

COPYRIGHT AND ORPHAN WORKS

By:

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Orphan works are copyright-protected works with unlocatable copyright holders. Prospective users (e.g. individuals, commercial organisations, and cultural heritage institutions) are legally required to obtain permission from the copyright holders before using their works (e.g. photos, paintings, novels, songs, movies). However, such copyright clearance may not be able to be obtained in the orphan works scenario. Activities like preservation, digitisation, restoration, adaptation, modification, or commercialisation of intellectual resources might be problematised for fear of legal suits from the reappearing copyright holders. Eventually, the works might be abandoned from the above activities, resulting in a massive loss to society for cultural and social benefits from the orphan works cannot be further leveraged.

works to be shared almost instantly and separated from ownership information (Beldiman, 2005; Colaangelo and Lincesson, 2012).

The dissemination of works via the internet has created a vast ocean of works whose authorship is frequently difficult to ascertain and, to a large extent – indeterminable at worst (Young, 2016). Secondly, the copyright duration. It has been observed that the terms of copyright duration had been extended in an upward fashion (Giblin, 2017). In 1710, the copyright duration under the **Statute of Anne** was 14 years. France then took the **post mortem auctoris** (pma) approach by granting rights for ten years after the author's death. The pma approach was reflected in the **Berne Convention** (as stated in **Article 7**), which mandates a minimum term of 50 years after the author's death.

At least two factors contribute to the emergence of the phenomenon of orphan work. Firstly, the internet and technological advancement. This factor has significantly changed how copyrighted contents are shared and distributed in the digital era, in the sense that it is now more convenient and more accessible for copyrighted



Overall, the copyright duration has been stretched and prolonged over the past years, resulting in copyrighted works being protected for a very long time and, above all, only expiring at the time the law determines (Brito and Dooling, 2005). This eventually frustrates the effort to locate the copyright owners because, over time, the copyright ownerships may change hands, and the links to the copyright owner may dissipate.

The orphan works problem is real on a global scale. In Germany, several Jewish family photographs were recovered from an abandoned hotel room shortly after World War II (Sarwate, 2008). The pictures were then surrendered to the US Holocaust Museum for preservation purposes. Nonetheless, the process of securing the necessary permission to use the images was problematised as the photographs' copyright holders were unknown. In the United States, Billy Mize's grandson wanted to use his grandfather's music for a documentary (Crispino, 2019). His plans, however, were interrupted because he could not identify the music's copyright holders (the record companies that originally owned the rights no longer exist).

In response to the problem, several suggestions and mechanisms have been developed specifically for the exploitation of orphan works. One suggestion is to use the Fair Use or Fair Dealing defence, which protects the users of the orphan work from copyright lawsuits. This recommendation, however, has been criticised by many because its application is subject to the four-factor test, leaving orphan works users in a state of uncertainty.



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**"Move forward.
Good things are
up ahead"**



In addition, the licensing mechanism is a strategy that is currently being implemented in the UK and Canada. The orphan works licensing scheme permits any interested parties to apply for orphan works licences with the respective authorising body (this organisation is similar to our Malaysian Intellectual Property Office). The proposed use of orphan works may then be permitted subject to certain payment of royalties (if required).

In Malaysia, there are still no official reports, statistics, or cases on orphan works. There are also no provisions relating to orphan works in our **Copyright Act 1987**. Despite the absence of such information or evidence of the consequences against the Malaysian copyright society, it does not mean that this issue does not exist. Thus, it is safe to practice diligent steps before using any copyright-protected works.

The prospective users are encouraged to identify and locate the right holders for their authorisation and keep records (strategies and numbers) of the attempts to reach them. Legislative intervention is also required so that these works can be used and exploited – legally. Singapore and other jurisdictions had already initiated a public consultation and devised proper mechanisms (e.g. non-exclusive licensing schemes) to address the issue, which further necessitates Malaysia to follow suit and liberate the works from the copyright orphanage.

References

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