

# Navigating Copyright: Strategies for Managing Orphan Works in Cultural and Memory Institutions in Malaysia

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## ABSTRACT

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"Orphan works" are works (such as essays, songs, photographs, paintings, and sculptures) that are still copyrighted but cannot be contacted or identified by prospective users. While permission to use is essential in copyright law, it cannot be obtained, particularly in the context of "orphan works". Several international organisations have attempted to estimate the size of orphan works. In the United Kingdom, for example, the Collections Trust and Strategic Content Alliances surveyed 500 institutions and estimated that their collection contains approximately 13 million orphan works. Malaysia is not immune to the situation. According to preliminary findings from interviews with major cultural and memory institutions in Malaysia, orphan works are likely to make up between 1 and 20% of their collections, indicating the potential legal risks in collection management, necessitating an effective and secure management strategy. This situation is exacerbated further by the lack of existing policies and legal loopholes in Malaysia regarding orphan works. On this basis, this paper sought to address the following two research questions: (i) What are the current strategies for providing access to orphan works? and (ii) "What strategies can cultural and heritage institutions in Malaysia implement? Through doctrinal analysis and library-based research, this paper discovered that Malaysia's existing laws are insufficient to assist cultural and heritage institutions in the management of orphan works in their institutions. Following that, this paper included several strategic recommendations, such as thorough search procedures and accurate record maintenance for items placed in the aforementioned institutions.



## **1. INTRODUCTION**

### ***1.1 Orphan Works***

Copyright law protects a variety of works, including written works, books, drawings, music, and paintings, provided that these works satisfy certain conditions, such as originality and fixation requirements. Once the requirements are met, the works are automatically copyright-protected, and the copyright owners are granted certain rights under the Copyright Act 1987. As a result, prospective users must obtain permission from the copyright holders before using their works. However, these copyright-protected works will be deemed "orphan" if users cannot identify and contact the copyright holder for copyright clearance purposes (US Copyright Office, 2006). Multiple factors, including non-requirement of work registration (Greismann, 2012), the Internet and technological advancement (Young, 2016) contribute to the existence of orphan works.

Orphan works pose a conundrum for the copyright community and, more broadly, copyright law. On the one hand, the law grants copyright holders exclusive rights. Section 13(1) of the Malaysian Copyright Act 1987, for example, specifies reproduction and distribution rights. The law does, however, prohibit the use of copyright-protected works without the permission of the copyright holder. In the case of orphan works, such consent cannot be obtained because users cannot locate and contact the copyright holders. As a result, the work would be abandoned in a copyright limbo, exposing prospective users to legal action from the copyright holders (Muhamad Khair, Mohamad Hashim & Anagnostopoulou, 2021). As a result of the restrictive nature of orphan works, these materials would become inaccessible to scholars, researchers, artists, and the general public. The consequences of not using orphan works may also impede cultural preservation efforts and derivative work creation (Boyle, 2005).

The orphan work problem is also present on a global scale. In China, for example, a woman gave the Shanghai Movie Museum the only known copy of the 1940s film "Fake Phoenix" (Li, 2018). However, the restoration process was hampered because the museum was unsure of the identity of the film's copyright holder. Several photographs of Jewish families were discovered in an abandoned hotel room in Germany shortly after World War II (Sarwate, 2008). The photographs were then given to the US Holocaust Museum for safekeeping. Nonetheless, because the photographers' copyright holders were unknown, obtaining permission to use the images was difficult. In the United States, Billy Mize's grandson planned to use his grandfather's music for a documentary (Crispino, 2019). However, the plan was also interrupted as he could not identify the music's copyright holders (the record companies that originally owned the rights were no longer exist).

### ***1.2 Cultural and Memory Institutions in Malaysia***

A cultural and memory institution is a generic term for institutions such as galleries, archives, libraries, and museums (Stainforth, 2016; Kumar, 2015). These organisations oversee, document, and preserve materials with educational, cultural, historical, and scientific values (Manžuch, 2009; De Laurentis, 2005). They also have a shared interest in serving as a vital information hub in a community and bringing together objects of social interest for the purposes of research, education, and entertainment, as well as making them available to the general public (Evans, 2008; Bates, 2006).

Collections in cultural and memory institutions are generally acquired in three ways. The first method of acquisition is through the operation of law, which is also referred to as "legal

deposit". Legal deposit is a statutory requirement that requires individuals or organisations to deposit one or more copies of their works with a nationally recognised institution such as a national library or a national archive (International Association of Sound and Audiovisual Archives, 2016; Larivière, 2000). For example, Sections 4(1) and 4(2) of the Deposit of Library Material Act 1986 (Malaysia) require the deposit of five copies of all printed materials such as books, serials, maps, charts, and posters, and two copies of non-printed materials such as films, microforms, video, audio recordings and other electronic materials, with the National Library of Malaysia. The purpose of legal deposit is to facilitate the collection, preservation, availability, and accessibility of the works for the public good (Larivière, 2000). The second method of acquisition is by voluntary surrender. Under this method, collections are typically donated, gifted, or bequeathed to the cultural and memory institutions by members of the public (US Copyright Office, 2006). The collections obtained in this manner are diverse, with some containing accurate and complete copyright information, and others containing little or incomplete details about copyright ownership (Sarwate, 2008). The third and final method of acquisition is through purchase. The cultural and memory institutions will use this method to acquire a specific object or collection from a third party, who will be involved in a legal transaction involving the transfer of ownership of the object to them (Law Collections, 2008).

In Malaysia, the Ministry of Tourism, Arts, and Culture is tasked with strengthening, promoting, conserving, and preserving national arts, culture, and heritage. The Ministry of Tourism, Arts, and Culture Malaysia also oversees all public cultural and memory institutions particularly in West Malaysia. The institutions include the National Art Gallery, National Archives, National Library, and National Museum. Besides the Ministry of Tourism, Arts, and Culture Malaysia, there are also state-level ministries in Sabah and Sarawak that oversee the cultural and memory institutions in the respective states. The Ministry of Tourism, Arts and Culture of Sarawak oversees the state's cultural and memory institutions which include Sarawak state library, archive, museum and gallery. On the other hand, the Ministry of Tourism, Culture, and Environment of Sabah oversees both state museum and gallery. The Ministry of Science, Technology and Innovation oversees the state library. Other than that, the Sabah state archive is placed under the purview of the Chief Minister's Department.

## **2. PROBLEM STATEMENT**

The size of orphan works that may be kept in cultural and memory institutions such as museums, libraries, and art galleries is difficult to estimate. Nonetheless, international organisations have made attempts to do so. The Collections Trust and the Strategic Content Alliances, for example, surveyed 500 institutional respondents in the United Kingdom and estimate that they have 13 million orphan works in their collections (Korn, 2009). Wilkin discovered in 2011 that the body of orphan works in the HathiTrust collection could potentially reach 2.5 million, with over 800,000 being US orphan works (Wilkin, 2011). Malaysia, like other countries, is also dealing with the orphan works issue. Preliminary findings from interviews with Malaysia's major memory institutions suggest that orphan works may account for between 1% and 20% of their collections (Muhamad Khair, 2022). Though no formal study has been conducted in Malaysia to precisely determine this, the above findings indicate a symptom of problem that is worth noting.

The Malaysian legal framework is insufficient in assisting prospective users, such as cultural and memory institutions, in dealing with orphan works (e.g. mass digitisation, preservation and restoration, commercialisation, and creation of derivative works). Malaysia currently lacks a legal provision comparable to the European Union's specific exception for the use of orphan works (i.e., Directive 2012/28/EU on Certain Permitted Uses of Orphan Works). This Directive

authorises cultural heritage institutions to use the works in their collections for indexing, cataloguing, preservation, restoration, and providing cultural and educational access to such works. While the Directive only applies to European Union members, such an approach is worth to be considered by other jurisdictions due to its ability to provide legal clarity regarding the use of orphan works in cultural and memory institutions.

Malaysia recently revised the Copyright Act 1987, making changes to copyright infringement exemption provisions. In light of this development, making and issuing copies of any work (including orphan works) to meet the special needs of hearing and visually impaired people will not be considered a copyright infringement under Section 13(2)(gggg) and (ggggg) of the Copyright Act 1987. As a result, if a museum wishes to make copies of an orphan literary or artistic work for the benefit of the deaf and blind communities, such activity will not constitute a copyright infringement. While these exemptions are welcomed and laudable, it is observed that their application is limited because the aforementioned provisions are context-specific (i.e. for hearing and visual impaired people) and subject to the phrase "on such terms as the Minister may determine" (i.e. not based on the user's wishes). As a result, the revisions do not cover situations that are not covered by the same, such as mass digitisations for the general public's benefit and the production of derivative works for commercial purposes. Furthermore, Section 13(2)(a) of the Malaysian Copyright Act 1987 may provide a broad fair dealing exception that can be used to protect prospective users. While the fair dealing exception may absolve any unauthorised use of orphan works, it is not automatic, has a limited scope, and is subject to the four-factor statutory test enshrined in Section 13(2A) of the Copyright Act 1987. Due to the uncertainty created by the limited scope of fair dealing and its test, users face the risk of legal action. The subjective application of the fair dealing exception demotivates potential orphan work users, undermining Malaysia's efforts to exploit orphan works.

The preceding analysis shows that Malaysian cultural and memory institutions may also house works that pose legal risks, such as orphan works, and that these works must be managed in a variety of ways. In the absence of specific laws in Malaysia for orphan works, Malaysian cultural and memory institutions must carefully strategise and implement well-accepted approaches to reduce the risk of being sued by copyright holders. Guided by this concern, this research aimed to answer two research questions. Firstly, "What are the current strategies for providing access to orphan works?". This study anticipated that the current strategies would take the form of a legal exception for orphan works or a balanced public-private interests framework, such as a licencing scheme. Secondly, "What strategies can cultural and heritage institutions in Malaysia implement?" and this research believes that those strategies should protect the interests of the keepers and users of orphan works while also upholding the rights of the copyright holders in their absence. The following section will describe the methods used by this study to suggest potential strategies for the parties involved.

### **3. METHODOLOGY**

This research design of this study was exploratory, as the main objective was to investigate the problems faced in dealing with orphan works in general and to propose several management strategies for cultural and memory memorial institutions in Malaysia. Due to the exploratory nature of this study, two research methods were utilised: (i) doctrinal analysis and (ii) library-based research. Regarding the first research question, "What are the current strategies for providing access to orphan works?" a doctrinal analysis was used. This method was suitable because this research required an examination of several relevant laws concerning orphan works, especially in the EU, UK, Canada and India. These jurisdictions were selected as they are Commonwealth countries that share a Common legal system with Malaysia. The EU was

also chosen because its strategy is unique and should be explored and considered by legislators. The researchers then performed library-based research to answer the second research question: "What strategies can cultural and heritage institutions in Malaysia implement?" This method was used to extract information from secondary sources like reports, textbooks, and journal articles. In light of this, the researchers investigated and compiled a list of strategies that these institutions can use to protect their positions while dealing with the orphan works housed in their collections.

## **4. FINDINGS**

### ***4.1 Strategies in Other Jurisdictions***

For the first research question, this study discovered at least two common strategies for providing access and permitting the use of orphan works in the European Union, the United Kingdom, Canada, and India. The first strategy involved making a specific exception for the use of orphan works (exception-based model), while the second involves using a licensing model. The next section will briefly explain the exception-based model.

#### ***4.1.1 Specific Exceptions for the Use of Orphan Works***

The law governing the management of orphan works in the EU is governed by Directive 2012/28/EU on Certain Permitted Uses of Orphan Works (the Directive), which applies to all European Union member states. The Directive's goal is to allow cultural heritage institutions to use orphan works in their collections for indexing, cataloguing, preservation, restoration, and providing cultural and educational access to such works. In this light, this model has been lauded for its ability to provide clarity and certainty in terms of its implementation while securing the rights of the copyright holders at the same time (US Copyright Office, 2006). According to Article 1 of the Directive, four types of cultural heritage institutions are eligible to use this specific exception: (i) publicly accessible libraries, educational establishments, and museums, (ii) archives, (iii) film or audio heritage institutions, and (iv) public-service broadcasting organisations established in member states. Once the status of an orphan work has been determined, Article 6(1) of the Directive allows cultural heritage institutions to reproduce and make such orphan works available to the public. Article 2 of the Directive mentions determining the status of the relevant works as "orphan." The provision requires cultural heritage institutions to conduct a search for the copyright holder. In other words, a work can only be considered "orphan" if cultural and heritage institutions have conducted a search before using the orphan works in question. The categories of activities are also specifically mentioned in the Directive. Article 6(1)(a) and (b) state that orphan works may only be reproduced for digitisation, making available, indexing, cataloguing, preservation, or restoration. Article 6(2) further states that orphan works may only be used to further the public interest missions of cultural heritage institutions, which include the preservation, restoration, and provision of cultural and educational access to such orphan works in their collections. The next section will briefly explain the second strategy mechanism i.e the licensing model.

#### ***4.1.2 Licencing Model***

The second (and possibly most advantageous) method is a licencing model, as used in the United Kingdom, Canada, and India. The implementation of this strategy is, for the most part, identical in these countries. In terms of licencing authority, their laws delegate authority to an agency in charge of intellectual property matters. This is to ensure efficiency and transparency by establishing a one-stop shop for orphan works licences. In the United Kingdom, for example,

Regulation 6 of the Copyright and Rights in Performances (Licensing of Orphan Works) Regulations 2014 empowers the UK Intellectual Property Office to grant licences for both commercial and non-commercial uses of orphan works. Section 77 of the Canadian Copyright Act of 1985 authorises the Copyright Board of Canada to grant a non-exclusive orphan works licence. Section 31A of the Indian Copyright Act of 1957 empowers the Appellate Board of India to grant a non-exclusive orphan works licence. Additionally, the requirement to search the copyright holder is the most notable feature shared by all three jurisdictions. Prior to applying for an orphan works licence from the licencing authority, the applicant must conduct a search of the copyright holders of the relevant works and provide evidence of such a search. If this requirement is not met, the licencing authority will refuse to grant the licence. In the United Kingdom, for example, Regulations 2 and 4 of the Copyright and Rights in Performances (Licensing of Orphan Works) Regulations 2014 state that anyone may apply for an orphan work licence if the diligent search requirement is met. 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. This search requirement should be emphasised because responsibility should be placed on the shoulders of the user rather than the licencing authorities (as they are just acting as a licence issuing body).

Ahmed and Al-Salihi (2020), Walker (2014), and Gompel and Hugenholtz (2010) agreed that it is the best approach because of its ability to create a one-stop shop for orphan works matters and reduce biased decisions. Nonetheless, the system is not without flaws. According to Sarid and Ben-Zvi (2023), it is still prohibitively expensive for users to identify and contact copyright holders prior to applying for a licence. However, the cost-related impediment and criticisms, while should be highlighted, should also be acknowledged for two reasons. Firstly, the cost associated with it is unavoidable - unless there is a scheme in place to provide free search services. While the cost is unavoidable, the prospective user is at least acting in good faith by contacting the copyright holder of orphan work before using it. Second, the monetary preparations and implications that will be incurred in defending a legal action (if the prospective users are being sued by reappearing copyright holders) are possibly much more prohibitive - considering the time, legal service, and damages that must be paid to the relevant parties.

## **4.2 Strategies for Cultural and Memory Institutions in Malaysia**

In response to the second research question, this paper proposed several strategies that cultural and heritage institutions in Malaysia may employ to manage the orphan works in their collections and reduce the risk of copyright infringement lawsuits (by the orphan work copyright holder). As previously stated, Malaysia lacks a specific mechanism for allowing the use and exploitation of orphan works. In the absence of specific legislation or mechanisms for providing access to these materials, this paper proposes several strategies in the hope that they will aid these institutions in more efficiently managing their collections – including orphan works.

- a. Determine the copyright status of the relevant collections. This step is crucial because it determines which works are still protected by copyright and which are no longer protected. As per Section 17 of the Copyright Act of 1987 (Malaysia), the copyright of literary, musical, and artistic works typically lasts for the author's lifetime plus 50 years following his death. Therefore, if a collection is extremely old (e.g., an ancient manuscript or an old sculpture), permission is not required, as these items are most likely in the public domain. However, if the institution is still unsure about the copyright status of the collection, it is prudent to err on the side of caution and treat the collection as "orphan works." That is, prior to handling the collection, attempt to identify and search the

copyright holder. The section that follows will elaborate more on the necessity of "search."

- b. Search for the work's copyright holder and properly document the search results. This procedure is essential for two reasons. Firstly, it is an international standard practice in most jurisdictions, as described in the "Findings". To recap, the requirement of "search" is essential in both the exception-based model (e.g. the EU model) and the licencing model (e.g. the orphan works licencing scheme in the United Kingdom, Canada, and India). Second, this search activity signifies the good faith of organisations engaged in efforts to locate the copyright holders of works prior to dealing with the same. Simply put, it reflects the organisation as a responsible institution that respects the rights of copyright holders. The "search" results may also be recorded and stored in a database managed by the relevant department, such as the collection management department of the organisation.
- c. Check whether the proposed activities such as the digitization, reproduction, and distribution of works are covered by any copyright exceptions and defences under the relevant laws. One of the most common defences is the fair dealing defence under Section 13(2)(a) of the Copyright Act of 1987. This step is essential because, if the proposed activities are exempted by one of the applicable exceptions, it can eliminate the costs and time associated with "search," thereby boosting the institution's confidence in using a collection. However, it should be noted that most of these exceptions and defences are subjective in nature (e.g. the fair dealing exception, which is subject to a statutory test) and sometimes also restrictive in the sense that they are subject to government direction (e.g. Section 13(2)(i) of the Copyright Act 1987). Therefore, it is essential to consult the legal department.
- d. Revise the organisation's policy on the management of intellectual property. In addition, cultural and heritage institutions must include a notice or a dedicated section on their websites devoted to potential orphan works housed in their repositories. This notice or section should outline at least two points: (i) the organisation's commitment to respecting the rights of copyright holders, and (ii) the procedure for filing a complaint with the institution and removing infringing works (including orphan works) from the organisation's activities. Similar to point B above, this step is essential for demonstrating the organisation's good faith and commitment to complying with the law. One point worth mentioning; however, while there are a number of templates available online that can be used as a guide when drafting the notice, it is advised to consult the legal department in order to draft a clear notice and policy on this matter.
- e. Subscribe to an insurance policy for intellectual property. This type of insurance policy is designed to protect organisations financially against the risks and costs associated with intellectual property infringement claims. In other words, should the organisations be sued by copyright holders, the insurance provider would cover the litigation-related expenses and damages, thereby mitigating the financial impact from the lawsuits. While some may oppose this strategy (given that the organisations are still being brought to court to answer the claims), this type of coverage is still essential as it serves as cost-saving and risk-mitigation mechanisms. However, this recommendation is highly dependent on a number of variables, including the industry, risk profiles, and insurance company's packages. Therefore, organisations are advised to consult with their insurance provider.

## **5. CONCLUSION**

This paper summarised the current legal treatment of orphan works under Malaysian copyright law, with a particular focus on those kept in cultural and memory institutions. The legal analysis revealed that there are insufficient mechanisms in this country for granting access to and allowing for the use and exploitation of orphan works. In the absence of a specific law on orphan works in Malaysia, activities such as mass digitisation, the creation of derivative works, and commercialisation by cultural and memory institutions would be problematic and place them in a dilemma. Abandoning the works would leave the orphan works in a copyright limbo, whereas continuing the aforementioned activities would expose them to the risk of legal action from reappearing copyright holders. In addition, the legal analysis revealed two strategies currently utilised in other jurisdictions, namely (i) a specific exception for the use of orphan works (European Union) and (ii) an orphan works licencing scheme (the UK, Canada, and India). Before dealing with the orphan works, both approaches involve locating the owners of the copyright. In accordance with the primary objective of this study, this paper concluded by proposing several strategies that cultural and memory institutions in Malaysia can employ. These strategies involve determining the copyright status of the relevant collections and identifying and contacting the copyright holders in advance of their use.

The implications of this paper are also worth mentioning. Firstly, the current paper broadens the discourse on orphan works in the context of cultural and memory institutions and raises awareness about the careful management of orphan works housed in these institutions. Secondly and finally, this paper contributes to a proper understanding and planning of legal risk reduction and management. On this note, it should be emphasised that the strategies proposed in this research paper are global in nature and are not limited to the Malaysian context. This is because the recommendations proposed here are consistent with the standards used in the EU, the United Kingdom, Canada, and India. It is also worth noting that research in this field is not stagnant. Future research is encouraged, especially in expanding and venturing further into other mechanisms for providing access to orphan works, such as the application of the adverse possession doctrine (Meeks, 2013) and Chesbrough's Open Innovation concept (Muhamad Khair & Mohamad Hashim, 2021). In addition, data and responses from cultural and memory institutions would be of great assistance to policymakers and legislators in developing the optimal model that would not only benefit their institutions but also the general public.

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## **AUTHORS' CONTRIBUTION**

MHMK prepared the introduction, problem statement, reference sections. FMI prepared the methodology and conclusion sections. MHMK and HNMH analysed the relevant laws for orphan works and prepared the report. All authors prepared the way forward for cultural and memory institutions. Final manuscript was also approved by all authors.

## **CONFLICT OF INTEREST**

None Declared.

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