

Enhancing Access and Facilitating Use of Orphan Works: A Policy-Led Framework

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ABSTRACT

Background and Purpose: Orphan works, which are copyright-protected works with unidentified right holders, are increasingly common as a result of the abundance of unregistered, unidentified, and abandoned copyright works. In contrast to the European Union, United Kingdom, Canada, and India, Malaysia is yet to devise a solution to the orphan works problem, much less to enact an orphan work legislation or policy. Such a scenario could expose potential users to the risk of being sued by the reappearing copyright holders. Such issues can thus impede the potential use and re-use of orphan works for the purpose of knowledge dissemination as well as progress in the arts, preservation, and digitisation activities.

Methodology: In overcoming the legal impediments relating to the use of orphan works, this research proposed a solution in the form of a policy. Such a policy should be developed by incorporating standard practices from other countries. In doing so, this research conducted an analysis of orphan work policies (policy analysis) from the selected jurisdictions.

Findings: The findings (i.e aims of exploitations, principles of exploitations) from such exercise are proposed to be incorporated when formulating a policy of orphan works in Malaysia.

Contributions: The proposal serves as a novel contribution of this paper to the body of knowledge. In the absence of a legislative solution, it is hoped that the proposed policy on orphan works will assist stakeholders in better managing orphan works held in their repositories and lay the groundwork for the legislation of orphan works law in Malaysia.

Keywords: Intellectual property, Copyright law, Orphan works, Unidentifiable copyright holder, Orphan works licensing scheme

INTRODUCTION

US Copyright Office (2015) defined orphan works as works in which copyright still subsists, but their right holders are unlocatable or unidentified. Orphan works exist due to the absence of a statutory requirement of formal registration (Giblin, 2017; Sullivan, 2012), the extension of copyright duration (Varian, 2006; Brito & Dooling, 2005), and the proliferation of copyright works in digital format over the internet (Young, 2016). These factors inadvertently create an incomplete copyright ownership database, making it challenging to identify and track the authors and right holders of the copyright works. Under the copyright law, potential users such as individuals, memory organisations, and cultural heritage institutions are required to obtain the copyright holders' permission prior to using and re-using the copyright works that are not covered under the

fair dealing provisions. As the right holders are unlocatable, unidentifiable, or both, obtaining permission to use and re-use orphan works is difficult, if not impossible (Hansen, 2016). As a result, potential users will likely abandon the works for the fear of threat of legal suits. The inability to obtain the permission to use and re-use orphan works will impede copyright preservation and mass digitisation efforts, as well as thwart the efficient dissemination of knowledge and arts progress (Goldenfein & Hunter, 2017; Hansen 2016). It is widely anticipated that the number of orphan works will grow exponentially due to the internet and technological advancement that enable copyright works to be easily created and disseminated (Wilkin, 2011; Colangelo & Lincesson, 2012; Padfield, 2010). In the US, it was estimated that there were more than 800,000 orphan works in 2011 alone, which could potentially increase to 2.5 million orphan works in the years to come (Wilkin, 2011). The Collections Trust and the Strategy Content Alliances of the UK reported that globally, there were 13 million orphan works held by 503 institutions in their databases (Korn, 2009). Based on these statistics, it is observed that the problem around orphan works would lead to a failed opportunity for the use and re-use of literary, musical, and artistic works as well as films, sound recordings, and broadcasts.

Many countries have begun to realise the cultural, educational, and economic loss caused by the inability to use and re-use orphan works and have taken legal and policy measures to accommodate this situation (Wilkin, 2011). Canada, for instance, had re-examined the compulsory licensing regime under Section 77 of the Canadian Copyright Act to accommodate the use and re-use of orphan works (De Beer & Bouchard, 2010). Closer to home, Singapore initiated a public consultation and contemplated to use the limited liability-based approach (Ministry of Law Singapore, 2019). Additionally, an extant literature surrounding orphan works is centred around proposing solutions to the problem, including the use of a centralised licensing approach (Ahmed & Al-Salihi, 2020; Hargreaves, 2011; Gompel & Hugenholtz), the application of the blockchain-based system (Goldenfein & Hunter, 2017), the use of the reversionary copyright concept (Favale, 2019), and the implementation of the Chesbrough's open innovation concept (Muhamad Khair & Mohamad Hashim, 2021). Malaysia, however, has yet to come up with a legal or policy measure to address the shortfall of the existing copyright law in dealing with orphan works. Therefore, this paper endeavours to contribute to the current body of knowledge by exploring the challenges to exploit orphan works in Malaysia and to propose a policy that can better manage the risks associated with the use and management of orphan works. The ensuing part will proceed with the methodology that this paper adopted to achieve the above objective.

METHODOLOGY

In proposing the ingredients for an orphan work policy-led framework, there are two research questions that need to be answered, namely: (i) "What are the obstacles to handling orphan works in Malaysia?", and (ii) "How do the European Union, United Kingdom, Canada, and India approach the exploitation of orphan works in their orphan works policies?". To answer these questions, this research employed a combination of three strategies: (i) doctrinal analysis, (ii) policy analysis, and (iii) library-based research. The doctrinal approach is adopted because this research requires an examination of legislation pertaining to orphan works in Malaysia. This approach serves two purposes, namely (i) to clarify the current legal treatment of orphan works issues, and (ii) to establish a legal foundation for formulating the proposed aspiration policy. Next, the policy analysis is adopted because this research involves an analysis of orphan works policies in the selected jurisdictions, namely the European Union, United Kingdom, Canada, and India. Finally, library-based research is employed as this research aims to holistically understand the orphan works issues. The following section will answer the first research question, "What are the obstacles to handling orphan works in Malaysia?" In addressing this question, this research adopted doctrinal analysis to examine the relevant provisions of the Copyright Act 1987.

Challenges Faced By Potential Users To Use And Re-Use Orphan Works In Malaysia

The copyright law system (which is a proprietary model of the intellectual property system) grants a bundle of exclusive rights for copyright holders to control how their works can be used and re-used by other users. These exclusive rights include the right to make copies and perform the works to the public. However, the right for the public to enjoy cultural and artistic values from copyrighted works may be problematized by an overly protective proprietary model of a copyright law system (Marlin-Bennet, 2004). The proprietary model is a deficient model for optimising the exploitation of orphan works as it treats orphan works similarly to other

copyright works, where the right holders assert their proprietary rights (Ilie, 2014). Malaysia, like other jurisdictions, also adopts a similar copyright system, which has resulted in a number of obstacles.

The first obstacle comes from the nature of Section 13(1)(a)–(f) of the Copyright Act 1987 that protects orphan works (as copyright-protected works) from being reproduced, commercialised, rented, shown, played, and distributed to the public without the owner’s permission. The section also prohibits the re-use of orphan works as derivative works, which further impedes activities such as translations, adaptations, arrangements, and other kinds of transformation of orphan works. These activities require potential users to obtain permission to use the work (through licenses) from the copyright holder. They must identify and contact the copyright holder to negotiate the terms of use and payment of royalty (Guibault & Schroff, 2018). With this aspect of “permission” in mind, potential users may face the risk of copyright infringement if they proceed to use any orphan works without obtaining required authorisation from the copyright holders. In this present context, since the copyright holders of orphan works cannot be reached or located for licensing arrangement, the efforts to exploit orphan works through the said activities will be thwarted by Section 13(1).

The second obstacle comes from the ambiguity of Section 25(2)(a) and (b) of the Copyright Act 1987. The reading of this section reveals that the Malaysian proprietary model recognises the author’s moral rights (i.e., the right of paternity and the right of integrity), and these rights are exercisable at his option via the phrase “no person may, without the consent of the author, do or authorise the doing of any of the following acts”. In other words, the section grants the author some kind of control as to how his works may be identified or dealt with. The section further prohibits the presentation of the works without identifying the author or under a name other than that of the author. It also prohibits any distortion, mutilation, or other modification of the work that significantly alters the work and might reasonably be regarded as adversely affecting the author’s honour or reputation. Be that as it may, the application of the section in the context of orphan works can be problematic. This is because since the authors of the orphan works cannot be identified and located by potential users, the ideal way to respect the moral rights of the works remains questionable as it is not addressed in the section.

The last obstacle arises from the subjective application of Section 13(2)(a) of the Copyright Act 1987. Commonly known as the fair dealing defence, this section exempts certain uses of copyrighted works from any infringement claims if such uses are conducted for research, private study, criticism, review, reporting of current events, or under any other acceptable circumstances (due to the word “including” in the said provision). In this present context, this legal defence might exonerate some unauthorised uses of orphan works. Conceding this premise, the US Copyright Office (2015) and Urban (2012) opined that this legal mechanism might provide room for flexibility, especially in covering new fact patterns such as orphan works. The said argument for the employment of the fair dealing defence is further supported by Urban (2012) where the commentator hailed the legal mechanism as a cost-saving approach, given that the government or the relevant authority is not required to develop a separate licensing system which may incur substantial budgets and costs. This approach will eventually result in a reduction or elimination of administrative and transactional costs, thereby expediting the endeavour to permit the use and re-use of orphan works.

Nevertheless, a careful reading suggests that the application of Section 13(2)(a) is subjective rather than an automatic defence that releases potential users from liability. This is because such defence must always be evaluated using the four-factor statutory test as enshrined in Section 13(2A) (Khaw & Tay, 2017). The said factors are the purpose of the dealing, the nature of the copyrighted work, the amount and substantiality of the portion used, and the effect of the dealing on the potential market. This view was also acknowledged by Nallini J (as she then was) when commenting on the said defence in *Mediacorp News Pte Ltd & Ors v. Mediabanc (Johore Bharu) Sdn Bhd & Ors* [2010] 6 MLJ 657. She mentioned that the practice of other foreign jurisdictions, such as the United Kingdom and the United States, might be taken into consideration when interpreting the fair dealing exception so as to provide a better picture of the same, and that includes the use of a number of factors (the motive of the party in its dealing with the work is also a relevant factor) that can be considered when determining the question of fairness. Overall, in this present context, her suggestion reflects the nature of this legal defence that depends on the abovesaid factors (which is now cemented in Section 13(2A)), thus reflecting the challenging measures that one must consider when dealing with the use and re-use of orphan works.

The above argument for the employment of the fair dealing defence may appear compelling at first blush. However, if viewed from another perspective, the use and re-use of orphan works (being copyrighted works) remains a risky and challenging task as the favourable outcome of using the fair dealing defence is dependent on the four-factor statutory test. Simply put, there is no guarantee of success as potential users are still exposed to a state of uncertainty, which Hansen et al. (2013) viewed as a threat. Furthermore, the fair use defence does not nullify the right of the owner to bring legal suits, and in the event that it happens, the parties relying on Section 13(2)(a) have to go through the necessary hurdles to prove their case in a court of law. While the fair dealing may strike a balance between the copyright owner’s interest and society’s need to progress in the development of creativity and ideas, the employment of this legal defence must be applied with caution. Thus, it is understood that the section is not a default provision that could automatically absolve potential users from liability in their use of orphan works as the court is obliged to determine the case in a context-specific inquiry in light of the four-factor statutory test. Therefore, it can be argued that while the Malaysian copyright regime provides an avenue for potential users to escape the liability from copyright infringement, they are still exposed to the risk of legal suits due to the provision’s subjective application, thereby suppressing their confidence and eventually impeding the efforts to exploit orphan works.

In summary, the above discussion has disclosed the obstacles posed by the Copyright Act 1987 in facilitating the use and re-use of orphan works in Malaysia. To recapitulate, the obstacles stem from (i) the overly protective model of the copyright system, (ii) the nature of Section 13(1)(a)–(f), (iii) the ambiguity of Section 25(2)(a) and (b), and (iv) the subjective application of Section 13(2)(a). While relevant provisions are available in permitting the use of orphan works, they are still insufficient to provide legal certainty to safeguard potential users from prospective liability. As a result, the position of orphan works in Malaysia seems to be in limbo and trapped within the proprietary licensing regime. Thus, before any legislative solution is proposed to close the gaps and address the said challenges, this paper attempts to provide a solution in the form of a policy. In view of this aspiration, the next section will answer the second and final research question, “How do the European Union, United Kingdom, Canada, and India approach the exploitation of orphan works in their policies?” The analysis and findings from this research question are proposed to be the ingredients when formulating a policy-led framework for orphan works. In addressing this question, this research adopted policy analysis to examine relevant orphan work policies from the selected jurisdictions.

Orphan Works Policies In The Selected Jurisdictions: Analysis And Discussions

Preliminary investigation revealed that while the European Union, United Kingdom, Canada, and India have enacted the laws underpinning orphan works, their policies on the exploitation of orphan works are found scattered in consultation papers, Hansards, and law commission reports. Although these policies are piecemeal and do not exist in a single policy document, they lay the foundations of orphan works legislation in the said jurisdictions. This paper conducted a comparative analysis of the policies on orphan works exploitation in the European Union, United Kingdom, Canada, and India (a summary of the comparative analysis is outlined in **Table 1** below). The scopes of comparison are the aims of the exploitation of orphan works, the principles of the exploitation of orphan works, and the strategies of the exploitation of orphan works. The criteria used to distinguish each policy are their similarities, differences, and special feature of the orphan works policies. Following that, the most common feature among the policies is grouped under “Most Common Feature (Similarities)”, the less common feature is placed under “Less Common Feature (Differences)”, while “Least Common Feature (Special/Unique)” describes the least adopted feature among the policies.

Table 1: Summary of the Comparative Analysis of Orphan Works Policies in the Selected Jurisdictions

Scope of Comparison	Most Common Feature	Less Common Feature	Least Common Feature
Aims of the exploitation of orphan works.	Dissemination of knowledge (UK, EU, CAN, IND)	Preservation of knowledge and culture through archiving and cataloguing (EU, UK)	Avoid wastage of intellectual capital (UK); Avoid needless litigation (IND)

Principles of the exploitation of orphan works.	Openness: Promote free movement of knowledge and innovation (EU, CAN, UK, IND)	Fairness: Conduct a balanced exercise by the authority (CAN, UK); Adherence: Instil adherence toward copyright rules (CAN, UK)	-
Strategies of the exploitation of orphan works.	Outbound Open Innovation (i.e., licensing scheme) (UK, CAN, IND)	-	-

Aims of the Exploitation of Orphan Works

The policy examination found that dissemination of knowledge is the most common feature among the policies underpinning orphan works across the selected jurisdictions. This aim has been adopted in the policy documents of all jurisdictions. This is evidenced by the EU Directive on Orphan Works, the 2008 Green Paper on Copyright, and the Communication from the EU Commission, which have called for a mechanism to improve access to orphan works in the EU in promoting the free movement of knowledge (Commission of the European Communities, 2008, 2010; Directive 2012/28/EU). It is also evidenced by the ruling of the Copyright Board of Canada which supports the goal of the orphan works licence to disseminate knowledge from orphan works (Copyright Board of Canada, 2006; Sookman, 2019). Further evidence is provided by the Gowers and Hargreaves Reports which advocate for the use of orphan scientific papers and the creation of educational and creative works from orphan materials for public use (Hargreaves, 2011; Gowers, 2006). Finally, it is also evidenced by parliamentary Hansards in India which recorded their support for the continuous use of orphan works for the benefit of the general public (Rajya Sabha, 2012).

The policy examination also found that preservation of educational and cultural values is a less common feature among the policies underpinning orphan works across the selected jurisdictions. Both EU and UK are the only jurisdictions that incorporate this aim in their policy documents. This is evidenced by the Communication of the EU Commission, which has called for a mechanism to facilitate all processes related to the digitisation and preservation of the European cultural heritage (Commission of the European Communities, 2005). It is also evidenced by the Hargreaves Report, which advocates for the digitisation and preservation of orphan works to keep them from becoming obsolete or deteriorating (Hargreaves, 2011). The policy examination also found that avoiding wastage of intellectual creations and the prevention of unnecessary lawsuits are the least common features of the policies underpinning orphan works. The aim of avoiding wastage of intellectual creations has been adopted in the UK policy document. This is evidenced by the Gowers Report which has consistently recognised the optimal use of intellectual creations in preventing them from going abandoned or unexploited (Gowers, 2006). It is believed that such aim is in line with the goal of copyright law in supporting activities that leverage ideas and knowledge from copyright-protected works, as well as intellectual property for socio-economic benefits (Muhamad Khair et al, 2021). Finally, the aim for the prevention of unnecessary lawsuits has been adopted in the Indian policy document. According to the Parliamentary Hansards, a licensing scheme for the exploitation of orphan works is necessary to reduce unnecessary copyright infringement cases (Lok Sabha, 2012). It is observed that this aim is in line with the principle of respect to the proprietary rights of the right holders. This can be achieved through an orphan work licensing scheme, which aims to legalise the exploitation of orphan works and, in the long run, aid in the avoidance of unnecessary legal actions.

Principles of the Exploitation of Orphan Works

The policy examination established that the principle of openness is the most common feature of the policies underpinning orphan works across the selected jurisdictions. The principle has been adopted in the policy documents of all jurisdictions. This is evidenced by the EU Directive and the Communication of the EU Commission, which urge for an improved and open access to knowledge as well as required cultural heritage

institutions to make digitised orphan works available to the public (Directive 2012/28/EU; Commission of the European Communities, 2010). The aim is also evidenced by the Hargreaves Report and the UK government's response toward the proposal of an orphan works licensing scheme by agreeing that it would create a permissive and conducive environment to do creative business in the UK and permit the relevant parties to generate income from the use of orphan works (Hargreaves, 2011). It is further evidenced by the ruling of the Copyright Board of Canada, which recognises an open and permissive licensing scheme to allow the use of orphan works and mitigate the threats posed by unlocatable copyright owners to the goal of the Copyright Act (Copyright Board of Canada, 2006; Sookman, 2019). Finally, the aim is evidenced by the Parliamentary Hansards of India that propounds similar agreement in unlocking the proprietary copyright regime by introducing a permissive licensing scheme for both published and unpublished orphan works (Lok Sabha, 2012). The policy examination also found that the principle of fairness is a less common feature of the policies underpinning orphan works across the selected jurisdictions. The principle has been adopted in the UK and Canada policy documents. This is evidenced by the Hargreaves Report which condemns the deliberate unauthorised use of orphan works and urges the authorising body in ensuring fair treatment to the absent copyright holders of orphan works when assessing the licence application (Hargreaves, 2011; UK Intellectual Property Office; 2014). This is also evidenced by the ruling of the Copyright Board of Canada which requires the authorising body to be fair in evaluating the licence application by balancing the interests of the public members, prospective users, and the rights of the copyright holder (Copyright Board of Canada, 2006). Lastly, the policy examination established that the principle of adherence to law is another less common feature of the policies underpinning orphan works across the selected jurisdictions. The principle has been adopted in the UK and Canada policy documents. This is evidenced by the Hargreaves Report, which requires prospective users to follow due processes such as diligent search and evaluation by the authorising body before exploiting orphan works (Hargreaves, 2011). It is also evidenced by the ruling of the Copyright Board of Canada which requires prospective users to apply for an orphan works licence before exploiting the same and avoid viewing licensing as an afterthought (Copyright Board of Canada, 2006). It is observed that this aim is in line with the principle of respect of the proprietary rights through the elimination of free rider.

Strategies of the Exploitation of Orphan Works

The policy examination also established that the Outbound Open Innovation strategy is the most common feature of the policies underpinning orphan works in the selected jurisdictions. Open Innovation concept was propounded by Professor Henry Chesbrough through his 2003 and 2006 seminal works, advocating greater use of external resources to accelerate the follow of knowledge as well as the sharing of unused ideas and technologies with outsiders (Chesbrough, 2003, 2006). One of the mechanisms employed under the Outbound Open Innovation strategy which focuses on the outflow of knowledge by sharing the institution's unused and underutilised ideas, knowledge, and resources with other entities through licensing and donation of intellectual property (Chesbrough & Bogers, 2006; Gassmann & Enkell, 2004) The above strategy has been adopted in the policy documents of all jurisdictions, with the exception of the EU. This is evidenced by the emphasis on a special licensing scheme for orphan works in the UK, Canada, and India policy documents; however, there is no evidence that Inbound or Coupled Open Innovation has been adopted in the respective policies. Overall, it is believed that the exploitation of orphan works through the Outbound Open Innovation strategy (i.e., via a licensing scheme) is aligned with the aim to promote openness and permissiveness in the sharing of knowledge and information with members of the public. In summary, the preceding exercise has revealed several key elements of orphan works policies in the selected jurisdictions. These elements have influenced the legislative responses to the orphan works phenomenon in the respective countries. For instance, the principle of adherence to law (via diligent search requirement) has been a focus in the United Kingdom, Canada, and India, thus prompting the establishment of an orphan works licensing scheme in these countries.

CONCLUSION

This paper examined the shortcomings of the Malaysian copyright law in terms of facilitating the management and exploitation of orphan works. The analysis found that the Malaysian copyright law is still vague and restrictive, thus creating significant obstacles for potential users wishing to use and re-use orphan works. The ambiguity surrounding fair dealing exception further complicates the efforts in managing and reusing these materials in Malaysia. As a result of these challenges, potential users have two choices, either (i) to drop

orphan works from their activities, or (ii) to proceed with the exploitation of the same. Both options are impractical and risky as the former can result in the abandonment of orphan works while the latter exposes potential users to legal actions if the right holders reappear in the future. Based on the aforementioned observations, this study proposed a policy for the management and exploitation of these materials in Malaysia. A number of key features are proposed based on an analysis of orphan works policies currently in place in the European Union, the United Kingdom, Canada, and India. For example, the proposed policy should prioritise the dissemination of knowledge derived from orphan works. The proposed policy should also encourage prospective users to look for the work's copyright holder before using it and to keep a proper record of the search results. The ultimate goal is to strike a balance of rights by (i) respecting the rights of the unlocatable and unidentified copyright holders, and (ii) permitting the management and exploitation of orphan works within the limitation of the Copyright Act 1987. In the absence of a legislative solution from the legislator, it is hoped that the proposed aspiration policy will allow members of the public to manage, use, and re-use orphan works without fear of legal ramifications.

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