

# IP Osgoode Orphan Works Hackathon: Final Report (Abridged Version)

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## Introduction

“(…) In February 2016, IP Osgoode and The Copyright and International Trade Policy Branch of the Department of Canadian Heritage, came together to organize the “Orphan Works Licensing Portal Hackathon”, a multi-day hackathon to develop options for a new online system to process licensing of Canadian orphan works through collaborative engagement of experts and stakeholders.

The Hackathon, a unique workshop-type event, using a mixture of user-centered design and agile start-up methodology, allowed the full range of participants (students, engineers, policy analysts, collective society members, industry experts, librarians, archivists) from Canada and abroad to work in teams to identify opportunities, design new prototypes to improve the Canadian Orphan Works system. Significantly, the participants pitched the resulting prototypes and tested these for evaluation by subject-matter experts.

The hackathon produced and vetted many new ideas within the three days, and some of the more successful concepts were built into initial demos with the potential to be flushed out in full by ongoing projects. Thanks to IP Osgoode’s collaboration with BEST (Bergeron Entrepreneurs in Science & Technology) at the Lassonde School of Engineering, which ultimately awarded as prizes, time and expertise in their labs to further develop the prototypes, these projects have the serious ability of being adopted and making a difference in the orphan works system. In addition to the concepts and demos, the hackathon also produced some key insights and directions for future work in improving intellectual property policy generally, and specifically that around orphan works and the copyright regime. Rather than the usual “conferencing of ideas”, the hands-on approach of the hackathon served as a quick and agile way to surface many concerns, new ideas, and key points for intervention and opportunities.”

## 1. The Hackathon and Its Goals

“The Orphan Works Hackathon took place at Osgoode Hall Law School at York University in Toronto, Canada from February 3 to February 5, 2016. There were approximately 35 participants and 10 coaches and facilitators who attended the hackathon. (...) The hackathon was planned in conjunction with Margaret Hagan of the Stanford d.school (Institute of Design), in order to structure the event with a mixture of user-centered design and agile start-up methodology. (...) Invitations were sent out to a select list of creators, policy makers, engineering and law students, legal professionals, industry leaders, academics and representatives from archival institutions, collective societies, and libraries to participate in the Orphan Works Hackathon.”

## 2. The Need

“The challenge at the core of the Hackathon is the need for a better Orphan Works scheme in Canada. An orphan work is a creation that is copyright-protected, but for which the copyright-holder cannot be found. Because the work has an unlocatable (or, not easily locatable) owner, it is an ‘orphan work’. The owner might be unlocatable because the right-holder is deceased and did not assign the right to another, or because the work was abandoned, created informally, or was distributed without documentation of the creator. (...)

Like other copyright-protected works, anyone who is interested in using an orphan work in a way that implicates the rights of the copyright owner would need to identify and locate the owner to seek permission and/or submit payment. Just because the rights-holder is not easily locatable does not mean that the work can be used without permission and freely by others. Rather, in Canada, anyone who wishes to use an orphan work is required to submit a licence application to the Canadian government's Copyright Board ("Board"). The 1988 *Copyright Act*, section 77, gives the Board authority to issue a licence to use an orphan work in Canada. (...)

To apply for and secure a licence for an orphan work in Canada, a person must apply to the Board with demonstrations that they have done a diligent search to find the work's owner, and that they have not been able to do so. The Board will evaluate the application, consider the thoroughness of the search, and whether the work needs a licence. (...)

Canada has an orphan works licensing scheme, which is more advanced than many other countries who have no process to licence orphan works at all. But there are many shortcomings with Canada's current scheme.

- First, the procedures of getting a licence are bureaucratic and non-transparent for a potential licensee. Processing times can take from several months to a year. And the process to apply is confusing, because there is no official form, the instructions are buried on the Board's website in disparate places, and there is no ability to review past applications. This nebulous process can lead to a resistance to use the system at all or a poor user experience for those who do use it.
- Second, collective societies must deal with large administrative burdens when engaging with this regime. When licences are granted for use of Orphan Works, a royalty fee is paid to a collective society to retain in the event that an owner is located. Under this scheme, some have criticized that the issues surrounding orphan works are shifted upon the collective societies. There is also a need for greater clarity on the retention duration of the royalty fees.
- Finally, licences are not available for works that are unpublished. Only those works that have been 'published' are eligible to get an orphan works licence in Canada. Those users like librarians and museum archivists who wish to digitize unpublished works are unhappy with the current regime, because it gives them no recourse for a licence-based protection if they were to put unpublished works online. (...)"

### 3. The Hackathon Process

#### *The six idea pitches on Day 2*

- "Team A presented a streamlined diligent search tool, to allow a person search whether a work they want to use is an Orphan Work, or whether it has an owner that they can contact to obtain a licence. It had a series of search mechanisms, to let a potential user know what steps to take to satisfy the authority's diligent search requirement, and then present them with relevant databases to look through in their search.
- Team B proposed the Owl project that would allow a user of an orphan work to clearly mark the work as orphaned and display their good faith in using the work. (...)
- Team C pitched Annie, a smart navigator for the search and licensing and process for a potential orphan work. Annie would accompany a person through the process of doing a

- diligent search to find who owns a work that they want to use, create a search record that could be submitted to the Copyright Board as proof of a diligent search, and then go through with a licence application. (...)
- Team D pitched a policy change to allow for orphan licences of unpublished works. They proposed Canada create an exception to the current law for unpublished works. It would give rights to a user, like an author who wants to use unpublished letters and materials from an archive, the ability to use these works, establishing a procedure to follow to ensure that such use would be protected from liability. (...)
  - Team E proposed a new service for straightforward IP compliance of streaming music. It was targeted at organizations either starting a new streaming music service, or interested in making their streaming music service compliant with copyright law. Their proposed initiative would gather IP-related metadata about all of the songs that they wished to use, check if the information was in need of correction or update, check which songs had any licensing issues or liabilities, and report back to the service about which songs were cleared and which not to use until liability concerns or licences could be cleared.
  - Finally, Team F pitched Orphan Hunter, an online marketplace for aspiring users of orphan works to find people who would execute the diligent search of a possible owner for them. (...)

In addition to the existing teams, one new team formed to create a problem they identified as unaddressed: how to give liability protection to those who wanted to use orphan works or other items without a clear licensing scheme. They proposed F'it, an organization that would protect works-users from liability.

Rather than create a new legal policy or making the current scheme more navigable, they identified the key problem as the organizations' need for protection from liability. Their insight was that there are other ways to protect organizations from expensive but infrequent lawsuits aside from changing the policy to limit liability, or giving a licence that would protect from liability. They proposed F'it as a new private company that would help organizations either negotiate licences, or that would provide a guarantee that if the organization did get sued for their use of work, that F'it would cover their costs of a lawsuit. It would be comprised of legal and insurance experts, who would know how to cost a protection policy for different organizations and works. They could also help an organization to negotiate with known rights-holders to secure licences."

#### 4. Guiding Insights and Ideas for the Future

"In addition to the design process work that the teams created (...) the participants (...) brought forward a host of ideas and insights.

##### Leading Concepts

- One of the primary innovations presented was for more effective, streamlined and efficient diligent search, by streamlining the steps required to perform it and integrating databases together so that a single search could more effectively identify what potential rights-holders or works already established as orphaned. (...)
- Another theme was to provide more resources to potential users. This could be in the form of coordinated, government-sponsored databases. Or, it could be a crowdsourcing

- platform like Orphan Hunter, that would give the user a bank of possible workers to help them with their search and potentially also their application. Alternatively, it could be a private company that analyzes works, tells the user what IP strategy or protection is needed, and then helps the user deal with the issues they face. The resources, to reduce the amount of work of a person needed to get a licence, would hopefully encourage more people to engage with the intellectual property scheme.
- A final theme of interventions was to provide more good-faith signaling and awareness tools that gives assurance to non-profit and other well-intentioned actors. This would be a bridge until new policies or schemes allowed these actors to use unpublished works. This might be in the form of a little mark, like an Owl, that signals that the person is conscious of IP rules, and will take the work down if requested. (...)

### Key Targets for Possible Intervention

In addition to these proposals for a better orphan works system, there also emerged a shortlist of outcomes for future innovations to target. The teams identified several areas with the orphan works (and broader intellectual property) regime that can be improved. These areas are all points that the government and new third-party actors can target with new initiatives.

- Public Engagement: Can we make more people -- content-users and -creators -- aware of IP and Copyright obligations, and the existence of the orphan works scheme?
- Easier, more robust search process: Can we improve the diligent search, making it easier to find the status of a work and whether a rights-holder is locatable? More ambitiously, could the government take a more central role in simplifying the search process?
- Customized rules: Can the system differentiate what is required of whom, so that there are rules that are better fits for certain actors and use cases, rather than blanket rules? This could include exceptions and specific protocols for the actors that are special (frequent users, good actors, non-profits).
- Matching users and rights-holders: Can we find better ways for owners and users to find each other, and negotiate use terms, and form licence agreements on their own?
- Higher quality, centralized data: Can we invest in a database of ownership and licences, that allow for efficiency and transparency in what licences exist, what works have been identified as orphans, and what rights-holders have been identified.
- Major policy changes: Could there be dramatic shifts in how orphan works are licensed, and who has authority to do this? This would involve new legislation in Canada, or even more dramatically, a shift away from the Berne Convention and its requirements and restrictions. (...)

### Concluding Thoughts

Aside from the specific question of how to make a workable, usable orphan works scheme, the hackathon also led to some larger insights about the developing the ideal process to instigate innovation in policy-making and intellectual property. This involves how design and agile start-up methodology can best be used for a hackathon-like event, as well as how governments can join together to share and spur on digital innovation worldwide.

### Use of the agile user-centered design process, with some tweaks

Overall, the respondents responded favorably to the format of the event, even if there was initial resistance to the design process' quick deadlines and priority on visuals over text. Once participants got further along the process -- especially as the teams began to brainstorm concepts and decide on the idea they wanted to prototype and test -- the teams clicked and became very enthusiastic about their work. Participants took a great sense of ownership in the ideas as they prototyped them, and embraced the chance to pitch, to gather testing feedback, and make their ideas convincing, thought-out, and meaningful. (...)

### The potential for cross-government collaboration

Another path to innovation is to bring different governments' intellectual property agencies together to share best practices, user insights, policy recommendations, and software code with each other. This hackathon benefitted from the close participation of the US and especially the UK intellectual property leaders, who were able to talk about the research and development they have already invested into resolving the IP challenge at hand. They were able to provide insights and share their platforms with the Canadian teams, giving them a jumpstart on concepts to try, user needs to prioritize, and functions to embed in the solutions they were creating.

In the future, this could take the form of governments sharing the digital platforms and tools they create. For example, the UK could share the orphan works licensing portal it created, either making it open source or licensing it to Canada. The Canadian government could customize the databases, protocols, and payment schemes that the UK agency has already invested in developing, so it would significantly cut their costs of rolling out a digital, interactive, easy-to-use online platform. Then, going forward, Canada could share back with the UK -- and other governments also using the same core platform -- any modifications or additional tools that it has built in. There could more easily be an exchange of innovations among government agencies, when they are starting from the same platform and are connected together in a spirit of open development and cross-border collaboration.

This hackathon served as an informal testing of this potential new model, and it was a success -- with the UK policy- and development-team from their orphan works project being great collaborators for the Canadian teams. In the future, these collaborations could be formalized, and lead to greater progress towards a usable, engaging intellectual property system that works in each country, and is connected worldwide."

The full report can be found at [IP Osgoode](#): (English only)