ADDRESSING 'ORPHAN WORKS' PROBLEM UNDER THE ETHIOPIAN COPYRIGHT REGIME: LESSON FROM OTHER JURISDICTIONS

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The author of this thesis was born in Oromia, West Shewa Zone, Ilu Gelan Woreda, Saden Ilu kebele in small rural village called Abono in March of 1996 from his father Fikadu Gilo and his mother Mulu Wondimu. He attended his primary education at Saden Ilu Elementary School and his high and preparatory education at Ejaji Secondary and Preparatory School. After passing the Ethiopian Higher Education Entrance Examination, he joined Ambo University in 2015 for higher education and on January 30, 2021, he graduated with LL.B Degree in Law with Great Distinction (Gold Medalist). After graduation, the author employed as Assistant Lecturer of Law at Ambo University. After that, in October 2022, he joined Haramaya University College of Law as postgraduate student in International Economic and Business Law (LL.M) program.

DEDICATION

This thesis is dedicated to my father ***Fikadu Gilo*** *and my mother* ***Mulu Wondimu*** *who always encourages me in all my ways.*

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ACRONYMS AND ABBREVIATIONS

US	United States
UK	United Kingdom
EU	European Union
WTO	World Trade Organization
IPO	Intellectual Property Office
BSAC	British Screen Advisory Council
HELG	High Level Expert Group
EC	European Commission
OWD	Orphan Works Directive
TRIPs	Trade Related Aspects of Intellectual Property
ERRA	Enterprise and Regulatory Reform Act
CDPA	Copyright, Designs and Patent Act
ECL	Extended Collective Licensing
CPUO	Certain Permitted Use of Orphan Works
LOW	Licensing of Orphan Works
ISSN	International Standard Serial Number
CMO	Collective Management Organization
TEACH ACT	Technology, Education and Copyright Harmonization Act
ID	Idem
EIPO	Ethiopian Intellectual Property Office
FDRE	Federal Democratic Republic of Ethiopia
HPR	House of Peoples Representative

STATEMENT OF THE AUTHOR **iii**

BIOGRAPHICAL SKETCH **iv**

DEDICATION **v**

ACKNOWLEDGEMENT **vi**

ACRONYMS AND ABBREVIATIONS **vii**

ABSTRACT **xi**

CHAPTER-ONE **1**

1. INTRODUCTION **1**

1.1. Background of the Study 1

1.2. Statement of the Problem 4

1.3. Review of Related Literature 5

1.4. Objective of the Study 11

1. 4.1. General Objectives 11

1. 4.2. Specific Objectives 11

1. 5. Research questions 11

1.6. Methodology of the Study 12

1.7. Scope of the Study 12

1.8. Significance of the Study 13

1.9. Limitation of the Study 13

1.10. Organization of the Paper 13

CHAPTER-TWO **14**

2. BACKGROUND CONCEPTS ON COPYRIGHT AND ORPHAN WORKS **14**

2.1. The Origin and Historical Development of Copyright 14

2.2. General concepts of copyright. 20

2.3. Background of Orphan Works and Copyright 24

2.3.1. Defining Orphan Works 24

2.3.2. Orphan Works and Copyright 26

2.4. Types of Orphan Works 28

2.4.1. Works whose right holders are unknown 28

2.4.2. Works whose right holders cannot be located 29

2.5. Causes of Orphan Works Problem 30

2.5.1. Principle of automatic protection and absence of formalities 30

2.5.2. Copyright term extension 33

2.5.3. Technological developments 35

2.5.4. Transfer of rights 37

2.5.5. Joint ownership of works 38

CHAPTER-THREE 39

3. ADDRESSING ORPHAN WORKS PROBLEM UNDER THE ETHIOPIAN COPYRIGHT REGIME: LESSON FROM OTHER JURISDICTIONS 39

3.1. Orphan Works under the European Union Directive 39

3.2. Orphan works under UK Copyright Law 43

3.2.1. Certain Permitted Uses of Orphan Works under UK Law 44

3.2.2. Licensing of Orphan Works under UK Law 46

3.2.3. Extended Collective Licensing under UK Law 48

3.3. Orphan Works under the Canadian Copyright Law 53

3.4. Orphan Works under the US Copyright Law 58

3.4.1. Limited Liability Approach 59

3.4.2. The 2015 US Copyright Office Report 63

3.4.3. Fair Use 64

3.4.3.1. Purpose and character of the use of the work 65

3.4.3.2. Nature of the copyrighted work 66

3.4.3.3. The amount and substantiality of the taking 67

3.4.3.4. The effect of the use on the market of the original work 67

3.5. Copyright Law and the Concept of Orphan Works in Ethiopia 69
3.5.1. General Overview of Copyright Law in Ethiopia. 69
3.5.2. Orphan Works under the Ethiopian Copyright Law 71
3.5.2.1. The idea/expression dichotomy limitation 72
3.5.2.2. Fair practice under the Ethiopian copyright law 74
3.5.2.3. Reproduction by libraries, archives and other similar institutions 80
3.5.2.4. Non-voluntary licenses 85
3.5.3. Lessons for Ethiopia 88
CHAPTER-FOUR 92
4. CONCLUSIONS AND RECOMMENDATIONS 92
4.1. Conclusions 92
4.2. Recommendations 95
REFERENCES 98

ABSTRACT

Copyright law accords protection to creative works regardless of their ownership status. To grant protection, copyrights are not required to be registered and there is no comprehensive list of who owns particular right. This lack of ownership data will leads to the problem of "orphan works", the situation in which locating the owner of certain copyrighted works is difficult even after diligent search is conducted by users. Obtaining the consent of copyright holder is necessary in order to use both works whose authors are known and unknown. The issue with orphan works is that users may choose not to use them by incorporating them into newly created works or digitizing and distributing them online. The possibility of a copyright owner who may bring legal action for copyright infringement in the future is a deterrent to the use of orphan works. Even if the probability of such an occurrence is insignificant, using orphan works for any purpose can result in copyright law violation. It is a common challenge for every copyright law. This study addresses the issue of orphan works under the Ethiopian copyright regime. The research employs doctrinal legal methodologies, analyzing primary and secondary data through legal reasoning tools to explore the regulation and pricing of orphan works in various jurisdictions in order to investigate a variety of policy options and to draw a lesson for Ethiopia. The study demonstrates that as this has a problem largely emerged with the development of technology, Ethiopia has not taken orphan works as a problem serious enough to take action to address. The research indicates that there is no provision of Ethiopian law that directly deal with orphan works. Interpreting existing laws may not fully address all the challenges associated with orphan works, rather it may help to clarify how orphan works can be used within the existing law. Therefore, the study suggests that clear legal frameworks should be established to improve access to these works. Finally, it recommends adopting compulsory licensing for commercial reuse and exception-based approaches for non-commercial reuse of orphan works.

Key words: Copyright, Orphan works problem, Unidentified, Unlocatable, Solution, Diligent search, Digitization.

CHAPTER-ONE

1. INTRODUCTION

1.1. Background of the Study

Copyright is one of the different types of intellectual property rights that are universally granted to safeguard an individual's creative works. It is a property right that subsists in a certain specified class of works.[1] As a branch of intellectual property law, in principle copyright law grants copyright holders' exclusive rights over copyrighted works for a limited period of time to reproduce, publish, sell, perform, or create derivatives of original fixed works.[2] In the typical situation, a person who wishes to exercise one or more of these rights would seek to find the copyright owner and obtain permission for his/her planned use.

There are two available options to institutions, individuals, and any other interested party to use copyright protected-works. Either to rely on the system of exceptions and limitations or to demand and obtain the right holder's authorization.[3] However, where the proposed use exceeds an exception or limitation to copyright, the user cannot avoid the risk of copyright liability for such use; since there is always, a chance that a copyright owner could appear and file an infringement action after that use has started.[4] Inability to contact or locate the owner of copyright may render the copyright-protected work unusable by the third party through any legal means as use of the work without authorization constitutes copyright infringement.[5] For this reason, these copyright protected works are known as "*Orphan Works*"[6] a term coined by Fay Kanin of the National Film Preservation Board of the United States.

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[1] Buning Marius, *Teaching Intellectual property: Constructing Ownership of Knowledge: Beyond Intellectual Property*, (2023) p. 91.
[2] Arthur R. Miller and Michael H. Davis, *Intellectual property: Patents, Trademarks and Copyright in Nutshell,* (2012), p. 295.
[3] Majekolagbe, F. and Priora, G., *An International Instrument on Copyright and Educational Uses: Regulatory Models and Lessons in Intellectual Property Rights in Times of Crisis*, Edward Elgar Publishing, (2024).
[4] Cornish, W., Llewelyn, D. and Aplin, T., *Intellectual Property: Patents, Copyright, Trade Marks and Allied Rights* (6th. London, Sweet & Maxwell, 2003), p. 344.
[5] Bzhar, Abdullah Ahmed, *The Situation of Orphan Works under Different Jurisdictions,* 20 Chi.-Kent J. Intell. Pro. (2021).
[6] The term is officially recognized in the United States (as seen in the proposed Orphan Works Act of 2006, H.R.5439, 109th Cong.) as well as the European Union (as seen in the Directive 2012/28/EU, among others.).

Orphan works are those for which the rights holder cannot be identified and/or located despite diligent and reasonable search in good faith.[7] It refers to copyrighted works whose owners are difficult or impossible to identify or locate even after carrying out a diligent search. This makes it difficult or impossible for individuals or organizations to use the work without infringing on copyright. The orphan works problem is regarded as one of the current challenges to copyright law and this problem has become more apparent due to technological advancements.[8] Making creative works easily accessible to the public is the primary objective of copyright laws, which are intended to increase the quantity of creative works that are made available to the public.[9] However, the fear of potential legal action by unknown copyright owner, who may suddenly appear, will cause the users to refrain from using works whose authors are unknown.[10]

There are a number of factors intrinsic to the copyright regime that contribute to work becoming orphaned. The issue of orphan works is primarily a result of two factors: the legal and non-legal factors.[11] The term "orphan work" has been used in United States and elsewhere to describe the situation in which the copyright owner cannot be identified and located by someone who wants to use the work in a way that requires the owner's consent.[12] The Canadian Copyright Act refers to "owners who cannot be located".[13] High profile reports from the United States (the US Report), United Kingdom (the BSAC Paper)[14] and Europe (the HLEG Reports and the IViR Report),[15] demonstrate that the issue of orphan works has gained global attention.

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[7] Brito, Jerry and Bridget Dooling, *An Orphan Works Affirmative Defense to Copyright Infringement Actions*, Mich. Telecomm. & Tech. L. Rev., 12, (2005), p.75.
[8] Bzhar Abdullah Ahmed & Kameran Hussein Al-Salihi, *Proliferation of the Problem of Orphan Works across the World*, J. World Intell. Pro., 22, (2019), p. 419.
[9] Robin Wright, *The Three-Step Test and the Wider Public Interest: Towards a More Inclusive Interpretation*, The Journal of World Intellectual Property, Volume 12, Number 6, November 2009 at p. 600.
[10] Tokavera, Vira O., Iryna V. Dvydova, Olena S. Adamova, and Elena Adamova, *Legal Problems of the use of Orphan Works in Digital Age,* (2021).
[11] Greismann, Libby, *The Greatest Book You Will Never Read: Public Access Rights and the Orphan Works Dilemma*, Duke L. & Tech. Rev., 11, (2013), p. 193, 197-198.
[12] United States Copyright Office, Report on Orphan Works: A Report of the Register of Copyrights, January 2006, 37; i2010: Digital Libraries High Level Expert Group—Copyright Subgroup: *Final Report on Digital Preservation, Orphan and Out-of-Print Works,* 4 June 2008, s. 5.5.1.
[13] Copyright Act, R.S.C. 1985, c. C-42, s. 77. http://laws.justice.gc.ca/en/c-42/index.html.
[14] British Screen Advisory Council, *Copyright and Orphan Works*: A Paper Prepared for the Gowers Review by the British Screen Advisory Council (2006), http://www.bsac.uk.com/reports/orphanworkspaper.pdf [BSAC Paper].
[15] United States Copyright Office, Report on Orphan Works *supra* note 12.

The legal uncertainties surrounding the use of orphan works would create a significant obstacle to mass-scale digitization projects and it can be a real problem for users. In US, for example, in an attempt by the Library of Congress to display on its public website news, letters, clippings and other papers kept by the author and political philosopher Hannah Arendt, of the 25,000 items available in its collections, the library determined only 7,000 for authorization research, but finally made only 5,000 items available online. The library rejected making the rest of the items available online because of its inability to locate and identify the right holders.[16]

The idea of orphan works in copyright was first emerged in the US in the mid-2000, following a large scale-digitization project conducted by the Google Company. It is a widespread problem that affects most countries similarly. This is partly due to most countries copyright law including the Ethiopian copyright law being in line with the Berne Convention.[17] This affords legal scholars the opportunity to compare different countries copyright legislation. For the purposes of this study, the solutions utilized or proposed by European Union,[18] United Kingdom[19], Canada[20] and the United States of America[21] have been analyzed.

The concept of copyright is a new development in the legal history of Ethiopia. Modern copyright law emerged in Ethiopia during 20th century, and modern copyright proclamation was enacted in 2004.[22] The proclamation includes provisions for the protection of creative works irrespective of whether they are orphan works. The creator or owner has exclusive economic rights over derivative works described under Art. 7 of the proclamation subject to exceptions and limitations provided under the proclamation.[23] However, compared to the above mentioned jurisdictions, it is a strong question that needs to be answered whether the issue of orphan works has been addressed under the Ethiopian copyright law.

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[16] Meeks, Katherine Moran, *Adverse Possession of Orphan Works,* Loyola of Los Angeles Entertainment Law Review, 3 No. 1, (2013), p. 1-36.
[17] The countries that are party to the Berne Convention are listed in General Notice 136 in Government Gazette 11718, 3 March 1989.
[18] European Parliament: Directive 2012/28/EU of the European Parliament and of the Council of 25 October 2012 on Certain Permitted Uses of Orphan Works (2012), https://goo.gl/WSPsdQ, last accessed 2017.
[19] United Kingdom, *The Enterprise and Regulatory Reform Act,* 2013, [online], available at: https://www.legislation.gov.uk/ukpga/ 2013/24/contents/enacted [Accessed 30 May. 2021].
[20] The Canadian Copyright Act.
[21] The Shawn Bentley Orphan Works Act of 2008, S 2913, 110th Congress, 2nd Session, 24 April 2008.
[22] Ethiopian Copyright and Neighboring Rights Protection Proclamation No. 410/2004, *ifra* note, 222.
[23] *Id.*

1.2. Statement of the Problem

The uncertainty surrounding the ownership status of orphan works does not serve the objective of copyright system, which are intended to encourage creation and dissemination of creative works. The consequences of orphan works are two-fold. New works incorporating an orphan work cannot be created, and the orphan work itself cannot be preserved through the digitization thereof or through any other means that requires reproduction of this work. Orphan works are not available for legal use by filmmakers, archivists, writers, musicians or broadcasters in countries whose laws do not specifically allow for their use.

The permission of the right holder is necessary in order to use both works whose authors are known and those whose authors are unknown. The fundamental problem posed by orphan works can be that potential users unable to use the works in a socially beneficial manner. These concerns will have a clear negative impact on public access to knowledge and historical and cultural materials. The loss of cultural heritage is not restricted to works of the past, as no future work that is based on an orphan work can be produced without the consent of the owner of the copyright in the orphan work. The possibility of a copyright owner who may file a lawsuit for copyright infringement in the future is a deterrent to the use of orphan works. Even if the possibility of such an occurrence is insignificant, such actions violate copyright laws.

When it comes to mass digitization, the problem lies more in the licensing marketplace's inefficiency than in a lack of knowledge. The cost of obtaining *ex ante* authorization from each individual rights holder for a digitization project encompassing hundreds, thousands, or millions of copyrighted works might be more expensive than the value of the usage to the user. Therefore, even where a library or other repository agrees that a usage requires permission and would be willing to pay for a license, the costs of rights clearance may effectively prohibit it from doing so. This outcome is difficult to reconcile with the public interest, to the extent that granting such access could serve valuable informational or educational purposes. At the same time, there is too much at stake to permit such usage in the absence of proper legal clarification.

The absence of reported orphan works cases in a certain country does not necessarily mean that the problem of orphan works does not exist. Orphan works are often a hidden problem,

meaning that they may not be widely recognized or addressed even if they are present. The problem is a common challenge that every copyright regime encounter. Under the Ethiopian copyright law, there is no provision of law that directly deal with orphan works. Since the existing copyright law lacks explicit provisions on orphan works, it may create uncertainty for users and potential legal risks when dealing with works whose copyright status is unclear. Though the owner of the copyright may be identifiable, in some cases the owner may not be traceable which is why explicit provisions on orphan works is essential.

Our country, Ethiopia is establishing various digital libraries, museums and cultural institutions. These institutions may digitize and make the items in their collections available online which may include orphan works. But in order to do so, an explicit law governing orphan works must exist. Regardless of their intended use, digitization efforts should act in compliance with the copyright law in place, particularly when involving copyrighted works. As a result, orphan works problem may undermine the principal role of these institutions in preserving these works and making them available online. This may hinder the creation and development of widely accessible digital libraries. This is due to the fact that the incorporation of orphan works often entails cost, and time-consuming searches to locate the right holder that may turn out to be fruitless. Due to these, for good faith users, orphan works are a frustration, a liability risk, and a major cause of gridlock in the digital marketplace.

In general, due to the uncertainty surrounding the legal status of orphan works, future creators and users may be discouraged from incorporating such works into new derivative works or making them available to the public. Moreover, the presence of orphan works may affect freedom of expression protected by copyright, may led to unintentional censorship, and increase copyright infringement. To remove such a barrier, it is essential to provide clear legal strategies to address the issue in our copyright law. The first and foremost aim of providing clear legal solutions for the problem is to achieve the goal of copyright protection, which is to enable the public to access and benefit from copyright-protected works. However, failure to specifically addressing orphan works will deprive the public of access to such works.

1.3. Review of Related Literature

In various legal jurisdictions, several academic works have been conducted on orphan works issue. In Ethiopia, on the other hand, despite so many research and publication works done on

intellectual property law in general and copyright law in particular, there is no research yet done specifically on the orphan works problem. As far as my knowledge and access is concerned, no academic research and investigation has been conducted in Ethiopia that is directly related with the issue. Meaning, none of the previous researches conducted on the Ethiopian copyright law has been explicitly and directly discuss the issue of orphan works. Thus, domestic literature on this issue has been scanty.

Jean-François Canat, Lucie Guibault and Elisabeth Logeais in their research titled "Study on Copyright Limitations and Exceptions for Museums",[24] conducted at University of Amsterdam on 45 countries copyright laws including the Ethiopian copyright law, they stated that of the forty-five countries examined, only the member states of the European Union have implemented or are in the process of doing so a specific regime allowing cultural heritage institutions, like museums, to use orphan works.[25] According to the authors, items from more recent times are typically underrepresented in the online collections of museums, because their copyright may not have expired. To reproduce and make the works available online, the cultural heritage institution in most cases needs authorization from the copyright owner.[26] When the owner or rights holder of a copyright protected work is unknown or unidentified, it becomes even more difficult, as this makes it impossible to obtain permission for the dissemination of the orphaned work[27].

In his dissertation thesis entitled, Exception and Limitations under the Ethiopian Copyright Law: A Comparative Analysis, Taamee Berihu argued that as to the type of teaching; distance, face-to-face, online etc., the purpose of teaching commercial or non-commercial etc is not indicated in the copyright proclamation.[28] Regarding library exception, the author argued that, the reproduction is dependent on the request of physical person. Furthermore, the author

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[24] Canat, J-Francois, Guibault, L., & Logeais, E., *Study on Copyright Limitations and Exceptions for Museums*, World Intellectual Property Organization (WIPO), SCCR; No. 30/2 (2015), available at http://www.wipo.int/edocs/mdocs/copyright/en/sccr_30/sccr_30_2.pdf.

[25] Countries that have implemented the OWD: Australia, Denmark, Estonia, Finland, France, Germany, Italy, Latvia, Lithuania, Netherlands, Portugal, Romania, Slovakia, Spain, United Kingdom; Countries that must still implement the OWD: Belgium, Bulgaria, Cyprus, Hungary, Luxembourg, Malta, Poland, Slovenia.

[26] Except when rights were transferred with the purchase of the work, but normally this is not the case.

[27] Commission Staff Working Paper, *Impact Assessment on the Cross-Border Online Access to Orphan Works Accompanying the Proposal for a Directive of the European Parliament and of the Council on Certain Permitted Uses of Orphan Works*, COM (2011) 289 final (May 24, 2011).

[28] Taame Berihu, *Exception and limitation under Ethiopian Copyright law: A Comparative Analysis,* (2013), p.87.

regarding non-voluntarily licensing exception argued that the non-voluntary licensing exception under the Ethiopian proclamation does not follow the requirement under the Berne Convention.

He argued that the Berne Convention allows the issuance of compulsory license for commercial purposes in the appendix. According to article IV(I) of the appendix of the Berne Convention, a license under Article II or Article III may be granted only if the applicant, in accordance with the procedure of the country concerned, establishes either that he has requested, and has been denied, authorization by the owner of the right to make and publish the translation or to reproduce and publish the edition, as the case may be, or that, after due diligence on his part, he was unable to find the owner of the right. However, the Ethiopian copyright law does not follow this procedure.

In "The Interplay between Copyright Protection and the Expansion of Education in Ethiopia," Mandefro Eshete attempts to highlight some of the shortcomings of exceptions and limitations.[29] He also states that the law has introduced stronger right protection and enforcement mechanisms to the rights holders. The author argued that the exception and limitation to copyright even favors copyright holder by restricting the scope of protection. Furthermore, by examining teaching exception he provides that, as the teaching exception is limited to reproduction right only one cannot invoke the teaching exception to translate the work. Lastly, according to the author, there are imbalances between the rights of the creators and the interest of the public in using literary and artistic works without the authorization of the creator.

Biruk Haile in his paper, “Scrutiny of the Ethiopian System of Copyright Limitations in the Light of International Legal Hybrid Resulting from (the Impeding) WTO Membership: Three Step Test in focus,” also stated that the preamble of the Ethiopian copyright proclamation stresses the importance of protecting copyright and neighboring rights but express reference is

[29] Mandefro Eshete, *The Interplay between Copyright Protection and the Expansion of Education in Ethiopia,* (WIPO-WTO colloquium for teachers of intellectual property law) (2010): p.27-35. See also Mandefro Eshete and Mola Mengsitu, *Exceptions and limitations Under the Ethiopian Copyright Regime: An Assessment of the Impact on Expansion of Education*, Journal of Ethiopian Law, Vol.XXV No.1, (2011): p.159 ff.

not made about the importance of dissemination and exploitation of the protected works through limitations.[30]

In the above-discussed literatures, authors addressed the fact that under the Ethiopian copyright law access to learning materials is hampered by narrow exceptions and limitations. They analyzed the limitations and exceptions provided under the copyright law irrespective of whether the works are orphan works. These studies shown us, that there are a plenty of shortcomings in Ethiopian copyright law to use copyrighted works even for purposes that users are normally allowed to use by exceptions and limitations, let alone for the use of orphan works which is a problem that needs to be solved.

In addition, the work of Canat. *et al,* tried to raise the problem of using orphan works by cultural heritage institutions like museums under Ethiopian law. This study tried to address that, one way of solving the issue of orphan work can be through adopting statutory exception-based model. According to this paper, there is no exceptional mechanism under the Ethiopian copyright law that allows cultural heritage institutions, like museums to use orphan works and they suggested for copyright law amendment.[31] Indeed, none of the above domestic literatures has been directly and fundamentally addressed the issue of orphan works as a research topic. The work of Canat. *et al*, attempt to clarify the absence of exception for museums to use orphan works in general. It focused only on museums. Therefore, this paper is different from the above-discussed researches as it sought to directly focus on "Addressing the Orphan Works Problem under the Ethiopian Copyright Regime: Lesson from Other Jurisdictions."

Apart from these, preliminary research from collections across the world indicates that libraries and archives hold a large number of orphan works.[32] Further, while collections of published books may already include many orphan works, special collections containing

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[30] Biruk Haile (PHD), *Scrutiny of the Ethiopian System of Copyright Limitations in the light of International Legal Hybrid Resulting from (the Impending) WTO Membership: Three Step Test in Focus*, journal of Ethiopian law XXV No. 2. (2012): p. 160.

[31] Canat. *et al*, *supra* note 24, p. 28.

[32] Barbara Stratton, *Seeking New Landscapes: A Rights Clearance Study In The Context Of Mass Digitization of 140 Books Published Between 1870 and 2010* (London: British Library, 2011), http://pressandpolicy.bl.uk/ImageLibrary/detail.aspx?MediaDetailsID=1197 (concluding that 43% of the potentially in-copyright books in the sample were orphan works, after more than an average of 4 hours of investigation for each work).

copyrighted works pose ever-greater challenges because these collections often contain ephemeral, personal, and other non-traditional materials, for which contextual information about ownership is less uniform and often non-existent.[33] In United States, changes in the copyright law beginning with the 1976 Copyright Act, such as the removal of copyright formalities and the extension of copyrights terms. There are probably more orphan works now than there have ever been because of these legal changes. In January 2005, the United States Copyright Office initiated the first comprehensive inquiry in to the orphan works issue, calling for public comments and policy proposals for increasing public access to the use of "copyrighted works whose owners are difficult or even impossible to locate."[34] In 2005, it issued its "Orphan Works Notice of Inquiry" and in 2006, it's subsequent "Orphan Works Report".[35]

The Office issued a report in 2006 that summarized its conclusions and suggested legislative amendments to restrict the copyright remedies available against users who had first carried out a reasonably diligent search for the owners of the work. This strategy attempted to reduce concerns about severe copyright damages or injunctions, which would otherwise make exploiting orphan works more difficult. Libraries, archives,[36] and researchers such as Jennifer Urban,[37] have argued that certain uses of orphan works should be permitted under the flexible fair use doctrine in the United States, particularly if the use is non-profit and takes place in the same context as uses traditionally made by libraries and archives.

As stated by Marybeth Peters, the former Register of Copyrights in the U.S., "If there is no copyright owner, there is no beneficiary of the copyright term and it is an enormous waste. The licensing difficulties of orphan works have substantial adverse effects on the purpose of copyright law and the public interest. The outcome does not further the objectives of the copyright system.[38] The U.S. Copyright Office has also noted that "the public interest may be

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[33] Dwayne K. Butler, *Intimacy Gone Awry: Copyright and Special Collections,* 52 J. LIBR. ADMIN. 279 (2012) ("Copyright interpretation requires highly fact specific analysis. For many special collections, much of that factual predicate has simply drifted from the historical record").
[34] United States Copyright Office, Report on Orphan Works, *supra* note 12
[35] United States Copyright Office, Report on Orphan Works, *supra* note 12.
[36] David Hansen, Gwen Hinze, and Urban Jennifer, *Orphan Works and the Search for Rights Holders: Participants in the Search Process*, White Paper No. 4, Berkley Digital Library Copyright Project, (2013).
[37] Urban, Jennifer, *Solving the Orphan Works Problem for the United States,* (2016).
[38] *Orphan Works to Open Access*: Harvard Library Publishes Report on Digitizing Orphan Collections, HARV. LIBR. OFF. FOR SCHOLARLY COMMC'N (Aug. 12, 2016).

harmed when works cannot be made available to the public due to uncertainty over its copyright ownership and status, even when there is no longer any living person or legal entity claiming ownership of the copyright or the owner no longer has any objection to such use."[39]

Recent methods outside of the US include the European Commission's Directive, which mandates that European member states incorporate into their national laws procedures that permit libraries, archives, and other non-profit organizations to use orphan works for limited purposes following a thorough search;[40] plans where licenses are obtained from a central administrative authority;[41] and arrangements where licenses for orphan works are granted by a collective management organization that represents the owners of similar works to the suspected orphan work.[42]

The UK Copyright, Designs and Patents Act (1888)[43] was amended in 2013 in accordance with the recommendations given by Ian Hargreaves in his 2011 report. The changes are as follows: non-exclusive licenses are granted for the use of orphan works in the event that the potential user diligently searches for the copyright owners and is unsuccessful. In contrast to Directive 2012/28, which solely covers the non-commercial use of works, the licensing scheme is applicable to all forms of copyrighted works within the UK. As a result, in 2013, the UK became the first country in the world to permit the use of orphan works for both commercial and non-commercial purposes, as long as a diligent search is conducted and a license fee is paid.

In Canada, orphan works are recognized under section 77 of the Copyright Act (amended in 1988). According to section 77, works are considered "orphaned" where the "author cannot be located". The granting of non-exclusive license[44] for the use and exploitation of orphan works is subject to terms and conditions and lies with the Copyright Board of Canada (hereinafter

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[39] United States Copyright Office, Report on Orphan Works, *supra* note 12.
[40] Directive 2012/28/EU, *supra* note 18.
[41] Jeremy De Beer & Mario Bouchard, *Canada's Orphan Works Regime: Unlocatable Copyright Owners and the Copyright Board*, Oxford Uni. Commonwealth L. Journal, No. 10, (2010), p. 215-254.
[42] Johan, Axhamn & Lucie, Guibault, *Cross Border Extended Collective Licensing: A Solution to Online Dissemination of European's Cultural Heritage*? In International Conference on Theory and Practice Digital Libraries, Berlin, Heidelberg: Springer Berlin Heidelberg, (2011) p. 501-504.
[43] United Kingdom, *Copyright, Designs and Patents Act,* 1988, [online], available at: https://www. legislation.gov.uk/ukpga/1988/48/ contents [Accessed 30 May. 2021].
[44] A non-exclusive license fulfils two purposes: (1) it accounts for the possibility that the unlocatable owner may have issued (or may later issue) a license to another user; and (2) it stops the Board from granting a license that would amount to a monopoly on the use of a particular orphan work.

the Board) which is "an economic regulatory body empowered to establish, either mandatorily or at the request of an interested party, the royalties to be paid for the use of copyright works and has the power to issue licenses for the use of works when the copyright owner cannot be located."[45]

1.4. Objective of the Study

1. 4.1. General Objectives

The general objective of this study is to address orphan works under the Ethiopian copyright law in comparison with copyright laws of different jurisdictions like the US, UK, EU, and Canada in relation to the regulation of orphan works and to draw a lesson from their experiences.

1. 4.2. Specific Objectives

1. To analyze how the jurisdictions the EU, UK, Canada and US address orphan works in their copyright law
2. To address the regulation of orphan works problem under the Ethiopian copyright law
3. To propose regulatory approach that Ethiopia should adopt among the approaches used in selected jurisdictions

1. 5. Research questions

Having these facts as a background, this research has sought to answer the following questions:

1. How do selected jurisdictions the EU, UK, Canada, and US address the orphan works in their copyright law?
2. Does the Ethiopian copyright law address the orphan works problem?
3. Which regulatory approaches Ethiopia should adopt to regulate the orphan works among the approaches used in selected jurisdictions?

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[45] Copyright Board of Canada, *Unlocatable Copyright Owners, What is the Copyright Board of Canada*? Available at http://www.cb.cda.gc.ca/unlocatable-introuvables/brochure2-e.html (accessed 07-08-12). *See* also, Gervais, Daniel, J., *The Purpose of Copyright Law in Canada* (2005) 2, University of Ottawa Law and Technology Journal 316-356; Gervais, Daniel, J., *Application of an Extended Collective Licensing Regime in Canada: Principles and Issues Related to Implementation* (Ottawa: Heritage; 2003).

1.6. Methodology of the Study

The study is about addressing the orphan works problem under the Ethiopian copyright law by drawing a lesson from other jurisdictions. The methodology adopted for formulating this research is doctrinal legal research. Since orphan works problem is the challenge that every copyright law encounter, analyzing relevant copyright regimes of the selected jurisdictions and other laws in the field of the study have been the main technique used to perform this study. This can help to assess and identify the gaps in the current Ethiopian copyright regime and provide insights into potential avenues for addressing the orphan works problem. In conducting the study, mainly I have been relying on relevant literature review and analysis of domestic, foreign, and international copyright instruments. The above jurisdictions were selected because of the relevance of their copyright regime to the research problem and they have an advanced copyright law regarding the topic of the study.

With regard to the type and source of data, based on the above methodology, the researcher used the qualitative method to gather both primary and secondary sources. Primary sources include Copyright and Neighboring Rights Protection Proclamation No. 410/2004 and its Amendment Proclamation No.872/2014, and the relevant provisions of the Constitution of the Federal Democratic Republic of Ethiopia (the FDRE Constitution). In addition, the above-mentioned jurisdictions copyright regime in relation to the regulation of orphan works were also used as a primary sources in conducting this study. Secondary sources include books, journals, articles, reports, literatures, internet as well as international laws and instruments relating to the topic of the research. As a result, it is hoped that a qualitative approach would help to further address the study's research questions since this research have relied on review of literature and legal analysis.

1.7. Scope of the Study

This research paper will be limited to the concept of copyrights in intellectual property rights. The scope of this research is limited only to the problem of orphan works in copyright, not the whole copyright. Accordingly, orphan works is the central topic that had been discussed in depth. The study has been not dealt with all legal approaches used to regulate orphan works problems, and it is limited to the main approaches or solutions used by selected jurisdictions. In addition, it has not deal with the legal frameworks of all countries in the world. It is limited

to the legal frameworks of some exemplary jurisdictions. Accordingly, the EU, UK, Canada, and the US will be the main jurisdictions concerned in this paper.

1.8. Significance of the Study

This study will have multifaceted benefits for many stakeholders, as it makes contribution on the issue of orphan works under the copyright law. With the successful completion of this paper, the researcher believes the paper will be used as a benchmark for further in detail and comprehensive study in related areas. The findings and recommendations of the study will serve as input for lawmakers. The paper may also help copyright holders, users, and readers to have a clue and knowledge of what orphan works mean, what factors cause the emergence of orphan works, and knowledge on the negative impacts of orphan works in copyright regime. Generally, readers will be acquainted with basic knowledge of the gap in the Ethiopian copyright law regarding the regulation of orphan works, and the legal solutions used in selected jurisdictions to regulate this issue. Finally, students may use this paper as a reference material.

1.9. Limitation of the Study

The basic limitation of this research is lack of relevant literatures particularly domestic literatures is major problems likely to be encountered in conducting this study. Furthermore, inadequacy of time and finance are a possible limitations or constraints of conducting this research.

1.10. Organization of the Paper

This research is organized into four chapters. The first chapter forms the proposal part of the study. This chapter briefly introduces the readers about the general background of the study, methodologies used, principal issues and objectives sought to be achieved. The second chapter provides background concepts on copyrights and orphan works. In this chapter, the origin and historical developments of copyright have been discussed. It also deals with the background concepts of orphan works in copyright, the types of orphan works and potential factors for its emergence. Chapter three of the paper attempts to analyze the legal frameworks of orphan works issue under the European Union, United Kingdom, Canada and United States. The Ethiopian copyright regime regarding the regulation of orphan works were also analyzed

and examined in comparison with the copyright laws of these jurisdictions. In the end, chapter four deals with concluding remarks and recommendations.

CHAPTER-TWO

2. BACKGROUND CONCEPTS ON COPYRIGHT AND ORPHAN WORKS

2.1. The Origin and Historical Development of Copyright

Historically, the development of copyright law at international level is recent compared to other developments.[46] The economic right of the author was not safeguarded in ancient times, at the beginning of civilization, and there has been persons who profited from the work of others. The emphasis was on moral rights of the author. During those times, two things restricted the protection of literary works. First, prior to fifteenth century, the vast majority of books were religious, written by monks and plagiarism of them were impossible because they require a great deal of human labor and expertise to produce such works. Second, there was no market for books because so many people were illiterate.[47] Copyright law became truly necessary only after the invention of printers and copiers.

The historical developments of copyright law may be divided into three major generations. The first generation began with the creation of the printing press and ended with the adoption of the Statute of Anne of 1710[48] in England and in much of Europe with the end of the 18th century. It was the time when authors and publishers were given particular privileges. The second generation is the generation began with the first legislative enactment in the history of the world to protect the authors' rights and is represented by: 1) the Statute of Anne of 1710 in England; 2) the Federal Copyright Act of 1790[49] in the United States of America; and 3) the Literary and Artistic Property Act of 1793[50] in France,[51] owes its legislative history to the

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[46] Corpus Juris Secundum, *Copyright and Literary Rights*, (1939), Vol. 18, p. 161.
[47] Buning Marius, *Teaching Intellectual property: Constructing the Historical Narrative of Intellectual Property in University Textbooks*, (2023).
[48] Statute of Anne, 8 Ann., c. 19 (1709).
[49] 1 US Statute At Large, 124.
[50] French Decree of July 19, 1793.
[51] Frédéric Rideau, *Nineteenth Century Controversies Relating to the Protection of Artistic Property in France,* in Privilege and Property: Essay on the History of Copyright, 241-254, 243-245 (Ronan Beazley et al., eds., Cambridge Open Book Publisher, 2010).

French Decree of March 1852. The 3rd generation is the generation that started in the late 19th century and paved the way for the international codification and standardization of copyright laws.

The first generation of copyright emerged with the invention of the printing press in the 15th century.[52] It is thought that prior to that time no recognition of the legal rights of the authors acknowledged. The act of copying a literary or artistic work is not prohibited by law, despite the fact that plagiarism was undoubtedly condemned by public opinion.[53] At that time, the only agency protecting the authors' interests was social control rather than the law. Two innovations in the late fifteenth century: the creation of typewritten in 1455 and the development of printing press in 1478 changed the history and contributed for the development of copyright. The invention of the art of printing (in time of the first copying industry) was the first situation that gave rise to the need for copyright law.[54]

The concept of copyright first developed in England. The first copyright privilege was granted in England in 1518. It was given to Richard Pynson, King's Printer, the successor to William Caxton. These copyright privilege is called monopoly. The privilege granted a monopoly for two years. In the world history of copyright, England pioneered the true copyright law.[55] With the development of art of printing, multiplying copies became easy and its profitability increased. In an effort to limit and regulate the printing of religious and political books, Henry VIII of England banned importation of books into England. However, the Act of 1529 established a system of privileges and empowered the stationers' company to manage printing.[56] This was the earliest form of copyright protection in which the current copyright laws developed. The Act of 1529 forbids printing unless the stationers' company first grants a license and registers the book. The Act was not intended to protect authors or publishers; rather the purpose of the Act was censorship.

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[52] See Shamim, Khalid and Aqa Raza, *The Copyright and Her History*, NTUT Journal of Intellectual Property Law and Management 11, no. 1 (2022); and Birrell, Augustine, *Seven Lectures on the Law and History in Books,* Cassell, 1899.
[53] Stephen P. Ladas, *The International Protection of Literary and Artistic Property*, 16 (Macmillan, 1938).
[54] Corpus Juris Secundum, *supra* note, 46.
[55] Corpus Juris Secundum, *supra* note, 46.
[56] Buning Marius, *supra* note 47.

In 1556, Mary & Philip of England granted a charter to the Stationer's Company.[57] In addition to the company's regular supervisory authority over the craft, the Charter gave the company the powers to search out and destroy books printed in contravention of statute or proclamation. As a result, the company was able to identify which was in effect a licensing system by requiring lawfully printed books to be entered into its register. These printed books were registered in the company's registration as the property of particular printers. The English Parliament enacted the Licensing of the Press Act 1662 in response to the printing of "Scandalous books and Pamphlets",[58] which required all intended publications to be registered with the government-approved Stationers Company, granting the Stationers the right to control what material could be printed.

In England, the royal grants of privilege to print certain books were not copyrights. They were not granted to promote education or for the benefit of authors. They served as commercial monopolies and licenses to businessmen to follow their professions. In the first generation, copyright was in the form of individual and personal privileges or licenses based on the idea that 'right comes straight from the public authority'. Since the Pope, King, or the Princes were the authorities who granted these privileges, there was no question of international protection of the author's right. However, foreigners whose works was published within the country were granted privileges in absence of any international protection of the authors' rights. One notable work that was granted a 15-years privilege is Hugo Grotius's famous treatise *'De Jure Belli ac Pacis (The Rights of War and Peace)'* which was published in 1625.[59]

The second generation was the time when the Copyright Act of 1709 also known as the Statute of Anne was enacted. The parliaments of England and Scotland were united as a result of the Anglo-Scottish Union, later in 1701. The new parliament was able to amend the laws in both countries and a significant early piece of legislation was the Copyright Act of 1709, also known as the Statute of Anne,[60] after Queen Anne. The statute was regarded as the first true copyright law in copyright history of the world and it came into force in 1710. The

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[57] Himali Sylvester, *The Exordium of Copyright System in UK*, ENHELION BLOGS (May 10, 2003), (last visited Apr. 3, 2022). https://enhelion.com/blogs/2021/05/10/the-exordium-of-copyright-system-in-uk/.
[58] Patterson, Lyman Ray, *Copyright in Historical Perspective*, Vanderbilt Univ. (1968), p. 136-137.
[59] Volpe, Tony & Joachim Schöpfel, *Dissemination of Knowledge and Copyright: A Historical Case Study*, Journal of Information, Communication & Ethics in Society 11, No. 3, (2013), p. 144–155
[60] Statute of Anne, *supra* note 48.

enforcement of the Statute of Anne in 1710 signaled a historic movement in the evolution of copyright law. As the world's first copyright statute, it granted book publishers a legal protection of 14 years from the date of the statute's enactment.[61] Until 1783,[62] the US did not have proper copyright legislation. The same year, congress had recommended to the various states that the US citizens' authors and publishers should be granted copyright protection.[63] The Federal Copyright Act of 1790 which copied from the Statute of Anne was enacted in accordance with the provisions of the USA Constitution, and so there existed the similarity between copyright law of the UK and the US.[64]

Since 1710 attempt was made to restrict as well as to establish copyright protection.[65] After that, further works were progressively added to the copyright's scope.[66] The legal protection to publishers and the challenges posed by authors showed the important commercial distinction between authors and publishers in 18th century. Prior to publication, the author possessed certain legal rights although they were not clearly defined. The publisher gained publication right after publication. With various modifications, such distinction existed until recently.[67]

The American copyright law came to make distinction between the right of an author to his unpublished creations and the statutory copyright that might be obtained up on publication. The right of an author to his unpublished works was recognized as "common law" right of an author, meaning the author had an inalienable right to his creation until recently. Furthermore, the author had the right to decide when and how to publish the work. In the event that it is published, the author's common law rights terminate upon publication and are replaced by their statutory rights. Although the common law copyright existed independently from statutes of copyrights, it has been recognized for a long time in the express provision of the copyright acts in United States of America.[68] But in order to avoid confusion and dual

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[61] Wikipedia, *History of Copyright* – Wikipedia, [online] Available at: https://en.wikipedia.org/wiki/History_of_Copyright [Accessed 17 January 2022].
[62] Conn. Acts 133.
[63] See Los Angeles Copyright Society (LACS) & UCLA *School of Law, Copyright and Related Topics: A Choice of Articles*, 77 (2006); and Shamim, Khalid, and Aqa Raza, *supra* note 53.
[64] Buning Marius, *supra* note 47.
[65] Arthur R. Miller and Michael H. *supra* note 2, p. 286.
[66] Buning Marius, *supra* note 47.
[67] Arthur R. Miller and Michael H, *supra* note 2.
[68] Corpus Juris Secundum, *supra* note, 46, p. 138.

protection to copyright, the 1976 Copyright Act altered the distinction between common law right of an author to his unpublished works and the statutory copyright upon publication; and the line of demarcation was shifted from the moment of publication to the moment of fixation of the work.[69]

Limiting the author's right was outlined in the 1709 Statute of Anne, in the first true copyright law. The Statute of Anne replaced perpetual copyright that exist at common law for unpublished works with a time limitation for published works. Since then, judges have actually limited the author's rights even more by allowing certain copies by the reason of "fair dealing". Then the idea of fair dealing was codified by the parliament in 1911. Consequently, an attempt was made to reconcile the dual purpose of Statute of Anne as recognized by courts: compensating the author, and encouraging other authors to create for the benefit of society.[70] Then the American judges learn from English precedent and developed the concept of "fair use", which is the counter part of England's "fair dealing".[71]

Like in common law countries of England and US, the rise of printing press demanded also copyright laws in civil law countries, such as France.[72] The historical development of copyright in these countries was not as such different, substantively, from those countries discussed in the above. Nonetheless, the French copyright law is recognized historically and currently for its authors right related-approach. Despite the fact that the French copyright system is associated with author's rights, some observers testify that copyright in France was the least protected of all property rights since they were enforced by balancing with the public domain and social welfare. In the middle of 19th c, the French copyright jurisprudence was considered in terms of rights of personality. However, the moral rights of authors were not recognized by law until the early 20th century. Since then, the subsequent copyright laws recognize moral rights of the author.

In the second generation, the freedom of press played a crucial role and its expanding scopes paved the way for the recognition of works of the authors and their rights. One may argue that the restoration of freedom of press led to the enactment of statutes. With regard to the rights

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[69] Arthur R. Miller and Michael H, *supra* note 2, p. 287.
[70] *Copyright Fair Use: Case Law and Legislation, Duke Law Journal*, Vol. 1969, Feb. 1969, p.75.
[71] *Id.*
[72] French Decree, *supra* note 50.

of foreigners, the Statute of Anne stipulated that the work be published within the country and did not distinguish between "citizens" and "foreigners". It grants authors and their assignees the exclusive right and freedom to print books. In addition, authors were given exclusive recognition in this generation. Moreover, it appears that this generation somehow recognized and moved further to the proposition that the real fruit should go to the tiller of the land. Further to this, the author's economic, moral, and neighboring rights were recognized, taking into account the author's integrity and paternity in their works.

Finally, during the third generation, the demand for the fuller protection of authors led to important historical advancements in the history of copyright law which are of fundamental importance even today. Taking full advantage of her initiative in enacting the French International Copyright Act in 1852, France was able to establish 23 treaties for the reciprocal protection of author's rights between 1852 and 1862.[73] Finally, in 1858, the first Congress of authors and artists was held in Brussels.[74] By its resolutions, the principle of international recognition of author's rights without the condition of reciprocity was declared.

Further, uniform legislation on literary and artistic property by all countries was demanded. In 1886, the first attempt was made at the International Copyright Conference. This generation urged the need for uniform legislation at the international level to specifically address the problems that the authors faces and include the literary, dramatic, film, and cinematographic works within the statutory ambit of copyright, and further protect the performers and broadcasting rights of the authors by general legislation. Thereafter, came international agreements like the Paris Convention and the Berne Convention which are the standards of the copyright law enacted by every country. The Berne International Copyright Convention of 1886 finally provided protection for authors among the countries who signed the agreement.[75] This generation has addressed the issues relating to copyright law from the Berne Convention of 1886 to the Marrakesh Treaty of 2013.

In general, the laws concerning copyright were not always in existence as we know them today. They were shaped through the historical developments. The history did not flow in one

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[73] Lionel Bentley & Martin Kretschmer, eds., *French International Copyright Act, Paris (1855), Primary Sources on Copyright (1450-1900)*, (last visited Apr. 8, 2022.)
[74] Sam Ricketson & Jane C. Ginsburg, *International Copyright and Neighboring Rights: The Berne Convention and Beyond*, Vol. 1, (2nd ed., Oxford University Press, 2006), p. 340.
[75] Day O'Connor, Sandra, *Copyright Law from an American Perspective*, Irish Jurist, 37, (2002), p. 16-22.

direction in each and every country and, therefore, copyright laws today are territorial in nature, varying from country to country, or in the case of USA, from state to state. The idea of copyright emerged following the invention of the printing press in Europe[76] during the 15th and 16th centuries.[77] The invention of printing brought profound social changes. It was associated with a common law and rooted in the civil law system.[78]

2.2. General concepts of copyright.

A copyright is a sort of intellectual property that grants the owner of the right or the creator of an original work, the exclusive, legally secured right to copy, distribute, adapt, display, and perform a creative work, usually for a limited period of time.[79] The creative work may be in a literary, artistic, educational, or musical form. The goal of copyright is to safeguard the original expression of an idea in the form of a creative work, but not the idea itself.[80] The owner is the one who exercises the exclusive rights, including the rights to reproduction, the derivative work right, the distribution right, the performance right, the display right and the digital transmission performance right.[81] A copyright law granted by the government gives to the owner of an intellectual output the exclusive use and enjoyment of it to the extent specified by law.[82]

These exclusive rights of authors are subject to limitations and exceptions under copyright law in many jurisdictions. Copyright limitations and exceptions are provisions found in domestic copyright law or the Berne Convention, which allow for copyright protected works to be used without a license from the copyright owner. The rational for the limits or exceptions to the exclusive right of copyright owners is to provide a fair balance between the rights of copyright owners and the rights of the society at large.

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[76] Patterson, Lyman Ray, *supra* note 58.
[77] Joanna Kostylo, *From Gunpowder to Print: The Common Origins of Copyright and Patent*, (2010).
[78] Goldstein, Paul; Hugenholtz, P. Bernt, *International Copyright: Principles, Law and Practice*, Oxford University Press, (2010).
[79] Merriam-Webster, *Definition of Copyright*, Retrieved 20 December 2018; Nimmer on Copyright Vol. 2 § 8.01; Intellectual Property, Black's Law Dictionary, 10th ed. (2014); *Understanding Copyright and Related Rights,* World Intellectual Property Organization, (2018), p. 4.
[80] Daniel, A. Tysver, *Works Unprotected by Copyright Law*, (2018).
[81] Arthur R. Miller and Michael H, *supra* note 2, p.323.
[82] Corpus Juris Secundum, *supra* note, 46.

Therefore, copyright refers to incorporeal, intangible property right that the law grants to the owner of certain kinds of works such as literary or artistic works.[83] One nature of copyright is that it is intangible, incorporeal right in which the right completely separated and independent from any material substance, such as the manuscript or the plate used for printing, sale or other transfer.[84] In addition, a copyright is a statutory grant or a grant by law to the owner to have a complete monopoly over the copyrighted work.[85] Only works that fall within the enumeration or description of the copyright law are eligible for a copyright. According to the common law interpretation, copyright is not a pre-existing right; rather it is a legally granted new or independent right. The rights are as only the law confers and such rights can be used and acquired only with respect to the subject, by the persons on the terms and conditions set forth in the copyright law.[86]

A "work" can be said in case of copyright, as the ordered expression of thought.[87] Furthermore, copyright protection subsists in original works of authorship fixed in any tangible medium of expression. In no case does copyright protection for an original work of authorship extend to any idea, procedure, process, and system, method of operation, concept, principle, or discovery.[88] The copyright may require the work to have some tangible form. This indicates that the copyright law requires the work to be fixed. Original literary works, musical works (including any accompanying works), dramatic works (including any accompanying music), pantomimes and choreographic works, pictorial, graphic, and sculptural works, motion pictures and other audiovisual works, and sound recordings are among the works of authorship or the specific types of works in which copyright protection exists.[89]

Generally speaking, a work, in order to be protected by copyright law, must meet minimal standards of originality. In case of copyright originality implies that the copyright owner created the work. A work needs be original in order to be protected by copyright; this means the author has created it by his own skill, labor, and judgement without directly copying or

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[83] Buning Marius, *supra* note 47.
[84] Corpus Juris Secundum, *supra* note, 46.
[85] Harriet F. Pilpel and Morton, D. Gold Berg, *A Copyright Guides*, (1966).
[86] Corpus Juris Secundum, *supra* note, 46, p. 165.
[87] Buning Marius, *supra* note 47.
[88] Daniel, A. Tysver, *supra* note 80.
[89] *Id.*

evasively imitating the work of another.[90] Copyright law recognizes the right of an author based on whether the work actually is an original creation, rather than based on whether it is unique. Even if many other people created the work before him, the author is still entitled to copyright protection.

Originality only implies that the person who claimed copyright did not copy from someone else.[91] One way of testing originality of a work is searching for a reasonable amount of effort extended in the creation of a work. A copyright protection to subsist in a literary, dramatic, musical or artistic work, such things must qualify as a 'work'. To determine whether a thing qualifies as a work, considering the amount of skill, labor or judgement applied in its creation is important.[92] A work to get protection by copyright law need not consist of a new or original matter.

A copyright protection may extend to plan of a work as connected with the selection, arrangement, and combination of the matter, even though all the materials used and its subject are common to all authors. An author may come up with his own work by selection and modification, arrangement, and combination even if it shows evidence that it was derived from a former publication.[93] In such a case, if the selection, plan, arrangement, and combination of material are new and original, the author will be entitled to copyright to that work. The copyright protection is extended to what is new and original not to the old material used in the new work. Therefore, compilations, abridgements, and indexes may get copyrights protection to the extent that it is new and original in respect of selection, modification, arrangement, and combination.[94]

As stated in the above, the copyright law empowers the owner to have a control over the work. The author himself may be the owner of the copyrighted work. Author means a person who produces or created an original work by his own intellectual skill and labor.[95] Here, a corporate body may also be the author of a work. For example, the arrangements in sound recordings made by officers of a music company in which case the company are deemed to be

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[90] Corpus Juris Secundum, *supra* note, 46, p. 166.
[91] Arthur R. Miller and Michael H, *supra* note 2, p. 295.
[92] Buning Marius, *supra* note 47.
[93] Corpus Juris Secundum, *supra* note, 46, p. 168.
[94] *Id.*
[95] Corpus Juris Secundum, *supra* note, 46, p. 182.

the author. And sometimes, the identity of the author may not be known. The author may not wish his identity to be disclosed in case of anonymous and pseudonymous works.[96]

Copyright owner has the exclusive right to: copy the work, issue copies of the work to the public, rent or lend the work to the public, perform, show or play the work in public, broadcast the work or include it in a cable program, and make an adaptation of the work.[97] If anyone performs or authorizes another to perform these acts restricted by copyright law without the consent of the owner, he infringes the copyright subsisting in a work. So, infringement occurs whenever some body exercises any of the rights reserved exclusively for the copyright owner by the copyright law without the consent of owner.[98]

In the past, many jurisdictions required either notice or registration as a prerequisite for copyright protection. Worldwide copyright laws mandated for many years that authors register their works in order to receive copyright protection.[99] Depending on the jurisdiction, this involved fixing a copyright notice on the work, putting a copy of their work at a public library, and renewing copyright status after a certain period of time.[100] For example, the first copyright statute, the Statute of Anne, required that works be registered at Stationer's Hall prior to publication in order to be protected.[101] In France, as well, Article 6 of the 1793 Act linked the exercise of copyright to the deposit of a copy of the work: authors who failed to submit were barred from suing for copyright infringement.[102]

Formalities as a requirement for protection were abolished with the 1908 Berlin revision of the Berne Convention and were in turn gradually eliminated in all the signatory countries. And the Berne Convention is also incorporated into the TRIPs Agreement.[103] These changes in copyright law have made it easy for a work to become legally protected. However, problem come up when an individual or organization wishes to use a copyrighted work but cannot

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[96] Buning Marius, *supra* note 47.
[97] Buning Marius, *supra* note 47.
[98] Arthur R. Miller and Michael H, *supra* note 2, p. 340.
[99] Over 180 in the US.
[100] William F. Patry, *Copyright Law and Practice*, (Rockville, MD: BNA Press, 1994), p. 408-412; on the abolition of formalities in US see Shira Perlmutter, *Freeing Copyright from Formalities*, Cardozo Arts & Entertainment Law Journal 13 (1994-95), p. 565, 568.
[101] Statute of Anne, *supra* note 48.
[102] This formality was abolished with the 1925 Act.
[103] Article 9 of TRIPs Agreement.

contact the copyright holder to obtain permission.[104] This problem is known as "orphan works", the topic of this research.

2.3. Background of Orphan Works and Copyright

2.3.1. Defining Orphan Works

There are currently numerous different definitions for the concept of orphan works, instead of one universally accepted definition.[105] This is unfortunate as the principle of "national treatment" applies to copyright which results in terms the rights of citizens and foreigners being treated equally under the local law.[106] If no universal definitions for orphan works exists, it will result in works being deemed orphans works in one country, but not in another. Use of a works as an orphan works in one country might adversely affect the interest of licensees in another country, but this is an unfortunate consequence of the lack of international treaties on the matter.

This does not mean that the term is an obscure concept. There is a common idea to the concept and through analysis of the existing definitions, it is submitted that an orphan work can essentially be defined as a work of which the existing owner/copyright holder of the copyright cannot, after a reasonable search, be traced. When we define orphan works we talk about creative works which are protected by a copyright however one or more of the right holders cannot be found or are unknown despite a thorough search being carried out to establish their identity or locate them.

The Intellectual Property Office of United Kingdom which is responsible for granting copyrights in UK defines orphan works as "creative works or performances that are subject to copyright such as diary, photograph, film or piece of music for which one or more of the right holders is either unknown or cannot be located".[107] According to the US Copyright Office Reports on Orphan Works, an orphan work is "a phrase used to describe the situation where

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[104] For example, copyright may belong to corporate entities that go out of business, leaving no means of identifying the successor of the copyright.; Olive Huang, *US Copyright Office Orphan Works Inquiry: Finding Homes for Orphans*, Berkley Tech. L. J. 21, (2006), p. 271.

[105] Gasaway Laura N., *Copyright Basics: From Earliest Times to the Digital Age* (2009-2010) 10(3), Wake Forest Intellectual Property Law Journal, 10, (2009-2010), p. 241, 262; United States Copyright Office, Reports on Orphan Works, *supra* note15, and Article 2 of Directive 2012/28/EU.

[106] Article 3(1) of the Agreement on the Trade Related Aspects of Intellectual Property Rights.

[107] "Copyright: Orphan Works" (GOV.UK) https://www.gov.uk/guidance/copyright-orphan-works accessed June 7, 2020.

the owner of a copyrighted work 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".[108]

However, if we look at the Orphan Works Directive (OWD) of the EU, it can be observed that it does not define orphan works; instead, it outlines the prerequisites that must be met for a works to be considered an orphan. Article 2(1) of the OWD stipulates that: [109]

> *A work or a phonogram shall be considered an orphan if none of the right holders in that work or phonogram is identified or, even if one or more of them is identified, none is located despite a diligent search for the right holders having been carried out and recorded in accordance with Article 3.*

Thus, it could be noted from the Article above that four conditions must be fulfilled to consider a work an orphan. Firstly, a work or phonogram shall still be under copyright protection. Secondly, none of the copyright holders in that work or phonogram is known, or if one or more of them is known, none of these identified copyright holders could be traced. Thirdly, a diligent search shall have been carried out by the user without being successful in identifying or locating the copyright holder(s). For purposes of discerning whether a work is an orphan work, a diligent search[110] carried out in good faith[111] is required.[112] Finally, the effort expended upon a diligent search shall be recorded in a central, publicly accessible online database, in accordance with Article 3 of the Directive.

It could be observed from the above definitions that although they are different from each other in terms of vocabulary, they are similar in content, because most of them take into account the identity and location of the copyright holder as well as a diligent search. A diligent search is considered as a common principle that underlies most of the orphan works legislation. In order for the use of the work to be lawful, it must meet the required conditions, which vary from jurisdiction to jurisdiction, the standards of which could be strict or lenient contingent on the legislation. In general, we can define orphan works as follows: an orphan works is one that is legally protected by copyright and neighboring rights law, but it is

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[108] United States Copyright Office Report on Orphan Works, *supra* note 12.
[109] Article 2(1) of Directive 2012/28/EU.
[110] Article 3 of Directive 2012/28/EU.
[111] Article 3(1) of Directive 2012/28/EU.
[112] Article 2(1) of Directive 2012/28/EU.

difficult or impossible to identify or locate the right holder after conducting a diligent search in a situation where it is legally required to obtain permission from the copyright holder.

2.3.2. Orphan Works and Copyright

New technologies breathe new value into old content.[113] The history of the media provides ample illustration of this simple truism. The development of television broadcasting in the 1950s and 1960s created massive secondary markets for pre-existing cinematographic works. New digital media provide unprecedented opportunities for reutilizing old existing content. Digitization also allows broadcasting organizations, archives and libraries to create vast digital repositories of pre-existing audiovisual content. Numerous significant copyright issues are brought up by the phenomena of library digitization in general, and the digitization of the so-called orphan works in particular.

Digitization challenges traditional concepts of copyright law such as the categorization of works into different classes. The seamless transmission of digital works and the ease with which works in digital form can be reproduced pose unheralded challenges to copyright law. The emergence of digital technologies has allowed cultural heritage institutions, including libraries, archives, museums and galleries to digitize and make online things from their collections that might not have otherwise been known to the public. The process of digitizing pre-existing content typically involves both copyright-protected works and performances protected by neighboring rights, i.e., rights related to copyright. However, keep in mind that before digitizing any form of work, copyright owners must give their consent.

The copyright law was merely a territorial protection based on stringent registration procedures prior to the Berne Convention. The UK's Statute of Anne of Copyright, which was passed in 1710, was the first internationally recognized copyright law. During this period protection of copyright were granted to only those who had registered their creative works as the stationer hall under the supervision of the guild of stationers. This implies that there was no automatic copyright protection, unlike what is common in modern society. Internationally, copyright registration requirements that were previously mandatory had been eliminated by

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[113] Gailey, Elizabeth Atwood, *Who Owns Digital Rights? Examining the Scope of Copyright Protection for Electronically Distributed Works*, Comm. & L., vol. 18 (1996), p. 3.

the turn of the 20th century. This marked the start of automatically occurring copyright protection, which is now universally accepted.[114]

Orphan works in the context of copyright law are a self-created issue. The idea of orphan works in copyright was first emerged in the US in the mid-2000, following a large scale-digitization pushed by library funds that sought to upload works for which the right holders could not be located. In 2005, when the U.S. Copyright Office launched the first comprehensive investigation into the issue of orphan works, it asked participants to discuss what types of challenges orphan works posed, how frequently problems arose, and what next steps should be taken.[115] In US, prior to the Copyright Act of 1976,[116] copyright were contingent upon an author or other rights holder complying with a number of formalities, such as notice, registration, and renewal.[117] However, the 1976 copyright law amendments have resulted in protections that obviously benefit copyright holders, but have also presented challenges.[118]

A number of European countries have started digitizing a vast collection of their copyrighted works, which they view as a symbol of their cultural heritage.[119] The European Union has been grappling with the issue of orphan works since 2005, when the European Commission (EC) launched an initiative to create Europeana, an online digital library by 2010. It is believed that this digital library serves as a platform for the distribution of digital works from the collections of all national libraries in Europe. The goal of Europeana is to provide a wide range digital works, including books, articles, newspapers, films, music, and photographs, freely accessible to the general public. It preserves and makes these works available to greatest number of people by archiving all important cultural assets. By visiting the website,

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[114] "Copyright" Encyclopedia of Early Modern History Online.
[115] United States Copyright Office, Report on Orphan Works, *supra* note 12.
[116] Copyright Act of 1976, 17 U.S.C. §§ 101-1332 (2000).
[117] Act of Mar. 4, 1909, Ch. 320, 35 Stat. 1075 (codified as amended at 17 U.S.C.).
[118] Joel Sage, *Revenue Streams and Safe Harbors: How Water Law Suggests a Solution to Copyright's Orphan Works Problem*, 16 B.U.J. SCI. & Tech. L., (2010), P. 294, 298.
[119] Katharina, de la Durantaye, , *Finding a Home for Orphans: Google Book Search and Orphan Works Law in the United States and Europe*, 21 Fordham Intell. Prop. Media and Ent. L.J., (2011), p. 229, 275.

people from all over the world can enjoy or study European cultural heritage without having to go to libraries to collect actual copies of the works.[120]

Furthermore, the European Commission recommended in 2006 that EU Member States implement a licensing system to facilitate the issue of orphan works and to increase the accessibility to listings of recognized orphan works. The creation of High-Level Expert Group (HLEG) on Digital Libraries in 2006 brought together all stakeholders concerned with online accessibility and the digitization of works including orphan works. The European Commission then recognized the cross-border problems relating to orphan works in 2008.[121] In 2012, the European Union passed the Orphan Works Directive, which mandates member states to provide an exception to their copyrights laws permitting cultural and heritage institutions to digitize, make publically available, and catalog orphan works in their collections.[122] Subsequently, the United Kingdom introduced its regulatory framework in 2014 to address orphan works.[123]

2.4. Types of Orphan Works

From the above definitions, it is clear that there are two types of orphan works: those whose right holders are unknown and those whose right holders cannot be located.

2.4.1. Works whose right holders are unknown

To determine the copyright status of a works, you must identify the copyright owner.[124] When no one claims ownership of a work protected by copyright or when the owner is unknown, it might result in copyright orphanhood.[125] This can occur for several reasons. For example, the copyright owner may never have been publicly known, as in the case of publishing works anonymously or unpublished works. The identity of the author may have once been known, but the information has been lost over time. For instance, it might often impractical to

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[120] Ringnalda, Allard, *Orphan Works, Mass Rights Clearance, and Online Libraries: The Flaws of the Draft of Orphan Works Directive and Extended Collective Licensing as a Solution,* 8 Medien und Recht International, 8, (2011), p. 3-10.

[121] Eleonora Rosati, *The Orphan Works Provisions of the ERR: Are They Compatible with the UK and EU Laws?* Eur. Intell. Prop. Rev., (2013), p. 1, 7.

[122] Directive 2012/28/EU, *supra* note 18.

[123] See UK, The Enterprise and Regulatory Reform Act, *supra* note 19; See also Daniela Simone, Note, *Unlocking Orphan Works: A New Licensing Scheme,* 19 Art Antiq. L. (2014), p.315-316.

[124] Vuopala, Anna, *Assessment of the Orphan Works Issue and Costs for Right Clearance*, European Commission, DG Information Society and Media, Unit E4 Access to Information, (2010).

[125] Khong, Dennis WK., *Orphan Works, Abandonware and the Missing Market for Copyrighted Goods*, International Journal of Law and Information Technology, 15(1), (2007), p. 54-89.

determine who inherited a copyright and is now the owner.[126] Another possibility is that the original copyright holder passed away intestate and his/her copyright was not properly transferred to the legal heir. Similarly, copyrights may not be assigned upon a company's liquidation.

Another scenario is that a party may have been granted a copyright, but he/she does not recognize its importance or worth and, as a result, does not claim ownership of the work.[127] In addition, the identity of the copyright holder might remain unclear in circumstances in which the original right holder (author) is known, but the identity of the works current copyright holder is unknown. This is mostly true for books, since there are situations where a book that has been out of print for a long period of time and the right of publication reverted to the author, who may have died, depending on a contract or other legal means. Another possibility is that the works digital use was not covered by a publishing contract.[128]

2.4.2. Works whose right holders cannot be located

Another type of orphan works relates to the inability to locate the right holder and although the owner of the copyright might have been identified, the owner location might be unknown. Even though the true copyright holder might be identified, his/her domicile could be undisclosed. The issue is further exacerbated by the possibility that owners of work protected by copyright are a foreign nationals, whose locations may be especially hard to ascertain. The Berne Convention allows each member country to enable foreigners to own copyright under their national law, so the right holder of a works may be a foreign national, and as a result locating the owner may be challenging. Like the first type of orphan works, this type of orphan prevents users from getting consent from the owner of the rights. However, it is argued that this type of orphan works is less serious in scope than the unknown ownership, because technology, such as the telephone and email, makes it more likely to find copyright owners.[129]

Furthermore, it is sometimes challenging to locate an identified individual or company in order to obtain authorization when there is either no information about their presence or

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[126] Van Gompel, Stef, *The Orphan Works Chimera and How to Defeat It: A View from Across the Atlantic*, Berkeley Technology Law Journal, 27(3), (2012), p. 1347-1378.
[127] Khong, Dennis WK., *supra* note 125.
[128] Vuopala, Anna, *supra* note 124.
[129] Khong, Dennis WK., *supra* note 125.

outdated information. For instance, it might not possible to locate several inheritors in the event of the death of the right holder. Without a clear assignment of assets, a company may have declared bankruptcy or gone out of business in the event the rights have been assigned to it. In the case of rights having been assigned to a company, the company may have gone out of business or gone bankruptcy without the clear assignment of assets. Even when the right holders (e.g., the author's inheritors or publishers) are located, some of them, particularly when the works are no longer commercially available, may not be willing or able to answer license requests within a reasonable period of time.[130]

2.5. Causes of Orphan Works Problem

A work that is protected by copyright is essentially considered an orphan works if the person requesting authorization to exercise one of the exclusive rights allowed by the copyright system is unable to identify or trace the owner of the rights in the work. There are number of factors intrinsic to the copyright regime that contribute to work becoming orphaned. The most pervasive and typical causes are the prohibition of formalities and copyright term extension, and technological developments which are discussed and examined in detail below. In general, the causes can be classified into legal and non-legal factors.

2.5.1. Principle of automatic protection and absence of formalities

One reason for the issue of orphan works is that the absence of registration like to what is used for trademarks and patents. However, such system is burdensome when it comes to copyright, due to the volume of works that are produced every day. The removal of formality requirement for the protection of copyright at international level by the Berne Convention is thought to be the most significant factor in aggravating the issue of orphan works.[131] The Berne Convention imposes an international obligation of “the formality free or no formality principle” upon its signatories. The convention prohibits member states from requiring registration or other formalities in order to grant copyright protection and copyright protection is granted to authors automatically upon creating or publishing their works.[132]

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[130] Greismann, Libby, *supra* note 11, p. 193-211.
[131] Sprigman, Christopher, Reform(aliz)ing Copyright in Intellectual Property Law and History, 57 Stanford L. Rev., (2017), p. 485, 487-488.
[132] Berne Convention for the Protection of Literary and Artistic Works art. 5(2), Paris Act, July 24, 1971, 25 U.S.T.

The idea of "automatic protection" is one of the convention's guiding principle. This principle states that copyright protection cannot be conditioned upon compliance with any formality. The convention stipulates in its Article 5(2) that "the enjoyment and the exercise of copyright shall not be subject to any formality," which forms the cornerstone of international copyright law.[133] This provision fundamentally changed the structure of copyright and was implemented with the intention of eradicating instances of censorship over the use and enjoyment of copyright.[134] The automatic subsistence of copyright marked the end of formalities and the transition from conditional to an unconditional system of protection, whereby authors enjoy automatic copyright protection without needing to take affirmative actions, like registration or renewal.

Formality conditions were originally allowed to be placed on authors in order for them to exercise their copyright, according to Article 2 of the Berne Convention of 1886. However, at the national and international levels, formality in copyright law began to lose its importance in the late 19th and early 20th centuries. Following the 1908 Berlin Act amendment to the Berne Convention, Article 2 of the convention was replaced by Article 5(2), which removed the formality requirement. As per this article, before a work is protected by copyright, neither registration nor an accompanying copyright notice have to be attached to a work. Once a qualifying work is created, it is protected by copyright.[135] Today in all nations where the Berne Convention standards apply, copyright is automatic, and does not require formal registration with any government agency.[136]

If we consider the Ethiopian copyright law, even though Ethiopia has not yet ratified the major international copyright agreements, such as the Berne Convention, the national copyright and neighboring rights law is in line with the minimum requirements outlined in these agreements. Under the Ethiopian copyright law, copyright protection is not subject to any formality requirement. Article 6 of the copyright proclamation No. 410/2004 provides

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[133] Berne Convention for the Protection of Literary and Artistic Works 1886, as amended in 1979. By effect of Art 9 of the TRIPS Agreement, this provision of the Berne Convention is accorded mandatory status.
[134] On the effects of the abolition of formalities in light of the Berne Convention see Paul Goldstein, *International Copyright: Principles, Law, and Practice*, (New York: Oxford University Press, 2001), p. 2.
[135] Bingbin, Lu, *The Orphan Works Copyright Issue: Suggestion for International Response,* Journal, Copyright Society of the USA, 60, (2013), P. 255-284.
[136] Van Gompel, Stef*, Formalities in Copyright Law: An Analysis of their History, Rationales, and Possible Future (Unpublished Doctoral Dissertation),* University of Amsterdam, Amsterdam, the Netherlands, (2011).

requirements for the protection of a work. This article states that an author is entitled to protection upon creating original work without any formality requirements.[137] This implies that the Ethiopian copyright law does not need any formalities, application for registration, examination, or disclosure of the work in any way in order to grant protection. Rather, under the proclamation protection is granted automatically and what is needed is creation of original work and its fixation. Therefore, copyright is automatically granted at the moment original work is created and up on its fixation.

The abolition of formalities at international level does not mean that they are outlawed in principle. Certain national laws encourage authors to voluntarily register their rights as a means of providing evidence in the event of copyright infringement, even if registration is not a prerequisite for protection. What is forbidden is making the enjoyment or exercise of copyright conditional upon formalities. While some minor formalities have been maintained as legal under Berne, virtual entry of the work into public domain for non-compliance with a formality is a harsh consequence that would seemingly violate the Berne.[138]

However, this change in the formality condition by the Berne Convention and national laws led to the exacerbation of the issue of orphan works because there is now less information about the copyright owners, which makes the process of identifying and locating the right holders more difficult. The Berne Convention created a new issue called orphan works, along with all positive improvements. The problem with automatic form of copyright protection is the possibility of the existence and creation of orphan works. In my opinion, copyright system prioritizes the interests of the copyright owners over the interests of the general public in the case of the removal of formalities, because the removal of formality leads to the creation of orphan works, which have a detrimental effect on the public's access to copyrighted works.

As a result of the copyright system currently at the international and national levels, sufficient information regarding the ownership of works protected by copyright is not always provided. In certain circumstances, the name of the author or the owner of the copyright might be known but, other than name no further information is provided, which means that locating the

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[137] See Article 6 (1) of the Proclamation.

[138] United States Copyright Office Report on Orphan Works, *supra* note 12; Reply Comments of Jane Ginsburg & Paul Goldstein, at 3bi (May 9, 2005) [hereinafter Ginsburg & Goldstein Comment] ("To make non-registration determinative of any diminution in the author's rights would likely put the U.S. in non-compliance with its international obligations.").

right holder will be difficult or even impossible.[139] The situation is exacerbated with the lapse of time, because information regarding the right holder of some works fades and attributing a works to its owner becomes more difficult, more expensive, and sometimes even impossible.[140]

2.5.2. Copyright term extension

The term of copyright has been greatly extended over time. As a practical matter, long copyright duration increase the number of works that are orphans. Tracking a chain of title over a lengthy period of time can become very difficult in the absence of registration system. It is not possible to find the author's heirs both after 50-60 years of author's death and after a short period of time after his death. The majority of countries have steadily increased copyright term extensions in order to make obtaining copyright protection easier.[141] The harmonization of the international copyright system has made the issue of orphan works worse because the period of copyright protection is now extended to at least the author's life plus 50 or 70 years. The length of the copyright protection term has led to making it difficult for users to determine whether a work is still protected by copyright.[142]

Taking the law of many countries into consideration reveals that the term of copyright protection has been lengthening, from the earliest modern copyright law to the present. For instance, in UK under the first modern copyright law, the Statute of Anne of 1710, copyright protection was granted for 14 years, with the right to renew for additional 14 years if the author was still alive. The UK Copyright Act of 1814 increased the term of copyright to 28 years, with the right to renew for an additional term of the same period of time if the copyright owner survived after the first term.[143] The copyright duration was then extended to the author's life time plus 7 or 42 years from the date of publication, whichever was longer, with the enactment of the Literary Copyright Act of 1842.[144] After that, under section 3 of the Imperial Copyright Act of 1911, copyright term was extended to the life of the author plus 50

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[139] Bingbin, Lu, *supra* note 13.
[140] Urban, Jennifer, *How Fair Use Can Help Solve the Orphan Works Problem*, 27 Berkeley Technology Law Journal 1379, (2012), https://perma.cc/C7KT-GLAK accessed 2 May, 2021.
[141] Hansen, David R., *Orphan Works: Definitional Issue*, Berkeley Digital Library Copyright Project White Paper 1, (2011).
[142] Bunce, Abigail, *British Invasion: Importing the United Kingdom's Orphan Works Solution to the United States Copyright Law,* North Western University Law Review, 108(1), (2014), p. 243-282.
[143] UK Copyright Act of 1814.
[144] UK Literary Copyright Act 1842.

years.[145] Finally, in 1995, the UK implemented the EU Copyright Term Directive of 1993,[146] which further extended copyright protection to the author's lifetime plus 70 years.[147]

Furthermore, in US, prior to the enactment of 1976 Act, the copyright term was 28 years, with the right to renew for an additional 28-year period. Therefore, in order to maintain copyright protection, owners of such rights must have registered their renewal, and failure to do so would result in the loss of their copyright protection. The Copyright Act of 1976 extended the period of copyright protection to the life of the author plus 50 years. The Sonny Bono Copyright Term Extension of 1998, which amended section 302 of the copyright act of 1976, further extended this period to the author's life time plus 70 years.[148]

Looking at the Ethiopian copyright proclamation of 2004, as far as term of protection is concerned, the proclamation under Art. 20(1) states that the standard of period of protection of economic rights is the author's lifetime plus 50 years after his/her death.[149] In case the author dies before the publication of his work, the 50 year should be count from the time of publication. In case of a work of join ownership, the fifty years period will start to run from the death of the last surviving author. If the work is published anonymously or under a pseudonym, the economic rights shall be protected for fifty years from the date on which the work was either made or first made available to the public or first published, whichever date is the latest as stated under Art. 20(5).[150] However, in the case of anonymous works, it is difficult to identify the beneficiary for a 50-years period and determine who is to grant free use of the work.

Inference can be drawn from the provision relating to the term of copyright that the proclamation itself is tolerant of the creators of orphan works and aims to protect their rights. The proclamation recognizes works by unidentified, anonymous, or pseudonymous, author. If the author of a literary, musical, or artistic work is unknown or pseudonymous, the copyright proclamation nonetheless allows the work to be protected for fifty years form the start of the year succeeding the year in which it was first published. The proclamation does however,

[145] The UK Imperial Copyright Act 1911.
[146] Council Directive 93/98/EEC of 21 October 1993 on Harmonizing the Term of Protection of Copyright and Certain Related Rights, Official Journal of the European Communities, L290, (1993), P. 9-13.
[147] UK Duration of Copyright and Rights in Performances Regulations 1995.
[148] The US Sonny Bono Copyright Term Extension Act 1998.
[149] Article 20(1) of the proclamation.
[150] Article 20(5) of the proclamation.

allows the term of copyright to be calculated from the year immediately following the author's death, irrespective of whether the author's true identity was discovered during his lifetime or after his death.

This problem will probably be worse in the future if there are no significant legal and technological reforms. This extension in the term of copyright has worse the issue of orphan works, because there is a negative link between the length of copyright term and the amount of information available. The longer the duration of copyright protection, then the more information available about the owner fades and it becomes more difficult for users to identify and locate the owner.

2.5.3. Technological developments

Historically, there is tension between copyright holders and technological changes.[151] With the development of digital technology, the means for copyright infringements increased. The technologies that presently are raising issues for copyright law are those related to digital storage and transmission of works.[152] The process of creating and utilizing copyrighted works has changed due to technological advances, as libraries, archives and other repositories of copyrighted books have started digitizing their holdings and making them available online.[153] This simplifies the creation of copyrighted works easy and less costly, but with less or no information about the owner.[154] Therefore, in today's world, technology is becoming more widely available and sophisticated and is contributing to the emergence of orphan works, because the society in the digital age prefers to rely on digital copies of a work rather than traditional hard copies in physical libraries.

One of the most significant developments in the history of books and perhaps in the history of copyright is the mass digitization initiative that has been undertaken by Google in collaboration with more than 40 major libraries and 30,000 publishers.[155] Because of the

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[151] Professor Lessig considered that "copyright has been always at war with technology." LAWRENCE LESSIG, CODE AND OTHER LAWS OF CYBERSPACE, 124 (Basic Books 1999).
[152] https://www.digitalworld.net/industries-and-jobs accessed on October 23/2021.
[153] Hansen, David R., *Comments in Response to the Copyright Office's Orphan Works and Mass Digitization Notice of Inquiry*, (2013).
[154] Maggs, Peter B., *The Balance of Copyright in the United States of America*, American Journal of Comparative Law, 53, (2010), p. 369-376.
[155] Pamela, Samuelson, *Google Book Search and the Future of Books in Cyberspace,* Minnesota Law Review, 94, (2010), p. 1308-1374.

Google project, in 2005 Authors Guild and five other publishers sued Google for violating copyright by scanning books and make them available online.[156] Google acted without receiving authorization from right holders and plaintiffs alleged that Google had violated their exclusive rights under copyright law, although Google defended itself by relying on the fair use principle.

In the past, copyrighted works could be used by authors and researchers when they had access to hard copies. However, these restrictions are being broken down by technology due to widespread availability of digital versions of the works. Individuals who wish to utilize copyright-protected works do not need to travel any more to the physical location of these works.[157] New digital technologies have made it possible for the public to search and access archival and cultural materials online, and digital copying and distribution is now easy and seamless due to the widespread availability of technological means and tools.[158]

It is therefore, the development of technology is a contributing factor for the spread of orphan works, because technology makes it easier for authors and artists to create their works and make them available online with little or no information. This could result in the separation of the works from their owners and it would be impossible or extremely difficult to locate the owner of such works to secure a permission to reuse their work.[159] As a result, even though technology encourages the creation of more creative works, the problem of orphan works impedes the creative potential that new technologies could unleash. For example, thousands of images of British servicemen from the First and Second World Wars, are housed in the British Library.[160] Despite the evident usefulness of these photographs to scholars, they cannot be digitized and made accessible since their owners cannot be found. As a result, neither the owner nor the user enjoys the job, creating a "lose-lose" situation.

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[156] Pamela, Samuelson, *supra* note 155.
[157] Janssens, M., & Tryggvadottir, R., *Facilitating Access to Orphan and Out of Commerce Works to Make Europe's Cultural Resources Available to the Broad Public*, Athens, (2014), p. 1-44.
[158] Wasoff, Lois F., *Symposium: Collective Management of Copyright: Solution or Sacrifice?* Columbia Journal of Law and the Arts 34, (2011), p. 731-746.
[159] Ventajar, Danilo, *Finding a Home for Orphan Works: Will a Human Rights Perspective Help?* (unpublished master's thesis), Lund University, Lund Sweden, (2010).
[160] Many of them have been digitized and updated onto this British Library website: https://www.bl.uk/. An example of world war pictures on the BL website is over at https://www.bl.uk/world-war one/themes/life-as-a-soldier.

2.5.4. Transfer of rights

Even in cases when users are able to determine the copyright holder from a copy of the work, things that happened after that copy was made may have an impact on a later user's ability to locate the current right holder. Copyright is a type of property, and like any other property, its owner can transfer the ownership to others by different legal means. The transfer of rights in works protected by copyright makes it more difficult to identify the right holder to obtain a permission from the holder to utilize the work. Although information about the original owner may still be accessible on the work, this may not be up to date due to the transfer of the rights from the original owner to another individual without updating the information on the work. The issue of the transfer of rights may also arise in the event that the legitimate owner dies, as in this case the right in the works transfers to the heirs.[161]

Changing ownership is especially difficult when it involves company and it is observed that numerous ownership transfers put significant barriers to in front users trying to identify and locate the right holder. Conclusive determination of ownership after multiple transfers, mergers or acquisitions can be a difficult and time consuming procedure. This problem could be exacerbated in situations in which the work is out of print or not being used for commercial purposes. Therefore, in such circumstances, identifying the owner of copyright may not be cost efficient.[162] The right holder may die, face dissolution (if the right holder is legal entity such as company), or otherwise stop business.[163]

Moreover, changes in the circumstances of the right holder are deemed to be the primary reasons of a present right holder being unknown and unlocatable. Transferring ownership of copyright from one generation to the next by means of will, or other methods, also creates problems involving individual copyright owners. Some heirs are ignorant of their legal rights. For example, rights could be fractionally divided among a number of heirs, some or all of whom may be distant from each other or the potential user. Furthermore, the most common frustration to prospective users could be the corporate owners of copyright ceasing to exist or conduct business. Access to sufficient information about the right holder may also be

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[161] Van Gompel, Stef, *Unlocking the Potential of Pre-Existing Content: How to Address the Issue of Orphan Works in Europe?,* IIC-International Review of Intellectual Property and Competition Law, 38 no. 6 (2007). p. 669-702.
[162] United States Copyright Office, Report on Orphan Works, *supra* note 12.
[163] British Screen Advisory Council, *supra* note 14.

hampered by a company's insolvency. In such situations, numerous users are not able to carry out a scheduled use.[164]

It is undeniable that inheritability and transferability complicate the process of clearing rights because, for each work a user plans to reuse, he/she must trace the chain of title of the existing rights, to track down the current owner of copyright protected work. It can be considerably difficult to identify the rightful owner when, over the years, such rights have been passed, transferred, or assigned through disposition or heritage.[165]

2.5.5. Joint ownership of works

Joint ownership of the work is the other factor that contributes to the creation of orphan works. There are several circumstances in which joint ownership may occur, such as when a work is originally created by multiple individuals and the law grants them joint ownership of the work. Joint ownership may also happen in the case of the transfer or inheritance of copyright. Moreover, joint ownership can also occur when new layers of protection are added to an already existing work that was under copyright protection. Similarly, joint ownership also occur when a new work is based on a pre-existing work; for instance, in the case of the translation, adaptation, or transformation of a works in modified form which are protected as separate works, without affecting copyright in the original work. These circumstances have been the result of the expansion in the copyright and neighboring rights in today's world. Thus, single object could be protected by various layers of overlapping copyright and related rights.[166]

Joint ownership makes the problem of rights clearance more difficult because national laws require the user to obtain authorization from each owner of the right in joint work. For example, if we consider the Ethiopian copyright proclamation, it states that when a work is created with the participation of two or more persons, they become co-authors and original joint owners of the economic rights. Hence, if even one of the owner does not agree to grant authorization for the use of the work, the user cannot benefit from using the entire work. As there could be several right holders in a work of join ownership, this makes it more difficult

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[164] United States Copyright Office, Report on Orphan Works, *supra* note 12, p. 28-29.
[165] De Werra, Jacques, ed., *Research Handbook on Intellectual Property Licensing*, Edward Elgar Publishing, (2013).
[166] Van Gompel, Stef, *supra* note 161.

for the user to identify and locate all of them. In practice, compared to works owned by a single owner the probability that a right holder will remain untraceable can be much higher in works of joint ownership.

CHAPTER-THREE

3. ADDRESSING ORPHAN WORKS PROBLEM UNDER THE ETHIOPIAN COPYRIGHT REGIME: LESSON FROM OTHER JURISDICTIONS

3.1. Orphan Works under the European Union Directive

The European commission issued a working paper titled "Impact Assessment on the Cross Border Online Access to Orphan Works and a draft proposal for an orphan works directive in 2011.[167] The Commission recognized the challenges posed by orphan works and stated that a solution in the EU was especially urgent to prevent a "knowledge gap" with the US if the then-pending Google settlement were granted. In order to handle orphan works, the commission identified a number of legislative options and evaluated the social and economic implications of each. Among the options examined by the commission were Extended Collective Licensing (ECL), a specific orphan works license, and a statutory exception.

The EU rejected ECL approach because it would not permit a positive determination of a work's orphan status and does not require users to perform an upfront diligent search prior to engaging in the usage of orphan works. In addition, the EU rejected ECL due to the perceived challenges in determining licensing fees and the concern that any library making use of a substantial number of orphan works could be required to pay significant sums for works that have no defined market value. The EU also considered but declined to implement a specific orphan works licenses.[168] The EU discovered that libraries with collections made up of works published in multiple jurisdictions may face serious difficulties under this model, which would require a library user to obtain a license for online access to recognized orphan works

[167] Commission Staff Working Paper, *supra* note 27.
[168] *Id.*

via each collecting society operating in the countries of the works' first publication.[169] Beyond this, the EU concluded that setting fair licensing fees for works considered orphan would present substantial obstacles.

In the end, the EU chose a statutory exception-based approach. In October 2012, the European Council officially approved the proposed Directive on Certain Permitted Uses of Orphan Works, which mandates member states to introduce statutory exception to the rights of reproduction and making available certain permitted uses of orphan works.[170] The Directive excludes standalone artworks including photographs unless embedded in other works, and limits the use of orphan works to "libraries, educational establishments and museums,… archives, film or audio heritage institutions and public-service broadcasting organizations" that are located in member states and that have public service missions.[171] It refers to these organizations as beneficiaries. The Directive requires a diligent search and provides that once a work is declared orphaned in one member state, it is deemed orphaned in all other member states and may be used and accessed in any of them. A single registry is also required to maintain data on all works that are considered orphans.

Statutory exception-based model was recommended for the first time by the British Screen Advisory Council (BSAC) in a paper organized in response to the United Kingdom Gowers Review. According to the BSAC's proposal, anyone wishing to use orphan work shall have made their best endeavor to locate the owner of the copyright. The question of whether someone has made best endeavor shall be determined on case-by-case basis. In any case, however, best endeavor should not be evaluated against an absolute standard.[172] This type of approach is also known as the "European Model" because it has been adopted by the European Union (EU) through issuing Directive No. 2012/28/EU on the authorization of uses of orphan works. According to this approach, specific use of orphan works is permitted through exceptions to copyright. Regard has to be made that a diligent and reasonable search must be conducted by the user to take benefit of the exceptions.[173] Therefore, if specific

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[169] *Id.*
[170] See Press Release, Council of the European Union, Intellectual Property: *New EU Rules for Orphan Works* (Oct. 4, 2012), available at http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/intm/132721.pdf.
[171] Directive 2012/28/EU, *supra* note 18.
[172] British Screen Advisory Council, *supra* note 14.
[173] Goldenfein, J., and Hunter, D., *Blockchains, Orpha Works and the Public Domain,* Columbia Journal of Law and the Arts. 41, (2017).

requirements were met, using orphan works would not constitute copyright infringement under the exception-based model and it would not lead to giving a remedy to the copyright holder.[174]

To apply the solution, different precondition must be satisfied which is to mark the work as used under the exception. In the first place, the work that is used by a user must still be protected by copyright law; otherwise, it can be used freely without the owner's permission. Second, before utilizing any work or phonogram, the user must conduct a diligent search in good faith to determine the work's status. A diligent search is conducted by consulting relevant sources for the category of the work or other subject matter in issue. Third, the Directive is only applicable to works that are first published or, in the absence of first publication, broadcasted in a member state. This means works that are first published or broadcasted elsewhere in the world are exempt from the Directive. Fourth, the works shall previously have been available with the permission of the copyright holder. Finally, the Directive only applies to works that are contained in the collections or archives of the beneficiary institutions.

The Directive does not determine to appropriateness of the sources reviewed during diligent search; rather, it is up to the member states to determine in consultation with users and copyright holders. The relevant sources specified in the Directive's Annex must, however, be included among the appropriate sources that each member states determines. There are two types of sources in the Annex. First, there are catalogues and registers. The kinds of catalogs and registries listed in the Annex are the ones that are most likely to be comprehensive in practice, such as legal deposits, and those that provide important business information, like the ISSN (International Standard Serial Number) for books, journals, and equivalents. Second, there are sources that identify the copyright holder. Furthermore, the place of the diligent search is the member state of the first publication or, in the absence of the first publication, the first broadcast, with the exception of cinematographic or audiovisual works, where the diligent search should be conducted in the member state of the producer's headquarters or habitual residence.[175]

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[174] *Id.*
[175] Council Directive 2012/28, art. 3, 2012 O.J. (L 299) 5, 9 (EU).

Under exception-based model, only non-commercial institutions, such as public libraries, archives, museums and so on are allowed to rely on these exceptions.[176] It has been argued that extending these exceptions to commercial uses could create a gap that would be easy for bad actors to take advantage of, without providing any benefits to the owners and creators of visual arts in terms of increased licensing.[177] Even though the Directive does not specifically exclude commercial uses of orphan works from its scope, it could be construed from the wording of Article 1(1) that only non-commercial uses of orphan works are allowed. This is because the article only specifies that publicly accessible libraries, museums, educational institutions, archives film or audio heritage institutions, and public service broadcasting organizations are permitted to make certain uses of orphan works. However, it has been said that this type of solution is limited to non-commercial uses. In short, the scope of the EU Directive is limited in terms of users, types of works, and types of use.

The Directive also mandates the orphan works users to give fair compensation to a reappearing copyright owner and it has been left to the member states to set a mechanism for determining the amount of compensation.[178] The only compensation the copyright holder may receive for the use made is the "reasonable royalty" to which he/she is entitled for the use made, rather than suing the user for copyright infringement. Moreover, according to Article 5 of the Directive, the right holders, as far as their rights are concerned, have the right to terminate the status of their work as an orphan works at any time.[179] Thus, even after the work or phonogram is deemed orphaned, the copyright holders has the right to terminate the orphan work's status as soon as they become aware of the situation. After the reappearance of a copyright holder, a user who wants to maintain making use of the work should start negotiating the terms and conditions of the use of the work with the right holder in the usual way. Moreover, the Directive also prohibits any future use of an orphan or derivative work without the consent of the resurfaced copyright holder.

It is important to clarify the various types of exceptions because there are provisions for using all forms of copyrighted works as well as exceptions for using orphan works. Since it applies to all types of copyrighted works, irrespective of whether they are orphans, the first type of

[176] Goldenfein, and Hunter, *supra* note 173.
[177] *Id.*
[178] Council Directive 2012/28, recital 18, 2012 O.J. (L 299) 5, 6 (EU).
[179] Council Directive 2012/28, art. 5, 2012 O.J. (L 299) 5, 9 (EU).

exception is much wider than the latter. The second type of exception on the other hand, is more limited because it is only applicable to orphan works and excludes all other types of copyrighted works. The first type of exception has been provided in the law of a number of countries including Ethiopia. For example, the Ethiopian copyright law regulates the exceptions imposed on the copyright holders under part two of the Copyright and Neighboring rights Protection Proclamation No. 410/2004 from articles 9-19.[180] However, the second type of exception cannot be seen in the law of many countries, because most of those countries, especially developing countries, have not yet produced an explicit policy regarding the problem of orphan works. In contrast, some countries, particularly developed ones, have provided such exceptions for the use of orphan works in addition to the first type of exception.

Even though the Directive only provides exceptions to address the issue of orphan works, member states are free to implement additional approaches to address the problem, such as extended collective licensing agreements, legal presumptions of representation, transfer or collective management or similar arrangements, or a combination of these, including the case of mass digitization.[181]

3.2. Orphan works under UK Copyright Law

The attempt to address the orphan works issue in United Kingdom was launched with the report of the Gowers Review in 2006, which asserted that creators recognize that providing a solution would be good for everyone.[182] A solution would be beneficial for everyone engaged in cataloging and archiving, for all creators who rely on previous works to produce new work, for all those whose work is restored and who might benefit from collecting payment from new source, and for end users.[183] And in 2011, the Hargreaves Review of Intellectual Property and Growth contended that the problem of orphan works demonstrated the starkest failure of a copyright framework to be adopted, because access to these works was restricted since it was difficult or impossible to identify the copyright holder.

In 2014, the UK enacted its first law addressing the issue of orphan works, following the Gowers Review and Hargreaves Review of Intellectual Property and Growth. Finally, three

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[180] Mandefro Eshete, *supra* note 29, p. 29.
[181] Council Directive 2012/28, recital 24, 2012 O.J. (L 299) 5, 8 (EU).
[182] Andrew Gowers, *Gowers Review of Intellectual Property*, HM Treasury, Dec. 2006, at 71.
[183] *Id.*

new sets of regulations were issued: the Copyright and Rights in Performances (Certain Permitted Uses of Orphan Works) Regulations 2014 (hereinafter CPUO Regulations); the Copyright and Rights in Performances (Licensing of Orphan Works) Regulations 2014 (LOW Regulations); and, in 2014, an Extended Collective Licensing Scheme, which allowed cultural institutions to digitize orphan works located in their collections.[184]

3.2.1. Certain Permitted Uses of Orphan Works under UK Law

As outlined above, the issue of orphan works in UK has been addressed using three types of approach. The first type was introduced to implement the EU Orphan Works Directive and was created by the CPUO Regulations 2014. It comprises of a narrowly limited orphan works exception to the exclusive rights of reproduction of creative copyrighted works and making available. This approach was introduced at EU level by the OWD,[185] and has been implemented in the UK by the CPUO Regulations 2014. A relevant body may use any orphan work by making it publicly available or by reproducing it for the purposes of scanning, indexing, making available, cataloging, restoring, or preserving it, according to Section 1 of the CPUO Regulations 2014.[186]

A relevant body can be defined as a publicly accessible library, educational establishment, or museum, archive, or film or audio heritage institution, or a public broadcasting organization under Section 2(1) of the Regulations. According to Section 2(2) of the Regulations, a relevant work can also be any writing that is in the form of a book, newspaper, magazine, journal, or other writing that is in the relevant body's collections; a sound recording; or a cinematographic or audiovisual work that is in the relevant body's collections; or a sound recording that was produced or commissioned for exclusive exploitation by one or more public service broadcasting organizations on or before December 31, 2002, and kept in the archives of that organizations or one or more of those organizations.[187]

A relevant work also comprises a work or performance that is integrated into, embedded in or forms integral part of relevant work. Moreover, under both the EU Directive and the UK

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[184] Hansen *et al, supra* note 36, at 39.
[185] Orphan Works Directive.
[186] The Copyright and Rights in Performances (Certain Permitted Uses of Orphan Works) Regulations 2014, SI 2014/2861, art. 1 (U.K.).
[187] The Copyright and Rights in Performances (Certain Permitted Uses of Orphan Works) Regulations 2014, SI 2014/2861, art. 2 (U.K.).

Regulations, examples of the aforementioned works that have not been published or broadcasted but have been made publicly accessible with the permission of the copyright holders also qualify as relevant works, given that it is a reasonable assumption that the copyright holders would not object to the use of the work.[188]

According to Section 3 of the CPUO Regulations, an orphan work is one that has one right holder and that right holder has not been found or identified, or it can have multiple rights holders and that none of the rights holders has been found or identified, even after performing and recording diligent search to identify and locate the right holder(s). It further states that a works is considered orphaned if one or more rights holders have been identified or located, and one or more rights holders have been not identified or located even after conducting and recording a diligent search to identify or trace the rights holder(s).[189] While the wording the UK definition is to some extent different from that of the EU Directive, in terms of substance, they are the same.

According to Section 5 of the CPUO Regulations, users must conduct a diligent search in good faith, respecting the work by searching in the right category of works.[190] The regulation lists further pertinent sources that should be consulted for certain categories of work in addition to establishing mandatory sources that must be consulted throughout each diligent search. The mutual recognition principle stated in OWD is also expressly recognized by the regulation. This principle states that every EU member state will automatically recognize works as orphans in respect of which a qualified diligent search has been made. This eliminates the need for repeated diligent searches.

Although there is no statutory established requirements on what constitutes diligent search, the UK Intellectual Property has been introduced detailed guidelines on this complex matter. The guidelines include a list of specific sources to be consulted by the user for each type of work in the form of a checklist. The checklist is an extensive one and comprises almost all institutions that have any connection to ownership of rights. The fact that the sources are

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[188] Id, Council Directive 2012/28, recital 12, 2012 O.J. (L 299) 5, 8 (EU).
[189] The Copyright and Rights in Performances (Certain Permitted Uses of Orphan Works) Regulations 2014, SI 2014/2861, art. 3 (U.K.).
[190] The Copyright and Rights in Performances (Certain Permitted Uses of Orphan Works) Regulations 2014, SI 2014/2861, art. 5 (U.K.).

provided as an illustrative list, however, gives users the choice to search sources outside of the checklist.[191]

Moreover, rights holder may terminate a relevant work's orphan work status under Section 7 of the CPUO Regulations, provided that the rights holder can provide evidence proving his/her ownership of rights. A user of an orphan work must within a reasonable time, give the owner fair compensation and instructions on how the compensation was determined. If, however, the user and the owner are unable to agree on a fair amount of compensation, either of them is entitled to apply to the Copyright Tribunal to determine an amount.[192]

3.2.2. Licensing of Orphan Works under UK Law

One mechanism was insufficient for solving orphan works in the UK. As a result, the UK issued the LOW Regulations which are the second type of orphan works solution in UK, in addition to implementing the EU Directive. This approach is referred to as individual licensing system because every individual has the right to apply to make use of orphan works under the system. It is outlined in Section 77 of the Enterprise and Regulatory Reform Act (ERRA).[193] Much of the authority for determining how this system would function in practice is delegated to the Secretary of the State by Section 77. The LOW Regulations include the provisions she made.[194] Similar to the CPUO Regulations, they mandate that a diligent search must be conducted to verify the orphan status of works for which licenses are requested.

In cases when the copyright holders cannot be identified or located, licenses for all kinds of copyrighted works and performances can be granted under the terms of the UK licensing scheme. Since the LOW Regulations permit the use of any kind of text-based and artistic work for any purpose, whether commercial or non-commercial, and entitles anyone to obtain a license to use an orphan work except a person authorized to grant a licenses, the scope of its application is much broader than that of the EU Directive. The authority to grant licenses has been given to the Intellectual Property Office (hereinafter IPO), and the licenses that the IPO grants are non-exclusive. The licenses are valid for maximum of seven years and are also

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[191] *Id.*
[192] The Copyright and Rights in Performances (Certain Permitted Uses of Orphan Works) Regulations 2014, SI 2014/2861, art. 7(4) (U.K.).
[193] Section 77 of the ERRA inserts a new section 116A into the Copyright, Designs and Patents Act 1988 which deals with the individual licensing of orphan works.
[194] LOW Regulations SI 2014/2863.

limited to the UK. Any act restricted by copyright may be authorized by the licenses, but they cannot confer exclusive rights over the work or be given to a person authorized to grant licenses.[195]

The user of orphan work is required to pay a reasonable license fee. There are differences in license fees between commercial and non-commercial uses. When calculating the licensing fee for commercial usage, market rates are taken into account, and the license fee is higher compared with the license fee for non-commercial uses. In accordance with Section 10(2) of the LOW Regulations, the licensing authority (IPO) must collect license fees from users and keep them for a minimum of eight years after the license is granted, in designated account, on behalf of the absent copyright holders. The absent copyright holder will be entitled to receive the fees if he/she come forward within this time limit.[196] However, after the lapse of this time, the IPO is allowed to use the fees to cover the set-up and running cost of an orphan works program, and the remainder is used to fund cultural, social and educational activities.[197]

In contrast to the EU Directive, users of the UK licensing scheme is required to pay administration (application) fees in addition to the license fees. Because users are charged for each item, it is argued that the administration fees may be a barrier for small organizations digitizing a large number of orphan work items.[198] Prior to application submission, application fees must be paid; even in the event that an application is denied, these payments are not refunded.[199] Moreover, the Copyright, Designs and Patent Act's (CDPA) Section 116A (5) (c) prevents the granting of a license to a person empowered to grant licenses.[200] It is argued that preventing such licenses is important and required because in such situations there would be two conflicting interests in the hands of one person and it would be extremely difficult for that person to strike a balance between them, especially when one of the interests is his/her own.

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[195] *Id.*
[196] The Copyright and Rights in Performances (Licensing of Orphan Works) Regulations 2014, SI 2014/2861, art. 10 (U.K.).
[197] The Copyright and Rights in Performances (Licensing of Orphan Works) Regulations 2014, SI 2014/2861, art. 13 (U.K.).
[198] Samantha, Callaghan, *Has the Introduction of Orphan Works Licensing Schemes Solved the Problem that Orphan Works Present to Digitization Projects*? 38. J. ARCHIVES & REC. ASS'N., (2017), P. 244, 245.
[199] U.K. Intellectual Property Office, *Orphan Works Licensing Scheme: Overview for Applicants*, (Oct. 29, 2014), https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/518251/Orphan_Works_Licensing_Scheme_Overview_for_Applicants.pdf.
[200] *Id.*

Once the applicant submits an application, the IPO shall check whether the applicant performed the diligent search requirement or if there is any derogatory treatment or any other reason to refuse the granting of a license. After the IPO has made its licensing decision, both the reappearing rights holder and the orphan licensee have the right to appeal to the Copyright Tribunal if they believe that the IPO violated any of its obligations under the Regulations, or if the orphan licensee is dissatisfied with the refusal decision or any other obligations imposed on him/her by the IPO.[201] On the other hand, if an application is approved by the IPO, the user is given a license to utilize the orphan works for an initial term of seven years, provided the user attributes the work to the copyright holder if possible. The user is entitled to reapply for another seven years, if after the lapse of this period the copyright holder has not reappeared. If the user wish to utilize the work permanently, he/she must reapply every seven years until the copyright protection expires. Furthermore, if the user granted a license to use an orphan work for a non-commercial purpose but later decides to use for commercial purpose, he/she must apply for a different license for commercial use and vice versa.[202]

3.2.3. Extended Collective Licensing under UK Law

In addition to the CPUO and LOW Regulations which are specifically designed to address the issue of orphan works, the UK issued the Copyright and Rights in Performances (Extended Collective Licensing) Regulations 2014 (hereinafter ECL Regulations). Under Section 116B of the CDPA, the Secretary of the State may promulgate regulations allowing a body to grant licenses for works for which the body or the person on whose behalf the body acts does not own the copyright.[203] The ECL Regulations were not intended for the widespread licensing of orphan works, even if they may apply to and cover them. Whilst it specifically benefits as a solution for mass digitization, by virtue of its capacity in covering the whole repertoires of works, it would inevitably include orphan works too.[204]

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[201] The Copyright and Rights in Performances (Licensing of Orphan Works) Regulations 2014, SI 2014/2861, art. 14 (U.K.).

[202] Stobo, V., Patterson, K., Erickson, k. and Deazley, R., *I should like to see sometime: an empirical study of copyright clearance costs in the digitization of Edwin Morgan's scrapbooks*, 74 J. DOC. (2018), p. 655.

[203] Section 77 of the ERRA also inserts a new section 116B into the Copyright, Designs and Patents Act 1988 which deals with extended collective licensing.

[204] Dinusha Mendis, *Orphan Works*, (Copyrightuser.org)http://copyrightuser.org/topics/orphanworks/accessed 26 August 2015.

Moreover, the ECL system has only recently been adopted into the UK law, whereas it was implemented in the Nordic countries since 1960s.[205] It took three years for the first collecting society to apply to the UK government to extend its mandate to function in an extended mode to give licenses that encompassed the works of non-members.[206] Similar to the LOW Regulations, beneficiaries that have the right to apply for ECLs are not limited. An extended collective license is a license for a particular use of a copyright-protected works in a specified category. These regulations permit licensing bodies fulfilling certain requirements to grant copyright licenses for works for which the licensing body or any of its members do not possess the copyright.[207] The foundation of the license is that an agreement is made between a Collective Management Organization (CMO), which acts as a representative of the relevant right holder in a specific field.[208] The arrangement is extended to include copyright holders in the same area who have not joined the collective management organization, and these non-members are often called outsiders.[209]

According to Section 4(4) (b) of the 2014 ECL Regulations, the Secretary of the State may only grant authorization to the CMO if they are confident that the CMO's representation in the kinds of relevant works that will be the focus of the proposed ECL scheme is significant. Furthermore, there is an argument that the ECL Regulations apply to both published and unpublished materials because unpublished material is not expressly excluded from their scope. Accordingly, it is argued that the ECL's provisions do not apply only to material that has been made available to the public or previously published.[210] However, since the author has the exclusive right to publish his/her works first, the inclusion of unpublished works may raise a moral rights issue.[211]

This type of solution involves copyright holders registering their works with collective management organizations, who thereafter provide licenses for the use of the works at a

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[205] Kyrsten Elena Baker, *It's A Hard Knock Life: A Critic of the Legislative Response to the Orphan Works Problem in the UK,* 5 UCL J. L. & L. & JURIS. 1, 5 (2016).
[206] Benjamin White, *Background Paper on Extended Collective Licensing: The UK Experience of Extended Collected Collective Licensing: Greased Lightning or the Road to Nowhere*? INT'L FED'N LIBR. ASS'N & INST., Aug. 2018 at 17.
[207] Hargreaves, Ian, *Digital Opportunity: A Review of Intellectual Property and Growth*, (2011).
[208] Intellectual Property Office, *Extended Collective Licensing: Guidance for Relevant Licensing Bodies Applying to Run ECL Schemes,* 2 (2016).
[209] Janssens, & Tryggvadottir, *supra* note 157, p. 1-44.
[210] Johan, Axhamn & Lucie, Guibault, *supra* note 42.
[211] Eleonora Rosati, *supra* note 121.

predetermined cost and allocate royalties accordingly. ECL operates on the basis that rights holders become a member of a licensing body who are then mandated by members to act on their behalf in their management of their copyright. By using this method, the user avoids having to look for the copyright owner and deal directly with them to negotiate a license. Statutory ECL, legislated for in the UK, creates a framework for qualifying licensing bodies to operate a licensing scheme for both their members as well as non-members on an opt-out basis.[212]

As stated in the 2014 ECL Regulations, there are several requirements that should be met for a relevant body to begin representation.[213] First, the relevant body must indicate that there is significant representation in the type of works intended to be in the ECL scheme. Second, non-member rights holders shall be given protection by giving them with the right of opting out in the code of practice of the relevant licensing body.[214] Third, the plans to notify non-member copyright holders about the proposed scheme and make contact them to pay the net license fees and any unpaid net license payments should be suitable for the proposed scheme, having regard to the interests of non-member copyright holders. Forth, the proposed ECL scheme has received the necessary approval from the competent licensing agency. Fifth, the right to operate as a licensing body is personal and cannot be transferred to another person or organization.

Moreover, there are a number of procedures that needs to be followed from the time an application is prepared until authorization granted. First, the relevant body must submit an application to the Secretary of the State in both written and electronic form. The application must contain: a summary of the application, the name of the applicant, evidence indicating that the applicant is a relevant licensing body, the applicant's address for service within the European Economic Area, the types of relevant work to which the ECL scheme will apply, the copyright holders' rights pertaining to relevant works that the relevant licensing body

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[212] More about ECL operated by UK Government and the detailed framework associated with ECL is available at: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/544362/extended-collective-licensing-application-guidance.pdf (Accessed: 27 July 2022).
[213] The Copyright and Rights in Performances (Extended Collective Licensing) Regulations 2014, SI 2014/2588, art. 4 (U.K.).
[214] Id, section 16(1).

requests permission to license and other information.[215] Second, following the successful submission of the application by the relevant body, the Secretary of the State is required to notify the relevant licensing body, within 14 days of receipt, of the following: the application has been received, any additional information that is required to facilitate consideration of the application, and the date that the application will be determined.[216] Third, the Secretary of the State must notify the relevant licensing body that the application has been rejected, within 14 days of receiving the application, if it is found that it does not meet all the necessary requirements.[217] The reasons for rejection must be stated in the decision.

For a license to be granted, a collecting society's representations must be significant. In accordance with Section 18(3) of the ECL Regulations, the licensing body is in duty of paying the licensing fees to non-member copyright holders who have been identified or located.[218] A license fee will also be payable by potential users of orphan works. This fee minus a reasonable administrative fee will be distributed to the appropriate identifiable and locatable right owners within nine months. The success of this model is dependent upon the existence of a well-developed culture and structure of collective management organization system. It may be necessary to supplement the system with the rules of good governance, when relying on such a model in the countries where the collective management culture and structure are less developed.[219] The primary advantages of this model are that the potential users who act in good faith are able to receive the benefit of a clear legal path to follow. It also prevents works from becoming orphans and safeguards works whose owners absent.

Furthermore, in contrast to the CPUO and LOW Regulations, the applicants are not required by the ECL Regulation to conduct a good faith diligent search before using the intended work.[220] Consequently, users would be able to avoid spending time and money on conducting

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[215] The Copyright and Rights in Performances (Extended Collective Licensing) Regulations 2014, SI 2014/2588, art. 5, (U.K.).
[216] The Copyright and Rights in Performances (Extended Collective Licensing) Regulations 2014, SI 2014/2588, art. 6(1), (U.K.).
[217] The Copyright and Rights in Performances (Extended Collective Licensing) Regulations 2014, SI 2014/2588, art. 6(2), (U.K.).
[218] The Copyright and Rights in Performances (Extended Collective Licensing) Regulations 2014, SI 2014/2588, art. 18(3), (U.K.).
[219] Johan, Axhamn & Lucie, Guibault, *supra* note 42.
[220] Kyrsten Elena Baker, *supra* note 205.

a diligent search simply by obtaining permission from a CMO under this scheme.[221] However, there is no guidance provided by the ECL Regulations regarding the standard of search necessary to identify and locate copyright holders. The expected standard of search would therefore be estimated to be lower than what is required by the LOW Regulations. This kind of solution encourages management of copyright collectively in works which are most appropriate for digital reuse. Moreover, if there is any litigation against such organizations by right holders, discretion shall be left for a competent court to establish whether the search conducted amounted to a diligent effort.

In Ethiopia, the Copyright and Neighboring Rights Protection (Amendment) Proclamation No. 872/2014[222] granted legal recognition to the collective management and empowered rights holders to establish COMs and jointly administer their rights, should they want to do so.[223] Article 34 of the proclamation, as amended, listed the powers and duties of CMOs.[224] It includes negotiating on terms of license with users, collecting royalties from users, distributing it for right holders, withholding taxes from collected fees and submitting to relevant authority, preparing a royalty scheme, submit it to EIPO and implement it upon approval, collecting royalties from works without master to pay it to EIPO and other related functions.

The Ethiopian copyright law provides a voluntary system of collective management. To handle their rights collectively copyright holders may choose to form collective management society. The authority of CMO to exercise its function of collective administration normally depends on the contract it enters with the right holders. The proclamation does not empowers CMOs to grant license on behalf of the non-member copyright holders. Many of the listed powers of CMOs are easily understood and reflect the traditional functions of COMs. Representing right holders in the administration of their rights is the traditional role of CMOs.

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[221] Kyrsten Elena Baker, *supra* note 205.
[222] A Proclamation to amend the Copyright and Neighboring Rights Protection Proclamation, Proclamation No. 872/2014, FED. NEGARIT GAZZETA 21st Year No. 20, Addis Ababa, 14th January, 2015.
[223] Article 32 of the proclamation.
[224] Article 34(1-9).

3.3. Orphan Works under the Canadian Copyright Law

Canada has a system in force under Section 77 of the Canadian Copyright Act that deals with the issue of orphan works. As per this provision, anyone can apply to the Copyright Board for a license to use a published work, a fixation of a performer's performance, a published sound recording, or a fixation of a communication signal, provided that he/she has made a reasonable efforts to locate the owner of the copyright and that owner cannot be located.[225] This Canadian solution is known as non-exclusive licensing or centrally granted license. Under this model, licenses are granted on a case-by-case basis by a competent authority and users can utilize specific kinds of orphan woks. When an applicant is able to establish that he/she has performed diligent search to locate the right holder, but the right holder cannot be located, then his/her application will be accepted by a competent authority and he/she will be granted a non-exclusive conditional license.[226] The prospective user must deposit a royalty payment in accordance with this license model.[227]

As per Section 77 of the Canadian Copyright Act, a potential solution to the problem of using orphan works is to grant non-exclusive licenses for their use.[228] This section provides:

Section 77: owners who cannot be located

Circumstances in which license may be issued by Board

1. Where, on application to the Board by a person who wishes to obtain a license to use
   a) a published work,
   b) a fixation of performer's performance
   c) a published sound recording, or
   d) a fixation of a communication signal in which copyright subsists, the Board is satisfied that the applicant has made reasonable efforts to locate the owner of the copyright and that the owner cannot be located, the Board may issue to the

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[225] Khong, Dennis WK., *supra* note 125.
[226] Brenda Siso-Calvo and others, *Is There a Solution to the Orphan Works Problem? Exploring the International Models,* (Transforming Digital Worlds 13th International Conference, Sheffield, UK, March, 2018) available at https://link.springer.com/chapter/10.1007/978-3-319-781051_73 accessed 18 January 2019.
[227] Kelu, L. Sullivan, *Orphan Works at the Dawn of Digitization,* 18 Richmond Journal of Law & Technology 31, (2012).
[228] Jeremy De Beer and Mario Bouchard, *supra* note 41, p. 215, 226.

applicant a license to do an act mentioned in section 3, 15, 18, or 21, as the case may be.

2. A license issued under sub-section 1 is non-exclusive and is subject to such terms and conditions as Board may establish.
3. The owner of a copyright may, not later than five years after the expiration of a license issued pursuant to sub-section 1 in respect of the copyright, collect the royalties fixed in the license or, default of their payment commence an action to recover them in a court of competent jurisdiction.
4. The Copyright Board may take regulations governing the issuance of licenses under sub-section 1.

What is inferred from the above provision is that after conducting a reasonable effort to locate the copyright owner, users may submit an application for a license to the Copyright Board of Canada. The Copyright Act permits licensing only of published or fixed orphan works, not of unpublished or unfixed works.[229] But limiting licenses to only published works is viewed as a deficiency of the system, because it can be challenging to determine whether an ancient work, like a photograph, has ever been published. Though this is a shortcoming of this system, it should be borne in mind that it upholds the author's moral right to decide whether or not to make his/her work available to the public.[230]

The Canadian Copyright Board only has legal authority over works, performances, sound recordings, and communication signals that are still protected by copyright, as stated in section 77(1) of the Copyright Act.[231] As a result, the Copyright board is impliedly not allowed to grant licenses for the use of works over which copyright does not subsist. Copyright law does not protect works that do not meet certain requirements for copyright protection and as a result, they are implicitly excluded from the system of orphan works. Similarly, Copyright Board has no legal base to grant licenses for making use of works for which copyright protection has lapsed.[232] Regarding the purpose of the use, a license can be

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[229] Hirtle, Peter B., *Unpublished Material, New Technologies, and Copyright: Facilitating Scholarly Use*, 49 Journal of the Copyright Society of the USA (2001).
[230] Van Gompel, Stef, *supra* note 161.
[231] Canadian Copyright Act, section 77(1).
[232] Jeremy De Beer and Mario Bouchard, *supra* note 41.

granted regardless of whether the use is for commercial, religious or educational.[233] Moreover, the license can only be granted within the territory of Canada, and outside that territory the Board has no legal system to grant licenses. Nevertheless, the Board is empowered to grant licenses irrespective of whether the work is of domestic or foreign origin.

Before granting a license to a potential user, the Copyright Board must be satisfied that the user has made a reasonable effort to locate the copyright holder. It is not a requirement that the user shall make every effort to locate the right holder, but the user is required to establish that he/she has performed a diligent search. In order to conduct a diligent search, the Board's recommendation to potential users is to contact various collecting societies and publishing houses; consult national library, university, and museum indexes; check copyright office registration systems; inspect inheritance records; and just search the internet.[234] In determining the reasonableness of a search, the Board works closely with other entities, like the Canadian Copyright Licensing Agency and the COPIBEC[235] collecting society. These organizations assist the Board in examining applications for the use of orphan works that are commonly found in their collections and provide advice to the Board regarding issuance of licenses, license royalties and other terms and conditions.[236]

Copyright Board will not grant a license if the owner is found but refuses to negotiate or grant a license. As long as the right holder is locatable, the Copyright Board will not grant the license even if the right holder do not reply to any requests from users.[237] Section 77(2) of the Copyright Act also authorizes the Copyright Board to grant only non-exclusive licenses.[238] This implies that the user must act in accordance with the terms of the license and is not permitted to grant sub-licenses. Though every license issued by the Board sets a price for the permitted usage, not all of them demand the licensee to pay a royalty up front. The royalties that the user pays must be reasonable, and in order to determine what constitutes a reasonable royalty, the Copyright Board requests information from potential users regarding, if available,

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[233] Van Gompel, Stef, *supra* note 126, p. 1369-1370
[234] Van Gompel, Stef, *supra* note 161.
[235] COPIBEC is a collecting society in Canada and is the 'Société québécoise de gestion collective des droit de reproduction' (Quebec Society for the Collective Management of Reproduction Rights).
[236] Yael Lifshitz-Goldberg, 'Orphan Works' (WIPO Seminar, Hebrew University Jerusalem 2010).
[237] Ariel Katz, *The Orphans, the Market, and the Copyright Dogma: A Modest Solution for a Grand Problem*, Berkeley Technology Law Journal 27, (2012), p. 1285, 1323.
[238] Canadian Copyright Act, section 77(2).

the amount of license fees for works that are licensed directly from the copyright holders. Under the UK licensing system, the amount of license fees are different for commercial and non-commercial purposes. But there is no such distinction under Canadian licensing system.

According to Section 77(3), the right holder is entitled to ask for paid royalties that were set at the time of authorization if he/she resurfaces within five years from the time of the expiration of the license. The duration of the licenses can be determined by the Board. The applicant who wants to continue to use the work will be required to make a new application.[239] If the royalties were not paid at the time the license was granted and the user refused to pay, the right holder has the right to bring the matter before competent court in order to obtain the required fees. However, if the right holder does not reappear within five years from the date of the expiration of the license, the royalty could be used for purposes unrelated to the use in question.[240]

The Copyright Board will decide on the appropriate terms and conditions of the license if it is satisfied that a license should be granted. The terms and conditions are at the discretion of the Copyright Board, although there are some limitations imposed by general legal principles and the Copyright Act. For example, the Copyright Board is only authorized to issue non-exclusive licenses as per Section 77(2). The Board is required by principles of administrative law to act fairly and its decisions must be accompanied by reasons. If the Copyright Board is compliant with the procedural and substantive requirements, it can impose reasonable terms and conditions as it deems appropriate. When imposing terms and conditions, the Copyright Board considers a number of different factors. These factors may include the number of copies requested, the level of predicted profit, the proposed use and the nature of the application. While taking in account the above mentioned factors, the Copyright Board determines license terms and conditions on a case-by-case basis.[241]

One of the advantages of centrally licensing scheme is that it offers users of orphan works legal certainty, as there is no chance of being sued for infringement by reappearing owner.[242] Providing a means by which users can acquire a positive entitlement to a particular work

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[239] See e.g. *Re L'Office national du film du Canada* (18 June 2003), 2003-UO/TI-15, online: Copyright Board of Canada (license renewed in Board decision 2008-UO/TI-03).
[240] Hansen *et al, supra* note 36.
[241] Jeremy De Beer and Mario Bouchard, *supra* note 41.
[242] Khong, Dennis WK., *supra* note 125.

would make it easier for them to utilize orphan works than if they were given a strong affirmative defense. Another advantage of this model is that in the case of reappearing right holder, collecting royalty payments from licensee would be less expensive than collecting damages from violators of copyright.[243] Meanwhile, the legitimate interest of the copyright holder is not unjustly prejudiced for the following reasons. First, an independent public authority undertakes the task of verifying the good faith of a user, as it can take the duty for striking a balance in the interests of both right holders and users. Second, licenses are granted on case-by-case basis. Third, the license is granted to a specific user for a particular type of use only, and it is not all inclusive.[244]

Despite the aforementioned advantages of this system, it also has shortcomings. While anyone can apply for a license under this system, experience in Canada has shown that most applications are made for commercial purposes and that most applicants are seeking permission for a single work. Libraries, archives, museums have also criticized this model on the grounds that a case-by-case system would not work for them, since it is overly burdensome for those organizations that own a large number of potentially orphaned works and that obtaining a license for each work would be too time consuming and costly.[245] In comparison to other orphan works solutions, a centrally licensing model may be more expensive. The other shortcoming of the system is that it imposes additional burden on the government, as the administration is required to allocate a budget and experts to it. In particular, the problem with the Canadian licensing systems is that there are two types of orphan works: those whose copyright holders unidentified and those whose copyright holders unlocatable. The Canadian Copyright Act only addresses the second type of orphan works and does not deal with an unidentified copyright holder.

A centrally granted licensing system has been found to have advantages and disadvantages. But each country has a different set of internal circumstances that determine whether or not this system is appropriate for them. For instance, for countries that have not provided any

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[243] Walker, Robert Kirk, *Negotiating the Unknown: A Compulsory Licensing Solution to the Orphan Works Problem*, Cardozo Law Review, 35, (2014), p. 983-1017.
[244] Van Gompel, S. & Hugenholtz, P., *The Orphan Works Problem: The Copyright Conundrum of Digitizing Large-Scale Audiovisual, Archives, and How to Solve it*, The International Journal of Media and Culture 4 no.1, (2010), p. 61-71.
[245] Young, Aaron C., *Copyright's Not so Little Secret: The Orphan Works Problem and Proposed Orphan Works Legislation,* Cybaris®7, no. 2. (2016).

mechanism to address the issue of orphan works, this could be a good initiative to provide public awareness about the solution. It would also be a feasible choice for countries in which the enforcement of law is not a real problem, because people would trust governments to enforce the law rather than collective management organizations.

3.4. Orphan Works under the US Copyright Law

The process of legalizing orphan works in America is still under construction. Despite the fact that the country does not currently have a specific law addressing the orphan works, there have been continuous attempts to pass legislation to close the gap in the US legal system. In 2004, the issue of orphan works gained attention for the first time, when the Google began digitizing and making a number of out-of-print books available online via the Google Book Search Project.[246] The first attempt to solve the problem of orphan works was to prepare a report on the issue of orphan works, and the US Copyright Office published a report on January 23, 2006. This report diligently and carefully examined the orphan works problem, including determining the most common obstacles to identify and locate the copyright owners and factors affecting the issue.

Both copyright owners and users overwhelmingly supported the US Copyright Office's report on orphan works. The report stated that if the user had conducted a reasonably diligent search without being able to locate the copyright holder, he/she would be entitled to enjoy the benefit of a limitation remedy in the event that the copyright owner later reappears and files a claim of infringement. The report makes two main recommendations: first, requiring a reasonably diligent search to find the owner of the copyrighted work and if possible, attributing the work to the author and copyright owner; and second, the limitation of remedies that could be enjoyed by the user if he/she could prove that a reasonably diligent search had been conducted by him/her.[247]

Two legislative bills were drafted to address the issue of orphan works: the Orphan Works Bill of 2008 in the House and the Shawn Bentley Orphan Works Bill of 2008 in the Senate,

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[246] Favale, M. Homberg F., Kretschmer, M., Mendis D. and Secchi, D., *Copyright, and the Regulation of Orphan Works: A Comparative Review of Seven Jurisdictions and a Rights Clearance Simulation*, Intell. Prop. Office, July 2013.
[247] *Id.*

which were based largely on the US Copyright Office's recommendations.[248] However, it is important to note that the Orphan Works Act of 2006 was the first bill introduced and delivered to Congress but was withdrawn during the 109th Congress; instead, new bills were introduced to both the House and the Senate.[249] Although the Shawn Bentley Orphan Works Bill 2008 passed by the Senate, it was rejected by the House of Representatives.[250]

The main difference between the two bills is the diligent search requirement. The Orphan Works Bill of 2008 states that in determining whether a search is diligent, the following factors must be taken into account by the court. First, the user's activities during the search are reasonable and appropriate in light of the relevant facts, including whether or not the actions were motivated by information found during the search. Second, the infringer employed the applicable best practices maintained by the Register of the Copyright. Lastly, whether or not the search was conducted before using the work and at a time that was sufficiently close to the start of the infringement.[251]

Though the two Acts differ in their requirements for diligent search, both have given the authority to the Register of Copyrights to recommend practices for conducting and documenting searches.[252] The solution under both bills was a limited liability approach. The bills did not release the users from all liability. This implies that the bills always call the user an infringer. Under both bills, a user enjoys a limitation of remedies including monetary and injunctive relief.[253]

3.4.1. Limited Liability Approach

The limited liability approach is regarded as an *ex post* solution for the problem of orphan works. Limited liability limits liability to a license fees and restricts injunctive remedies, provided that a potential user conducts a sufficiently diligent search before using the work and is unable to discover the copyright holder. When a dispute arises, a court would have the

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[248] Favale et al., *supra* note 246.
[249] Bingbin, Lu, *supra* note 135, at 267.
[250] Alessandra Glorioso, *Google Books: An Orphan Works Solution?* 38 HOFSTRA L. REV. 971, 980 (2010).
[251] H.R. 5889.
[252] Simon Teng, *The Orphan Works Dilemma and Museums: An Uncomfortable Straitjacket*, 2 J. INTELL. PROP. L. & PRAC. 30, 35 (2007).
[253] Jane C. Ginsburg, *Recent Developments in US Copyright Law: Part 1-Orphan Works*, Colum. Pub. L. & Legal Theory Working Papers, ((2008).

authority to determine a licensing fee in the form of damages or to verify the diligence of the search.[254]

The 2008 Shawn Bentley Orphan Works Act and the 2008 Orphan Works Act provided the following requirements. First, the user must carry out and record a reasonable diligent search in good faith for the copyright owner. Second, the potential user shall have been not able to locate the copyright holder even after carrying out the necessary diligent search. Third, the user is required to file a notice of use with the Register of Copyrights. Fourth, if the legal owner of the infringed copyright was known with a reasonable degree of certainty based on information gathered during the qualifying search, the user must attribute the work to the owner if possible, in a way that is reasonable under the circumstances.[255]

When these conditions are met, the infringer will only be required to pay a reasonable compensation to the owner of copyright. In terms of the bills, a user of orphan works is only required to pay reasonable compensation to the legitimate copyright owner if he/she reappears and files a claim. Reasonable compensation is the amount that a willing buyer in the position of the infringer and a willing seller in the position of the owner would have agreed upon immediately before the infringement started. The limitation on monetary relief includes disallowance of an award for statutory damages, actual damages, attorney fees and costs.[256] If the infringer is a public broadcasting organization, museum, library, archives, or non-profit educational institution, the owner of the copyright to an orphan work will not entitled to claim reasonable compensation. In case when the infringed work is an orphan work, these entities are exempted from any obligation to compensate.[257] No monetary relief could be assessed against such a user if the infringement was performed without any purpose of commercial advantage and was primarily educational, religious, or charitable in nature, and the infringer promptly ceased the infringement after receiving notice of the claim.[258]

Under this approach, the user is required to perform a thorough search before using the work and must bear burden of determining what search was performed and whether it was

[254] Goldenfein, and Hunter, *supra* note 173.
[255] Orphans Works Act of 2008, H.R. 5889, 110th110th Cong. § 514 (2008); Shawn Bentley Orphan Works Act *supra* note 19.
[256] Pomerantz, Aryeh L., *Obtaining Copyright Licenses by Prescriptive Easement: A Solution to the Orphan Works Problem*, Jurimetrics 50, no. 2 (2010), p. 195-227.
[257] S. 2913 § 2(c) (2) (A).
[258] S. 2913 § 2(c) (1) (B) (i)-(iii).

reasonable.[259] Moreover, the Shawn Bentley Orphan Works Act listed the sources that should be searched by prospective user for a search to qualify as diligent. According to Section 514 of the Act, a user must perform the following searches. First, the user must search the Copyright Office's records, which are accessible to the general public online and vital for identifying and tracking down copyright holder. Second, the user must look for information on copyright authorship, ownership, and were appropriate, licensor from sources that are reasonably available.

Third information, the user must make use of printed materials, technological tools and, if it is reasonable, shall obtain the assistance of internal and external experts. Fourth, the user shall search for copyright owner using relevant databases, including those accessible to the public online. The search must involve actions which are reasonable and appropriate under the facts relevant to the search, including actions based on facts known at the commencement of the search and those discovered during the search, which include a review of the Copyright Office records that are not publicly accessible online which are reasonably likely to be helpful in identifying and locating the copyright holder.[260]

Failure to comply with any of the requirements would entitle the right holder to rely on the usual copyright remedies and sue the user for copyright infringement, even in situation when a right holder who is asked for permission does not respond to the query, because non-response of the right holder does not mean that the work is an orphan.[261] The fact that the work does not include information identifying the owner of the copyright or that the owner did not respond to any inquiry or communication about the work cannot be regarded as sufficient to meet the requirements for reasonable and diligent search.[262] This is to prevent prospective authors from publishing their desire to utilize the work without first conducting a reasonable and diligent search.

With regard to injunctive relief, the copyright holder can still ask the court for injunction to stop infringing acts as well as to prevent future infringements. But the limited liability approach limits the scope of the injunctions available. For example, if the user had completed

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[259] Walker, *supra* note 243.
[260] Simon Teng, *supra* note 252.
[261] Colangelo, Giuseppe, & Irene Lincesso, *Law versus Technology Looking for a Solution to the Orphan Works Problem*, International Journal Law and Information Technology 20 No. 3, (2012), p. 178-202.
[262] S. 2913 § 2(b) (2) (A) (iv).

preparation or begun preparing a derivative work that recasts, transforms, adapts, or integrates the infringed work with a significant amount of original expression, the reappearing copyright holder would not be able to obtain an injunction to stop the use of the derivative work that incorporates a work thought to be an orphan.[263] This is only the case if the infringer pays reasonable compensation as agreed upon with the right holder while providing attribution in a manner that is reasonable if requested by the right holder to do so.[264] However, full injunctive relief would be granted in the case of simply republishing or posting online without any transformation of the content, but the courts are instructed to take in to consideration and accommodate any reliance interest of the user that may be harmed by injunctive relief.[265] It further states that even though a derivative work may have been created as a result of the unlawful use of a copyrighted work, it will not be denied copyright protection.

Using this approach could have several advantages. Since users are only obliged to compensate copyright owners when they come forward and initiate legal action, it might be a cost-efficient model.[266] The other benefit of this approach is that if appropriate for the intended use of the work, the goal of any system of orphan works should be to increase the likelihood that a user may locate the relevant right holder in the first place and negotiate a voluntary agreement over permission and payment. The system should ideally encourage users to use all reasonable attempts to locate all copyright holders of works they want to utilize, and provide incentives to copyright holders to make themselves known. Thirdly, the system will allow the potential user to utilize the relevant works if, after conducting a sufficiently diligent search, he/she are unable to identify and locate the copyright holder.

It is believed that limiting monetary relief to reasonable compensation for utilization would make it easier to gain access to more orphan works by eliminating the significant preventive effect of a potential statutory damages award and attorney fees. At the same time, it would protect the economic and moral rights of copyright owners by attributing the work to the owner and providing reasonable compensation. Last but not least, limiting the availability of

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[263] Bradrick, Laura N., *Copyright Don't Forget about the Orphans: A Look at A Better Legislative Solution to the Orphan Works Problem*, 34 WESTERN NEW ENG. L. REV. 537, 559 (2012).
[264] Hansen *et* al, *supra* note 36.
[265] Elizabeth Herbert Schierman, *Orphan Works: Congress Considers Lessening Penalties to Copyright Infringers*, (2009).
[266] Van Gompel, Stef, *supra* note 126.

injunctive relief will provide *ex ante* certainty for risk-averse non-profit users and encourage commercial users to create transformative derivative works that benefit society.[267]

However, this approach has been criticized because it does not provide enough information or guidance on how to specify a fair compensation that the user should pay to the right holder; it leaves to the court to determine the amount of compensation without proper guidance. Using orphan works may be discouraged by the absence of guidelines. The approach is also criticized as limiting monetary relief can encourage willful infringement of orphan works. Copyright holders have expressed their fear that some users may not always conduct sufficiently diligent search to locate right holder and, that, as a result, their works would be mistakenly classified as orphans. The reason for their fear is that users can unfairly view their works as orphans, and under this approach, it is the responsibility of copyright owners to bear the burden of seeking judicial relief if a dispute arises. The limited liability has also been criticized for requiring users to search diligently for all alleged orphan works, which may not be possible for large-scale projects that include thousands or even millions of works.[268]

3.4.2. The 2015 US Copyright Office Report

The US Copyright Office restarted its efforts in 2015 to come up with a better orphan works solution that would convince both sides of the problem.[269] The 2015 report on orphan works and mass digitization by the US Copyright Office was released in response to the proposal of two bills introduced in 2006 and 2008 to enact a particular statute to address the issue of orphan works. Following a comprehensive search, the Copyright Office concluded that the Shawn Bentley Act would be the most viable legislative solution, provided three key substantive modification were made to it: a notice of use provision to increase the possibility that copyright owners will communicate with prospective users; allowing judicial consideration of the results of foreign diligent searches, acknowledging the global nature of the orphan works issue; and an exception to the restriction on injunctions for the use of

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[267] Hansen *et al, supra* note 36.
[268] Walker, *supra* note 243.
[269] United States Copyright Office, *Orphan Works and Mass Digitization*, *A Report of the Register of Copyrights*, June 2015, [online], available at: www.copyright.gov. [Accessed 30 May 2021].

orphan works in derivative works, thereby addressing the integrity concerns of certain copyright owners.[270]

According to the 2015 report, a user may be eligible for injunctive relief or limitation of remedy if the following requirements are satisfied: 1) if the user can prove that he/she conducted a good faith qualifying search to identify and locate the copyright owner prior to the work's use; 2) the user files a notice of use with the Copyright Office; 3) the user must attribute the work to the legitimate copyright owner, if feasible under the circumstances; 4) the user must include a symbol or notice that the work is being as an orphan work with the use of the work made by the infringer; 5) the user must assert eligibility for such limitations in the initial pleading in any civil action involving the infringed work; 6) during initial discovery disclosures, the user must specifically state the grounds for eligibility for the limitations.[271]

Moreover, mass digitization was investigated by the US Copyright Office. As a comprehensive solution to the mass digitization, the US Copyright Office recommended Extended Collective Licensing regime.[272] It made clear that the legitimate goal of mass digitization could not be achieved under the current law, other than in specific circumstances. As a result, the Copyright Office recommended implementing an ECL pilot program, which would provide full-text access to works subject to agreements made between copyright holders and representative users.[273]

3.4.3. Fair Use

In US, fair use is considered as a significant affirmative defense against infringement in appropriate circumstances and a significant option for users of copyrighted works, including orphan works.[274] Fair use is regarded as a flexible restriction on copyright that permits and requires courts to avoid rigid application of copyright law when it discourages the creativity that the law intended to foster. The fair use doctrine is first recognized by the courts, and it is now provided in the US Copyright Act.[275] The foundation of the fair use principle is the idea that certain works that are still protected by copyright may be freely used by the public for

[270] United States Copyright Office, *supra* note 12, at 51.
[271] *Id.*
[272] Janice Pilch *et* al., *Background Paper on Extended Collective Licensing: United States*, IFLA, Aug. 7, 2018.
[273] United States Copyright Office, *supra* note 15, at 72.
[274] United States Copyright Office Report on Orphan Works and Mass Digitization, *supra* note, 273.
[275] Hansen David, *Digitizing Orphan Works: Legal Strategies to Reduce Risks for Open Access to Copyrighted Orphan Works*, (2016), Retrieved from https://dash.harvard.edu/handle/1/2784043.

specific purposes, such as comment, teaching, news, criticism, reporting, scholarship, or research.[276]

A fair use solution simply tries to find a legal means to allow users who fail to obtain permission from copyright owners to use copyrighted works. Fair use is different from other types of exceptions and limitations because it is not limited to specific actors or uses, but is an equitable rule of reason that takes some factors into account to be applicable to the use of works. A use is not a copyright infringement if it is found to be fair. The US Copyright Act establishes four factors to be taken into account in determining whether a use is fair: a) the purpose and character of the use of the work; b) the nature of the copyrighted work; c) the amount and substantiality of the taking; and d) the effect of the use on the market of the original work.[277]

3.4.3.1. Purpose and character of the use of the work

The central purpose of the first factor investigation is to determine whether the new work merely supersedes the objects of the original creation, or instead adds something new, with a different purpose or character, changing the first with new expression, meaning, or message. Put differently, it inquiries as to whether and how much the new work is transformative. A transformative use of a works is one in which the goal of using it is not the same as the one for which the original work was created. It focused on whether the secondary works provides any new or further function than the original work; this is typically done by altering or adding something new to the original work, rather than merely copying it. Therefore, it could be argued that transformative works, which criticize, comment upon, or give information about, or serve functions different from those of the original copyrighted work, are more likely to be deemed fair use.[278] The justification for this is that the creation of transformative works typically advances the goal of copyright, which is to promote science and arts.

This factor also takes into account whether the use is for non-profit educational purposes or commercial activities.[279] The courts have to be focused on the transformative uses, which give

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[276] Brenda, Siso-Calvo *et al*, supra note 226.
[277] 17 U.S.C. § 107 (codified as amended, 2012).
[278] Hansen, Connor j, Permission Impossible: An Exception-Based Legislative Solution for Digitizing Copyright-Protected Works, Chicago-Kent Journal of Intellectual Property 17, (2018), p. 74.
[279] See *Sundeman v, Seajay Soc'y, Inc.*, 142 F.3d 194, 203 (4th Cir. 19198), https://casetext.com/case/sundeman-v-the-seajay-society-inc (Courts may "consider the public benefit resulting from a particular use notwithstanding

new life to the original works by adding new expression to it and, as a result, provide social benefits by shedding light on the previous work and thus a new work is created.[280] This implies that whether the use expands fundamental social objectives, such as education, access to information, freedom of expression and innovation, or simply violates the exclusive rights of the copyright holder in relation to the work. This factor is thought to favor public libraries and archives, as their primary purpose is to benefit the public.

3.4.3.2. Nature of the copyrighted work

The second factor is the nature of the copyrighted work and this concept is based on the notion that some kinds of works are more suited to fair use than others since they are more closely aligned with the main objective of the Copyright Act, which is to encourage the creation and dissemination of creative works. The nature of the copyrighted work is taken into consideration, whereby more protection is granted to creative works. As a result, there is less likelihood of applying the fair use doctrine to creative works than to non-creative ones. For example, more protection is accorded to novels and paintings than works which are mostly functional, like repair manuals.[281] Thus, determining whether the work is factual or creative is necessary for evaluating the use under the second criteria.

In addition, the courts must determine whether a work was published or unpublished, and if it was a published work, fair use is favored. Similarly, some courts have also concluded that a work not available on the market or out of print may also weight this factor in favor of fair use, a consideration that is significant for orphan works use.[282] Information resources with historical and cultural importance are usually found in the collections of memory institutions.

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the fact that the alleged infringer may gain commercially." This public benefit typically involves "the development of art, science, and industry."). See also *Sega Enters. Ltd. v. Accolade, Inc.*, 977 F.2d 1510, 1523 (9th Cir. 19192), as amended (Jan. 6, 1993), https://casetext.com/case/sega-enterprises-ltd-v-accolade-inc-2.

[280] Diaz, Angel Siegfried, *Fair Use Mass Digitization: The Future of Copy-dependent Technologies After Authors Guild v. HathiTrust*, Berkeley Technology Law Journal 28, (2013), p. 683-714.

[281] Diaz, *supra* note 280.

[282] See, e.g., *Hamper & Row Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 553 (1985), https://casetext.com/case/harper-row-publishers-inc-v-nation-enterprises ("If the work is out of print and unavailable for purchase through normal channels, the user may have more justification for reproducing it."); *Peter Letterese & Assocs., Inc. v. World Inst. of Scientology Enters.*, 533 F.3d 1287, 1313–14 (11th Cir. 2008), https://casetext.com/case/peter-letterese-assoc-v-world-inst-of-scient ("Defendants characterize the book as out of print, which would tend to favor their claim of fair use"); *Triangle Publ'ns, Inc. v. Knight–Ridder Newspapers, Inc.*, 626 F.2d 1171, 1176 n.14 (5th Cir. 1980), https://casetext.com/case/triangle-publications-v-knight-ridder ("If the copyrighted work is out of print and cannot be purchased, a user may be more likely to prevail on a fair use defense.")

These works are often inaccessible on the open commercial market, in part because their owners are unlocatable. As long as the potential user has made a diligent search to locate the right holder, the fact that the work is an orphan should weigh heavily in favor of fair use. There is a strong but as yet unproven argument that a work's status as an orphan work should itself tend to tilt a given use toward being considered fair use.

3.4.3.3. The amount and substantiality of the taking

A third consideration is the amount and substantiality of the taking of the original work. If the amount used is large, it would be in violation of fair use doctrine, whereas if the amount used is little, it would be supported by the doctrine of fair use.[283] However, it shall be noted that this factor is not only about the quantity of the work, and the quality is also taken into consideration.[284] Courts in some cases have concluded that using 10% of a work is prohibited,[285] whereas in others, copying the whole works is allowed as long as that is the amount needed to serve the purpose of the intended use.[286]

Because the entirety of the orphan works would probably be copied and made available to a potentially wide audience, this factor might initially seem as though it would cut strongly against a fair use claim. But the Supreme Court made it quite clear in the Campbell case that each of the four fair use elements needs to be taken into account in relation to one other.[287] A use will not be deemed overly substantial if it is reasonable in light of the purpose.[288] Indeed, all factors are to be investigated, and the results weighted together, in light of the objectives of copyright.

3.4.3.4. The effect of the use on the market of the original work

According to this analysis, courts must take into account both the potential harm to the original work's market that could arise from the defendant's alleged specific actions as well as the possibility that the defendant's widespread and unrestricted conduct would have on the

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[283] Hansen *et al, supra* note 36.
[284] Hansen, Connor j, *supra* note 278.
[285] *Cambridge Univ. Press v. Patton*, 769 F.3d 1232, 1272 (11th Cir. 2014), https://casetext.com/case/cambridge-univ-press-oxford-univ-press-inc-v-Patton.
[286] *See Bill Graham Archives, LLC v. Dorling Kindersley Ltd.*, 448 F.3d 605, 613 (2d Cir. 2006), https://casetext.com/case/bill-graham-archives-v-dorling-kindersley ; *see also Authors Guild, Inc. v. HathiTrust*, 755 F.3d 87, 96 (2d Cir. 2014), https://casetext.com/case/authors-guild-inc-v-hathitrust-1.
[287] Campbell, 510 US. at 578.
[288] *Bill Graham Archives v. Dorling Kindersley Ltd.*, 448 F.3d 605, 613 (2d Cir. 2006).

original work's potential market. Courts have to hold that the analysis requires a balancing of the benefit the public will obtain if the use is allowed and the private gain the copyright owner will receive if the use is denied.[289] Therefore, for example, this factor can also weigh how the proposed market for the work connects to the general objective of the Copyright Act, to encourage the creation of works.

In case where there is no relevant market or when the defendant's usage does not occupy a relevant market, the consideration of market harm is typically weighed in favor of fair use. When a market is fails to establish or has socially harmful flaws like high transaction costs or negative externalities, courts are reluctant to declare market harm. Furthermore, the market will probably suffer and the court will probably rule against fair use if the new work replaces the original one.[290] It is argued that the usage of orphan works has no effect on the market of the work under the fourth fair use criteria since there is no market for the work without an owner who can sell it or grant permission to use it. Urban Jennifer argues that use of an orphan work has no impact on the potential market for the work under the fourth fair use factor, because no market can exist without an owner to sell or license the work. This argument has gained considerable attention, and the American Association of Research Libraries has adopted the view.[291]

Finally, it shall be borne in mind that the aforementioned factors are not exhaustive, and courts may consider other elements in determining whether the defendant's use is fair. Moreover, in terms of assessing the factors together, the Supreme Court has mandated that all are to be explored, and the results weighed together, in the context of the copyright objectives.[292]

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[289] *Bill Graham Archive*s, 448 F.3d at 613 (quoting MCA, Inc. v. Wilson, 677 F.2d 180, 183 (2d Cir. 1981), https://casetext.com/case/mca-inc-v-wilson). *See also Swatch Grp. Mgmt. Servs. Ltd. v. Bloomberg L.P.*, 756 F.3d 73, 90 (2d Cir. 2014), https://casetext.com/case/swatch-grp-mgmt-servs-ltd-v-bloomberg-lp-4.

[290] Proskine, Emily Anne, *Google's Technicolor Dream coat: A Copyright Analysis of the Google Book Search Library Project*, Berkeley Technology Law Journal, 21, no. 1, (2006), p. 213-239.

[291] Ass'n of Research Libraries, Resource Packet on Orphan Works: Legal and Policy Issues for Research Libraries 9, 17 (Sept. 13, 2011), http://www.arl.org/storage/documents/publications/resource_orphanworks_13sept11.pdf.

[292] Campbell, 510 US. at 578.

3.5. Copyright Law and the Concept of Orphan Works in Ethiopia

3.5.1. General Overview of Copyright Law in Ethiopia.

In Ethiopia, compared to other countries that were pioneers in the field, intellectual property in general and copyright in particular are recent development.[293] The introduction of policy, legal and institutional frameworks in relation to intellectual property is a recent phenomenon. Lack of awareness on the need of the protection of intellectual property and the resulting economic advantages stands as a main reason for underdevelopment of the sector.[294] The 1995 FDRE Constitution entrusted the power of safeguarding copyright to the federal government[295] and the power to enact copyright law to HPR.[296] The cultural policy of Ethiopia also recognizes the need for the protection and promotion of copyright sector.[297] In Ethiopia's legal history, copyright protection first emerged during the country's massive codification in the middle of the 20th century. Provisions for punishing copyright infringement were included in the 1957 penal code.[298] The first formalized copyright law was introduced by the 1960 civil code, which provided an independent section titled "Literary and Artistic Ownership".[299] The code grants exclusive rights to authors to utilize their works subject to a certain limitations and exceptions. However, this law was insufficient to address all copyright-related issues, and to effectively safeguard the right of authors and copyright owners.

To address the shortcomings of the Civil Code, the 2004 Copyright and Neighboring Rights proclamation was issued.[300] This new proclamation expanded the scope of copyrights and related rights, introduced new ideas and rights, and provided a better protection and enforcement mechanism. This copyright proclamation better than the civil code addressed

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[293] Daniel Mitiku, *Fair Practice under Copyright Law of Ethiopia: The Case of Education*, 63, 2010 (LLM Thesis, unpublished).
[294] Getachew Mengiste (Former Director General of Ethiopian Intellectual Property Office), *Intellectual Property Assessment in Ethiopia*, 10, (2006).
[295] FDRE Constitution, Proclamation No. 1/1995, FED. NEGARIT GAZETTE, 1st Year No. 1, 1995 (hereinafter FDRE Constitution), Articles 51(19) and 77(5).
[296] FDRE Constitution, Article 55(2) (g).
[297] World Intellectual Property Office, *National Studies on Assessing the Economic Contribution of the Copyright Industries: Creative Industries Series* No. 9, 15 (2014).
[298] Penal Code of the Empire of the Ethiopia: Proclamation No. 158 of 1957, NEGARIT GAZETA Gazette Extraordinary, 16th Year No. 1, Addis Ababa, 23rd July, 1957, Articles 675 and 676.
[299] Civil Code of the Empire of Ethiopia: Proclamation No. 165 of 1960, NEGARIT GAZETA Gazette Extraordinary, 19th Year No. 2, Addis Ababa 5th May 1960, Articles 1647-1674.
[300] Copyright and Neighboring Rights Protection, Proclamation No. 410/2004, 10th Year No. 55, Addis Ababa, 19th July, 2004 (hereinafter Copyright and Neighboring Rights Proclamation).

comprehensively all aspects of copyrights and is consistent with the standards of international copyright instruments. The proclamation without requirement of prior registration, accords protection for literary works, musical works, artistic works, maps and technical drawing, photographic works, cinematographic works, and computer programs etc.

Under the proclamation, the rights of performers, producers of sound recordings, and broadcasting organizations are protected as related rights. These rights protect the legitimate interests of individuals and companies who contribute to making works available to the general public.[301] Works based on or derived from already existing works are also protected by the proclamation.[302] In addition to extending protection to broad ranges of works, the proclamation also provided detailed rules on requirements to claim copyright protection,[303] exceptions to the rights of copyright owners that aim to balance the interests of users and the public[304] with those of authors, as well as details on duration, ownership, and licensing of rights, [305] and enforcement of rights, and remedies for infringement.[306]

As can be inferred from its preamble, the copyright proclamation is aspired on the premise that protection of literary, artistic and similar creative works has a major role to cultural, social, economic, scientific and technological development of the country.[307] This makes it clear that the proclamation is crafted based on the natural, utilitarian and personhood theories of copyright. This is true because, first as mentioned in Art. 7, the proclamation grants copyright holder's exclusive rights, allowing them to benefit from their works.[308] Second, a number of exceptions and limitations permit the free use of these works in support of the development agenda. Thirdly, Art. 8 of the proclamation provides protection for the moral rights of the authors.[309] So that moral rights of authors should be protected which are rooted in the personhood theory. This indicates that the proclamation is constructed based on the justifications of different theories.

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[301] Article 3(6) of the proclamation.
[302] Article 4 of the proclamation.
[303] Article 6 of the proclamation.
[304] *Id*, Articles 9-19.
[305] *Id*, Articles 20-25.
[306] *Id,* Article 33-36.
[307] Paragraph one of the preamble of the Proclamation No. 410/2004, states that "literary, artistic and similar works have a major role to enhance the cultural, social, economic, scientific and technological development of a country".
[308] Article 7 of the proclamation.
[309] Article 8 of the proclamation.

In spite of its comprehensive nature and detailed rules, the proclamation 410/2004 disregarded two major issues: the payment of royalties to right holders and the collective management of rights. To address this gap, ten years after the promulgation of the proclamation, HPR issued Copyright and Neighboring Rights Protection Amendment Proclamation No. 872/2014.[310]

3.5.2. Orphan Works under the Ethiopian Copyright Law

The philosophical justification for copyright protection is the idea that everyone should be entitled to the fruits of his/her labor and that no one should be permitted to use another person's work without permission. The artist, writer, and musician deserves to have the result of their mental and physical labor protected from unauthorized use. This was resolved a long time ago. What happens where artist, author or musician does not intend, *ab initio*, to firmly manage the rights in their work or be discovered by persons desirous of obtaining authorization for the use of those rights? The Ethiopian copyright law is silent in this regard.

In copyright law, the issue of orphan works has been long-standing problem that has gained more attention in recent years. With the development of digital technology and increasing accessibility of large volumes of copyright protected works online, the problem has gotten worse. Managing orphan works in collections without risking potential copyright infringement is a problem that many institutions such as libraries, museums, and educational institutions, may encounter. As discussed above, in response to this problem several countries have enacted orphan works legislation or guidelines to provide a legal frameworks for the use of these works subject to specific conditions.

Coming to the Ethiopian copyright law, regulating orphan works in Ethiopia may be challenging, as the existing laws does not specifically address the problem. However, it may be possible to interpret some existing copyright law provisions in a way that allows for the regulation of orphan works. Users may have a choice among several alternatives that enable them to go forward with their project: making non-infringing use of the work, such as by copying only elements not covered by copyright; claiming fair practice; resorting to exceptions available to libraries, museums, archives and other similar institutions and other relevant copyright provisions to develop a framework for dealing with orphan works.

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[310] A Proclamation to amend the Copyright and Neighboring Rights Protection Proclamation, *supra* note 222.

3.5.2.1. The idea/expression dichotomy limitation

The idea/expression dichotomy refers to the principle that copyright protects the expression of ideas, not the ideas themselves. Through the idea-expression distinction, copyright law safeguards the expressive aspects of the author's work while allowing subsequent authors the necessary breathing room to make their own contributions by adding to, reusing, or reinterpreting the facts and ideas included in the original work. Subsequent authors are not allowed to compete with the copyright owner by providing his/her original expression to the public as a substitute for the copyright owner's work, but they are free to compete with their own expression of the same facts, concepts, and ideas. Therefore, the idea/expression dichotomy plays a crucial role in maintaining the balance between the competing interests of society in allowing ideas, information, and commerce to flow freely and the interests of authors in preserving the exploitation of their works.[311]

The idea-expression dichotomy is embodied in Art. 5 of the Ethiopian copyright proclamation, which states that idea, procedure, systems, method of operations, concepts, formulas, numerical tables and forms of general use, principles discoveries or mere date regardless of whether they are expressed, described, explained, illustrated or embodied in a work shall not be protected.[312] Meaning, the ideas and facts included in the work are not protected by the proclamation; rather it only extends to the expression contributed by the author. This indicates that copyright law does not protect general ideas or concepts, only the specific way they are expressed is protected. This distinction is essential to allowing future creators and users to build upon an existing work by using its ideas and concepts to create new works of their own.

In fact, the creation of copyrighted works immediately enriches the public domain because those works reveal and expose ideas that are immediately available for use without copyright limitation. The idea-expression distinction is particularly important for works of non-fiction like historical and news accounts, and more utilitarian works such as computer programs, textbooks, manuals and the like. Much of the value in this works is the facts, ideas, systems, and methods described in them, not necessarily the particular expression embodied therein. Although copyright prohibits a user form directly copying the exact words of the author, it

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[311] *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 429 (1984); see also *Warner Bros. v. Am. Broad. Cos.*, 720 F.2d 231, 240 (2d Cir. 1983) (describing the idea expression distinction as "an effort to enable courts to adjust the tension between these competing effects of copyright protection").

[312] Article 5 of the proclamation.

does permit that user to restate the ideas, concepts, methods and other non-protected aspects. Most of the time, is not difficult for user to come up with a different expression of the same underlying ideas or facts without stealing any protected expression from the author.

In US, the idea/expression dichotomy is particularly relevant to copyrighted works such as computer programs. Under section 102(b), copyright does not extend to the functional aspects of the computer program, only the expression embodied in a computer program which includes the actual source and object code as well as structure, sequence and organization that is original is protected[313] Computer programs is cited as examples of orphan works, usually where the company that created the software had gone out of business and it was impossible to determine who owned the copyright on the program. In certain instances, the user had the option to write his own code to interact with the existing work or reproduce its features and functions.[314] Someone can develop a computer program that performs the same functions as another program that is protected by copyright, but without using any of the protected expression embodied in that underlying work.[315]

The idea-expression distinction does not directly address the issue of orphan works, as it is more focused on the scope of copyright protection, rather than the issue of unknown copyright owners. However, some legal scholars and policy makers have proposed using the idea/expression distinction as a framework for developing solutions to orphan works problem. For example, by distinguishing between the underlying ideas and the specific expression of orphan works, it may be possible to develop legal mechanisms that allow for the use of orphan works while still respecting the rights of copyright owners.[316] To be sure the boundary between idea and expression is not fixed and bright, but a gray area that requires judgement and therefore it may entails uncertainty as to whether the user has taken only ideas and

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[313] US Copyright Act 1976, section 102(b).
[314] See Andre (315) (describing how when owner of portions of code cannot be found, the code is rewritten); Berry (608) (describing how users of a typesetting program "TeX" rewrite code for "add-on packages" when the owner of that code cannot be found).
[315] *Lotus Dev. Corp. v. Borland Int'l*, 49 F.3d 807 (1st Cir. 1995), aff'd by an equally divided court, 516 U.S. 233 (1996); *Computer Assocs. Int'l, Inc. v. Altai, Inc*., 982 F.2d 693 (2d Cir. 1992).
[316] *Baker v. Selden*, 101 U.S. 99, 102 (1879), "Art" and "illustrate" are not meant in the aesthetic sense in this context.

concepts. However, the doctrine is true and may be successfully invoked by defendants in copyright cases.[317]

3.5.2.2. Fair practice under the Ethiopian copyright law

For the purpose of developing legislative solution we can describe the orphan works situation as one in which the usage exceeds any copyright limitations and exceptions such as fair practice. The Ethiopian copyright proclamation No. 410/2004 provides exceptions and limits to the exceptions of copyright. It also introduces the standard of "fair practice" within such exceptions and limitations which is similar to "fair use" and "fair dealing" in US and UK legal systems respectively. Fair use is part of a defense available to the accusation of copyright infringement. It is a limitation to the exclusive rights of copyright holder.

Regarding free access to orphan works, the fair use defense is one of the most widely used in practice in the United States. It will most likely continue to be a crucial component of any strategy for managing orphan work, particularly for open access usage supporting scholarship and research. In US, fair use has become one of the most widely used techniques among non-profit digitizers to promote providing online access to orphan works. A growing number of academics,[318] librarian, and archivist membership associations, and libraries and archives themselves, have written about how fair use can support open access to orphan works, both individually,[319] and collectively,[320] even though no court has specifically addressed how fair use will apply to orphan works.

The Ethiopian copyright proclamation incorporated the term "fair practice" exception without providing substantive standard for its application. The proclamation only stipulated fair practice in two exceptions: quotation and reproduction for teaching.[321] However, the definition and standards to interpret and apply the fair practice is not provided in the proclamation. The fair standards is also not provided for other exceptions provided by the proclamation. Moreover, the proclamation does not provide the fair practice standard for the use of important exceptions such as for criticism, review, libraries, archives and similar

[317] See *Aharonian v. Gonzales*, No. C 04-5190 MHP, 2006 U.S. Dist. LEXIS 13 at *18 (N.D. Cal. Jan. 3, 2006).
[318] Urban, Jennifer, *supra* note 140.
[319] Stanford University Library, *Comments on Orphan Works & Mass Digitization Report*, Oct. 9, 2015, https://perm.cc/GUL4-YJB4 accessed 11 April, 2021.
[320] Statement of best practices in fair use of collections containing orphan works for libraries, archives, and other memory institutions 7 (2014), https://perma.cc/JU4L-Q5CB
[321] Article 10 and Article 11 of the copyright proclamation.

institutions. But, fair practice exception is a known exception in other countries in cases of library, research and experiment because fair practice covers a broad range of subject matter like orphan works. Fair practice is not limited to any particular group of users as many other limitations are. However, some organizations, such as non-profit libraries and educational institutions enjoy greater latitude under fair practice than other users of copyrighted materials.

The copyright proclamation recognizes the fair practice exception to education under Art.11. The article prescribes that the owner of copyright cannot forbid a reproduction of a published work or sound recording for the purpose of teaching. The full reading of the provision is the following:

Article 11: reproduction for teaching

(1) Notwithstanding the provision of Article 7(1) (a) of this proclamation the owner of copyright cannot forbid, without exceeding fair practice and the extent justified by the purpose, a reproduction of a published work or sound recording for the purpose of teaching.

(2) A copy made in accordance with the preceding sub-Article shall indicate, as far as practicable, the sources of the work or sound recording reproduced and the name of the author.[322]

Copying the work of another for the purpose of education is a known exception to exclusive right of the copyright owner. Of course, copying for educational purpose is not without limitation. Fair reproduction for the purpose of education is allowed. But the standard of fair practice is not well known and incorporated under the proclamation. Moreover, the proclamation is not clear whether users are allowed to use orphan works for educational purposes under the guise of fair practice.

The writer of this paper suggest that the use of orphan works may be possible by users for educational purposes. Users may use fair practice as a defense to their act of copyright infringement in the case of orphan works. This suggestion is given because these standards can be taken from other countries experience mainly USA which are important also for our country. These standards can be also derived from the preamble, objective, the particular provision, and total spirit of the Proclamation No. 410/2004. By the fair practice defense, it

[322] Id, Article 11(1 and 2) of the copyright proclamation.

can be established that some uses of copyrighted works are by their nature more helpful to meet the objective of copyright than others.

The other justification is that if there is a constitutional policy favoring dissemination of information, a broader application of fair practice may be justified.[323] The first rationale for fair practice is to meet the constitutional purpose behind copyright law. If the copyright protection purpose is not affected by the use and rather if public welfare is advanced that will be a fair practice. In Ethiopia, for example, the constitutional purpose to protect copyright is to "promote the development of arts, science and technology". The FDRE Constitution requires the government to support the development of copyright under its cultural policy provision. Article 91(3) of the constitution states that the government shall have the duty to the extent its resources permit to support the development of arts, science and technology.[324] Securing authors exclusive rights to their works is one way to do this. Therefore, fair practice would be justified if the use did not lessen the author's economic benefit.

The second reason for having a fair practice exception is to develop and create a better work that contributes much to the society. To develop a better work and to make a progress a reality, persons have to base on the creative of others. To advance knowledge, encourage further research and to promote art and culture, some use of a copyrighted work may be made. According to the preamble of the proclamation No.410/2004, the reason behind protecting literary, artistic, and similar creative works is to enhance cultural, social, and economic development of the country.

The primary concern of the proclamation is not rewarding the copyright owner. Rather the primary concern is promoting cultural, social, and economic development through allowing the public need for access to and use of knowledge, and the copyright owners to receive a fair return. However, the uncertainty surrounding the ownership status of orphan works does not serve these objectives of the copyright system. So that, the fair practice concept under the Ethiopian copyright law should permit prospective users to use copyrighted works without permission of the author which result in wider dissemination of those works without

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[323] *Copyright Fair Use: Case Law and Legislation*, Duke Law Journal, vol. 1969, (Feb. 1969), p. 97.
[324] FDRE Constitution, Article 91(3).

significantly undermining the incentives for creators.[325] Otherwise progress of science and useful arts would be hindered and so that the copyright legislation may fail to promote such important areas of the society.

Thirdly, it is to guarantee social utility and fulfill the general public interest.[326] The purpose of copyright law is not only to reward creative individuals to engage in creative intellectual efforts, but also to make the works of creative individuals available and be accessible to many peoples as quick and cheap as possible. Therefore, in order to satisfy the interests of both the general public and the individual author, fair practice will recognize incentives for producing original works as well as their dissemination to the public.[327] Moreover, fair practice exists to encourage creativity and promote productive use of existing copyrighted material.[328] In balancing the equities, public interest should prevail over the possible damage to the copyright owner. The copyright holder's interest in a maximum financial return is subordinate to the greater public interest in the development of art, science and industry.[329]

Mostly, in many jurisdictions, the fair practice standard is ill-defined in the copyright law. However, fair practice in common law countries are mainly applied by the use of case law. The standards stated under U.S copyright Act and England legal system are developed by the case law. The U.S copyright Act under section 107 provides, better than others, certain standards in which copyrighted materials to be used without the consent of the copyright owner.[330] Fair practice defense can be used in a number of diverse situations including orphan works. It can be utilized arguably in any circumstances.[331] Fair practice can be determined differently to each cases and situation. There is no rigid rules that can be applied to all situations. But certain standards can be used to determine whether the taking of copyrighted material does or does not exceed the limits of fair practice.[332]

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[325] *Id*
[326] Corpus Juris Secundum, *supra* note 46.
[327] *Id.*
[328] Phan, DanThu Thi, *Will Fair Use Function on the Internet*, Columbia Law Review, Vol. 89, no. 1 (1998).
[329] *Id.*
[330] Correa, Carlos M., *Fair Use in the Digital Era*, International Review of Intellectual Property and Competition Law (IIC), Vol. 33, No. 5/2002, p. 574.
[331] Buning Marius, *supra* note 1.
[332] *Id.*

Fair practice is a solution to the orphan works problem that has been suggested by many, including the defendants in the Google Books settlement and in *U.S. v. Gordon*.[333] As mentioned before, fair use is a codified defense to copyright infringement. The U.S. Code states that "the fair use of a copyrighted work, including such use by reproduction . . . for purposes such as criticism, comment, news reporting, teaching . . . scholarship, or research is not an infringement of copyright."[334] In addition, in England, the fair dealing exception for the purpose of research or private study, for reporting current event, or for criticism or review are permitted.[335] So, it can definitely be said that the standard of fair practice was originated and also developed well in common law countries.

Under US Copyright Act, to determine if a use is fair practice and not infringement, the court must consider four factors on a case-by-case basis.[336] Because of its equitable nature, fair use can flexibly accommodate changes in both copyrighted works and uses of those works over time.[337] Accordingly, fair use is especially well-suited to copyright problems that arise from evolving situations, such as the orphan works phenomenon.[338] Fair use and other free use limitations and exceptions in National Copyright Act of US maintains a balance between the individual interests of creators of works and other copyright holders, and the public interest in fostering a culturally productive exchange of information and ideas. In the United States, fair use makes it possible for individuals to quote or reproduce from copyrighted materials without seeking permission from the copyright holder. The fair use exception of the US copyright Act also allows reproduction of protected works for private use.

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[333] *See Authors Guild v. Google Inc.*, 770 F. 2d 666, 678 (S.D.N.Y. 2011); see also United States v. Gordon, 37 F. 4th 767, 771 (1st Cir. 2022).
[334] *Id.* (emphasis added).
[335] Cornish *et al*, *supra* note 4.
[336] Kenneth, D. Crews and Jacque, Ramos, *Comparative Analysis of International Copyright Law Applicable to University Scholarship*, (2005), p. 34.
[337] See *Sony Corp. v. Universal City Studios*, Inc., 464 U.S. 417, 447–56 (1984) (accommodating "time-shifting" of televisions shows via video tape recorders); *Sega Enters. v. Accolade*, Inc., 977 F.2d 1510, 1520–28 (9th Cir. 1992) (accommodating "reverse engineering" of computer programs); *Kelly v. Arriba Soft Corp*., 336 F.3d 811, 817–22 (9th Cir. 2003) (accommodating an image search engine).
[338] As works in the collections of libraries and archives age, it seems likely that they will simultaneously become more likely to become "orphaned" and in greater need of preservation. At the same time, new methods of digitizing, and making works available are likely to arise, as are new uses of digital corpuses. Fair use's flexibility in accommodating such developments makes it, where it applies, especially appropriate for addressing orphan works issues over time.

The standards which help to interpret and apply the fair practice are provided extensively in the U.S copyright Act, section 107. Even the standards are not exhaustive. The standards and the non-exhaustive nature of them help the judges to entertain each case in relation to various public policy reasons. Providing standards to fair practice doctrine under the Ethiopian copyright proclamation helps the judges to consider various social, economic, and political policies of the country in entertaining each case. Allowing reproduction of books, for example, for the purpose of expanding education, research and experiment has a positive impact in fulfilling social objectives of the country. At the same time, the job of judges becomes easy in interpreting and applying the fair practice standard to individual cases.

Without having clear definition and standards, it is difficult to apply the fair practice. How much does the fair practice standard allow one to use the original copyrighted work without the permission of copyright holder is the prevailing question behind the application of fair practice? In addition, the exception under Art. 11 of the Ethiopian copyright proclamation is limited only to reproduction right. What about other rights in copyright, such as translation, digitization, adaptation, and other rights? These rights, other than reproduction right, have to be included in the provisions. In US, fair use which is not an infringement can involve reproduction of orphan works or any other uses that might otherwise be infringement.

The corresponding provision in the Berne Convention can be found in Art. 10(2). It uses the term ‘utilization’ which provides for the reproduction, translation, adaptation and exemptions from other related rights. Unfortunately, the same is not true under Ethiopian law. In contrast to the Berne Convention, teaching exceptions apply only to the reproduction of works and sound recordings. This conclusion can be based on the definition of the term reproduction as used in the same law. It could be argued that the pertinent provision under the Ethiopian copyright law limits the types and forms of utilization.

The Ethiopian copyright law also introduced the fair practice to the quotation exception. Art. 10 of this law provides that the owner of copyright cannot forbid the reproduction of quotation from a published work. The quotation shall be compatible with fair practice and should not exceed the extent justified by the purpose. The source and the name of the author must be indicated. Under the Ethiopian copyright law apart from the general requirement of

fair practice and legitimate purpose, nothing has been regulated with regard to the size of quotations and the purposes for which they may be made.

In Canada, the orphan works provision is not only the copyright exception available for prospective users desirous of using it. Another applicable exception is fair dealing. The Canadian Copyright Act provides general open-ended exceptions to the exclusive rights of copyright holders in the form of fair dealing. Fair dealing reproduction of a copyrighted work is not an infringement for the purposes of research or private study, criticism or review and news reporting if the appropriate information of the source is mentioned.[339] Whether the dealing will constitute fair dealing is not merely based on the purpose of the dealing, but is also subject to a value judgement, determined on an *ad hoc* basis by weighing up multitude of factors. Fair dealing is determined by evaluating the purpose of the dealing, the character of the dealing, the amount of the dealing, the alternatives of the dealing, the nature of the work and the effect of the dealing on the work. Despite similarities to the American provision on fair use, the Canadian provision on fair dealing is not nearly as far reaching as it is limited to certain uses.

3.5.2.3. Reproduction by libraries, archives and other similar institutions

As stated above, the ultimate goal of the copyright system is promoting an efficient mechanism of dissemination of information and knowledge so that the required scientific and cultural transformation will materialize. To that end, it is necessary to make sure that institutions that are engaged in this blessed task of dissemination of information are getting the necessary input which in turn is to be made available for the benefit of the general public. Libraries, museums, archives, and other similar institutions are among these information dissemination centers.

The proclamation under Art. 12 provides exception applicable to the libraries, archives, memorial hall, museums and other similar institutions. According to article 12(2), a library or archive can make a reproduction of a published article, short work or short extract of a work to satisfy the request of a physical person. With respect to the purpose of reproduction, the proclamation has stipulated three requirements under article 12(3). Accordingly, reproduction should be to preserve and, if necessary to replace a copy which has been lost, destroyed or

[339] Section 29 of the Canadian Copyright Act.

rendered unusable in the permanent collection of another similar library or archive; where it is impossible to obtain a copy under reasonable conditions and the act or reproduction is an isolated one occurring and if repeated on separate and unrelated occasions.

The proclamation also put preconditions under which reproduction made by libraries, archives and other similar institutions under article 12(2). The use exception here applies three step tests in order to such reproduction eligible for the exception. First, there must be demand or request for copy of the copyrighted work for public consumption and secondly there is no institution to issue license of reproduction and the third is the reproduction is separate or repeated but in unrelated occasion.

The topic of orphan works is of critical importance to all academic and research libraries and archives, which play a unique and vital role in providing long-term preservation of and access to knowledge. Almost all academic and research libraries contain numerous items likely to be orphan works in their collections and archives.[340] These institutions may digitize and make their collections available online which may include orphan works. And making a copyrighted work accessible to the public requires prior permission from the copyright owner. If these institutions unable to determine or locate the copyright holder of a work under copyright, then they must either restrict access to and use of the item.

Is there any little guidance on applying article 12 to orphan works? Can we give some reasonable interpretation to the phrase…"reasonable conditions" requirement under article 12(3)b))? As to me (the writer of this paper), this may serve as a defense provide legal justifications for use, and it may lower risk by supporting efforts to avoid disputes in the first place, and deterring prospective litigants from bringing claims by convincing them that they have no legal basis. In some cases it may also, even when not completely successful, help to minimize negative outcomes from a dispute. But in order to invoke this exception, the library or archives must, among other things, first determine on the basis of a "reasonable conditions" that a copy of the work cannot be obtained. The scope and nature of a reasonable conditions to determine that the copy cannot be obtained may be vary according to the circumstances of a particular situation.

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[340] John Wilkin, *Bibliographic Indeterminacy and the Scale of the Problems and Opportunities of "Rights" in Digital Collection Building*, (2011).

The word reproduction under the proclamation should not be interpreted narrowly. International law requires that the term reproduction be interpreted broadly to include all known and unknown methods of reproducing a work. In the digital world, the reproduction right outlined in Article 9 of the Berne Convention and the exceptions allowed thereunder are fully applicable, especially when it comes to the use of digital works. In accordance with this article, it is recognized that storing a protected work in digital form on an electronic medium is reproduction. Reproduction may also include storage of a work in digital form using an electronic medium even though the result is not visible or the medium is not tangible. Taking this to the case in Ethiopia, it states reproduction in any form or manner so that storage or digital reproduction is also allowed. This conception is stated under article 2(25) of the copyright law of Ethiopia.

Article 2(25) of the proclamation, defines reproduction as the making of one or more copies of a work or sound recording in any way, including any temporary or permanent storage of the work or sound recording in electronic form. From this, we can understand that digital reproduction is allowed. In terms of the proclamation, libraries or archives can reproduce the work without the permission of the owner of the copyright, but only for the sole purpose of replacing a copy which has been lost, destroyed or rendered unusable in the permanent collection of another similar library or archive so that patrons can use the library. These provisions make application to online dissemination a challenge because the provision of a digital copy may require creation of temporary copies of the work to facilitate digital transmission. The scope of Art. 12 is very narrowly tailored and the provision does not authorize a general digitization program for preservation purposes. It allows change of format only for preservation purposes.

The Proclamation is not clear whether such reproduction is also allowed for digital copyrighted works with the development of digital library. This is because reproduction of digital content may include posting in a given web address so that user may use it or scanning of works to make available on internet. Are Ethiopian libraries, archives, and museums and other similar institutions, allowed to make digital content of copyrighted works available to the public? They may do that upon the permission of the right holder. However, it may create

uncertainty for users and potential legal risks when dealing with works whose copyright status is unclear (orphan works).

Libraries and archives seek to preserve a wide variety of orphan works: books, photographs, sound recordings, visual works, rapidly disintegrating films,[341] and websites, among many other materials. With regard to orphan works specifically, preservation is likely of even greater value, as with no owner to preserve them or give permission for others to do so. Libraries and archives also routinely promote learning and access to information by organizing materials, making them searchable, providing direct access to them, and offering productive enhancements such as curation, direct contextualization, or commentary.[342]

If we look for example at the 1976 Copyright Act of the US, section 108 entitles libraries and archives to make one copy of a work as long as it is not alone for commercial advantage. The Act also allows libraries to make the copy of the entire work or substantial part of it where the user makes requests and the copying library, based on a reasonable investigation determined that a copy of the work cannot be obtained at a fair price. Under the US Copyright Act, reproduction by libraries and archives is not infringement provided that the reproduction should fulfill certain requirements.

The rights of reproduction and distribution under Section 108(e) applies to the entire work, or to a substantial part of it, made from the collection of a library or archives where the user makes his or her request or from that of another library or archives. The Act allows the reproduction of protected works in more than one copy for libraries and archives depending on the purpose of the reproduction, the type of work to be reproduced etc. Libraries and archives are allowed to engage in the systematic reproduction or distribution of single or multiple copies or phono records of material provided, that nothing in this clause prevents a library or archives from participating in interlibrary arrangements that do not have, as their purpose or effect, that the library or archives receiving such copies or phono records for

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[341] Eric J. Schwartz, Founding Director/Board Member, National Film Preservation Foundation, Panel at Berkeley Orphan Works Conference: *Who Wants to Make Use of Orphan Works and Why?*, at slide 6 (Apr. 12, 2012) (slides available at http://www.law.berkeley.edu/files/paul_schwartz.pdf).

[342] *Mission and History (American Memory)*, LIBRARY OF CONGRESS, http://memory.loc.gov/ammem/about/index.html (last visited July 28, 2012).

distribution does so in such aggregate quantities as to substitute for a subscription to or purchase of such work.[343]

Section 108(h) is the second provision that can be used to justify orphan works' uses. Created as a way to ameliorate the effect of the 1998 Sonny Bono Copyright Term Extension Act, Section 108(h) provides that during the last 20 years of any term of copyright of a published work, a library or archives, including a non-profit educational institution that functions as such, may reproduce, distribute, display, or perform in facsimile or digital form a copy or phono record of such work, or portions thereof, for purposes of preservation, scholarship, or research. Two significant limitations are that Section 108(h) only applies to published works, and that it only applies to works in the final 20 years of their copyright term. Given these limitations, the most immediate application of Section 108(h) is to works published between 1923 and 1941, many of which may be in the public domain anyway.

The UK Copyright, Designs and Patents Act of 1988, permit the exceptional use of orphan works under section 57.[344] Section 57 (1) states that copyright in a literary, dramatic, musical or artistic work is not infringed by an act done at a time when, or in pursuance of arrangements made at a time when (a) it is not possible by reasonable inquiry to ascertain the identity of the author, and (b) it is reasonable to assume provided that copyright protection has expired, or that the author died 70 years more before the beginning of the calendar year in which the act is done or the arrangements are made.

The United Kingdom has a statutory provision stating that copyright infringement does not occur if it is not possible by reasonable inquiry to ascertain the identity of the author and reasonable to assume that copyright has expired or that the author died 70 years or more before the time the work is used. This provision only covers a small subset of orphan works, older works that have unidentifiable copyright owners. Libraries, archives and museums in the UK can rely on this copyright exceptions that make it easier and cheaper for them to use, share and preserve the items in their collections. Such explicit exception for the use of orphan works does not incorporated under the Ethiopian copyright law.

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[343] Maria, A. Pallante, *Copyright Law of the United States and Related Laws*, Contained in Title 17 of the United States Code, (2011), p.17

[344] UK Copyright, Design and Patents Act 1988, *supra* note 43.

The Ethiopian copyright law should allow reproduction for libraries not only for replacement and preservation but to make available to the public a digital copyrighted works including orphan works. This is true because the newly established digital libraries, archives, and museums may contain a lot of items likely to be orphan works in their collections. If these works cannot be digitized for preservation and available to the public, then their orphaning will create a large social cost and a significant drag on the copyright system purposes to encourage creativity and the spread of knowledge.

3.5.2.4. Non-voluntary licenses

Compulsory licensing is a legal mechanism that allows for the use of a copyrighted work without seeking the permission of the copyright owner. It is typically implemented when the use of the work serves the public interest or promotes competition in a particular industry. It provides an avenue for individuals or organizations to access and utilize copyrighted materials, even if the copyright holder does not grant explicit permission. Accordingly, the Ethiopian copyright law provide general limitations to facilitate this demand in favor of the interest of the public and make works available without request from copyright owners and irrespective of their opposition in some cases.

In Ethiopia, the office is empowered to grant license to permit the reproduction or translation or broadcasting of a published work even against the objection of the author, heirs or legatees as per Article 17(1) of the proclamation.[345] There must be a public interest for the office to authorize the reproduction, translation or broadcasting of published work. Taking into consideration the overall importance of literary and artistic works in a given country, the dissemination of such works is crucial. In doing so, different factors may hinder the public accessibility of such works like language barriers and problem of accessibility for different reasons. Even though the author or owner of such works has exclusive economic right to reproduce or translate, involuntary license may be issued for other persons to make such works available to the public through reproduction or translation.

The license granted by the office may serve commercial or non-commercial uses. But the proclamation is not clear whether non-voluntary license granted by the office is also given for

[345] Article 17(1) of the copyright proclamation.

the use of orphan works. Because pursuant to Art. 17(2) of the proclamation,[346] the conditions, forms of such authorization, and in particular the fair compensation to be made to the owner of copyright shall be determined by subsequent regulations. However, no regulation is enacted up to now. The proclamation provides only the general possibility of compulsory license without incorporating the conditions to grant the license.[347] It is not possible to use compulsory licensing as a means of exploiting copyrighted works in the absence of regulations that provide substantive and procedural guidelines. This makes non-voluntary license under the Ethiopian copyright law ineffective. Issuance of compulsory license under the proclamation is also limited to three rights: right to reproduction, translation and broadcasting. The other rights in copyright, such as adaptation, distribution and other use of the works are not covered under the proclamation.

A number of jurisdictions have opted to facilitate the use of orphan works through a centralized body with the ability to license uses of orphan works. For example, Canada has adopted compulsory licensing model which enables a public body to issue licenses for users of orphan works. Under section 77 of the Canadian Copyright Act, in the case of the failure of the prospective user to locate the copyright holder of a work, the Copyright Board of Canada may grant a license to the user in order to make use of the work.[348] However, the Board grants authorization only if it is satisfied that the prospective user has made reasonable efforts to trace the copyright owner but was unable to do so, despite that effort.

In Canada if the Board is satisfied that the prospective user has made the required effort, it can grant a non-exclusive license permitting the user to make use of the work under the conditions set by the Board, such as those relating to license fees, expiration time and type of use.[349] But the Ethiopian copyright proclamation does not provide this procedure. It only indicates that the license may granted by the office to authorize the reproduction or translation or broadcasting of a published work without providing the conditions to grant the license.

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[346] Article 17(2) of the copyright proclamation.
[347] According to Bereket Bashura, at p. 30, "this is understood as a limitation in the interest of the public; i.e. access to knowledge." The Berne Convention in its appendix contains provisions which allow developing countries two compulsory license options. The first one allows governments to issue a license to make translations. The other one allows governments to issue license to reproduce and publish.
[348] Canadian Copyright Act 1985 last amended on 19 June 2017, section 77.
[349] British Screen Advisory Council, *supra* note 14.

Under the UK Orphan Works Licensing Scheme, a license may be issued for orphan works to be used commercially or non-commercially, subject to payment of fees and only if a diligent search has been carried out first. The search must be completed before the work in question has been used, it must be done in good faith, and the diligent search must involve consultation of the appropriate sources. The Scheme states that a diligent search must comprise a reasonable search of the relevant sources to identify and locate the rights holder(s).

Article 17 of the proclamation No. 410/2004 is drafted in line with the Appendix of the Berne Convention, which is incorporated in to the TRIPs Agreement. The Berne convention allows issuance of compulsory license in the appendix. According to article IV(1) of the appendix of the Convention, a license under Article II or Article III may be granted only if the applicant can prove that, after having asked the holders of the rights for authorization to reproduce or translate the work and publish it (in conformity with the provisions in force in the country concerned), he was not able to obtain such authorization or after due diligence on his part, he was unable to locate the holders of the rights.

Accordingly, in accordance with the procedure of the country concerned, the Berne Convention allows the reproduction or translation of orphan works by prospective users. However, the Ethiopian copyright law does not follow this procedure. It only indicates under article 17 that the office may grant license to authorize the reproduction or translation or broadcasting of a published work with payment of fair compensation. The writer of this paper suggest that the Ethiopian copyright law should provide the manner and conditions to issue non-voluntary license. The regulation which shall implement the copyright law will eventually govern the manner in which compulsory licenses are granted. The use of orphan works should also be allowed through licensing model particularly for commercial purposes.

In Ethiopia, the existing copyright laws does not provide a clear legal framework to address orphan works, which can create uncertainty for individuals or organizations seeking to use these works. Interpreting existing laws may help to clarify how orphan works can be used with in the current legal framework, but it may not fully address all the problem related with the issue. In such situations, new regulations or amendments to existing laws could be necessary to provide a more comprehensive solution to the problem of orphan works. A combination of interpreting existing laws and potentially creating new regulations needed in

Ethiopia to effectively regulate orphan works and provide clarity for those seeking to use them.

3.5.3. Lessons for Ethiopia

The biggest problem with orphan works is what is called the orphan works dilemma. As mentioned before, no clear legislation or case law on the regulation of orphan works currently exists in Ethiopia. It is therefore to address the orphan works problem within Ethiopia's copyright law, lessons can be learned from other jurisdictions by establishing clear guidelines for the use of orphan works, while ensuring that the rights of copyright holders are respected.

Different factors should be taken into consideration in choosing appropriate solutions for the problem of orphan works. For example, if a country intends to choose an ECL model, it should have a strong culture of collective management organization. Ultimately, the effectiveness of each model will depend on the specific context and needs of the stakeholders involved. It may be beneficial to consider a combination of approaches or tailor the solution to the best fit to the particular circumstances of the orphan works problem. Some approaches may be more suitable for certain types of works or contexts, while others may be more appropriate in different situations.

In this paper, several models for solutions to the orphan works problem adopted by different jurisdictions were analyzed. The first was the statutory exception that proposed by EU. An approach based on a statutory exception has been adopted in Europe in the guise of the Orphan Works Directive, one of the key initiatives of the European Commission's Digital Agenda for Europe.[350] The OWD obliges member states to introduce a new exception to copyright that enables specific types of use of some categories of orphan works. The EU model can be an efficient solution for non-profit users seeking to use orphan works. In addition, the Directive provides some guidance on what constitutes a diligent search for this purpose, but the final details will be set out in the national laws of the concerned states.

However, the EU Directive approach has been criticized for its narrow scope and inability to provide assistance to the full range of organizations that must engage with orphan works. In addition to the publicly accessible libraries and cultural institutions that are the beneficiaries

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[350] *A Digital Agenda for Europe*, COM (2010) 245, available here: http://eur-lex.europa.eu/legal content/EN/TXT/PDF/?uri=CELEX:52010DC0245&from=EN (accessed: 12 December 2016).

of the Directive, there are many other types of non-profit organizations that may have orphan works worth displaying to the public, but that would fall outside the exception contemplated by the Directive.

The second was the three-branched approach under the UK copyright system. The UK approach to addressing orphan works involves a combination of exception-based model, licensing schemes, and extended collective licensing to provide a framework for the use of orphan works while respecting the rights of copyrights owners. The first was introduced at EU level by the OWD, and has been implemented in the UK by the Copyright and Rights in Performances (hereinafter CPUO Regulations 2014). The regulations permit certain relevant bodies to reproduce orphan works for particular purposes and make them available, insofar as the use is in pursuit of a public interest mission. The orphan status of a work must be established by way of a diligent search before it may be used under this exception.[351]

The second UK solution consists of a system of individual licensing for the use of orphan works. Like the CPUO Regulations, they require that a diligent search be carried out to confirm the orphan status of works for which licenses are requested. The licenses may authorize any act restricted by copyright, but may not grant exclusive rights in the work or be granted to a person authorized to grant licenses. A reasonable license fee must be paid by the user of the orphan work.[352] This fee will be repaid to a right holder who reappears within eight years of the date on which the orphan license was granted in respect of his work.[353]

The third orphan works solution under the UK copyright system is Extended Collective Licensing Regulations 2014 (hereinafter ECL Regulations). Under these regulations, licensing bodies fulfilling certain requirements may be authorized to grant copyright licenses in respect of works in which the copyright is not owned by the body or any of its members. Non-members are afforded an option to opt-out. A license fee will also be payable by prospective users of orphan works. The licensing system envisaged by the ECL Regulations appears much better suited to facilitating the use of orphan works in mass digitization projects than the previous two options. The ECL regulations contain no explicit recognition that the licensing of rights in works on behalf of others might give rise to infringement of moral rights, and

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[351] *Id.*
[352] Id, section 10(1) (a).
[353] Id, section 13(1)

contain no safeguards to prevent this occurring. The success of this model is dependent on the existence of well-developed structure and culture of collective management organizational activities. Since there is no a well-developed culture of CMOs in Ethiopia, applying this model to the current Ethiopian context is unthinkable.

The Canadian approach to the orphan works issue was to create a licensing scheme through which the Canadian Copyright Board would be able to license the use of orphan works, subject to the payment of a royalty the Copyright Board deemed fit. The Canadian solution is not however limited to the specific orphan works provision, but it is allowed to the whole and include many copyright exceptions beyond the orphan works exceptions. The U.K. licensing scheme also allows the granting of licenses for all types of copyrighted works and performances where the copyright holder cannot be identified or located. It is therefore clear that the solution is all encompassing and will alleviate the orphan works dilemma immensely.

Libraries, archives, and museums have criticized the licensing solution on the grounds that a case-by-case system would not work for them, since it is overly onerous for those institutions that hold numerous works that can be orphaned and obtaining a license for each work would be too time consuming and expensive.[354] But the licensing system provides a legal certainty for the user while keeping the legitimate interests of right holders. In particular, this system is helpful for facilitating commercial reuse of orphan works by prospective users that seek certainty of lawful use and can afford to pay the application fee and license fees before use.

The US approach to the orphan works problem was a limited liability solution, which would have limited the remedies of owners of copyright in cases where the infringer could prove that a reasonable and diligent search was done in good faith and the owner could not be located or identified. What constituted a reasonable and diligent search was to be determined on case-by-case basis, but statements on Recommended Practice was to be drafted in an attempt to alleviate vagueness. The solution posed will not alleviate the fear of litigation to such an extent that would entice the parties desirous to use orphan works to do so. This is especially true for large-scale of modern digitization efforts, as claims of copyright infringement are calculated per work. It also creates an implied duty on copyright owners to remain locatable

[354] Young, Aron C., *supra* note 245.

and identifiable, which renders it incompatible with the Berne Convention prohibition on copyright subsisting subject to formalities or requirements.

The fair use provision in US copyright system was also evaluated. Given the recent decision by American courts, it can be argued that any work, regardless of its status as an orphan work, can legally be digitized by libraries and archives. The benefit of using a fair use provision to cases of digitization is that it negates the need to evaluate whether the work is an orphan work. This reduce the cost of digitization as the costs related to conducting reasonable search is avoided in its entirety. However, the application of fair use for orphan works require a developed court system to provide guidance and interpretation on how the fair use doctrine applies to these works. The courts play crucial role in determining whether the use of these works falls under fair use or not.

Finally, the writer suggests that distinct regulatory strategies should be adopted under the Ethiopia copyright law for commercial and non-commercial uses and users. Although the cost and its bureaucratic nature may deter libraries, museums, archives, and non-profit organizations from preserving and providing access to their collections, the licensing scheme of orphan works is helpful for facilitating commercial reuse of orphan works by prospective users that seek certainty of lawful use and can afford to pay the application fee and license fees before use. For countries like Ethiopia, that have not provided any explicit mechanism for solving the problem of orphan works, this may be a good initiative to provide awareness to the public about the solution. Under the Ethiopian copyright law, the license granted by the office may serve commercial or non-commercial uses. The provision on licensing should be amended and expanded to accommodate orphan works. Thus, Ethiopia should adopt the licensing scheme that deal with both types of orphan works for commercial reuse of the works.

Apart from licensing scheme, the EU approach will raise several interesting policy issues Ethiopia policymakers to consider. While there is a widespread establishment of digital institutions in Ethiopia, providing legal solution to make use of orphan works in their collections will have much social benefits. It may be preferable to Ethiopia to allow these non-profit organizations to engage directly in non-commercial reuse of orphan works via exception-based model in order to accommodate the current digital progress in Ethiopia and facilitate socially beneficial initiatives. Legislative authorization should be required to permit

such non-commercial uses by these organizations and new orphan works exception should be introduced in our copyright law. This could be achieved by amending the existing copyright law.

In addition, the fair practice concept and its standards have to be defined and interpreted broadly to allow the use of copyright protected works under the proclamation regardless of their orphan status particularly by non-profit organizations.

CHAPTER-FOUR

4. CONCLUSIONS AND RECOMMENDATIONS

4.1. Conclusions

Copyright is a form of legal protection given to content creators when certain rights are assigned to their works that meet the requirements for protection. To grant protection,

copyrights are not required to be registered. This lack of ownership data leads to the orphan works problem, which occurs whenever a good faith, prospective user cannot readily identify and/or locate the copyright owner of the work they are trying to use. Different jurisdictions have recently working on finding a suitable solution to the problem, including through policy reform and existing legal mechanisms. In an effort to find a solution, different approaches in copyright laws of the selected jurisdictions have been analyzed in this research.

First, the solution provided under the European Union Directive were analyzed. In 2012, the EU adopted Directive 2012/28/EU on certain permitted uses of orphan works. The Directive requires the EU member states to create an exception in their national copyright laws to permit the beneficiary institutions listed under the directive to digitize and make available orphan works in their collections on certain conditions. The permitted institutions can, directly or indirectly, make temporary or permanent reproductions of the orphan works by any means and in any form, completely or partially. However, the EU model is criticized by being solution that is more limited because it covers a limited class of works and is restricted to a limited class of beneficiary institutions.

The research also demonstrated that the UK has provided the most comprehensive scheme for addressing the problem of orphan works, as it provides three types of solution: an exceptions-based model, compulsory licensing and extended collective licensing.

The other solution analyzed under this research is the licensing scheme adopted by the Canadian Copyright Act. In Canada, a party desirous to use published orphan works can apply to the Copyright Board for a non-exclusive license to do so. The Board is authorized to issue non-exclusive license, only as exclusive licenses will afford the applicant a monopoly in the use of the work which will clash with any licenses that the owner of the copyright might have issued or will issue in the future. Such a licenses is granted for specific period of time determined by the Board. The Board is entitled to issue licenses for uses of commercial or non-commercial nature. The Canadian Copyright Act provides users of orphan works with adequate legal certainty. However, this model is criticized by its expensive and bureaucratic nature. The research also revealed that the Canadian Copyright Act has only addressed one type of orphan works (unlocatable owners) and it does not deal with an unknown copyright owner.

This paper also examined that there have been attempts to legalize the use of orphan works in the USA by providing a solution. Although there is no specific provision of law for solving the issue of orphan works, in USA, there are limited liability approach and a fair use doctrine that users of orphan works could utilize as a defense. Under the limited liability approach, the infringer of a copyrighted work would only be required to pay reasonable compensation. But, if the infringer is a non-profit institution, they will be exempted from paying reasonable compensation, provided that the infringer must prove that it did not have any direct or indirect commercial advantage, and it ceased its use directly after being notified of the infringement by a copyright holder who reappeared. In addition to paying reasonable compensation, injunctive relief is available in certain situations. However, the copyright holder is not entitled to injunctive relief when the infringed work is transformed by a considerable amount. The main advantage of this solution is that it is a cost-efficient model.

The other solution of orphan works under the US copyright law is the doctrine of fair use. The origin of fair use is as a judicial doctrine, but it has been codified under section 107 of the U.S. Copyright Act. The doctrine of fair use stems from and aids the fundamental aim of copyright to promote the progress of science by striking a balance between providing incentives to create original works and the social benefits that flow from disseminating such works. The doctrine of fair use is not defined in copyright law; rather, four factors to be taken into account to apply.

A common condition that users should meet before being entitled to use an orphan work in most of the solution models is the requirement of a diligent search. However, in the extended collective licensing model, it is not the duty of the users to carry out a reasonably diligent search; it is for the collective management organization to conduct this search after granting licenses to users. Moreover, there is no diligent search requirement at all under fair use doctrine. Another prior condition is that users are required to pay a reasonable royalty to the copyright holder if the holder reappears. However, the latter condition is not required under the US limited liability model, as in this model, the user would face limited liability, which results in paying reasonable compensation instead of paying a reasonable royalty before use.

The development of intellectual property in general and copyright including regulating orphan works in particular varies from jurisdiction to jurisdiction and legal systems. The development

of copyright law was accelerated due to the economic contribution of creative artistic and literary works. Copyright policies and legislations currently are crafted on the basis of economic, cultural, social, technological and scientific contribution to the public. Compared to the selected jurisdictions, Ethiopia did not have clear legal frameworks to regulate the orphan works problem in copyright.

Compulsory licensing is a solution to orphan works in other jurisdictions such as in the UK and Canada. But the Ethiopian copyright law failed to provide conditions of granting compulsory licenses. Regarding fair practice, in contrast to the fair use in US and fair dealing in UK and Canada, the Ethiopian copyright law does not provide the meaning and guidelines to interpret and apply the concept. Moreover, the fair practice standards is also not provided for other exceptions provided by the proclamation. The Ethiopian copyright proclamation is also not clear whether the exceptional reproduction rights by library, museums and other institution is allowed for digitization of copyrighted works in general and orphan works in particular.

Copyright law has always evolved in response to technological change. Even though the Ethiopian copyright law is modern, it failed to accommodate different issues born with changing conditions and hence, there are different issues not covered by the law such as orphan works. But the law has positive sides because there are possibilities inviting positive and broad interpretation enabling to settle this uncovered issue. However, interpreting existing laws may help to clarify how orphan works can be used within the current legal framework, but it may not adequately address all the challenges associated with the problem, which is why a clear legal framework is essential. Therefore, the author demonstrates that as this problem largely has emerged with the development of technology, Ethiopia have not considered orphan works an issue serious enough to take steps to address. The research revealed that the issue of orphan works are not explicitly addressed under the current copyright law. No specific provision that directly deal with orphan works is incorporated under the Ethiopian copyright law.

4.2. Recommendations

None of the above discussed approaches are free from critics. Each methods have its own advantages and limitations. But some approaches may be more suitable for certain types of

works or contexts, while others have been more appropriate in different situations. Thus, in line with the above conclusions and the whole discussion in this paper, the researcher recommends the following measures that require amending the existing copyright regime, among others, to be taken to address the problems identified.

1. Non-voluntary licensing model would be the most appropriate solution for those countries that have not provided any explicit mechanism for solving the problem of orphan works because it is managed by the government itself, which can deal fairly with the cases. Especially, this system would be helpful to facilitate commercial reuse of orphan works by prospective users that seek certainty of lawful use and can afford to pay the application and license fees before use. Therefore, Ethiopia should adopt a licensing model that deal with both types of orphan works for commercial purposes.
2. The regulation to implement the provision of non-voluntary license have to be enacted. The regulation that would be enacted should provide orphan works as a condition to grant the license.
3. The non-voluntary license under the proclamation is applicable only to reproduction, broadcasting and translation rights of works but not applicable to the enjoyment of other copyrights. Thus, the provision on non-voluntary license should be amended and expanded to incorporate comprehensive provisions to promote pro-competitive copyright licensing practices, particularly with a view to fostering creativity and dissemination of creative works.
4. For non-commercial purposes, Ethiopia should adopt the EU statutory exception-based model for non-profit users of orphan works. Thus, Ethiopian copyright law should be amended to introduce new exceptions for open access to orphan works by non-profit institutions such as libraries, archives, museums, educational establishments and other similar organizations.
5. The exception-based model that would be introduced in the copyright law should be broadly framed in terms of both the beneficiary and categories of works allowed.
6. The diligent search requirement and mandatory sources to be consulted in the course of each diligent search for different categories of works should be introduced to the Ethiopian copyright law.

7. The concept of fair practice should be defined and appropriate standards which help to interpret and apply should be provided. The rule of reason should be introduced to allow the use of copyright protected works under the proclamation regardless of their orphan status particularly by non-profit organizations. It should be incorporated as a limitation to the exclusive rights of copyright owners.

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