



ASSOCIATION  
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LIBRARIES

## Issue Brief: Orphan Works

### **Summary:**

On January 31, the Copyright Office released the long-awaited report on orphan works – works whose owner cannot be identified or located. The *Report on Orphan Works* can be found at: <http://www.copyright.gov/orphan/orphan-report-full.pdf>. Overall, the report’s recommendations, if adopted by Congress, constitute a very positive step forward in solving orphan works concerns. The proposed legislative solution addresses the majority of concerns raised by the library community, includes both foreign and unpublished works, and presents a relatively flexible system for users and institutions regarding what constitutes a reasonable search for orphan works. The draft legislation contains some ambiguities that should be clarified.

On March 8, 2006, the House Judiciary Subcommittee on Courts, the Internet, and Intellectual Property held an oversight hearing on “*The Report on Orphan Works by the Copyright Office*.” Testifying at the hearing were representatives of the Copyright Office, publishers, museums and libraries, and photographers and other visual artists.

At the request of Chairman Smith, Subcommittee on Courts, the Internet and Intellectual Property, negotiations on legislative language began on March 13 with representatives from each community: publishers, cultural organizations, and photographers. Jonathan Band (legal counsel, Library Copyright Alliance), Prue Adler (ARL) and Jeffrey Cunard (Debevoise & Plimpton for College Art Association) are representing cultural organizations. The Chairman asked that if possible these negotiations conclude by the end of the month.

### **Background:**

In January 2005, at the request of Senators Orrin Hatch (R-UT) and Patrick Leahy (D-VT) and Representatives Lamar Smith (R-TX) and Howard Berman (D-CA), the Copyright Office began a study on orphan works by issuing a Notice of Inquiry. The office received over 850 written initial and reply comments—including from ARL and others in the library and cultural heritage community—held three days of roundtable discussions, and met informally with various organizations to explore the issues raised.

The Copyright Office report recommends the enactment of legislation that would limit the remedies available against a user who makes a "good faith, reasonably diligent search" to locate the copyright owner, but does not succeed. For noncommercial uses, there are no damages if the user ceases the infringement expeditiously after the owner reemerges. In this case, if a library posts an orphan

work to the Web and the owner comes forward, there would be no damages if the library takes down the work. For commercial and noncommercial uses that continue after the owner comes forward, the user must pay reasonable compensation. Injunctive relief is also available, unless the user has commenced making a derivative work that contains the user's own expression. In essence, if the user has made a substantial investment in reliance on the orphan status, the user can continue the use, but must pay reasonable compensation.

Under the proposed legislative solution, the majority of the uses libraries are likely to make will fall within the noncommercial limitation. Digitization projects that provide online access will benefit greatly, because the library can avoid damages by taking down the infringing item.

At the oversight hearing, Jule Sigall of the Copyright Office presented the recommendations of the report. Maria A. Pallante-Hyun, Associate General Counsel for the Guggenheim Museum, represented the interests of 18 museum, library, and cultural heritage organizations. She noted that these communities largely agree with the findings of the report and that orphan works legislation, "should help to make cultural heritage more broadly available to the public. It must give users the confidence necessary to take works out of obscurity."

Allan Adler, Vice President for Legal and Government Affairs for the Association of American Publishers, testified that, "...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." Many of the publishing community recommendations match those of the cultural sector though recently publishers have asked that a highly contentious issue be included in the negotiations.

Finally, David Trust, Chief Executive Officer of the Professional Photographers of America, testified that the PPA and its members have grave concerns with the Copyright Office proposal and asked "the Committee to make significant changes to the language proposed by the Copyright Office before introducing any legislation on this issue."

Additional information about orphan works is available on the ARL Web site at <http://www.arl.org/info/frn/copy/orphanedworks/index.html> and the Copyright Office Web site at <http://www.copyright.gov/orphan/>.

The *Report on Orphan Works* is available at  
<http://www.copyright.gov/orphan/orphan-report-full.pdf>.

Hearing testimony is available at  
<http://judiciary.house.gov/Oversight.aspx?ID=221>.