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(Original Signature of Member)

110TH CONGRESS
2D SESSION

H. R. _____

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

IN THE HOUSE OF REPRESENTATIVES

Mr. BERMAN introduced the following bill; which was referred to the Committee on _____

A BILL

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

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

3 **SECTION 1. SHORT TITLE.**

4 This Act may be cited as the “Orphan Works Act
5 of 2008”.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

13 “(b) CONDITIONS FOR ELIGIBILITY.—

14 “(1) CONDITIONS.—

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

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

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

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

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

9 “(ii) before using the work, filed with
10 the Register of Copyrights a Notice of Use
11 under paragraph (3);

12 “(iii) provided attribution, in a man-
13 ner that is reasonable under the cir-
14 cumstances, to the owner of the infringed
15 copyright, if such owner was known with a
16 reasonable degree of certainty, based on in-
17 formation obtained in performing the
18 qualifying search;

19 “(iv) included with the use of the in-
20 fringing work a symbol or other notice of
21 the use of the infringing work, in a man-
22 ner prescribed by the Register of Copy-
23 rights;

1 “(v) asserts in the initial pleading to
2 the civil action the right to claim such limi-
3 tations;

4 “(vi) consents to the jurisdiction of
5 United States district court, or such court
6 holds that the infringer is within the juris-
7 diction of the court; and

8 “(vii) at the time of making the initial
9 discovery disclosures required under Rule
10 26 of the Federal Rules of Civil Procedure,
11 states with particularity the basis for the
12 right to claim the limitations, including a
13 detailed description and documentation of
14 the search undertaken in accordance with
15 paragraph (2)(A).

16 “(B) EXCEPTION.—Subparagraph (A)
17 does not apply if, after receiving notice of the
18 claim for infringement and having an oppor-
19 tunity to conduct an expeditious good faith in-
20 vestigation of the claim, the infringer—

21 “(i) fails to negotiate reasonable com-
22 pensation in good faith with the owner of
23 the infringed copyright; or

1 “(ii) fails to render payment of rea-
2 sonable compensation in a reasonably time-
3 ly manner.

4 “(2) REQUIREMENTS FOR SEARCHES.—

5 “(A) REQUIREMENTS FOR QUALIFYING
6 SEARCHES.—

7 “(i) IN GENERAL.—For purposes of
8 paragraph (1)(A)(i)(I), a search is quali-
9 fying if the infringer undertakes a diligent
10 effort to locate the owner of the infringed
11 copyright.

12 “(ii) DETERMINATION OF DILIGENT
13 EFFORT.—In determining whether a
14 search is diligent under this subparagraph,
15 a court shall consider whether—

16 “(I) the actions taken in per-
17 forming that search are reasonable
18 and appropriate under the facts rel-
19 evant to that search, including wheth-
20 er the infringer took actions based on
21 facts uncovered by the search itself;

22 “(II) the infringer employed the
23 applicable best practices maintained
24 by the Register of Copyrights under
25 subparagraph (B); and

1 “(III) the infringer performed
2 the search before using the work and
3 at a time that was reasonably proximi-
4 mate to the commencement of the in-
5 fringement.

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

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

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

22 “(ii) CONSIDERATION OF RELEVANT
23 MATERIALS AND STANDARDS.—In main-
24 taining the statements of best practices re-
25 quired under clause (i), the Register of

1 Copyrights shall, from time to time, con-
2 sider materials and standards that may be
3 relevant to the requirements for a quali-
4 fying search under subparagraph (A).

5 “(3) NOTICE OF USE ARCHIVE.—The Register
6 of Copyrights shall create and maintain an archive
7 to retain the Notice of Use filings under paragraph
8 (1)(A)(i)(III). Such filings shall include—

9 “(A) the type of work being used, as listed
10 in section 102(a) of this title;

11 “(B) a description of the work;

12 “(C) a summary of the search conducted
13 under paragraph (1)(A)(i)(I);

14 “(D) the owner, author, recognized title,
15 and other available identifying element of the
16 work, to the extent the infringer knows such in-
17 formation with a reasonable degree of certainty;

18 “(E) a certification that the infringer per-
19 formed a qualifying search in good faith under
20 this subsection to locate the owner of the in-
21 fringed copyright; and

22 “(F) the name of the infringer and how
23 the work will be used.

24 Notices of Use filings retained under the control of
25 the Copyright Office shall be furnished only under

1 the conditions specified by regulations of the Copy-
2 right Office.

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

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

11 “(1) MONETARY RELIEF.—

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

21 “(B) FURTHER LIMITATIONS.—An order
22 requiring the infringer to pay reasonable com-
23 pensation for the use of the infringed work may
24 not be made under subparagraph (A) if the in-
25 fringer is a nonprofit educational institution, li-

1 brary, or archives, or a public broadcasting en-
2 tity (as defined in subsection (f) of section 118)
3 and the infringer proves by a preponderance of
4 the evidence that—

5 “(i) the infringement was performed
6 without any purpose of direct or indirect
7 commercial advantage,

8 “(ii) the infringement was primarily
9 educational, religious, or charitable in na-
10 ture, and

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

16 except that if the legal or beneficial owner of
17 the exclusive right under the infringed copy-
18 right proves, and the court finds, that the in-
19 fringer has earned proceeds directly attributable
20 to the infringement, the portion of such pro-
21 ceeds so attributable may be awarded to such
22 owner.

23 “(C) EFFECT OF REGISTRATION ON REA-
24 SONABLE COMPENSATION.—If a work is reg-
25 istered, the court may, in determining reason-

1 able compensation under this paragraph, take
2 into account the value, if any, added to the
3 work by reason of such registration.

4 “(2) INJUNCTIVE RELIEF.—

5 “(A) GENERAL RULE.—Subject to sub-
6 paragraph (B), the court may impose injunctive
7 relief to prevent or restrain any infringement
8 alleged in the civil action.

9 “(B) EXCEPTION.—In a case in which the
10 infringer has prepared or commenced prepara-
11 tion of a work that recasts, transforms, adapts,
12 or integrates the infringed work with a signifi-
13 cant amount of the infringer’s original expres-
14 sion, any injunctive relief ordered by the
15 court—

16 “(i) may not restrain the infringer’s
17 continued preparation or use of that new
18 work;

19 “(ii) shall require that the infringer
20 pay reasonable compensation to the legal
21 or beneficial owner of the exclusive right
22 under the infringed copyright for the use
23 of the infringed work; and

24 “(iii) shall require that the infringer
25 provide attribution, in a manner that is

1 reasonable under the circumstances, to the
2 owner of the infringed copyright, if re-
3 quested by such owner.

4 “(C) LIMITATIONS.—The limitations on in-
5 junctive relief under subparagraphs (A) and (B)
6 shall not be available to an infringer if the in-
7 fringer asserts in the civil action that neither
8 the infringer or any representative of the in-
9 fringer acting in an official capacity is subject
10 to suit in the courts of the United States for an
11 award of damages to the legal or beneficial
12 owner of the exclusive right under the infringed
13 copyright under section 106, unless the court
14 finds that the infringer—

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

17 “(ii) has made an enforceable promise
18 to pay reasonable compensation to the
19 legal or beneficial owner of the exclusive
20 right under the infringed copyright.

21 “(D) RULE OF CONSTRUCTION.—Nothing
22 in subparagraph (C) shall be construed to au-
23 thorize or require, and no action taken under
24 such subparagraph shall be deemed to con-
25 stitute, either an award of damages by the

1 court against the infringer or an authorization
2 to sue a State.

3 “(E) RIGHTS AND PRIVILEGES NOT
4 WAIVED.—No action taken by an infringer
5 under subparagraph (C) shall be deemed to
6 waive any right or privilege that, as a matter of
7 law, protects the infringer from being subject to
8 suit in the courts of the United States for an
9 award of damages to the legal or beneficial
10 owner of the exclusive right under the infringed
11 copyright under section 106.

12 “(d) EXCLUSION FOR FIXATIONS IN OR ON USEFUL
13 ARTICLES.—The limitations on monetary and injunctive
14 relief under this section shall not be available to an in-
15 fringer for infringements resulting from fixation of a work
16 in or on a useful article that is offered for sale or other
17 distribution to the public.

18 “(e) PRESERVATION OF OTHER RIGHTS, LIMITA-
19 TIONS, AND DEFENSES.—This section does not affect any
20 right, limitation, or defense to copyright infringement, in-
21 cluding fair use, under this title. If another provision of
22 this title provides for a statutory license that would permit
23 the infringement contemplated by the infringer if the
24 owner of the infringed copyright cannot be located, that
25 provision applies instead of this section.

1 “(f) COPYRIGHT FOR DERIVATIVE WORKS AND COM-
2 PILATIONS.—Notwithstanding section 103(a), an infringer
3 who qualifies for the limitation on remedies afforded by
4 this section with respect to the use of a copyrighted work
5 shall not be denied copyright protection in a compilation
6 or derivative work on the basis that such compilation or
7 derivative work employs preexisting material that has been
8 used unlawfully under this section.”.

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

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

13 **SEC. 3. DATABASE OF PICTORIAL, GRAPHIC, AND SCULP-**
14 **TURAL WORKS.**

15 (a) ESTABLISHMENT OF DATABASE.—

16 (1) IN GENERAL.—The Register of Copyrights
17 shall undertake a certification process for the estab-
18 lishment of an electronic database to facilitate the
19 search for pictorial, graphic, and sculptural works
20 that are subject to copyright protection under title
21 17, United States Code.

22 (2) PROCESS AND STANDARDS FOR CERTIFI-
23 CATION.—The process and standards for certifi-
24 cation of the electronic database required under
25 paragraph (1) shall be established by the Register of

1 Copyrights, except that certification may not be
2 granted if the electronic database does not contain—

3 (A) the name of all authors of the work,
4 and contact information for any author if the
5 information is readily available;

6 (B) the name of the copyright owner if dif-
7 ferent from the author, and contact information
8 of the copyright owner;

9 (C) the title of the copyrighted work, if
10 such work has a title;

11 (D) with respect to a copyrighted work
12 that includes a visual image, a visual image of
13 the work, or, if such a visual image is not avail-
14 able, a description sufficient to identify the
15 work;

16 (E) one or more mechanisms that allow for
17 the search and identification of a work by both
18 text and image; and

19 (F) security measures that reasonably pro-
20 tect against unauthorized access to, or copying
21 of, the information and content of the electronic
22 database.

23 (b) PUBLIC AVAILABILITY.—The Register of Copy-
24 rights—

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

4 (2) may include any database so certified in a
5 statement of best practices established under section
6 514(b)(5)(B) of title 17, United States Code.

7 **SEC. 4. EFFECTIVE DATE.**

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

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

15 (1) take effect on the earlier of—

16 (A) the date on which the Copyright Office
17 certifies under section 3 at least 2 separate and
18 independent searchable, comprehensive, elec-
19 tronic databases, that allow for searches of
20 copyrighted works that are pictorial, graphic,
21 and sculptural works, and are available to the
22 public through the Internet; or

23 (B) January 1, 2013; and

24 (2) apply to infringing uses that commence on
25 or after that effective date.

1 (c) PUBLICATION IN FEDERAL REGISTER.—The
2 Register of Copyrights shall publish the effective date de-
3 scribed in subsection (b)(1) in the Federal Register, to-
4 gether with a notice that the amendments made by section
5 2 take effect on that date with respect to pictorial, graph-
6 ic, and sculptural works.

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

11 **SEC. 5. REPORT TO CONGRESS.**

12 Not later than December 12, 2014, the Register of
13 Copyrights shall report to the Committee on the Judiciary
14 of the Senate and the Committee on the Judiciary of the
15 House of Representatives on the implementation and ef-
16 fects of the amendments made by section 2, including any
17 recommendations for legislative changes that the Register
18 considers appropriate.

19 **SEC. 6. STUDY ON REMEDIES FOR SMALL COPYRIGHT**
20 **CLAIMS.**

21 (a) IN GENERAL.—The Register of Copyrights shall
22 conduct a study with respect to remedies for copyright in-
23 fringement claims by an individual copyright owner or a
24 related group of copyright owners seeking small amounts
25 of monetary relief, including consideration of alternative

1 means of resolving disputes currently heard in the United
2 States district courts. The study shall cover the infringe-
3 ment claims to which section 514 of title 17, United States
4 Code, apply, and other infringement claims under such
5 title 17.

6 (b) PROCEDURES.—The Register of Copyrights shall
7 publish notice of the study required under subsection (a),
8 providing a period during which interested persons may
9 submit comments on the study, and an opportunity for
10 interested persons to participate in public roundtables on
11 the study. The Register shall hold any such public
12 roundtables at such times as the Register considers appro-
13 priate.

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

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

23 (a) IN GENERAL.—The Comptroller General of the
24 United States shall conduct a study examining the func-
25 tion of the deposit requirement in the copyright registra-

1 tion system under section 408 of title 17, United States
2 Code, including—

3 (1) the historical purpose of the deposit require-
4 ment;

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

7 (3) the feasibility of making deposits, particu-
8 larly visual arts deposits, electronically searchable by
9 the public for the purpose of locating copyright own-
10 ers; and

11 (4) the impact any change in the deposit re-
12 quirement would have on the collection of the Li-
13 brary of Congress.

14 (b) REPORT.—Not later than 2 years after the date
15 of the enactment of this Act, the Comptroller General shall
16 submit to the Committee on the Judiciary of the House
17 of Representatives and the Committee on the Judiciary
18 of the Senate a report on the study conducted under this
19 section, including such administrative, regulatory, or legis-
20 lative recommendations that the Register considers appro-
21 priate.