

Orphan Works in Copyright Law: Causes, Challenges, and Comparative Legal Responses

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Abstract: *This article examines the legal, structural, and technological factors that contribute to the growing problem of orphan works within contemporary copyright systems. It explains how the removal of registration formalities, the steady extension of copyright duration, and weak metadata practices have made ownership identification increasingly difficult, particularly in the digital environment. Using a doctrinal and descriptive research methodology, the paper draws on domestic legislation, international treaties, judicial decisions, and policy reports to assess the scale of the problem and its practical consequences for authors, users, libraries, and cultural institutions. Comparative analysis of approaches in the United States, the European Union, Canada, and India highlight divergent regulatory models ranging from fair use doctrines to licensing and centralized orphan works registries. The discussion shows how legal uncertainty discourages preservation, digitization, and lawful reuse, resulting in a broader loss to public access and cultural memory. The article concludes by outlining policy options and preventive measures, emphasizing the role of diligent search standards, limited liability frameworks, and improved rights information systems in balancing copyright protection with public interest objectives.*

Keywords: Orphan works, copyright law, digital preservation, diligent search, comparative legal frameworks

1. Introduction: The Concept of Orphan Works

Works become “orphan works” when their owners cannot be identified or located. This problem arises in multiple circumstances: an author may never have been publicly known; a work may have been published anonymously or under a pseudonym; or information identifying the author may have been lost over time. In other cases, the work may be inherently informal or collaboratively produced, rendering attribution impracticable. This latter category has become especially prevalent in the digital environment, where blogs, websites, and user-generated content are often created through the collective efforts of numerous contributors whose identities are difficult, at many times even impossible, to trace.

Despite remaining publicly accessible, orphan works are effectively unclaimed. Their ambiguous legal status creates uncertainty for users and cultural institutions, discouraging lawful use and preservation while simultaneously exposing such works to misuse or neglect.

2. Research Methodology and data sources

The methodology adopted in this research is doctrinal and descriptive nature. In Order to obtain necessary conclusions pertaining to research objectives, both primary and secondary data are used here. The primary sources include the study and analysis of the domestic laws and relevant international conventions and treaties. The secondary data sources such as different text books, journals, periodic reports, judicial cases, magazines, newspapers, websites and reports etc. are collected.

3. Causes of Orphan Works

Two structural developments in modern copyright law significantly contribute to the proliferation of orphan works. First, the Berne Convention for the Protection of Literary and Artistic Works abolished formalities such as registration as a precondition for copyright protection.¹

While this principle strengthened authors’ rights by ensuring automatic protection upon creation, it also eliminated centralized registries that could facilitate ownership identification.

Second, the progressive extension of copyright duration has exacerbated the problem. In the United Kingdom, for example, copyright protection has expanded over the past century from a fixed term of fourteen years to a term lasting seventy years after the author’s death.² Although extended protection arguably enhances incentives for creation, it also increases the likelihood that ownership information will be lost before copyright expires, thereby expanding the universe of orphan works.

4. Scale and Practical Implications

Unofficial estimates suggest that as many as 80% of copyrighted works may qualify as orphan works. The British Library has estimated that approximately 40% of all print works in its collection fall into this category.³ The problem continues to grow, particularly in the digital sphere, where new orphan works are generated at an unprecedented pace.

Digital platforms frequently strip uploaded content of metadata—information identifying the creator and source of a file—making attribution nearly impossible. Applications such as Facebook and WhatsApp remove such data during the upload process, thereby severing the link between works and their creators. As a result, tracing a digital work back to its originator becomes exceedingly difficult.

The absence of identifiable ownership also eliminates economic incentives for preservation. Since no individual or entity can claim exclusive rights, orphan works are at heightened risk of deterioration or destruction, particularly when preservation requires significant financial investment.

5. Copyright Law and the “Lose–Lose” Scenario

Copyright protection arises automatically upon creation, regardless of registration. While this principle reflects the core philosophy of copyright law, it also complicates ownership identification in the absence of registries or recordation systems. Consequently, prospective users must expend substantial time and resources conducting searches that frequently yield no results.

Even after conducting an exhaustive search, users face significant legal uncertainty. If a rightsholder later emerges, the user may be exposed to injunctive relief or monetary damages. This risk deters academics, artists, libraries, and archivists from using orphan works, despite the likelihood that the original rightsholders no longer exist or would not object to the use.

Libraries and cultural institutions encounter similar obstacles. For example, the British Library holds extensive collections of photographs depicting British servicemen during the First and Second World Wars. Despite their immense historical value, many of these photographs cannot be digitized or made publicly accessible because their copyright owners cannot be identified.

Ultimately, orphan works produce a “lose–lose” outcome: the owner derives no economic benefit, potential users forego creative opportunities, and the public is deprived of access to culturally valuable material.

6. Contemporary Controversies and the Digital Environment

The risks associated with orphan works are magnified by mass digitization and online dissemination. Anyone with internet access can locate and reuse such works without authorization, often under the mistaken assumption that availability implies free use. A notable example arose when the Indian Prime Minister’s public relations office shared a Dhanteras greeting image that was later claimed by a photographer based in the United States, who had originally uploaded the photograph to Flickr. Although no infringement action was filed, the incident illustrates widespread misconceptions regarding online content ownership.

These disputes highlight a fundamental policy dilemma: should orphan works be made freely accessible in the public interest, or should they remain inaccessible to avoid infringing unknown rights?

7. Comparative Legal Analysis

A. United States

The U.S. copyright framework contributes significantly to the orphan works problem. The Copyright Act of 1976 eliminated mandatory registration,⁴ and the Sonny Bono Copyright Term Extension Act extended protection to life of the author plus seventy years.⁵

In 2006, the U.S. Copyright Office released a comprehensive report concluding that new legislation was necessary to address orphan works.⁶ The report proposed limiting remedies against good-faith users who conducted diligent searches, particularly shielding nonprofit institutions from statutory damages.

Subsequent legislative proposals—the Orphan Works Act of 2008 and the Shawn Bentley Orphan Works Act—adopted these recommendations but ultimately failed to pass. Both bills emphasized diligent search requirements and limited remedies to “reasonable compensation,” while exempting nonprofit educational and cultural institutions acting without commercial intent.

Authors Guild, Inc. v. Google, Inc.

In *Authors Guild, Inc. v. Google, Inc.*, authors challenged Google’s mass digitization of copyrighted books.⁷ The Second Circuit held that Google’s scanning, indexing, and snippet display constituted fair use under 17 U.S.C. § 107, emphasizing the transformative nature of the use and its minimal market harm. The decision significantly shaped the U.S. approach to orphan and out-of-print works by prioritizing public access over strict enforcement.

8. European Union

The European Union addressed orphan works through the Orphan Works Directive, adopted in 2013.⁸ The Directive establishes a harmonized framework permitting cultural heritage institutions to digitize and make orphan works available online following a diligent search. Once a work is registered as orphan in the EU Intellectual Property Office database, it enjoys orphan status across all Member States.

Directive mandates consultation of specified databases and registries and allows institutions to generate revenue solely to offset digitization costs. This centralized approach emphasizes legal certainty and cross-border access.

9. Canada and India

Canada employs a licensing-based model. Section 77 of the Canadian Copyright Act authorizes the Copyright Board of Canada to grant non-exclusive licenses when reasonable efforts to locate the owner have failed.⁹ Royalties are held in trust for reappearing owners for up to five years after license expiration.

India addresses orphan works under Section 31A of the Copyright Act, 1957, as amended in 2012.¹⁰ Applicants must publicly advertise their intent, apply to the Copyright Board, and deposit royalties determined by the Board. However, the statute provides limited guidance regarding unclaimed royalties and the rights of reappearing owners.

10. Proposed Solutions and Preventive Measures

Most policy proposals converge on three mechanisms: (1) diligent search requirements, (2) limited liability regimes,

and (3) licensing systems. Preventing future orphan works requires improved metadata practices, accessible registries, and rights information systems.

Projects such as ARROW (Accessible Registries of Rights Information and Orphan Works) and MILE (Metadata Image Library Exploitation) aim to enhance rights identification and prevent works from falling into orphanhood. However, critics caution that mandatory registries may undermine the Berne Convention's prohibition on formalities.

11. Conclusion

Orphan works represent a systemic failure at the intersection of copyright duration, automatic protection, and technological change. Comparative legal approaches reveal a shared objective of balancing public access with authors' rights, yet no jurisdiction has achieved a comprehensive solution. A combination of diligent search standards, limited liability protections, and improved rights information infrastructure remains essential to resolving the orphan works dilemma.

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