

Orphan works update

Legislation has been introduced in both the U.S. Senate and House of Representatives that limits remedies in copyright infringement cases involving orphan works.

While we strongly support legislation resolving the orphan works problem, we recommend the Senate version of the bill over the House version, which includes a “dark archive” provision, mandating that users file a notice to the U.S. Copyright Office before using an orphan work.

Brief history

In 2005, the U.S. Copyright Office conducted a study of the orphan works problem and concluded that Congress should enact legislation to “free” these works, and a bill was introduced in the House of Representatives: the Orphan Works Act of 2006 (H.R. 5439). However, the 109th Congress ended before the full Judiciary Committee could consider the bill.

On April 24, 2008, Rep. Howard Berman (D-California) and Rep. Lamar Smith (R-Texas) introduced the Orphan Works Act of 2008 (H.R. 5889), cosponsored by Rep. Howard Coble (R-North Carolina) and Rep. John Conyers (D-Michigan). At the same time, Sen. Patrick Leahy (D-Vermont) and Sen. Orrin Hatch (R-Utah) introduced the Shawn Bentley Orphan Works Act of 2008 (S. 2913) in the Senate.

On May 7, 2008, the House Subcommittee on Judiciary Courts, the Internet and Intellectual Property approved orphan works legislation during a markup hearing and agreed to hold a meeting of stakeholders before moving to the full committee.

The Senate Judiciary Committee has scheduled the markup on their version of the Orphan Works bill for May 15, 2008.

Analysis of orphan works legislation

The library community thanks the House and Senate for introducing orphan works legislation to increase access to and use of works of great historic and cultural significance. However, ALA prefers the Senate version of the bill over the House version.

We do not support the House version’s additional provision: the “dark archive” requirement. Such a requirement would be excessively burdensome for users with little benefit to owners, will likely drive up compliance costs, and will require many institutions to consult legal counsel to review submissions prior to filing. (For example, these requirements will prove challenging, if not impossible, for librarians involved in mass digitization projects to meet).

Additionally, we do not support either the House and Senate versions’ inclusion of the following troublesome provision: tasking the U.S. Copyright Office with establishing best practices on conducting searches to locate the rights holder.

Update on PRO IP Act

The bipartisan leadership of the House Judiciary Committee introduced the Prioritizing Resources and Organization for Intellectual Property (PRO IP) Act of 2007. While the bill was unlikely to have a meaningful impact on IP infringement, one provision—section 104, concerning copyright statutory damages—would have had an adverse impact on libraries.

In response to the opposition to section 104, Chairman Howard Berman has asked the Copyright Office to convene a roundtable in January 2008 to explore this provision in greater detail. LCA participated in the roundtable. After the roundtable, Berman decided to drop section 104, and the PRO IP Act was reported out of the subcommittee without the provision. The Senate has not yet addressed its version of the bill. *zz*

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