In the real world of human activity, the orphan is a tragic metaphor: the child, bereft of parental love and support, is forced to make its own way in a harsh, unforgiving world. The orphan stirs our deepest emotions, demands our sympathy and, in overcoming early handicaps, earns our respect and admiration. Not for nothing is the orphan a potent force in literature: famous orphans include the Dickensian Oliver Twist and David Copperfield, Mark Twain’s Huckleberry Finn and Tom Sawyer, not to mention Harry Potter, Snow White, Cinderella, Heidi and Dorothy from the *Wizard of Oz*.

In intellectual property circles the notion of the orphan has been deployed to great effect in the field of patent law, where the notion of the “orphan drug” is conceived as a means of making investment in a research project a more financially realistic proposition: where an “orphan disease” is suffered by an insufficiently large number of patients to constitute a viable market, an enhanced period of exclusivity may be conferred—both in the USA and in Europe—during which the developer of a drug treatment may market its new product. In other words, adoption of the orphan is more likely where the orphan comes with a valuable commercial inheritance.

In copyright circles, however, the position of the orphan work is quite different. In this context the orphan is a work whose copyright owner cannot be identified or traced. Like the human orphan, the copyright orphan stirs up strong emotions—but there the analogy ends. Many commercial users of copyright-protected works are frustrated that they cannot make, sell or transmit works that contain or consist of such orphans, since by doing so they incur the risk of committing an infringing act. These users include both the fiction and non-fiction sectors of the film industry and the museum and archival sector, where the mere storage of original works is now seen as a threshold activity upon which are based such money-spinners as the sale of postcards and models of artefacts and the dissemination of unique archival material for scholarly and educational purposes.

The more law-abiding commercial sectors are calling for the use exploitation of orphan works to be legitimised, whether on payment of a notional royalty into a fund to be collected by the copyright owner in the event that such a person should come forward and prove entitlement to receive it or on some other basis. Various solutions have been mooted in the USA, which appears to favour a compromise that does not take the use of orphan works outside the scope of infringement but reduces the consequences for unauthorised users. Canada has already implemented its own official scheme, which is by all accounts little used and unlikely to serve as a model.

Less law-abiding commercial sectors, of which the newspaper and periodical industry is probably the best example, take a more practical view. The odds are that, if the would-be licensee cannot obtain clearance for an orphan work and goes ahead and uses it, nothing adverse will happen. The vast majority of copyright owners in orphan works have simply vanished and will never appear. There is no Society of Orphan Works Owners to protect their interests. Even if they have not vanished but are alive and well, the chances of them discovering that an infringement has taken place are slim. And where they do detect an infringement, the wrongful act is unlikely to attract any serious sanction, particularly where the work and the infringement are of trivial commercial value.

Some have mooted the introduction and encouragement of voluntary registration schemes for copyright works as a means of making it easier for prospective licensees to find copyright owners. This is unlikely to provide an overall solution for the orphan works problem. For one thing, many creators of copyright works have no idea that they are ever likely to be traced by a possible licensee and the idea of registering would not even cross their minds. For another, much work is of too trivial a nature to repay the inconvenience of voluntary registration even though it may hold commercial attractions: holiday photographs and items of pottery—created for amusement but later appreciated for their historical or aesthetic significance—come to mind here.

This editorial regrets that while the commercial world is being made to wallow in a murky half-world...
of legal uncertainty, tempted to commit wrongful acts but confident that they are unlikely to be detected, no firm lead is coming from international agencies or governments in identifying a global solution to what is, in reality, a global problem. In the meantime, the media and entertainment sectors should be encouraged to go for adoption—of a Code of Practice that they enter into voluntarily, and honourably, for the protection and fair treatment of both themselves and the vanished copyright owners: practising use but providing for payment. This approach will cause no harm and might very well generate some good.

doi:10.1093/jiplp/jpm170