; and

"(II) shall include any actions that are reasonable and appropriate under the facts relevant to the search, including actions based on facts known at the start of the search and facts uncovered during the search, and including a review, as appropriate, of Copyright Office records not available to the public through the Internet that are reasonably likely to be useful in identifying and locating the copyright owner.

"(iii) CONSIDERATION OF RECOMMENDED PRACTICES.—A qualifying search under this subsection shall ordinarily be based on the applicable statement of Recommended Practices made available by the Copyright Office and additional appropriate best practices of authors, copyright owners, and users to the extent such best practices incorporate the expertise of persons with specialized knowledge with respect to the type of work for which the search is being conducted.

"(iv) LACK OF IDENTIFYING INFORMATION.—The fact that, in any given situation,—

"(I) a particular copy or phonorecord lacks identifying information pertaining to the owner of the infringed copyright; or

"(II) an owner of the infringed copyright fails to respond to any inquiry or other communication about the work, shall not be deemed sufficient to meet the conditions under paragraph (1)(A)(i)(I).

"(v) USE OF RESOURCES FOR CHARGE.—A qualifying search under paragraph (1)(A)(i)(I) may require use of resources for which a charge or subscription is imposed to the extent reasonable under the circumstances.

"(B) INFORMATION TO GUIDE SEARCHES; RECOMMENDED PRACTICES.—

"(i) STATEMENTS OF RECOMMENDED PRACTICES.—The Register of Copyrights shall maintain and make available to the public

and, from time to time, update at least one statement of Recommended Practices for each category, or, in the Register's discretion, subcategory of work under section 102(a) of this title, for conducting and documenting a search under this subsection. Such statement will ordinarily include reference to materials, resources, databases, and technology tools that are relevant to a search. The Register may maintain and make available more than one statement of Recommended Practices for each category or subcategory, as appropriate.

"(ii) CONSIDERATION OF RELEVANT MATERIALS.—In maintaining and making available and, from time to time, updating the Recommended Practices in clause (i), the Register of Copyrights shall, at the Register's discretion, consider materials, resources, databases, technology tools, and practices that are reasonable and relevant to the qualifying search. The Register shall consider any comments submitted to the Copyright Office by the Small Business Administration Office of Advocacy. The Register shall also, to the extent practicable, take the impact on copyright owners that are small businesses into consideration when modifying and updating best practices.

On page 30, strike lines 1 through 15 and insert the following:

"(C) LIMITATIONS.—The limitations on injunctive relief under subparagraphs (A) and (B) shall not be available to an infringer or a representative of the infringer acting in an official capacity if the infringer asserts that neither the infringer nor any representative of the infringer acting in an official capacity is subject to suit in the courts of the United States for an award of damages for the infringement, unless the court finds that the infringer—

"(i) has complied with the requirements of subsection (b); and

"(ii) pays reasonable compensation to the owner of the exclusive right under the infringed copyright in a reasonably timely manner after the amount of reasonable compensation has been agreed upon with the owner or determined by the court.

On page 31, line 23, insert "commercial" after "other".

On page 33, line 17, insert "Prior to certifying that databases are available under this section, the Register shall determine, to the extent practicable, their impact on copyright owners that are small businesses and consult with the Small Business Administration Office of Advocacy regarding those impacts. The Register shall consider the Office of Advocacy's comments and respond to any concerns." after the period.

The committee amendment in the nature of a substitute, as amended, was agreed to.

The bill (S. 2913), as amended, was ordered to be engrossed for a third reading, was read the third time, and passed, as follows:

S. 2913

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the "Shawn Bentley Orphan Works Act of 2008".

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

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

§ 514. Limitation on remedies in cases involving orphan works

"(a) DEFINITIONS.—In this section, the following definitions shall apply:

“(1) NOTICE OF CLAIM OF INFRINGEMENT.—The term ‘notice of claim of infringement’ means, with respect to a claim of copyright infringement, a written notice sent from the owner of the infringed copyright or a person acting on the owner’s behalf to the infringer or a person acting on the infringer’s behalf, that includes at a minimum—

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

“(B) the title of the infringed work, any alternative titles of the infringed work known to the owner of the infringed copyright, or if the work has no title, a description in detail sufficient to identify that work;

“(C) an address and telephone number at which the owner of the infringed copyright or a person acting on behalf of the owner may be contacted; and

“(D) information reasonably sufficient to permit the infringer to locate the infringer’s material in which the infringed work resides.

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

“(3) REASONABLE COMPENSATION.—The term ‘reasonable compensation’ means, with respect to a claim of infringement, the amount on which a willing buyer and willing seller in the positions of the infringer and the owner of the infringed copyright would have agreed with respect to the infringing use of the work immediately before the infringement began.

“(b) CONDITIONS FOR ELIGIBILITY.—

“(1) CONDITIONS.—

“(A) IN GENERAL.—Notwithstanding sections 502 through 506, and subject to subparagraph (B), in an action brought under this title for infringement of copyright in a work, the remedies for infringement shall be limited in accordance with subsection (c) if the infringer—

“(i) proves by a preponderance of the evidence that before the infringement began, the infringer, a person acting on behalf of the infringer, or any person jointly and severally liable with the infringer for the infringement—

“(I) performed and documented a qualifying search, in good faith, to locate and identify the owner of the infringed copyright; and

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

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

“(iii) included with the public distribution, display, or performance of the infringing work a symbol or other notice of the use of the infringing work, the form and manner of which shall be prescribed by the Register of Copyrights, which may be in the footnotes, endnotes, bottom margin, end credits, or in any other such manner as to give notice that the infringed work has been used under this section;

“(iv) asserts in the initial pleading to the civil action eligibility for such limitations; and

“(v) at the time of making the initial discovery disclosures required under rule 26 of the Federal Rules of Civil Procedure, states with particularity the basis for eligibility for the limitations, including a detailed description and documentation of the search undertaken in accordance with paragraph (2)(A) and produces documentation of the search.

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

“(i) fails to engage in negotiation in good faith regarding reasonable compensation with the owner of the infringed copyright; or

“(ii) fails to render payment of reasonable compensation in a reasonably timely manner after reaching an agreement with the owner of the infringed copyright or under an order described in subsection (c)(1)(A).

“(2) REQUIREMENTS FOR SEARCHES.—

“(A) REQUIREMENTS FOR QUALIFYING SEARCHES.—

“(i) IN GENERAL.—A search qualifies under paragraph (1)(A)(i)(I) if the infringer, a person acting on behalf of the infringer, or any person jointly and severally liable with the infringer for the infringement, undertakes a diligent effort that is reasonable under the circumstances to locate the owner of the infringed copyright prior to, and at a time reasonably proximate to, the infringement.

“(ii) DILIGENT EFFORT.—For purposes of clause (i), a diligent effort—

“(I) requires, at a minimum—

“(aa) a search of the records of the Copyright Office that are available to the public through the Internet and relevant to identifying and locating copyright owners, provided there is sufficient identifying information on which to construct a search;

“(bb) a search of reasonably available sources of copyright authorship and ownership information and, where appropriate, licensor information;

“(cc) use of appropriate technology tools, printed publications, and where reasonable, internal or external expert assistance; and

“(dd) use of appropriate databases, including databases that are available to the public through the Internet; and

“(II) shall include any actions that are reasonable and appropriate under the facts relevant to the search, including actions based on facts known at the start of the search and facts uncovered during the search, and including a review, as appropriate, of Copyright Office records not available to the public through the Internet that are reasonably likely to be useful in identifying and locating the copyright owner.

“(iii) CONSIDERATION OF RECOMMENDED PRACTICES.—A qualifying search under this subsection shall ordinarily be based on the applicable statement of Recommended Practices made available by the Copyright Office and additional appropriate best practices of authors, copyright owners, and users to the extent such best practices incorporate the expertise of persons with specialized knowledge with respect to the type of work for which the search is being conducted.

“(iv) LACK OF IDENTIFYING INFORMATION.—The fact that, in any given situation,—

“(I) a particular copy or phonorecord lacks identifying information pertaining to the owner of the infringed copyright; or

“(II) an owner of the infringed copyright fails to respond to any inquiry or other communication about the work,

shall not be deemed sufficient to meet the conditions under paragraph (1)(A)(i)(I).

“(v) USE OF RESOURCES FOR CHARGE.—A qualifying search under paragraph (1)(A)(i)(I) may require use of resources for which a charge or subscription is imposed to the extent reasonable under the circumstances.

“(B) INFORMATION TO GUIDE SEARCHES; RECOMMENDED PRACTICES.—

“(i) STATEMENTS OF RECOMMENDED PRACTICES.—The Register of Copyrights shall maintain and make available to the public and, from time to time, update at least one

statement of Recommended Practices for each category, or, in the Register’s discretion, subcategory of work under section 102(a) of this title, for conducting and documenting a search under this subsection. Such statement will ordinarily include reference to materials, resources, databases, and technology tools that are relevant to a search. The Register may maintain and make available more than one statement of Recommended Practices for each category or subcategory, as appropriate.

“(ii) CONSIDERATION OF RELEVANT MATERIALS.—In maintaining and making available and, from time to time, updating the Recommended Practices in clause (i), the Register of Copyrights shall, at the Register’s discretion, consider materials, resources, databases, technology tools, and practices that are reasonable and relevant to the qualifying search. The Register shall consider any comments submitted to the Copyright Office by the Small Business Administration Office of Advocacy. The Register shall also, to the extent practicable, take the impact on copyright owners that are small businesses into consideration when modifying and updating best practices.

“(3) PENALTY FOR FAILURE TO COMPLY.—If an infringer fails to comply with any requirement under this subsection, the infringer is not eligible for a limitation on remedies under this section.

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

“(1) MONETARY RELIEF.—

“(A) GENERAL RULE.—Subject to subparagraph (B), an award for monetary relief (including actual damages, statutory damages, costs, and attorney’s fees) may not be made other than an order requiring the infringer to pay reasonable compensation to the owner of the exclusive right under the infringed copyright for the use of the infringed work.

“(B) FURTHER LIMITATIONS.—An order requiring the infringer to pay reasonable compensation for the use of the infringed work may not be made under subparagraph (A) if the infringer is a nonprofit educational institution, museum, library, archives, or a public broadcasting entity (as defined in subsection (f) of section 118), or any of such entities’ employees acting within the scope of their employment, and the infringer proves by a preponderance of the evidence that—

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

“(ii) the infringement was primarily educational, religious, or charitable in nature; and

“(iii) after receiving a notice of claim of infringement, and having an opportunity to conduct an expeditious good faith investigation of the claim, the infringer promptly ceased the infringement.

“(2) INJUNCTIVE RELIEF.—

“(A) GENERAL RULE.—Subject to subparagraph (B), the court may impose injunctive relief to prevent or restrain any infringement alleged in the civil action. If the infringer has met the requirements of subsection (b), the relief shall, to the extent practicable and subject to applicable law, account for any harm that the relief would cause the infringer due to its reliance on subsection (b).

“(B) EXCEPTION.—In a case in which the infringer has prepared or commenced preparation of a new work of authorship that recasts, transforms, adapts, or integrates the infringed work with a significant amount of original expression, any injunctive relief ordered by the court may not restrain the infringer’s continued preparation or use of that new work, if—

“(i) the infringer pays reasonable compensation in a reasonably timely manner after the amount of such compensation has been agreed upon with the owner of the infringed copyright or determined by the court; and

“(ii) the court also requires that the infringer provide attribution, in a manner that is reasonable under the circumstances, to the legal owner of the infringed copyright, if requested by such owner.

“(C) LIMITATIONS.—The limitations on injunctive relief under subparagraphs (A) and (B) shall not be available to an infringer or a representative of the infringer acting in an official capacity if the infringer asserts that neither the infringer nor any representative of the infringer acting in an official capacity is subject to suit in the courts of the United States for an award of damages for the infringement, unless the court finds that the infringer—

“(i) has complied with the requirements of subsection (b); and

“(ii) pays reasonable compensation to the owner of the exclusive right under the infringed copyright in a reasonably timely manner after the amount of reasonable compensation has been agreed upon with the owner or determined by the court.

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

“(E) RIGHTS AND PRIVILEGES NOT WAIVED.—No action taken by an infringer under subparagraph (C) shall be deemed to waive any right or privilege that, as a matter of law, protects the infringer from being subject to suit in the courts of the United States for an award of damages.

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

“(e) COPYRIGHT FOR DERIVATIVE WORKS AND COMPILATIONS.—Notwithstanding section 103(a), an infringer who qualifies for the limitation on remedies afforded by this section shall not be denied copyright protection in a compilation or derivative work on the basis that such compilation or derivative work employs preexisting material that has been used unlawfully under this section.

“(f) EXCLUSION FOR FIXATIONS IN OR ON USEFUL ARTICLES.—The limitations on remedies under this section shall not be available to an infringer for infringements resulting from fixation of a pictorial, graphic, or sculptural work in or on a useful article that is offered for sale or other commercial distribution to the public.”

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

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

(c) EFFECTIVE DATE.—

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

(A) take effect on the later of—

(i) January 1, 2009; or

(ii) the date which is the earlier of—

(I) 30 days after the date on which the Copyright Office publishes notice in the Federal Register that it has certified under section 3 that there exist and are available at least 2 separate and independent searchable,

electronic databases, that allow for searches of copyrighted works that are pictorial, graphic, and sculptural works, and are available to the public; or

(II) January 1, 2013; and

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

(2) DEFINITION.—In this subsection, the term “pictorial, graphic, and sculptural works” has the meaning given that term in section 101 of title 17, United States Code.

SEC. 3. DATABASES OF PICTORIAL, GRAPHIC, AND SCULPTURAL WORKS.

The Register of Copyrights shall undertake a process to certify that there exist and are available databases that facilitate a user's search for pictorial, graphic, and sculptural works that are subject to copyright protection under title 17, United States Code. The Register shall only certify that databases are available under this section if such databases are determined to be effective and not prohibitively expensive and include the capability to be searched using 1 or more mechanisms that allow for the search and identification of a work by both text and image and have sufficient information regarding the works to enable a potential user of a work to identify or locate the copyright owner or authorized agent. Prior to certifying that databases are available under this section, the Register shall determine, to the extent practicable, their impact on copyright owners that are small businesses and consult with the Small Business Administration Office of Advocacy regarding those impacts. The Register shall consider the Office of Advocacy's comments and respond to any concerns.

SEC. 4. REPORT TO CONGRESS.

Not later than December 12, 2014, the Register of Copyrights shall report to the Committee on the Judiciary of the Senate and the Committee on the Judiciary of the House of Representatives on the implementation and effects of the amendments made by section 2, including any recommendations for legislative changes that the Register considers appropriate.

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

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

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

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

SEC. 6. STUDY ON COPYRIGHT DEPOSITS.

(a) IN GENERAL.—The Comptroller General of the United States shall conduct a study examining the function of the deposit re-

quirement in the copyright registration system under section 408 of title 17, United States Code, including—

(1) the historical purpose of the deposit requirement;

(2) the degree to which deposits are made available to the public currently;

(3) the feasibility of making deposits, particularly visual arts deposits, electronically searchable by the public for the purpose of locating copyright owners; and

(4) the impact any change in the deposit requirement would have on the collection of the Library of Congress.

(b) REPORT.—Not later than 2 years after the date of the enactment of this Act, the Comptroller General shall submit to the Committee on the Judiciary of the Senate and the Committee on the Judiciary of the House of Representatives a report on the study conducted under this section, including such administrative, regulatory, or legislative recommendations that the Comptroller General considers appropriate.

OLD POST OFFICE BUILDING REDEVELOPMENT ACT OF 2008

Mr. WHITEHOUSE. Mr. President, I ask unanimous consent that the Senate proceed to the immediate consideration of Calendar No. 1079, H.R. 5001.

The PRESIDING OFFICER. The clerk will report the bill by title.

The legislative clerk read as follows:

A bill (H.R. 5001) to authorize the Administrator of General Services to provide for the redevelopment of the Old Post Office Building located in the District of Columbia.

There being no objection, the Senate proceeded to consider the bill.

Mr. WHITEHOUSE. Mr. President, I ask unanimous consent that the bill be read a third time and passed, the motions to reconsider be laid upon the table with no intervening action or debate, and any statements related to the bill be printed in the RECORD.

The PRESIDING OFFICER. Without objection, it is so ordered.

The bill (H.R. 5001) was ordered to a third reading, was read the third time, and passed.

APPALACHIAN REGIONAL DEVELOPMENT ACT AMENDMENTS OF 2008

Mr. WHITEHOUSE. Mr. President, I ask that the Chair lay before the Senate a message from the House with respect to S. 496.

The Presiding Officer laid before the Senate a message from the House as follows:

S. 496

Resolved, That the bill from the Senate (S. 496) entitled “An Act to reauthorize and improve the program authorized by the Appalachian Regional Development Act of 1965”, do pass with the following amendment:

Strike out all after the enacting clause and insert:

SECTION 1. SHORT TITLE.

This Act may be cited as the “Appalachian Regional Development Act Amendments of 2008”.

SEC. 2. LIMITATION ON AVAILABLE AMOUNTS; MAXIMUM COMMISSION CONTRIBUTION.

(a) GRANTS AND OTHER ASSISTANCE.—Section 14321(a) of title 40, United States Code, is amended—