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Adopting a Solution to Copyright's Orphan Works Problem

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I. INTRODUCTION

In an age where virtually every industry is rapidly digitizing, the Copyright Office has failed to keep up. While the Copyright Office permits online registration and recordation of copyrights, its online database is difficult to navigate and lacks data on the ownership of older works. This lack of ownership data leads to the "orphan works problem," which occurs whenever a "good faith, prospective user cannot readily identify and/or locate the copyright owner" of the work they are trying to use.[1]

The absence of clear ownership information makes it impossible to license orphan works. Additionally, unlicensed users of orphan works are susceptible to lawsuits if copyright owners eventually come forward.[2] Combining these factors together, the inability to license orphan works and the risk of potential lawsuits, have resulted in under-utilization of such works, impeding creativity and hindering the creation of new works. In 2006 and 2015, the Copyright Office addressed the orphan works problem and provided legislative suggestions to Congress.[3] Unfortunately, these suggestions were never enacted into law, which has prevented the Copyright Office from addressing the uncertainty surrounding copyright protection for orphan works.

It is high time for Congress to make changes to the law to protect orphan works. However, the Copyright Office's most recent 2015 Report does not offer the solution. The 2015 Report has been rejected by organizations representing authors and librarians, copyright experts, lawyers, journalists, and law students, all of whom collectively argued that the Report failed to address the real concerns of copyright owners, "doubled down" on already existing problems in copyright law, placed the burden on copyright owners, and worst of all, established unpredictable rules.[4]

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1. *Orphan Works to Open Access: Harvard Library Publishes Report on Digitizing Orphan Collections*, HARV. LIBR. OFF. FOR SCHOLARLY COMMC'N (Aug. 12, 2016), https://osc.hul.harvard.edu/programs/orphan-works/report-released/.

2. U.S. COPYRIGHT OFF., ORPHAN WORKS AND MASS DIGITIZATION: A REPORT OF THE REGISTER OF COPYRIGHTS 2 (2015), https://www.copyright.gov/orphan/reports/orphan-works2015.pdf [hereinafter ORPHAN WORKS AND MASS DIGITIZATION].

3. U.S. COPYRIGHT OFF., REPORT ON ORPHAN WORKS: A REPORT OF THE REGISTER OF COPYRIGHTS, at 1, 71 (Jan. 2006), https://www.copyright.gov/orphan/orphan-report.pdf; U.S. COPYRIGHT OFF., ORPHAN WORKS AND MASS DIGITIZATION: A REPORT OF THE REGISTER OF COPYRIGHTS, at 3, 4 (June 2015), http://copyright.gov/orphan/reports/orphan-works2015.pdf.

4. *See* Pamela Samuelson, *Thoughts on the Copyright Office Report and Orphan Works*, AUTHORS ALL. (June 18, 2015), https://www.authorsalliance.org/2015/06/18/thoughts-on-the-copyright-office-report-and-orphan-works/; *Response of the Library Copyright Alliance to the Copyright Office's Orphan Works Report*, LIBR. COPYRIGHT ALL., (June 15, 2015), https://www.ala.org/aboutala/sites/ala.org.aboutala/files/content/ogr/06-15-15%20Response%20of%20the%20LCA%20to%20the%20Copyright%20Office%27s%20Orphan%20Works%20Report.pdf; Mike Masnick, *Only The Copyright Office Would 'Fix' The Problem Of Orphan Works By Doubling Down On The Problem Itself*, TECHDIRT (June 8, 2015, 10:27 AM), https://www.techdirt.com/2015/06/08/only-copyright-office-would-fix-problem-orphan-works-

This Note aims to resolve the orphan works problem, a lofty goal which requires an examination of why the problem exists in the first place. In Part II, this Note explains what the orphan works problem is and how it impacts the use of creative works. Part III explains how current U.S. copyright law has exasperated the orphan works problem. Part IV analyzes the Copyright Office's 2015 Report on orphan works and discusses why the Copyright Office's proposed solutions does not solve the problem. Finally, Part V proposes solutions aimed at effecting the necessary changes to solve the orphan works problem, including the creation of a system to license orphan works, an easier-to-search database of the Copyright Office's records, and an automatic presumption of fair use for the use of orphan works. Overall, these solutions aim to provide users with certainty regarding who owns copyright protected works, so that orphan works can be utilized without the fear of litigation.

II. WHAT IS THE ORPHAN WORKS PROBLEM?

When I hear the words "orphan works," my mind drifts towards the image of Little Orphan Annie and her friends working away in the orphanage while singing "It's the Hard-Knock Life," a copyright-protected musical work from the 1977 Broadway musical "Annie."[5] Yet, my recollection of "It's the Hard Knock Life" is connected to the 1999 TV movie "Annie" that I watched as a child.[6] Someone else might remember the song from the 2014 movie "Annie," or the 1982 movie "Annie," or the 2021 live television production "Annie Live!"[7] Still, when others hear of Little Orphan Annie, they may think of the 1930's and 1940's radio show that was also prominently featured in the 1983 film "A Christmas Story." [8] This radio show was based on a comic strip, which was based on the Charles Dickens novel "Great Expectations" and other Victorian-era novels.[9] Annie is a prime example of how creativity build off of itself, as the character of Annie has not only inspired countless films, musicals, and television productions, but has also simultaneously been inspired by other characters and stories.

As Justice Story stated, "in truth, in literature, in science and in art, there are and can be, few, if any, things, which in an abstract sense, are strictly

doubling-down-problem-itself/; Aaron C. Young, *Copyright's Not So Little Secret: The Orphan Works Problem and Proposed Orphan Works Legislation*, 7 CYBARIS® INTELL. PROP. L. REV. 202, 205 (2016).

5. ANDREA MCARDLE, *It's the Hard-Knock Life, on* ANNIE: ORIGINAL BROADWAY CAST (Sony Music Entertainment 1977); CHARLES STROUSE, MARTIN CHARNIN & THOMAS MEEHAN, ANNIE (1977).

6. ANNIE (Walt Disney Television, Columbia TriStar Television 1999).

7. *See* ANNIE (Columbia Pictures 2014); ANNIE (Columbia Pictures 1982); *Annie Live!* (NBC television broadcast Dec. 2, 2021).

8. See *Little Orphan Annie* (NBC Radio 1931); A CHRISTMAS STORY (Metro-Goldwyn-Meyer 1983).

9. Jeet Heer, *Jeet Heer on the Complex Origins of Little Orphan Annie*, LITERARY HUB (Aug. 3, 2020), https://lithub.com/jeet-heer-on-the-complex-origins-of-little-orphan-annie/.

new and original throughout. Every book in literature, science and art, borrows, and must necessarily borrow, and use much which was well known and used before."[10] Justice Story further explained that while each work of authorship is its own unique creation, artists often are inspired by other creative works and well-known ideas, such as an orphan searching for family.[11] The difference between an artist's creative expression and their inspiration is at the foundation of copyright law, which protects the expression of ideas rather than the underlying idea itself.[12] By protecting an artists' individual expression, copyright law grants them exclusive rights to their creative contributions and, most importantly, the right to prevent others from copying their work.[13] The right to prevent copying, coupled with the other exclusive rights granted by copyright law, incentivizes creativity by giving artists a monopoly on their creative expressions; this allows others to be inspired by the artist's creativity while maintaining the artist's ability to profit off of their own work.[14]

Authors[15] are afforded copyright protection only for expressions of an idea, not an idea itself.[16] To better understand the distinction between the expression of an idea and an idea itself, consider the following: If someone were to write a book about an orphan living in a big city, they would likely be allowed to publish it without any copyright owner's permission because the idea of an orphan living in a big city is a popular trope.[17] However, if someone wanted to write a novel about an orphan living in New York who sings "It's the Hard-Knock Life," that author would need the consent of the copyright owner of the 1977 musical "Annie."[18] Moreover, this consent would be required until "Annie" the musical enters the public domain in 2072, as copyright protects works published in the U.S. between 1964 and 1977 for 95 years.[19] Without the consent of the copyright owner, any work containing "It's the Hard-Knock Life" infringes the owner's copyright, subjecting the infringer to a potential lawsuit. It is the hard-knock life indeed.

10. Emerson v. Davies, 8 F. Cas. 615, 619 (C.C.D.Mass. 1845).

11. Craig Joyce, Tyler T. Ochoa & Michael Carroll, COPYRIGHT LAW, 98–99 (11th ed. 2020).

12. *Id.* at 117.

13. *Id.*

14. *Id.* at 119–20.

15. The term "Authors" is a catch-all phrase for any creator of a copyright protected work, including musicians, painters, sculptors, photographers, and of course, authors.

16. Joyce, Ochoa & Carroll, *supra* note 11, at 117.

17. The trope of an orphan in a big city (Annie in New York, Harry Potter and Oliver Twist in London, etc.) is a *scène à faire*, which is not protected by copyright. *See* Nichols v. Universal Pictures Corp., 45 F.2d 119, 121-22 (2d Cir. 1930).

18. CHARLES STROUSE, MARTIN CHARNIN & THOMAS MEEHAN, ANNIE (1976).

19. *See* 17 U.S.C. § 302 (providing that for works created after 1978, the term of copyright protection is the life of the author, plus seventy years).

Now, imagine if there was no information available on who owned the copyright to the 1977 musical "Annie" in the above scenario. Any subsequent author seeking to use "It's a Hard Knock Life" would find themselves confronted with a challenging dilemma: risk a potential infringement lawsuit for use of the orphan work or refrain from using the work altogether. Unfortunately, most authors would choose the latter, and one could easily imagine how this situation hampers the progression of ideas and creativity in light of the orphan works problem. The U.S. Copyright Office understands the importance of this problem, stating that "[b]y foregoing [the] 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."[20] Fearing the loss of these works to the "black hole," the Copyright Office addressed the orphan works problem in two separate reports; first in 2006 and again in 2015.[21] Both reports proposed legislative changes to the 1976 Copyright Act to fix the orphan works problem, none of which were enacted into law.[22] Today, the orphan works problem persists in the United States.

III. HOW CURRENT COPYRIGHT LAWS HAVE EXASPERATED THE ORPHAN WORKS PROBLEM

A firm understanding of U.S. copyright law is important to better understand the orphan works problem. U.S. copyright law is as old as America itself; the Founding Fathers recognized the importance of copyright protection and included it in the Constitution, granting authors limited monopolies to benefit from their works.[23] Since the First Congress, copyright law has greatly expanded to protect various subject matters and adapt to evolving technologies.[24] Additionally, the requirements and duration of copyright protection have changed over time.[25] To gain copyright protection today, an "original work of authorship" must be "fixed in any tangible medium of expression."[26]

A work is "original" when "the work [is] independently created by the author" and "possess[es] at least some minimal degree of creativity. . . ."[27] An original work is "fixed" once a tangible copy of the work is placed in "any . . . medium of expression."[28] These broad requirements allow for

20. ORPHAN WORKS AND MASS DIGITIZATION, *supra* note 2, at 35.
21. *Id.* at 11.
22. *Id.* at 11–12.
23. U.S. CONST. art. I, § 8, cl. 8.
24. *See* Copyright Act of 1909; 17 U.S.C. §§ 101–02 (1976).
25. *Id.*
26. 17 U.S.C. § 102(a).
27. Feist Publications, Inc. v. Rural Tel. Serv. Co., 499 U.S. 340, 345 (1991).
28. 17 U.S.C. § 102(a).

nearly all original expressions to be protected by federal copyright law once they are fixed in a tangible copy.[29] According to the Copyright Act of 1976, protection begins at the moment of fixation, not when a work is registered with the Copyright Office.[30] Although copyright owners can register their works, for benefits like the ability to file an infringement suit, the Copyright Act of 1976 does not require registration for copyright protection.[31] While this system benefits authors by granting protection without additional formalities, it also results in confusion. Without registration, how do we know who owns a protected work?

The Copyright Office understands its role in creating a gap in the information on who owns copyright protected works. In 2006 and 2015, the Copyright Office published reports acknowledging that "a series of changes in U.S. copyright law over the past thirty-plus years . . . gradually but steadily . . . removed formalities in the law that had provided users with readily accessible copyright information . . . ."[32] One formality addressed in these reports was the notice requirement.[33] Under the 1909 Copyright Act, federal copyright protection required publication with proper notice of copyright ownership and prompt deposit of the work with the Copyright Office[34] The Copyright Act of 1976 subsequently removed the mandatory deposit requirement, making it no longer a "condition of copyright" protection.[35] The later Berne Convention Implementation Act of 1988 further removed the notice requirement, making it so neither notice, registration, nor deposit is required to secure copyright protection under American law.[36]

It might be logical to assume that reinstating the notice, deposit, or registration requirement could solve the problem of a lack of "readily accessible copyright information[;]" however, two problems remain.[37] First, these requirements only guarantee information for future copyright protected works; they do nothing to address the lack of information about already protected works.[38] Second, these requirements could jeopardize international protections for U.S. copyright holders.[39] One reason behind

29. *See* 17 U.S.C. § 102(a).
30. Joyce, Ochoa & Carroll, *supra* note 11, at 136.
31. *Id.* at 424.
32. ORPHAN WORKS AND MASS DIGITIZATION, *supra* note 2, at 10.
33. *Id.*
34. Joyce, Ochoa & Carroll, *supra* note 11, at 423.
35. *Id.* at 423-24.
36. *Id.*
37. ORPHAN WORKS AND MASS DIGITIZATION, *supra* note 2, at 10.
38. Anonymous Coward, Comment to *Only the Copyright Office Would 'Fix' The Problem of Orphan Works by Doubling Down on the Problem Itself*, TECHDIRT (June 8, 2015, 10:55 AM), https://www.techdirt.com/2015/06/08/only-copyright-office-would-fix-problem-orphan-works-doubling-down-problem-itself/#comments.
39. Joyce, Ochoa & Carroll, *supra* note 11, at 136-37.

Congress's decision to remove the notice and registration requirement was to allow the U.S. to enter the Berne Convention.[40] The Berne Convention is an international agreement aimed at protecting copyright across member countries, but member countries are required to eliminate formalities like registration for copyright protection.[41] Due to the possibility of losing international copyright protection and the lack of information concerning previously protected works, reestablishing copyright registration does not seem to be a viable solution, despite the growing number of works being "orphaned" due to a lack of registration.

The duration of copyright protection is another change by the Copyright Office that exacerbated the orphan works problem. As stated in the Constitution, Congress can grant copyright protection for "limited times."[42] The original term of copyright protection was fourteen years, after which the work entered the public domain.[43] The 1909 Act extended the copyright term to twenty-eight years, with the possibility of renewal for a total of fifty-six years of protection.[44] Then, the 1976 Act expanded the basic copyright term to the life of the author, plus fifty years, taking away the right to renew in exchange for a longer base term of protection.[45] In 1998, under pressure from lobbyists like the Walt Disney Company and Universal Studios, Congress passed the "Sonny Bono Copyright Term Extension Act," further expanding the basic copyright term to the life of the author plus seventy years.[46] Through the actions of Congress and the Copyright Office, the term of copyright changed from a limited fourteen years to essentially an indefinite number of years of protection from the public domain. Some argue that this expansion is beneficial because the additional years of protection give the owner more rights over their work and allow them to profit for a longer duration, but the expansion has prevented countless works from entering the public domain.[47] Unable to enter the public domain, works that have no clear owner are "orphaned" under federal copyright protection, rather than being utilized by the public.

40. *Id.*

41. *Berne Convention*, BRITANNICA, https://www.britannica.com/topic/Berne-Convention (last updated Apr. 12, 2018).

42. U.S. CONST. art. I, § 8, cl. 8.

43. Joyce, Ochoa & Carroll, *supra* note 11, at 321.

44. *Id.* at 323.

45. *Id*. at 322.

46. *Id.*

47. Stephen Carlisle, *Why Reducing Current Copyright Terms Would be Unwise…and Unconstitutional*, NOVA SOUTHEASTERN UNIV. (Feb. 26, 2016), http://copyright.nova.edu/copyright-terms/.

A. THE ORPHAN WORKS PROBLEM AND THE UNDER-UTILIZATION OF COPYRIGHTED WORKS

The most significant consequence of the orphan works problem is the under-utilization of copyright protected works that results from artists' inability to receive approval from the copyright owner to use the work. Since these works are protected by federal law, any use of an orphan work comes with the threat of a copyright infringement lawsuit, even if the work was made by an unidentifiable author and may have been produced decades ago.[48] These lawsuits may be brought by the family of the copyright owner as heirs to the copyright, or by the copyright owner themselves, who comes out of the woodwork to protect their work.[49] The threat of lawsuit and subsequent under-utilization of orphan works "exclude[es] potentially important works from the public discourse and threaten[s] to impoverish our national cultural heritage."[50] Museums, libraries, archives, and individual authors regularly decide not to use orphan works, "forgo[ing] socially beneficial use" of the works.[51] By protecting orphan works, the Copyright Office has locked them away from the public, giving no social or economic benefit to the works while simultaneously harming the public's knowledge, culture, and creativity.[52]

A pivotal example of this harm to the public is the 2008 Google Books settlement.[53] In 2004, Google announced that it would scan the full-text of books from participating research libraries and allow the text of the books to be searchable.[54] While Google and its partner libraries believed that the digitization of books offered a public benefit because it would make books more accessible and would provide a potential new audience to authors, copyright owners and the Author's Guild believed otherwise.[55] These groups sued Google, arguing that the digitization of books amounted to mass copyright infringement.[56] Google argued that its actions were protected as a fair use[57] of the copyright-protected works, but ultimately chose to settle with

48. Mike Masnick, *Only the Copyright Office Would 'Fix' The Problem of Orphan Works by Doubling Down on the Problem Itself*, TECHDIRT (June 8, 2015, 10:27 AM), https://www.techdirt.com/2015/06/08/only-copyright-office-would-fix-problem-orphan-works-doubling-down-problem-itself/.

49. Joyce, Ochoa & Carroll, *supra* note 11, at 319.

50. ORPHAN WORKS AND MASS DIGITIZATION, *supra* note 2, at 38.

51. *Id.*

52. *Id.*

53. Authors Guild v. Google Inc., 770 F. Supp. 2d 666, 669 (S.D.N.Y. 2011).

54. *See* Jonathan Band, *The Long and Winding Road to the Google Books Settlement*, 9 J. MARSHALL REV. INTELL. PROP. L. 227, 227 (2009).

55. *See id.* at 250, 255–56.

56. *Id.* at 227.

57. 17 U.S.C. § 107. ("Fair Use" is a term of art that is used to describe a common defense against copyright infringement.)

the Author's Guild.[58] Nevertheless, the decision to settle was merely the beginning of Google's problems.

A district judge ultimately rejected the attempted settlement, holding that the class action settlement would benefit major corporations rather than the public.[59] The judge stated that "the question of who should be entrusted with guardianship over orphan books . . . [is] more appropriately decided by Congress than through an agreement among private, self-interested parties."[60] Both copyright owners and the public benefited from this decision. Copyright owners gained greater leverage and rights against massive corporations, who would have enjoyed a "court-sanctioned competitive advantage" if the settlement was approved.[61] For the public, this decision affirmed that the rights of orphan works should be a public, not private, decision. Google, on the other hand, suffered from the rejection of a settlement that would have allowed the company to continue its mass digitization project.[62]

Unfortunately, the district judge failed to consider the benefits of mass digitization to the public in rejecting the settlement, which could have benefitted the public and shed light on the orphan works problem. For example, Google's effort in scanning books helped increase public knowledge by making the books more accessible to people, especially to those who are visually impaired.[63] Additionally, Google "generat[ed] new audiences and sources of income for authors and publishers," which is an incredible benefit for orphaned books that are no longer utilized in physical copies.[64] Google's attempt to provide a positive public service turned into a contentious issue, primarily due to the tricky problem of copyright-protected orphan works.

The Google Books settlement provides insight into how the Copyright Office and the American judicial system tackle (and further cause difficulty for) the orphan works problem. One key aspect of the Google Books case was Google's reliance on a fair use defense. Google believed that its digital scanning provided a societal benefit that did not harm the rights of copyright owner, and therefore the scanning should be considered fair use free from infringement liability.[65] As a result of its belief, Google implemented the archive of scanned books on an opt-out system, placing the burden on copyright owners to take affirmative steps to remove themselves from the

58. Band, *supra* note 54, at 227.

59. *Authors Guild*, 770 F. Supp. 2d at 670.

60. *Id.* at 677.

61. ORPHAN WORKS AND MASS DIGITIZATION, *supra* note 2, at 14.

62. *Id*. at 14–15.

63. *Increasing Access to Books: The Google Books Settlement*, GOOGLE, https://sites.google.com/a/pressatgoogle.com/googlebookssettlement/key-benefits-of-the-settlement (last updated Mar. 3, 2010, 11:00 AM).

64. ORPHAN WORKS AND MASS DIGITIZATION, *supra* note 2, at 74.

65. Band, *supra* note 54, at 241–42.

digital archives rather than the company seeking the approval of each owner before scanning the book.[66] However, this approach angered copyright owners who believed that Google should bear the burden of receiving the owner's approval.[67]

Google's rationale for leaving the burden with copyright holders is that a burden shift onto the corporation "would be costly and impractical," as "[c]opyright holders are in a better position to determine who has the right to authorize the digitization of copyrighted works" due to the difficulty of determining who owns the copyright for a particular work.[68] Ultimately, the project would have been "economically impossible" if Google had to seek out every copyright owner and obtain "all the requisite permissions" needed.[69] Although Google is a massive corporation, it would require numerous employees and countless hours to comb through copyright records to locate owners and even more time for them to secure actual approval from the owners. However, individual copyright owners could easily recognize when their rights have been infringed upon and could easily opt-out of the Google Books project.[70] Therefore, it was necessary for Google to rely on the opt-out system and "on fair use protection, rather than seek the permission of copyright holders, to incorporate works into their collections."[71]

Ultimately in 2015, the Second Circuit ruled that Google's scanning of books was protected from infringement as fair use – a major win for the company and for mass digitization of books.[72] While fair use has been considered as an appropriate defense for mass digitization, the Copyright Office has yet to endorse fair use as a valid defense for the use of orphan works.[73] Instead, the Copyright Office continues to place the burden on authors to receive permission to use orphan works.[74] Since orphan works have no clear owner, some members of the public may often view copying as a victimless crime. Douglas Gordon is one person with such a view.[75]

From 2014 to 2019, Gordon operated a small chain of video stores and video rental websites that specialized in selling "lost films."[76] The

66. *Id.* at 236.

67. *Id.* at 251–52.

68. Bryan Oberle, Note, *The Online Archive: Fair Use and Digital Reproductions of Copyright Works*, 25 S. CAL. INTERDIS. L.J. 753, 771 (2016).

69. *Id.*

70. *Id.*

71. *Id.*

72. Robinson Meyer, *After 10 Years, Google Books is Legal*, THE ATLANTIC (Oct. 20, 2015), https://www.theatlantic.com/technology/archive/2015/10/fair-use-transformative-leval-google-books/411058/.

73. ORPHAN WORKS AND MASS DIGITIZATION, *supra* note 2, at 76.

74. *Id.*

75. United States v. Gordon, 37 F.4th 767, 771 (1st Cir. 2022).

76. *Id.* at 769.

storeowner "found" these lost films by making DVD copies of VHS tapes "of movies not widely available for sale."[77] Gordon believed that these films could be copied because there was no clear copyright owner for the film; therefore, there was no clear harm in copying and selling the films.[78] Gordon also believed that these reproductions constituted permissible fair use, because he theorized that a film with societal value that was no longer sold to the public should be available to the public to watch.[79] Although Gordon strongly believed that the reproduced "lost films" were within the boundaries of the law, his arguments did not hold up as a fair use defense when he was ultimately sued.[80] Instead, he was found guilty of two counts of criminal copyright infringement.[81]

The Google and Gordon cases illustrate how the orphan works problem can impact both a large corporation and a single individual. Gordon aimed to benefit the public by selling the films, but his primary motivation to sell the lost films was to profit from it.[82] Google, on the other hand, had a stronger motivation to benefit the public through mass digitization, even though it also generated revenue from the digitization.[83] Beyond the parties' motives for utilizing the orphan works, both believed they *could* use the works. Both relied on the fact that there were no clear copyright owners of the films or books, and therefore presumably no harm in the sale or digitization of the works.[84] However, both were mistaken in this assumption and found themselves in court arguing against claims of infringement.[85] Ultimately, these cases show that without clear ownership of the works or a clear solution from the Copyright Office, the orphan works problem can affect anyone.

IV. THE COPYRIGHT OFFICE'S PROPOSAL TO SOLVE THE ORPHAN WORKS PROBLEM

Although the Copyright Office has proposed solutions to Congress several times, Congress has yet to adopt any solution.[86] The closest Congress came to doing so was when the Senate passed the Copyright Office-approved Shawn Bentley Orphan Works Act of 2008.[87] Unfortunately, the House of

77. *Id.*
78. *Id.* at 771.
79. *Id.*
80. *See id.*
81. *Id.* at 770–71
82. *Id.* at 769–72.
83. Oberle, *supra* note 68, at 771.
84. *See Gordon*, 37 F.4th at 771; *see also* Band, *supra* note 54, at 241–42.
85. *See Gordon*, 37 F.4th at 767; *see also* Band, *supra* note 54, at 227.
86. ORPHAN WORKS AND MASS DIGITIZATION, *supra* note 2, at 1–3.
87. *Id.* at 3.

Representatives did not approve it. One explanation might simply be that the House was "mired in trying to broker an economic revival package" and would not "take up the measure, at least not until after the November elections."[88] Ironically, allowing for the legal use of orphan works could have helped the economy, like these politicians sought, as it could have spurred greater creation and distribution of copyright protected works, one of America's most profitable industries.[89] Furthermore, these politicians clearly did not "take up the measure . . . after the November [2008] elections."[90] In 2015, the Copyright Office again published a report on "Orphan Works and Mass Digitization."[91] This report made even less progress than the 2006 report, as evidenced by the lack of new orphan works legislation proposed to Congress following the 2015 Report's publication. While addressing the orphan works problem is still important, it is equally important to recognize that the suggestions outlined in the 2015 report did not offer a viable solution.

A. THE COPYRIGHT OFFICE'S 2015 SOLUTION TO THE ORPHAN WORKS PROBLEM

In 2015, the Copyright Office suggested that the orphan works problem is best "fixed" by "limit[ing] monetary relief for infringement."[92] While this approach does not legalize the use of orphan works, it limits the damages awarded from infringement suit, making it less risky for artists to use orphan works. In this proposed solution, the "monetary relief for infringement" is "the amount that a willing buyer and a willing seller *would have* agreed upon immediately before the use began."[93] The Copyright Office deems this amount to be "reasonable compensation" for the use of the works, substituting a court-determined fee for a license fee negotiated prior to use.[94]

While this proposed solution may be a step forward from the orphan works problem as it stands today, it is only a small step forward. Today, the orphan works problem is exacerbated by the risk of copyright infringement lawsuits. The Copyright Office aims to "solve" this problem through continued infringement lawsuits, albeit lawsuits with reduced monetary damages. However, these lawsuits come with an overall greater risk of uncertainty.[95] First, an orphan work user remains uncertain that an

88. David Kravets, *'Orphan Works' Copyright Law Dies Quiet Death*, WIRED (Sept. 30, 2008, 2:50 PM), https://www.wired.com/2008/09/orphan-works-co/.

89. Joyce, Ochoa & Carroll, *supra* note 11, at 5.

90. Kravets, *supra* note 88.

91. ORPHAN WORKS AND MASS DIGITIZATION, *supra* note 2.

92. *Id.* at 4.

93. *Id.* (emphasis added).

94. *Id.*

95. *See id.* at 56.

infringement lawsuit will even be filed against them.[96] If the user is faced with a lawsuit, they must prove that they conducted a "diligent search" to find the copyright owner before they used the work.[97] The user is liable for damages if a judge determines there was no diligent search.[98] Even if the judge determines that there *has* been a diligent search, the user only receives limited liability and owes the "limited" monetary damages of "reasonable compensation."[99] Unfortunately for the user, there remains uncertainty over the amount of "reasonable compensation" a judge will grant.[100]

The first issue with this "solution" is the risk of infringement, which is a holdover from the risk of infringement that accompanies orphan works today. The ongoing risk of infringement makes little sense—if one of the major concerns of the Copyright Office is the under-utilization of orphan works that causes a "digital black hole," how can that concern be fixed without addressing the source of the problem?[101] Authors are already wary of using orphan works due to the risk of litigation. Under this proposed solution, authors would still face a risk of litigation, although they may be granted limited liability, provided there has been a "diligent search."[102] The Copyright Office admits that this is a risky process for users, stating that "[w]hen a user fails to conduct a qualifying search, the user is not eligible for a limitation on remedies. This does not technically mean that the user cannot move forward if he or she is inclined to take a risk; indeed, this is the situation we have today. Rather, it means that the user will have no clear shield against liability."[103] This approach does nothing to mitigate the risk of lawsuits and liability involved in the orphan works problem and does not seem like it would inspire authors to use orphan works.

The second problem with the proposed solution is the uncertainty surrounding the amount of "reasonable compensation."[104] This uncertainty does make sense; after all, an orphan film would likely have a higher negotiated license fee than an orphan photograph, and therefore there could not be one set price of "reasonable compensation." But the difference in value between different types of copyright protected works should not mean that there is uncertainty over the amount of "reasonable compensation." The 2015 Report proposed that judges decide "reasonable compensation" on a case-by-case basis to "allow a copyright owner to present evidence related to the market value of [their] work."[105] While allowing the copyright owner

96. *Id.* at 56.
97. *Id.* at 56–57.
98. *Id.* at 63.
99. *Id.*
100. *Id.* at 63–64.
101. *Id.* at 35.
102. *Id.* at 56.
103. *Id.* at 58 (emphasis added).
104. *Id.* at 4.
105. *Id.* at 63–64.

to present evidence is a reasonable idea, determining reasonable compensation on case-by-case basis for each specific work could lead to vast differences in the compensation for each type of works. It is unclear why judges must bear the burden of determining the rate per work, instead of the Copyright Office deciding what "reasonable compensation" is for each type of work.

Rather than establish "reasonable compensation," the Copyright Office provided judges with proposed guidelines for determining "reasonable compensation."[106] One guideline states that "'reasonable compensation' refers to the value that would have been arrived at *immediately before* the infringement began."[107] This means that "reasonable compensation" must be solely the amount that the work would have been licensed for and cannot include any sort of monetary damages that an owner would argue for in court, including attorney's fees.[108] Anchoring "reasonable compensation" to hypothetical license fees ensures fair compensation for the owners of orphan works.

However, the Copyright Office also stated that "'reasonable compensation' should be understood to include a percentage-based royalty as well as a single, fixed sum, so that an orphan work user does not reap an unfair windfall in the event that his reuse of the work proves to be commercially successful."[109] Unlike the previous guideline that balanced the interests of the copyright owner and the orphan work user, this guideline leans heavily in favor of the copyright owner. By establishing an ongoing royalty for use, this guideline expands the definition of "reasonable compensation" beyond a one-time license fee for use.[110] While it is possible that parties may have negotiated both a one-time license fee and an ongoing royalty, the latter is more similar to the codified actual damages for copyright infringement than the supposed limited liability "amount that a willing buyer and a willing seller would have agreed upon immediately before the use began."[111] Namely, a "copyright owner is entitled to recover the actual damages suffered . . . as a result of the infringement, and *any profits of the infringer* that are attributable to the infringement . . . ."[112] Here, "profits of the infringer" sounds incredibly similar to the royalty rate of "reasonable compensation," which prevents an orphan work user from "reap[ing] an unfair windfall," such as making a profit off of the work.[113] Therefore, it seems that the "reasonable compensation" is not limited liability at all.

106. *Id.* at 64.
107. *Id.*
108. *Id.*
109. *Id.*
110. *Id.*
111. *Id.* at 4.
112. 17 U.S.C. § 504(b) (emphasis added).
113. ORPHAN WORKS AND MASS DIGITIZATION, *supra* note 2, at 64.

Rather, it is simply actual damages of infringement, minus attorney's fees. Without the reassurance of actual limited liability, authors may choose not to use the orphan work, further exacerbating the "digital black hole."[114]

While there is uncertainty over the actual amount of the proposed limited liability, an infringing orphan works user cannot be granted this limited liability unless the judge finds that the orphan work user completed a "diligent search" to find the copyright owner before use.[115] As with "reasonable compensation," the Copyright Office's proposed guidelines for a "diligent search" attempt to balance the interests of orphan works users and copyright owners.[116] However, the Copyright Office's definition of a "diligent search" may be so burdensome that it discourages creators from using the orphan works. To the Copyright Office, a search is "'diligent' if users search or utilize: (1) Copyright Office online records; (2) reasonably available sources of copyright authorship and ownership information . . . (3) technology tools and, where reasonable, expert assistance . . . [117] The overwhelming requirements of this search may cause potential users of orphan works to give up on using them. Some critics have noted that "the administrative burden and transaction cost of finding and getting permission . . . [is] often greater than the return from so doing!"[118] Additionally, technology has made "the search process more difficult instead of easier."[119] Due to technological innovations, copyright protected works can be distributed around the world, in different formats, and there are many different databases and sources on copyright information that orphan work users would need to comb through in order for their search to be considered "diligent," thus granting limited liability if sued.[120]

This "diligent search" is a large burden for the small return of an uncertain "reasonable compensation," especially when "locating a specific copyright owner of a specific work is not tantamount to finding a needle in a haystack but rather more like finding a *particular needle* in a *particular haystack*."[121] Ultimately, the Copyright Office's proposed "solution" places a primary burden on orphan work users and a secondary burden on judges, which may ultimately increase the under-utilization of orphan works. The parties that benefit from this "solution" are the copyright owners that can come out of the woodwork to collect infringement damages and potential royalties, and the Copyright Office, which has no incentive to create more

114. *Id.* at 35.
115. *Id.* at 56.
116. *Id.* at 56–57.
117. *Id.* at 57.
118. Richard Hooper, *UK's Copyright Hub: A License to Create*, WIPO: WIPO MAGAZINE (Apr. 2016), https://www.wipo.int/wipo_magazine/en/2016/02/article_0007.html.
119. Aaron C. Young, *Copyright's Not So Little Secret: The Orphan Works Problem and Proposed Orphan Works Legislation*, 7 CYBARIS® INTELL. PROP. L. REV. 202, 224 (2016).
120. *Id.* at 223–24.
121. *Id.* at 224. (emphasis added).

accessible records or to properly define the amount of "reasonable compensation" per work. In this light, it seems that the 2015 Report's proposed solution is not a solution at all.

V. SOLUTIONS TO THE ORPHAN WORKS PROBLEM

A. EXTENDED COLLECTIVE LICENSING SYSTEMS

One potential solution is implementing an extended collective licensing system. Extended collective licensing systems ("ECLs") are government-run systems which allow for the licensing of orphan works.[122] While other collective licensing systems are run by collectives of copyright owners, extended collective licensing systems are run by the government because of the challenges in identifying the owners of orphan works.[123] The ECLs operate by licensing the use of orphan works, collecting royalties for the use, and then providing the proceeds to the copyright owner, if one comes forward.[124] As noted in the 2015 Report, many countries around the world have established ECLs in an attempt to fix the orphan works problem in their respective jurisdictions.[125] Although ECLs have been successful in other countries, the Copyright Office does not believe that an ECL is a viable solution to the orphan works problem in the U.S. due to the concern that an ECL "would end up ultimately as a system to collect fees, but with no one to distribute them to."[126]

While the Copyright Office may not believe ECLs are a viable solution for orphan works, the U.S. already has an established collective licensing system within the music industry that includes a consideration for orphaned musical works.[127] Under the Music Modernization Act of 2018, Congress established the Mechanical Licensing Collective (the "MLC") to grant blanket licenses for streaming services like Spotify and Apple Music to use musical works.[128] When a streaming service obtains a blanket license from the MLC, the MLC collects royalties on all music streamed and downloaded on the service.[129] Then, the MLC matches these royalties to songs registered by copyright owners within the MLC's database, and pays those registered

122. ORPHAN WORKS AND MASS DIGITIZATION, *supra* note 2, at 18–32.

123. Kevin Smith, *What is "Extended" About Extended Collective Licensing?*, DUKE UNIVERSITY LIBRARIES: SCHOLARLY COMMUNICATIONS @ DUKE (Aug. 4, 2015), https://blogs.library.duke.edu/scholcomm/2015/08/04/what-is-extended-about-extended-collective-licensing/.

124. *Id.*

125. ORPHAN WORKS AND MASS DIGITIZATION, *supra* note 2, at 18–32.

126. *Id.* at 50.

127. Joyce, Ochoa & Carroll, *supra* note 11, at 319.

128. *Id.*

129. *See How It Works*, THE MECHANICAL LICENSING COLLECTIVE, https://www.themlc.com/how-it-works (last visited Mar. 31, 2023).

copyright owners on a monthly basis.[130] However, when there are royalties for songs not registered in the MLC, the MLC holds the "unmatched" royalties for at least three years and attempts to locate the copyright owners.[131] If the works are still unmatched after three years, the unclaimed royalties are distributed to other copyright owners registered with the MLC.[132] This royalty distribution system serves as an incentive for copyright owners to claim their works in the MLC. If the works are not matched, other copyright owners[133] get to enjoy the profits from the licenses.[134]

The MLC solution is generally beneficial for people in the industry. For instance, artists and streaming services who want to use the musical works can license the use without the risk of litigation and without the burden of a diligent search.[135] Additionally, copyright owners get to profit off of their work once they come forward and register, and other musical copyright owners get to benefit from additional royalties until the orphan work is claimed.[136]

In addition to the widespread benefits of the licensing collective, ECLs are beneficial because they are *ex ante* solutions, meaning they can create a process for the legal use of orphan works before any potential infringement. The United States' current solution of limited liability is an *ex-post* solution, meaning the works must be used and infringed before the right to use is ever determined. While both solutions aim to balance the needs of orphan work users and orphan work owners, only the collective licensing system legalizes the use of orphan works, allowing the public to utilize orphan works more often.[137] Moreover, the collective licensing system shifts the burden onto the government and the licensing organizations to determine what counts as an orphan work and who gets to use them.[138] The burden is also placed on copyright owners to come forward and register their works, rather than wait until infringement happens to file a lawsuit.[139] This is in stark contrast to the United States' current "limited liability" solution, which places the burden on orphan work users and the judicial system to make sense of proposed

130. *Id.*

131. Joyce, Ochoa & Carroll, *supra* note 11, at 319.

132. *Id.*

133. In reality, these unclaimed royalties unfortunately tend to be distributed to the music publishers and companies that control the MLC. However, this Note will not dive into the current controversy surrounding the MLC's royalty distribution system.

134. *How It Works*, *supra* note 129.

135. *Id.*

136. Joyce, Ochoa & Carroll, *supra* note 11, at 319–20.

137. ORPHAN WORKS AND MASS DIGITIZATION, *supra* note 2, at 49.

138. *Id.* at 18–19.

139. *Id.* at 49.

amorphous solutions, including: who owns the orphan work, what a "diligent search" is, and what "reasonable compensation" is at trial.[140]

The 2015 Report discussed the collective licensing system, but almost immediately dismissed it as a failure.[141] The Report cited Japan's licensing system as an example of a failed licensing system, stating that only eighty-two compulsory licenses were granted from 1972 to 2010.[142] The U.S. Copyright Office perceived this small number of licenses as evidence that Japan's licensing system was underutilized, "highly inefficient," and not capable of fixing the orphan works problem.[143]

However, two of the Copyright Office's most important observations are hidden in the Report's footnotes. First, most of these licenses were granted between 1999 and 2010, a period when a greater amount of works were likely to be orphaned due to increases in technology that facilitated greater publication of works without proper credit to the owner.[144] While a work can technically be "orphaned" at any time due to problems with keeping track of authors and owners, the orphan works problem has been exasperated in the modern age.[145] Nowadays, a greater number of works are "orphaned" due to issues such as a lack of a proper recordation system, a digital age that gives greater access of works to the public, and a long copyright term, during which owners may have died and heirs may not have affirmatively claimed ownership.[146] So, while eighty-two is still a small number of licenses, the fact that most of these licenses were granted in recent years suggests that a licensing system could have greater utilization in the years going forward.

Second and more importantly, another footnote points out that each Japanese license can cover multiple works. [147] So, while only eighty-two licenses were granted, over 158,000 works were licensed. [148] The fact that thousands of works were being licensed through the system and utilized in some way by the Japanese public, rather than being argued over in court or lost in the "digital black hole," hardly suggests that a collective licensing system will not help to solve the orphan works problem.[149]

Still, the Copyright Office pointed to other jurisdictions to support its claim that ECLs are not the solution to the orphan works problem.[150] The 2015 Report explains that the E.U. rejected the ECL system because of

140. *Id.* at 56.
141. *Id.* at 49–50.
142. *Id.* at 31–32.
143. *Id.* at 48.
144. *Id.* at 32, n.138.
145. Young, *supra* note 119, at 247.
146. Joyce, Ochoa & Carroll, *supra* note 11, at 318–19.
147. ORPHAN WORKS AND MASS DIGITIZATION, *supra* note 2, at 32, n.138.
148. *Id.*
149. *Id.* at 35.
150. *Id.* at 18.

concerns over licensing rates; these concerns included the fear that orphan work users would have to pay large sums for works with no defined market value.[151] While it is true that some users would have to pay royalties for orphan works with little to no market value, the Copyright Office is missing the point—the licensing system is beneficial because it removes the risk of lawsuit.[152] Yes, some users such as libraries may have to pay "sums for works that have no defined market value," but in exchange for that sum, the user does not have to fear a lawsuit, mount an expensive attorney's bill to prepare for trial if sued, or pay damages that could include a one-time monetary damage as well as an ongoing royalty for use.[153] Additionally, the Copyright Office misses its own hypocrisy in stating that there is "difficult[y] in establishing licensing rates," as if there is no difficulty for judges to determine "reasonable compensation."[154]

It seems that the real reason why the Copyright Office does not want to adopt an ECL system lies in the burden that the system will put on the Office and the government. Today, orphan work users and the judicial system deal with the brunt of the orphan work problem's burden; with a licensing system, the government would have to determine licensing rates, collect royalties, and locate the owners to share the royalties with.[155] This system would require increased effort by the Copyright Office, as well as hiring more employees to run the system. Although the 2015 Report made no mention of the logistical burden an ECL would create, the Report's tone when discussing an ECL for orphan works is clear: the Copyright Office does not want to establish it.[156]

In addition to the examples of Japan and the E.U., the Report discusses six countries whose ECL systems issued a total of less than 1,000 licenses by the time of the Report's publication in 2015.[157] Through these examples, the Report implies that ECLs are a failure in other countries and, therefore, would never work in the U.S.[158] But the Copyright Office misses the point. Although ECLs in other countries might be underutilized now, the ECL system is a step in the right direction for solving the orphan works problem because it still allows hundreds of works to be licensed and used. The Copyright Office should stop viewing ECLs as a failure and start viewing them as an experimental solution, like the Copyright Small Claims Court.[159]

151. *Id.* at 20.
152. *Id.* at 48.
153. *Id.* at 20.
154. *Id.*
155. Smith, *supra* note 123.
156. ORPHAN WORKS AND MASS DIGITIZATION, *supra* note 2, at 48–50.
157. *Id.*
158. *Id.*
159. *Copyright Small Claims and the Copyright Claims Board*, U.S. COPYRIGHT OFF., https://www.COPYRIGHT.GOV/ABOUT/SMALL-CLAIMS/ (last visited Apr. 21, 2023) (The Copyright Small Claims Court is an experimental alternative to trial litigation for small claim copyright disputes. Parties

It is unclear if experiments like the Copyright Small Claims Court or an ECL system will be successful, but it is arguably worth a try. After all, an experiment like an ECL system could be the solution to the orphan works problem in the U.S.

B. CHANGES TO THE COPYRIGHT DATABASE

Another solution to the orphan works problem is to improve the Copyright Office's online database to make it easier to determine the owner of a copyright, since the orphan works problem ultimately stems from the issue of not knowing the identity of the copyright owner.[160] Currently, any person with access to the Internet can go to the Copyright Office's website and search through the Office's database of copyright records to find a copyright owner.[161] However, this database is hard to navigate and is an obstacle for an author's "diligent search," since it can be hard for users to find exactly what they are looking for.[162] Improving the copyright database will make it easier for users to conduct a diligent search to determine if there is an owner they can contact before using a copyright-protected work. This change will require the Copyright Office to take on some extra work, but there are multiple approaches to making these changes. This section will analyze proposed changes from scholars, other jurisdictions, and the Copyright Office itself.

To begin with, the Copyright Office is not stuck in the Dark Ages. Rather, since 2011, the Copyright Office has made it a priority to digitize its database and make it easily searchable.[163] As of December 2022, the Copyright Office has successfully digitized its entire catalog of cards and Catalog of Copyright Entries ("CCE").[164] Both of these records are vital to diligent searches because there are millions of cards listing ownership information about copyrighted works from 1870-1977, and the CCE lists copyright renewals from 1891-1982.[165] Being able to easily search these records through an online archive allows authors to conduct a diligent search from their computers, rather than having to sort through boxes of physical records.

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can bring claims of up to $30,000 to a three-member tribunal for an efficient resolution to the dispute. This experimental option launched in 2021, and its success and future viability is still in question.).

160. *Orphan Works to Open Access: Harvard Library Publishes Report on Digitizing Orphan Collections*, *supra* note 1.

161. *Search Copyright Records: Copyright Public Records Portal*, U.S. COPYRIGHT OFF., https://www.copyright.gov/public-records/ (last visited Apr. 21, 2023).

162. Young, *supra* note 119, at 223–24.

163. *Historical Public Records Program*, U.S. COPYRIGHT OFF., https://www.copyright.gov/historic-records/ (last updated Apr. 2023).

164. *Id.*

165. *Id.*

In addition to digitizing the physical records, the Copyright Office recently announced its creation of the Copyright Public Records System ("CPRS"), a more effective searchable database.[166] Unfortunately, the CPRS is still in its pilot phase and is not ready for public use.[167] As a result, there is a disconnect between the digitized records and the user-friendly search record. Currently, none of the CCE and only 2.3% of the card catalog are searchable through CPRS.[168] This is a shame, as those works are entirely digitized and would be incredibly helpful for diligent searches.[169] Until the CPRS is up and running, authors are forced to either wade through the current hard-to-search copyright database or scour through physical records to complete a diligent search.[170] Authors also have the option to hire attorneys or the Copyright Office to run their search for them; however, this can be financially burdensome.[171] For instance, the Copyright Office charges $200 per hour for a copyright records search.[172] Therefore, to make diligent searches easier, the Copyright Database needs to be fixed; a step in the right direction is completing and launching the CPRS for the public to use.

While launching the CPRS would help authors search diligently, some small tweaks to the CPRS would help improve the database even more. For instance, Aaron C. Young suggests that a searchable archive of "affirmative notice from copyright owners . . . should be established."[173] Like past copyright registrations listed in the catalog of cards, this notice would list information on who owns the copyright and the archive of these notices would be "searchable by users" within the Copyright Office's database.[174] However, unlike copyright registrations of the past, this notice would not be required to gain copyright protection because formalities such as registration could remove the United States from the Berne Convention.[175] Instead, this notice is a simple way for copyright owners to claim affirmative ownership of their works and would allow authors to easily determine who copyright owners are as part of a "good faith diligent search."[176]

Additionally, this notice would "satisfy the copyright owner's requirement to respond to all licensing requests," allowing authors to easily identify the owner they want to license from and removing the burden on owners from having to respond to each author who would like to use their

166. *Id.*
167. *Id.*
168. *Id.*
169. *Id.*
170. *Search Copyright Records: Copyright Public Records Portal*, *supra* note 161.
171. *Id.*
172. *Id.*
173. Young, *supra* note 119, at 240.
174. *Id.*
175. *Berne Convention*, *supra* note 41.
176. Young, *supra* note 119, at 240.

work "on an individual basis."[177] Young's suggestion would help to license works, but requires affirmative action on behalf of the owner. Some owners may protest this affirmative step, arguing that the burden should not be on them.[178] These owners may refuse to post a notice, furthering the lack of information on who owns copyright. Still, the owners who would post an affirmative notice would remove a major obstacle in an author's diligent search.[179] The hope is that more owners consent to posting an affirmative notice than those who protest. If so, the affirmative notice is a simple addition to the CPRS that would help to alleviate "the orphan works problem by providing a location . . . [of] copyright owners."[180]

Adding an affirmative notice is an easy change that can improve the Copyright Office's database by allowing authors to search and locate copyright owners, but adding a licensing component to the searchable archive would further improve the database and alleviate the orphan works problem. Take, for instance, the U.K. Copyright Hub, which launched in 2015.[181] The U.K. Copyright Hub (the "Hub") was a database aimed to develop technology to connect copyright-protected works with its owner, so that anyone who wanted to use the work could find the owner and get permission automatically.[182]

To make licensing even easier, the license transactions on the Hub took place directly and privately between the owner and the author, rather than as separate transactions between the licensing collective, the owner, and the author.[183] Each copyright-protected work on the Hub was given a "unique identifier" and "someone wishing to reuse" the copyrighted work could "with a simple right-click, connect to the computer of the rights owner . . . [who] can now offer, machine to machine, standard licenses for reuse requiring payment or proper acknowledgement."[184] Through its research, the Hub found that most copyright owners were happy with their work simply being acknowledged by the author, and did not require payment for use, removing the Copyright Office's concern that licensing systems cause authors to pay royalties with no one to accept the funds.[185] This system also alleviates the burden on the licensing collective, because the owner rather

177. *Id.* at 240–41.

178. *See* Band, *supra* note 54, at 251–52.

179. Young, *supra* note 119, at 242.

180. *Id*. at 240–41.

181. Andrew Orlowski, *Open Source Copyright Hub Unveiled with '90+ Projects" in the Pipeline*, THE REGISTER (July 31, 2015, 8:27 AM), https://www.theregister.com/Print/2015/07/31/copyright_hub_launch/.

182. Hooper, *supra* note 118.

183. *Id.*

184. *Id.*

185. *Id.*

than the licensing collective determines the license fee and collects it from the author.[186]

Like Young's proposal, the Hub's system required affirmative action from the owner and did not resolve the problem of copyright owners failing to register their works. In such cases, the unregistered orphan work would either not be used, or would be used and could lead to a later infringement suit.[187] The Hub recognized this unfortunate issue and added an educational component to the Hub.[188] Through this copyright education section of the site, authors were taught about the exclusive rights granted in copyright, infringement suits, and orphan works.[189] This education section also included a discussion forum, which allowed authors to discuss their concerns about copyright with other owners and authors.[190] The Hub's hope with this feature was to educate owners about their copyrights so that they would register with the Hub; if more authors were educated about infringement, they would license works within the guidelines of copyright law.[191] Ideally, the better educated both parties are, the less infringement and the fewer orphan works there would be.

Today, the Hub is still developing its technology and has not achieved the impact it intended when it first launched.[192] While this could be deemed as a failure, it should instead be deemed a success story. The U.K. researched orphan works, experimented with solutions, and then launched and ran a licensing and education hub for years. Although it ultimately shut down, at least the U.K. attempted to do *something*. Likewise, the Copyright Office should try to implement *something* as well, whether it be an easier-to-navigate and searchable database, a requirement of affirmative notice from copyright owners, or a registration and licensing hub like the Hub.

C. A BLOCKCHAIN LICENSING SYSTEM

Recent changes in technology have created an additional possible solution, one that partially builds off the Hub's existing technology. Professors Jake Goldenfein and Dan Hunter propose blockchain as the

186. *See id.*

187. ORPHAN WORKS AND MASS DIGITIZATION, *supra* note 2, at app. B at 64555.

188. Hooper, *supra* note 118.

189. Richard Hooper & Ros Lynch, *Copyright Works: Streamlining Copyright Licensing for the Digital Age*, U.K. GOV'T WEB ARCHIVE 1, 22 (July 2012), https://webarchive.nationalarchives.gov.uk/ukgwa/20140603083549/http://www.ipo.gov.uk/dce-report-phase2.pdf.

190. Hooper, *supra* note 118.

191. Hooper & Lynch, *supra* note 189.

192. *The History of the Copyright Hub*, COPYRIGHT DONE RIGHT, https://www.copyrightdoneright.org/the-history-of-the-copyright-hub/ (last visited Nov. 16, 2023).

solution to the orphan works problem.[193] Blockchain technology is "a technical protocol to create a secure, transparent ledger that reports transactions to everyone within a given network."[194] In short, the technology exists to create secured transactions between people on a given network.[195] For orphan works and other copyrighted works, Goldenfein and Hunter suggest "a distributed ledger that collects and records every time a search for the owner of a work is completed."[196] This ledger would thereby allow authors to view when past searches for owners have occurred, allowing authors to "avoid search duplication."[197] Additionally, the ledger could be used as evidence of a diligent search, "allowing the parties as well as the judge or jury to assess the nature of the search[.]"[198] If the ledger supports a finding of a good-faith diligent search, the author could receive limited liability in an infringement case.[199]

While this suggestion of a blockchain solution is beneficial to the Copyright Office's current proposal of limited liability, blockchain will not be a completely effective solution if it is only used as supplemental evidence of a diligent search, since authors will still be at risk of facing an infringement suit. This risk of infringement does not seem to complement the "comprehensive record" created by the blockchain ledger. If authors have a complete record of a diligent search readily available for determining if there is an owner, a licensing scheme would a better complement to this system than limited liability. Goldenfein and Hunter acknowledge this discrepancy and suggest that the "blockchain register would allow automatic licensing of orphan works through the coding and execution of compulsory 'smart contracts' licenses hosted on the register."[200] In practice, after completing the search on the blockchain, the author would be able to license the work directly from the blockchain.[201]

Although this system resembles the Hub, the nature of blockchain technology allows for licensing without any affirmative action from the copyright owner. The technology would allow for "the conditions of use" of the license to be controlled and changed "according to the legislative environment as well as user input."[202] This means that the licensing system would "remain dynamic over time," so when an author takes affirmative action, they could control the licensing system, and the licensing system

193. Jake Goldenfein & Dan Hunter, *Blockchains, Orphan Works, and the Public Domain*, 41 COLUM. J.L. & ARTS 1, 2–5 (2017).
194. *Id.* at 3.
195. *Id.*
196. *Id.* at 23.
197. *Id.* at 24.
198. *Id.* at 31.
199. *Id.*
200. *Id.* at 24.
201. *Id.*
202. *Id.*

would be in accordance with a collective licensing system until the author comes forward.[203] Additionally, and most beneficially, the blockchain could "provide for automated escrow, where a potential user could pay a license fee in case a rights holder does emerge."[204] That way, the work could be licensed by users, and the copyright owner would be paid immediately from the escrow if they come forward. For the user, this blockchain licensing system would remove the risk of infringement and the burden of having to hold onto the money until an owner comes forward from the collective licensing system. For the owner, instead of having to deal with the logistics of a licensing system or the result of an infringement suit, it would allow payment as soon as they come forward.

The Copyright Office may be wary of blockchain technology since it is a fairly new technology that is not yet fully understood or implemented. However, the suggestions of blockchain and the Hub go to show that small technological changes can improve diligent searches and licensing efforts, which will go a long way to improve usage of orphan works. Overall, the best way to solve the orphan works problem is to better help authors locate copyright owners and ultimately license from them. This may seem like an impossible feat, but integrating some technological solutions, like those enacted by the Hub, those suggested through blockchain, or those already attempted in the CPRS may be enough to increase utilization of orphan works and decrease infringement.

D. FAIR USE

Lastly, fair use is another solution to the orphan works problem that has been suggested by many, including the defendants in the Google Books settlement and in *U.S. v. Gordon*.[205] As mentioned before, fair use is a codified defense to copyright infringement.[206] The U.S. Code states that "the fair use of a copyrighted work, including such use by reproduction . . . for purposes such as criticism, comment, news reporting, teaching, . . . scholarship, or research is *not* an infringement of copyright."[207] To determine if a copy is fair use and not infringement, the court must determine four factors on a case-by-case basis: (1) "the purpose and character of the use," (2) "the nature of the copyrighted work," (3) "the amount and substantiality of the portion used in relation to the copyrighted work as a

203. *Id.*
204. *Id.*
205. *See* Authors Guild v. Google Inc., 770 F. Supp. 2d 666, 678 (S.D.N.Y. 2011); *see also* United States v. Gordon, 37 F.4th 767, 771 (1st Cir. 2022).
206. 17 U.S.C. § 107.
207. *Id.* (emphasis added).

whole," and finally, (4) "the effect of the use upon the potential market for or value of the copyrighted work."[208] Unfortunately, since the determination of fair use requires an allegation of copyright infringement, a fair use defense will not alleviate an author's risk of an infringement lawsuit and may lead to more underutilization of orphan works. This section proposes that instead of relying on a fair use defense, there should be an automatic presumption that the use of orphan works is fair use so that authors may feel comfortable using orphan works. This section aims to balance the four factors in favor of a presumption of fair use, although this is currently not an accepted solution to the Copyright Office, since the Copyright Office would rather handle fair use on a case-by-case basis.[209]

To determine a presumption of fair use, the Copyright Office, Congress, or the Supreme Court should emphasize that the four factors weigh in favor of the use of orphan works being fair. Looking to the first factor, "the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes," the purpose of using orphan works can sway between commercial and educational, and in some cases can be both.[210] For lost film salesman Gordon, use of copyrighted material was commercial.[211] For Google Books, the use was overwhelmingly educational, though there may have been some commercial use as well.[212] In addition to considering commercial and educational use, this factor also weighs how transformative the use is.[213] In the Google Books settlement, the use was transformative because Google was only "displaying snippets of copyrighted works," which was deemed to transform "expressive text into a comprehensive word index that helped readers, scholars, researchers, and others find books."[214] Again, the "purpose and character" of this transformative use seems educational, which will not always be the case for users of orphan works. It is unclear how to presumptively determine whether the use of orphan works is educational or commercial or transformative. Fortunately, none of the fair use factors are dispositive; meaning there can still be a presumption of fair use if the other factors weigh in favor of it.[215]

The second factor is the "nature of the copyrighted work."[216] This factor considers whether "a copyrighted work is factual/creative or published/unpublished" and gives greater protection to unpublished and

208. *Id.*
209. ORPHAN WORKS AND MASS DIGITIZATION, *supra* note 2, at 46.
210. 17 U.S.C. § 107.
211. *See* United States v. Gordon, 37 F.4th 767, 769–70 (1st Cir. 2022).
212. Authors Guild v. Google Inc., 770 F. Supp. 2d 666, 671 (S.D.N.Y. 2011).
213. Joyce, Ochoa & Carroll, *supra* note 11, at 852.
214. Oberle, *supra* note 68, at 759.
215. Campbell v. Acuff-Rose Music, Inc., 510 U.S 569, 578 (1994).
216. 17 U.S.C. § 107.

creative works.[217] This is because facts are not copyright-protected and the right of first publication is important to the copyright owner.[218] In the case of orphan works, "[s]ome have argued that another's use of an orphaned work should invariably be considered a fair use because of the 'orphaned' *nature* of the work being used."[219] The argument is that if a copyright owner abandons their work, the abandonment should be assigned more weight than whether the work is factual or creative; abandonment should lead to a presumption of fair use. Additionally, the second factor leans in favor of fair use if works are published but are "no longer in print."[220] Since orphan works generally tend to be "out-of-print" and abandoned, the second factor supports a presumption of fair use.[221]

The third factor looks to the portion of the copyrighted work used, assessing both the quantitative and qualitative portions used.[222] For the quantitative analysis, courts typically hold that the greater amount of the work used, the less fair use.[223] However, even if a small amount of the work has been used, if that small amount is the "heart" of the work, it may weigh against the finding of fair use.[224] Like the first factor, it is impossible to predict how much of an orphan work will be used or how important the amount used will be. However, the orphaned natured of the work is critical to the third factor, because it should not matter how much of the work was used if the entire work was abandoned by its owner. Abandonment presumes that the work is no longer used by or important to its owner.[225] So, it should not matter if it was a small subset of the orphan work, the whole orphan work, or even the "heart" of the orphan work that was copied, if it was abandoned. Therefore, factor three supports a presumption of fair use.

The fourth and final factor has been deemed "the most important element of fair use" and is the factor most in favor of a fair use defense for orphan works.[226] This fourth factor looks at the economic effect of the use on the value of the work, considering the extent of market harm to the original work and to derivative works.[227] As we have seen with the second and third factors, the foundational argument for the presumptive fair use for orphan works is the fact that they have been abandoned by their owner. Due to their abandonment, the orphan works are no longer providing a fair market

217. Joyce, Ochoa & Carroll, *supra* note 11, at 853.
218. Harper & Row, Publishers, Inc. v. Nation Enterprises, 471 U.S. 539, 544 (1985).
219. Joyce, Ochoa & Carroll, *supra* note 11, at 853.
220. Oberle, *supra* note 68, at 761.
221. *Id.*
222. 17 U.S.C. § 107.
223. Harper & Row, Publishers, Inc. v. Nation Enterprises, 471 U.S. 539, 564–66 (1985).
224. *Id.*
225. *See* Joyce, Ochoa & Carroll, *supra* note 11, at 942–43 (Abandonment is an affirmative defense to copyright infringement).
226. *Harper & Row, Publishers, Inc.*, 471 U.S. at 566.
227. *Id.* at 568.

value or a market benefit for the owner. Since the public could better utilize the orphan works, the works should be disseminated to the public under the protection of fair use.[228] Therefore, the fourth factor weighs in favor of presumptive fair use.

Additionally, there is an argument that the use of orphan works is presumptively fair use because orphan works are a market failure. Law and economics scholars explain that market failures occur when the "transaction costs . . . are so high that an otherwise mutually beneficial exchange could not take place."[229] Furthermore, when there is a market failure, "the role of fair use is to allow the dissemination of copyrighted works."[230] For orphan works, the transaction costs include the costs of a diligent search, the cost of litigation, and the costs of paying damages. In contrast, had the owner been apparent, the only cost to the user would have been a negotiated license fee. Since the difference between the transaction costs if the work is orphaned or not are so high, there is an argument that orphan works are a market failure and therefore, the use of orphan works is presumptively fair use.

As shown through a weighing of the four factors, as well as a law and economics argument, orphan works deserve a legal presumption of fair use. The Copyright Office should presume fair use for orphan works so that authors finally have a predictable and stable way to utilize orphan works. Yet, the Copyright Office does not believe fair use is the appropriate solution to the orphan works problem.[231] In its 2015 Report, the Copyright Office wrote that it "is not persuaded that fair use has achieved the predictability and stability that these commenters ascribe to it."[232] These commenters were describing the success of Google's fair use argument in the Google Books settlement, which the Copyright Office shrugged off as a "highly fact-specific inquiry prescribed by 17 U.S.C. § 107, and therefore [does] not extend to the wider dissemination of copyrighted works without permission or compensation."[233] Essentially, the Copyright Office stands in the way of fair use being a solution.

Currently, fair use is still a "back-up defense" for authors who utilize orphan works. In an infringement suit, the author must prove that they performed a diligent search to receive limited liability.[234] If the author fails to prove that a diligent search occurred, they may argue fair use. As pointed out by Aaron C. Young, "in the alternative, a user could choose to forego the orphan works limitation on liability completely and move forward using a

228. Joyce, Ochoa, & Carroll, *supra* note 11, at 858–59.
229. Joyce, Ochoa & Carroll, *supra* note 11, at 858.
230. *Id.*
231. ORPHAN WORKS AND MASS DIGITIZATION, *supra* note 2, at 76.
232. *Id.*
233. *Id.*
234. *Id.* at 56–57.

work under a theory of fair use alone."[235] Young emphasizes that fair use is not lost in the world of orphan works and is always an option for authors who want to argue it.[236] Moreover, "the Copyright Office's decision to specifically address and maintain fair use" in the 2015 Report "is an indication of the importance of fair use to copyright users" and to the Copyright Office.[237] Fair use is a defense that is always available. However, it is a shame the Copyright Office does not presumptively allow fair use for orphan works, as the protection of fair use would allow for the utilization of even more orphan works and could solve the orphan works problem.

VI. CONCLUSION

It will take work to solve the orphan works problem, but it is a problem worth addressing. Copyright protection for works created after 1976 lasts for the life of an author plus 70 years, an incredibly long amount of time which will likely result in even more works becoming orphaned in the future.[238] Unfortunately, the more works that are orphaned, the bigger the "20th century black hole" becomes, causing a decrease in creativity and knowledge.[239]

To best utilize orphan works under our current legal framework requires affirmative action and solutions. These should include a better licensing system and a searchable database to make diligent searches easier for authors. Technological improvements can help to implement these changes and make the system easier for authors and owners. Unfortunately for the Copyright Office, these solutions require a lot of work and shift the burden onto them. However, since the Copyright Office and copyright owners are the parties with the most knowledge on copyright ownership, the burden should be on them.

There are many other possible solutions for the Copyright Office and Congress to solve the orphan works problem. Telling authors to claim limited liability is not the best solution as it still places authors at risk of litigation. This risk will force more orphan works to enter into the "20th century digital black hole" as they continue being under-utilized.[240] A more effective solution for the Copyright Office and Congress is to create a presumption of fair use for orphan works, which will remove users' fear of litigation and will allow for an increased use of orphan works.

235. Young, *supra* note 119, at 246.
236. *Id.*
237. *Id.*
238. Joyce, Ochoa & Carroll, *supra* note 11, at 321.
239. ORPHAN WORKS AND MASS DIGITIZATION, *supra* note 2, at 35.
240. *Id.*

It is time for a new solution to be put in place to fix the orphan works problem. As in the words of little orphan Annie, "the Sun will come out tomorrow;" but for orphan works, they will only see the sunshine of tomorrow if the Copyright Office implements the changes to let them.