Applying Old Theories to New Problems: How Adverse Possession Can Help Solve the Orphan Works Crisis

ABSTRACT

This Note focuses on orphan works—works whose copyright owners cannot be found—and the problems they create for libraries and archives that wish to preserve and facilitate access to them. After describing the legal basis for the orphan works problem, the Note analyzes and critiques proposed legislative and scholarly solutions. After concluding that prior solutions fail to adequately address the needs of libraries and archives, the Note offers a solution based on the policy rationales underlying the traditional property concept of adverse possession, since the justifications that supported the advent of the adverse possession doctrine can also be applied to the current orphan works problem. The proposed solution ultimately seeks to balance the concerns of institutions of cultural heritage with the interests of copyright holders.

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“Librarians stand for one of the most important principles in the copyright system of America, a principle that Thomas Jefferson himself thought was central to what the Progress clause might achieve. That is guarantee of access to our culture.”

- Lawrence Lessig

The Library of Congress’ “American Memory Project” is an online collection of “written and spoken words, sound recordings, still and moving images, prints, maps, and sheet music that document[s] the American experience.” The digital library, which is free and open to the public, currently has over five million items online. The Hannah Arendt Collection, named for a well-known political philosopher, educator, and author, is one of the many resources available on the American Memory website. The Library of Congress holds approximately twenty-five thousand items in the Arendt

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3. Id.
collection, dating from as early as 1898 to as recent as 1977.\textsuperscript{6} The collection features her correspondences with various individuals, both prominent and obscure, and with corporate, nonprofit, and educational entities.\textsuperscript{7} The Arendt collection also contains newspaper clippings, book reviews from various types of publications, trial transcripts, and her mother’s notebook.\textsuperscript{8}

Of the twenty-five thousand items in the collection, seven thousand were selected for the American Memory Project.\textsuperscript{9} However, there was a problem. Of the items selected, 1,932 were unaccompanied by copyright information.\textsuperscript{10} Library employees spent two years researching the ownership of these seemingly orphaned materials, so they could obtain copyright permission and include the items in the online project.\textsuperscript{11} Of the 436 owners located, 422 granted permission and only fourteen denied permission.\textsuperscript{12} Still, despite diligent efforts, this left 1,496 items for which the copyright holder could not be found.\textsuperscript{13} As a result, the items that lacked copyright clearance could not be included on the Library of Congress’ public website.\textsuperscript{14} Since the Andrew W. Mellon Foundation funded the Arendt project, the Library of Congress was able to dedicate a significant amount of money and staff time to the search for the copyright owners, and ultimately they were able to digitally preserve items that could not be shared on the American Memory Project website.\textsuperscript{15} However, many other digitization projects might not be supported by such generous outside funding, and thus, these projects could be stifled by the magnitude of research required just to obtain copyright clearance.\textsuperscript{16}

The United States Copyright Office defines an orphan work as a “situation where 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 the permission of the copyright owner.”\textsuperscript{17}

\textsuperscript{6} Id.
\textsuperscript{7} Id.
\textsuperscript{8} Id.
\textsuperscript{9} LIBRARY OF CONGRESS, supra note 4, at 6.
\textsuperscript{10} Id.
\textsuperscript{11} Id.
\textsuperscript{12} Id.
\textsuperscript{13} Id.
\textsuperscript{14} Id. at 6 n.9 (noting that the entire collection has been digitized and can be viewed onsite with some restrictions).
\textsuperscript{15} Id. at 7.
\textsuperscript{16} Id.
Works become orphans for various reasons, including, but not limited to:

- inadequate identifying information on the work,
- inadequate information about copyright ownership due to a change of ownership or to a change in the circumstances of the owner,
- limitations of existing copyright ownership resources, or
- difficulties researching copyright information.\textsuperscript{18}

As copyright law has evolved, two specific changes to copyright laws have exacerbated the orphan works problem. First, revisions to the Copyright Act in 1976 provided automatic protection to creators upon the fixation of the work in a tangible medium without requiring formal copyright registration.\textsuperscript{19} Second, the Sonny Bono Copyright Term Extension Act (CTEA) substantially lengthened current and future copyright terms yet again.\textsuperscript{20} These developments have forced an unfathomable number of photographs, sound recordings, films, letters, blogs, e-mails, into a copyright black hole, where works ultimately become lost to unknown copyright holders.\textsuperscript{21}

Orphan works create a major obstacle for institutions of cultural heritage like libraries and archives.\textsuperscript{22} An item’s copyright status has a profound effect on how a library preserves a work and how it facilitates access to a digital surrogate.\textsuperscript{23} “What hinders these libraries and archives in their attempts to digitize copyrighted works and provide public access to them is the cumulative uncertainty that their searches will prove fruitful, which is a combination of both the orphan works problem and the denial of permission problem.”\textsuperscript{24} Permission to use a work cannot be obtained when there is no one from whom to seek permission, and many libraries lack the requisite funds to perform exhaustive searches or to seek legal advice regarding

\begin{itemize}
  \item \textsuperscript{18} See Library of Congress, supra note 4, at 4.
  \item \textsuperscript{19} Copyright Act of 1976, Pub. L. 94-553, 90 Stat. 2541 (1976).
  \item \textsuperscript{21} Lessig, Against “Orphan Work Proposals,” supra note 1.
  \item \textsuperscript{23} Olive Huang, Note, U.S. Copyright Office Orphan Works Inquiry: Finding Homes for the Orphans, 21 BERKELEY TECH. L.J. 265, 276-77 (2006).
  \item \textsuperscript{24} Id. at 277.
\end{itemize}
their search results. This lack of copyright clearance ultimately chills preservation efforts, since libraries and archives will generally choose to omit a work rather than take on the financial burden of copyright infringement litigation. Additionally, the exemptions to infringement for libraries under 17 U.S.C. § 108 do not provide libraries and archives with many options with regard to orphan works. First, the exemptions do not apply to musical works, pictorial, graphical, sculptural, or audiovisual works. Not only are these types of works particularly vulnerable to becoming orphan works due to their formats, but this limitation also severely reduces the reach of § 108. Second, the exemptions regarding permissible copying are unclear and impractical. Section 108(c) allows libraries to make up to three copies of published recordings once they have been “damaged, deteriorating, lost, or stolen,” as long as the format is obsolete. However, notwithstanding the practical impossibility of actually copying stolen, damaged, or obsolete items, the library must determine that a replacement item is unavailable at a “fair price” before it may make a copy, a vague standard that may cause libraries to steer clear of making such a subjective decision altogether. Third, although the restrictions on reproduction, distribution, performance, and display ease in the last twenty years of protection under § 108, libraries often cannot determine the original date of publication of an orphan work, and thus cautiously assume the longest possible term to avoid copyright liability. Fourth, digital copies made pursuant to § 17 U.S.C. § 108(b) and 108(c) may not be made available to the public in digital format “outside of the premises.” The legislative history specifies that the term “premises” refers to the physical building, excluding the digital space that libraries occupy. Thus, providing access to digital

26. *Id.*
29. *See infra* text accompanying notes 184-209 (discussing the vulnerability of film and digital records).
32. *Id.* Libraries may make up to three copies of unpublished works, but the copies may not be made available outside the premises. 17 U.S.C. § 108(b).
37. JUNE M. BESIK, COPYRIGHT ISSUES RELEVANT TO DIGITAL PRESERVATION AND DISSEMINATION OF PRE-1972 COMMERCIAL SOUND RECORDINGS BY LIBRARIES AND ARCHIVES
surrogates over computer networks would again expose libraries to liability.\textsuperscript{38} As a result, libraries and archives choose to avoid projects that would necessitate broad access to orphan works in order to avoid potential infringement suits, meaning that many orphan works stay on the shelves to deteriorate, and ultimately may be lost forever.\textsuperscript{39}

Although there are some non-legal resources available that attempt to resolve the problem,\textsuperscript{40} Congress must provide a true solution. Several legislative and scholarly solutions have been proposed, but none have succeeded. This Note critiques the proposed solutions and suggests an alternative approach inspired by traditional property law. It should be emphasized that this Note is about the effect orphan works have on libraries and archives, not on for-profit use. Part I describes the evolution of the orphan works problem and critiques the proposed scholarly and legislative solutions. Part II analyzes the doctrine of adverse possession and considers how the policy justifications for the doctrine could be useful in creating an orphan works solution. Part III suggests a solution based on the doctrine of adverse possession that balances the concerns of potential users as well as copyright holders. Finally, Part IV offers some final words on the urgency of solving the orphan works problem.

I. ORPHAN WORKS: THE PROBLEM AND PROPOSED SOLUTIONS

The policy ideals behind copyright protection are fairly simple. Unlike full ownership terms in the realm of real property, copyright terms do not last indefinitely.\textsuperscript{41} Copyright terms are limited in order to balance the competing interests of inventors and the public at


\textsuperscript{39} Id.

\textsuperscript{40} See, e.g., Stanford University, Copyright Renewal Database, http://collections.stanford.edu/copyrightrenewals/bin/page?forward=home (last visited Sept. 20, 2009); University of Texas at Austin, Writers, Artists, and Their Copyright Holders (WATCH), http://tyler.hrc.utexas.edu/about.cfm (last visited Sept. 20, 2009) (noting that WATCH is a joint project between the Harry Ransom Center at the University of Texas at Austin and the University of Reading).

large. Copyright law seeks to provide an incentive to creators to generate new works of expression, but it does not “want to interfere unduly with the flow of information to the public.” The limited term functions as a compromise, whereby the law gives “inventors and creators the right to exclude others from using or copying their innovations, but [puts] a time limit on how long these rights of exclusion can be exercised, after which the information can be used freely by anyone.”

A. Evolution of the Orphan Works Issue

Congress enacted the first federal copyright law in 1790. This law provided federal protection for fourteen years after registration. After the fourteen-year period elapsed, the author could renew copyright protection for another fourteen years, or the work passed into the public domain. This renewal system assured that copyright would be granted only for works that sought such protection. Copyright terms were extended once over the next hundred years when, in 1831, the initial term was increased to twenty-eight years, lengthening the maximum term to forty-two years. Then, in 1909, Congress further extended the maximum term to fifty-six years.

Extensions have been much more frequent in recent years. Since 1962, copyright terms have been extended nine times for existing copyrights and twice for future copyrights. Most recently, in 1976, Congress extended all existing copyrights by nineteen years; and in 1998, existing copyrights and future copyrights were extended by another twenty years. The effect of these extensions is that works are impeded from passing into the public domain. As a result of the twenty-year increase in 1998, no works will enter the public domain for another two years.

42. THOMAS W. MERRILL & HENRY E. SMITH, PROPERTY: PRINCIPLES AND POLICIES 1085 (Foundation Press 2007).
43. Id.
44. Id.
46. Id.
47. Id.
48. Id.
49. Id. at 134.
50. Id.
51. Id.
52. Id.
53. Id. at 134.
until 2019. Additionally, under the 1976 changes, authors are not required to register new works, and once a work is fixed in a tangible medium it is protected. Everything from a child’s artwork to a personal e-mail is protected upon fixation.

Congress’ ability to perpetually extend copyright terms was challenged in the recent Supreme Court case *Eldred v. Ashcroft*. Following the CTEA in 1998, petitioner Eric Eldred, an Internet publisher whose online products and services depended on the public domain, brought his case to question the constitutionality of the CTEA. Law professor and prominent copyright scholar Lawrence Lessig served as petitioner’s lead counsel. Eldred argued that the CTEA’s extension of current copyrights ran afoul of the Constitution, which empowers Congress to “promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.” Eldred asserted that, due to the continuous twenty-year extensions, copyrights no longer last for just a limited time. In a 7-2 decision, the Supreme Court rejected Eldred’s arguments, stating that Congress may continue to extend copyright terms, so long as they are limited in scope, confined within bounds, and do not actually last forever. In his dissent, Justice Breyer estimated that only 2 percent of works copyrighted between 1923 and 1942 are still commercially valuable.

**B. Proposed Scholarly and Legislative Solutions**

After the *Eldred* decision, the orphan works issue became a major concern. If Congress could extend copyright terms every few years, then a method for allowing abandoned and orphaned works to enter the public domain must be developed. The public domain serves as “the catalyst and wellspring for creativity and innovation,” and a healthy public domain depends on “a balance...between licenses, copyrights, patents, and freely available information.”

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54. *Id.* at 214.
55. *Id.* at 138.
56. *Id.*
58. *Id.* at 186.
59. *Id.*
60. *Id.*
63. *Id.* at 199-200.
64. *Id.* at 254 (Breyer, J., dissenting).
Lessig proposed a plan in an editorial appearing in the New York Times that would allow orphan works to enter the public domain while still permitting copyright holders to maintain their rights. An online petition quickly surfaced in support of the proposal, demanding that something be done to remedy the orphan works problem. It received twenty-two thousand signatures in a matter of days.

Congresswoman Zoe Lofgren responded to the public outcry and introduced a bill called the Public Domain Enhancement Act (PDEA) in June 2003. This legislation limited initial copyright terms to fifty years, and during the initial term registration was not required. After the fifty-year period, domestic copyright owners would be required to register a work and pay a $1.00 fee to maintain copyright protection for subsequent periods of ten years. Copyright terms could be renewed every ten years up to the maximum copyright term. Unregistered works would then become part of the public domain.

The PDEA raised awareness amongst lawmakers about the public’s growing concerns regarding orphan works. In January 2005, Senators Orrin Hatch and Patrick Leahy wrote a letter to the Copyright Office asking them to investigate the orphan works issue and create a comprehensive report including recommendations for future legislation. The Copyright Office issued a Notice of Inquiry, giving people and institutions the opportunity to voice concerns and offer recommendations relating to orphan works. Over 850 comments were received, and representatives from the Copyright Office held roundtable discussions and met personally with the representatives of several institutions. The Copyright Office

why/bigpicture (last visited Sept. 21, 2009).


69. Id.


71. Id.


73. Id.

74. Id.

75. Id.

76. Huang, supra note 23, at 265-66. See also REPORT ON ORPHAN WORKS, supra note 17, at 7.

77. Id.

concluded that the orphan works issue was indeed a problem that needed to be remedied via legislation.  

The final product of the inquiry was the REPORT ON ORPHAN WORKS. This comprehensive work describes the orphan works issue in detail, touching upon everything from the definition of an orphan work to possible solutions. Representative Lamar Smith used the recommendations made in the report to write the Orphan Works Act of 2006, which states that, if a copyright owner cannot be located after a “reasonably diligent search,” as defined by the bill, then certain uses would be considered less culpable should a copyright owner eventually step forward. For example, if an orphan work is utilized for “charitable, religious, scholarly, or educational purposes,” and if the work is “expeditiously” removed upon notice of infringement, then the infringer will not have to compensate the copyright owners for the use of their works. Even if an orphan work is used for a purpose that is not charitable, religious, scholarly, or educational, as long as the infringer performed a reasonably diligent search for the copyright owner, then the user will only be liable for the use of the work and not for damages, attorney’s fees, and other monetary relief. The 2006 bill languished in House subcommittees, but it was eventually reintroduced with adjustments and passed in the Senate in 2008. However, it ultimately died in the House of Representatives.

While the proposed Orphan Works Acts of 2006 and 2008 brought significant attention to this issue and offered potential solutions, several scholars have offered alternative solutions. Lessig offers a proposal that suggests changes to federal copyright laws that would give owners a grace period after creation during which the work

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79. REPORT ON ORPHAN WORKS, supra note 17, at 7.
80. Id.
81. Id.
83. Id. at § 514. See also Lessig, Against “Orphan Work Proposals,” supra note 1.
84. Orphan Works Act of 2006 § 514.
85. Id.
would not have to be registered to receive full protection. However, after a specified period of time, the work would have to be registered to maintain full protection. Lessig uses the original copyright term as a starting point, stating that if a US creator does not register a work within fourteen years after creation, then the work should be available for either what he calls “limited copyright remedies” or else it should fall into the public domain.

Lessig’s plan further deviates from the PDEA and the Orphan Works Acts by recommending the use of a registry. Although he recommends a formal registry, he does not advocate that the United States Copyright Office maintain the registry. Instead, he believes that this matter should be left to private entities, similar to domain name registries on the Internet. In his view, while the government should establish guidelines that registries must follow, competition is the only way to ensure reliability and efficiency of information. Lessig further recommends that all countries create laws requiring registries so that foreigners can more easily find copyright information.

Professor William Landes and Judge Richard Posner have offered another scholarly proposal in response to the CTEA that recommends a system of perpetual copyright conditioned upon renewal. Based on economic efficiency—meaning that valuable resources should be owned in order to promote efficient use—their proposal suggests that creators who are willing to put forward the cost and effort to renew the copyrights to their work should own it;

90. Id.
91. Lessig, Against “Orphan Work Proposals,” supra note 1. Note that there is a big difference between these two choices. If a work becomes part of the public domain, then anyone can use it for any purpose, regardless of whether it is a commercial or non-profit use, without any repercussions. This is the principle behind the PDEA. On the other hand, the Orphan Works Act calls for limited remedies, which means that certain uses (charitable, religious, scholarly, and educational) would not make an institution financially vulnerable should a copyright owner resurface, but other users would still remain liable. The limited remedies option favors the copyright owners since it gives them the opportunity to reclaim a work, but it is easier for potential users if the work falls into the public domain. Either way, libraries and archives would be able to digitize and display orphan works without worrying about financial consequences, since their uses would likely be scholarly or educational.
92. Lessig, Little Orphan Artworks, supra note 89.
93. Id.
94. Id; Lessig, Against “Orphan Work Proposals,” supra note 1.
95. Lessig, Little Orphan Artworks, supra note 89; Lessig, Against “Orphan Work Proposals,” supra note 1.
otherwise, the work belongs in the public domain.\footnote{98} Although the Constitution states that a copyright term should be set for “limited Times,” Landes and Posner avoid this problem with the interpretation that “[a]ny time short of infinity, which is to say any fixed period of years, is ‘limited’ in the literal sense of the word.”\footnote{99} In the alternative, if “limited” cannot be read to mean anything short of infinity, then extensions could possibly be interpreted as something separate from the original copyright term altogether.\footnote{100} Their proposal also requires registration, thus ensuring that a potential user could contact the copyright holder.\footnote{101} In addition, copyright owner information would be updated every time a work’s status is renewed, making the system more reliable.\footnote{102} It would also require, when possible, that a notice of registration be posted on the item itself.\footnote{103}

Judge Posner also wrote an article with prominent copyright lawyer William Patry in which they advocate for an expansion of the fair use doctrine as a way to solve the problem presented by the holding in \textit{Eldred}, which is how, in light of the CTEA, can a potential user utilize older works of limited commercial value when copyright owners cannot be determined.\footnote{104} The fair use doctrine is a defense for copyright infringement, and it “allows the copying of parts, and sometimes the whole, of copyrighted works without the authorization of the copyright owner.”\footnote{105} Patry and Posner posit that, in certain circumstances, the fair use doctrine is flexible enough to allow the copying of entire works without having to obtain a copyright license.\footnote{106} In addition, the economic incentives to research and locate the copyright holder are limited: the transaction costs of negotiating copyright licenses for older items are very high, while the commercial value of many of these items is limited.\footnote{107} To combat this disparity, Patry and Posner’s solution requires potential users to conduct a reasonable inquiry into the copyright ownership.\footnote{108} If the search for a true owner yields no results, then copying the entire work should be deemed a fair use, and thus the copier would not be liable for

\footnotesize
\begin{itemize}
\item[98.] \textit{Id.} at 475.
\item[99.] \textit{Id.} at 472.
\item[100.] \textit{Id.}
\item[101.] \textit{Id.} at 475.
\item[102.] \textit{Id.} at 477.
\item[103.] \textit{Id.}
\item[104.] Patry & Posner, \textit{supra} note 88, at 1639.
\item[105.] \textit{Id.} at 1644.
\item[106.] \textit{Id.}
\item[107.] \textit{Id.} at 1660.
\item[108.] \textit{Id.} at 1650.
\end{itemize}
infringement later.\textsuperscript{109} In addition to assuaging the fears of would-be copiers, such a rule would inevitably lead to a private registration system, through which owners who cared to protect their rights could be easily contacted, thereby lowering future transaction costs.\textsuperscript{110}

Finally, Christopher Sprigman, a law professor at the University of Virginia, has proposed a solution that calls for the return of a formal, but voluntary, registry.\textsuperscript{111} He asserts that the orphan works problem was created in large part by the United States’ elimination of formal registration procedures.\textsuperscript{112} Although formal registrations violate the Berne Convention, Sprigman states that his registry solution complies with the spirit of the Berne Convention, because it does not interfere with the “enjoyment and exercise of copyright.”\textsuperscript{113} If an author fails to comply with voluntary registration, the work then becomes available for compulsory licensing, which allows anyone to use the work for a fixed government royalty fee.\textsuperscript{114}

\textit{C. Inadequacy of Proposed Solutions}

While these legislative and scholarly proposals have appealing elements, they largely fail to adequately address many of the real world concerns faced by potential users of orphan works;\textsuperscript{115} specifically, most of these solutions—like proposing the use of databases\textsuperscript{116} and registration fees\textsuperscript{117}—are ex ante solutions, meaning the solution is meant to help new works from becoming orphan works in the future.

For several reasons, there needs to be a solution that adequately addresses the problems created by extant orphan works in libraries and archives. First, the orphan works that currently languish in libraries cannot be helped with registration requirements

\begin{footnotes}
\footnotetext{109}{Id.}
\footnotetext{110}{Id.}
\footnotetext{111}{Sprigman, supra note 72, at 494.}
\footnotetext{112}{Id.}
\footnotetext{113}{Id.}
\footnotetext{114}{Id.}
\footnotetext{115}{For example, the Patry and Posner article, supra note 88, does provide an ex post option by advocating for an expanded fair use doctrine. The Orphan Works Act of 2006 also proposes a viable ex post solution: limited fees for uses that are for “charitable, religious, scholarly, or educational purposes,” and are “expeditiously” removed upon notice of infringement. H.R. 5439, 109th Cong. § 2(a) (2006).}
\footnotetext{116}{See generally Landes & Posner, supra note 97; Sprigman, supra note 72; Lessig, “Little Orphan Artworks,” supra note 89.}
\footnotetext{117}{See Public Domain Enhancement Act, supra note 70.}
\end{footnotes}
While these kinds of solutions could be useful in preventing new works from becoming orphans, they really do nothing to help works that have already become orphans.

Second, the search guidelines, like the ones contained in the Orphan Works Acts, are vague. For example, potential users may be unsure about what it means to perform a “diligent” search for a copyright owner. The Orphan Works Act of 2006 contained a vague definition of “reasonably diligent search,” stating that such a search should be “reasonable under the circumstances,” and “includes the use of reasonably available expert assistance and reasonably available technology, which may include, if reasonable under the circumstances, resources for which a charge or subscription fee is imposed.” Lessig calls this definition “mush,” asking, “Is this really the best they could do?” He goes on to say that definitions like this only create permanent employment for lawyers at the expense of a permanent financial burden on libraries and archives. The ambiguous nature of these legislative definitions ensures that, even after libraries expend resources to find copyright owners, they will still lack the confidence to make use of a particular item.

Third, the fair use doctrine does not provide adequate protection, particularly for creative works such as photographs, films, musical scores, or recordings, because courts decide such cases in a context-specific inquiry, and two of the four prongs of the fair use test will likely favor the copyright owner. As a result, the uncertainty of the four-factor fair use test may be insufficient to instill confidence in would-be users of orphan works.

Two of the fair use factors would probably favor the library. The first prong—the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit

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118. See supra text accompanying notes 17-21 (describing how orphan works' copyright owners are already unidentifiable).
120. Id.
123. Id.
124. Id.
126. Fair use analysis requires courts to consider the following factors: "(1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes; (2) the nature of the copyrighted work; (3) the amount and the substantiality of the portion used in relation to the copyrighted work as a whole; and (4) the effect of the use upon the potential market for or value of the copyrighted work." 17 U.S.C. § 107 (2009). See also Huang, supra note 23, at 272-73.
educational purposes—might favor the nonprofit, educational purposes typically found in the library setting.\textsuperscript{127} However, the Supreme Court has indicated that profit versus nonprofit is not “intended to be a bright line test, [and] that nonprofit status [is] only one factor whose weight will vary with the facts.”\textsuperscript{128} In addition, the library would largely be copying, making it difficult to argue that the use is transformative, another important element of the first prong.\textsuperscript{129} Additionally, the fourth prong—the effect of the use upon the potential market—would also likely favor the library’s use of the orphan work, as long as the work is not commercially viable.\textsuperscript{130}

However, the other two factors—the nature of the work and the portion of the work copied—would in many instances make it more difficult for the institution to rely on the fair use doctrine, since many orphan works are creative works and since libraries likely desire to copy the entire work.\textsuperscript{131} It is necessary to bear in mind, however, that in making a fair use determination all four of these factors are explored together—not in isolation—and that it can be difficult to predict how a court will apply the fair use defense.\textsuperscript{132} While the first and fourth factors are unofficially the more important factors of the test,\textsuperscript{133} the court will consider the other two factors and could find that they weigh against a finding of fair use.\textsuperscript{134}

Additionally, many libraries are further hindered by the fact that university policies are generally “excessively conservative” with regard to fair use guidelines.\textsuperscript{135} Ultimately, institutions of cultural heritage need to feel confident that their expensive preservation efforts will not be thwarted by lawsuits.\textsuperscript{136}

\textsuperscript{127} Steven J. Melamut, Pursuing Fair Use, Law Libraries, and Electronic Reserves, 92 LAW LIBR. J. 157, 168 (2000).
\textsuperscript{128} Id. (citing Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 584 (1994)).
\textsuperscript{129} Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 579 (1994) (citing Sony Corp. of America v. Universal City Studios, Inc., 464 U.S. 417, 455, n.40 (1984)) (“Although such transformative use is not absolutely necessary for a finding of fair use, the goal of copyright, to promote science and the arts, is generally furthered by the creation of transformative works.”); see also Sony Corp. of America v. Universal City Studios, Inc., 464 U.S. 417, 479 (1984) (“I am aware of no case in which the reproduction of a copyrighted work for the sole benefit of the user has been held to be fair use.”).
\textsuperscript{130} Melamut, supra note 127, at 168 (discussing how courts look to lost income or potential lost income when considering this factor).
\textsuperscript{131} Id. at 168-70.
\textsuperscript{132} Id. at 171 (citing Campbell, 510 U.S. at 584).
\textsuperscript{133} See generally Campbell, 510 U.S. 569.
\textsuperscript{134} Id. at 578.
\textsuperscript{135} See Patry & Posner, supra note 88, at 1657 (citing KENNETH D. CREWS, COPYRIGHT, FAIR USE, AND THE CHALLENGE FOR UNIVERSITIES: PROMOTING THE PROGRESS OF HIGHER EDUCATION 115 (1993)).
\textsuperscript{136} See supra text accompanying note 24.
II. ADVERSE POSSESSION AND ORPHAN WORKS

Ultimately, the PDEA, the Orphan Works Acts, and the scholarly alternatives do not offer solutions that would alleviate the frustration of dealing with orphan works. This Note proposes that instead of coming up with a complicated solution that involves registration fees, catalogs, and convoluted terms, legislators and lawyers should draw ideas from the traditional property concept of adverse possession. Applying adverse possession to intellectual property requires an understanding of both the differences between real property and intellectual property, as well as the traditional justifications for adverse possession. Due to the inherent differences between real and intellectual property, it is not practical to simply transplant the adverse possession doctrine from real property law to intellectual property law; however, many of the policies underlying adverse possession may be useful to lawmakers when trying to devise a solution to help the extant orphan works in libraries and archives.

A. Real Versus Intellectual Property

Comparing real property and intellectual property—in this case, copyright—is not a new concept. While the two fields are different in a variety of ways, the “introduction of the property label onto copyright and patent was not accidental.” The property rhetoric—for example, the concept of ownership—often applied to intellectual property did not evolve from common law property rules in general, but rather is derived from the view that property law provides the right to capture or internalize the full social value of property. Although similar notions of ownership, control, and exclusion certainly arise in both contexts, the inherent differences cannot be ignored.

First, intellectual property rights evolved from a different foundation than real property rights. Real property rights are meant to protect against breaches of peace, while intellectual property rights serve as an incentive to create new works. Furthermore, real

138. Sterk, supra note 137, at 419.
139. Lemley, supra note 137, at 1037.
140. Sterk, supra note 137, at 417
141. Sterk, supra note 137, at 421.
property rights are rooted in common law. They developed from “Lockean theories of natural rights, and the government, in protecting those rights, had to protect a citizen’s right to property.” To the contrary, intellectual property rights—namely, copyright and patent—are rooted in the Constitution, which imposes some boundaries on the scope of copyright and patent laws.

Second, real property is rivalrous, meaning that use by one person prevents use by another, and exhaustible, meaning that continuous use depletes the resource. Intellectual property, on the other hand is neither rivalrous nor exhaustible. This fundamental difference “affects the methods and purposes of regulation in either realm.” Thus, real property is subject to the “tragedy of the commons”—a concept developed by ecologist Garrett Hardin which posits that resources will be overused when no individual owner has the incentive to consider how his use affects other potential users. Intellectual property, on the other hand, seems to suffer from the opposite problem, sometimes called the “anticommons,” where overuse by many people has no impact on the protected work; rather, the exclusive ownership of intellectual property actually has the potential to result in an item’s underuse.

Third, intellectual property rights are fixed in duration, while the right to own land is unlimited. The right to exclude is also much stronger in real property since intellectual property allows some intrusion based on the fair use and first sale doctrines and other statutory exemptions. The remedies for an encroachment on real property are also different than those offered for violations of intellectual property rights. Invasions of real property typically result in an injunction, whereas many copyright cases result in an award of monetary damages.

Although the stark differences between intellectual and real property provide support for the argument that it is inappropriate to transplant real property concepts into the realm of intellectual

142. Id. at 449.
144. Id.
145. Id. at 560 (citing Lawrence Lessig, Commentary, The Law of the Horse: What Cyberlaw Might Teach, 113 Harv. L. Rev. 501, 526 (1999)).
146. Id.
147. Id.
148. Sterk, supra note 137, at 435.
149. Id.; Broder, supra note 137, at 560-61.
150. Sterk, supra note 137, at 446.
151. Id.
152. Id.
many of these differences are less pronounced in the context of orphan works. As a result, these similarities justify the application of some real property concepts—namely, adverse possession—to copyrighted works.

B. The Doctrine of Adverse Possession

“Title by adverse possession sounds, at first blush, like title by theft or robbery, a primitive method of acquiring land without paying for it.” However, the doctrine has its benefits. The doctrine of adverse possession intrudes upon the owner’s absolute right to transfer, or not to transfer, property by forcing a transfer when the requirements of the doctrine are met. The doctrine has its historical roots in statutes passed centuries ago in England that limited the time available to bring an action to recover the possession of land through ejectment. That legal notion made its way to the United States, where similar statutes eventually developed in all fifty states. Most of these statutes terminated the true owner’s ability to seek judicial assistance to recover the land once an adverse possessor had occupied the land for a certain amount of time.

In the nineteenth century, courts sought to develop rules that would encourage the use of the nation’s untamed wilderness. Using the adverse possession statutes as justification, courts began to grant the hostile possessor title to the property. Today, adverse possession occurs when an “occupier of a piece of land who is not the true owner nevertheless acquires title to the land if his occupation is hostile to the owner’s interests, open, notorious, exclusive, and continuous for the statutorily required period of time.” Good faith is not a requirement for adverse possession in most jurisdictions.
There are several policy justifications for adverse possession, and a few of them are applicable to the orphan works dilemma.\textsuperscript{166} One rationalization for adverse possession addresses the difficulty of ascertaining true ownership after an adverse possessor has been occupying the land for a significant time.\textsuperscript{167} This is similar to a statute of limitations argument—as more time passes, evidence of true ownership disappears.\textsuperscript{168} Additionally, adverse possession serves economic and social welfare by punishing landowners who do not make efficient use of their land.\textsuperscript{169} The doctrine protects those who have used a piece of land for long enough to develop “considerable reliance interests that would be lost if the true owner could reclaim the title at any time.”\textsuperscript{170} This is often referred to as the “sleeping owner” justification.\textsuperscript{171} Finally, adverse possession lowers transaction costs by eradicating old claims to property, thus “facilitating market exchange.”\textsuperscript{172}

The doctrine of adverse possession, as it applies to modern concepts of real property, stands on somewhat shaky ground in the court of public opinion.\textsuperscript{173} Some scholars have hypothesized that it is no longer necessary.\textsuperscript{174} Due to modern conveniences, like the property recording system, they argue that some of the previous justifications for the doctrine are moot.\textsuperscript{175} Additionally, the “sleeping owner” theory is said to run contrary to current social norms.\textsuperscript{176} In modern times, social norms suggest that people do not deserve to be punished for failing to enforce their property’s boundaries.\textsuperscript{177} The following section illustrates that the reasons supporting the doctrine’s eradication in the real property context are exactly the reasons that adverse possession could be a valuable tool in solving the orphan works problem.

\textsuperscript{166} See generally Stake, supra note 159 (giving numerous justifications for adverse possession).
\textsuperscript{167} Micelli, supra note 164, at 161.
\textsuperscript{168} Id.
\textsuperscript{169} Id.
\textsuperscript{170} Id.
\textsuperscript{171} Stake, supra note 159, at 2434-35.
\textsuperscript{172} Id.
\textsuperscript{173} Id. at 2434.
\textsuperscript{174} See generally id.
\textsuperscript{175} Miceli, supra note 164, at 162.
\textsuperscript{176} Stake, supra note 159, at 2435.
\textsuperscript{177} Id.
C. Applying Adverse Possession to Orphan Works

The policies underlying adverse possession are important to an effective solution to the orphan works issue. Although the doctrine, as it currently stands, would not be a complete solution for orphan works, it could serve as a strong foundation. The remainder of Part III is dedicated to finding a solution to the orphan works problem that utilizes the adverse possession doctrine with some adjustments to suit it to the task at hand. Ultimately, the goal is to devise a solution that balances the interests of copyright holders with the interests of institutions of cultural heritage.

1. Why Adverse Possession?

As mentioned above, the main problem with many of the proposed scholarly and legislative solutions is that they are meant to function mainly at the time of publication or creation, and do not offer help after a work has been orphaned. Although these solutions present many ideas regarding new works, there needs to be a retrospective solution to include the millions of items that were created after registration was no longer required and contain absolutely no information regarding their publication status, whether it was a work for hire, information about authorship, or even the date. Libraries and archives need a solution that addresses their ability to preserve and provide access to items that are already deteriorating. Adverse possession already serves such a function in the real property context.

2. Parallel Features of Orphan Works and Real Property

a. The “Tragedy of the Commons”

This Note proposes the use of adverse possession as a foundation for an orphan works solution, partially because of the unexpected similarities between orphan works and real property. First, intellectual property is itself property. In other words, the library that holds a photograph in its collection has a real property interest in the item. The photograph as an object is real property, while the image represented on the surface is also intellectual property. In the archival setting, where many items may be unique,
unpublished, and even one-of-a-kind, it is difficult to truly separate the ownership of the photograph from the ownership of the image.\textsuperscript{180} Thus, although it typically does not arise in the realm of copyright, the “tragedy of commons” may very well apply to some works of intellectual property where an item exists in a single manifestation, since multiple uses and physical handling can cause it to deteriorate and thereby diminish the future utility of the object.\textsuperscript{181}

b. Duration of Ownership Terms

Additionally, as copyright terms continue to become longer and longer, their duration starts to seem constructively unlimited. In other words, although copyright terms are technically limited to the life of the author plus seventy years,\textsuperscript{182} the actual medium on which the expression is fixed may not be capable of surviving the duration of the copyright term.\textsuperscript{183} Consider the following examples.

The first moving image was recorded on cellulose nitrate film in the 1890s.\textsuperscript{184} Although the film is strong, it is also highly flammable, and fires started by nitrate are difficult to extinguish.\textsuperscript{185} As a result of these hazards, filmmakers developed another film base: acetate.\textsuperscript{186} Cellulose acetate film, developed in the early twentieth century, has been regularly used since about 1909.\textsuperscript{187} Although the film is not as flammable, acetate is very sensitive to storage conditions.\textsuperscript{188} Fresh acetate film stored at a temperature of sixty-five degrees Fahrenheit and 50 percent relative humidity will last approximately fifty years before the onset of vinegar syndrome, which is a term used to describe the chemical disintegration of film and its

\begin{footnotes}
\item[180] See supra text accompanying notes 6-8 (discussing how the Arendt collection contains personal correspondences and other unpublished items).
\item[181] Mausner, supra note 22, at 419 (citing Brief for the Internet Archive as Amicus Curiae Supporting Petitioners, Eldred v. Ashcroft, 123 S. Ct. 769, at *13 (2003) (No. 01-618) (“the Internet-the dominant platform for access to digital archives-provides relatively unlimited low cost capacity to support both the archiving of, and universal access to, traditional printed works, as well as audio, video, and still images.”)).
\item[182] Copyright terms vary for works made for hire (ninety-five years from the year of its first publication, or a term of 120 years from the year of its creation, whichever expires first). 17 U.S.C. § 302 (2006).
\item[183] See infra text accompanying notes 186-90. See also Lessig, Against “Orphan Works Proposals,” supra note 1.
\item[185] Id.
\item[186] Id.
\item[187] Id.
\item[188] Id. at 9.
\end{footnotes}
accompanying vinegary odor. Reducing the temperature fifteen
degrees, while keeping the humidity at the same level, can delay the
first signs of deterioration by 150 years. Thus, even if the acetate
film is stored in an ideal setting for its entire existence, decay is highly
likely to begin within 150 years. However, because many acetate
home movies are currently stored in attics or closets across the
country instead of these ideal conditions, much of the cultural
material that will eventually be archived is probably not being stored
properly. If these films ever make it to an archive, their usable life
may already be significantly shortened. At a minimum, the
copyright term of life plus seventy years is certainly longer than fifty
years (which is when films stored at 65 degrees Fahrenheit and 50
percent relative humidity begin to disintegrate), and in some cases
the age of the film may even approach 150 years before it emerges
from copyright protection. Thus, by the time a cellulose acetate film
enters the public domain, chances are quite high that it is suffering
from vinegar syndrome, and its usable life may have already expired.
As a result, even though copyright terms are technically limited, their
duration may actually surpass an object’s usable life.

The passage of time also has an acute effect on digital orphan
works. While acetate film can last upwards of a hundred years when
appropriately stored, digital objects may have even shorter life
spans due to the rapid obsolescence of formats and playback
equipment. Although digital formats are typically thought of as
more permanent than their analog counterparts, “[r]esearch shows
that longevity issues for digital media are two-fold: on one hand, the
media must last the passage of time (e.g., CD-ROM, tape, disk); on the
other hand, even if media can be read by modern drives, the
information must be stored in formats that can be understood by
modern programs (e.g., PDF, TIFF, JPEG).”

189. Id.
190. Id.
191. Id.
192. See supra text accompanying notes 190-91.
193. Id.
194. See supra text accompanying notes 189.
195. See supra text accompanying notes 190-91
196. Lessig, Against “Orphan Work Proposals,” supra note 1 (discussing how, without a
solution, a generation of film will turn to dust).
197. See supra notes 186-90.
198. Julian Jackson, Digital Longevity: The Lifespan of Digital Files,
199. Andreas Stanescu, Assessing the Durability of Formats in a Digital Preservation
The Domesday Project—a digital compilation of maps, photographs, statements and news footage that provides a survey of the United Kingdom in 1986—illustrates the difficulty of preserving digital objects. The project was created to commemorate the 900th anniversary of William the Conquer’s Domesday Book, a survey of the United Kingdom from 1086. It was funded by the BBC and cost approximately £2.5 million.

Despite this investment, the readability of the original Domesday Book from 1086 surpassed that of the 1986 version. While the 1086 version can still be seen in person, the 1986 project’s format was unreadable after only sixteen years and the data has not yet been entirely recovered. Originally stored on two Laservision-Read Only Memory (LV-ROM) discs—a format that was readable on Basic Combined Programming Language (BCPL)—the project had to be reverse engineered to be readable by a Windows personal computer. However, the programmer on the project suddenly died after only one of the discs was reformatted, halting the emulation process. Currently, volunteers are working to recover the information on the other disc and to make the entire resource available online. Although the already-preserved disc had been available online, it was removed from the web partially due to copyright issues. It is estimated that over one million people contributed to the Domesday Project, and now, only twenty-three years later, the owners of many of the works originally included in the project are “indeterminable through any reasonable research mechanism”—in other words, they are orphan works. The Project therefore will not be free of copyright issues until 2090 at the earliest.


201. Id.
202. Id.
203. Id.
204. Id.
206. Id.
at which point the works will begin to enter the public domain.\textsuperscript{210} This example demonstrates the unique problems caused by digital items, and how digital objects are even less likely than analog formats to outlive their copyright terms.

3. Parallel Policy Justifications of Adverse Possession as Applied to Orphan Works

\textit{a. The Sleeping Copyright Owner: The Labor Justification}

The doctrine of adverse possession of land sought to punish a “sleeping owner” and allow property to pass to the person actually using the land.\textsuperscript{211} As such, the doctrine could be viewed as a way to induce owner custodianship and encourage use, which creates social value but also protects the adverse possessor's reliance interest.\textsuperscript{212} In the intellectual property context, preserving items of cultural heritage takes a significant amount of money and staff time. The institution bears the burden of storing, cataloging, and preserving; thus, they should reap some reward from their significant investment.\textsuperscript{213} In fact, the cost in staff time of performing searches for true owners may outweigh the benefits of the potential use. Carnegie Mellon University Libraries published a study regarding the feasibility of finding all of the copyright owners for a theoretical book digitization project in 1999.\textsuperscript{214} The library selected 337 items, with variable publication dates and publishers.\textsuperscript{215} Ultimately, 11 percent of the copyright owners could not be found, and 3 percent of the items were “too complicated to pursue” due to third-party ownership.\textsuperscript{216} Carnegie Mellon conservatively estimated that it costs them approximately $78 per title just to seek permission to digitize an item, including the cost of labor, postage, and long distance phone calls.\textsuperscript{217} Further

\begin{itemize}
\item \textsuperscript{210} Id.
\item \textsuperscript{211} Stake, supra note 159, at 2436.
\item \textsuperscript{212} Id.
\item \textsuperscript{213} See infra text accompanying notes 214-19.
\item \textsuperscript{215} Id.
\item \textsuperscript{216} CARNEGIE MELLON UNIV. LIBRARIES, RESPONSE TO NOTICE OF INQUIRY ABOUT ORPHAN WORKS 3 (March 22, 2005), available at http://www.copyright.gov/orphan/comments/OW0537-CarnegieMellon.pdf.
\item \textsuperscript{217} Id. at 4. Other libraries have also encountered financial barriers when caring for orphan works. In 2000, Wayne State University spent $24,500 seeking permissions to digitize one thousand articles. CARNEGIE MELLON UNIV. LIBRARIES, supra note 214, at 3. Cornell University spent $50,000 in staff time trying to get copyright clearance for 343 monographs, and ultimately could not locate owners for 58 percent (198 of the 343) of the items. CORNELL UNIV.
complicating matters, Carnegie Mellon’s data suggests that older books were more likely to be out of print.218 These out-of-print items are neither generating revenue for their copyright owners nor are they accessible to readers.219 As a result, institutions of cultural heritage, like land owners, should be rewarded for the useful social function of providing the public access to this otherwise unreachable knowledge. An appropriate reward is the ability to make some uses of orphan works without fearing liability to those who let their works fall by the wayside.

Additionally, orphan works are rarely financially valuable, and individual items probably do not have much value in the marketplace.220 Karen Coe, associate legal counsel for the United States Holocaust Museum and Memorial, has pointed out that in a collection of 1,500 family photographs one single photograph is not that valuable; however, the collection as a whole is quite valuable and provides a poignant image of a community destroyed by the Holocaust.221 Unlike a collection of Ansel Adams photographs, the family photographs would probably never reach the public but for the efforts of the archive.222 In this way, the archive creates social value where there was previously little to none, a significant benefit that is often frustrated by the prevalence of orphan works.

b. Failed Recording Systems Creating Inefficient Market Transfers

Another argument advanced for eliminating adverse possession is that it is unnecessary in light of the modern land recording system.223 Adverse possession is arguably unnecessary for real property since a comprehensive registration system has been created that facilitates efficient market transfers.224 However, the opposite has happened with copyright law since the formalities of copyright registration have basically disappeared.225 All new works are
protected by copyright without registration. Thus, records are incomplete and the copyright system does not enable efficient market transfers. Consider the Hannah Arendt example mentioned in the introduction: library employees spent two years searching for nearly two thousand copyright holders and, after their long and arduous search, could only located 23 percent of them. This is extremely inefficient.

4. The Elements of Adverse Possession in the Library Setting

Since copyright terms have become virtually unlimited, and because there is no mandatory recording system, the similarities between orphan works and nineteenth-century land become clearer. Having established this, it is necessary to examine how the elements of adverse possession—that is, hostile, open, and continuous use—arise in the library setting.

a. Hostile

This element is simple to satisfy in the archival setting. With real property, hostile use occurs when an adverse possessor uses land without the permission of the true owner. This element is therefore satisfied when a library makes use of an orphan work without obtaining permission of the copyright owner.

b. Open and Continuous Use

This element is harder to satisfy. Since it cannot be occupied in the same way real property can, the use of an orphan work is arguably more passive than that of real property. Additionally, the time that an item spends in the depths of library storage would not be considered open in the traditional sense of the word. However, this is not an impossible barrier to overcome. It seems that in the real property realm, “open” is a synonym for “discoverable,” in other words, that someone else (presumably the owner) has the opportunity to discover the hostile use and then either stop it or grant permission for it. For orphan works, this could be accomplished by making digital surrogates available for a certain amount of time via a website or some other form of notification.

226. Id.
227. See supra text accompanying notes 1-12.
229. Stake, supra note 159, at 2423.
230. Id.
III. SOLUTION: CREATING COMPROMISE

A. Assuaging the Concerns of Creators

Many artists, creators, and copyright owners are vehemently against any orphan works solution, even going so far as to say that if the Orphan Works Act had passed in 2008, the results would have been “catastrophic.” Some of these concerns arise out of confusion, but others are valid and should be addressed. The first step is to remind copyright holders about what constitutes an orphan work. An orphan work is not created when an author refuses to grant permission or if a licensing fee is too high. Additionally, state law covers audio recordings made prior to 1972, so these recordings would not fall under a federal orphan works solution until the federal preemption date of 2067. Furthermore, works that are clearly labeled, are registered, or are published and commercially viable would also be excluded by definition. These scenarios are outside the scope of the orphan works problem since it is possible for a potential user to locate and negotiate with the copyright owner. Since they are not orphan works, they would not be affected by an orphan works solution. As a result, such concerns are misplaced. Other concerns, such as concerns about commercial exploitation, are warranted. The solution below is meant to balance the concerns of copyright owners with the interests of libraries and archives.

232. See infra text accompanying notes 233-36; 239-49.
233. See REPORT ON ORPHAN WORKS, supra note 17, at 22.
234. Id. at 35-36. Sound recording developed in the 1890s. BESEK, supra note 37, at vii.
235. REPORT ON ORPHAN WORKS, supra note 17, at 22.
236. Id.
237. See supra text accompanying notes 233-36.
238. See infra text accompanying notes 246-48 (discussing “squatters”).
B. Modifying the Adverse Possession Doctrine for a Workable Solution

Ultimately the doctrine of adverse possession would have to be modified in several ways in order to effectively serve as the foundation of an orphan works solution. By narrowing the permissible uses of orphan works, limiting the potential user pool to nonprofit libraries and archives, allowing rights to revert to the true copyright owner, and instituting a good faith requirement, an orphan works solution based on adverse possession could allow libraries and archives to preserve and provide access to orphan works without the fear of liability while simultaneously assuaging the concerns of copyright owners.

1. Permissible Uses

The first compromise that should be made concerns the type of types of use permitted under an adverse possession exemption. The REPORT ON ORPHAN WORKS describes four categories of uses for orphan works:

(1) uses by subsequent creators who add some degree of their own expression to existing works and create a derivative work; (2) large-scale “access” uses where users primarily wish to bring large quantities of works to the public, usually via the Internet; (3) ‘enthusiast’ or hobbyist uses, which usually involve specialized or niche works, and may also involve posting works on the Internet; and (4) private uses among a limited number of people.239

The first compromise would be to limit the type of use allowed to the second category: large-scale access. Ideally, libraries should place collection materials online for widespread public access, as was the intention with the Hannah Arendt collection.240 This solution is about preservation and access, not about financial exploitation.

2. Limiting the User Pool

Next, the solution should limit who may adversely possess. The only entities capable of adverse possession of orphan works should be nonprofit libraries and archives. These entities are already provided some safe harbors under current copyright law,241 showing that they are considered deserving of some special treatment in situations such as these. The nonprofit limitation ensures that the

239. See REPORT ON ORPHAN WORKS, supra note 17, at 23.
240. See supra text accompanying notes 1-13.
users are concerned primarily with preserving culture and should appease creators concerned about commercial exploitation.

3. Rights of the True Copyright Owner

The solution need not erase the true owner’s opportunity to reclaim the work in all situations. The adverse possession model could be modified in cases when a true owner steps forward.\textsuperscript{242} In such cases, assuming that ownership could be verified, the true owner could still exercise his rights over the work and choose to leave it in the archive or withdraw it. There is also a concern that an orphan works solution would be particularly unfair to foreign creators, who are inherently more difficult to locate due to various factors, including language barriers or lack of resources.\textsuperscript{243} To alleviate such concerns, the “title” or ownership of items could revert back to the true owners if they ever present themselves. In this way, adverse possession can also be seen as a way to reunite creators with older works.

As far as compensation is concerned, it would unduly complicate the adverse possession framework. The threat of reasonable compensation to an owner who later steps forward might chill productive uses. If use is limited in the ways mentioned above, then owners should not be able to come in after the fact and reap the benefit once the institution has spent time and money to restore or reformat an item. The copyright owner is compensated by virtue of being reunited with a lost work that may be in excellent condition, in part due to the efforts of the institution. Once a true owner steps in, he could still register the work if he was worried about similar impermissible uses. Such registration would enable future users to contact the true owner for permission, ultimately placing the creator in a position to make some money from the previously orphaned work.

4. Good Faith Requirement

It is necessary to keep in mind that adverse possession in the real property realm does not generally have a good faith requirement.\textsuperscript{244} However, as modified in the archival context, a good faith requirement could—and should—be instituted. Adverse possession remedies for real property apply to all takeovers, even those in bad faith, because “good faith errors are difficult, if not impossible to distinguish from intentional boundary encroachment.”\textsuperscript{245}

\footnotesize
\begin{itemize}
\item 242. \textit{See supra} text accompanying note 167.
\item 243. Lessig, Against “Orphan Work Proposals,” \textit{supra} note 1.
\item 244. \textit{See supra} text accompanying note 165.
\item 245. Miceli, \textit{supra} note 164, at 162.
\end{itemize}
One of the arguments against applying the adverse possession doctrine to real property is once again relevant in the orphan works context: “The problem with protecting the reliance interests of adverse possessors, however, is that it encourages ‘squatters’ to make such investments as a way of acquiring title outside the market.”

It is easy to sympathize with copyright owners who are concerned that an orphan works solution could result in them being taken advantage of by intellectual property squatters. However, the solutions proposed by legislators and scholars discussed earlier apply only to those who make a good faith effort to locate a copyright owner. For the adverse possession solution, a similar good faith effort requirement could be implemented; however, as the proposed legislative solutions have demonstrated, wording such a requirement can be difficult.

Ideally, good faith search guidelines should be clear. In order to create evidence of the good faith search, libraries and archives should be required to document their search efforts. The chances of actually finding a true copyright owner will doubtless vary dramatically depending on the item’s format, the amount of information available at acquisition, and the information available on the work itself. Thus, good faith effort requirements should be adaptable to a variety of situations. Especially since the user pool is limited to libraries and archives, which are recognized as having a unique cultural position in relation to copyright law, the search guidelines should be flexible as long as they are documented. Additionally, if items are used online or in other resources, they should be clearly labeled as orphan works.

5. Recording Systems for Orphan Works

An orphan works solution should also include the creation of an orphan works database to help all potential users determine the status of a work with incomplete copyright information and to assist with the management of orphan works. Such a database could be used to keep track of copyright owners and to document orphan works within institutions’ collections. The database would help keep track of previous efforts to contact copyright owners and may help with future projects for the institution. By placing the database online, it could

246. Id. at 161.
247. See generally Part I.B.
248. See supra text accompanying notes 121-24.
249. See supra text accompanying notes 27-39.
also aid other potential users when they seek copyright permission for items with the same author, assuming the author is identifiable.

Libraries and archives have already started to create such databases on their own. For example, the Harry Ransom Center at the University of Texas at Austin, in cooperation with the University of Reading, maintains the WATCH (Writers, Artists, and Their Copyright Holders) Database. This resource was initially created to compile information about copyright holders of manuscripts in the US and in the UK, but it has since grown into one of the largest copyright databases in the world, listing those who have indicated that they hold the copyrights to an author’s unpublished works. This database serves as a useful resource for institutions researching an orphan work.

In another case, Stanford University has launched the Copyright Renewal Database to help creators determine copyright status for works with confusing copyright heritage. This addresses a common complaint by institutions holding orphan works: that the Copyright Office only has online records for works created since 1978. Some statuses are clear: the 1976 Copyright Act automatically renewed copyright for items published in 1964 and later, and works published before 1923 are in the public domain. On the other hand, items published between 1923 and 1963 could be in the public domain, unless their copyright owner renewed their protection prior to 1978. It can be difficult to determine if a copyright was renewed without visiting the Copyright Office in Washington, D.C.; however, copyright renewals registered between 1950 and 1977 were published in semi-annual publications by the Copyright Office. Stanford has simply transcribed this information and placed it in a searchable database, making it available to anybody with Internet access. Although this particular database is limited to books, this type of resource would be useful for other mediums.

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250. University of Texas at Austin, Writers, Artists, and Their Copyright Holders (WATCH), supra note 40.
251. Id.
252. Stanford University, Copyright Renewal Database, supra note 40.
253. Id.
254. Id.
255. Id.
256. Id.
257. Id.
258. Still, there would be difficulties in adapting the system. Creating databases similar to WATCH and the Copyright Renewal Database or modifying the Copyright Office’s website would be a challenge for orphan audiovisual works. These items are more likely to have little or no identifying information, such as a formal title or author, therefore a different system would have to be developed. LIBRARY OF CONGRESS, supra note 4, at 4. Databases compiling
IV. CONCLUSION

Copyright terms are limited in order to balance two competing interests: the interests of inventors and of the public at large.\textsuperscript{259} Due to numerous copyright term extensions, the balance is currently tipped too far in favor of copyright owners, creating a new class of orphan works that are in danger of becoming extinct since libraries and archives cannot obtain permission to preserve them. Although this Note focuses on finding an orphan works solution for libraries and archives, the bigger issue concerns the effect of copyright extensions on the public domain. No works currently under copyright protection created will enter the public domain until 2019.\textsuperscript{260} In the meantime, these films, photographs, music, and documents will literally turn to dust.\textsuperscript{261} They will not be used, they will not be preserved, and they will not be remembered. According to Public Knowledge, a digital advocacy group, the dwindling public domain “will have a major impact [on] people’s need to communicate, to share ideas, to pass down traditional knowledge, to participate in popular culture.”\textsuperscript{262} Ideally, the current trend of increasing copyright term extensions would cease or reverse, and our society could again foster a healthy public domain. In the meantime, legislation needs to be passed to enable libraries and archives to preserve and to grant access to items of cultural heritage. Without definitive action, we risk losing decades of work that defines our culture before anyone has the opportunity to preserve it for future generations.\textsuperscript{263}

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