



AUTHORS
ALLIANCE



August 31, 2015

The Honorable Michael Froman
United States Trade Representative
600 17th Street NW
Washington, DC 20508

Re: Orphan Works and the TPP

Dear Ambassador Froman:

We are writing about one issue in the Trans Pacific Partnership (TPP) trade agreement negotiation - the remedies for copyright infringement as they relate to orphan works.

The groups signing this letter have diverse views on the other issues in the TPP. However, they agree that the TPP should not include measures restricting adoption of the Copyright Office's recent proposals regarding orphan works.

As you know, in May of 2015, the Register of Copyrights issued a report titled "Orphan Works and Mass Digitization: A Report of the Register of Copyrights." Orphan works is a term used to describe books, articles, photographs, recordings, and other types of documents that are protected by copyright, and for which the owners of the works cannot be located. In the report, the Register noted:

The uncertainty surrounding the ownership status of orphan works does not serve the objectives of the copyright system. For good faith users, orphan works are a frustration, a liability risk, and a major cause of gridlock in the digital marketplace. The consequences of this uncertainty reverberate through all types of uses and users, all types and ages of works, and across all creative sectors. By electing to use a work without permission, users run the risk of an infringement suit resulting in litigation costs and possible damages. By foregoing use of these works, a significant part of the world's cultural heritage embodied in copyright-protected works may not be exploited and may

therefore fall into a so-called “20th-century digital black hole.” [page 35, footnotes omitted]

In the 2015 report, the Register discussed a variety of proposals to expand access to copyrighted works, including systems of compulsory licensing of the works, providing access to works under the U.S. fair use doctrine, or limiting remedies for the infringement of works. The Register discussed the different approaches, and proposed legislation that would limit the remedies for copyright infringement. The Register’s proposal, summarized on pages 3 and 4 of the report, was complex. It included, among other provisions, the following proposed changes to U.S. copyright law:

- Establish a limitation on remedies for copyright infringement for eligible users who can prove they have engaged in a good faith diligent search for the owner of a copyright and have been unable to identify or locate him or her;
- Limit monetary relief for infringement of an orphan work by an eligible user to "reasonable compensation" – the amount that a willing buyer and a willing seller would have agreed upon immediately before the use began;
- Bar monetary relief for infringements of orphan works by eligible nonprofit educational institutions, museums, libraries, archives, or public broadcasters, for noncommercial educational, religious, or charitable purposes, provided the eligible entity promptly ceases the infringing use;
- Condition injunctive relief for infringement of orphan works by accounting for any harm the relief would cause the infringer due to its reliance on its eligibility for limitations on remedies;
- Limit the scope of injunctions against the infringement of an orphan work if it is combined with "significant original expression" into a new work, provided the infringer pays reasonable compensation for past and future uses and provides attribution;
- Allow a court to impose injunctive relief for the interpolation of an orphan work into a new derivative work, provided the harm to the owner-author is reputational in nature and not otherwise compensable;
- Condition the ability of state actors to enjoy limitations on injunctive relief upon their payment of any agreed-upon or court-ordered reasonable compensation; and
- Explicitly preserve the ability of users to assert fair use for uses of orphan works.

The proposals in the Register’s report are not law. It is possible that the Congress will take no action, or embrace a different approach. Some of the groups signing this letter would in fact

prefer different approaches than that put forward by the Register. However, we ask that the TPP not adopt measures that would prevent the Congress from enacting these or other such provisions should they be needed at some point to expand access to orphaned copyrighted works.

Sincerely

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cc: Maria Pallante, Shira Perlmutter, Nancy Weiss, Probir Mehta