APPLYING COPYRIGHT ABANDONMENT IN THE DIGITAL AGE

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ABSTRACT

Copyright law protects orphan and parented works equally—but it shouldn't. Consequently, current law unnecessarily restrains public access to works that authors have not exercised dominion over for decades.

This problem has come to the fore in the Google Books settlement, which critics argue will give Google a de facto monopoly over orphan works. But this criticism implicates an obvious question: Why are orphan works protected by copyright law in the first place? If orphan works were in the public domain, then no one would worry about Google's supposed "monopoly" because Google's competitors would be free to copy the works without facing class action lawsuits.

To address these concerns, I propose a new equitable defense to copyright infringement: the orphan theory of abandonment.

INTRODUCTION

¶1 "In 1996, Google co-founders Sergey Brin and Larry Page were graduate computer science students working on a research project supported by the Stanford Digital Library Technologies Project. Their goal was to make digital libraries work . . . ."[2] To accomplish this, Brin and Page developed BackRub, a program which would allow users to determine the relevance of certain books by calculating the number of times a work is cited.[3] What they learned in the process ultimately "inspired Google's PageRank algorithms—the core search technology that makes Google, well, Google."[4]

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[2] *History of Google Books*, GOOGLE BOOKS, http://books.google.com/googlebooks/history.html (last visited Nov. 7, 2010).

[3] *Id.*

[4] *Id.*

¶2 In 2002, Google launched a secret books project[5] with an ambitious goal of digitizing every book ever written. This is no easy task; it takes forty minutes to digitize just one 300-page volume.[6] After Mary Sue Coleman, president of the University of Michigan, informed Page it would take nearly one thousand years to scan the university's seven million volumes, he nevertheless told her "Google can help make it happen in six."[7]

¶3 Google successfully created a digital library, but not without opposition. In 2005, publishers and authors of digitized works sued Google in a class action copyright infringement suit.[8] Recently, this suit was settled and is awaiting judicial approval.[9] Under the settlement, Google will retain thirty-seven percent of the revenue generated by Google Books. The remaining sixty-three percent will go to a "Book Rights Registry, run by authors and publishers, to administer rights and distribute payments."[10]

¶4 Much of the controversy in the Google Books case revolves around the status of so-called orphan works. Orphan works are—as the name suggests—works without an identifiable copyright owner. Without their copyright owner identified, libraries and book stores cannot negotiate distribution deals, relegating these works to remain "lost in the bowels of a few great libraries."[11] The Google Books settlement will make these works available to the public unless the copyright owner demands their removal from the database. This benefits society by bringing a vast wealth of knowledge to the internet-surfing public.[12]

¶5 Despite this benefit, the Google Books settlement remains controversial.[13] There is a growing concern that the settlement vests a

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[5] *Id.*
[6] *Id.*
[7] *Id.*
[8] *See* Complaint, The Authors Guild v. Google, Inc., No. 1:05-CV-08136 (S.D.N.Y. Sept. 20, 2005); Complaint, McGraw-Hill Cos. v. Google, Inc., No. 1:05-CV-08881 (S.D.N.Y. Oct. 19, 2005).
[9] Settlement is awaiting judicial approval as of March 15, 2010. Google has published the 141 page settlement agreement on its website. http://books.google.com/booksrightsholders/Settlement-Agreement.pdf.
[10] Miguel Helft, *Some Raise Alarms as Google Resurrects Out-of-Print Books*, N.Y. TIMES, Apr. 4, 2009, at A1, *available at* http://www.nytimes.com/2009/04/04/technology/internet/04books.html?_r=1.
[11] *Id.*
[12] *See* JAMES BOYLE, THE PUBLIC DOMAIN: ENCLOSING THE COMMONS OF THE MIND, 221 (2008) (discussing the orphan works problem), *available at* http://thepublicdomain.org/thepublicdomain1.pdf. The orphan works problem has been studied extensively by Professor Boyle. His analysis and insight is far beyond the scope of this iBrief. *See id.* at 253 n.8.
[13] Miguel Helft & Motoko Rich, *Lawyer and Author Adds His Objections to Settling the Google Book Lawsuit*, N.Y. TIMES, Aug. 19, 2009, at B2, *available*

virtual monopoly to Google over orphan works.[14] "Since no authorization is possible for orphan works, only Google would have access to them, so only Google could assemble a truly comprehensive book database."[15] Additionally, the barriers to entry (e.g., building an online library like Google Books) are high enough to foreclose any realistic possibility of competition.

¶6 Of course, monopolization would not be an issue if orphan works were already in the public domain. Because the works are still protected by copyright, potential competitors cannot copy Google Books' digital copy of orphan material without infringing on the orphan author's copyright. Much like Google, the second comer who creates an online library to compete with Google Books will likely be subject to a class action copyright infringement suit of its own. In other words, the Google Books settlement waives only the infringement claims against Google, not its potential competitors. Thus, many are concerned that the Google Books settlement simply trades one monopoly for another.

¶7 Further complicating the issue is the relationship between copyright's limitations and the orphan works problem. One such limitation, which is constitutionally mandated, is that copyrights last for a "limited time."[16] Another limitation is the constitutionally acknowledged purpose of copyright and patent law "to promote the Progress of Science and useful Arts."[17] One possible interpretation of this limitation is that Congress exceeds its constitutional authority under the Copyright Clause when it grants copyrights to works that do not "promote the Progress of Science and useful Arts."[18] Defenses like fair use[19] and abandonment function as additional safeguards against Congress's copyright powers.[20]

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at http://www.nytimes.com/2009/08/19/technology/internet/19google.html?_r=2&hpw (Scott E. Gant of Boies Schiller describes the settlement as providing Google with the commercial rights to millions of books without having to negotiate for them individually).

[14] *Id.*

[15] Helft, *supra* note 10.

[16] U.S. CONST. art. I, § 8, cl. 8. Of course, after *Eldred v. Ashcroft*, 537 U.S. 186, 221–22 (2003) (holding that the Copyright Term Extension Act satisfies the limited times clause by extending the duration of copyright to 95 years), it is not clear what—if anything—the limited times clause really limits.

[17] *Id.*

[18] *See id.*

[19] 17 U.S.C. § 107 (2006) (fair-use defense codified in the Copyright Act).

[20] *See* Robert A. Kreiss, *Abandoning Copyrights to Try to Cut Off Termination Rights*, 58 MO. L. REV. 85, 92 n.24 (1993) (citing numerous cases recognizing abandonment as a valid defense to copyright infringement).

¶8 Because orphan works are remarkably similar to works found in the public domain, I argue that a new theory of abandonment should provide an affirmative defense to copyright infringement. This theory would provide a basis for declaratory relief to good-faith infringers who are willing to compensate lost authors, but need judicial assurance that their behavior is non-infringing in order to compete in the market dominated by Google Books.

I. THE DIVERGENCE OF LAW AND POLICY AFTER BERNE

¶9 The simplest policy argument in favor of strong intellectual property rights comes from intellectual property's non-rivalrous and non-excludable character.[21] Intellectual property rights are nevertheless limited by (1) restrictions imposed by the policies behind traditional property law, (2) restrictions imposed by the Constitution (e.g., the First Amendment) and other statutes (e.g., the Sherman Act), and (3) the notion that all intellectual property belongs to the public domain by default. These limitations are incorporated into many of the affirmative defenses to copyright infringement. In addition to balancing domestic policy concerns, copyright law must also respond to the obligations of international treaties. This section explains how American law has lost touch with the policy goals it purports to advance.

¶10 In simple terms, the "divergence of law and policy" occurred when the Berne Convention abolished copyright law's notice requirement. Indeed, the lack of a notice requirement in America's copyright regime is the primary reason for the orphan works problem.

A. The Notice Requirement

¶11 In the late 1980s, a cacophony of criticism was brewing in the United States over the country's 100-year abstinence from the Berne Convention. On April 21, 1988, Senator Patrick Leahy published an op-ed in the *New York Times* arguing that ratification of the Berne Convention was necessary to "earn[] a voice and a veto when the world's copyright community convenes to respond to new technological advances."[22] Later that year, the "modest changes"[23] described by Leahy were enacted when the United States Senate passed the Berne Convention Implementation Act of 1988 ("BCIA") and joined the Berne Convention.[24]

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[21] *See* BOYLE, *supra* note 12, at 3.
[22] Senator Patrick J. Leahy, *How to Protect [Copyright] In World Markets*, N.Y. TIMES, Apr. 21, 1988, at A31.
[23] *Id.*
[24] Berne Convention Implementation Act, Pub. L. No. 100-568, 102 Stat. 2853 (codified in scattered sections of 17 U.S.C.).

¶12 Prior to the BCIA, federal law "required notice of copyright for all publicly distributed copies of a work of authorship."[25] Historically, the United States was the only major country where notice was a prerequisite to protection.[26] Failure to comply with the notice requirement would result in forfeiture of copyright.[27] In order to satisfy the notice requirement prior to the BCIA's implementation, an author had to satisfy the following three elements: (1) Physical affixation of the symbol "©," the abbreviation "Copr.," or the word "Copyright" on the work itself; (2) the name of the copyright owner; and (3) the date of first publication.[28] The notice provisions "gave rise to substantial litigation and led to a whole body of law" over legal formalisms.[29]

¶13 Proponents of the notice requirement justify it thusly: First, "it places into the public domain works in which no one has an interest in maintaining copyright."[30] Second, it "informs the public of a claim for copyright."[31] Finally, it identifies the date of the first publication.[32]

¶14 Critics point to three instances wherein notice fails to inform the public of when the copyrighted work will lapse into the public domain.[33] Indeed, this would be impossible to know at the time of publication, because the work falls into the public domain seventy years after the author's *death*; under current law, the date of publication simply does not factor into the equation.[34] Notice also will not reflect subsequent changes in copyright ownership[35] and does not need—in the case of derivative works—to identify the original work![36] Therefore, while notice can be helpful, "it is far more useful to investigate registration records."[37]

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[25] MARSHALL LEAFFER, UNDERSTANDING COPYRIGHT LAW, 161 (4th ed. 2005) (Matthew Bender & Co.).
[26] *Id.*
[27] *Id.* at n.76 (citing NIMMER ON COPYRIGHT § 7.02 (2005)).
[28] 17 U.S.C. § 401(b) (1978).
[29] Thomas P. Arden, *The Questionable Utility of Copyright Notice: Statutory and Nonlegal Incentives in the Post-Berne Era*, 24 LOY. U. CHI. L.J. 259, 261–63 (1993).
[30] LEAFFER, *supra* note 26, at 162.
[31] *Id.*
[32] Arden, *supra* note 30, at 267. This is no longer important because the date of publication no longer triggers copyright protection. Under the pre-1976 regime, an individual familiar with copyright law could use the date of publication to determine when the work passes into the public domain. *Id.*
[33] *Id.* at 267–68.
[34] *See* Sonny Bono Copyright Term Extension Act, Pub. L. No. 105-298, 112 Stat. 2827 (1998).
[35] Arden, *supra* note 30, at 268.
[36] *Id.*
[37] *Id.* (citations omitted).

¶15 But registration records are "only as good as the information reflected in [them]."[38] The absence of a record does not mean that the work is unprotected[39] because "copyright registration is essentially voluntary, and many copyright owners choose not to register."[40] Nevertheless, because registration is a prerequisite to suit, it remains a very important element of copyright protection.[41] At one point, 17 U.S.C. § 205(d) "required recordation of a transfer of an interest in copyright in order to bring an infringement suit."[42] The orphan works problem would have never existed under this rule because Google would have easily been able to find the copyright owners of most works. Unfortunately, the damage done by the BCIA—which abrogated this rule—is more than a decade old.[43] Even if the old rule was reinstituted, there would still be millions of orphan works whose copyright ownership has already been transferred without recordation.

¶16 In sum, registration does little to alleviate the damage caused by the BCIA. Although it is a prerequisite to suit, registration is not a prerequisite to negotiation. Without the Google Books settlement, Google might be sued by the copyright owner of an orphan work decades into the future, even though Google is ready and willing to negotiate a license today. The alternative—that Google should *not publish* orphan works, and instead, allow them to lie comatose in "the bowels of a few great libraries"[44]—is unfathomable. The purpose of copyright is to "to promote the Progress of Science and useful Arts,"[45] not to protect the rights of those unconcerned with the exercise thereof.

B. The Obsolescence of the Contemporary Equitable Defenses After the United States' Entrance to the Berne Convention

¶17 Orphan works cannot be accessed or distributed by anyone without permission from the long-lost copyright owner. This is the orphan works problem. If the copyright owner of a work cannot be found, then the public cannot possibly know with much certainty when the owner's work will divest to the public domain.[46]

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[38] LEAFFER, *supra* note 26, at 274.
[39] *Id.*
[40] *Id.*
[41] *Id.*
[42] *Id.* at 281 n.17.
[43] *Id.*
[44] Helft, *supra* note 10.
[45] U.S. CONST. art. I, § 8, cl. 8.
[46] *See* BOYLE, supra note 12, at 21 (summarizing Thomas Jefferson's argument that "intellectual property rights are not and should not be permanent; in fact

¶18 There are several defenses that Google could raise in a potential infringement suit brought by the copyright owner of an orphan work. The most obvious include the statute of limitations, forfeiture, abandonment, and the fair use defense. Unfortunately, none of these defenses are relevant to the Google Books case; nor would they be successful in any potential infringement suit. They are nevertheless relevant because their limitations contextualize why an orphan works abandonment defense is needed in the first place.

¶19 One of the most obvious defenses to infringement is the three-year statute of limitations.[47] Exactly when that three-year period begins, however, is obfuscated by variances in judicial interpretation. One line of cases treats each act of infringement separately and only bars those more than three years old.[48] The other line employs a "continuing infringement" theory that treats the individual infringing acts as a single cause of action for infringement.[49] In these cases, the statutory period runs from the time of the last infringing act.[50] Under either theory, however, Google could not mount a successful statute of limitations defense because Google infringes every time a user accesses copyrighted material on Google Books. In other words, Google is always infringing because someone is always accessing copyrighted content on Google Books.

¶20 Fair use is also unavailing. In Google's case, the use is commercial, which is enough to establish a presumption against fair use.[51] While other equitable considerations could help overcome this presumption, a court would likely hold that Google's dominant market position precludes the fair-use defense.[52] As one court put it, "[t]he fair use doctrine is not a

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they should be tightly limited in time and should not last a day longer than necessary to encourage the innovation in the first place.").

[47] 17 U.S.C. § 507 (2006).

[48] LEAFFER, *supra* note 26, at 516 n.210 (citing Makedwe Publ'g Co. v. Johnson, 37 F.3d 180 (5th Cir. 1994); Roley v. New World Pictures, Ltd., 19 F.3d 479 (9th Cir. 1994); Stone v. Williams, 970 F.2d 1043 (2d Cir. 1992), *cert. denied*, 508 U.S. 906 (1993); Rosette v. Rainbo Record Mfg. Corp., 354 F. Supp. 1183 (S.D.N.Y. 1973), *aff'd*, 546 F.2d 461 (2d Cir. 1976)).

[49] According to Leaffer, the leading case on this is Judge Posner's opinion in Taylor v. Meirick, 712 F.2d 1112 (7th Cir. 1983). LAEFFER, *supra* note 26, at 515.

[50] *Id.* at n.209 (citing Taylor v. Meirick, 712 F.2d 1112, 1119 (7th Cir. 1983) ("The initial copying was not a separate and completed wrong but simply the first step in a course of wrongful conduct that continued till the last copy of the infringing map was sold . . . .")).

[51] *See* Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417, 451 (1984) (commercial use establishes a presumption of market harm).

[52] Helft, *supra* note 10 ("'No other company can realistically get an equivalent license,' said Pamela Samuelson.").

license for corporate theft, empowering a court to ignore a copyright whenever it determines the underlying work contains material of possible public importance."[53]

¶21 Abandonment and forfeiture provide additional defenses to copyright infringement. Abandonment is a complete defense because, if successfully interposed, it refutes the plaintiff's claim of ownership.[54] Successfully asserting the abandonment defense therefore places the abandoned work in the public domain.[55] Forfeiture is less relevant in modern cases because it only occurs when a copyright owner fails to comply with the notice requirement.[56] Unlike abandonment, proving forfeiture does not require a showing of intent.[57] Forfeiture is irrelevant to the orphan works problem because the BCIA eliminates the notice requirement.[58] Abandonment's justifications, however, are extremely relevant.

¶22 Proving that a copyright owner abandoned his copyright is a rather onerous process. To establish that a copyright was abandoned, a defendant must show (1) that the plaintiff *intended* to surrender rights in his or her work; and (2) that the plaintiff committed some *overt act* showing this intent.[59] These elements are difficult to prove: even if a copyright owner loses interest in extracting value from a work—as is generally the case with orphan works—it is unlikely that the copyright owner will surrender the right to extract value for nothing in return. Accordingly, very few works are abandoned.

¶23 Thus, no current doctrine enables the public to access the vast body of human knowledge contained within orphaned intellectual property.[60] I

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[53] Iowa State Univ. Research Found., Inc. v. Am. Broad. Cos., 621 F.2d 57, 61 (2d Cir. 1980).
[54] *See* Lydia Pallas Loren, *Building a Reliable Semicommons of Creative Works: Enforcement of Creative Commons Licenses and Limited Abandonment of Copyright*, 14 GEO. MASON L. REV. 271, 320–21 (2007).
[55] *Id.* at 320.
[56] *See* Nat'l Comics Publ'ns, Inc. v. Fawcett Publ'ns, Inc. 191 F.2d 594, 597–98 (2d Cir. 1952).
[57] *See id.*
[58] *See* Loren, *supra* note 55, at 320.
[59] *Nat'l Comics Publ'ns, Inc.*, 191 F.2d at 598.
[60] The most analogous doctrine we have is the doctrine of limited abandonment, whose existence is questionable at best. As Loren points out, "[o]nly a handful of judicial opinions have addressed the possibility of a limited abandonment of copyright. . . . The cases merely cite to each other without any case offering a persuasive justification for barring limited abandonment." Loren, *supra* note 55, at 321. But even this doctrine requires an overt act, which does not solve the orphan works problem. *Id.* at 322.

propose a doctrine to fill the void created by the intersection of changing copyright law and digital technology: the orphan theory of abandonment.

II. THE ORPHAN THEORY OF ABANDONMENT

¶24 The law of adverse possession promotes the free transferability of *real and personal* property.[61] *Intellectual* property, however, has no concomitant. This should not be a surprise, because strictly applying adverse possession to intellectual property could cause disastrous results. But the policy behind adverse possession—that free transferability of property is a good thing—is certainly applicable to intellectual property. To bring the argument full circle, I contend that the orphaned theory of abandonment is justified by the following policy: that the law should promote the free transferability of intellectual property.

¶25 The orphan theory of abandonment, which I refer to interchangeably as orphan abandonment, would be a two-stage defense. First, the infringer cannot raise the defense unless he has spent three years searching for the true copyright owner through the "reasonable exercise of due diligence."[62] Second, the consequence to the copyright owner of a successful orphan abandonment defense depends on when the suit was filed: if the copyright owner files suit within ten years of when he first knew or should have known of the infringement, then orphan abandonment is merely an affirmative defense to *infringement*; after that time, however, orphan abandonment would constitute a complete defense to *validity*. In its latter form, the orphan abandonment defense would produce the same results as a successful assertion of the original abandonment defense: the "exclusive rights" over the work lapse to the public domain.

¶26 To prove orphan abandonment, a defendant should be required to show:

1. The copyright is owned by an individual or entity that could not be identified in three years[63]
2. through the reasonable exercise of due diligence.

¶27 The orphan theory protects every conceivable interest[64] while fixing a massive problem with contemporary copyright law. It plugs the hole left by the statute of limitations' "continuing violation" theory[65] by kicking in at

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[61] WILLIAM B. STOEBUCK & DALE A. WHITMAN, THE LAW OF PROPERTY 860 (3d ed. 2000).
[62] *See infra* ¶ 26.
[63] The author's proposal is for three years. However, any term of years that remedies the concerns raised *supra* ¶¶ 16–22 is sufficient.
[64] Namely, those of the author, industry, and the public.
[65] *See supra* ¶ 18.

the moment of the first infringing act. It also brings back a form of forfeiture without resurrecting the notice requirement—which is banned by the Berne Convention.[66] Like fair use, the orphan theory of abandonment lets courts balance the unique facts of each case with the subjective element of "reasonable exercise of due diligence." Finally, the orphan theory of abandonment allows the dissemination of works whose copyright has—but for the absence of some "overt act"— been abandoned.[67]

¶28 The defense also contains many internal safeguards. For instance, to trigger the clock for orphan abandonment, it is not enough that the defendant infringe on the plaintiff's copyright. Such activity could occur in the privacy of the defendant-infringer's home where the plaintiff could never be reasonably expected to know of the defendant's infringing conduct. Therefore, the clock does not start until the copyright owner should know of the infringing act "through the reasonable exercise of due diligence."[68] This occurs after the defendant conducts an exhaustive three-year search for the true copyright owner.[69] Only after that three-year period can a defendant infringe and seek refuge through the orphan abandonment defense. This is comparable to adverse possession, which requires the possessor to maintain continuous possession for a specific period of time.[70] In the case of orphan abandonment, the defendant must continuously search for three years before having a colorable orphan abandonment defense. The defendant cannot merely search for one month, wait thirty-five more, and then utilize the defense. Additionally, the "reasonable due diligence" requirement coupled with the ten-year delay between the first infringing act and when the copyrighted work lapses into the public domain protects a copyright owner from suffering inadvertent forfeiture.

¶29 Moreover, the orphan theory of abandonment mitigates the monopoly problem while protecting the rights of copyright owners. After exercising three to ten years of due diligence, the defense protects *only the defendant* in that particular suit against infringement. But after ten years, the defense functions as a complete defense to validity, vesting the work in the public domain. This rule avoids the monopoly problem introduced at the beginning of this iBrief.

¶30 Google—which is the subject of many contemporary monopoly concerns—was willing to suffer a nine-figure class action copyright infringement suit in order to get Google Books online. If the orphan theory

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[66] 17 U.S.C. § 401(a) (2006); *See* Berne Convention Implementation Act, Pub. L. No. 100-568, 102 Stat. 2853 (1988).
[67] Loren, *supra* note 55, at 319–20.
[68] *See supra* ¶ 24–25.
[69] *Id.*
[70] STOEBUCK & WHITMAN, *supra* note 62, at 859.

of abandonment did not treat defendants differently based on how hard they tried to find the copyright owner, then defendants like Google would reap a de facto copyright-like monopoly for simply being the first mover. At the same time, however, Google should have some incentive to be the first mover. Having a ten year period between when Google begins its exhaustive search for the copyright owner and when the work enters the public domain should be sufficient. This will give Google a head start but not an uncontestable monopoly.

¶31 The elements of the orphan theory of abandonment also respond to and rectify the deficiencies of the contemporary defenses discussed in Part I.[71] In particular, the defense fuses the continuity requirement of adverse possession (the three-year exhaustive search) with the overt act requirement (the reasonable exercise of due diligence) in copyright abandonment.

¶32 This three-year requirement prevents copyright poachers from stripping a work of its copyright protection by simply waiting for a copyright owner to disappear (i.e., die, fall off the grid, etc.).[72] This requirement is similar to the adverse possession requirement of continuous possession. The adverse possessor must continuously possess the property throughout the statutory period. Similarly, a defendant cannot begin infringing, and then search for the copyright owner. Rather, the process is reversed: the defendant must first exercise reasonable due diligence to find the copyright owner for three years. Only after that period may a defendant employ this proposed defense to copyright infringement.

¶33 The second element dovetails with the first: it requires that the defendant search for the copyright owner and fail, despite his "reasonable exercise of due diligence." Although it is a higher standard than good faith, it does not require the defendant to expend every possible resource in his search. Rather, the defendant need only expend resources commensurate with the value of the work for which he sought a license.

¶34 Economic standards like these are not new to copyright law. Courts frequently employ a market-based analysis under the fair use defense's fourth factor, which focuses on the potential market for the work.[73] The analysis for this element of orphan abandonment is not much different: When the market for the work is strong, the defendant should invest significant resources to find the copyright owner before the orphan abandonment defense should apply. Conversely, when the market for the work is virtually non-existent, the defendant should not be expected to spend millions of dollars in order to find the copyright owner.

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[71] *See supra* Part I.
[72] *See supra* ¶¶ 24–25.
[73] 17 U.S.C. § 107(4).

¶35 Concededly, other methods could work to rectify the orphan works problem without broadening the scope of the abandonment doctrine.[74] Such methods include a stricter registration system or a different interpretation of the statute of limitation triggers. Both of these approaches, however, have significant flaws. For example, if the United States adopted a stricter registration system, it would likely run afoul of its obligations under the Berne Convention.

¶36 More moderate thinkers who reject the orphan theory as too harsh would prefer to modify the statute of limitation triggers. The problem with this approach, however, is that the statute of limitations only provides a defense to *infringement*; it does not act as a complete bar to *validity*. Altering the statute of limitations, therefore, does not solve the monopoly problem because the statute of limitations shuts out second infringers. In other words, let us say that Google is infringing with its Google Books program and successfully runs the statute of limitations for ten years—seven years longer than is necessary under current law. Let us further assume that the publisher of the infringed work sues Google for infringement and loses on statute of limitations grounds. If a competitor, let us say Amazon, wants to do the same thing, the statute of limitations *as to Amazon* starts at the moment Amazon starts infringing, which may be long after Google is already online disseminating the works in question. Thus, Google's acts will be considered non-infringing but Amazon will be deemed an infringer because the statute only begins to run once Amazon starts infringing. The orphan theory solves this problem by forfeiting the copyright owner's work to the public domain after ten years. This forfeiture is necessary to mitigate the monopoly harm that exists under either the status quo or under a system with different statute of limitations triggers.

CONCLUSION

¶37 Admittedly, it is not likely that an orphan theory of abandonment will gain traction in the United States because of the country's adherence to the Berne Convention.[75] However, there is nothing in the Berne Convention Implementation Act that specifically bars the defense. To the contrary, section 3 of the BCIA provides,

> The provisions of the Berne Convention shall be given effect under title 17, as amended by this Act, and any other relevant provision of Federal or State law, *including the common law*; and shall not be

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[74] *But see* Loren, *supra* note 55 (proposing a similar defense: limited abandonment).

[75] Loren, *supra* note 55, at 323 ("The Copyright Act today, as well as international treaties concerning copyright law, make[s] it impossible to inadvertently lose copyright protection.").

> enforceable in any action brought pursuant to the provisions of the Berne Convention itself.[76]

¶38 The size and scope of the orphan works problem is still not fully understood. With more than a century of copyright protection for most works, it is doubtful that the problem is a small one. The confluence of digital technology, extended copyright terms, and international harmonization requires legislators and judges alike to rethink the limits of copyright protection. Under present law, works that have been all but abandoned receive full copyright protection. This paradigm benefits no one. Perhaps this proposal, in addition to others, will ignite a much needed debate within the judiciary on the status of orphan works.

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[76] Berne Convention Implementation Act, Pub. L. No. 100-568, 102 Stat. 2853 (1988) (emphasis added).