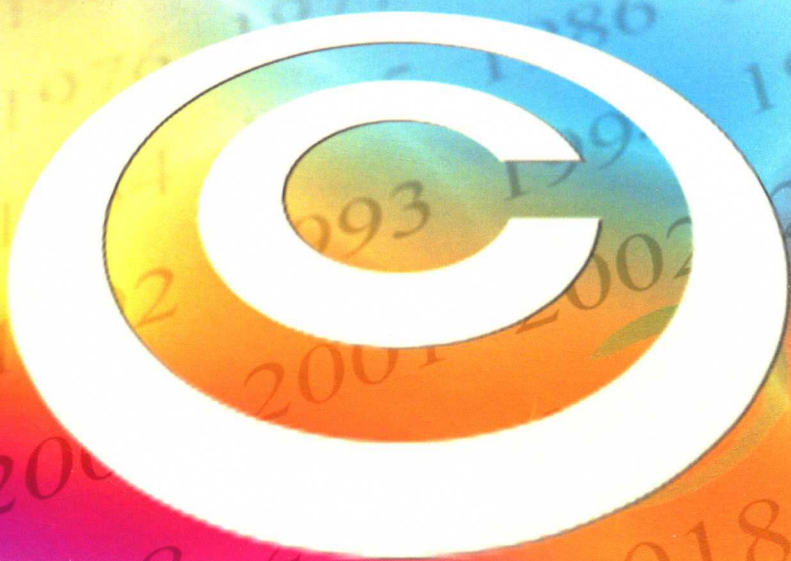


Laws and Legislation

Copyright and the Orphan Works Issue

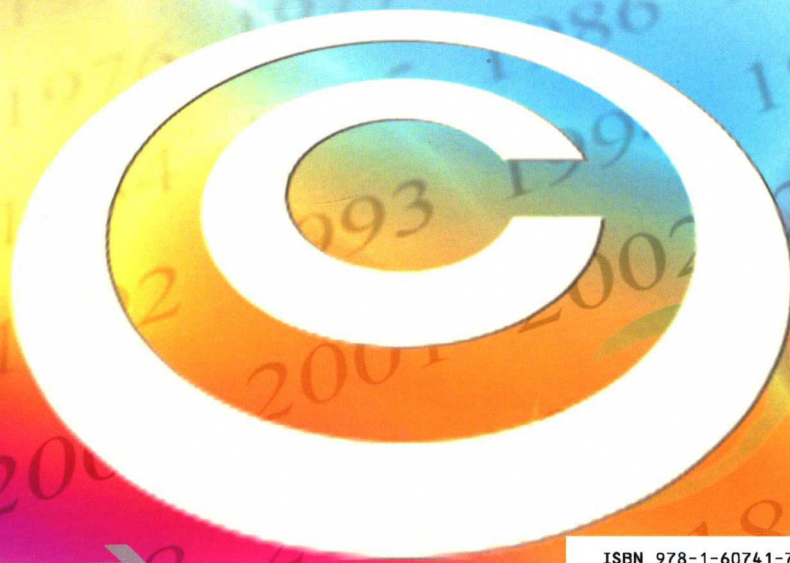
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Editor



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LAWS AND LEGISLATION

**COPYRIGHT AND THE ORPHAN
WORKS ISSUE**

ANDREW D. OWENS
EDITOR

Nova Science Publishers, Inc.

New York

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PREFACE

Orphan works are perceived to be inaccessible because of the risk of infringement liability that a user might incur if and when a copyright owner subsequently appears. Consequently, many works that are, in fact, abandoned by owners are withheld from public view and circulation because of uncertainty about the owner and the risk of liability. This book defines the problems it identifies, and concludes that the problem is indeed real and should be addressed legislatively. It analyzes stakeholders' views on the issue and constraints on solutions imposed by the structure of U.S. copyright law and international copyright obligations. The book sets forth a proposal to amend the Copyright Act by adding a provision that would limit liability for infringing use of orphan works when, prior to use, a user performs a reasonably diligent search for the copyright owner and provides attribution to the author and copyright owner, if possible. This book consists of public documents which have been located, gathered, combined, reformatted, and enhanced with a subject index, selectively edited and bound to provide easy access.

Chapters 1 through 6 feature testimony before the U. S. House of Representatives

Chapter 7 - This chapter surveys the findings and conclusions in the U.S. Copyright Office's *Report on Orphan Works* ("Report"), issued in January 2006, and legislation introduced to address the problem. Orphan works are copyrighted works whose owners are difficult or impossible to identify and/or locate. The goal of the chapter was to elicit public comment and evaluate the extent of real or perceived problems that content users encounter in their efforts to use these works.

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

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

Adopting many of the suggestions of the Copyright Office, the Orphan Works Act of 2006 was introduced in the 109th Congress, second session (H.R. 5439). This bill was later incorporated into an omnibus copyright bill, appearing as Title II of The Copyright Modernization Act of 2006 (H.R. 6052). However, the bill was not addressed by the end of that Congress's adjournment. The bill would have implemented a limitation on monetary damage liability for specified infringement of orphan works, but took a more detailed approach than the chapter's original proposals in establishing requirements for such liability limitations, such as articulating standards for a "reasonably diligent search." The bill would also have directed the Copyright Office to study and report on the implementation of the new orphan works amendment, and to study and make recommendations for a "small claims" procedure to address copyright infringement.

Legislation addressing the orphan works issue was reintroduced in the 110th Congress: the Orphan Works Act of 2008 (H.R. 5889) and the Shawn Bentley Orphan Works Act of 2008 (S. 2913). The two bills resembled the Orphan Works Act of 2006, although there were substantial differences from that earlier legislation and even between themselves. These additional or revised provisions were added in part to address concerns raised by photographers, illustrators, and other visual artists, as well as textile and home furnishing manufacturers. While S. 2913 passed the Senate, H.R. 5889 did not make it out of the House Judiciary Committee.

Chapter 8 - This chapter addresses the issue of "orphan works," a term used to describe the situation where the owner of a copyrighted work cannot be identified and located by someone who wishes to make use of the work in a manner that requires permission of the copyright owner. Even where the user has made a reasonably diligent effort to find the owner, if the owner is not found, the user faces uncertainty – she cannot determine whether or under what conditions the owner would permit use. Where the proposed use goes beyond an exemption or limitation to copyright, the user cannot reduce the risk of copyright liability for such use, because there is always a possibility, however remote, that a copyright owner could bring an infringement action after that use has begun.

Concerns have been raised that in such a situation, a productive and beneficial use of the work is forestalled – not because the copyright owner has asserted his exclusive rights in the work, or because the user and owner cannot agree on the terms of a license – but merely because the user cannot locate the owner. Many users of copyrighted works have indicated that the risk of liability for copyright infringement, however remote, is enough to prompt them not to make use of the work. Such an outcome is not in the public interest, particularly where the copyright owner is not locatable because he no longer exists or otherwise does not care to restrain the use of his work.

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Chapter 1

ORPHAN WORKS HEARING—ADLER TESTIMONY

Allan Adler

Mr. Chairman and Members of the Subcommittee:

Thank you for inviting me to appear here today on behalf of the Association of American Publishers ("AAP") to discuss the need and framework for "orphan works" legislation.

As you may know, AAP is the principal national trade association of the U.S. book publishing industry, representing some 300 member companies and organizations that include most of the major commercial book and journal publishers in the United States, as well as many small and non-profit publishers, university presses and scholarly societies. AAP members publish hardcover and paperback books and journals in every field of human interest. In addition to publishing print materials, many AAP members are active in the emerging market for ebooks, and also produce computer programs, databases, Web sites and a variety of multimedia works for use in online and other digital formats.

BACKGROUND

AAP has been on the public record urging the need to resolve the problem of "orphan works" at least since the proceedings that resulted in the issuance of the Copyright Office *"Report on Copyright and Digital Distance Education"* in May 1999. Book publishers believe it is important to address how U.S. copyright law might permit uses of a copyrighted work that implicate the exclusive rights of the copyright owner, when the uses are not authorized by any of the statutory limitations or exceptions applicable to such rights and the would-be users cannot identify or locate the copyright owner in order to obtain required permission.

As both users and producers of copyrighted works, book publishers have a fundamental interest in advocating the widespread availability and use of copyrighted works consistent with established principles of copyright law. They also have considerable experience in seeking necessary permissions to incorporate photographs, illustrations and other discrete,

third-party copyrighted works into the histories, biographies and other kinds of copyrighted literary works they publish.

For these reasons, book publishers fully understand the frustration that can arise when the desire to incorporate a third-party work as part of a new work being prepared for publication is thwarted by a concern over potential infringement liability based not on the copyright owner's refusal to authorize such use of the third-party work but on the inability of the publisher — or author — of the new work to identify or locate that copyright owner in order to request the permission that is necessary to legally make the intended use.

Book publishers also have considerable experience in dealing with those who infringe their works and attempt to exploit loopholes in the copyright law to justify their actions. Consequently, while AAP is extremely supportive of the need for legislation to adequately and effectively address the orphan works issue, we also understand the concerns of others that language in any orphan works legislation must be carefully crafted so as not to create any additional loopholes for unscrupulous infringers.

THE COPYRIGHT OFFICE REPORT AND PROPOSED “ORPHAN WORKS ACT OF 2006”

When the Copyright Office published its "Report on Orphan Works" in January 2006, AAP was gratified to learn that the chapter recommended the *same basic framework that the book publishing community and many others had proposed* for dealing with the "orphan works" problem in the Comments and Reply Comments that AAP had earlier submitted to that agency.

From the perspective of the book publishing community, the Copyright Office wisely rejected a variety of proposed "orphan works" schemes that seemed excessively complex, discriminatory, costly or bureaucratic, in favor of advocating a relatively simple, uniform, and flexible way of addressing the problem. Its minimalist approach seemed calculated to require the fewest possible changes to current U.S. copyright law, no impact on U.S. obligations under international copyright agreements, and the least possible bureaucratic impact on governmental entities, as well as on owners and users of copyrighted works. By its terms, it could be characterized as a "fine tuning" of statutory law that would *not* impose any new prerequisites for registration or enforcement of copyright, or in any way affect the duration of copyright, the scope of copyright liability, or the applicability of "fair use" or other defenses against infringement.

The core concept of the Copyright Office recommendation, which was also the basic premise of the proposal advanced by AAP, was fairly straightforward:

If the infringing user of a copyrighted work has first performed a reasonably diligent but, ultimately, unsuccessful search to identify or locate the copyright owner to obtain permission before engaging in an infringing use of the work, then that infringing user generally would be entitled to have the benefit of limitations on the compensation and injunctive remedies that the copyright owner could obtain if the owner turns up subsequent to the commencement of such infringing use and pursues an infringement claim.

The infringing user's eligibility for protection under a "limitation of the copyright owner's remedies," as the result of performing a reasonably diligent (albeit unsuccessful) search for the copyright owner, was carried forward as the basic consensus framework for the proposed "Orphan Works Act of 2006" (H.R.5439), which was introduced and approved by this Subcommittee in May 2006. Although not enacted in the last Congress, H.R.5439 built upon the recommendations of the Copyright Office in a manner that leads AAP to urge that the Subcommittee- approved version should be the starting point for a push to enact orphan works legislation before the end of the current Congress later this year.

Let me briefly touch upon a few key concepts that were developed in the 2006 bill to clarify the basic application of the essential framework elements, and a few key issues that still need to be resolved:

Reasonably Diligent Search: AAP generally agreed with the Copyright Office recommendation that whether an infringing user has conducted a "reasonably diligent search" to identify or locate the copyright owner should be determined on a case-by-case basis measured against a flexible standard of reasonableness in the totality of the circumstances. However, among the useful statutory clarifications that added flesh to this concept in H.R.5439 were requirements that the search:

- Must be performed *and* "documented" *before* the infringing use of the work commences;
- Must include steps that are "reasonable under the circumstances" to identify or locate the copyright owner in order to obtain permission for the use, *including, at a minimum*, review of information from "authoritative sources" (i.e., industry guidelines, statements of "best practices," and other relevant documents) that is maintained and made available to the public by the Copyright Office, and designed to assist users in conducting and documenting such a search;
- Must also include review of "sources of reasonably available technology tools" and "reasonably available expert assistance" that are similarly obtained and maintained and made available to the public by the Copyright Office, which may include (if reasonable under the circumstances) resources for which a charge or subscription fee is imposed; and,
- Must extend beyond reference to the lack of identifying copyright ownership information on the copy of the work.

In addition, at the urging of AAP and others, H.R.5439 at least partially addressed the question of when it should be appropriate for a would-be user to be eligible for the limitations on remedies in reliance upon the results of a *previous* third-party search, rather than the user's *own* search efforts (i.e., "piggybacking"). The bill made it clear, for example, that a reasonably diligent search conducted by a would- be user's employees acting within the scope of their employment, or by a third-party acting in an agency capacity on behalf of the user, will qualify the user for the statutory limitations on remedies in the same way as would such a search conducted by the user.

It also made it clear that any person who engages in a *related* infringing use of the *same* work as the user who conducted a reasonably diligent search, should be able to qualify for the limitations on remedies based on the user's search where the related infringing use occurs

pursuant to a license from the user or the user's licensee. For example, if the original user of the "orphan work" is an author who incorporates the work into a new work pursuant to conducting a search that meets the statutory standard, then the publisher of the new work, as well as the publisher's distributors and licensees, would also qualify for the limitations on remedies without having to each conduct their own search for the copyright owner of the original work.

However, the 2006 bill did not specifically address *other* instances of potential "piggybacking" on previously-conducted searches that will arise in situations where the second user of the work is not tied to the original user by any license or other basis for asserting a claim of legal privity, and the use of the work by the second user is *different from and unrelated to* the use of the work by the original user. AAP believes that applying an objective reasonableness test to such reliance, as suggested by the Copyright Office report, invites the real risk that such follow-on users, as a matter of practice, will not make *any* independent effort to locate the copyright owner *other than* to determine whether a previous search was conducted by another user. This could have the unfortunate effect of perpetuating the mistaken notion that "orphan work" is a designation which, once applied, adheres to the *work* in question and creates a *status* for that work that governs all of its future uses by all users, instead of reflecting the more accurate and appropriate notion that the designation applies to the work only in connection with a particular *use* by a particular user or users.

AAP does not suggest that a subsequent unrelated user should *never* be permitted to reasonably rely on the results of a previous search conducted by another user, but urges that any treatment of this issue should avoid conveying the idea that a subsequent user would qualify for the limitations on remedies *simply by reference* to the previous search efforts of another user. As a general rule, it should be clear that the responsibility to conduct a reasonably diligent search for the copyright owner prior to using an "orphan work" attaches to each *use* of the work, rather than to each *user*. This will help to ensure that a reasonable legal process established to provide for the use of "orphan works" without undue risks of infringement liability will not degenerate into a means by which such works are treated, in common practice, as though they were no longer subject to copyright protection.

Attribution: In addition to the "reasonably diligent search" requirement, the infringing user's eligibility for the "limitations on remedies" under the bill depends on whether the infringing use of the work provided "attribution" to the author *and* owner of the copyright, in a manner reasonable under the circumstances and "if known with a reasonable degree of certainty based on information obtained in performing the reasonably diligent search."

Insofar as U.S. copyright law contains no general requirement for attribution when third-party works are used, it is unclear why attribution should be required for a use under "orphan work" treatment, especially since the "orphan work" situation will predictably be one in which the accuracy of any attribution to the copyright owner frequently will be inherently suspect. Given the circumstances in which such notice will be provided, it is likely that the provided attribution in many instances may be more misleading than informative. AAP is also concerned that requiring attribution as a *condition* for obtaining the limitations on remedies could make such attributions a routine litigation target for emergent copyright owners to challenge the infringing user's eligibility for such protection, notwithstanding the user's satisfaction of the "reasonably diligent search" requirement.

It also is not clear why the 2006 bill would have made the attribution requirement apply to *both* the author *and* the copyright owner of the work, when being able to identify either of these persons often will be extremely doubtful under the basic premise of orphan works treatment. In the context of orphan works legislation, it makes little sense to identify the author, since the author has no right or ability to license the use of the work at issue if that person is not also the copyright owner. It is not clear that requiring attribution to the author — in addition to attribution to the copyright owner — accomplishes anything other than creating a significant potential loophole in the orphan works limitation.

In light of these concerns, Congress should carefully consider whether attribution should be made a *condition* for obtaining the limitations on remedies, and, if so, whether attribution to only the copyright owner should satisfy the eligibility requirement.

Limitations on Remedies: Overall, AAP believes that the 2006 bill, insofar as it developed and clarified Copyright Office recommendations for shaping the "limitations on remedies" policies, was fairly balanced and reasonable, particularly in its handling of the availability of "reasonable compensation" for the copyright owner who comes forward subsequent to the commencement of a qualifying "orphan work" use. However, given the concerns raised by some of the parties to both the user and owners camps, AAP believes there is more work to be done.

Limitation on Remedies — Monetary Relief: Inherent in the very concept of "orphan work" treatment, as urged by AAP and recommended by the Copyright Office, is the expectation that the issue of "reasonable compensation" is unlikely to arise in the vast majority of cases. If the "reasonably diligent search" requirements for obtaining limitations on remedies are implemented in good faith by would-be users of "orphan works," such users will seldom, if ever, subsequently encounter a claim for monetary relief by the copyright owner. Nevertheless, in those cases where a copyright owner *does* subsequently surface, the point of the "reasonable compensation" provision is to put the owner and user, to the greatest extent possible, in the respective positions they would have occupied in an ordinary marketplace negotiation occurring prior to the infringing use, where the amount paid to the owner by the user would represent what a reasonable willing user would have paid a reasonable willing owner based on knowledge and evidence of comparable marketplace transactions.

However, the copyright owners of certain types of works are apparently concerned that the proposed implementation of the limitations-on-remedies principle, which would eliminate the availability of an award of attorney fees and costs to the emergent copyright owner, as well as the availability of actual or statutory damages, may not provide sufficient economic incentive for them to pursue a claim of infringement in circumstances where the infringing user unreasonably refuses to pay reasonable compensation to the owner. For this reason, in the interest of fairness, AAP supported a provision in the 2006 bill that would give the federal courts discretion to award "full costs," including reasonable attorney fees, to a subsequently emergent plaintiff-owner "if the infringer fails to negotiate in good faith" with such plaintiff-owner regarding the amount of reasonable compensation to be paid by the infringer. We were also sympathetic to the idea of studying whether a "small claims action" for infringement would be workable and resolve some of their issues.

In addition, AAP would urge Congress to make sure that the practical meaning and application of "reasonable compensation," "direct or indirect commercial advantage,"

"charitable, religious, scholarly, or educational purpose" and other key terms that establish the limitations on monetary relief in the statutory scheme are fully explained in statutory definitions or legislative history. Among other things, the legislative history should make clear that actions by the infringing user *other than* selling copies of the infringed work may constitute "commercial advantage," and that the provision's purpose in providing a safe harbor for infringing uses "performed without any purpose of direct or indirect commercial advantage and primarily for a charitable, religious, scholarly, or educational purpose" is not to lay a foundation for the assertion of a general "personal use" or "private use" exemption from infringement liability but only to effectuate the limitations on remedies for non-profit infringing uses that qualify for "orphan work" treatment, regardless of whether the user is an individual or an entity.

Limitation on Remedies — Injunctive Relief: AAP generally supports the distinctions that were drawn in the Copyright Office legislative recommendations regarding the availability of injunctive relief. However, AAP believes that the attempt by the Copyright Office to use the concept of "derivative works" in describing the circumstances where injunctive relief may not be awarded to "restrain the infringer's continued preparation and use" of a new work that "recasts, transforms or adapts" the infringed work was awkward, confusing and inconsistent with the kind of results that the Copyright Office seeks to effectuate as described in its Report. For example, although the discussion in the body of the chapter clearly contemplated that this limitation should apply where the infringed work is a photo or manuscript that the infringing user has incorporated into a new literary work, such a use of the infringed work would not constitute the creation of a "derivative work" based on that infringed work. Moreover, in the attempt to make sense of what the Copyright Office was seeking to accomplish, provisions in the 2006 bill that would have limited injunctive relief in cases where the infringing user "recasts, transforms, adapts, or integrates the infringed work with the infringer's original expression in a new work of authorship" would have unaccountably discriminated against use of the infringed work in compilations, including anthologies and exhibitions, without any public policy justification.

AAP believes that these issues still need to be sorted out with the Copyright Office and interested stakeholders. However, there is another issue regarding the limitation on injunctive relief that was not addressed in the Copyright Office report but was the subject of a consensus provision developed for the 2006 bill.

AAP believes that it would be unfair to copyright owners and, potentially, a problem for U.S. adherence to its international treaty obligations if State entities are permitted to claim the proposed "limitation on remedies" protection for their attempts to engage in "orphan works" use.

As the result of a series of federal court decisions on the sovereign immunity of States under the Eleventh Amendment, State entities cannot be liable for monetary damages resulting from their acts of copyright infringement. They may, however, be subject to injunctions prohibiting further infringing use of copyrighted works. Since the proposed "orphan work" scheme would, in some circumstances, allow the copyright owner of the infringed work to obtain monetary damages (in terms of court-determined "reasonable compensation") but not injunctions, letting State entities avail themselves of the "orphan work" scheme would mean that a copyright owner who comes forward to confront a State entity that is an infringing user would be unable to get either an injunction (under the "orphan

works" scheme) or, if the State entity balks at providing "reasonable compensation," a monetary award (under the existing case law) and, thus, would be left with no recourse. This would be a patently unfair result, which almost certainly would violate U.S. obligations under the TRIPs Agreement, among others.

Accordingly, in order to avoid this situation on which the Copyright Office report was silent, the 2006 bill clarified that the "orphan work" scheme would not be available to limit injunctive relief against an infringing State entity *unless* the entity has complied with the general eligibility requirements for a limitation on remedies, *and* made a good faith offer of reasonable compensation which, upon rejection by the copyright owner, was affirmed in writing by such entity after the court determined that the amount of compensation offered was reasonable.

Effective Date: Although the issue of an effective date for implementation of the statutory "orphan works" scheme was not addressed by the Copyright Office, AAP believes the effective date should be the date of enactment. However, we understand that some stakeholders may want to *delay* the effective date for implementation in order to provide time for their communities to become familiar with the intended operation of the enacted scheme, and to develop the "best practices" and owner information resources that will help facilitate a fair and efficient implementation of "orphan works" treatment. In particular, some copyright owners of photographic, graphic arts or sculptural works have suggested that the effective date of any legislation should be delayed with respect to their works in order to facilitate their use of image search technologies and databases to help safeguard their works.

TECHNOLOGY AND ORPHAN WORKS

During discussions about orphan work legislation, certain copyright owners have raised issues regarding the potential adverse impact of such legislation on their ability to control the exploitation of their works in the marketplace. As previously noted, photographers, graphic artists and illustrators, along with applied arts designers whose works appear on functional objects of utility, have voiced dire warnings that they are currently unable to protect their works effectively from infringing uses, and that this problem will be greatly exacerbated under an orphan work scheme that effectively authorizes infringing uses of their works without their authorization.

Whether their current problems are due to the sheer number of works they produce each year; how those works are used in commercial advertising, domestic "personal" or "private" uses, or by overseas manufacturers; the expense claimed to be involved in attempting to provide effective protections; or the lack of affordable technological capabilities to address their needs, there has been steady discussion about creating *exclusions* from the orphan work legislation for certain types of works or uses of works, or *delaying the application of the legislation* to such works or uses until appropriate technological solutions for finding works or copyright ownership information related to them have become widely-available.

AAP is confident, however, that enactment of the proposed "orphan works" scheme will create *new business opportunities in the marketplace for third parties* offering professional search services, ownership information services, and the like. We believe the statutory