

# Liberating Orphan Works from The Copyright Orphanage: The Malaysian Perspective

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**Abstract:** Orphan works are works that are still protected by copyright and whose owners cannot be identified or located by prospective users for copyright clearance. Many countries have addressed this issue since the emergence of the problem, and it remains a legitimate subject of inquiry in this present day. However, Malaysia is yet to initiate public consultations and formulate legislative and non-legislative solutions to the orphan work problem. Hence, this paper aspires to underline the challenges and obstacles in exploiting the orphan works in Malaysia. It starts with a brief introduction to the orphan works problem and its causes. It further highlights the legal and policy uncertainties about the orphan work phenomenon in Malaysia and its implication to higher learning education. Besides, this paper also examines the current practices in the United Kingdom and Canada. Finally, this paper proposes some suggestions into what Parliament and policymakers have to do and avoid when solving Malaysia's orphan work phenomenon. It is hoped that the access to the orphan works in Malaysia would not be problematised, thereby liberating them from the copyright orphanage.

**Keywords:** Copyright law, Orphan works, Orphan works licensing scheme

## 1. Introduction

Orphan works are copyright-protected works and whose owners cannot be identified or located by prospective users for copyright clearance (US Copyright Office Office, 2015, Copenhagen, 2014). A work becomes an "orphan" when these two requirements are satisfied. First, the work must still be copyright protected, and second, the prospective user fails to locate the copyright owner after a diligent search.

There are at least two causes that lead to the emergence of this phenomenon. First, is the non-requirement of registration of works (Lu, 2013, Greismann, 2012). As this is no longer a mandatory requirement under the copyright regime, the system fails to create a comprehensive database of authorship, making it difficult to trace the whereabouts of the copyright owner. Second, is the technological advancement and innovation that has opened a full window of opportunity for works to be disseminated rapidly on the internet; this makes it challenging to locate and ascertain the authors of the works (Young, 2016, Colangelo and Lincesson, 2012).

This scenario is essential to be addressed as it affects various stakeholders such as educational and cultural institutions like libraries, museums, and archives. These institutions are generally left with two options when facing this situation. First, proceed to exploit the orphan works, but this option will encourage wide-spread copyright infringement and expose them to legal suit in the event the copyright holder resurfaces (Goldenfein and Hunter, 2017). Second, abandon the orphan works – unexploited.

Such abandonment will lock away significant historical footage, photographs, books, sound recordings and documents, thereby suppressing efficient dissemination of knowledge to the public and recreation of derivative works (Goldenfein and Hunter, 2017, Lerner and Donaldson, 2013). As a result, the orphan works will continue to be kept in the copyright orphanage.

In addressing the phenomenon of the orphan work, many foreign jurisdictions like Canada, the United Kingdom, the European Union, India, and Japan have implemented legislative solutions to address the problem. However, Malaysia has yet to initiate public consultation or formulate legislative and non-legislative solutions to the orphan work problem, thereby making this area a legitimate subject of investigation in the Malaysian context. Hence, this paper aspires to highlight this gap by underlining the challenges in exploiting the orphan works in Part 2. Part 3 continues with a brief discussion on the implication of this issue to higher learning education. Part 4 continues with practices implemented in Canada and the United Kingdom. Part 5 makes recommendations, and Part 6 concludes the discussion.

## **2. Challenges in Exploiting the Orphan Works in Malaysia**

The proprietary model of the copyright law system is worried to be a deficient model, especially in optimising the exploitation of orphan works (Ilie, 2014, Marlin-Bennett, 2004). Marlin-Bennett (2004) echoes this concern when she highlights the peril of an overly strong proprietary right that would endanger the right of the public to enjoy freely in our cultural, scientific, and technological heritage.

Further, the proprietary model which protects orphan works as copyright works prohibits the orphan works from being reproduced, commercialised, shown, played, distributed and rented to the public (The Copyright Act (Malaysia), 1987,s.13(1)(a)-(f)). Besides, the proprietary model also prohibits the reuse of orphan works as derivative works, which will impede translations, adaptations, arrangements, compilations and other transformations of orphan works (The Copyright Act (Malaysia), 1987,s.13(1)). All these activities will require a licensing arrangement with the copyright holder.

In addition, Section 25(2) (a) and (b) also recognise moral rights of the creator of copyrighted works and prohibits the presentation the same without identifying the author or under a name other than that of the author; and the distortion, mutilation or other modification of the work which significantly alters the work; and might reasonably be regarded as adversely affecting the author's honour or reputation. While Malaysian copyright regime provides fair dealing exceptions, it is mainly devised for educational, research, private study, critics and review. The fair dealing scheme under Malaysian copyright law does not cater for the exploitation of orphan works.

Besides, Section 26 (4) (c) might be the closest provision that indirectly speaks about orphan works when it mentions "unpublished work where the identity of the author is unknown". The copyright of such works vests in the Ministry responsible for culture. This section, however, excludes "published works" from the aegis of the section, thereby restricting its application. The section only takes effect if the unknown author of the unpublished work is "presumed" to be a citizen of Malaysia. The section does not explain as to whose presumption is deemed material for the purpose of vesting copyright of the unpublished work in the Ministry. The section also shall cease to apply when the identity of the author becomes known, creating uncertainty and ambiguity on the part of the member of the public who is interested in exploiting the unpublished work.

Up to this present day, the relevant Ministry is yet to introduce any regulation, procedure or guideline on the exploitation of unpublished work. Due to the restrictive, qualified, uncertain and ambiguous nature of Section 26 (4) (c), this paper argues that it poses challenges to the prospective users to exploit the orphan works under the Malaysian copyright regime.

Furthermore, the lack of empirical study to prove severe repercussions of the orphan work phenomenon against the Malaysian copyright society is also worth to be mentioned. However, this does not mean that the phenomenon of the orphan work does not require further solutions, particularly in the Malaysian context. Hence, it is necessary to study the orphan works problem and analyse existing solutions and proposals in other countries to understand the problem thoroughly, be able to investigate current copyright laws of Malaysia and propose appropriate and effective alternative solutions.

In light of the above, this paper believes that the failure to address the above gaps will result in Malaysia being left behind in a digital and innovation-based economy that is currently embraced by many developed and highly developing countries around the world. As other jurisdictions such as EU, UK, US, Australia, Canada, Japan, South Korea and India have already put in place legal and policy

regimes addressing issues underpinning orphan works, it is high time for Malaysia to follow suit. The fact that Singapore has initiated a public consultation on how to address the orphan works in the country further necessitates similar initiatives to be conducted in Malaysia. The next part will briefly elucidate the implications of the problem to higher learning education.

### **3. Implications to Higher Learning Education**

The nature of the orphan works, i.e. an essential source of knowledge, is perhaps the best starting point to underline these materials' value and significance to various parties. Reflecting Aristotle's theory of knowledge, Madison (2009) asserts that copyright-protected works (e.g. books, articles, artwork) are the products of intellectual creations, resulting from a series of creative processes. Simply put, these materials (e.g. books, articles, artwork) may be perceived as the embodiment of creative and technical knowledge, which according to Chon (2011), can promote spillover of the same. For example, these works (orphan or non-orphans) can be used as sources for exploitation, education, and inspiration for creating new products.

The above discussion is also in line with Hansen et al. (2013) and Sag (2012), who argue in favour of data and text mining of digitised orphan works collections – which may support new forms of research. It follows that new findings from the said activities may provide a catalyst for new batches of inventions, thereby promoting the progress of science and useful arts. Additionally, Badrul and Zuraimi (2007) envision the possibility for university teaching and learning experience to be gained at museums and art galleries as part of the students' training requirements. This proposal should be acknowledged because learners may also obtain a higher learning experience outside of the university premises. In this context, if the use of orphan works (which may be kept in such organisations) is problematised, it is afraid that such a vision may not be materialised to the fullest extent.

Overall, the analyses thus far have irresistibly suggested this premise: That orphan works (being copyright-protected materials) are an important source of knowledge. They should be allowed to be used or exploited by any interested parties (such as students, educators, educational institutions, libraries, and cultural heritage organisations) – without fear of legal repercussions. This suggestion may foster the reuse of intellectual creations, avoid any wastage of intellectual resources, and eventually promote the organisational roles and functions in disseminating knowledge and promoting the progress of arts. However, it is understood that due to the ambiguity on the proper and legal way to use them, there will be risks in dealing with the same. Suppose the legal impediments and such ambiguities are cleared. In that case, it is believed that it will provide an opportunity to explore further the works' potential uses) and exploit them without fear of legal consequences.

Hence, it is worth restating that the failure to address this problem may adversely affect numerous parties and various activities pertinent to teaching and learning. Smooth dissemination and utilisation of knowledge should not be made difficult if it involves orphan materials. Therefore, by addressing the orphan works problem, the key players and stakeholders of the higher learning education may benefit from these materials without fear of legal suits. The next part will explain several mechanisms implemented in other countries in addressing the orphan works problem.

### **4. Practices in other Jurisdictions**

#### **4.1 Canada**

Canada adopts the non-exclusive licensing scheme for orphan works. Section 77 of the Copyright Act 1985 (Canada) vests the power to grant the orphan works license in the Copyright Board of Canada. Under the said scheme, any person such as private individuals, museums, libraries, archivists, TV producers, business organisations is eligible to apply for the orphan works licence, following the efforts to identify and locate the copyright holder. The duration of the licence, however, is not explicitly mentioned in the said provision. Despite the silence, De Beer and Bouchard (2010) posit that the Copyright Board is obligated to state the duration as it gives some time certainty, especially when dealing with royalties issues.

Besides, Section 77 (1) outlines three essential points. Firstly, the licensing scheme applies only to works in which copyright exists. Hence, it excludes unoriginal and out-of-copyright works from the

Canadian scheme. Secondly, the licensing scheme applies to all types of conventional works i.e. literary, dramatic, musical, and artistic works. Performances, sound recordings, and communication signals were later included within the ambit of the licencing scheme in 1997 (De Beer and Bouchard, 2010). Thirdly, a work can only be declared as "orphan" after the prospective user has accomplished the necessary search to find the copyright holder and failed to locate him. Therefore, in order for the orphan works to be covered under the Canadian scheme, the copyright holder must be unknown, or if he is known, must be unlocatable.

The licence issued authorises the prospective user to exploit the orphan works through any acts mentioned in Section 3, 15, 18, or 21. These sections permit the orphan works licensee to produce, reproduce, adapt, convert, perform, translate, telecommunicate and exhibit an orphan work in public. The nature of the permitted uses of the orphan works (either for commercial or non-commercial purpose) is not mentioned in their Copyright Act. Nonetheless, Section 77(4) permits the Copyright Board to make further regulations concerning the issuance of the licence. References to the various practices of the Copyright Board in issuing the licences revealed that the orphan works could be exploited for commercial and non-commercial purposes.

Once a licence application is successful, the Copyright Board may instruct the prospective user to pay a sum of royalties to the relevant collective society which will be kept by them in trust until the legitimate copyright holder reappears (De Beer and Bouchard, 2010). The Copyright Board will also determine the amount based on several factors such as the appropriate rate as suggested by the relevant collective society, the nature of the proposed use of the orphan works, and the expected profits (if applicable).

Concerning the right to claim the said royalties, Section 77 (3) provides an extended limitation period of five years (calculated from the date of the issuance of licence) for the legitimate copyright holder to claim the said royalties from the relevant collective societies. He can bring a civil legal action in the court (instead of suing for copyright infringement) to recover the unpaid royalties if he fails to claim the same. If no legitimate copyright holder comes forward to make a claim, the collective societies are allowed to use the unclaimed royalties to offset the costs relevant with the maintenance of the orphan works or for other purposes which they see fit as long as they undertake to compensate the copyright owner when it becomes necessary (De Beer and Bouchard, 2010).

The Board maintains a publicly accessible orphan works register encapsulating a list of licences granted or refused for used orphan works. However, a review of the Board's online register reveals that some orphan works licences are issued in the language in which the application was filed. The Copyright Board could revisit this aspect as it would not be deemed as a complete publicly accessible database if the information to the orphan works is hindered with the language barrier.

## **4.2 United Kingdom**

### **4.2.1 Orphans Works Licensing Scheme**

The United Kingdom also adopts the orphan works non-exclusive licensing scheme. Regulation 6 (1) of the Copyright and Rights in Performances (Licensing of Orphan Works) Regulations 2014 grants the power to the United Kingdom Intellectual Property Office (UKIPO) to issue the license for both commercial and non-commercial uses of the orphan works. The orphan works licence is issued for a term not exceeding seven years (renewable) and valid only for uses in the United Kingdom (The Copyright and Rights in Performances (Licensing of Orphan Works) Regulations 2014,reg.6(1), 6(2)(a)(b), 8).

Besides, Regulation 4 (1) permits anyone (such as private individuals, museums, libraries, archivists, TV producers, business organisations) to apply for the orphan works license, subject to the completion of the diligent search requirement.

The UK orphan works scheme also applies to any works or performances (published and unpublished) which are protected by copyright, following a diligent search (The Copyright and Rights in Performances (Licensing of Orphan Works) Regulations 2014,reg 3). For this purpose, the prospective user must state that he has failed to identify and locate the whereabouts of the copyright holder following the said search.

Regulation 6 (2) (b) states that the orphan works licence authorises the licensee to use the work through acts restricted by the copyright. The phrase "acts restricted by the copyright" refers to a bundle of rights, exclusive only to the copyright holder permitting him to exploit the works in accordance with the law (The Copyright, Designs, and Patents Act 1988, s.16). For example, the right to copy and issue copies of the work to the public, as well as the right to make an adaptation of the same.

For the orphan works licensing Scheme, the UKIPO has further translated the above mentioned exclusive rights into two categories of permitted uses of orphan works as spelt out in its 2016 Guidance. The first category is the non-commercial uses, which include preservation purposes, digitisation and making the relevant materials available online, materials for teaching, learning, training and free hand-outs for exhibitions and live events. The second category is the commercial uses of the orphan works, covering activities that are aimed at making a profit from the use of the orphan works. These include selling copies and charging access to the works or use for merchandising and commercial advertising. The list of the permitted uses, however, is not exhaustive, as it will depend on the circumstances surrounding the proposed use of the orphan works.

In addition, an upfront payment of licence fee is required to be paid to the UKIPO before exploitation of the orphan works can be made. Regulation 10 (1) (a) authorises the UKIPO to collect a predetermined sum of licence fee from the prospective users which shall be assessed on case-by-case basis i.e depends on the types of the orphan works and the proposed use of the same (Martinez and Terras, 2019).

Concerning the proceeds obtained from the issuance of the licence, Regulation 10 (2) authorises the UKIPO to keep the proceeds (on behalf of the unidentifiable copyright holder) in a designated account for eight years from the date of the grant of the licence. Further, under Regulation 13, if no copyright holder reappears after the expiry of eight years, the UKIPO is allowed to use the proceeds from the unclaimed licence fees to offset the reasonable costs incurred in connection with the maintenance of the orphan works scheme. If there is a surplus from the unclaimed proceeds, it may be used by the UKIPO to fund any social, cultural, and educational activities.

Be that as it may, the right of the copyright holder to claim the licence fee does not automatically dissipate even if he reappears after the expiry of eight years. At this stage, however, the UKIPO reserves the discretion to recompense him, depending on the circumstances of the case (The Copyright and Rights in Performances (Licensing of Orphan Works) Regulations 2014, reg 13(3)).

Regulation 5 requires the UKIPO to set up, maintain, and update an orphan work register, spelling out all the relevant details of the orphan works, the licensees, and the terms and conditions of the issued licence. This orphan works register is publicly accessible, and the use of the same is free of charge.

#### **4.2.2 Extended Collective Licensing**

The extended collective licensing (ECL) is another mechanism used to address the orphan works problem in the UK. The ECL is established as an alternative to the existing collective management system and it is not exclusively introduced to address the orphan works problem *per se*. In light of its operation that covers all types of copyright-protected works i.e orphan and non-orphan works, the ECL scheme is viewed as another alternative solution to enable the exploitation of orphan works in the UK.

Tryggvadóttir (2018) defines ECL as a licence for a specific use of in-copyright works in a specific field based on an agreement that a collective management organisation (CMO) makes with a user such as a library, and which is extended to rights holders that are not the members of the CMO. Simply put, CMO acts as a representative or intermediary between the copyright holders and prospective users. Under the traditional collective management system, the CMO is authorised by the copyright holders to administer their rights and represent them in the licensing negotiations with the prospective users of the works. The activities that the CMO is given the mandate to represent include the negotiations of the licence rate and royalties, as well as the collection and distribution of the said proceeds among the copyright holders (Dryden, 2017). The traditional collective management system is also run on voluntary or opt-in basis i.e the CMO would only be entitled to act for the copyright holders that have opted-in to become the member of the organisations and further assigned their rights to the CMO (Guibault and Schroff, 2018).

Under ECL, the CMO is authorised by the legislation to issue licences not just for the members (those who voluntarily opt-in) but also the non-represented members of the organisations, unless they choose to opt-out from the scheme (Tryggvadóttir, 2018). By default, the rights of the non-members will be administered by the ECL scheme, and the CMO is presumed to have the authorization to manage their rights unless they choose to exclude themselves out of the system.

In the context of the orphan works, the ECL scheme automatically includes the unidentifiable and unlocatable copyright holders within the operation of the system since they are deemed not represented by any licensing organisations. Theoretically speaking, the unrepresented and unlocatable orphan works copyright holders will be presumed to have given the mandate to the CMO to manage their rights as long as they do not opt-out from the system.

By virtue of Section 116 (2) of the Copyright, Designs, and Patents Act 1988 and Regulation 4 of the Copyright and Rights in Performances (Extended Collective Licensing) Regulations 2014, any CMO in the UK is entitled to apply for an authorisation from the UKIPO. In this regard, Regulation 4 (4) (b) requires the applicant CMO to demonstrate that they represent a significant number of the relevant class of copyright holders.

The applicant CMO is also required to submit a written application to the UKIPO together with a sum of fee and provide a long list of information as stipulated in Regulation 5. The details of the said information, among others, include;

1. the evidence that the applicant is a relevant licensing body,
2. the types of relevant works to which the ECL scheme will apply, and
3. the opt-out arrangements that the applicant CMO will adopt for non-member copyright holders.

Upon receiving the application, Regulation 7 further requires the UKIPO to publish the proposed authorisation in order to notify any copyright holders who might be affected with the said proposed authorisation and receive feedback and comment if there is any. If there are no oppositions from any parties, the UKIPO may issue the grant of the authorisation and the CMO will be permitted to operate the ECL scheme.

The ECL Regulations 2014 is silent on the requirement for the CMOs to establish a dedicated register for orphan works that are exploited under the ECL scheme. However, Regulation 18 (5) requires the CMOs to publish information on any works which have been licensed under the ECL scheme and for which non-member right holders have not been identified or located. As no CMOs have yet to be authorised by the UKIPO to operate the ECL scheme, it is hard to imagine how the said organisations are implementing this regulation. Nonetheless, the UKIPO anticipates that such information will be made publicly accessible by the CMOs through their websites.

One final point that must be highlighted is the requirement of diligent search. As aforementioned, the crux of the orphan work problems is the failure to identify and locate the copyright holders for the licensing purpose. This condition, however, is not spelt out in the UK ECL scheme. Neither the CMO nor the prospective users are required to conduct the search. However, Dahlberg (2011) explains that the method to exploit an orphan work under this system is based on the reciprocal contract on the basis of free negotiation where a prospective user and a CMO negotiate a contract where the user agrees to pay compensation and the CMO by collecting the payment issues a licence on behalf of the copyright.

## **5. Practices in other Jurisdictions**

As aforementioned, this paper aims to highlight the obstacles in exploiting the orphan works in Malaysia. In doing so, this paper highlighted the gaps and challenges that exist primarily in the Copyright Act 1987. There are at least two key findings that can be derived from the preceding discussion, which can be summarised as follows:

- 1 The provisions of the Copyright Act 1987 are still not sufficient to bridge the gap to the orphan works.
- 2 The restrictive, qualified, uncertain, and ambiguous nature of Section 26 (4)(c) fails to promote the exploitation of the orphan works under Malaysian copyright regime.

Hence, in order to provide access to the orphan works in Malaysia, the above obstacles must be acknowledged and addressed. The present paper proceeds to propose the following recommendations for adoption:

- 1 Launch a public consultation. This step is crucial because it serves as a preliminary engagement with the stakeholders and copyright holders that will be affected by the proposed solutions. Plus, there is yet a comprehensive response ever documented from the key players *vis a vis* the orphan works phenomenon in Malaysia.
- 2 Just like Canada and the UK, an orphan works license scheme could also be introduced and implemented in Malaysia. However, further study should be conducted as it will require many changes to be proposed. These include the agreed definition of an orphan work, the due diligence requirement and the license fee rate for the orphan works scheme, as well as the development of the orphan work register.
- 3 The above orphan works licence scheme, if successfully introduced, could be run and overseen by a competent body such as the Malaysian Intellectual Property Organisation (MyIPO), an organisation that is equivalent to the Copyright Board of Canada and the UKIPO. This proposal is not to undermine the Ministry's role, as highlighted in Section 26 (4)(c) of the Copyright Act 1987. However, it is to lessen the burden of the Ministry by placing this portfolio under MyIPO's management.
- 4 Alternatively, an open innovation-based model could also be proposed in order to provide access and make use of the orphan works (Muhamad Helmi Muhamad Khair and Haswira Nor Mohamad Hashim, in press). This model is based on Henry Chesbrough's seminal works (Chesbrough, 2003, Chesbrough and Bogers, 2014, Chesbrough, 2006). Through the proposed open innovation-based model, it is anticipated that the orphan works could be exploited, which in return, increase socio, cultural, and economic benefits arising from them.
- 5 Finally, while waiting for suitable solutions to be developed, the relevant key players such as museums, libraries, and archives could develop a code of best practices in dealing with orphan works. These encompass the diligent search requirement before using any orphan works and the inclusion of take-down notice in their websites.

## 6. Conclusion

The orphan works problem is a global phenomenon that has affected many parties from various interests in copyright-protected works. A myriad of approaches has been implemented by many countries in their effort to exploit these works, thereby accentuating the gravity of the phenomenon of the orphan work. Thus, in the Malaysian context, this paper believes that the failure to devise legislative and non-legislative solutions to this phenomenon would likely hamper our key players' effort in dealing with these works, and ultimately disrupt the smooth dissemination of knowledge. The fact that Singapore has already made proposals in addressing this phenomenon, it is high time for Malaysia to follow suit and execute similar initiatives in liberating the orphan works from the copyright orphanage as well as making use of them for the benefit of all.

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