

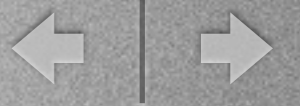


The Orphans, the Market, and the Dogma

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Permission first



dogma In general, a belief held unquestioningly and with undefended certainty. In the Christian Church, a belief communicated by divine revelation, and defined by the Church.

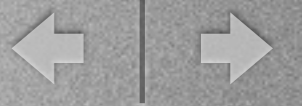
Dogmatism is one possible reaction to scepticism: it selects some set of propositions and insists, apparently arbitrarily, that they be not doubted.

The Oxford Dictionary of Philosophy. Simon Blackburn. Oxford University Press, 2008



“[T]he law of the United States is that a copyright owner may sit back, do nothing and enjoy his property rights untrammelled by others exploiting his works without permission.”

Judge Chin, *Authors Guild v. Google*, citing David Nimmer

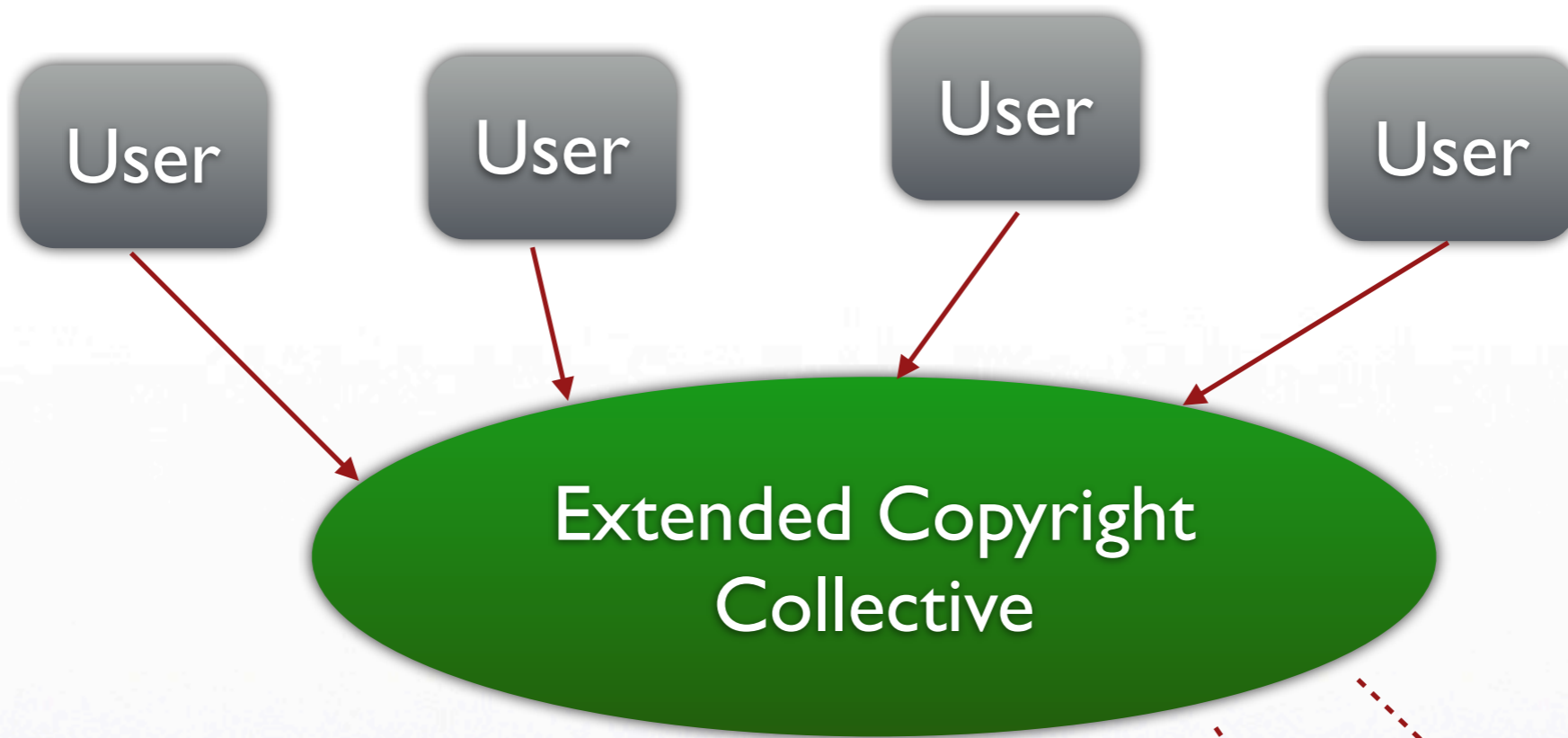


... sit back, do nothing.

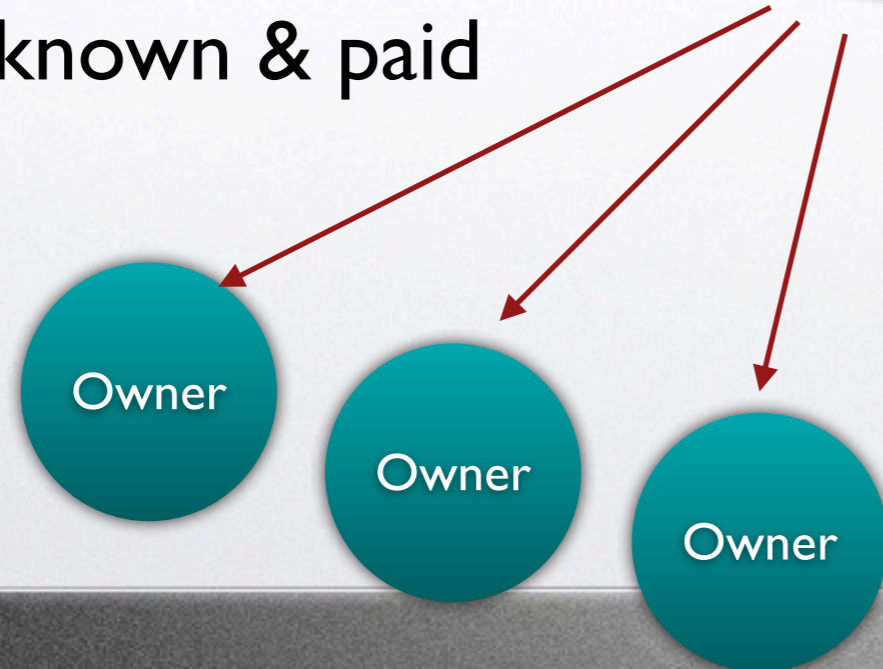


Oy Canada!

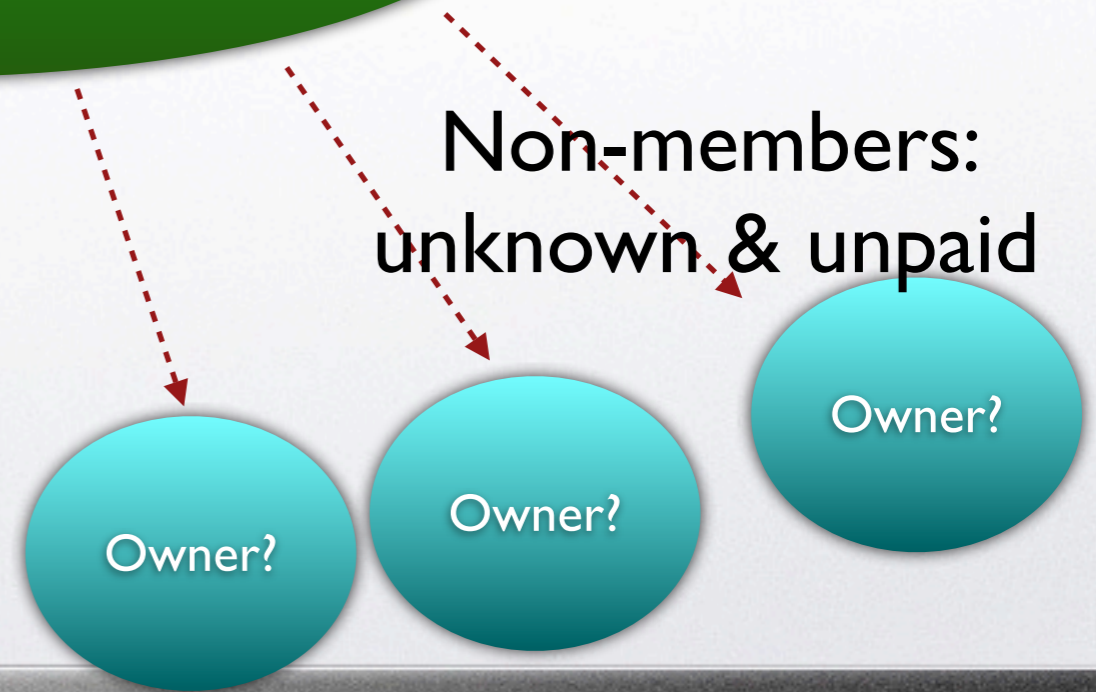




Members: known & paid




Non-members: unknown & unpaid






Copyright Board of Canada

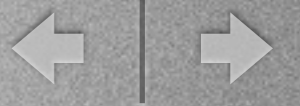
- No free insurance for violators;
- Disgorgement of profit (the user is an offender);
- Payment should be the norm;
- “given the choice, the unlocatable copyright owner would prefer that the royalties be paid to a group that represents interests similar to those of the owner than to see the user take advantage of the owner's copyright for free.”



In Vollmacht  aller Heiligen
und in Erbarmung gegen Dich, absolviere
Ich Dich von allen Sünden und Missetha-
ten und erlasse Dir alle Strafen auf zehn
Tage.
Johannes Tietzel.

Printed indulgence certificate signed by Johannes Tietzel (Tetzel) (circa 1517).

The German text reads, "In the authority of all the saints, and in compassion towards you, I absolve you from all sins and misdeeds, and remit all punishment for ten days."



Is there a better
solution?



Common law solution: Remedy Tweaking



Remedy tweaking

- In deciding the appropriate remedy
- After a finding of infringement (when not fair use, etc)
- Locatability of the owner should be a relevant consideration



Public benefits/costs
 \neq
private benefits/costs



Owner considers only private costs and benefits

- Not orphan: when expected $V_{\text{private}} > C_{\text{info}}$
- Orphan: when expected $V_{\text{private}} > C_{\text{info}}$
- Public costs and benefits externalized (ignored)



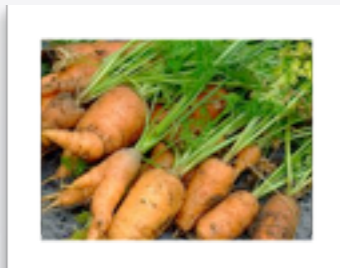
© owner is
Least-cost avoider



Incentives



if you don't make yourself easily locatable *ex ante*
you will be entitled to less *ex post*



invest today and
be entitled to all
remedies in the
future

OR

don't invest today
but you might
earn less in the
future

Petr Kratochvil, *Wooden Sticks in Sephia Tone Background*

Unknown, *Carrots*



Duty to mitigate



How to solve the orphans problem?

- Encourage ownership records
- Incentives to cost avoiders to avoid cost
- Decline the “New Stationers” invitation
- Don’t substitute an “indulgences industry” for copyright markets