LOST IN THE LIMBO: ORPHAN WORKS, THE PUBLIC DOMAIN AND THE CASE FOR A GLOBAL LICENSING FRAMEWORK

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ABSTRACT

Orphan works: copyrighted works whose right-holders cannot be identified or located; constitute one of the most intractable paradoxes in modern intellectual property law. The international framework that was to provide immunity for these authors, in particular the automatic protection regime introduced by the Berne Convention, has generated an enormous and mounting corpus of works that is legally inaccessible to the public, but culturally vital to literature. This paper investigates the structural drivers of the orphan works problem, evaluates legislative and administrative responses in the United States, European Union, Canada and India, as well as a review of the adequacy of each regime in terms of their own and to the others. This paper contends that individual national solutions may fail to provide meaningful access under present circumstances and suggests that a multilateral and WIPO-administered licensing framework, based on the Canadian model (the state compulsory licence), it is the most feasible way for the state to achieve harmony between copyright protection on one hand and making sure that everything belongs in the public domain.

I. Introduction

Whether author dies, publisher closes or registration is never made, the work effectively goes unreachable. Hobson's choice would be: risk infringement liability, or drop the culturally important book. As the U.S. Copyright Office has stated, orphan works are "a frustration, a liability risk and a significant source of gridlock in the digital marketplace."[1] Scholars argue that the Orphan Works problem is a manifestation of two interdependent forces: the widening of copyright terms, and the abolition of registration and renewal processes.[2] Collectively they have established a system in which copyright protection is deep, self-generating, and long-lasting but the identity of the rightsholder is often not transparent, or completely obscured. This article interrogates the reinforcing framework, examining comparatives of national responses while advocating a coordinated international solution.

An orphan work is classically defined as a copyrighted work whose owner is not identifiable and not locatable despite a goodwill and meticulous search from a potential searcher. The definition involves a wide variety of materials: photographs taken in the mid-twentieth century, out-of-print novels, archival film footage, manuscripts published by no longer functioning publishing houses and unpublished correspondence from deceased individuals. Each of these might enjoy full copyright protection for decades in many fields; for the life of the author plus seventy years; yet there is no mechanism for obtaining the authorization that copyright law requires.

A self-regulating filter: The Copyright Act of 1976[3] that removed the registration and renewal requirements in the United States made the problem all the worse. However, the 1909 Act when the original 28-year term copyright was failed to renew; dropped the work in the public domain. Empirical evidence indicates that less than half of all registered works were renewals, suggesting that the public domain had been much larger than is currently allowed within the present regime.[4] By omitting renewal, the 1976 Act locked vast categories of works into perpetual private ownership, even where no living person wanted to exercise that ownership. The Centre for the Study of the Public Domain of Duke Law School argues that orphan works likely account for the majority of the twentieth-century cultural record.[5] Libraries, archives,

[1] U.S. Copyright Office, *Orphan Works and Mass Digitization* (2015), p. 1.
[2] Neil Netanel, *Copyright's Paradox* (Oxford University Press, 2008), p. 47.
[3] U.S. Copyright Act of 1976, Pub. L. No. 94-553, 90 Stat. 2541 (codified at 17 U.S.C. s. 102).
[4] U.S. Copyright Office, *Orphan Works and Mass Digitization* (2015), p. 5.
[5] Duke University Centre for the Study of the Public Domain, *Orphan Works*.

film restorers and scholars can see the same quandary: in the absence of a locatable rights-holder, even non-commercial, preservation-oriented uses are legally precarious.[6] The actual risk is not hypothetical. Statutory damages in the United States have increased up to $150,000 for each work that is infringed; this amount can smash any type of institutional digitization initiative.[7]

The underlying issues stem from structural factors. First, the restriction on formalities in the Berne Convention intended to protect authors from bureaucratic barriers prohibits member states from requiring registration as a condition of protection, at least for the works of foreign nationals. Second, copyright terms, in which copyright obligations have traditionally been enforced, have grown steadily from 14 years (in the original Statute of Anne (1710) to the life of the author plus 70 years in most regions. An extension produces more time during which a work can become orphaned while still be legally protected.[8]

Article 5(2) of the Berne Convention stipulate that "the enjoyment and exercise of copyright shall not be subject to any formality."[9] It was a cornerstone of international copyright harmonization and designed to prevent authors from being compromised by bureaucratic demands, especially when a work was to be protected abroad. It has been adopted into TRIPS Agreement, applicable to all WTO Members and into the WIPO Copyright Treaty of 1996. The orphan works problem is partly the result of this same principle.

When formalities were gotten rid of and Berne was the world's first to do this and then the US - Copyright Act of 1976 was first to effect on the United States, followed by the Implementation Act of Berne Convention 1988, copyright disappeared. Works' protection was done without notice to the public, thereby leaving future users without any means of tracing ownership through a credible government document.[10]

Legal writers have argued that member states can leverage the Berne constraint by imposing only the formal obligations of a formality on their nationals' works: a path the Convention expressly allows under Article 5(3) concerning protection in the country of origin.[11] Yet no

[6] Ibid.
[7] Congressional Research Service, 'Orphan Works in Copyright Law' (RL33392, 2010), p. 3.
[8] U.S. Copyright Office, *Report on Orphan Works* (2006), at 15-16.
[9] Berne Convention, Art. 5(2).
[10] WIPO, Summary of the Berne Convention (WIPO Publication No. 880 (E)).
[11] Berne Convention, Art. 5(3).

major jurisdiction has pursued this domestic-only route and its political feasibility remains uncertain. The fundamental tension of how the international framework brings about the orphan works problem and limits the tools available for resolving it; is a true structural defeat that national legislatures alone cannot surmount.

II. Comparative National Responses

A. Canada: The Compulsory Licensing Model

The Copyright Board of Canada has the power under section 77 of the Copyright Act (RSC 1985) to award a non-exclusive licence to an applicant who makes reasonable efforts to locate the rights-holder and subsequently fails to do so.[12] It is governed by terms stipulated by the Board including royalty payments deposited in escrow for five years to cater to any rights-holder that follows. In a landmark empirical study commissioned by the Copyright Board, Professor Jeremy de Beer and Mario Bouchard revealed that the Board had adjudicated 441 applications under section 77, providing licences for more than 12,640 works.[13] The study also found that approximately half of applications were resolved within eight weeks.[14]

The Canadian model is frequently cited as a standard international example, although the model is not without its detractors. Critics have found that the procedure saddles administration with burdens and delays that are disproportionate to the probable harm; especially for non-commercial educational purposes.[15] This lack of clearcut guidance on what's considered "reasonable efforts" has generated confusion over what should be covered; and amount of applications has overwhelmed the Copyright Board's resources.

B. The European Union: Directive 2012/28/EU

The European Union had responded to orphan works in Directive 2012/28/EU on particular allowed applications of orphan works, signed on 25 October 2012.[16] The Directive applies to printed works, cinematographic and audiovisual works, phonograms and embedded works

[12] Copyright Act, RSC 1985, c C-42, s. 77.
[13] Jeremy de Beer and Mario Bouchard, 'Canada's 'Orphan Works' Regime: Unlocatable Copyright Owners and the Copyright Board' (2009) 10(2) *Oxford University Commonwealth Law Journal* 215, 228.
[14] Ibid., at 231.
[15] De Beer and Bouchard (n 14), at 220.
[16] Directive 2012/28/EU of the European Parliament and of the Council of 25 October 2012 on certain permitted uses of orphan works [2012].

found in libraries, educational facilities, museums, archives and public service broadcasters.[17] It imposes diligence on search obligation that prior to a work registering as an orphan within the EUIPO database must be consulted over prescribed databases and registers for each work type.[18]

The record of The Directive has been widely interpreted as disappointing. By early 2016 (three years after it took effect), the EUIPO database featured only 1,435 works registered; in 2018 this number had reached 6,000, a number critics describe as proof that the EU approach "won't meet the problem."[19] Professor James Buyle described the Directive as "heavily institutional, statist and inflexible," and noted that its provisions can be used only by non-profit cultural heritage institutions as well as ordinary citizens, who also have a legitimate request to access orphan works are completely excluded from its scope.[20] The Directive, however, bore the brunt of the Brexit transition, with in December 2020 the orphan works exception fell away in the United Kingdom when the whole country exited the EU legal framework.[21] The UK had formerly undertaken a parallel IPO licensing scheme, but this could not cope with limited uptake given that only 877 works were covered four years after their launch.

C. India: Providing Compulsory Licence under the Copyright Act 1957

India addressed the orphan works problem through section 31A of the Copyright Act 1957, inserted by the Copyright (Amendment) Act 2012.[22] The provision permits any person seeking to publish or communicate a work to apply to the Copyright Board for a licence where the author is dead, unknown, or cannot be traced. It is a principled statutory response, but scholars have noted that it remains largely inoperative in practice, owing to the absence of adequate administrative infrastructure and a digitised rights registry.[23] Furthermore, it does not consider the real issues of mass digitization and there is no publicly accessible database of licences given, which makes it difficult to assess the effects of the provision in practice.[24] The article has also been addressed by Indian scholarly commentary that the requirement for the provision

[17] Ibid., Art. 2(1).
[18] Ibid., Art. 3.
[19] Wikipedia, 'Orphan Works Directive' (last updated March 2026).
[20] James Boyle (cited in Wikipedia, 'Orphan Works Directive' (n 20)).
[21] EIFL, 'The European Orphan Works Directive: An EIFL Guide.'
[22]Copyright Act 1957, s 31A (inserted by Copyright (Amendment) Act 2012).
[23]P. Narayanan, *Intellectual Property Law* (3rd edn, Eastern Law House, 2001), p. 89.
[24] Ibid., at 93.

is supplemented by administrative facilities and a digitised register.[25]

The United States Copyright Office issued a Notice of Inquiry on orphan works as early as 2005[26] and has subsequently produced multiple reports and legislative recommendations. The Music Modernization Act of 2018 made headway further by creating a format and structure for orphan sound recordings that obliges a copyright-filing, requiring submission to the Copyright Office and a 90-day window for rights-holders to come forward before use is permitted.[27] But no general legislation has been followed. The *Authors Guild vs. Google* case that briefly raised the specter of a class settlement under a court-supervised approach which included orphan work was ultimately dismissed with the court interpreting it as an overreaching of judicial power.[28]

III. The Case for a Global Licensing Framework

The deficiency in the prevailing national methods is no accident. It is indicative of the structural tension in the above: orphan works are a problem created in part by international law (the Berne no-formalities rule and extended terms), but solutions are largely developed domestically and without coordination. The end result is fragmentation by different legal environments where cultural institutions in different jurisdictions are subject to different standards for essentially the same problem accessing potentially legal works of uncertain ownership for legitimate educational, preservation or creative purposes.

Directly addressing this fragmentation could be the development of a WIPO-administered multilateral licensing framework. This framework could incorporate some of the most effective features we are working towards: the Canadian model's openness to applicant categories and utilization of compulsory licensing with escrowed royalties[29]; the Japanese model's direct royalty deposit mechanism operated by the Agency for Cultural Affairs[30] and the U.S. Copyright Office's draft notice-of-use register.[31]

Stef van Gompel has contended that the fundamental failure of the EU Directive in the context of orphan works is that "citizens also need to have access to orphan works, for uses that almost

[25] Ministry of Education, Government of India, *National Education Policy* 2020 (2020), para 24.
[26] U.S. Copyright Office, *Orphan Works and Mass Digitization* (2015) (n 2), Recommendation 1, p. 84.
[27] Music Modernization Act, Pub. L. No. 115-264, 132 Stat. 3676 (2018), Title II.
[28] Authors Guild, Inc. vs. Google Inc. 804 F. 3d 202 (2d Cir. 2015).
[29] WIPO Seminar Summary (n 11), p. 4.
[30] Japanese Copyright Act, Chapter II, Section 8, Article 67.
[31] U.S. Copyright Office, *Orphan Works and Mass Digitization* (2015) (n 2), p. 79.

certainly pose no threat to any living rightsholder."[32] A global framework then, to be meaningful, needs to be broader than any purely institutional model. It should enable individual makers, scientists and educators to acquire licences for non-commercial purposes without the administrative headaches that have so impeded the EU system. The system should also feature a consolidated online international registry, and public-searchable repository of information pertaining to ownership of rights and in so doing would reduce the number of works orphaned when they are first discovered and give users, in a way, an account of the painstaking search activity undertaken.[33]

Funding for escrowed royalties might be used via the already existing collective-management frameworks at WIPO. Rights holders arising after a licence has been granted would receive the escrowed royalties, but would not be allowed to seek injunctive relief where use had itself taken place in good faith, a principle identified in the law-and-economics literature as socially optimal.[34]

The Berne Convention is a problematic but not insurmountable one. Article 5(2)'s prohibition against formalities pertains to the enjoyment and exercise of copyright and not to the handling of licences for those works whose rights-holder cannot be determined.[35] A framework that allows for no limitation to those with rights which was an exclusively permissive and not a prohibitory obligation would not violate the principle of no formalities. The regime would work in harmony with and not against the Berne Convention.

IV. Conclusion

Orphan works constitute a systemic failure of the copyright system to meet its own stated goals. Copyright is justified as an incentive for the creation of new works and as a mechanism for eventually releasing those works to the public domain. When works are neither commercially available nor in the public domain when they are simply lost, locked in private ownership without any active rightsholder; neither justification is fulfilled. The legal regime causes harm but does not deliver anything in return.

[32] Stef van Gompel 'The Orphan Works Chimera and How to Defeat It: A View from Across the Atlantic' (2012) 27 *Berkeley Technology Law Journal* 1347, 1370.
[33] U.S. Copyright Office, *Orphan Works and Mass Digitization* (2015) (n 2), p. 90.
[34] Joelle Farchy and Jessica Petrou, 'Optimising Use of Orphan Works While Respecting Intellectual Property Rights: A Law and Economics Perspective' (2012) 2 *Queen Mary Journal of Intellectual Property* 250, 262.
[35] WIPO, Summary of the Berne Convention (n 11).

The national responses by way of Canada's compulsory licensing, to the EU's institutional directive, have brought real but partial progress. At this juncture, the United States, the world's biggest copyright market, has utterly gone unanswered to legislate. India's Section 31A is a principled but has insufficient infrastructure to be effective at scale. The underlying cause of all these failures is the lack of international coordination.

The solution needs to get at the level the problem was initiated at: international treaty law. As such, a WIPO-administered licensing system open to all user categories, supported by a global rights registry centrally controlled at an international level and aligned with the restrictions described by the Berne Convention, provides the best-case scenario for a course forward. Without it, the cultural record of the twentieth century and now increasingly of the twenty first too will continue to be inaccessible, not simply because there is nothing to allow for use of it, but because there does not exist any legal mechanism for users to use it. That is not an intellectual property law victory. It is the most visible failure.