

A THEORETICAL ANALYSIS OF ORPHAN WORKS ♦

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ABSTRACT

In American libraries, museums, and archives, there currently are tens of millions of cultural treasures, such as photos, manuscripts, and sound recordings, which hold extraordinary academic, cultural, and historical value. But these valuable items, known as “orphan works,” remain out of public reach. Orphan works are subject to copyright, but their copyright owners cannot be located. These works are stuck in limbo—as copyright works, they cannot be used without permission, but permission cannot be granted because the copyright owner is unknown. This exceptional predicament has not escaped the attention of legislators and academics, yet thus far, the United States has not established a coherent framework for dealing with orphan works. Other jurisdictions, such as the European Union, Canada, and the United Kingdom, have frameworks in place, but data suggest that these are largely ineffective. Rather than freeing orphan works, they intensify the problem by requiring heavy investment in clearing copyrights.

This Article advances an original approach to this problem by arguing that one ought to reassess the issue from the point of view of copyright theory. Current legislative responses and academic writing focus on formulating practical, ad-hoc solutions to the orphan works predicament but do not consider how these solutions cohere with the philosophical

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underpinnings of copyright law. To correct this oversight, we analyze orphan works through the lens of four prominent theories of copyright—the utilitarian, natural rights, personality, and democratic culture theories—and propose a novel typology of orphan works. Analyzing orphan works through a theoretical lens allows for subtle distinctions between different categorizations of orphan works that are in fact dissimilar and which the current legal frameworks and academic literature lump together. Thus, we assert that not all orphan works are the same and should not be treated as such. Rather, we identify a spectrum of orphanage and explain how different theories approach different types of orphan works. We then propose general principles for a practical framework that is attentive to copyright law and theory.

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INTRODUCTION

In 1915, in the midst of World War I, Dorothy Lawrence did what no other woman had done: she joined the British forces at the frontlines. Lawrence was a British journalist who wanted to report from the battlefield. Having failed previous attempts to reach the combat zone as a war correspondent because women were denied access, she decided to forge identity papers and enlist as Private Denis Smith.¹ She was sent to the German frontline and ended up in the trenches as part of the British Expeditionary Force.² After a short period, her true identity was revealed, and she was subsequently sent back to the United Kingdom.³ In 1919, she published a book called *Sapper Dorothy*, describing her experience.

¹ DOROTHY LAWRENCE, SAPPER DOROTHY LAWRENCE: THE ONLY ENGLISH WOMAN SOLDIER (1919); 'Sapper' Dorothy Lawrence: A Forgotten Wiltshire Heroine, WILTSHIRE AT WAR, <http://www.wiltshireatwar.org.uk/story/sapper-dorothy-lawrence-a-forgotten-wiltshire-heroine/> [https://perma.cc/7HS4-V3DT].

² LAWRENCE, *supra* note 1 at 88–120.

³ LAWRENCE, *supra* note 1 at 121–144; WILTSHIRE AT WAR, *supra* note 1.

Lawrence died in 1964. Fast forward to 2016—almost a century after she published her book and half a century after her passing—when a film company wished to make an adaptation of her book as a motion picture.⁴ However, the company was not able to do so. The reason: the book was still subject to copyright and the holders of the copyright (most likely Lawrence’s heirs or her publisher’s heirs) could not be located. Therefore, the film company was unable to obtain permission to use the work from the copyright holders.⁵

Lawrence’s book is not alone. In libraries, museums, and archives in America and around the world, there currently are an estimated hundreds of millions of works that are subject to copyright law but whose copyright holders cannot be located.⁶ These works, known as “orphan works,” present some of the greatest challenges copyright law currently faces. An abundance of creative works is stuck in limbo—as works that are subject to copyright, they cannot be used without permission from the rightsholder, yet the rightsholder’s identity or location are currently unknown. Copyrights in orphan works produce what James Boyle has called a copyright “black hole” that is “sucking our collective culture into a vortex from which it cannot escape.”⁷ Or, in the words of Michael Donaldson, a representative of documentary filmmakers, in his testimony before Congress, “[t]he orphan works problem is perhaps the single greatest impediment to creating new works that are now possible due to [new digital technologies]. The United States desperately needs a workable solution.”⁸

Many of these orphan works, such as documentary photographs,

³ *Application Number OWLS000053-1, ORPHAN WORKS REG.*, <https://www.orphanworkslicensing.service.gov.uk/view-register/details?owlsNumber=OWLS000053-1&workCategory=Written%20works&filter=0> [https://perma.cc/GY67-43X6].

⁵ *Id.*

⁶ See U.S. COPYRIGHT OFF., ORPHAN WORKS AND MASS DIGITIZATION: A REPORT OF THE REGISTER OF COPYRIGHTS 2 (2015); see also Press Release, Dep’t for Bus., Innovation & Skills, Intell. Prop. Off., & Baroness Neville-Rolfe DBE CMG, UK Opens Access to 91 Million Orphan Works (Oct. 29, 2014), <https://www.gov.uk/government/news/uk-opens-access-to-91-million-orphan-works> [hereinafter Press Release]; David R. Hansen, Kathryn Hashimoto, Gwen Hinze, Pamela Samuelson & Jennifer M. Urban, *Solving the Orphan Works Problem for the United States*, 37 COLUM. J. L. ARTS 1, 7 (2013).

⁷ James Boyle, *A Copyright Black Hole Swallows Our Culture*, FIN. TIMES (Sept. 6, 2009), <https://www.ft.com/content/6811a9d4-9b0f-11de-a3a1-00144feabdc0> [https://perma.cc/H8Z3-2WJU]; see also MAURIZIO BORGHI & STAVROULA KARAPAPA, COPYRIGHT AND MASS DIGITIZATION 70 (Oxford Univ. Press 2013).

⁸ *Preservation and Reuse of Copyrighted Works: Hearing Before the Subcomm. on Cts., Intell. Prop. & the Internet of the H. Comm. on the Judiciary*, 113th Cong. 2 (Apr. 2, 2014), <https://docs.house.gov/meetings/JU/JU03/20140402/102046/HHRG-113-JU03-Wstate-DonaldsonM-20140402.pdf> [https://perma.cc/BQK2-ZSZJ] (statement of Michael Donaldson of the International Documentary Association and Film Independent).

letters, and sound recordings, present low commercial, but high academic, cultural, and historical value.⁹ Moreover, orphan works are often disproportionately valuable to scholarship vis-à-vis non-orphan works.¹⁰ Mass digitization and new technologies make the orphan works predicament ever more acute as the promise of easy access to an abundance of creative works is inhibited by a copyright whose benefits no one actually enjoys. Moreover, the orphan works predicament is in fact more profound than often thought because of the nature of the collections of which many orphan works are a part. The value of many collections, such as documentary photographs or letter correspondence, hinges on their completeness—a valuable collection is one in which *all* of the documents in the collection are available.¹¹ For example, an exchange of letters between historical figures can be of paramount importance; yet, if only the letters of one party and not the other are accessible, the collection as a whole loses much of its appeal. Thus, even if only parts of the collection are identified as orphan works, cultural institutions often will not pursue digitization, nor make the rest of the collection accessible.¹²

The orphan works problem is a global phenomenon, and, as such, has not escaped the attention of scholars and policymakers in the United States and elsewhere. The U.S. Copyright Office examined the topic of orphan works and mass digitization and issued reports in 2006 and 2015.¹³ In these reports, the Copyright Office identified the broad impact of these issues and suggested possible legislative responses. The House and the Senate Judiciary Committees considered the orphan works question in 2006 and 2008, holding multiple hearings and proposing several bills. Both the 109th and the 110th Congresses considered the orphan works problem and introduced legislation to address it.¹⁴ The proposed legislation included limited remedies when a diligent search for the copyright owner has been conducted, it would have applied on a case-by-case basis (meaning that there is no assumption that a work retains its orphan status indefinitely) and should have an owner resurfaced they would have been awarded reasonable compensation, but not statutory

⁹ NAOMI KORN, IN FROM THE COLD: AN ASSESSMENT OF THE SCOPE OF 'ORPHAN WORKS' AND ITS IMPACT ON THE DELIVERY OF SERVICES TO THE PUBLIC 8 (2009).

¹⁰ *Id.* at 13.

¹¹ *Id.* at 19.

¹² *Id.*

¹³ See generally U.S. COPYRIGHT OFF., *supra* note 6; U.S. COPYRIGHT OFF., REPORT ON ORPHAN WORKS (2006).

¹⁴ Proposed bills included the Shawn Bentley Orphan Works Act of 2008, S. 2913, 110th Cong. (2008); the Orphan Works Act of 2008, H.R. 5889, 110th Cong. (2008); and the Orphan Works Act of 2006, H.R. 5439, 109th Cong. (2006).

damages or attorney fees.¹⁵ Note that the proposed legislation would not have created an exception but rather a limitation on the *remedies* that would be awarded.¹⁶ Congress came very close to adopting the legislation in 2008, but it ultimately adjourned before enacting it.¹⁷ The Senate passed its version, the Shawn Bentley Orphan Works Act of 2008, unanimously.¹⁸ That bill would have applied limited remedies if the user conducted and documented a diligent search for the copyright owner, provided attribution (if possible), and the use of the work included proper notice.¹⁹ An exception would have applied to non-profit educational institutions, museums, libraries, archives, or public broadcasting entities, with no monetary relief if the use was non-commercial and in the pursuit of the institution's public mission and if the institution promptly ceased the use after receiving notice of a claim.²⁰ Finally, in 2019, the Musical Works Modernization Act introduced a blanket licensing scheme that covers orphan works but only for orphaned musical works.²¹

Meanwhile, the courts decided two key cases that involved the digitization of orphan works. The first case involved the Google Books Project, a vast digitization project in which Google digitized books, without requesting the copyright-holders' permission, and made 'snippets' (short excerpts) of copyright books available online.²² In 2005, the Authors Guild, representing authors and rightsholders, filed a class action copyright infringement lawsuit against Google in the Southern District of New York, and in 2008 the parties reached a settlement (which was amended in 2009).²³ The case was re-argued on appeal several times: in 2011 when the court denied the settlement agreement; in 2012 when the parties settled once again; and then again in 2013, when the court granted Google's defense of fair use.²⁴ Ultimately, in 2015, the Court of

¹⁵ *Id.*

¹⁶ U.S. COPYRIGHT OFF., *supra* note 6, at 11–12.

¹⁷ *Id.*

¹⁸ S. 2913, 110th Cong. (as passed by Senate, Sept. 26, 2008); *see also* 154 Cong. Rec. S9,867 (daily ed. Sept. 26, 2008).

¹⁹ S. 2913, 110th Cong., sect. 2, § 514(b)(1)(A).

²⁰ S. 2193, sec. 2 § 514(c)(1)(B).

²¹ 17 U.S.C. § 115(d)(3)(E)(iii); *see also* Lydia Pallas Loren, *Copyright Jumps the Shark: The Music Modernization Act*, 99 B.U. L. REV. 2519, 2546 (2019).

²² *See* Authors Guild, Inc. v. Google, Inc. (*Google II*), 954 F. Supp. 2d 282, 286–87 (S.D.N.Y. 2013). Google implemented technological measures limiting the portion of any book accessible through snippet views, including generating only three snippets and blocking certain snippets and entire pages. *Id.*

²³ *See* Authors Guild, Inc. v. Google, Inc. (*Google I*), 770 F. Supp. 2d 666, 670–71 (S.D.N.Y. 2011); Memorandum of Law in Support of Plaintiffs' Motion for Preliminary Approval of Amended Settlement Agreement, Authors Guild, Inc. v. Google, Inc., 770 F. Supp. 2d 666 (S.D.N.Y. Nov. 13, 2009) (No. 05-CV-8136), 2009 WL 4093055.

²⁴ Authors Guild, Inc. v. Google, Inc., 804 F.3d 202, 211 (2d Cir. 2015).

Appeals for the Second Circuit affirmed Google's fair use defense.²⁵

In a (mostly) similar case, several universities and non-profit organizations that founded the HathiTrust Digital Library, which made available online book collections from the members' libraries, were sued by the Authors Guild and others for copyright infringement.²⁶ In 2012, the Southern District ruled in favor of HathiTrust, maintaining that their activities constituted fair use.²⁷ This was (mostly) affirmed by the Second Circuit on appeal.²⁸ In the *HathiTrust* case, the plaintiffs also challenged the University of Michigan's (separate) Orphan Works Project, which digitized and allowed public access to out-of-print orphan works.²⁹ The plaintiffs claimed that they were able to easily locate the copyright holders of several of the works on the University of Michigan's Orphan Works Project, thus illustrating that these works were not orphan. Consequently, the University of Michigan suspended the project indefinitely, and the issue of whether the University of Michigan's Orphan Works Project could be considered as fair use was not decided by the courts.³⁰

The *Google* and *HathiTrust* decisions are important milestones, yet they are far from providing clarity and certainty regarding the orphan works predicament. As the Copyright Office noted, "anyone using an orphan work does so under a legal cloud."³¹ The U.S. still has no specific legislative framework for orphan works, apart from orphaned musical works.³² Some scholars have suggested that 'fair use' exceptions might apply for some uses of orphan works.³³ However, as Pamela Samuelson and Tara Wheatland maintain, a sensible risk-averse party would likely not wish to rely on a fair use defense that does not guarantee protection from legal action or liability.³⁴ Samuelson and Wheatland illustrate this point by calculating Google's exposure in the Google Books project: an

²⁵ *Id.*

²⁶ Authors Guild, Inc. v. HathiTrust (*HathiTrust I*), 902 F. Supp. 2d 445, 448 (S.D.N.Y. 2012).

²⁷ *Id.* at 445.

²⁸ Authors Guild, Inc. v. HathiTrust, 755 F.3d 87, 105 (2d Cir. 2014) (holding that the creation of a full-text searchable database and the provision of access for the print-disabled texts were fair uses but vacating the finding that the trust's preservation function was also fair use and remanding for consideration of whether the plaintiffs even had standing to challenge this activity).

²⁹ *Id.*

³⁰ *HathiTrust I*, 902 F. Supp. 2d at 449.

³¹ U.S. COPYRIGHT OFF., *supra* note 6, at 2.

³² 17 U.S.C. § 115(d)(3)(E)(iii); *see also* Loren, *supra* note 21.

³³ *See* Hansen, Hashimoto, Hinze, Samuelson & Urban, *supra* note 6 at 23–30.

³⁴ Pamela Samuelson & Tara Wheatland, *Statutory Damages in Copyright Law: A Remedy in Need of Reform*, 51 WM. & MARY L. REV. 439, 490–491 (2009); *see also* U.S. COPYRIGHT OFF., *supra* note 6, at 2. ("While some users certainly may have viable defenses on fair use or other grounds, many will choose to forego use of the work entirely rather than risk the prospect of expensive litigation.").

award of the statutory minimum of \$750 per book, they contend, would yield approximately \$4.5 billion in liability for Google.³⁵

The orphan works predicament has not escaped the attention of legislators and policymakers overseas. In 2006 and 2011, the British government commissioned reviews of its intellectual property (“IP”) framework.³⁶ Both reviews dedicated extensive discussions to orphan works, recommending different possible solutions, such as collective licensing schemes.³⁷ In 2008, the European Union initiated inquiries into the orphan works issue, suggesting various solutions including registries, defenses from liability, and licensing.³⁸ Subsequently, in 2012, the European Union introduced the Orphan Works Directive, which requires member states to introduce an exception allowing cultural and heritage institutions to digitize, make available to the public, and catalogue orphan works in their collections.³⁹ Following its IP reviews and the Orphan Works Directive, in October 2014, the United Kingdom launched what the then-Minister for Intellectual Property applauded as a “trailblazing solution” to the orphan works predicament: an online licensing scheme.⁴⁰ Recent data, however, indicates that the solutions adopted in the United Kingdom and in the European Union are ineffective and seldom used. Moreover, these solutions have been criticized by cultural institutions and academics as being inapt, costly, complex, and leaving cultural institutions exposed to liability. We discuss these frameworks and their setbacks in Part II below.

Current legal scholarship mainly focuses on formulating practical solutions to the orphan works predicament. These solutions include providing immunity against infringement claims,⁴¹ introducing

³⁵ Samuelson & Wheatland, *supra* note 34, at 491.

³⁶ ANDREW GOWERS, GOWERS REVIEW OF INTELLECTUAL PROPERTY (2006), <https://www.gov.uk/government/publications/gowers-review-of-intellectual-property> [<https://perma.cc/VAV5-64VD>]; IAN HARGREAVES, DIGITAL OPPORTUNITY: A REVIEW OF INTELLECTUAL PROPERTY AND GROWTH (2011), <https://www.gov.uk/government/publications/digital-opportunity-review-of-intellectual-property-and-growth> [<https://perma.cc/59HT-BT3Z>].

³⁷ See GOWERS, *supra* note 36 at 71–72; HARGREAVES, *supra* note 36 at 38–40.

³⁸ For examples of U.S. inquiries into the orphan works issue, see Notice of Inquiry, 77 Fed. Reg. 204 (Oct. 22, 2012), <https://www.govinfo.gov/content/pkg/FR-2012-10-22/pdf/2012-25932.pdf> [<https://perma.cc/EW5V-T59F>]; see also Notice of Inquiry, 70 Fed. Reg. 3739 (Jan. 26, 2005), <https://www.copyright.gov/fedreg/2005/70fr39341.html> [<https://perma.cc/T8FU-5DGE>]. For an example of an EU inquiry, see COMM’N EUR. CMTYS, *Green Paper: Copyright in the Knowledge Economy*, at 10–13, COM (2008) 466 final (July 16, 2008), <http://op.europa.eu/en/publication-detail/-/publication/47dec4c0-34ca-421d-b1c3-e01f96669340> [<https://perma.cc/E948-58SX>].

³⁹ Directive 2012/28/EU of Oct. 25, 2012 on Certain Permitted Uses of Orphan Works, 2012 O.J. (L 299) 5, 7, 9–10.

⁴⁰ See Press Release, *supra* note 6.

⁴¹ Lydia Pallas Loren, *Abandoning the Orphans: An Open Access Approach to Hostage Works*, 27 BERKELEY TECH. L.J. 1431, 1458–59 (2012).

compulsory or collective licensing,⁴² ‘fair use’ or ‘fair dealing’ provisions,⁴³ exceptions and limitations on remedies (including common law and equitable doctrines to limit infringement remedies),⁴⁴ using blockchain technology or crowdsourcing to clear copyrights or create orphan works databases,⁴⁵ and adopting common law doctrines such as abandonment and adverse possession.⁴⁶

We pursue a different approach: contrary to the prevailing literature, which is mostly focused on ad-hoc, technical solutions, we argue that it is important to analyze orphan works through the lens of copyright theory before making any policy suggestions. We examine orphan works through four major theoretical frameworks that underlie copyright—the utilitarian, natural rights, personality, and democratic culture theories—investigating if, and how, each theory would justify affording copyright to orphan works. In addition, we conduct an initial comparative analysis of the legal frameworks in multiple jurisdictions, including the European Union, The United Kingdom, Canada, and Israel.

Opting for a theoretical and comparative approach introduces three important advantages. First, legal theory provides normative guidance in tricky legal situations, such as the case of orphan works (even if the guidance is not conclusive but only instructive). Practical solutions that consider theory are preferable both in fitting into existing legal frameworks and being more attentive to the underlying normative considerations that are at play. Second, analyzing orphan works through a theoretical lens allows for making subtle distinctions between different categorizations of orphan works that are in fact dissimilar and which the legal framework and academic literature lump together. Specifically, we assert that not all orphan works are the same. Rather, we identify a

⁴² See Stef van Gompel, *The Orphan Works Chimera and How to Defeat It: A View from Across the Atlantic*, 27 BERKELEY TECH. L.J. 1347, 1360–61, 1369, 1377–1378 (2012).

⁴³ See Oren Bracha & Patrick R. Goold, *Copyright Accidents*, 96 B.U. L. REV. 1025, 1082 (2016).

⁴⁴ See Loren, *supra* note 41; van Gompel, *supra* note 42, at 1365–66; Ariel Katz, *The Orphans, the Market, and the Copyright Dogma: A Modest Solution for a Grand Problem*, 27 BERKELEY TECH. L.J. 1285, 1297–1303 (2012).

⁴⁵ See Jake Goldenfein & Dan Hunter, *Blockchains, Orphan Works, and the Public Domain*, 41 COLUM. J. L. & ARTS 1 (2017); Maurizio Borghi, Kris Erickson & Marcella Favale, *With Enough Eyeballs All Searches Are Diligent: Mobilizing the Crowd in Copyright Clearance for Mass Digitization*, 16 CHI.-KENT J. INTELL. PROP. 135 (2016).

⁴⁶ See Emily Hudson & Robert Burrell, *Copyright, Abandonment and Orphaned Works: What Does it Mean to Take the Proprietary Nature of Intellectual Property Rights Seriously?*, 35 MEL. U. L. REV. 971 (2011) (suggesting that the general law of abandonment can be applied in such a way as to remove copyright protection from some types of works without compromising the integrity of either the copyright system or the rules on abandonment). See generally Katherine Moran Meeks, *Adverse Possession of Orphan Works*, 33 LOY. L.A. ENT. L. REV. 1 (2013). See also Barbara Lauriat, *Semi-formal Copyright? The Past and Future of Orphan Works*, 17 ART, ANTIQ. & L. 293 (2012) (arguing that historical evidence suggests that a registry of orphan works could help in identifying owners and works).

spectrum of orphanage: at one end of the spectrum, we find works whose copyright holders are extremely unlikely to be locatable, such as an unnamed, decades-old photograph; on the other end of the spectrum, there are works whose characteristics suggest their copyright-holders are easier to locate, but were still not located after some investigation, such as a labeled photograph taken recently. Third, looking at jurisdictions where different frameworks were adopted allows us to test-case our more theoretical hypothesis and evaluate the extent to which a match between the legislative response to the orphan work problem and the theoretical underpinnings of copyright leads to better solutions for the orphan works predicament.

The main upshot of our analysis is that different copyright theories pull in different practical directions. Thus, pursuing practical solutions to the orphan works predicament entails identifying (at least roughly) which theory or group of theories one prefers. The debate, in other words, is not only practical—it is not simply a matter of choosing the best institutional arrangement—but rather inherently and deeply normative, as it relates to fundamental questions in copyright theory. One cannot choose the best institutional arrangement for orphan works without explaining what normative foundation makes a solution the “best” of its kind.

The Article proceeds as follows: Part I introduces orphan works and the legal frameworks in the United Kingdom, The European Union, and other jurisdictions. It explains that these frameworks have been mainly unsuccessful in providing adequate solutions to the orphan works predicament, with the possible exception of Israel, whose scheme has shown some early promising indications. Part II introduces four major copyright theories and proceeds to analyze orphan works in relation to each. Against this background, the article shows how there exists a theoretical distinction between different types of orphan works. It goes on to suggest that from a theoretical perspective, the four copyright theories would likely justify a broad exception that allows using orphan works whose owners are extremely unlikely to be located. However, in the case of orphan works with greater chances of locating the copyright-owner, the different theories pull toward different practical directions. The Article then briefly introduces general principles for a framework to tackle the orphan works predicament in line with the utilitarian approach to copyright and copyright law formalities. The Article concludes by suggesting that revisiting the orphan works puzzle through a theoretical and comparative lens allows to reconceptualize the challenges orphan works present and proposes better practical solutions.

I. ORPHAN WORKS AND FOREIGN LEGAL FRAMEWORKS

Orphan works are copyright works for which the right holder has not been identified or located.⁴⁷ The main challenge that orphan works present is that a potential user or the body in possession of a work may not use the work or make it available to the public without the permission of the copyright holder, yet such permission cannot be obtained. This leads to a situation wherein millions of creative works are lost to the public, at least until their copyright expires.⁴⁸ Examples might include a film company wishing to create a screen adaptation of a book, a museum wishing to upload a digitized collection of documentary photographs, or an archive wishing to burn a copy of a musical work onto a CD for archiving.

The breadth of the orphan works phenomenon is astounding. For example, in British and European cultural institutions alone there are an estimated hundreds of millions of orphan works.⁴⁹ Furthermore, the European Union's Former Commissioner for Telecoms and Media, Viviane Reding, estimated that "[m]ore than 90% of books in Europe's national libraries are no longer commercially available, because they are either out of print or orphan works"⁵⁰ The Copyright Office notes that while in the United States, the precise scope of the phenomenon is difficult to measure, it seems that it is very similar to the European Union's, explaining that "[t]here is a robust body of evidence indicating that the orphan works issue . . . may be just as widespread."⁵¹ According to the Copyright Office, "[s]tudies of library collections of printed, published books and similar works estimate that between 17% and 25% of published works and as much as 70% of specialized collections are orphan works."⁵² As the Copyright Office notes, "[t]his outcome is difficult to reconcile with the objectives of the copyright system and may

⁴⁷ U.S. COPYRIGHT OFF., *supra* note 6, at 9 ("[T]he [U.S. Copyright] Office defined 'orphan works' as any original work of authorship for which a good faith prospective user cannot readily identify and/or locate the copyright owner(s) in a situation where permission from the copyright owner(s) is necessary as a matter of law."); *see also* Copyright, Designs and Patents Act 1988, c. 48, § 3(1), sch. ZA1 (UK).

⁴⁸ U.S. COPYRIGHT OFF., *supra* note 6, at 11. The copyright generally extends 70 years after the author's death or 70 years from publication if the author's identity is unknown *See generally* 17 U.S.C. §§ 301–305.

⁴⁹ *See* Press Release, *supra* note 6; Hansen, Hashimoto, Hinze, Samuelson & Urban, *supra* note 6, at 7; KORN, *supra* note 9, at 19.

⁵⁰ Viviane Reding, EU Comm'r for Telecoms & Media, Digital Europe – Europe's Fast Track to Economic Recovery, Address at the Ludwig Erhard Lecture 9 (July 9, 2009), https://ec.europa.eu/commission/presscorner/detail/en/SPEECH_09_336 [<https://perma.cc/EZV8-EAZY>]; *see also* Uma Suthersanen, *Who Owns the Orphans? Property in Digital Cultural Heritage Assets*, in RESEARCH HANDBOOK ON COPYRIGHT LAW 359, 361 (Paul Torremans ed., 2017).

⁵¹ U.S. COPYRIGHT OFF., *supra* note 6, at 36–37.

⁵² *Id.* at 38.

unduly restrict access to millions of works that might otherwise be available to the public.”⁵³

In the United Kingdom, the British Library estimates that 43% of the works in its collections are orphan, including “such titles as diverse as an illustrated children’s book from the 1920s, travel guides and local history material from throughout the twentieth century, political pamphlets from the 1960s and 1970s and poetry and early ‘fan fiction’ from the 1980s.”⁵⁴ The orphan works predicament is particularly acute in certain creative fields such as documentary photographs, where the proportion of orphan works in British museums’ collections is estimated at 90%,⁵⁵ or artistic works (other than fine art) where the proportion is estimated at over 50%.⁵⁶ In addition to this remarkable quantity, orphan works are said to often be disproportionately valuable to research and scholarship compared with copyright works whose owners can be located.⁵⁷ Furthermore, orphan works’ potential impact on cultural, health, and educational institutions’ ability to serve their public mission can be significant. Recent data suggest that, on average, the fact that some works in their collections are orphan affects the delivery of services by cultural, health, and educational institutions in as much as nine of ten cases.⁵⁸ Data also suggest that archives, galleries, and museums are particularly negatively affected by the orphan works predicament. As Naomi Korn notes, “the presence of Orphan Works is in essence locking up culture and preventing organisations from serving the public interest.”⁵⁹ Orphan works therefore present one of copyright law’s greatest challenges.

British and European lawmakers began to address this problem in the 2010s. In 2012, the European Union enacted the Orphan Works Directive, which requires member states to introduce an exception to their copyright laws allowing cultural and heritage institutions to digitize, make available to the public, and catalog orphan works in their collections.⁶⁰ Following that, in 2014, the United Kingdom launched its regulatory framework to deal with orphan works. The British framework

⁵³ *Id.* at 36.

⁵⁴ *Electronic Clearance of Orphan Works Significantly Accelerates Mass Digitisation*, BRIT. LIBR., <https://www.bl.uk/press-releases/2011/september/electronic-clearance-of-orphan-works-significantly-accelerates-mass-digitisation> [https://perma.cc/3P69-STMM]; see also BARBARA STRATTON, *SEEKING NEW LANDSCAPES 5* (British Library Board 2011).

⁵⁵ BORGHI & KARAPAPA, *supra* note 7, at 72.

⁵⁶ KORN, *supra* note 9, at 13.

⁵⁷ *Id.* (quoting Richard Ranft, Head of the Sound Archive, National Sound Archive (Feb. 4, 2009)).

⁵⁸ *Id.* at 19.

⁵⁹ *Id.*

⁶⁰ Parliament and Council Directive 2012/28/EU, 2012 O.J. (L 299) 5 (pertaining to “certain permitted uses of orphan works”).

introduced a licensing scheme that allows any interested party to apply for a license to use an orphan work.⁶¹ Until January 2021, in line with the Orphan Works Directive, the British framework also included an exceptions scheme for cultural institutions to make certain uses of orphan works in pursuing their public interest missions; however, following the United Kingdom's withdrawal from the European Union, this scheme was terminated and British cultural heritage institutions are no longer able to rely on the orphan works exception.⁶²

The United Kingdom's exceptions scheme for cultural institutions was quite narrow; it was limited to non-commercial uses, only applied to certain works (such as text-based, audio-visual, and embedded artistic works), and required that the institution undertake a "diligent" search to locate the rightsholders.⁶³ In addition, if the rightsholder was to resurface after the work was used, the institution would have had to pay them a license fee.⁶⁴ This scheme is now obsolete in the United Kingdom, but it is still the operating scheme in the European Union.

The licensing system remains the United Kingdom's main framework to deal with orphan works. It requires obtaining a license from the British Intellectual Property Office to use an orphan work, which is granted for up to seven years.⁶⁵ The license covers all users and uses (including commercial uses) and all works. Like the exceptions scheme, it requires a "diligent" search to locate the work's rightsholders. However, unlike the exceptions scheme, it requires paying an application fee of £20 for one work and £30 for 80 works (or \$27 and \$40, respectively), and a fee for the license itself, the price of which depends on the use and the type of work.⁶⁶ Yet, if the rightsholder surfaces, the Intellectual Property Office will pay them for the use of the work, rather than the licensee.⁶⁷

⁶¹ See Copyright, Designs and Patents Act 1988, c. 48, § 5, sch. ZA1 (UK); The Copyright and Rights in Performances (Certain Permitted Uses of Orphan Works) Regulations 2014, SI 2014/2861, art. 3 (UK); see also Daniela Simone, Note, *Unlocking Orphan Works: A New Licensing Scheme*, 19 ART ANTIQ. L. 315, 316 (2014).

⁶² *Orphan Works and Cultural Heritage Institutions: Copyright*, INTELL. PROP. OFF., U.K. GOV'T (Jan. 30, 2020), <https://www.gov.uk/guidance/orphan-works-and-cultural-heritage-institutions-copyright-after-the-transition-period> [<https://perma.cc/39B8-RVKY>] ("Part of Brexit: business guidance.").

⁶³ The Copyright and Rights in Performances (Certain Permitted Uses of Orphan Works) Regulations 2014, SI 2014/2861, art. 3 (UK).

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ *Copyright: Orphan Works*, INTELL. PROP. OFF., U.K. GOV'T, <https://www.gov.uk/guidance/copyright-orphan-works> [<https://perma.cc/VZW5-XUC4>] (Sept. 9, 2021).

⁶⁷ *Guidance – Orphan Works Licensing Scheme Overview for Applicants*, INTELL. PROP. OFF., U.K. GOV'T, [https://www.gov.uk/government/publications/orphan-works-overview-for-](https://www.gov.uk/government/publications/orphan-works-overview-for)

Both the exceptions and the licensing schemes, however, are largely inadequate for most potential users of orphan works. The exception scheme provided a narrow list of uses, such as reproduction for digitization, indexing, and preservation, leaving out other uses.⁶⁸ The exception was limited to certain public cultural institutions, thus excluding private libraries and public-private partnerships, both of which may serve important functions similar to those of public institutions.⁶⁹ The exception scheme provided a limited exception, not an immunity, leaving cultural institutions susceptible to costly compensation if rightsholders were to resurface.

In addition, and perhaps most notably, the costs involved in executing a diligent search, which is a requirement in both schemes, can be extremely high: the British Library estimated the total cost of conducting a diligent search of its and the BBC's archives at between £7.8 billion and £9.4 billion (\$10.8 billion and \$13 billion).⁷⁰ The cost of a diligent search for a single book was estimated between £62 and £162 (\$86 and \$225).⁷¹ Conducting a diligent search is also time-consuming. The British Library estimated the time involved in clearing a single photo averages 3.5 hours, a television or radio program between 3.25 and 6.5 hours, and 3.5 hours for a newspaper.⁷² Clearing the BBC's photo collection, for instance, would take 17.5 million hours, clearing the BBC archive of TV and Radio would take 6.1 million hours, and clearing the British Library's 18.5 million pieces of sundry content would take between 18.5 million to 64.8 million hours.⁷³ The British Library's attempt to clear the St. Mary-Le Bow Church collection—a collection of recordings of lectures without music or additional copyright works, made between 1964 and 1979—provides an illustration: 299 rightsholders were

applicants/orphan-works-licensing-scheme-overview-for-applicants [https://perma.cc/4JHB-7ANR] (Jan. 4, 2021).

⁶⁸ See The Copyright and Rights in Performances (Certain Permitted Uses of Orphan Works) Regulations 2014.

⁶⁹ See Randal C. Picker, *Private Digital Libraries and Orphan Works*, 27 BERKELEY TECH. L.J. 1259 (2012); see also British Library Consultation.

⁷⁰ See INTELL. PROP. OFF., ORPHAN WORKS, IMPACT ASSESSMENT BIS1063 (2012) (UK), <https://www.bl.uk/collection-items/orphan-works-impact-assessment>

[https://perma.cc/RP3A-TLJU]; see also *Daily Spot Exchange Rates Against US Dollars*, BANK ENG.:

DATABASE, <https://www.bankofengland.co.uk/boeapps/database/Rates.asp?Travel=NixAZx&into=USD>

[https://perma.cc/CQ73-NXSU] (citing to prices in text adjusted from £6.1 billion and £7.3 billion to reflect inflation and exchange rates to USD calculated using Bank of England's official database).

⁷¹ IMPACT ASSESSMENT, *supra* note 70, at 8 (citing original costs were estimated at £47–£126).

⁷² *Id.* at 8–9.

⁷³ *Id.* at 8.

identified;⁷⁴ over 300 hours were spent by a freelance researcher and British Library staff on seeking permission from rightsholders, resulting in only eight permissions being received.⁷⁵ Indeed, data suggest that the exception scheme was seldom used by British cultural institutions.⁷⁶

A similar case from the United States provides further illustration: Cornell University Library attempted to digitize 343 orphan monographs published between the early nineteenth century and the mid-twentieth century. These monographs were selected for their historical importance, with the aim “to preserve the literature of agriculture.”⁷⁷ Cornell University Library invested over \$50,000 in staff time, but for 58% of the works the copyright holder could not be identified, 28% were identified and permission was granted, and 14% were identified and permission denied (but in most cases this was because the person they contacted was unsure if they really could authorize the reproduction).⁷⁸ Sarah Thomas, a Cornell University Librarian, mentioned that “[t]he bottom line for this project is appalling” noting that none of the works had great economic value, but substantial academic importance.⁷⁹ Thomas further mentioned that the library has many more precious works that are orphaned, such as rare manuscript illustrations made by a Japanese-American artist in the Poston War Relocation Center and 350,000 unpublished photographs that they would like to make available. However, she notes, only 1% of the photographs have any indication as to the photo’s author or copyright holder.⁸⁰

The U.K.’s licensing scheme is also largely ineffective in tackling the orphan works predicament. While uses and users are not limited and there is no risk in the case of right-holders resurfacing, the costs involved are astronomical. On top of the substantial costs of conducting a diligent search, there is a mandatory application fee and licensing fee, the license’s duration is limited to seven years, and it is geographically

⁷⁴ Ed King, *British Library Digitisation: Access and Copyright*, WORLD LIBR. INFO. CONG.: 74TH ILFA GEN. CONF. & COUNCIL 1, 15 (2008).

⁷⁵ *Id.*

⁷⁶ See Samantha Callaghan, *Has the Introduction of Orphan Works Licensing Schemes Solved the Problem that Orphan Works Present to Digitization Projects?*, 38 ARCHIVES & RECS. 244, 254 (2017); Merisa Martinez & Melissa Terras, *‘Not Adopted’: The UK Orphan Works Licensing Scheme and How the Crisis of Copyright in the Cultural Heritage Sector Restricts Access to Digital Content*, 5 OPEN LIBR. HUMANS. 1, 33–34 (2019).

⁷⁷ Letter from Sarah E. Thomas, Carl A. Kroch Univ. Libr., Cornell Univ. Libr., to Jule L. Sigall, Assoc. Reg. for Pol’y & Int’l Aff., U.S. Copyright Off. (Mar. 23, 2005), <https://www.copyright.gov/orphan/comments/OW0569-Thomas.pdf> [<https://perma.cc/WKW3-8A35>].

⁷⁸ *Id.*

⁷⁹ *Id.*

⁸⁰ *Id.*

confined to the United Kingdom.⁸¹ This scheme could perhaps provide a solution for smaller, local projects such as producing a locally-broadcast screen adaptation of a book but falls short of supplying an adequate solution for bigger projects. The resources required for clearing the millions of orphan works in archives, libraries, and museums are immense, meaning that this solution is simply ineffective. Indeed, there has been very low uptake on behalf of potential users, and digitization and use of orphan works in research, education, cultural, and commercial sectors in the United Kingdom are still stymied.⁸² In fact, between its introduction in October 2014 and August 2020, there have been only 222 applications to use orphan works, comprising 1,074 works (of these, 49 applications, comprising 96 works, have been withdrawn).⁸³ All applications have been approved (except those withdrawn),⁸⁴ meaning that, on an average, the British Intellectual Property Office received (and approved) twenty-nine applications for 163 works per year.

In the European Union, the Orphan Works Directive provides a very narrow exception for cultural institutions to make some uses of orphan works. After a diligent search has been completed, a cultural institution can register a work as orphan (the Directive established such a registry) and then make limited uses of the work.⁸⁵ If the right-holder resurfaces, the cultural institution may be required to pay a retroactive license fee, and the use of the work may be stopped.⁸⁶ Member States have discretion as to specific implementation arrangements. Denmark's framework, for example, includes two prongs. The first set of regulations follows the Directive providing exceptions for cultural institutions.⁸⁷ The second set of regulations is not particularly aimed at orphan works but covers their use: it involves an extended collective license system which allows using copyright works for varied uses, the license includes non-represented authors thus it includes orphan works.⁸⁸ Germany, on the other hand, uses

⁸¹ See INTELL. PROP. OFF., U.K. GOV'T, *Guidance - Orphan Works Licensing Scheme Overview for Applicants*, *supra* note 67.

⁸² Martinez & Terras, *supra* note 76, at 2; Callaghan, *supra* note 76, at 254.

⁸³ E-mail from Margaret Haig, Head of Copyright Operations, Intellectual Property Office to Dr. Eden Sarid, Professor of Law, University of Essex (Aug. 24, 2020) (on file with author). Some of this information is also available on the public register. ORPHAN WORKS REG., <https://www.orphanworkslicensing.service.gov.uk/view-register> [<https://perma.cc/A7FT-LUXC>].

⁸⁴ *Id.*

⁸⁵ Directive 2012/28/EU, *supra* note 39.

⁸⁶ *Id.* at 18.

⁸⁷ THOMAS RIIS, *INTELLECTUAL PROPERTY LAW IN DENMARK IIX* (4th ed. 2018).

⁸⁸ *Id.* See also Marcella Favale, Fabian Homberg, Martin Kretschmer, Dinusha Mendis & Davide Secchi, *Copyright, and the Regulation of Orphan Works: A Comparative Review of Seven Jurisdictions and a Rights Clearance Simulation* (CREATE, Working Paper No. 7, 2013), <https://www.create.ac.uk/publications/copyright-and-the-regulation-of-orphan-works/>; van Gompel, *supra* note 42, at 1361–62; see also Katharina de la Durantaye, *Orphan Works: A*

a licensing system through collecting societies, but it closely follows the European Union Directive's narrow approach and licenses are given only for non-commercial purposes.⁸⁹

The European Union's scheme, however, has thus far proved to be ineffective in terms of making orphan works available, and has seen very low uptake on the part of cultural institutions.⁹⁰ Uma Suthersanen, for example, notes that between 2014 and 2018 fewer than 2,000 orphan works were registered, a fourth of which were registered by British Library or the British Film Institute.⁹¹ Preliminary empirical studies suggest that the prohibitive costs of conducting a diligent search remains a major reason for cultural institutions refraining from using the European Union scheme.⁹² Back in 2009, the European Union's Former Commissioner for Information Society and Media, delivered the following warning: "Let us be very clear: if we do not reform our European copyright rules on orphan works and libraries swiftly, digitisation and the development of attractive content offers will not take place in Europe, but on the other side of the Atlantic."⁹³ Yet, almost a decade after introducing its Orphan Works Directive, the European Union's scheme remains inadequate.

On the other side of the Atlantic, things were not looking much better. The United States, as discussed, does not have a framework for orphan works (with the exception of a licensing scheme for musical works), and Canada's legal framework, too, is ineffective in terms of clearing orphan works. Canada administers collective licensing for orphan works through its Copyright Board. The Board will issue such a license after "reasonable efforts to locate the owner of the copyright" are made, and it will set certain terms and conditions, such as those relating to fees, expiration, and type of use.⁹⁴ The Canadian standard of 'reasonable efforts' is considered lower and more flexible than the European Union's and the United Kingdom's 'diligent search' standard.⁹⁵ Yet, the Canadian model has also been criticized as time-consuming and

Comparative and International Perspective, in INTERNATIONAL INTELLECTUAL PROPERTY: A HANDBOOK OF CONTEMPORARY RESEARCH 190 (Daniel Gervais ed., 2015).

⁸⁹ U.S. COPYRIGHT OFF., ORPHAN WORKS AND MASS DIGITIZATION, *supra* note 6, at 27.

⁹⁰ See Callaghan, *supra* note 76, at 248, 254; see Suthersanen, *supra* note 50, at 15.

⁹¹ Suthersanen, *supra* note 50, at 15.

⁹² See Callaghan, *supra* note 76, at 244.

⁹³ Reding, *supra* note 50.

⁹⁴ Copyright Act, R.S.C. 1985, c C-42, s.77 (Can.).

⁹⁵ See Jeremy De Beer & Mario Bouchard, *Canada's 'Orphan Works' Regime: Unlocatable Copyright Owners and the Copyright Board*, 10 OXF. UNIV. COMMONW. L.J. 215, 227 (2010); Bzhar Abdullah Ahmed, *Orphan Works Situation Under Canadian Copyright Act*, 95 J.L. POL'Y GLOB. 93, 97–98 (2020).

including unnecessary government involvement. Also, notably, very few applications have been made since its introduction in 1988.⁹⁶

Finally, the Israeli scheme, enacted in 2019, presents a unique approach.⁹⁷ First, there is no governmental body that issues licenses, rather, users wishing to use an orphan work may simply do so, subject to certain conditions.⁹⁸ Second, any use, including commercial uses, is allowed, and users do not need to pay in advance for a license.⁹⁹ Third, Israel's standard for search is the lower and more flexible 'reasonable search' standard.¹⁰⁰ Furthermore, the law states that the reasonableness of search would be determined, *inter alia*, by the orphan work's character and age.¹⁰¹ Namely, the older the work and the more indistinctive it is—the lower the standard. For example, the search standard for an unnamed photo from the 1950s will be substantially lower than for a film from the 1990s whose producer's name is known. Fourth, users must indicate that they are using the orphan work in accordance with the Copyright Act and provide contact details should a right-holder appear.¹⁰² Fifth, in case of commercial uses, users must announce their intention to use the orphan work in a daily newspaper or the internet prior to use (there is no designated website, so users may advertise their intention on their own website).¹⁰³ In addition, the law exempts cultural and educational institutions from liability for any non-commercial use in pursuing their public interest missions.¹⁰⁴ The exemption also includes private cultural and educational institutions.¹⁰⁵ Finally, the law clarifies that in non-commercial use, should a right-holder appear, the user is only required to cease use, whereas in the case of commercial use – a license fee will be decided.

There is limited data on the Israeli law's effectiveness, yet there are some indications that since its introduction there has been an increase in using orphan works and making them available to the public. For example, in February 2020 the National Library of Israel started digitizing various orphan works, and its CEO stated in an interview that following the 2019 legislation, the library intends to digitize and upload

⁹⁶ De Beer and Bouchard's data shows that between 1988, when the scheme was first introduced, and 2009, fewer than 450 applications were made and only 12,640 works were licensed. De Beer & Bouchard, *supra* note 95, at 242.

⁹⁷ § 27A, Copyright Act, 5768-2007, as amended (Isr.).

⁹⁸ *Id.* § 27A(a).

⁹⁹ *Id.*

¹⁰⁰ *Id.*

¹⁰¹ § 27A(C).

¹⁰² § 27A(a)(2)

¹⁰³ § 27A(B).

¹⁰⁴ § 56A (c).

¹⁰⁵ § 56A (c).

tens of thousands of additional orphan works.¹⁰⁶ In addition, reports in Israeli media indicate that in the year since the law's enactment there has been notable use of orphan works in Israeli media and television broadcasts.¹⁰⁷

In sum, while the urgency and magnitude of the orphan works predicament is largely acknowledged by global policymakers, the solutions thus far provided are mainly ineffective (with Israel being a possible exception). Millions of copyright works remain 'captured' in a copyright black-hole and a wealth of works remains unavailable, with no authors or right-holders obtaining any perceivable benefit. Part of the reason as to why orphan works schemes have thus far been unsuccessful rests, in our view, in the fact that these schemes narrowly follow copyright formalities, but generally deviate from copyright theory. A stronger alignment with copyright theory can potentially assist in finding better solutions for the orphan works predicament while also achieving greater internal coherence in copyright law. We therefore now turn to discuss copyright theory and orphan works.

II. COPYRIGHT THEORY AND ORPHAN WORKS

IP literature commonly focuses on four leading theories to justify copyright: (1) a *utilitarian approach* that emphasizes economic incentives to advance creativity and views copyright as a mechanism for social welfare maximization; (2) a *natural rights approach* that is centered on the proposition that a person has a natural right to the fruits of their intellectual labor; (3) a *personality approach* according to which one's personhood is reflected in their work, and that therefore a person should have the right to shield their works from appropriation; and (4) a *democratic culture* approach according to which copyright fosters a just and attractive culture by providing creators with economic and cultural independence.

These theories are discussed in various debates in copyright, such as copyright duration and the scope of copyright. Yet, debates around orphan works mainly focus on trying to locate practical solutions, and seldom consider copyright theory. This creates a gap in the theoretical understanding of orphan works, as well as obscures some of the problems inherent in the solutions suggested for the orphan works predicament.

¹⁰⁶ Tzala Kotler Hadari, *Archive Open! The Orphan Works That Are Exposed to the Public for the First Time*, GLOBES (Feb. 19, 2019), <https://www.globes.co.il/news/article.aspx?did=1001273942> [<https://perma.cc/8GYK-FDFN>] (Hebrew).

¹⁰⁷ Eilat Kahana, *Copyright? It Depends on Who You Ask*, MAKOR RISHON (Sept. 7, 2020, 7:38 PM), <https://www.makorishon.co.il/magazine/245773/> _____ [<https://perma.cc/D43Y-TWZQ>] (Hebrew).

Solutions that are more aligned with copyright theory in general (or a specific theory) may prove to be more suitable to help solving the challenge presented by orphan works. In a similar vein, as William Fisher notes, theoretical explorations can foster valuable discussions among academics and policymakers, prompting new possibilities and solutions.¹⁰⁸ Lastly, there is important value in a theoretical exploration of real-world copyright problems because it allows for better comprehension of the different dimensions of value that inhere in academic debate and writing about IP issues.¹⁰⁹ We thus turn to briefly introduce each of the four leading copyright theories. We then apply them to the case of orphan works.

A. Copyright Theory – A Brief Introduction

The utilitarian justification for copyright is premised on the insight that most intellectual goods are costly to produce but easy and cheap to reproduce, and that they can be used by many people simultaneously.¹¹⁰ Thus, copyists will free-ride on creators' labors, discouraging creators from creative production or dissemination of intellectual goods and information.¹¹¹ This inefficient consequence can be avoided by granting legal entitlements to exclude copying, namely, copyright. By providing a copyright, creators will be incentivized to create and share their creations. Copyright achieves social welfare maximization as it fosters creativity and its dissemination. While in recent years many IP scholars repeatedly pointed to some empirical anomalies and theoretical limitations of the utilitarian approach,¹¹² it still is widely accepted as the principal justification for copyright in the United States.¹¹³

¹⁰⁸ William Fisher, *Theories of Intellectual Property*, in *NEW ESSAYS IN THE LEGAL AND POLITICAL THEORY OF PROPERTY* 168, 194 (Stephen R. Munzer ed., 2001).

¹⁰⁹ See Omri Ben-Zvi & Eden Sarid, *Legal Scholarship as Spectacular Failure*, 30 *YALE J. L. & HUMANS*. 1, 1 (2018).

¹¹⁰ William M. Landes & Richard A. Posner, *An Economic Analysis of Copyright Law*, 18 *J. LEGAL STUD.* 325, 326 (1989).

¹¹¹ Fisher, *supra* note 108; Mark A. Lemley, *Property, Intellectual Property, and Free Riding*, 83 *TEX. L. REV.* 1031, 1033, 1037–40 (2005); Kenneth J. Arrow, *Economic Welfare and the Allocation of Resources for Invention*, in *THE RATE AND DIRECTION OF INVENTIVE ACTIVITY: ECONOMIC AND SOCIAL FACTORS* 609, 623–24 (1962).

¹¹² See Glynn S. Lunney, *Reexamining Copyright's Incentives—Access Paradigm*, 49 *VAND. L. REV.* 483 (1996). See also Christopher Jon Sprigman, *Copyright and Creative Incentives: What We Know (and Don't)*, 55 *HOUS. L. REV.* 451 (2017); *CREATIVITY WITHOUT LAW: CHALLENGING THE ASSUMPTIONS OF INTELLECTUAL PROPERTY*, (Kate Darling & Aaron Perzanowski eds., 2017); Marta Iljadica, *Painting on Walls: Street Art Without Copyrights?*, in *CREATIVITY WITHOUT LAW* 118 (Kate Darling & Aaron Perzanowski eds., 2017); Eden Sarid, *Don't Be a Drag. Just Be a Queen—How Drag Queens Protect their Intellectual Property Without Law*, 10 *FIU L. REV.* 133 (2014).

¹¹³ Sprigman, *supra* note 112, at 451 (“The dominant justification for copyright in the United States is consequentialist. Without copyright, it is claimed, copyists will compete away the profits from

The natural rights justification is founded on the proposition that a person has a natural right to the fruits of her labor and that the state has a duty to enforce this entitlement. Based on John Locke's widely cited justification for property rights, the argument is that authors who labored upon resources that are unowned or held in common, to create valuable finished products, should be rewarded and enjoy the right to control them.¹¹⁴ Locke's justification, as William Fisher notes, is "especially applicable" to copyright, given that an author's intellectual labor significantly contributes to creating new products derived from common resources.¹¹⁵ Yet, Locke attaches two important provisos to a person's natural property right: the "sufficiency proviso," according to which "enough and as good" should be left in the commons, and the "spoilage proviso," according to which one should not appropriate more than she can make use of.¹¹⁶ These will be discussed further below.

A *personality justification*, generally derived from the writings of Hegel, contends that in their works authors express and reflect their personhood and their will.¹¹⁷ Copyright provides protection against appropriation of authors' works and their personhood.¹¹⁸ Copyright also helps in forming ecologies which allow people to express themselves creatively, and earn respect, reputation, and economic reward.¹¹⁹ The personality approach is prominent in European jurisdictions such as France and Germany, and not as much so in the Anglo-American tradition, though in recent years it has gained some recognition there as well.¹²⁰

The *democratic culture* justification asserts that people should enjoy economic independence and the opportunity to shape their cultural and social environments.¹²¹ This does not spontaneously transpire and needs

new artistic and literary creativity, thereby suppressing incentives to create new artistic and literary works in the first place."); see also Landes & Posner, *supra* note 110.

¹¹⁴ JOHN LOCKE, TWO TREATISES OF GOVERNMENT § 27 (Rod Hay ed., McMaster Univ. Archive 2004) (1690), <https://www.yorku.ca/commnel/courses/3025pdf/Locke.pdf> [<https://perma.cc/97AZ-GKHG>].

¹¹⁵ Fisher, *supra* note 108, at 170.

¹¹⁶ LOCKE, *supra* note 114, §§ 27, 31, at 116–18.

¹¹⁷ See G.W.F. HEGEL, ELEMENTS OF THE PHILOSOPHY OF RIGHT §§ 41–45 (Allen W. Wood ed., H.B. Nisbet trans., 1991 ed. 1821).

¹¹⁸ Justin Hughes, *The Personality Interest of Artists and Inventors in Intellectual Property*, 16 CARDOZO ARTS & ENT. L.J. 81 (1998); Justin Hughes, *The Philosophy of Intellectual Property*, 77 GEO. L.J. 287, 330–50 (1988); Jeanne L. Schroeder, *Unnatural Rights: Hegel and Intellectual Property*, 60 U. MIAMI L. REV. 453 (2006).

¹¹⁹ Cf. JEREMY WALDRON, THE RIGHT TO PRIVATE PROPERTY 302–03 (1990).

¹²⁰ See Fisher, *supra* note 108, at 174; Thomas Cotter, *Pragmatism, Economics, and the Droit Moral*, 76 N.C. L. REV. 1, 6–27 (1997); Hughes, *The Philosophy of Intellectual Property*, *supra* note 118, at 330.

¹²¹ Neil Weinstock Netanel, *Copyright and a Democratic Civil Society*, 106 YALE L.J. 283, 363–64 (1996); Niva Elkin-Koren, *Copyright Law and Social Dialogue on the Information*

to be fostered through policy interventions. Copyright, the argument goes, incentivizes creative expression “thus bolstering the discursive foundations for democratic culture and civic association.”¹²² Moreover, copyright supports authors’ independence from reliance on state subsidy or patronage, and cultural hierarchy, as it allows creators to claim financial rewards for their intellectual creations.¹²³ This logic reflects the utilitarian understanding that copyright restricts free-riders’ ability to exploit others’ work. Thus, creators can control their creations and benefit from them financially. Yet, copyright is important not only because it provides incentives to create and disseminate creativity, but also because it provides creators with the aptitude to create without restriction, financial hardship, or censorship, fostering a culture where more voices are expressed.

B. *Applying Copyright Theory to Orphan Works*

A crucial observation for the understanding of orphan works, in light of copyright theory is that two types of normative justifications for copyright underlie the four leading copyright theories: *self-oriented justifications* and *society-oriented justifications*. Self-oriented justifications supply a reason for legal protection of works based on the normative value of that protection to the creator. For example, the idea that works reflect the author’s personality, as the personality approach contends. Society-oriented justifications, on the other hand, focus more on the benefits to society as a whole and less on the way copyright affects creators. The democratic culture theory, for example, focuses on the way copyright protection enhances certain virtues in society, such as supporting a plurality of independent creative voices.¹²⁴

Most theories of copyright incorporate both self- and society-oriented considerations and balance them in different ways. But the distinction between these types of justifications is important to the issue of orphan works, because the idea of intellectual orphanhood—that a work can be subject to copyright without an identified owner—forces the

Superhighway: The Case Against Copyright Liability of Bulletin Board Operators, 13 CARDOZO ARTS & ENT. L.J. 345, 399–400 (1994).

¹²² Netanel, *supra* note 121, at 288.

¹²³ *Id.*

¹²⁴ This distinction roughly coincides with the deontological/consequentialist distinction in Ethics: society-based justifications tend to be consequentialist in nature, *i.e.*, they focus on value that accrues to society as a whole as a consequence of copyright protection, while self-oriented justifications usually identify intrinsic value that is connected to an individual (*e.g.*, the importance of the will, expressing personality, etc.). However, there could be exceptions to this rule, for example self-oriented reasons can also be consequentialist in nature (*e.g.*, the importance of authors’ independence from reliance to individual creators).

theories to demarcate exactly when, if ever, society-oriented reasons should outweigh self-oriented considerations. Different theories draw the line in different places and supply contrasting rationales for their view.

Another important distinction to be made is between different categories of orphan works. Copyright law and scholarship bundles together all works whose owners cannot be located under the single category of orphan works. Yet, orphan works vary significantly in what can be seen as their degree of orphanage. On the one end of the spectrum, we find works whose characteristics suggest that the prospect of locating their copyright-holders is virtually non-existent. For example, a decades-old unsigned letter found in an archive with no identifiers would fall into this category. We call these *truly orphan works*. On the other end of the spectrum, there are works whose owners are likely to be found with some minimal effort, such as a recently created meme. These, in fact, are *non-orphan* works. Between these two poles, we find works whose characteristics suggest varying prospects of locating their copyright-holders following further investigation. For example, a signed letter written a few years ago, or a book whose front matter mentions the publisher's name, but whose right-holders were nevertheless not located. We call this category *presumed orphan works*.

Note that in defining presumed orphan works this way, we have for the moment sidestepped the tough question of delineating exactly how hard one has to search for the copyright holder. The concept of a presumed orphan work is wide enough to capture many positions on this question, some of which we discuss below. In any case, the distinction between these two categories, though not rigid or binary, is vital, because there are important normative differences between truly orphan works and presumed orphan works, which we address later.

With this in mind, we now turn to analyze orphan works in light of copyright theory. We first discuss truly orphan works and then move to consider presumed orphan works.

1. Truly Orphan Works

From a theoretical standpoint, there seemingly is no rationale for extending copyright protection to truly orphan works according to any of the four leading copyright theories. The reason is that in regard to truly orphan works, there are no self-oriented justifications for granting legal protection, as a relevant "self" does not (legally) exist, while society-oriented reasons pull in the direction of unrestricted use of the works.

From a *utilitarian perspective*, copyrights in truly orphan works are ineffective and therefore unjustified. While the objective of affording

copyright is incentivizing creativity and its dissemination,¹²⁵ in the case of truly orphan works, legal protection achieves the exact opposite—copyright in these works creates deadweight losses, impedes creativity and its dissemination, and diminishes social welfare, while achieving no apparent utilitarian goal. Copyright, which may have initially incentivized creators to create and to make the works available, no longer does so, and in addition, it prevents the works from being used by others who wish to use them. The assumption that the right-holder is the best agent to optimize the utilization of works proves erroneous in this case. In fact, the right-holder is the main obstacle to utilization. Truly orphan works are a prime example of deadweight losses and inefficiencies that copyright can generate: the works are unutilized by right-holders, and any other use is impeded.

Another inefficiency is connected to the nature of orphan works. In many instances, orphan works are part of a collection whose value rests on access to the collection as a whole. In such cases, because an incomplete collection is deemed to be of limited value, the bodies holding a “mixed” collection of orphan and non-orphan works, often opt not to make any part of the collection available.¹²⁶ Thus, truly orphan works might “capture” other, non-orphan works leading to those works also being unavailable. Moreover, even if the other non-orphan works are available, their value is compromised.

Applying the *natural rights justification* also suggests that extending copyright to truly orphan works cannot be justified. The reason is that in the case of truly orphan works, there is no relevant rights-bearer. The right to the fruits of one’s labor is contingent on the existence of the person who labored (or to which she assigned her right). In the case of truly orphan works, this person does not (legally) exist. Once there is no owner, there is no justification why the resources that originated from the commons should not go back into the commons. Moreover, since another person is willing to invest labor in what can be described as “abandoned” or “unowned” property they should be permitted to do so.¹²⁷

Locke’s spoilage proviso also suggests that copyright in truly orphan works cannot be justified from a natural rights perspective. In Locke’s Second Treatise, he argues that “[a]s much as any one can make use of to any advantage of life before it spoils, so much he may by his

¹²⁵ See e.g., Edwin C. Hettinger, *Justifying Intellectual Property*, 18 PHIL. & PUB. AFF. 31, 47–51 (1989).

¹²⁶ KORN, *supra* note 9, at 19.

¹²⁷ This idea also coheres with common law doctrines such as the doctrines of adverse possession, salvage rights, finds, and abandonment. See Maria A. Pallante, *Orphan Works & Mass Digitization: Obstacles & Opportunities*, 27 BERKELEY TECH. L.J. 1251, 1251–52 (2012)).

labour fix a property in. Whatever is beyond this, is more than his share, and belongs to others.”¹²⁸ One’s right to privatize from the commons is legitimate only to the point where that person can make use of what she appropriated, otherwise it should be left in the commons. Truly orphan works are a strong manifestation of the spoilage proviso: the right-holder does not make use of the works, thus “spoiling” them. If the right-holder does not make sensible use of a work (or any use whatsoever, in the case of truly orphan works), then she is no longer deemed entitled to it, and it should return to the commons. The removal of one’s exclusive rights to derelict surplus property is, as Eloise Harding contends, “a key tenet of Locke’s theory.”¹²⁹ Therefore, truly orphan works should not enjoy copyright.

The personality approach also cannot justify extending copyright to truly orphan works on the basis of protecting of one’s personhood when, in effect, there is no person who can be identified as author.¹³⁰ At the heart of the personality approach rest the conceptions of will, personality, and freedom. One’s will and personhood are at the core of one’s existence, expressed through her creative works,¹³¹ which therefore merit legal protection (namely, copyright). However, will and personality cannot exist in a void, they must be attached to a person. In the case of truly orphan works, the person does not (legally) exist. The copyright in truly orphan works is in fact attached to the work rather than to the (unknown) person who created it, therefore there is no will or personhood, and there is little justification for copyright to subsist.¹³²

Finally, also from a *democratic culture* approach, copyright in truly orphan works is not justified. Truly orphan works are almost an antithesis of a thriving democratic culture. When there is no right-holder, and consequentially no one receives remuneration for intellectual creations,

¹²⁸ LOCKE, *supra* note 114, § 30.

¹²⁹ Eloise Harding, *Spoilage and Squatting: A Lockean Argument*, 26 RES PUBLICA 299, 301 (2019), <https://doi.org/10.1007/s11158-019-09445-0> [<https://perma.cc/Z3HZ-T9ZQ?type=image>].

¹³⁰ We realize that there are several possible accounts of what personhood is, and its varying degrees. Yet, this has no bearing on this discussion. See Hughes, *The Philosophy of Intellectual Property*, *supra* note 118, at 330–50.

¹³¹ See HEGEL, *supra* note 117, § 41; Hughes, *The Philosophy of Intellectual Property*, *supra* note 118, at 331.

¹³² We are aware that it could be argued that the author’s will is that the work should not be used by others. However, this is, in our view, a feeble argument that cannot justify copyright in orphan works according to the personality approach. First, a better way to guarantee that the work will not be used is actually asserting one’s copyright (especially given that it can be licensed by the competent authorities, though admittedly not many authors have that kind of knowledge of copyright law). Second, many orphan works are not held by the author but by an external right-holder (e.g., music-label, publisher). Lastly, this kind of argument would perhaps support an argument for moral rights such as attribution and integrity, less so economic rights of copying and distributing.

no one can be said to acquire economic self-reliance or freedom from censorship. Furthermore, civic engagement and exchange are curtailed in the case of truly orphan works more than they would arguably be in the case of non-orphaned works, because of the tendency of cultural institutions to refrain from making collections available if part of the collection is orphaned.¹³³ This “extended orphanage” results in even less culture being shared, debated, and possibly created. Furthermore, creators of cultural content tend to refrain from using works that they suspect as orphaned to avoid possible legal complications and liability resulting in even further orphanage.¹³⁴

In sum, truly orphan works present a unique theoretical situation: though copyright theories disagree on the fundamental normative assumptions underlying the field, they seem to converge in this case. All four theories suggest that there is no normative case to be made in favor of granting copyright protection for truly orphan works. Thus, even if the problem of orphan works as a whole is especially hard to solve, our analysis reveals that at least a part of the problem could receive a relatively simple answer. We do not deny that part of the predicament is that in some cases one may not know in advance whether a work is truly orphan and that copyright formalities complicate matters. But even granting these concessions, our analysis is helpful as the creative community can identify at least some works which are truly orphan and considering that there are many ways to cope with formalities (a point which we discuss below). This notion is also reflected in the words of the former Register of Copyrights and Director of the Copyright Office, Maria Pallante, who stated that:

We seem to have general agreement that in the case of a true orphan work, where there is no copyright owner and therefore no beneficiary of the copyright term, it does not further the objectives of the copyright system to deny use of the work, sometimes for decades. In other words, it is not good policy to protect a copyright when there is no evidence of a copyright owner.¹³⁵

Lastly, it is important to note that from a theoretical and normative perspective, our suggestion that copyright protection should be waived in truly orphan works better reflects common law and property law doctrine.

¹³³ KORN, *supra* note 9, at 19.

¹³⁴ See Robert Kirk Walker, *Negotiating the Unknown: A Compulsory Licensing Solution to the Orphan Works Problem*, 35 CARDOZO L. REV. 983, 986–87 (2014); Ariel Katz & Eden Sarid, *Who Killed the Radio Star? How Music Blanket Licensing Distorts the Production of Creative Content in Radio*, 71 AM. U. L. REV. 111, 134 n.69 (2021).

¹³⁵ Pallante, *supra* note 127, at 1251.

The legal reality in which there is property without an actual owner is a radical shift from established doctrines such as escheat, adverse possession, salvage rights, finds, and abandonment, as well as the principle that ownerless property cannot exist.¹³⁶

2. Presumed Orphan Works

While truly orphan works present a relatively straightforward theoretical outcome, it is with presumed orphan works that the theoretical consensus terminates. In the case of presumed orphan works, the key challenge is determining at what point enough resources have been invested in locating the right-holders, which uses should be allowed, and whether a license should be sought in advance. As we shall see, the different copyright theories provide different answers, by balancing self-oriented and society-oriented considerations in different ways. In addition, answers may change depending on the degree of orphanage of the work.

The *utilitarian approach's* answer begins by noting that most legal solutions result in substantial social resources wasted on locating right-holders, often in vain. This is a significant inefficiency. Under the current legal frameworks, the costs for clearing rights are astronomical.¹³⁷ This creates a cost burden that disincentivizes clearing rights for orphan works and for collections that include orphan works. Moreover, current frameworks seem to create an anomaly wherein the price for the use of orphan works substantially exceeds their (supposed) market value. The estimated cost for using a single orphaned photo from the British Library's collection is estimated at £43 (\$57).¹³⁸ The cost of a license to use a copyright photo whose owner is known is typically priced between a few cents and a few dollars, depending on the nature of the use, or is even free of charge.¹³⁹ These figures demonstrate how the copyright in orphan works inflates their price. Furthermore, most orphan works have very little commercial value, but significant historical, cultural, and academic value. Additionally, the fact that licenses involve costs and could involve the risk of having to compensate the right-holder if she surfaces deepens the economic burden and disincentivizes utilization of orphan works.

¹³⁶ See, e.g., *id.* at 1251–52; see also Hudson & Burrell, *supra* note 46.

¹³⁷ *Orphan Works Impact Assessment*, *supra* note 70. Prices were adjusted to reflect inflation, as calculated by the Bank of England's inflation monitor. Original costs were estimated between £47–£126.

¹³⁸ *Id.* at 66.

¹³⁹ See e.g., Amos Struck, *How Much Does a Stock Photo Cost? A Comprehensive Guide*, STOCK PHOTO SECRETS, <https://www.stockphotosecrets.com/questions-answers/how-much-does-a-stock-photo-cost.html>; *About*, UNSPLASH, <https://unsplash.com/about>.

Still, these costs could theoretically be redeemed from a utilitarian standpoint, if they create sufficient benefits overall. To understand what benefits could count as worthwhile, recall that the standard utilitarian defense of copyright rests on the assumption that copyrights generally incentivize creativity and its dissemination, as one knows that their work is legally protected.¹⁴⁰ This is true of orphan works as well: for creators know (or ought to know) that future generations wishing to use their works will have to search for them and obtain their permission. This, purportedly, creates some additional incentive to create, over and above the regular incentive that copyright law sans search standards for orphan works creates. Is this additional incentive enough to justify the current doctrine? While empirical data regarding creators' opinions on this incentive could be helpful in answering this question, we hazard a guess that the astronomical costs of clearing works mean that the current state of affairs is highly inefficient and therefore unjustified from a utilitarian perspective.

The question, however, remains: what should the standard of search for right-holders in presumed orphan works be? The utilitarian approach's answer is that the bar should be set at the point where the value to the community as a whole from using the works outweighs the added value generated by the additional incentives produced by the need to actively search for creators. It goes beyond the scope of this Article to give a more concrete answer, as this would entail quantifying in more detail the added value on both sides of the equation (though we discuss this further below). For now, it is enough to show what relevant factors the utilitarian theory identifies as controlling this situation, and to note that both are society-oriented. We also note that the more resources needed to locate the right-holder, the higher the economic and social cost. Therefore, in determining a search standard a utilitarian approach would take into consideration the supposed effort in locating the right-holder.

Similar considerations would apply to the question of whether a potential user should have to apply for a license and pay the relevant application and license fees in advance. It seems that the main rationale for such actions is to have an external body ensure that a proper search has been undertaken, to provide users with "insurance" from compensating a resurfaced right-holder, and to provide compensation to resurfaced right-holders. Yet, this mechanism entails costs—application and license fees, and funding for the license-issuing body.¹⁴¹ The question

¹⁴⁰ See, e.g., Landes & Posner *supra* note 110 at 326; Lemley *supra* note 111 at 1033, 1037–40.

¹⁴¹ See e.g., *Orphan Works Impact Assessment*, *supra* note 70 at 64–65 (estimating the cost of creating an authorizing body for the United Kingdom at £0.54m–£1.07m, and the annual cost of running such an authorizing body at £50k).

then is that of balance: what is gained and what is lost, from a social welfare perspective. Here too, it goes beyond the confines of this Article to articulate where exactly the line should be drawn, though we note that research indicates that the mechanism of a license-issuing body deters potential users.¹⁴² In addition, licenses are very costly, in the United Kingdom, for example, there is a £20 (\$28) application fee, in addition to an individually priced license fee.¹⁴³ Moreover, in practice, right-holders rarely resurface and consequently license fees are almost never paid to them. In fact, since the introduction of the licensing scheme in the United Kingdom in October 2014 until August 2020, only 20 right-holder claims were made to the Intellectual Property Office, and *none* of the claimants have been compensated.¹⁴⁴

Lastly, the utilitarian approach accepts that any user and any uses should be allowed for presumed orphan works. The logic here is simple: both private players and public institutions, and commercial and non-commercial uses, can advance social welfare. There is no apparent rationale or justification to differentiate between them.

Under the *natural rights approach*, copyright is generally justified based on the natural right a person has to the fruits of her labor. Thus, it is easy to understand why this theory presents mainly self-oriented reasons to protect presumed orphan works. Even if she is hard to find and the process involves costs, the owner of the work is still entitled to benefit from her labor, and so all other things being equal, one should search hard for the owner before the work is cleared. This entails that the search standard for presumed orphan works should be considerably high.

However, two considerations complicate matters. First, note that the main justification for granting legal protection under this theory—the idea of a natural right to the fruits of one’s labor—diminishes in strength as we move from the creator of the work to her heirs or people who bought the rights to the work. Even if we accept the idea of natural rights, it is harder to conceive of a natural right to the fruits of *another’s* labor: after all, an heir or buyer are entitled to benefit from the work only because of the *legal*—as opposed to natural—institutions of inheritance or conveyancing. As time passes, it becomes more and more plausible to assume that the beneficiary of the work is not the creator but someone else, thus lowering the standard required to clear a work.

Second, Locke introduced the “sufficiency” proviso to his theory of property. Applying this proviso entails asking what standard would leave

¹⁴² See, e.g., Ahmed, *supra* note 95.

¹⁴³ *Id.*

¹⁴⁴ E-mail from Margaret Haig, *supra* note 83.

“enough and as good” in the commons.¹⁴⁵ Because many orphan works are part of collections whose value rests on them being made available as a whole, we doubt that a high search standard satisfies the sufficiency proviso (at least in this scenario), as orphan works may condemn other works to become unavailable, resulting in fewer and lower quality works being left in the commons.

Thus, the natural rights theory suggests that a self-oriented rationale for granting enhanced protection is at odds with two other normative considerations: the first is also self-oriented—the normative difference between the creator and the current owner, and the second is society-oriented—the sufficiency proviso. The first rationale could be understood to imply that the standard for clearing works should be dynamic, *i.e.*, it should be set lower and lower as time passes. The second rationale is sensitive to other normative considerations, namely the creative community’s sufficient intellectual and cultural resources at the moment and in the future. According to this rationale, the bar should be set in a manner that allows for sufficient resources to be available. Note, however, that “sufficient” does not equal “maximal” or even “optimal” resources. Also, the provision could possibly create a different standard for stand-alone orphan works and orphan works which are part of a collection, with the latter case decreeing a lower search standard.

These considerations also reflect on the questions of whether a license should be sought and paid for in advance, and what type of users and uses should be allowed for presumed orphan works. As the natural rights justification asserts self-oriented reasons to protect presumed orphan works, it seems it would accept the high application and license costs and the hassle that potential users might need to invest in obtaining the license. Having a governmental body scrutinizing potential users’ searches and guaranteeing that a resurfaced right-holder is paid, is a justifiable end even if the costs are high and even if this disincentivizes potential users.

In regard to the question of which users and uses should be allowed, it would seem that the natural rights theory would be opposed to commercial uses and users, as such users would be unjustly enriching themselves at the expense of the right-holder. This theory could have a more relaxed approach for non-commercial uses and users, as those would only minimally infringe the creator’s economic right to the fruits of her labor.

The *personality* justification theory’s main line of argument is, essentially, self-oriented: it places a high normative value on the author’s

¹⁴⁵ See John Tomasi, *The Key to Locke’s Proviso*, 6 BR. J. HIST. PHIL. 447, 447 (1998).

will as manifested in her creative work. It seems that the personality justification would endorse a relatively high search standard for presumed orphan works, because even if the author is hard to find, one cannot simply neglect or misappropriate her will by using the work without her permission. A similar logic would apply to the question of applying for a license in advance. Given that this theory reflects self-oriented reasons, with its focus on the author's personhood and will, scrutiny by an external body would make sense to ensure that the user is particularly careful in executing the search.

Regarding the question of uses and users, it seems that the personality approach is oblivious to the user's identity, as both commercial and non-commercial uses may equally misappropriate or respect the author's will and personhood. Yet, the personality approach would allow for only very limited types of uses, mainly those that simply reproduce, conserve, or archive the piece, *i.e.*, uses that do not alter the work in any way, thus maintaining the author's expression unchanged.

That being said, note that the personality theory also places an emphasis on fostering ecologies that allow people to express their personalities—and could therefore provide a society-oriented rationale for limiting the standard of search or the permitted uses, at least in some cases. However, the primary focus of the personality approach remains the person's will; fostering communities to allow her to express herself is only secondary. The formation of a creative community is generally only instrumentally valuable as it helps individuals express themselves. It would be strange if the theory would breach its central commandment and allow harming authors' personhood interests by using their works without their permission only to allow more creative resources for other people down the road.

Finally, the *democratic theory* presents a society-oriented approach, which, to a degree, is also contingent on upholding some self-oriented interests. The society-oriented goal of a flourishing democratic society is dependent on authors being independent from patronage or censorship, which is achieved through copyright. The question then is how to advance economic independence, which could pull in different directions.

In determining the standard of search, the democratic approach is particularly attuned to the characteristics of the orphan work at hand: the higher the chances of locating the creator and consequently increasing her economic and creative independence, the higher the standard of search, and vice versa. The search standard will optimally be dynamic and reflect the work's age and similar characteristics such as if the author's identifying information exists.

The objective of advancing the society-oriented goal of a pluralistic democratic society while supporting authors' economic self-reliance

means that all uses and users would be allowed. This is because such a model promotes cultural exchange and civic engagement, while not undermining authors' ability to profit from their creativity should they resurface. Note that this approach would likely require payments to authors that resurface regardless if the use was for a commercial or non-commercial use and regardless of the identity of the user. The amounts of compensation, however, could be dictated by the type of use. Also, the administrative and financial burden that having to apply for a license places on subsequent users, along with the observation that the fees rarely end up in the creators' pockets (*i.e.*, providing them with economic self-reliance) would lead to a conclusion that a democratic approach would oppose the need to apply for a license in advance.

In sum, the above analysis demonstrates that while there is a solid consensus across the four copyright theories with regards to truly orphan works, the different approaches lead to very different practical results in the case of presumed orphan works. The theoretical approach that the legal system ends up endorsing will bear heavily on the design and outcomes of its framework for dealing with orphan works. For instance, if a legal system is committed to a utilitarian approach, it will possibly benefit from more orphan works being released, but also compromise authors' personhood interests. A legal system that endorses the personality approach would likely entail high search costs (and consequently millions of works remaining unavailable), but authors' moral interests would be strictly upheld.

3. A Possible Way Forward

While this Part has thus far focused on a theoretical analysis of the orphan works predicament, we now move to briefly outline practical solutions that are attentive to the underlying theoretical justifications we explored earlier. These recommendations are reflective of the comparative analysis conducted in previous sections of this Article. Our goal is to illustrate that, through theoretical exploration, better practical solutions can be identified. In addition, we demonstrate that solutions that are informed by theory fit better with copyright formalities and copyright law's internal structure. Our suggestions here are not meant to be all-encompassing, but rather to sketch general principles for a practical framework that can be better aligned with copyright theory.

While our discussion draws on U.S. legislation and the utilitarian approach, which is often noted as the United States' primary copyright justification theory, we will use the British framework as our main comparative framework. This is because American and British copyright laws share several notable features, and because both jurisdictions tend

to emphasize the utilitarian approach as a justification for copyright.¹⁴⁶ Using the United Kingdom's framework as a case study is also an opportunity to examine, in more detail, the extent to which there is a mismatch between the legislative response to the orphan work problem and the primary copyright theoretical underpinning.¹⁴⁷ In our discussion, we also took some inspiration from the Israeli model, as this model seemingly represents a legislative response that is committed to a specific theoretical justification (the utilitarian approach).¹⁴⁸ Another advantage to this approach is that Israeli copyright law, which was revised in 2007, was greatly inspired from both American and British copyright legislation.¹⁴⁹ Yet in 2019 Israel enacted an original framework for dealing with orphan works; there are some early indications that the Israeli model enjoys relative success.¹⁵⁰

In short, we argue that a model that is reflective of the different categorizations of orphan works and of copyright's utilitarian theory (and other theories too, as we explain below) should: (a) extend to all uses and users, (b) allow the use of an orphan work without prior license or application, (c) not involve any upfront payment, but entail reasonable compensation if a right-holder resurfaces, (d) include a flexible "reasonable search" standard that reflects the orphan work's character and age, (e) require the provision of contact details and attribution. We turn to briefly discuss each of these components.

First, the permission to use orphan works should extend to all uses and all users. Commercial players, such as private libraries and firms, can play an important part in making orphan works available, disseminating them, and furthering creativity. For example, a movie based on the orphan book "Sapper Dorothy," which we mention earlier, has clear cultural value, and the fact that it was a private firm that wanted to produce it does not change that. From a utilitarian standpoint, there is no justification to limit users or uses, as all users and uses can maximize social welfare. This

¹⁴⁶ Commentators have indeed considered the option of "importing" the British framework to the United States, noting the similarities between the legal foundations and justification theory of copyright law in both jurisdictions. See, e.g., Abigail Bunce, *British Invasion: Importing the United Kingdom's Orphan Works Solution to United States Copyright Law*, 108 NW. UNIV. L. REV. 243 (2015).

¹⁴⁷ Recall that the United States has no specific legislation for orphan works. See *id.*

¹⁴⁸ Guy Pessach, *Israeli Copyright Law: A Positive Economic Perspective*, 39 ISR. L. REV. 123 (2006); see also DK, 20th Knesset, Session No. 129 (2018) (Isr.), URL; Protocol 822 of the meeting of the Knesset's Economic Committee (25 July 2018) (Hebrew); DK, 20th Knesset, Session No. 129 (2018) (Isr.), URL Protocol 907 of the meeting of the Knesset's (Israeli Parliament) Economic Committee (27 December 2018) (Hebrew).

¹⁴⁹ See Guy Pessach, *The New Israeli Copyright Act – A Case Study in Reverse Comparative Law*, 41 IIC INT'L REV. INTELL. PROP. COPYRIGHT L. 187 (2010).

¹⁵⁰ *Id.*

notion is also reflected in the United Kingdom's current licensing scheme which allows all users to apply for a license for all uses. In our view, such a suggestion also aligns with the United States' copyright law, and is also compatible with international IP frameworks, including the Berne Convention and The Agreement on Trade-Related Aspects of Intellectual Property Rights.¹⁵¹

Second, a user wishing to use an orphan work should be allowed to simply do so (subject to certain conditions), without the need to apply in advance for a license. The need to apply for a license increases costs for potential users and for the public. In addition, the need to apply for a license likely deters potential users (as the Canadian and British examples demonstrate).¹⁵² Therefore, from a utilitarian point of view, there is no reason as to why a license should be obtained, especially given that the money collected does not go to the right-holders. Furthermore, just as United States' copyright law allows for fair use,¹⁵³ and the United Kingdom's copyright law accepts certain "permitted" acts as fair dealing without the need to apply for a permit or clearance in advance,¹⁵⁴ we could, and should, allow users of orphan works to use those without applying for a license in advance.

Third, in the case that a right-holder resurfaces, a license fee will be decided. Upfront payments (as the United Kingdom's current scheme requires) are unjustified according to a utilitarian approach as they increase costs and subsequently decrease the use of orphan works, thus diminishing social welfare.¹⁵⁵ Furthermore, as discussed, it raises the price of orphan works well above their presumed price in a free market. Moreover, our data indicate that *zero* right-holders re-appeared and were paid by the United Kingdom's Intellectual Property Office.¹⁵⁶ Upfront payments cannot be justified by a personality or a natural rights approach either, as the payments do not go to the author (or their successors). A democratic culture justification would also oppose upfront payments as the money does not go towards supporting creators. Our suggestion that a license fee be paid in the case of a right-holder resurfacing includes all

¹⁵¹ Marrakesh Agreement Establishing the World Trade Organization Annex 1C, Apr. 15, 1994, 1867 U.N.T.S. 154 Berne Convention for the Protection of Literary and Artistic Works, Sept. 9, 1886, as revised at Paris on July 24, 1971, and amended in 1979 S. Treaty Doc. No. 99-27 (1986).

¹⁵² Regarding Canada, see De Beer & Bouchard, *supra* note 95, at 227; Ahmed, *supra* note 95 at 97–98. Regarding the United Kingdom, see discussion in Part II.

¹⁵³ 17 U.S.C. § 107 (1992).

¹⁵⁴ Copyright, Designs and Patent Act, Pt. 1 Ch. 3 (1988).

¹⁵⁵ Currently, an applicant is required to pay an application fee of £20 for one work and £30 for 80 works plus a license fee. See Intellectual Property Office, *Copyright: Orphan Works*, GOV.UK (2020), <https://www.gov.uk/guidance/copyright-orphan-works>.

¹⁵⁶ E-mail from Margaret Haig, *supra* note 83.

uses, though we do note that there are strong arguments to support a proposition that non-commercial uses should be exempt so long that they cease use once a right-holder emerges.

Fourth, the standard of search should reflect the orphan work's character and age. The more a work approaches the "truly orphan" pole of the spectrum, the more reason there is to waive (or limit) copyright protection. This is true according to all copyright theories. Since works usually exhibit a wide array of different characteristics that place them in different places on the spectrum, there is no justification for treating all works alike. Moreover, from a utilitarian perspective, the current "diligent search" standard entails substantial costs which diminish social welfare and upset the balance that lies at the heart of copyright—between safeguarding creators' rights and public interests. A "reasonable search" standard which considers the orphan work's character and age, better reflects the different categorizations of orphan works, the commercial value of the work, and the balances at the basis of copyright. It seems that the utilitarian, natural rights, and democratic theories all agree that the further we are from the original creator, the lower the search standard should be. In addition, the fewer the indications of the right-holder's identity, the higher the search costs, so from a utilitarian perspective the search standard should reflect the availability of such information as well.

Fifth, we suggest including a requirement that users indicate their contact details, state that the work they are using is an orphan work, and, where possible, provide attribution to the author. Indicating contact details and that the work being used is an orphan will make it easier for a resurfaced right-holder to contact the user and comes at a very low cost. It could also help in clarifying the work's legal status for other subsequent users. Providing attribution serves several purposes. First, studies show that attribution and acknowledgment are an important motivator for authors to create and disseminate their creativity.¹⁵⁷ Unlike upfront monetary payments that will not go to the unlocatable author of orphan works, attribution will (even if the author cannot be located, she will be acknowledged). As attribution entails virtually no costs but can motivate creators, it is an attractive proposition for the utilitarian and democratic culture approaches. Moreover, this suggestion could also be attractive to the personality and natural rights approaches as it acknowledges the connection between creator and creation, even when the right-holder is unlocatable.

¹⁵⁷ See, e.g., Catherine Fisk, *Credit Where It's Due: The Law and Norms of Attribution*, 95 GW. L.J. 49 (2006); Rebecca Tushnet, *Naming Rights: Attribution and Law*, 2007 UTAH L. REV. 787 (2007); Greg Lastowka, *Digital Attribution: Copyright and the Right to Credit*, 87 B.U. L. REV. 41 (2007); Sarid, *supra* note 112, at 173.

The above initial guidelines reflect the values at the foundations of a utilitarian approach to copyright law, they are consistent with copyright formalities, and they consider the rights and interests of creators, users, and the general public. These guidelines, admittedly, require further development. Yet, we believe that they demonstrate how revisiting copyright challenges through a theoretical lens can lead to better practical solutions.¹⁵⁸ Of course, one could construct a different framework using different theoretical justifications. But this just illustrates our main point, *i.e.*, that finding good solutions to the orphan works predicament requires using a theoretical lens.

CONCLUSION

Dorothy Lawrence's story, like the songs and music of early twentieth century Black musicians,¹⁵⁹ and Indigenous People's artworks¹⁶⁰—invaluable treasures for understanding and sharing human history, culture, and heritage—are shackled in a “copyright prison.” Copyright formalities remain a major impediment to sharing, using, or accessing these, and millions of other works. While this predicament, known as orphan works, received academic attention and even some (albeit limited) legislative response, an effective solution is still wanting. Devising better, more effective outcomes, we argue in this Article, must involve reflecting on copyright theory, thus aligning the theoretical approach that underpins copyright law with practical legal solutions.

Emerging technologies for digitizing, storing, and accessing works hold the promise of providing unprecedented access to these vast cultural treasures, many of which are the creation of marginalized and underrepresented communities.¹⁶¹ But so long that copyright formalities and ad hoc solutions—far removed from their theoretical underpinnings—remain, millions more long-lost stories, undelivered letters, and songs that faded from the charts will keep on being locked-up in this “copyright prison” from which there currently is no escape.

¹⁵⁸ Consistency between theory and the legislative response is, of course, important to achieve success in other areas of law as well. *See, e.g.*, Haim Abraham, *Tort Liability for Belligerent Wrongs*, 39 OXF. J. LEGAL STUD. 808 (2019) (discussing torts); Eugenio Vaccari, *OW Bunker: A Common Law Perspective on Multi-lateral Co-operation in Insolvency-related Cases*, 28 INT'L CO. COMMERCIAL L. REV. 245, 251 (2017) (discussing insolvency).

¹⁵⁹ Brianna Dahlberg, *The Orphan Works Problem: Preserving Access to the Cultural History of Disadvantaged Groups*, 20 S. CAL. REV. L. & SOC. JUST. 275, 292 (2011).

¹⁶⁰ *Id.* at 296.

¹⁶¹ *Id.*