

## **Open Access and Orphan Works: Parallels and Pitfalls**

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Legal recognition of private property rights seeks, among other ends, to avoid overconsumption of, and under-investment in, property (a.k.a. the tragedy of the commons). When we are concerned about waste, particularly in the context of abandoned property, the law establishes rules to identify a new owner of the abandoned, or “orphaned,” property. For example, when someone finds a gold ring in a public place, the law provides a regime for attempting to locate the owner. Police reports are filed and notices are published in public places. If, after following the procedure established, no owner is located, the law provides the “finder” with rights in that property. When considering real or tangible property, with its inherent characteristics of rivalrous consumption and excludability these rules make sense.

However, for the category of intangible property rights in products of the mind, including copyrights, the policy justification of preventing waste supports a different result for abandoned or orphaned works. Copyrights and other intellectual property assets lack inherent characteristics of excludability and rivalrous consumption. In fact, these assets are characterized by non-rivalrous consumption. For these types of “property” rights, over-consumption is not the concern that animates the creation of property rights in the first place. Rather, the incentive/utilitarian justification is one based only in a fear of under-investment in the creation and dissemination of the asset.

When considering intellectual property, with its inherent characteristics of non-rivalrous consumption, concerns about preventing waste should focus on removing legal barriers for new users, not on identifying a new owner of these assets. Barriers that prevent consumption and at the same time lack a positive effect on the utilitarian incentive promote a type of waste that intellectual property laws should minimize. “Orphan works” is a label not only for works whose rightsholder cannot be identified or located even after a diligent search, but also for a type of “waste” that exists in the copyright system. The waste stems from the robust protection copyright protection automatically provides authors for ever-lengthening terms. For orphan works, an examination of the policy underpinnings both for granting protection in the first place and for defining and guarding against waste of those legally protected assets, may mean that the law should require new users to adopt a type of open access regime.

Open access regimes facilitate authors’ and copyright owners’ adoption of less restrictive rights regimes than currently automatically granted by U.S. and other maximalist oriented copyright regimes, including those found in the major multilateral treaties of the Berne Convention and the TRIPS Agreement. This paper seeks to explore whether imposing on new users of orphaned works a requirement of identifying the orphan status of the works used, would significantly reduce a type of waste that copyright law should seek to minimize.