

# *The Orphans, the Market, and the Copyright Dogma*

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How do you solve a problem like orphan works? Copyright law requires users to seek permission before they copy works, but how can a user seek permission when the owner is unlocatable? With the rejection of the Google Book Settlement it has become widely accepted that the orphan works problem reflects a serious market failure, but an equally accepted view is that because any solution to the orphan works problem requires deviation from the “permission-first” rule, only Congress is empowered to make such a fundamental change to copyright.

This paper challenges this view. I argue that the reason why it has been so difficult to find a solution to the orphan works problem because the permission-first rule is treated as a dogma—a belief held unquestioningly and with undefended certainty, instead of as a rule whose validity depends on how well it promotes the purpose of copyright law and its market orientation. The dogma does not regard the use of works as something that ought to be celebrated, and hence limited by the need to reward creators and ensure creativity. Instead, the dogma considers the use of works as a sin that can be avoided by seeking permission. Unfortunately, many of the proposed solutions are captive of the dogma: they focus exclusively on the user side. Some proposed solutions would impose a requirement of “diligent search” that would give compliant users some limited immunity, while others, such as proposal to create extended collective licensing mechanisms would absolve the user from the sin of copying by paying a fee to a collecting society. These solutions resemble some aspects of Catholic dogma in the middle ages, when the Catholic Church promoted the notion of sin and realized that if it couldn’t really prevent it, it might as well monetize it through the sale of indulgences. While selling indulgences may benefit those who collect the money, it will not solve the underlying market failure.

After rejecting the dogma and its proposed solutions, the paper will show that the orphan works problem is not only a demand-side problem (users find it prohibitively costly to locate owners) but also, or predominantly, a supply-side problem. The problem arises because owners, who do not internalize the full social cost arising from the non-use of their works, don’t have sufficient incentives to make socially optimal investments in maintaining themselves locatable. Even though copyright owners are the “least-cost avoiders” of the problem (they typically know best who they are and how they can be contacted) they do not have enough incentives to provide this information under a strict permission-first rule. Solving the problem, therefore, requires creating such incentives.

I propose that owner’s locatability would be a mitigating factor that courts should consider when determining the proper remedy for the infringement of a copyright. In appropriate cases courts should deny injunctions and should also have some discretion to deny or reduce statutory damages. The court may still order the user to pay damages, or account for the profit attributable to the infringed work, but if these

approximate what the parties would have agreed had a license been negotiated in advance, the orphan works problem would be seriously diminished. Moreover, if the owner's behavior becomes relevant as well, aggregating many small claims into a massive class action may become more difficult.

This kind of remedy tweaking will shift some of the risk of using orphan works from the user to the owner. It will adjust the user's duty to seek ownership information and permission with a corresponding duty of the owner to provide such information. This should motivate copyright owners to make themselves locatable: to de-orphan their works. Tort law takes into account a plaintiff's contributory or comparative negligence; contract law demands that plaintiff take reasonable effort to mitigate their damage before they can recover its full extent. Property law sometimes imposes a duty to provide notice before a right can be enforced. The law does not recognize an unfettered right to sit back and do nothing in all circumstances and regardless of the consequences. Copyright law should not recognize such right as well.

Remedy tweaking is a modest yet satisfactory common law solution to the orphan works problem, based on well-established principles of liability and limitations thereto from other areas of law. While statutory reform giving courts clear mandate to tweak the remedies might be fruitful, courts can implement this solution, in large part, even if Congress takes no action.