

# THE GREATEST BOOK YOU WILL NEVER READ: PUBLIC ACCESS RIGHTS AND THE ORPHAN WORKS DILEMMA

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## ABSTRACT

*Copyright law aims to promote the dual goals of incentivizing production of literary and artistic works, and promoting public access and free speech. To achieve these goals, Congress has implemented a policy that acknowledges the rights of both the copyright holder and the public, which vest with the fixation of the work. However, as Congressional action has strengthened copyright protection, the rights of the public have been narrowed. Orphan works – works to which the copyright owner cannot be located or identified – present a unique problem, in that achieving free access and use of the works is often impossible. This note argues that the public has a recognizable right in both gaining access to and using orphan works – a right which emanates from, but is tangential to, the First Amendment right to free speech.*

## INTRODUCTION

The framework of the United States' current copyright regime is founded largely on a multitude of balancing tests. At its most fundamental level, copyright protects the expression of an idea – not the idea itself – in order to strike a balance between granting the public free access to creative expression and protecting the interests of that expression's creator.<sup>1</sup> Yet implicit within this simple baseline are myriad other intellectual seesaws that Congress and courts have ridden to arrive at this idea/expression dichotomy.<sup>2</sup>

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<sup>1</sup> See *Franklin Mint Corp. v. Nat'l Wildlife Exch., Inc.*, 575 F.2d 62, 64 (3d Cir. 1978) (“[T]o reconcile the societal interests inherent in the copyright law, copyright protection has been extended only to the particular *expression* of an idea and not the idea itself.”).

<sup>2</sup> See Glenn S. Lunney, Jr., *Reexamining Copyright's Incentives-Access Paradigm*, 49 VAND. L. REV. 483, 485 (1996) (“[D]efining copyright's proper scope has become a matter of balancing the benefits of broader protection, in the

On one end of the seesaw, an economic incentive model speaks strongly for more extensive protection of copyright holders. The exclusive rights inherent within copyright protection create a market, which allows authors to obtain financial reward for their work.<sup>3</sup> This economic model dictates that the more the copyright holder is afforded the exclusive rights to his work, the more he will be motivated to produce copyrightable works.<sup>4</sup> Put simply, “[t]he greater the protection, the greater the reward; the greater the reward, the greater the incentive to create new works; and the greater the incentive to create new works, the greater the number of new works created.”<sup>5</sup>

On the other end of the seesaw, critical free speech interests keep the copyright regime from exacting a stronger hold over authors’ works. The First Amendment seeks to “maximize the dissemination of information,” while copyright law seeks to “restrict the ability of people to disseminate speech.”<sup>6</sup> Thus, courts have interpreted the First Amendment as an inherent limitation on the copyright regime, and a possible check on Congress’s power to expand it.<sup>7</sup> Other principles of the creative process serve to limit copyright’s hold as well. For example, the truism that all works of authorship build in some part on previous creations necessitates the allowance of some borrowing from other works to further creative expression.<sup>8</sup>

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form of increased incentive to produce such works, against its costs, in the form of lost access to such works.”); *see also* *Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151, 156 (1975) (“The limited scope of the copyright holder’s statutory monopoly . . . reflects a balance of competing aims upon the public interest[.]”).

<sup>3</sup> Raymond Shih Ray Ku, Jiayang Sun, & Yiyang Fan, *Does Copyright Promote Creativity?: An Empirical Study of Copyright’s Bounty*, 62 VAND. L. REV. 1669, 1671 (2009).

<sup>4</sup> *Id.*

<sup>5</sup> *Id.*

<sup>6</sup> Erwin Chemerinsky, *Balancing Copyright Protections and Freedom of Speech: Why the Copyright Extension Act is Unconstitutional*, 36 LOY. L.A. L. REV. 83, 83 (2002).

<sup>7</sup> *See id.* at 87; *see also* *Eldred v. Ashcroft*, 537 U.S. 186, 219 (2003) (finding that the “idea/expression dichotomy strike[s] a definitional balance between the First Amendment and the Copyright Act by permitting free communication of facts while still protecting an author’s expression.”) (quoting *Harper & Row Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 556 (1985)).

<sup>8</sup> *See* Lunney, *supra* note 3, at 509 (“Because an author will inevitably reuse some elements that have appeared previously in earlier copyrighted works, allowing a trier of fact to find infringement based upon the reappearance of such

Engaging in this delicate balancing act, Congress and the courts fashioned the copyright regime, all the while asserting a decidedly pro-public interest view of copyright law.<sup>9</sup> The Supreme Court has explicitly declared that the purpose of copyright law, as intended by the framers of the Constitution, is not primarily to protect the author's rights, but to "stimulate artistic creativity for the general public good."<sup>10</sup> Thus, the copyright provisions reached by Congress, and the monopolistic privileges they confer, must ultimately serve to further this public good.<sup>11</sup>

In furtherance of this purpose, Congress has created an inherently limited copyright doctrine.<sup>12</sup> Only those uses expressly laid out as "exclusive" are born with an original work and vest in the author at the moment of fixation for the duration of copyright.<sup>13</sup> At the same moment, numerous rights vest in the public – rights to ideas, quotes, fair uses, nominative uses, parodies, and many more.<sup>14</sup> The public retains not merely those rights reserved explicitly by statute, but also those created by the nature of copyright itself. The idea/expression dichotomy ensures that the idea embedded within the work is effectively gifted to the world at the time of fixation – once it is revealed, it is impossible to protect again.<sup>15</sup> Thus, at the time of publication, the public has actually gained

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elements would unduly limit the ability of later authors to exercise their own creativity and would threaten the creation of future works.”).

<sup>9</sup> See *Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151, 156 (1975) (“Creative work is to be encouraged and rewarded, but private motivation must ultimately serve the cause of promoting broad public availability of literature, music, and the other arts.”); see also H.R. REP. NO. 60-2222, at 7 (1909) (“In enacting a copyright law Congress must consider . . . two questions: First, how much will the legislation stimulate the producer and so benefit the public; and second, how much will the monopoly granted be detrimental to the public?”).

<sup>10</sup> *Twentieth Century Music Corp.*, 422 U.S. at 156; see *Feist Publ'ns, Inc. v. Rural Tel. Serv. Co., Inc.*, 499 U.S. 340, 349 (1991) (“[T]he primary objective of copyright is not to reward the labor of authors but to promote the Progress of Science and useful Arts[.]”).

<sup>11</sup> *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 429 (1984).

<sup>12</sup> See *id.* (“[This] limited grant is a means by which an important public purpose may be achieved.”).

<sup>13</sup> 17 U.S.C. § 106 (2010) (The six exclusive rights, in short form, are (1) to reproduce the work; (2) to prepare derivative works based on the work; (3) to distribute copies of the work to the public; (4) to perform the work publicly; (5) to display the work publicly; (6) to perform sound recordings publicly by means of a digital transmission).

<sup>14</sup> 17 U.S.C. §§ 107–22.

<sup>15</sup> See *Eldred v. Ashcroft*, 537 U.S. 186, 219 (2003) (“[E]very idea, theory, and fact in a copyrighted work becomes instantly available for public exploitation at the moment of publication.”); see also *Int'l News Serv. v. Assoc. Press*, 248

something quite tangible: the right to use and build upon a new idea, and to take certain expression and use it in any number of ways.

The ways in which the public may make use of the work, taken together, comprise one definition of that elusive term, the “public domain.”<sup>16</sup> Liberally defining the public domain as such, and not merely as those works that have been freed from copyright restraints, acknowledges the creation of a powerful bundle of rights for the public.<sup>17</sup> Indeed, this is exactly what Congress wanted to emphasize in the creation of the statute, and what courts have repeatedly stressed. Copyright provides only limited rights to the holder himself. Outside of those limited rights, the rights to the use of the information automatically vest in the public.<sup>18</sup> This note argues that this explicit division of rights is undermined by provisions Congress has repeatedly enacted that sequester orphan works – and the information held within – out of the public’s reach.

## I. ORPHAN WORKS

### A. The Problem in General

Congress’s 2008 Report on Orphan Works defines the orphan works problem as a situation in which “the owner of a copyright cannot be identified and located by someone who wishes to make use of the work in a manner that requires permission of the copyright owner.”<sup>19</sup> Because of copyright’s division of rights between the copyright holder and the public, any person who wants to copy or borrow from a work must first seek permission from the copyright holder. However, for a

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U.S. 215, 250 (1918) (“The general rule of law is, that the noblest of human productions – knowledge, truths ascertained, conceptions, and ideas – become, after voluntary communication to others, free as the air to common use.”) (Brandeis, J., dissenting).

<sup>16</sup> See Yochai Benkler, *Free as the Air to Common Use: First Amendment Constraints on Enclosure of the Public Domain*, 74 N.Y.U. L. Rev. 354, 362 (1999) (“[T]he public domain is the range of uses of information that any person is privileged to make absent individualized facts that make a particular use by a particular person unprivileged.”).

<sup>17</sup> See *id.* at 363 (“[A]nyone is privileged to use information in ways that are in the public domain, and absent individualized reasons, government will not prevent those uses.”).

<sup>18</sup> See *id.* at 358 (“[T]he government has prohibited certain uses or communications of information to all people but one, the owner. The public domain, conversely, is the range of uses privileged to all.”).

<sup>19</sup> U.S. COPYRIGHT OFFICE, REPORT ON ORPHAN WORKS 1 (2006).

number of reasons, ownership information can be difficult to find.<sup>20</sup> A work might be missing an author's identification, a work's author might be deceased, with heirs unknown, or a work's publisher might have gone out of business with assigned rights unknown.<sup>21</sup> Even if the author can be identified, often there is no corresponding contact information, or, if contacted, the author may not respond.<sup>22</sup> Those works whose copyright information cannot be located are called "orphan works."

Given the size of the body of copyrighted works, it follows logically that there exist some works that have near-untraceable origins. Despite this certainty, the inability to locate a copyright holder does not protect users from the "strict liability hammer of copyright law."<sup>23</sup> As such, a common situation often arises where a creator seeks to incorporate an older work into a new work, and is willing to seek permission, but is not able to identify or locate the copyright owner in order to do so.<sup>24</sup> In such circumstances, though the creator's use may not infringe copyright, under the current system the copyright in the work is still valid and enforceable, and the risk of an infringement claim cannot be completely eliminated.<sup>25</sup> With the high costs of litigation, and the inability of most creators, scholars, and small publishers to bear those costs, often "orphan works often are not used – even where there is no one who would object to the use."<sup>26</sup> Because of this, "[w]hatever value those works originally had as foundational materials for other works is then lost, as future use is chilled by the possibility of litigious 'parents' returning to protect their (previously valueless) orphan work."<sup>27</sup>

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<sup>20</sup> Olive Huang, *U.S. Copyright Office Orphan Works Inquiry: Finding Homes for the Orphans*, 21 BERKELEY TECH. L.J. 265, 265 (2006).

<sup>21</sup> Comment of the Carnegie Mellon Univ. Libraries, *In re Orphan Works*, No. 537 (Mar. 22, 2005) at 2, available at <http://www.copyright.gov/orphan/comments/OW0537-CarnegieMellon.pdf>.

<sup>22</sup> *Id.* at 3.

<sup>23</sup> *The "Orphan Works" Problem and Proposed Legislation: Hearings Before the Subcomm. on Courts, the Internet, and Intellectual Property of the H. Committee of the Judiciary*, 110th Cong. 131, at 17 (2008) (statement of Marybeth Peters, The Register of Copyrights), available at <http://www.copyright.gov/docs/regstat031308.html>.

<sup>24</sup> *Id.* at 16. For a few telling examples of abandoned projects, see Pamela Brannon, *Reforming Copyright to Foster Innovation: Providing Access to Orphaned Works*, 14 J. INTELL. PROP. L. 145, 146–47 (2006).

<sup>25</sup> Notice of Inquiry, 70 Fed. Reg. 3739 (Jan. 26, 2005).

<sup>26</sup> *Id.*

<sup>27</sup> Keith Porcaro, Student Note, *Private Ordering and Orphan Works: Our Least Worst Hope?* 2010 DUKE L. & TECH. REV. 015 at ¶6.

## B. Intensification of the Orphan Works Problem

Though orphan works have long been an unfortunate byproduct of the United States' copyright framework, Congress's recent actions have created both a heightened awareness of the problem and an escalation of its scale.<sup>28</sup> First, in 1989, Congress removed the condition that published works must contain a copyright notice.<sup>29</sup> Since works now have no registration requirement, no repository exists to determine and locate authors of works. 1992 provided perhaps the most significant contributor to the explosion of the orphan works problem, with the removal of the last vestiges of the renewal requirement.<sup>30</sup> This move shifted copyright from an "opt-in" system, which required content creators to actively maintain copyright, to an "opt-out" system.<sup>31</sup> Thus, works that might have entered the public domain due to a low commercial value – providing little incentive to renew – now remain covered by copyright.<sup>32</sup> Two years later, under the Berne Convention, many foreign copyrights were extracted from the public domain and brought back under copyright protection.<sup>33</sup> These foreign works present the unique challenge of tracking down copyright owners who are both in another country and under the assumption that their work is not under copyright protection. Against this backdrop of decreased formalities has been a steady increase in the length of the copyright term itself, with the most recent, the 1998 Sonny Bono Copyright Term Extension Act, extending the term to 70 years after the author's death.<sup>34</sup> The net result of these amendments and this "virtually perpetual" term<sup>35</sup> is that more and more copyright owners go missing.

At the same time, the need to acquire permission for use of a work has expanded, exacerbating the orphan works problem.<sup>36</sup> The Digital Millennium Copyright Act has placed additional restrictions on fair use, particularly for digital content.<sup>37</sup> Copyright extension imposes a

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<sup>28</sup> Huang, *supra* note 21, at 268 ("The orphan works problem is largely a by-product of developments in U.S. copyright laws that have increased the strength and duration of protection for primary creators.").

<sup>29</sup> U.S. Copyright Office, *Circular 3 Copyright Notice* (2011).

<sup>30</sup> U.S. Copyright Office, *Circular 15 Extension of Copyright Terms* (2010).

<sup>31</sup> Kahle v. Gonzales, 487 F.3d 697, 699 (9th Cir. 2007).

<sup>32</sup> *Id.*

<sup>33</sup> *Id.*

<sup>34</sup> Eldred v. Ashcroft, 537 U.S. 186, 242–43 (2003) (Breyer, J., dissenting).

<sup>35</sup> *Id.* at 243.

<sup>36</sup> CHRISTINE L. BORGMAN, SCHOLARSHIP IN THE DIGITAL AGE: INFORMATION, INFRASTRUCTURE AND THE INTERNET 108 (MIT Press, 2007).

<sup>37</sup> *Id.*

permissions requirement – “not only upon potential users of ‘classic’ works that still retain commercial value, but also upon potential users of *any other work* still in copyright.”<sup>38</sup> Thus, a culture of permissions has arisen that can inhibit or prevent the use of old works, and is only increasing in scale.<sup>39</sup> As one scholar puts it, “these idiosyncrasies in American copyright law conspire to create orphan works.”<sup>40</sup>

Further, and perhaps most important, the wealth of knowledge locked away within orphan works is literally disintegrating. A study done by Carnegie Mellon suggests that over half of the books published in the United States since 1923 are now out of print.<sup>41</sup> Older books printed on non-acid-free paper will eventually dissolve, and many out of print books are already in advanced states of decay – a process that non-digital preservation efforts cannot remedy.<sup>42</sup> Similarly, orphan films constitute the majority of the Library of Congress’s impressive collection.<sup>43</sup> In 1994, the Librarian of Congress estimated that 80% of films from the 1920’s, and 90% of the films from the 1910’s had already decayed beyond repair.<sup>44</sup> These orphan films cannot be widely viewed or distributed due to uncertainty about copyright status. By the same token, digitization efforts are stymied, locking these works into a perpetual state of decay remedied only by primitive restoration techniques.<sup>45</sup> As transaction costs and the difficulty of locating copyright owners inhibit the ability of creators to build off of previous works, the increasingly poor condition of these works will further deter their use.<sup>46</sup>

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<sup>38</sup> *Eldred v. Ashcroft*, 537 U.S. 186, 249 (2003) (Breyer, J., dissenting).

<sup>39</sup> *See id.* at 250, 252.

<sup>40</sup> Brannon, *supra* note 25, at 158.

<sup>41</sup> Comment of the Carnegie Mellon Univ. Libraries, *supra* note 22, at 3; *see also* William M. Landes & Richard A. Posner, *Indefinitely Renewable Copyright*, 70 U. CHI. L. REV. 471, 474 (2003) (“[O]f 10,027 books published in the United States in 1930, only 174, or 1.7 percent, were still in print in 2001.”).

<sup>42</sup> Comment of the Carnegie Mellon Univ. Libraries, *supra* note 22, at 6.

<sup>43</sup> Duke University School of Law Center for the Study of the Public Domain, *Access to Orphan Films: Submission to the Copyright Office* (2005), <http://www.law.duke.edu/cspd/pdf/cspdorphanfilm.pdf>.

<sup>44</sup> REDEFINING FILM PRESERVATION: A NATIONAL PLAN; RECOMMENDATIONS OF THE LIBRARIAN OF CONGRESS IN CONSULTATION WITH THE NATIONAL FILM PRESERVATION BOARD 23 (Annette Melville & Scott Simmon eds., 1994).

<sup>45</sup> *See* Pamela Samuelson, *Toward a “New Deal” for Copyright in the Information Age*, 100 MICH. L. REV. 1488, 1494 (2002) (explaining that since creating a digital work “requires making a copy in the transmission process,” digitization requires consent of the copyright holder).

<sup>46</sup> Porcaro, *supra* note 28, at 16.

### C. Traditional Arguments Urging for Orphan Works Reform

A number of arguments have been made condemning the rigid copyright policy responsible for keeping orphan works off limits. These arguments generally take one of two forms. First, an economic argument holds that orphan works undermine copyright's incentive to create, as additional transaction costs are placed on subsequent creators wishing to use material from existing works.<sup>47</sup> Second, critics point out that orphan works do not "promote the progress"<sup>48</sup> as prescribed by both the Constitution and the copyright statute.<sup>49</sup> The risk of potential liability, distant but still harsh, impedes rather than encourages creative efforts. When the author cannot be found, subsequent creators are dissuaded from creating new works that incorporate those existing works, resulting in a net loss for the creative wealth of society.

These arguments herald more permissive use of orphan works as a way to align existing law with the traditional tenets of copyright law. Those tenets promote the creation of a strong incentive structure for creators to produce works, and further the principle that borrowing is inherent and vital to the creative process. Stated another way, these arguments focus on the *disutility* of the orphan works sitting "lost in the bowels of a few great libraries"<sup>50</sup> and not on the active right of the public to access them.

But there is another fundamental argument that must be raised when addressing the orphan works problem. If orphan works' copyright owners are given the same rights as any other works' owners, then the public must be guaranteed the same rights to orphan works as they are to any copyrighted work. Yet in practice, because copyright law encloses orphan works to the point of inaccessibility, the public is in fact deprived of the rights granted to them.

## II. PUBLIC RIGHTS AND THE PUBLIC DOMAIN

Courts have been decisive in their role as protectorates of creative dissemination, repeatedly demonstrating their interest in preserving the public's right to access and make use of the vast body of

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<sup>47</sup> See generally, Sami J. Valkonen & Lawrence J. White, *An Economic Model for the Incentive/Access Paradigm of Copyright Propertization: An Argument in Support of the Orphan Works Act*, 29 HASTINGS COMM. & ENT. L.J. 359 (2007).

<sup>48</sup> U.S. CONST. art. I, § 8, cl. 8.

<sup>49</sup> See generally, Brannon, *supra* note 25.

<sup>50</sup> Miguel Helft, *Google's Plan for Out-of-Print Books is Challenged*, N.Y. TIMES, Apr. 3, 2009, at A1, available at [http://www.nytimes.com/2009/04/04/technology/internet/04books.html?\\_r=1](http://www.nytimes.com/2009/04/04/technology/internet/04books.html?_r=1).



creative works available. The Eleventh Circuit explained that through copyright's structure, "the public is protected in two ways: the grant of a copyright encourages authors to create new works . . . and the limitation ensures that the works will eventually enter the public domain, which protects the public's right of access and use."<sup>51</sup> However, nowhere in the copyright statute is the "public domain" defined.<sup>52</sup>

#### A. Defining the Public Domain

Defining the parameters of the public domain has proven to be a difficult task. One interpretation views the public domain, and the public rights that it embodies, as materially undeserving of the otherwise expansive rights granted to the copyright owner.<sup>53</sup> Another view takes the position that the intellectual property regime grants the author only those "limited rights" delineated in the statute, leaving all other rights to the public untouched.<sup>54</sup> In sum, the operative question remains whether the public domain is "simply whatever is left over after various tests of legal protection have been applied . . . the 'negative' of whatever may be protected" or in fact something positive, something "of the form instead of just the background."<sup>55</sup>

As Congress's express mission in creating the copyright statute was to "promote the Progress of Science and the useful Arts,"<sup>56</sup> it seems clear that the public benefit, if not the public domain per se, was at the forefront of the founders' minds. Still, to go a step further and take the position that the public domain is a positive form, there must be some public policy argument or legal principle compelling enough to give the public domain "a life of its own."<sup>57</sup> Filling this void, a solution emerges from a rarely articulated third viewpoint that diverges from the dichotomy of a "negative" versus "positive" form explained above. This view posits that the public's right to access and use copyrighted works

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<sup>51</sup> *Suntrust Bank v. Houghton Mifflin Co.*, 268 F.3d 1257, 1262 (11th Cir. 2001).

<sup>52</sup> Elizabeth Townsend Gard, *Copyright Law v. Trade Policy: Understanding the Golan Battle Within the Tenth Circuit*, 34 COLUM. J.L. & ARTS 131, 131 (2011).

<sup>53</sup> See, e.g., Benjamin Kaplan, *An Unhurried View of Copyright: Proposals and Prospects*, 66 COLUM. L. REV. 831 (1966).

<sup>54</sup> See, e.g., Jessica Litman, *The Public Domain*, 39 EMORY L.J. 965 (1990).

<sup>55</sup> Edward Samuels, *The Public Domain in Copyright Law*, 41 J. COPYRIGHT SOC'Y 137, 137 (1993).

<sup>56</sup> U.S. CONST. art. I, § 8, cl. 8.

<sup>57</sup> Samuels, *supra* note 56.

derives from elsewhere in the Constitution, such as the First Amendment right to free speech.<sup>58</sup>

Recently, the Supreme Court heard oral arguments on *Golan v. Holder*, in which the plaintiffs – a group of orchestra conductors, educators, performers, film archivists and motion picture distributors – argued that the First Amendment should be used as a mechanism to hold provisions of the Berne Convention unconstitutional. These provisions restored a large number of U.S. copyrights for foreign works that never previously had U.S. protection.<sup>59</sup> The plaintiffs claimed that they had depended for years on these previously public domain works and were cut off from those opportunities when Congress granted the works a new copyright.<sup>60</sup> They argued that the provisions were unduly restrictive of free speech, and violated the First Amendment under an intermediate scrutiny analysis.<sup>61</sup>

This will not be the first time that the Court has addressed copyright concerns under a First Amendment framework, and the free speech issues at work here are certainly compelling.<sup>62</sup> However, approaching the public domain through this lens may not solve the problem of orphan works. Technically, free speech relating to orphan works is just as “free” as it is with any copyrighted work – the same laws apply, and with them convey the same rights. This is a different situation than in *Golan*, where Congress’s affirmative legislative actions directly affected the channels of free expression.

The problem remains, however, that uniformly applying the current structure of the law effectively locks away orphan works – and all uses thereof – in a box that current copyright policy does not have the tools to open. Access to the work itself, either because the work is no longer being distributed or has literally fallen apart, is one of the most difficult hurdles to overcome in any attempt to use an orphan work. Someone who merely wants to *read* a book, which might then inspire him to write his own story or conduct his own research, cannot do so

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<sup>58</sup> See *Golan v. Holder*, 609 F.3d 1076 (10th Cir. 2010) (reviewing restoration provisions of the Uruguay Rounds Agreement under First Amendment analysis); *Kahle v. Gonzales*, 487 F.3d 697 (9th Cir. 2007) (reviewing automatic renewal provision under First Amendment analysis); *Eldred v. Ashcroft*, 537 U.S. 186, 221 (2003) (recognizing that copyrights are not “categorically immune from challenges under the First Amendment”). It should be noted that none of these cases have held that the contested legislation violated a First Amendment right.

<sup>59</sup> *Golan*, 609 F.3d at 1081.

<sup>60</sup> *Id.* at 1082.

<sup>61</sup> *Id.* at 1083.

<sup>62</sup> See note 59, *supra*, and accompanying text.

because he physically cannot access the book.<sup>63</sup> Use of a work for research purposes, a well-established fair use,<sup>64</sup> is similarly hindered by the orphan works problem, with many researchers abandoning their projects as transaction costs increase.<sup>65</sup> No scholar would argue that either of these uses constitute violations of copyright, yet they are de facto prohibited by the current structure of the law.

If this were a traditional free speech issue, a constitutional problem would arise only if the second-comer's speech were abridged – that is, if he is prevented from creating a new work. However, the structure of copyright law not only prohibits that second work from being created, but stops the flow of information from the orphan work to the potential author in the first place. As such, the potential author has essentially been stripped of crucial rights that copyright provides. He cannot access the information within, he cannot ruminate or extrapolate ideas from it, read it to his children – purely because he cannot access it. This creates a more tenuous free speech claim, one that implicates the connected rights of access to information and the right to listen.

## B. Access Rights

The First Amendment right to free speech is meaningless without a way to exercise it.<sup>66</sup> Though second-comers are technically not forbidden from making speech that utilizes orphan works, the ability to pursue such speech possibilities is so limited that the right itself is rendered insignificant. To remedy this injustice, this note proposes that a modified right of access be recognized in the public, deriving from the common law principles of a right to access information and a right to listen.

The First Amendment right of access flows from the First Amendment's guarantees of the freedoms of speech and press.<sup>67</sup> Though

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<sup>63</sup> See, e.g., Comment of Tracy Baker, Assistant Head of Reference, Minn. Historical Soc'y, to Jule L. Sigall, Assoc. Register for Policy and Int'l Affairs, Copyright Office (Mar. 10, 2005), <http://copyright.gov/orphan/comments/OW0253-BakerT.pdf> (explaining that her library owns many historical films with little or no credit information, which they are unable to make available to researchers).

<sup>64</sup> 17 U.S.C. § 107 (2010).

<sup>65</sup> Brannon, *supra* note 25, at 149.

<sup>66</sup> See *Lamont v. Postmaster Gen.*, 381 U.S. 301, 308 (1965) (“[T]he protection of the Bill of Rights goes beyond the specific guarantees to protect from congressional abridgment those equally fundamental personal rights necessary to make the express guarantees fully meaningful.”) (Brennan, J., concurring).

<sup>67</sup> Meliah Thomas, *The First Amendment Right of Access to Docket Sheets*, 94 CAL. L. REV. 1537, 1566 (2006).

the right is currently recognized only in limited circumstances, as a “right to inspect and copy public records and documents, including judicial records and documents,”<sup>68</sup> the right is still developing, and the full scope of its application remains to be seen.<sup>69</sup> The right of access was first established by the Supreme Court in *Nixon v. Warner Communications*,<sup>70</sup> and firmly upheld in *Richmond Newspapers, Inc. v. Virginia*,<sup>71</sup> in which the Court recognized the media’s right of access to criminal trials. In upholding the right in *Richmond*, the Court cited broad principles, including a “tradition of openness” and the need to promote accurate fact-finding.<sup>72</sup> Further, the Court acknowledged that the right of access supports the crucial value that “the First Amendment . . . guarantees not only free speech, but public access to the information that makes speech meaningful.”<sup>73</sup>

Justice Brennan, concurring with the majority in *Richmond*, acknowledged the theoretically endless nature of the access right being proposed. “Virtually any action could be justified by the need to gather information, and virtually any restriction could be challenged as resulting in ‘decreased data flow.’”<sup>74</sup> To level this slippery slope, Brennan established a two-prong experience and logic test that weighs the access right against countervailing interests.<sup>75</sup>

The first prong of the test requires that the access claim be supported by historical practice.<sup>76</sup> Claims are weightier when there is an “enduring and vital tradition of public entrée to particular proceedings or information,” because “a tradition of accessibility implies the favorable judgment of experience.”<sup>77</sup> Under the second prong, the value of access sought must be “measured in specifics.”<sup>78</sup> Access should not be deemed unequivocally valuable in its own right, but should be assessed in terms of the value of access to the particular process at hand.<sup>79</sup>

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<sup>68</sup> *Nixon v. Warner Communications*, 435 U.S. 589, 597 (1978).

<sup>69</sup> See generally, Raleigh Hannah Levine, *Toward a New Public Access Doctrine*, 27 *CARDOZO L. REV.* 1739, 1745 (2006) (relating the “fundamentally inconsistent” access doctrine jurisprudence).

<sup>70</sup> *Nixon*, 435 U.S. at 597.

<sup>71</sup> *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555 (1980).

<sup>72</sup> *Id.* at 569–71, 592 (Brennan, J., concurring).

<sup>73</sup> See Levine, *supra* note 70, at 1748.

<sup>74</sup> *Id.*

<sup>75</sup> See *Richmond*, 448 U.S. at 588–89 (Brennan, J., concurring).

<sup>76</sup> *Id.* at 589.

<sup>77</sup> *Id.*

<sup>78</sup> *Id.*

<sup>79</sup> *Id.*

In *Richmond*, the Court related the public right of access to the right to listen, or to receive information and ideas.<sup>80</sup> The Court held that the First Amendment “prohibit[s] government from limiting the stock of information from which members of the public may draw.”<sup>81</sup> The Supreme Court and scholars have also since acknowledged that the right to hear or receive information is crucial for the effective operation of the First Amendment.<sup>82</sup> “The marketplace of ideas collapses without listeners since the whole purpose of the marketplace is to make a variety of ideas, information, opinions, and arguments available to listeners for their consideration.”<sup>83</sup> In sum, speech has little value if there are no listeners to hear or receive it.

The right to listen was squarely established, again by Justice Brennan in a concurring opinion, in *Lamont v. Postmaster General*.<sup>84</sup> In striking down a statute that required the Post Office to hold foreign communist propaganda until the addressee requested that the mail be sent, Brennan pronounced that, “[i]t would be a barren marketplace of ideas that had only sellers and no buyers.”<sup>85</sup> Brennan specifically conceded that “[i]t is true that the First Amendment contains no specific guarantee of access to publications,” but emphasized that the Bill of Rights also protects “those equally fundamental personal rights necessary to make the express guarantees fully meaningful.”<sup>86</sup>

The right to hear and receive information has been heralded by the Supreme Court as key to both a commercial marketplace<sup>87</sup> and a participatory democracy,<sup>88</sup> and by scholars as crucial to supporting the very core of individual autonomy.<sup>89</sup>

Both the right of access and the right to listen are also supported by the robust concerns of “knowledge and information policy” that

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<sup>80</sup> *Id.* at 576.

<sup>81</sup> *Id.* (quoting *First Nat’l Bank of Boston v. Bellotti*, 435 U.S. 765, 783 (1978) (internal citations omitted)).

<sup>82</sup> Caroline Mala Corbin, *The First Amendment Right Against Compelled Listening*, 89 B.U. L. REV. 939, 972 (2009).

<sup>83</sup> *Id.* at 973.

<sup>84</sup> *Lamont v. Postmaster Gen.*, 381 U.S. 301 (1965).

<sup>85</sup> *Id.* at 308 (Brennan, J., concurring).

<sup>86</sup> *Id.*

<sup>87</sup> *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council*, 425 U.S. 748 (1976).

<sup>88</sup> *First Nat’l Bank of Boston v. Bellotti*, 435 U.S. 765 (1978).

<sup>89</sup> Corbin, *supra* note 83, at 976.

encapsulate the broader First Amendment values.<sup>90</sup> These policies overlap with free speech, but their scope is much broader – seeking, for example, to actively promote scientific research, education, and universal access to telecommunications facilities.<sup>91</sup> Jack Balkin, Director of the Information Society Program at Yale Law School, defines the goals of knowledge and information policy as, among others, promoting the production and diffusion of valuable information and knowledge, developing a healthy and vibrant public sphere of opinion and culture, and encouraging widespread participation in a culture of information and knowledge production.<sup>92</sup> In light of these objectives, the policies Congress adopts to regulate the flow of information should aim to promote and encourage the fulfillment of these goals.

### C. Application of Access Rights to Orphan Works

For the reasons evinced by the Court in both *Lamont* and *Richmond*, it is crucial that Congress recognize the public's right of access to the information found within orphan works. First, the "tradition of openness" and the need to promote accurate fact-finding weigh in favor of a public access right to such information. The very same virtues inherent to judicial documents that make accurate fact-finding so important – namely their role in creating an "uninhibited, robust, and wide-open" debate on public issues, and in ensuring that that debate be informed – are present in many of the historical documents trapped within the bounds of the orphan works dilemma.<sup>93</sup>

Perhaps second only in importance to the contemporary public issues that court documents allow us to critique are the deeply important historical controversies that our country has weathered. Thomas Jefferson is quoted as saying "a morsel of genuine history is a thing so rare as to be always valuable."<sup>94</sup> And indeed, true morsels of history are becoming even rarer, as primary sources are turning to dust, untouched and unpreserved, in our libraries. In testimony before the House, representatives for the U.S. Holocaust Museum spoke of the millions of pages of archival documents, photographs, oral histories, and reels of film that it and other museums cannot publish or digitize.<sup>95</sup> In testimony

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<sup>90</sup> Jack M. Balkin, *Media Access: A Question of Design*, 76 GEO. WASH. L. REV. 933, 941 (2008).

<sup>91</sup> *Id.*

<sup>92</sup> *Id.*

<sup>93</sup> *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 587 (1980) (quoting *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964)).

<sup>94</sup> Letter from Thomas Jefferson to John Adams (1817).

<sup>95</sup> Marybeth Peters, *The Importance of Orphan Works Legislation* (Sept. 25, 2008) <http://copyright.gov/orphan>.

before the Senate, a filmmaker spoke of the historically significant images that are removed from documentaries and never reach the public because ownership cannot be determined.<sup>96</sup> The inability of institutions to preserve these items, much less present them to the public, in turn limits the ability of the public to engage in a fully informed, culturally rich discussion of the vitally important issues embedded within.

Despite the fact that some works may be of greater or lesser political significance, all are still physical manifestations of our country's changing culture and philosophies, and often represent the last vestiges of an era. Recently, the National Jazz Museum in Harlem acquired a vast collection of previously unreleased recordings from the 1930's, a rare capture of many of jazz's greats playing improvised pieces.<sup>97</sup> This collection represents one of the only documentations of such performances, as technology at the time was hardly capable of the recording necessary to document long, and often impromptu, jam sessions.<sup>98</sup> The director of the Institute of Jazz Studies at Rutgers University heralded the collection as "a cultural treasure [that] should be made widely available."<sup>99</sup> Yet the orphan works problem prohibits exactly this. Facing a near-impossible search for the recordings' copyright owners, the Museum will be barred from digitizing, distributing, or sampling from such works.<sup>100</sup> As a consequence, this remarkable historic collection will undoubtedly collect dust in the basement of the Museum, to the collective detriment of all.

To give the public's right of access further weight, any perceived right should be subjected to Justice Brennan's two-part test. The first prong of the test asks whether there is a historical practice of granting access to the information at issue.<sup>101</sup> The answer to this question for orphan works could not be a more resounding "yes." Though Congress has not had the opportunity to speak to the public's right of access to orphan works in particular, copyright law has always recognized a robust public right of access to copyrighted works in general.<sup>102</sup> Public access to

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<sup>96</sup> *Id.*

<sup>97</sup> Steven Seidenberg, *A Trove of Historic Jazz Recordings has Found a Home in Harlem, but You Can't Hear Them.*, ABA J. MAGAZINE (May 1, 2011), available at [http://www.abajournal.com/magazine/article/a\\_trove\\_of\\_historic\\_jazz\\_recordings\\_has\\_found\\_a\\_home\\_in\\_harlem\\_but\\_you\\_cant/](http://www.abajournal.com/magazine/article/a_trove_of_historic_jazz_recordings_has_found_a_home_in_harlem_but_you_cant/).

<sup>98</sup> *Id.*

<sup>99</sup> *Id.*

<sup>100</sup> *Id.*

<sup>101</sup> *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 589 (1980) (Brennan, J., concurring).

<sup>102</sup> *See Gard, supra*, note 53.

copyrighted works has always been lauded as a crucial step in promoting the progress of science and the useful arts, the expressed purpose of copyright law itself.<sup>103</sup>

In fact, orphan works pass this prong of Justice Brennan's test in even more convincing fashion than judicial documents, which inherently retain countervailing interests of privacy and, occasionally, national security.<sup>104</sup> As opposed to judicial documents, the very fact that orphan works are published is a clear sign that the author intended for the work to be available to the public.

The second prong of the Brennan test asks whether the access sought specifically enhances the functioning of the government process at issue.<sup>105</sup> Of course, this begs the question of what exactly the "government process" is for purposes of the discussion. For a better understanding, perhaps a more helpful term of art would be the "government objective" at work. Here, we can assume the government's overarching objective in keeping orphan works under strict copyright is to keep the copyright system functioning effectively. Thus, the question becomes whether public access to orphan works enhances the functioning of the copyright system. Again, the answer here has to be "yes." Access to orphan works can only serve to improve the copyright regime. Providing access allows second-comers to gain knowledge, inspiration, and useful material to create their own works, which is precisely the model Congress intended when designing copyright policy.

Furthermore, access to orphan works in particular is aligned with the economic incentives that guide copyright policy. The orphan works problem often stems from the fact that there is no longer any profit potential in the work, so the copyright owner neglects the work, letting it fall out of print and off the records.<sup>106</sup> Since the market created by the copyright monopoly has been exhausted, it is unlikely that allowing access to those works will affect authors' willingness to create in the first place.<sup>107</sup> A better solution would be "to give the monopoly only for as long as necessary to provide an incentive. After that, we should let the

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<sup>103</sup> *Feist Publ'ns, Inc. v. Rural Tel. Serv. Co., Inc.*, 499 U.S. 340, 349 (1991) ("The primary objective of copyright is not to reward the labor of authors but to promote the Progress of Science and useful Arts.")

<sup>104</sup> *Richmond*, 448 U.S. at 586 (Brennan, J., concurring).

<sup>105</sup> *Id.* at 589.

<sup>106</sup> *Kahle v. Gonzales*, 487 F.3d 697, 699 (9th Cir. 2007).

<sup>107</sup> When copyright required renewal after twenty-eight years, about 85 percent of all copyright holders did not bother to renew, indicating that these works have lost commercial viability after only twenty-eight years.



work fall into the public domain where all of us can use it, transform it, adapt it, build on it, republish it as we wish.”<sup>108</sup>

Fundamentally, the right of access to orphan works is squarely supported by Justice Brennan’s remarks on the right to listen in *Lamont*, and by knowledge and information policy more generally. Indeed, the tragedy here is that the “marketplace of ideas” inherent in the vast quantity of orphan works suffers not from a simple lack of buyers, but from a large group of potential buyers who are waiting, stymied, at the locked entrance. Knowledge and information policy urges us to unlock that entrance, to make the First Amendment meaningful, to promote the progress of science and the useful arts, and to encourage a robust and vibrant public sphere of opinion and culture.

#### D. A Proposed Solution

It is time for Congress to enact legislation addressing orphan works, something it has been urged to do by both copyright scholars and the Copyright Office.<sup>109</sup> This legislation must be carefully tailored to recognize the vital right of access without unduly upsetting the inherent structure of copyright. This note proposes two changes to the control of orphan works: first, an automatic right to preservation, and second, a copyright “last will and testament” – an advanced directive that spells out a copyright owner’s wishes should his work qualify as an orphan work in the future.

Before either of these remedies can be applied, Congress should codify a new definition of orphan works. Scholars have proposed that if the author cannot be located after a sufficient period of time, an affirmative defense of “abandonment” should be available to the second-comer.<sup>110</sup> The proposed definition would codify this term, not as an

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<sup>108</sup> JAMES BOYLE, *THE PUBLIC DOMAIN: ENCLOSING THE COMMONS OF THE MIND* 11 (Yale University Press 2008).

<sup>109</sup> Brannon, *supra* note 25, at 150 (“Senator Orrin Hatch asked the Copyright Office to study the issue, and in early 2005 the Copyright Office issued a call for initial comments on the issues relating to orphaned works. After a call for reply comments, the Copyright Office held roundtable discussions on the subject in the summer of 2005, resulting in the release of a report containing proposed statutory language in early 2006.”). The Shawn Bentley Orphan Works Act of 2008, § 2913, 110th Cong. (2008) and the Orphan Works Act of 2008, HR 5889, 110th Cong. (2008) were both introduced as possible remedies, but ultimately failed to pass.

<sup>110</sup> See, e.g., 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 (2007) (suggesting a limited abandonment theory of orphan works).

affirmative defense, but as a prerequisite for deeming the work “orphaned.” Once a work is declared orphaned, it would remain so until the work entered the public domain. This way, no litigious parent could come racing back in the future to capitalize upon some previously unrealized commercial opportunity. In addition to codifying a clear and concrete definition of orphan works, presenting this requirement would also create an incentive for copyright owners to keep their records in line, further mitigating the problem of orphan works.

Once a work is found to qualify as an orphan, the new legislation should allow anyone in possession of it – most often libraries, museums and archives – to preserve it in digital format. This right reflects the urgency of the problem of orphan works’ disappearance, and the reality that digital preservation is easier, cheaper, and more effective than any manual restoration efforts.<sup>111</sup> Moreover, it respects the public’s right of access by ensuring that the work will remain available – and comprehensible – for generations to come. Allowing anyone in possession to digitize maximizes the probability that the work can be found by a second-comer – with many institutions offering the works in digital format, public access will be expanded to the benefit of all.

The right of preservation functions primarily as a mechanism to ensure pure access to works. To further use the preserved work in a creative way, however, is another hurdle. This note proposes legislation that would allow the copyright holder to prescribe the ways that he would want his work used in the event that it becomes an orphan. The copyright holder would have some discretion in how his work would be treated should it become an orphan; however, the owner would not be able to opt-out of the preservation efforts unless he could demonstrate that he has assigned digitizing rights to a third party. The holder would have options, however, in deciding which permissive uses are automatically allowed if the copyright owner cannot be contacted. For example, a copyright owner may specify that all noncommercial uses of his work are permitted should the work become an orphan. Alternatively, the owner may favor an even more lenient approach and allow all uses that would otherwise require permission, as long as attribution is given to the author. Finally, the owner could allow all uses, including derivatives, as long as a portion of any revenue generated is donated to the author’s charity of choice.

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<sup>111</sup> Diane Leenheer Zimmerman, *Can Our Culture be Saved?: The Future of Digital Archiving*, 91 MINN. L. REV. 989, 993 (2007).

Given that 85% of authors would probably not renew copyright if renewal were still a prerequisite,<sup>112</sup> there is a significant likelihood that authors will be willing to relinquish the death grip that copyright policy has given them over their works. Particularly in today's atmosphere of open sharing and the widely held desire that information spread to the masses, authors may be willing to have their works used and promoted, even if they might not receive a possible economic benefit.<sup>113</sup>

This legislation, like the definition of orphan works itself, also provides a further incentive for authors to remain active in maintaining their records. If the copyright holder can be located and contacted, the advanced directive never goes into effect, and the holder maintains control as usual. If, however the author is lax about maintaining records, or circumstances are altered in such a way that the rights cannot be traced, then after the requisite period of time of searching, the advanced directive kicks in. This system still gives the copyright holder control over his work, but balances such control against the overriding public need for access.

#### CONCLUSION

No matter how one looks at it, it is clear that the policy surrounding orphan works needs to change. From an efficiency standpoint, the orphan works dilemma has stifled the smooth interchange of ideas and material that could be better used to enhance the creative wealth of society. From a cultural standpoint, copyright policy has tragically allowed vast amounts of literature, film, and art to be buried by time, and, eventually, to slowly disappear. Perhaps most worrisome of all, from the viewpoint of knowledge and information policy, the orphan works dilemma has created such a barrier to the flow of information as to render the First Amendment impotent. In the interest of expanding knowledge and maximizing our cultural potential, as well as honoring the rights to receive information that we hold so dearly, immediate action must be taken to remedy the injustices that copyright policy has produced. Orphan works legislation is the only feasible way to achieve this, and it is something that must be accomplished before our nation's history and the very growth of knowledge is compromised.

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<sup>112</sup> See Barbara Ringer, "Study Number 31: Renewal of Copyright," reprinted in U.S. Senate Committee on the Judiciary, Subcommittee on Patents, Trademarks and Copyrights, *Copyright Law Revision*, 86th Cong. 1st Sess., Committee Print (1960), 187.

<sup>113</sup> See BOYLE, *supra* note 109, at 13 (defining the Internet as an "existence proof" of users' willingness to share information and services).