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Orphan works: An examination of Indonesian and Malaysian copyright law

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Abstract

Introduction to the Problem: This paper reports findings from research on orphan works in Indonesia and Malaysia. "Orphan works" are copyright-protected works whose copyright holders cannot be contacted or identified by prospective users. Permission to use is essential under the copyright law, but it cannot be obtained in the orphan works context. Presently, there have been no recorded cases of orphan works in either jurisdiction. This situation is further exacerbated by the lack of policies and laws in Indonesia and Malaysia regarding orphan works.
Purpose/Study Objectives: On the above basis, this study sought to address the following research questions: (i) What is the current legal treatment to the issue of orphan works in Indonesia and Malaysia? and (ii) How can access to and exploitation of orphan works be legally authorised in Indonesia and Malaysia?
Design/Methodology/Approach: The research design was exploratory as this study aimed to examine the current legal treatment of orphan works in light of both jurisdictions' copyright statutes. The doctrinal analysis, as part of normative legal research, was used to answer the first research question by examining Indonesia's Law Number 28 of 2014 and Malaysia's Copyright Act 1987. The literature-based research was employed to answer the second research question by extracting information from secondary sources such as reports, textbooks, and journal articles.
Findings: This study discovered that Indonesia and Malaysia's existing laws are insufficient to support potential users in exploiting the orphan works. Specifically in Malaysia, the orphan works scenario might be addressed by Section 31 of the Copyright Act 1987, but further improvements could be made to this provision to expand its scope and application. Following that, this study made numerous strategic proposals, including defining a policy for the use of orphan works, establishing a statutory definition of orphan works, and developing an orphan works licensing scheme.
Paper Type: Research Article
Keywords: Intellectual Property; Copyright; Orphan Works; Orphan Works Licensing Scheme

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Introduction

"Orphan work" refers to a work that is still copyright-protected, but the prospective users are unable to locate, reach, and contact the work's copyright owner for copyright clearance (US Copyright Office, 2006) or to identify the lawful copyright owner of a work (Lu, 2013). While the orphan works problem has existed since the inception of copyright law, Greismann (2012) and Sarwate (2008) opine that the phenomenon only began to attract attention around the 1990s. This problem arises from the failure to identify and communicate with the copyright holders to obtain permission to utilise their work (Lu, 2013). It is also exacerbated by the attitude of the rightholders who do not intend to firmly manage the rights in their work or be discovered by prospective users (Ogbodo & Ugwu, 2020). Three indicators were introduced by Hansen (2016) to assist in elucidating the nature of orphan works. Firstly, the work in question must still be copyright-protected because out-of-copyright works can be used freely by anyone. Secondly, the potential users fail to get the permission from the copyright holder, either because they are unable to identify the lawful copyright owner or cannot locate or contact them despite efforts to do so. However, the "orphan" status of a work will end once the rightholder reappears. Finally, the orphan work situation frustrates many interested parties because users of copyrighted works would usually require the permission of the copyright holders. Thus, any attempts to legalise the use of orphan works would benefit a lot of parties by ensuring the inhibited cultural, educational and knowledge values from these orphan materials are preserved and leveraged (Ahmed & Al-Salihi, 2019; Khair et al., 2021)

Evidently, the issue of orphan works extends to various corners of the world. For example, Post-World War II, the discovery of photographs of Jewish families in an abandoned hotel room posed a unique challenge (Sarwate, 2008). These historically significant images found a home in the US Holocaust Museum, yet the quest for permission to use them was hindered by the unidentified copyright holders. A notable case in China involves the donation of the sole existing copy of the 1940s film "Fake Phoenix" to the Shanghai Movie Museum (Li, 2018). Unfortunately, the restoration process faced challenges, primarily stemming from the museum's uncertainty about the legitimate copyright holder of the film. Similarly, in the United States, the grandson of Billy Mize encountered obstacles while planning to feature his grandfather's music in a documentary (Crispino, 2019). Identifying the copyright holders for the music proved to be a daunting task, exacerbated by the nonexistence of the original record companies that once held the rights.

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Despite growing international awareness of the orphan works problem, there remains a practical gap in legal mechanisms that enable lawful use of such works, particularly for memory institutions, educators, and documentary filmmakers. Users face significant legal uncertainty and risk because the current laws in many jurisdictions do not provide a clear process for dealing with orphan works (Arman, 2023; Mausner, 2007). This also reflects an ideal versus actual disparity—copyright laws are meant to balance the protection of authors with public access to knowledge and cultural heritage, but in practice, the inability to locate copyright holders leads to unnecessary blockage of socially beneficial uses (Arman, 2023; Khair et al., 2024). The absence of practical legal mechanisms undermines this balance and highlights the need for focused legal reform in affected jurisdictions (Ahmed & Al-Salihi, 2020; Arman, 2023; Mausner, 2007).

To date, Malaysia and Indonesia have no reported orphan works cases either through decided cases or formal reports from governmental agencies. However, this absence of reported cases or formal reports does not mean that the orphan works problem does not exist. Here are the reasons. Firstly, preliminary findings from interviews with Malaysia's major memory institutions suggest that orphan works may be found in between 1% and 20% of their collections (Khair, 2022). Though this was just a prediction, and no formal study has been conducted to precisely determine the size of orphan works in both jurisdictions, the above findings indicate a symptom of the problem that is worth noting. Secondly, just like other jurisdictions, Malaysia and Indonesia are not exempt from experiencing the orphan works dilemma. Both countries follow the same standard for copyright subsistence—automatic protection upon creation—as prescribed by Article 5(2) of the Berne Convention. Since orphan works are, by definition, copyrighted works whose rights holders cannot be identified or located, the potential for their existence in both countries is high (Khair, 2023; Khair et al., 2024; Wilkin, 2011). In other words, Malaysia and Indonesia are not immune to this issue merely because there are no reported orphan works cases, either through decided cases or formal reports from governmental agencies. While there are no reported cases or formal documentation on orphan works in both jurisdictions, this absence does not diminish or undermine the need for scholarly inquiry. On the contrary, it highlights the importance of academic engagement to uncover and address issues that may be overlooked in practice. This research, therefore, plays a crucial role in identifying and contextualising the orphan works problem in these jurisdictions and contributes toward developing informed legal and policy responses before the issue becomes more pronounced.

While this study focuses on addressing the legal and policy issues surrounding orphan works in Malaysia and Indonesia, certain boundaries and constraints must be acknowledged. This research is limited to orphan works under copyright law and does not cover orphan drugs which fall under patent law, nor unexploited patents - a separate issue that has been more comprehensively addressed under legal regimes like the Bayh-Dole framework. Methodologically, this study relied on literature-based

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research and doctrinal legal analysis, which were sufficient for the present research. However, future research could adopt a more empirical approach through semi-structured interviews, which would require significant grant support and stakeholder collaborations (e.g cultural heritage institutions, regulators, and governmental agencies). Data limitations are another constraint: there is a lack of reported cases or formal governmental data on orphan works in either jurisdiction. Despite this, the research proceeds by drawing reasoned inferences from legal gaps and scholarly literature. Further studies could aim to quantify the number of orphans works in Indonesia and Malaysia, which would aid in contextualising the issue more precisely and inform better policy and legal development.

Guided by the above concern, this paper aspires to explore this area, particularly by examining the copyright legal framework and its treatment to orphan works in Indonesia and Malaysia. Two research questions were formulated for this purpose, namely (i) “What is the current legal treatment to the issue of orphan works in Indonesia and Malaysia?” and (ii) "How can access to and exploitation of orphan works be legally authorised in Indonesia and Malaysia?". The following section will describe the methods used by this study to answer the research questions.

Methodology

The research design was exploratory because the main objective was to examine the current legal treatment of orphan works in light of both jurisdictions' copyright statutes and to explore potential short-term and long-term solutions to address the identified gaps. We used two research methods, namely doctrinal analysis and literature-based research.

The doctrinal analysis, as part of normative legal research, was used to specifically answer the first research question, “What is the current legal treatment to the issue of orphan works in Indonesia and Malaysia?”. This method is particularly suited for examining and interpreting the existing legal provisions and underlying principles of copyright law in both jurisdictions. As supported by Abdullah (2018), and Disemadi (2022) doctrinal research facilitates a systematic analysis of legal texts, enabling (among others) the identification of ambiguities, loopholes, or inconsistencies that may affect the law's practical effectiveness. The insights gained through this method form a critical foundation for proposing improvements or legal reforms aimed at enhancing the clarity, coherence, and applicability of the law (Abdullah, 2018; Majeed et al., 2023). Given the study’s objective – to assess and clarify the current legal position on orphan works in both jurisdictions, doctrinal research was deemed the most appropriate and rigorous approach for analysing the relevant statutory frameworks—specifically by examining and comparing the provisions of Indonesia’s Law Number 28 of 2014, Indonesia’s Regulation Number 56 of 2021 concerning the Management of Song and/or Music Copyright Royalties, and Malaysia’s Copyright Act 1987.

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Concurrently, the researchers also conducted literature-based research to answer the second research question, "How can access to and exploitation of orphan works be legally authorised in Indonesia and Malaysia?" This method was used to extract information from secondary sources such as reports, textbooks, and journal articles, enabling a comparison of advances, best practices, and future directions (Ebidor & Ikhide, 2024; Ojo, 2021; Snyder, 2019). Drawing on the insights from this analysis, we proposed several strategies that both jurisdictions could use to close the loopholes and eventually allow the orphan works to be used legally in both jurisdictions. The findings for this research will be reported in the section that follows.

Results and Discussion

Gaps in the Legal Framework on Orphan Works in Indonesia and Malaysia

Regarding the first research question, "What is the current legal treatment to the issue of orphan works in Indonesia and Malaysia?", we found that the current legal framework in both jurisdictions is insufficient to legalise any unauthorised use of orphan works. Table 1 summarises the findings (which are also discussed in the following sections):

Table 1. Summary of findings

Areas of comparison	Indonesia	Malaysia
Definition of orphan works.	No statutory definition, but Article 39 of Law Number 28 of 2014, and Article 15 of Regulation Number 56 of 2021 Concerning Management of Song and/or Music Copyright Royalties maybe relevant.	No statutory definition, but Section 26(4)(c), and Section 31(3)(b)(ii) of the Copyright Act 1987 maybe relevant.
General exception of fair use / fair dealing.	Article 44 until Article 49 of Law Number 28 of 2014.	Section 13(2)(a) read together with Section 13(2A) of the Copyright Act 1987.
Specific exception for orphan works.	No specific exception.	No specific exception for orphan works, but Section 31 of the Copyright Act 1987 might be relevant.

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Definitions of Orphan Works

The justification for granting copyright protection is based on Locke's Labour Theory, which states that the fruits of one's labour should be protected and that no one should be allowed to exploit his work without his prior permission (Fisher, 2001; Khair & Hashim, 2020). In Malaysia, under Section 7(3)(a) and (b) of the Copyright Act 1987, a work is automatically protected by copyright if it is original, recorded or written down in material form, and satisfies the requirement for qualification, as illustrated in Honda Giken Kogyo Kabushiki Kaisha v Allied Pacific Motor (M) Sdn Bhd [2005] 3 MLJ 30 (HC). In comparison, Indonesia's Article 1 of Law Number 28 of 2014 grants copyright to the creator of a work based on the declarative principle. The work must still originate from the creator, fixed in a tangible form, and most importantly, publicly declared as his work (Dwipo, 2018; Noor, 2021). Despite the above legal basis, we found that neither jurisdiction provides a statutory definition of orphan work. However, Section 31(3)(b)(ii) of the Copyright Act 1987 can be interpreted as effectively defining orphan works as it states that, "the applicant, after due diligence on his part, is unable to trace or ascertain the owner." Although Section 31 of the Copyright Act 1987 primarily addresses licensing for reproduction and publication of translation of a literary work in any other language, it is submitted that the wording of Section 31(3)(b)(ii) aligns with the concept of orphan works as recognised in other jurisdictions.

We also discovered that both Indonesia and Malaysia mention "unknown authors" in their copyright statutes - which "may be relevant" to orphan works situations. Though there is a distinction between the concept of "authorship" and "ownership", this relevance arises as some orphan works might involve cases where the copyright holder is also the author (i.e retaining copyright without transferring it to anyone else). Article 39 of Chapter V of Indonesian Law Number 28 of 2014 highlights scenarios in which the State serves as trustee and copyright holder for works with unknown authors. One of them occurs when the author is unknown, and the work has not been published. In such a case, the State will become the copyright holder, but only as a trustee – due to the operative phrase, "for the benefit of the Author". Simply put, Article 39(1) does not confer copyright ownership on the State but rather serves as a trustee. Otherwise, if the works have been published, but the author is unknown or a pseudonym only, the right holder is held by the party who made the announcement for the benefit of the author as per Article 39(2). If the work of an unknown author has been published and the party who made the announcement is also unknown, the State will be the holder of the right as per Article 39(3). In addition, the duration of protection for an unknown author held by the State lasts for 50 years since the first announcement was made, as stipulated in Article 60(2).

A similar problem also exists in Article 15 of Regulation Number 56 of 2021 Concerning Management of Song and Music Copyright Royalties. This provision provides that for royalty of a copyrighted work whose holder is unknown may be kept

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by "*Lembaga Manajemen Kolektif Nasional* (National Collective Management Agency)" for 2 years or will be utilised as a reserve fund if the copyright holder of such work remains unknown after the lapse of said period. However, Regulation Number 56 of 2021 and the relevant ministry's regulations, remain silent as to the parameter and requirements to be regarded as "unknown author". Overall, the difficulty with Article 39 and Article 15 is that it does not properly define the orphan work situation i.e when a work becomes "orphan" that further requires the State to act as trustee and copyright holder. This element is missing from the specified provisions. Furthermore, the process of acquiring authorisation to use the works outlined in Article 39 remains unclear, rendering this provision ambiguous, incomplete, and inefficient in addressing Indonesia's orphan works situation. The law only states that the copyright will be held by the State for "the benefit of the author", without further explanation on methods to safeguard the interests of the unknown author.

The situation in Malaysia is also similar. Section 26(4)(c) of Malaysia's Copyright Act 1987 also addresses the situation of unpublished work with an unknown author. Even though this provision deals with such a scenario, it is observed that the application of the said section is still restrictive. Detailed analysis of Section 26(4)(c) reveals that this section only covers unpublished works with unknown authors who are presumed to be citizens of Malaysia. Thus, it effectively excludes published orphan works as well as unpublished orphan works of which the authors are non-Malaysians. Besides being restrictive, this section, particularly Section 26(5) also automatically revokes the user's rights to exploit the unpublished orphan works once the unknown author is known, leaving the users of the works in a state of uncertainty. Due to the restrictive and uncertain nature of Section 26(4) of Malaysia's Copyright Act 1987, it is observed that this section fails to promote the use and re-use of the orphan works in Malaysia.

Overall, the findings in this area support the need for a statutory definition of orphan works in Indonesia and Malaysia, just as other jurisdictions (e.g., the UK, Canada, and India) have incorporated their own definitions in their respective copyright statutes as a response to this issue. This further emphasises the necessity of an express statutory provision on orphan works. As discussed and agreed upon by legal scholars and commentators such as Ahmed & Al-Salihi (2020), Arman (2023), Bainbridge (2025), and Khair et al. (2024), the core legal issue surrounding orphan works is not about questioning their copyright status (whether such works are protected by copyright or not), but rather about facilitating lawful access and use when the copyright owner cannot be identified or located. The prevailing legal opinion recognises that users should be able to rely on a clear statutory framework to legitimately make use of orphan works without fear of infringement. The absence of such a statutory definition would only render the use of orphan works either unlawful or severely restricted, thereby discouraging beneficial uses and stifling creativity and innovation. Therefore, the incorporation of a statutory definition is not merely procedural but is critical to ensuring a balanced and functional copyright system.

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General Exception (Fair Use and Fair Dealing Defences)

We discovered that both jurisdictions have a mechanism in place that considers certain uses of copyrighted works to be non-infringement. In Malaysia, this mechanism is known as the fair dealing defence, encapsulated in Section 13(2)(a) and (b) read with Section 13(2A) of the Copyright Act 1987. According to Azmi (2021), the Malaysia's fair dealing model is a hybrid system of fair dealing and fair use system by virtue of the insertion of the four-factor test via Section 13(2A) of the Copyright Act 1987. Nevertheless, Khong (2021) suggests the Malaysian legislature intended to incorporate features of the American fair use doctrine without formally adopting its label, similar to Singapore in 2004, thus displacing the traditional English fair dealing framework under Section 13(2)(a) of the Copyright Act 1987. In Indonesia, such a mechanism is known as the fair use defence. It is encapsulated in Article 44 until Article 49 of Law Number 28 of 2014 and has been lauded as a good mechanism to spur creative activities through other people's creations (Manullang et al., 2023). While the said mechanisms are available, we found that they are not exclusively tailored for orphan works, as they may cover any use of copyright-protected works, which includes orphan works. Generally, the application of the fair use and fair dealing defences is subject to four conditions, namely (1) the purpose of use, (2) the nature of copyrighted works, (3) the amount and substantiality of the portion used, and (4) the effects of the use upon the potential market of the copyrighted works. If the infringer effectively invokes the fair use defence, they would be absolved of any allegations of copyright infringement (Leval, 1990).

The discussion about the possibility of using the fair use defence generates mixed responses. The first group supports the application of these defences to the use of orphan works. US Copyright Office (2006) for example, acknowledged the possibility of expanding its application to new issues such as orphan works. Echoing the US Copyright Office, Urban (2012) emphasised that the fair use defence is still a suitable mechanism to cover unauthorised use of orphan works because the court cannot simply decide it as an infringement but must instead evaluate each situation in light of the four conditions mentioned above. Especially in the 21st century where mass digitisation of works has become essential, challenges and opportunities presented can only be addressed with the support of the fair use doctrine. For example, in 2014, the US Court of Appeals (Second Circuit) in Authors Guild v HathiTrust had recognised the fair use doctrine to permit mass digitisation, and the use of orphan works by libraries in appropriate circumstances (Butler, 2023). Similarly in 2015, the US Court of Appeals (Second Circuit) in Authors Guild v Google unanimously upheld the lower court's decision on fair use, ruling in favour of Google. The court held that the Google Books Library Project, which involved digitising millions of books (including copyright-protected works such as orphan works), was protected by the US fair use doctrine. The judge opined that Google's scanning of the books was transformative and that the public benefits of the project outweighed any potential harm to the copyright holders.

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In summary, the application of fair use defence cannot simply be dismissed because these defences can still cover certain uses of orphan works as long as the relevant parties can prove their cases in light of the four-factor test. Additionally, with a basic understanding of the application of fair use defence, potential users can continue to use the orphan works while simultaneously searching for the copyright holder, thereby eliminating any costs relating to licensing scheme, if any (Urban, 2012).

The second group is sceptical of the scope of its application. Hansen (2016) and Meeks (2013) for example, warned that the fair use defence may not be applicable in certain unauthorised uses of orphan works because there is no guarantee that it will cover commercial parties or uses. Simply put, the scope of this legal defence must still be assessed against the purpose of the use in question i.e either commercial or non-commercial purposes. Hence, the application of the fair use defence remains ambiguous and restricted. It is worth noting that some transformative uses of orphan works may be profit-driven (e.g., which may contradict factors 1 and 4 of the fair use defence on "the purpose of use" and "the effects of the use on the potential market for the copyrighted works"). As a result, movies adapted from suspected orphan novels or using orphan materials would have a difficult time claiming the fair use defence. In summary, the application of the fair use defence to unauthorised use of orphan works, while possible, remains ambiguous and limited as it does not simply protect commercial-based organisations and profit-based uses of orphan works. Simply put, relying on a litigation-based defence to use an orphan work is risky, as it leaves the user vulnerable to legal challenges if the copyright owner resurfaces, whereas obtaining state-granted permission through a licensing-based model offers greater legal certainty and protection. Furthermore, being a legal defence, this mechanism does not preclude the copyright owner from bringing legal action against the infringer. This observation is derived from the nature of fair use / fair dealing doctrine as a legal defence itself. In other words, if legal action is taken, the infringer is still under a duty to demonstrate that this legal defence protects the unauthorised use of orphan works while potentially infringing. Such a party must still go to the court and defend the case. In total, despite its subjective application, the fair use defence may not be viable enough to protect potential users or eliminate the threat of litigation.

Specific Exception for the Use of Orphan Works

In terms of the specific exception for the use of orphan works, the best example that we referred to is the EU's directive for the use of orphan works by cultural and heritage institutions. The EU Directive is specifically designed to permit cultural heritage institutions in the European Union to deal with orphan works kept in the repositories. The United Kingdom for instance, had implemented the EU Directive by virtue of the Copyright and Rights in Performances (Certain Permitted Uses of Orphan Works) Regulations 2014 (which had later been omitted pursuant to the Intellectual Property (Copyright and Related Rights) (Amendment)(EU Exit) Regulations 2019).

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On this note, we discovered that neither Indonesia nor Malaysia has such an exact mechanism in their copyright statutes.

Be that as it may, although it is not exactly similar to the above EU Directive model, Section 31(3)(a) and Section 31(3)(b)(ii) of the Malaysian Copyright Act 1987 can potentially be seen as a specific mechanism in allowing the use of orphan and abandoned works. These provisions specifically deal with the translation of the said materials (both in published and unpublished forms, but limited to literary works), subject to the issuance of a licence from the Tribunal, which can be applied by any person, including cultural heritage institutions. In consonance with Khong (2007) who advocates for orphan and abandoned works to be released from their state of neglect, such a model could be employed to tackle situations where licensing cannot be obtained because the copyright holder no longer intends to commercialise the works.

Strategies to Improve Access and Use of Orphan Works in Indonesia and Malaysia

Regarding the second research question, "How can access to and exploitation of orphan works be legally authorised in Indonesia and Malaysia?", we benchmarked practices from other jurisdictions like Singapore, Canada, the UK, the EU, and India. We further proposed four strategies, which are divided into two categories: (i) no legislative intervention (Proposal 1 and Proposal 2), and (ii) with legislative intervention (Proposal 3 and Proposal 4), i.e. those that require the legislator to amend the relevant laws.

Proposal 1: Awareness and public consultation

As Ogbodo & Ugwu (2020) pointed out, the attitude of the creators of the works who appear to be hesitant to maintain a connection with his work also contributes to the rise of orphan works, making it even more important to raise awareness among them. Raising awareness about their rights (e.g economic and moral rights as right holders), is a key strategy to reduce and minimise the problems associated with orphan works. Governmental agencies such as Intellectual Property Corporation of Malaysia (MyIPO) and *Direktorat Jenderal Kekayaan Intelektual* (Indonesia's Intellectual Property Office) may lead this initiative being the bodies that oversee intellectual property matters in their respective countries. The following step is to launch a public consultation. This is critical to obtain input and responses from parties who may be impacted by potential solutions to orphan work issues. Closer to home, Singapore, for example, launched a public consultation in 2019, and their report stated that Singapore is considering using a limited liability-based approach (among others) to address the orphan work issue in their country (Ministry of Law Singapore, 2019). The limited liability approach is like the US's proposal, which limits the remedies available to copyright holders when an infringer has conducted a reasonably diligent search for the work's author before using it. However, after receiving feedback from

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the public and relevant stakeholders, Singapore considered expanding their exceptions for the cultural and heritage institutions. Additionally, the country encouraged reliance on the fair use exception and promoted mediation as a preferred alternative to court proceedings.

Proposal 2: A policy for the use of orphan works

A policy is the simplest strategy because it does not require a legislative process and can be done internally by organisations and implemented immediately at the organisational level. In Canada for instance, there is a Policy on Copyright Management of Canada issued by the federal institution known as Library and Archives of Canada. The policy, among others, announces their commitment to ensure consistent practices in managing copyright and apply a risk-managed approach to the management of access to orphan works (Government of Canada, 2015). We recommend that relevant institutions in Indonesia and Malaysia that may keep orphan works in their collections (e.g cultural & heritage institutions) develop their own policy for the use of orphan works. This proposal is critical in demonstrating the organisation's good faith and commitment to respecting one's rights and following the law (Khair et al., 2023). It is also important to note that while such a policy would not carry the force of law, it can still serve as an important measure to demonstrate the organisation's good faith, ensuring users are acting responsibly and mitigating risks when dealing with orphan works kept in their institutions. This is consistent with the concern raised by Arthur et al. (2024) and Bayrou (2022) about the importance of developing a clear guideline in dealing with orphan works instead of merely relying on the legal flexibility surrounding their use. In other words, a policy and accompanying guidelines can act as a risk mitigation tool, offering a defensible position for prospective users or institutional stakeholders in the event of legal action initiated by a reappearing copyright owner. By proactively setting out procedures and documentation standards for diligent search and responsible use, such measures can help reduce uncertainty and foster a more legally cautious yet accessible approach to utilising orphan works.

Proposal 3: Statutory definition of orphan works

It is necessary to provide a definition and clarify the meaning of certain phrases in the legislation (Rose, 2017). In this present study, "orphan work" is a special phrase that only applies in the context of copyright law, thereby requiring a definition for this terminology in the copyright statutes of Indonesia and Malaysia. The crux of orphan works is the inability to search for and locate the copyright holder as well as to identify the lawful copyright owner for copyright clearance. However, the search standards in each jurisdiction differ. The EU (by virtue of Article 2 of the Directive 2012/28/EU on Certain Permitted Uses of Orphan Works), the United Kingdom (by virtue of Regulation 2 and Regulation 4 of the Copyright and Rights in Performances (Licensing of Orphan Works) Regulations 2014, and India (by virtue of Section 32 (4)(b) of The Indian Copyright Act 1985 have adopted the "diligent search" standard,

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whereas Canada follows the "reasonable effort" standard (by virtue of Section 77(1) of the Copyright Act 1985 (Canada). In comparison to the EU, the UK, and India, the Canadian approach to search with "reasonable efforts" appears to be more lenient, as it will not impose unnecessary search costs on prospective users (De Beer & Bouchard, 2010).

However, for the proposed definition of orphan works in Indonesia and Malaysia, the approach of the EU, the UK, and India is suggested to be used. The reason is this. Terminologically, the phrase “diligent search” implies a comprehensive and systematic search effort, whereas the phrase “reasonable search” suggests a practical approach that meets the standard of what an average and prudent person would consider sufficient in similar circumstances. Schroff et al. (2017) also noted that in practice, the UK Intellectual Property Office interprets “diligent” as “exhaustive”, placing a heavier burden on the search process. From a theoretical standpoint, the requirement for a “diligent search” aligns with the natural rights perspectives—particularly John Locke’s labour theory of property. According to this view, copyright is granted on the basis that an author, through their intellectual labour, transforms common resources into original creations, thereby acquiring a just claim to the fruits of that labour—a justification which, as Professor Fisher notes, forms the theoretical foundation of copyright law (Fisher, 2001).

The above perspective reinforces the principle that a rights holder’s entitlement over his work (including orphan works) remains intact and valid even when they are difficult to locate (Sarid & Ben-Zvi, 2023). Therefore, the obligation to undertake a diligent search is not merely a procedural requirement, but a reflection of the broader ethical commitment to respecting one’s rightful ownership over a work. Consequently, this moral foundation justifies a higher threshold for search obligations: if one seeks to use a work, one must make a genuinely thorough effort to locate its rightful owner before treating it as available. Therefore, the standard for a diligent search should be robust and exacting.

Considering the above, it has been observed that a full-fledged search, i.e., diligent search, may help shape the behaviour of prospective users by not condoning deliberate and unlawful uses of orphan works under the guise of "reasonableness," which can be abused by lawbreakers. Furthermore, orphan works licensing schemes in the United Kingdom and India cover both published and unpublished orphan works. In contrast, Canada's system only applies to published orphan works. Nevertheless, for the purposes of the proposed definition of orphan works in Indonesia and Malaysia, the approach of the United Kingdom and India is preferable due to its broad coverage. While removing unpublished works from exploitation strategies symbolizes respect for the author's privacy (De Beer & Bouchard, 2010), it will limit the use of the licensing scheme, suppress the potential of leveraging the values of unpublished works (due to non-use), and upset users who genuinely want

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to use the unpublished materials. As a result, Indonesia and Malaysia's proposed definition of orphan works includes both published and unpublished works.

Thus, we propose the following definition of orphan work to be included in the copyright statutes of Indonesia and Malaysia: "Orphan work" means published and unpublished work, of which copyright subsists, but the copyright owner cannot be identified, or if identified, cannot be traced after a diligent search is performed. For the purposes of consistency, the above definition is to be used across the relevant provisions of the statute (e.g fair use exception), regulations, and orders (e.g orphan works licensing scheme).

Proposal 4: Orphan works licensing scheme

The final proposal is to create a licensing scheme for the use of orphan works. Licensing is a contract between persons in which the right holder allows any interested parties to exploit his intellectual property without relinquishing his title and goodwill in the same (Adesanya, 2023; Tosato, 2018). Through licensing, knowledge, benefits, and resources can be shared with other entities while providing benefits to the right holders and licensees (Bogers et al., 2012; Chesbrough & Bogers, 2014; Gassmann & Enkel, 2004). In the context of the orphan works licensing scheme, an organisation is designated as the governing body and custodian of the relevant matters (e.g licence issuance and royalty safekeeping). The use of a licensing model for the exploitation of orphan works attracts diverse directions.

The major argument against its implementation is the lengthy process and excessive costs that prospective users must incur. Urban (2012) and Mausner (2007) for instance argued that the process and costs for locating the copyright owner can be time-consuming and expensive. Martinez and Terras (2019) also pointed out that the fees for applying for a licence for commercial use of an orphan work can be prohibitively expensive, as demonstrated by the UK Orphan Works Licensing Scheme. While this may not be an issue for parties with sufficient funds and means, this paper posits that it would undoubtedly be a barrier to prospective users with limited budget, particularly non-profit organisations. To address this, a more balanced and fair approach would involve establishing a separate guideline: (i) conducting a diligent search to identify a yet-to-be-known copyright owner, and (ii) conducting a diligent search to locate a known copyright owner. This proposal would better accommodate applicants from diverse backgrounds by providing clear pathways for different search scenarios.

However, utilising a licensing model for orphan works is considered to have more benefits than potential risks for the users involved. Gompel and Hugenholtz (2010), as well as Hargreaves (2011) for instance argued that the orphan works licensing scheme may reduce the risk of being sued by reappearing copyright owners, thereby providing a legal certainty to prospective users. This is because the licence will only be issued by the authority once the applicant meets the application requirements (e.g

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attempt to locate the copyright owner prior to filing the application). The licensing mechanism also benefits the reappearing copyright owner themselves by saving them time in claiming their royalties from the authority. On this note, Walker (2014) argued that collecting royalty payments would be faster and less expensive than filing a lawsuit and seeking damages for copyright infringement in court.

In view of the above, considering its numerous benefits outweighing the risks, we propose the use of a licensing model for the exploitation of orphan works in Indonesia and Malaysia. The proposed licensing model would allow for activities such as commercial and non-commercial reproduction, as well as transformative use, thereby enabling greater access to and utilisation of orphan works. This proposal aligns with a more recent perspective on its execution as well. According to Ahmed and Al-Salihi (2020) the centrally granted licence is the best approach for orphan works because the government will manage and deal with licencing applications fairly, reducing the possibility of biased decisions. Echoing this, Sarid and Ben-Zvi (2023) also favour the use licensing strategy in maximising the leveraging of cultural and social value from orphan works.

It has been discovered that most characteristics of orphan works licensing schemes in the United Kingdom, Canada, and India are similar and thus would be best adapted. Orphan works licences are granted under the laws of the United Kingdom, Canada, and India to an agency in charge of intellectual property matters in their respective jurisdictions. The reason for this is obvious: putting orphan works matters under one management ensures efficiency and transparency. In the United Kingdom, Regulation 6 of the Copyright and Rights in Performances (Licensing of Orphan Works) Regulations 2014 gives the Comptroller (authorising body) the authority to issue orphan works licenses. Section 77 of the Canadian Copyright Act of 1985 empowers the Copyright Board of Canada, whereas Section 31A of the Indian Copyright Act of 1957 empowers the Appellate Board of India. For this present study, the power to issue such orphan works licences in Malaysia and Indonesia is proposed to be vested in MyIPO and the *Direktorat Jenderal Kekayaan Intelektual* (Indonesia's Intellectual Property Office), respectively. Before granting orphan works licenses to users, the United Kingdom, Canada, and India require the applicants to satisfy the requirement of a search. In the United Kingdom, Regulations 2 and 4 of the Copyright and Rights in Performances (Licensing of Orphan Works) Regulations 2014 permit any interested parties to apply for an orphan work licence subject to the fulfilment of the diligent search requirement. The same is true for Canada and India under Section 77(1) of the Canadian Copyright Act 1985 and Section 32(4)(b) of the Indian Copyright Act 1957, respectively.

Conclusion

This study investigated the current legal position on the issue of orphan works in Indonesia and Malaysia by examining Law Number 28 of 2014 and the Copyright Act

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1987, respectively. Summarily, we found that Indonesia currently lacks a specific mechanism to allow the use of orphan works. In contrast, the orphan works situation (including abandoned works) might be covered by Section 31(3)(b) of the Copyright Act 1987. The said provision deals with applications to the Tribunal for licences to translate and publish literary works when the applicant, despite diligent efforts, cannot locate or ascertain the owner. However, the scope of this section could potentially be expanded to broaden the range of works (rather than focusing solely on literary works) and include other activities, such as reproduction and transformative use. Additionally, while mechanisms such as the fair use defence are available in both jurisdictions, they are not specifically tailored for unauthorised uses of orphan works, thereby exposing potential users to legal risks of being sued by reappearing copyright holders. Hence, policymakers and legislators in both jurisdictions should devise several solutions to address this issue.

On this score, we proposed the following course of action. Firstly, provide a statutory definition of "orphan works" to give a conclusive understanding of this issue. Secondly, provide a specific exception for the use of orphan works by cultural heritage institutions. The EU Directive 2012 on the use of orphan works is the perfect example of this suggestion. Thirdly, formulate a non-exclusive licensing scheme to cover both non-commercial and commercial use of orphan works. The UK, Canada, and India's orphan works licensing schemes are the perfect model to follow. For the third course of action, we suggest conducting an in-depth study on developing a comprehensive licensing scheme for orphan works by taking into account inputs from the relevant governmental agency, stakeholders, and the public. The proposed licensing model should also account for the intended use (whether commercial or non-commercial), the best method for determining licensing fees and royalties, as well as the duties to uphold the moral rights of the author.

The implications of this comparative study are also worth mentioning. This study broadens the discussion on orphan works with a focus on Indonesia and Malaysia. This paper contributes to the forum by analysing the current state of the legal treatment of the issue and providing both immediate and long-term solutions. Further, despite differences in the two countries' legal systems, this study remains relevant to the local context. This is because orphan work is a global issue whose main cause stems from the same international legal instrument, i.e the Berne Convention, of which Indonesia and Malaysia are members. The present study also has managerial implications by informing various parties in the copyright ecosystem (which include authors, industry players, and stakeholders) about the value and importance of managing their intellectual property portfolios. As a final note, while the law has yet to resolve the ultimate solution, whether to regard it as public domain works or continue to uphold individual rights (Lieberman, 2024), we advocate for proper management of intellectual property portfolios, which would significantly reduce the legal risks associated with using potentially risky materials such as orphan works.

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