



# *Little Orphan Author*

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# Definition



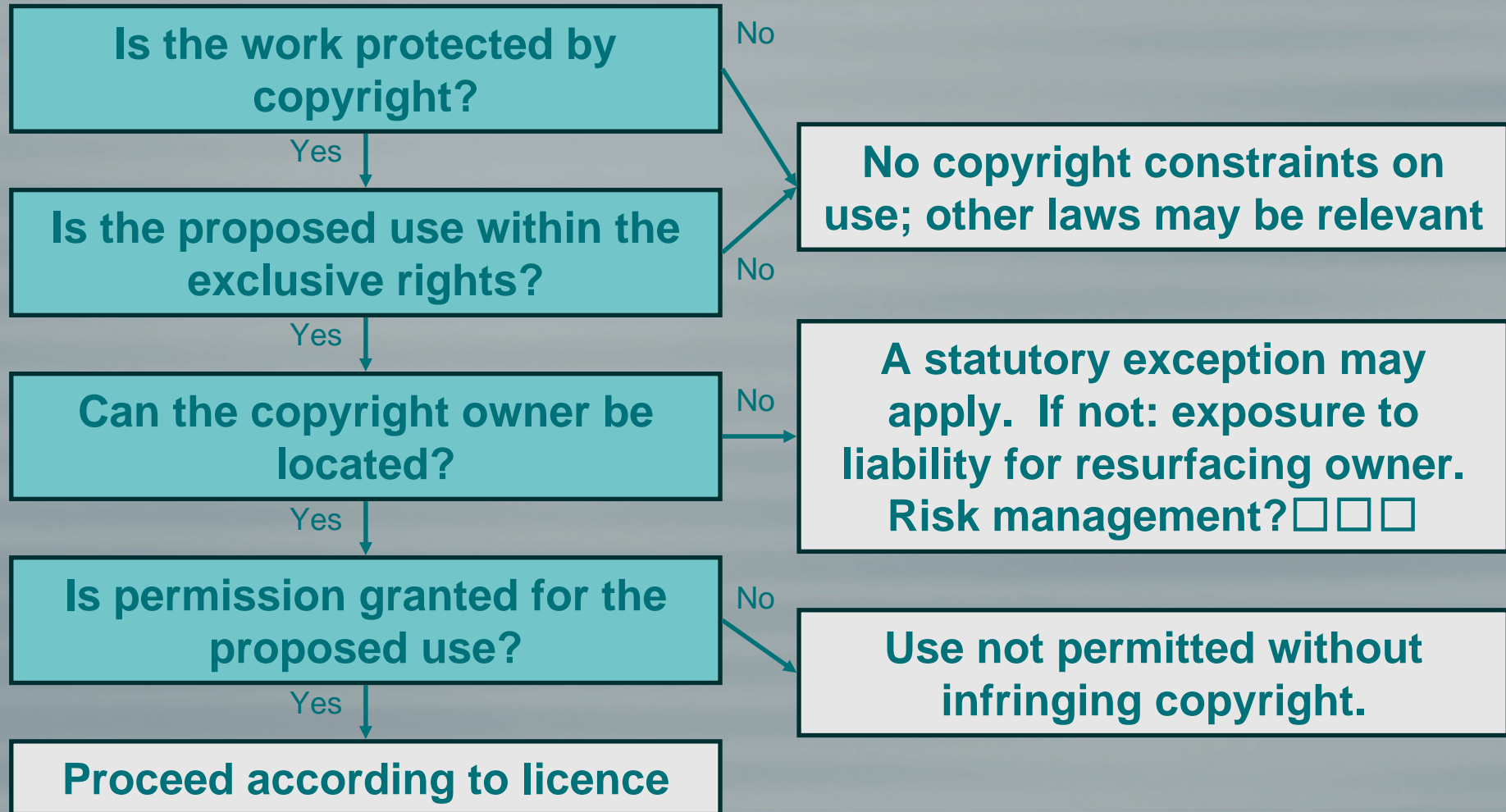
- An orphan work is one for which the copyright owner cannot be identified or located.
  - User is unable to negotiate for a licence.
  - Cf owner is uncooperative or unresponsive: not an orphan work under this definition.
- Not a new phenomenon ...
- ... but concern about orphan works appears to have increased in recent years.

# Is it *really* a problem?



- There is commentary and evidence to suggest that orphan works are a real and growing problem, eg:
  - submissions to the US Copyright Office and the AG's exceptions review; and
  - CMCL-IPRIA project on copyright, digitisation and cultural institutions.
- Are the disadvantages to users and new creators outweighed by benefits to copyright owners of orphan works?

# Why?



# Resurfacing owners



- Primary issue for users appears to be **uncertainty**: what are the possible consequences if copyright owner resurfaces?
  - Allocation of time and resources to negotiating with copyright owner, obtaining legal advice, etc.
  - Payment of monetary compensation (eg damages or account of profits).
  - Withdrawal of content or other injunctive relief.
    - Impact for new or transformative works.
  - Embarrassment or loss of public confidence.

# Change rules for protection



- Protect less copyright works (eg introduce more robust prerequisites for copyright subsistence).
- Shorten the copyright term, eg:
  - remove indefinite protection for unpublished LWs, DW, MWs, SRs, CFs; or
  - renewal requirements to enjoy full term.
- Note minimum standards in copyright treaties.
- Risk that such an approach is under-inclusive and over-inclusive?

# More copyright information



- Aim is to encourage voluntary licensing by facilitating the ability of users to locate owners.
- Examples:
  - Creation of databases and/or voluntary registries of copyright owners.
  - Improved networks between institutional users.
  - Development of online research aids.
- What about alternatives to traditional voluntary licensing, eg: open licensing and waiver of copyright?

# Expand exceptions



- Aim is to facilitate socially beneficial use of copyright material and respond to instances of market failure.
- Some options:
  - free vs remunerated;
  - targets orphan works vs any work;
  - closed list of users vs open list of users; and
  - closed list of purposes vs open list of purposes.
- Examples:
  - Canadian licensing scheme (remunerated; targets orphan works; open list of users and purposes).
  - US fair use (free; open list of works, users and purposes).
  - Aust 'flexible dealing' (free; open\* list of works and purposes; closed list of users).

# Limits on remedies



- Aim is to reduce uncertainty regarding the scope of remedies available to the resurfacing copyright owner.
- One approach: limit remedies based on acts by the user (eg, a reasonably diligent search and/or notice of intent).
- Another approach: limit remedies because of an omission by the copyright owner (eg, failure to register copyright after x years).



## *Final thoughts*

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