The life of the law has been experience, not logic.

"the law is a ass--a idiot. If that's the eye of the law, the law is a bachelor; and the worst I wish the law is, that his eye may be opened by experience--by experience."

Charles Dickens' Oliver Twist

To promote and succor creativity orphan works should be extricated from the legal quagmire isolating orphaned works from the public domain. The triumvirate of theories undergirding copyright law--Lockean, economic, and natural rights—support releasing orphan works from legal entanglements. Orphan works are anomalous property since estranged property's exploitation does not undermine true owners' economic entitlement and insubstantially affects markets. Copyright law's goals are best advanced by establishing permissive policies allowing authors and users desirous of utilizing orphaned works, after committing due diligence to discover the true owner, unfettered use.

Copyright law puts adoptive users in a legal bind. Legal alternatives that allow limited and fair use of orphaned works provide adoptive users scant coverage against litigation, dubious ownership titles, and, more importantly, insufficient use. As a result innovators and cultural preservationists are discouraged from working with orphaned works, effectively ensuring that many orphaned works pass into oblivion.[1] Rather than maintaining a scorched earth policy, a substantial amount of research indicates that euthanizing orphaned works copyrights most logically promotes the public welfare.

Estranged authors are less deserving than subsequent authors and users of copyright protection. While estranged authors sleep on their rights, subsequent authors and users keep orphaned works relevant. Overwhelming research suggests that limiting orphaned work accessibility stifles ingenuity. Despite the willingness to compensate estranged authors, subsequent authors and users engage in futile searches to identify estranged owners. Time, effort, and resources are wasted in Sisyphean endeavors to identify the owners of estranged works. Anecdotal experiences confirm the frustration many innovators encounter with the current state of law governing orphaned works. For instance, a digital artist explains that while "my work depends on good copyright protection…streamlined access to orphaned works is an invaluable multiplier to creativity."[2] Subsequent owners and users are not free riders reaping what they have not sown.

Releasing orphaned works into the public domain hastens the natural life cycle of copyright protection that ultimately culminates in expiration. Expediting the demise of orphaned works' copyright protection promotes copyright's twin goals of enhancing the public welfare without undermining incentives for author's productivity. Research suggests that prematurely terminating orphaned works copyright protection poses meager economic harm and does not threaten copyright's economic philosophy.[3] Anecdotally, in our litigious society, there are seldom cases of orphaned works true owners establishing claims against adoptive users.

Orphan works are the bastard child of the marriage between the United States and International law. Congress' ascension to the Berne Convention inadvertently created the orphan works problem.[4] Since the Convention shirked copyright formalities, Congress rescinded the requirement of author's submitting information to the Copyright Office, effectively changing the moment of copyright demarcation from submission to fixation. The new time designation arbitrarily and unfairly penalizes subsequent authors and users from utilizing orphan works. United States' copyright law, with regard to orphan works, lags behind internationally and disadvantages the country in the pursuit of cultural supremacy.[5] It discourages authors and users from investing in the restoration and public distribution of orphaned works. The Supreme Court acknowledged several times that "matching the level of copyright protection in the United States to that in the European Union "'can ensure stronger protection for U.S. works abroad and avoid competitive disadvantages vis-a-vis foreign rightholders."[6] As an anachronistic law orphaned works policy should be updated to reflect changed circumstances.

Paradoxically, orphan works' inherent characteristics should technically moot the debate. Since orphan works owners are anonymous, identifying the life-span of the author in order to establish the term of

copyright is impossible. Without this vital information, which functions as a filtering mechanism, orphaned works evade the “limited times” constraint by effectively creating a perpetual copyright. Orphaned works are, therefore, abandoned property whose owners disgorged their property rights. Even Congress acknowledges orphaned work marginal economic utility: “Of the remainder, a certain proportion is of practically no value to anyone, but there is a large number of unrenewed works that have scholarly value to historians, archivists, and specialists in a variety of fields.”[7]

Having established that the present orphaned works policy serves minor constructive purposes this letter humbly proposes two solutions. In order to make domestic orphaned works policy current with international competition Congress should authorize a statute emancipating orphan works from legal red-tape. The belated reform may be predicated upon the Canadian model or wholesale termination. In any case, adopting either solution enhances copyright law, unburdens adoptive users, and, ultimately, benefits the public welfare.

According to the Canadian model, adoptive users independently investigate the true owners’ identity under legal compunction. Upon a good-faith failure to discover the true owner, the adoptive users then contribute a nominal sum to a government administered fund that compensates true owners emerging from the wood work. Simultaneously, the Canadian system ensures orphaned work’s accessibility as well as preserving incentives. Basing a statute on the Canadian model addresses the concerns of those fretting about compromising the incentive structure. Putting those worries aside, the termination model singularly rewards ingenuity.

The termination model is elegant in its simplicity. Adoptive users conduct good-faith due diligence to discover orphaned works owners and, upon failure, orphaned works’ copyright protection summarily expires. There are three reasons for not including a compensation fund. First, adoptive users internalize the costs of the investigation and, therefore, should not have to pay double costs. Second, general U.S. property law penalizes owners sleeping on their rights. Lastly, U.S. property is heavily influenced by Lockean philosophy rewarding the sweat of one’s brow and is, therefore, hostile to idleness.

Congress’ authorization of either solution permits democratic exploitation of abandoned works. Since the due diligence obligation functions as a prophylactic for author’s respected rights, adoptive users’ freedom of exploitation are inherently limited by the condition of orphaned works’ owners. The identification and existence of orphan work’s owners subjects any potential copyright issues to ordinary copyright litigation—the orphaned works issue atrophies upon the discovery of owners. Having protected owner’s rights, the proposed solutions economically and morally promotes knowledge without sacrificing Copyright’s economic philosophy.

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[1] Kahle v. Ashcroft, 2004 U.S. Dist. LEXIS 24090 (D. Cal., 2004).
[2] http://freeculture.org/orphans/show_posts.php (19 March 2005).
[3] As the Court observed, "'**copyright** law celebrates the profit motive, recognizing that the incentive to profit from the exploitation of **copyrights** will redound to the public benefit by resulting in the proliferation of knowledge"' and, indeed, "'the profit motive is the engine that ensures the progress of science (emphasis in original).” American Geophysical Union v. Texaco Inc., 802 F. Supp. 1, 27 (S.D.N.Y. 1992).
[4] Under the Berne Convention, "'the enjoyment and the exercise of [copyright] shall not be subject to any formality."' Quoting Berne Convention, Art. 5(2).

[5] For example, Canada has established a system whereby users may contribute a prescribed royalty payment to a government fund in exchange for permission to use works when the copyright owners cannot be identified or are not forthcoming. Unfortunately, the law in the United States includes no such alternative. Consequently, copyright owners are neither required nor encouraged to respond to requests for permission, and users are left to explore a range of alternatives for accomplishing their goals http://www.copyright.iupui.edu/permdeadend.htm (23 March 2005).

[6] Eldred v. Ashcroft, 123 S. Ct. 769, 782 (U.S., 2003).

[7] Kahle v. Ashcroft, 2004 U.S. Dist. LEXIS 24090 (D. Cal., 2004)