

Decoding Orphan Works Policies: Lessons from the European Union, the United Kingdom, Canada, and India

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Abstract

Orphan works are works (e.g., books, photographs, films) that are still protected by copyright law but whose copyright owners are untraceable by prospective users. The exercise of searching for the copyright owners before exploiting their works is critical in copyright law, as failure to do so would constitute copyright infringement. This aspect, however, cannot be met because the copyright holders are either unknown or untraceable. Globally, the discussions in this area are primarily focused on developing legal mechanisms to legalise the use of orphan works. For example, the suggestion to use the copyright statute's fair dealing defence and the proposal to implement a specific legal exception for the use of orphan works. The trend to examine orphan works policies, on the other hand, is not heavily discussed by the copyright society, despite the fact that this aspect is critical in understanding certain basic principles of the relevant laws. In this light, the purpose of this study was to fill the gap by examining the relevant orphan works policies in the selected jurisdictions by using policy analysis. The purpose is two-pronged. Firstly, to identify the similarities and unique characteristics of the orphan works policies. Secondly, to extract the basic principles and other important information that policymakers can use when developing their own version

of orphan works policies and laws. Among the key findings are the importance of maintaining the goal of knowledge dissemination from orphan works and implementing the principle of openness to promote free movement of knowledge and innovation. It is hoped that this research will aid policymakers and legislators in better understanding the issue and developing a more robust solution.

Keywords: Intellectual Property, Orphan Works, Copyright Law, Unlocatable Copyright Owners, Orphan Works Licensing Scheme

Introduction

Orphan works are simply copyright-protected works whose copyright owners are either unknown or untraceable to prospective users. According to the US Copyright Office (2015) and Favale et al (2013), orphan works occur when a good faith prospective user is unable to identify or locate the right holder of a work, whether the creator or successor in title. Therefore, a photograph would be considered "orphan" if two conditions are met: (i) the photograph is still within the term of copyright duration, and (ii) the users fail to identify or locate the copyright holder despite a good faith search.

The requirement for permission to use one's copyrighted work is critical and is imposed on all prospective users, including individuals, business organisations, firms, companies, and memory and cultural heritage institutions. Failure to meet this requirement would constitute copyright infringement unless such uses are covered by the fair dealing provisions, or any exceptions provided by the copyright statute. However, for obvious reasons, this requirement is highly unlikely to be met (if not impossible) as the right holders are either unlocatable or unidentifiable - or both (Hansen, 2016). As a result, such work is considered "orphan," and any plans to use it should be carefully considered. Following that, potential users are likely to abandon the works out of fear of legal repercussions. Consequently, the inability to obtain permission to use and re-use orphan works will impede copyright preservation and mass digitisation efforts, as well as the efficient dissemination of knowledge and the advancement of the arts (Goldenfein & Hunter, 2017; Hansen 2016).

Many countries have begun to develop legal mechanisms to address this issue in response to the threat of legal action and the consequences of being unable to exploit orphan works (Wilkin, 2011). Canada for example, has established an orphan works licencing scheme under Section 77 of the Canadian Copyright Act to allow the use of orphan works (De Beer & Bouchard, 2010). India also had established the similar model under Section 31A of the Indian Copyright Act. Following suit, Singapore held a public consultation and considered using the limited liability approach (Ministry of Law Singapore, 2019). Furthermore, the literature on copyright and orphan works focused on proposing solutions to the problem, such as the use of a centralised licencing approach (Ahmed & Al-Salihi, 2020; Hargreaves, 2011; Gompel & Hugenholtz, 2010), the application of a blockchain-based system (Goldenfein & Hunter, 2017), the use of the reversionary copyright concept (Favale, 2019), and the implementation of Chesbrough's open innovation (Muhamad Khair & Mohamad Hashim, 2021). However, it is observed that the study on orphan works policies is less popular to be discussed among the copyright society. It is important to emphasise that the research in this field is crucial, as valuable insights can be gleaned from these documents to help other jurisdictions that lack solutions to the orphan works problem establish a standardised and internationally accepted solution. In an effort to contribute to the existing body of knowledge, this paper investigates

the policies pertaining to orphan works in the chosen jurisdictions. The following section will describe the methodology utilised in this paper to accomplish the aforementioned aim.

Methodology

This paper sought to answer the research question, "What are the lessons that can be drawn from the orphan works policies of the selected jurisdictions?" To answer the research question, this paper used policy analysis to examine relevant orphan works-related documents (as shown in **Table 1** below) in the European Union, the United Kingdom, Canada, and India. These jurisdictions were chosen because they were among the first to implement orphan works policies.

Table 1

Orphan Works Policies

Jurisdictions	List of Orphan Works Policies
The European Union	The i2010 A European Information Society for Growth and Employment; The i2010:Digital Libraries Initiative; Commission Decision on the Setting up of a High-Level Expert Group on Digital Libraries (2006/178/EC); the 2008 Green Paper; Directive 2012/28/EU On Certain Permitted Uses of Orphan Works
The United Kingdom	The Gowers Report 2006; The Hargreaves Report 2011, and the Government's Response to the Reports; the UKIPO's report, "The Implementation of Orphan Works Licensing Scheme".
Canada	The Policy on Copyright Management of Library and Archives of Canada; The Various Rulings from the Copyright Board of Canada
India	Hansards from Rajya Sabha (Senate) and Lok Sabha (House of the People)

A preliminary investigation revealed that their orphan works policies are fragmented and documented in a variety of documents, including consultation papers, governmental agency rulings, Hansards, and law commission reports (as reported in **Table 1** above). While their policies do not exist in a single document, they have been instrumental in laying the groundwork for orphan works legislation in the aforementioned jurisdictions. As a result, it is critical to examine these policies to identify their similarities and differences so that policymakers and legislators in other jurisdictions can use them when developing their own solutions to the orphan works problem. The section that follows will report on the observations made on orphan works-related policies in the selected jurisdictions.

An Exploration of the Orphan Works Policies

The European Union

In the European Union, the policies supporting the utilisation of orphan works were primarily formulated by the European Union Commission. It is observed that the primary objective of the orphan works policies of the European Union is to ensure the widespread distribution and conservation of knowledge. The i2010 Initiative, launched by the European Commission in 2005, sought to foster a unified information space across Europe with the objective of enhancing economic growth and quality of life through the establishment of digital libraries that safeguard cultural materials and knowledge (Commission of the European Communities, 2005a). As a result, the European Commission initiated the i2010:Digital

Libraries Initiative, whose objective was to enhance the accessibility of Europe's cultural heritage materials (including books, journals, museum objects, archival documents, and audio-visual materials) through online platforms (Commission of the European Communities, 2005b).

In 2006, the European Commission issued a statement urging member states to enhance the circumstances surrounding the digitization and online accessibility of cultural materials. To achieve this, the Commission suggested that each member state provide a list of recognised orphan works and establish mechanisms to facilitate the online access of such materials (Commission of the European Communities, 2006). In addition, the European Commission assigned the orphan works issue to a High-Level Expert Group on Digital Libraries, which was charged with conducting research and advising the EC on how to address the legal and technical challenges (Commission of the European Communities, 2006) most effectively. The High-Level Expert Group ultimately published the concluding report of their investigation in 2009, which contained a number of recommendations pertaining to the issue of orphan works (High Level Expert Group on Digital Libraries, 2009). The aforementioned recommendations stipulate the need for a thorough search to be performed prior to exploiting orphan works, as well as the establishment of databases and appropriate clearance centres.

The European Union's approach to orphan works was additionally shaped in part by the 2008 Green Paper. In essence, the aforementioned document emphasises two crucial points. Firstly, the 2008 Green Paper recognised the considerable importance attributed to the public dissemination of cultural heritage materials. Secondly, the 2008 Green Paper acknowledged that without solutions to the orphan works problem, numerous projects would be unable to proceed. Thus, it was necessary to develop a more robust method for disseminating European cultural materials to a wide audience (Commission of the European Communities, 2008). Additionally, the Green Paper of 2008 also recognised the multitude of domestic solutions that were already in place in certain European nations (Commission of the European Communities, 2008). However, implementation of these solutions had been limited to the national level. Due to their inadequate capacity to tackle potential cross-border challenges, the establishment of digital libraries in Europe became unattainable. This matter has significantly increased the urgency for a European Union-wide resolution that promotes the utilisation of orphan works. The European Commission ultimately put forth a solution based on statutory exceptions in 2011, which was subsequently executed via an EU Directive (European Commission, 2011). The final version of the proposed directive underwent multiple rounds of revisions before being adopted on October 25, 2012. This was accomplished in the form of Directive 2012/28/EU, which outlines specific authorised applications of orphan works.

The United Kingdom

The policies underlying the exploitation of orphan works in the United Kingdom were largely developed by the Gowers Report, the Hargreaves Report, and the government's response to the reports. The Gowers Review of Intellectual Property 2006 highlights three goals that underpin the use of orphan works in the United Kingdom. The first goal is to reduce intellectual capital waste (Gowers, 2006). This premise is based on the belief that no intellectual capital should be abandoned and unexploited due to the non-availability of

copyright owners (Gowers, 2006), thus reflecting Locke's labour theory's no-waste proviso (Muhamad Khair & Mohamad Hashim, 2020; Hull, 2008). The second goal is to allow any interested party to create transformative and derivative works (Gowers, 2006). This is to ensure that the works' commercial, educational, and creative values can be reused and leveraged by other parties, particularly research institutes, consumers, and users of creative works. The ultimate goal is to facilitate activities such as archiving and cataloguing in order to preserve orphan works (Gowers, 2006). This move would be especially beneficial to cultural heritage institutions in fulfilling their mission of heritage preservation.

The three pillar objectives envisioned in the Gower Report are based on the Hargreaves Report on Intellectual Property and Growth, as well as the UK government's response to the Hargreaves Report. The first goal is cultural preservation. Orphan works previously saved in the old format could be digitised and stored in memory institutions' databases and archives (Hargreaves, 2011). This goal would prevent orphan works from decaying, deteriorating, and becoming obsolete (Hargreaves, 2011). Second, the goal is for research purposes. According to the Hargreaves Report, researchers should be allowed to use orphan scientific papers to conduct additional research and possibly save a life as a result of their new discoveries (Hargreaves, 2011). In this case, orphan scientific papers may benefit not only industry players, but society as a whole. The ultimate goal is to make money. This dimension enables orphan works to be reused by others in the creation of more derivative works, allowing economic value to be realised (UK Intellectual Property Office, 2011a). For example, any interested parties could create new applications and generate revenue from orphan novels and movie snippets.

Another goal of orphan works exploitation is stated in a consultation paper titled "The Implementation of the Orphan Works Licensing Scheme" submitted by the UKIPO. The solution to the orphan works problem, according to the paper, should reduce copyright infringement while also assisting right holders in generating income from the orphan works and making the most of the UK's cultural and creative capital (UK Intellectual Property Office, 2014). The consultation paper also claims that the orphan works licencing scheme, in conjunction with other initiatives (such as extended collective licencing), will help the UK maintain its position as a vibrant and welcoming place to do creative business, as well as establish the country as a commercial licencing capital (UK Intellectual Property Office, 2014).

Based on an examination of various reports and government response documents, the following summarises the UK's policy regarding the exploitation of orphan works. First, the UK takes an innovative approach to orphan work exploitation by taking into account the needs of various parties with diverse interests in the orphan works. Second, the UK takes a balanced and flexible approach, allowing prospective users to exploit orphan works in ways that do not jeopardise the rights holders' interests while ultimately strengthening citizens' trust in the copyright system. The Gower Report clearly envisions a balanced and flexible approach. Third, the United Kingdom has implemented a special licencing scheme to facilitate the exploitation of orphan works. This approach is evidenced by the Hargreaves Report and the UK government's response document, which agreed to implement a special licencing scheme for orphan works. Fourth, the UK eliminates free-riding by requiring diligent search and confirmation by an independent authorising body. The Hargreaves Report proposed this solution, which states that any solution based on the deliberate use of orphan works should not be tolerated because it amounts to infringement toleration. As a result, the key principles

guiding the operation of the orphan work licencing scheme should be anchored in ensuring fair treatment and adequate protection of the interests of absent copyright holders, in the same way that non-orphan right holders are treated, and maximising the licencing scheme's economic growth benefits (UK Intellectual Property Office, 2011).

Canada

The policies underlying the exploitation of orphan works in Canada can be found in the Library and Archives of Canada's Policy on Copyright Management. The policy focuses on increasing access to institutional repository collections. In order to maximise access, the policy requires the Library and Archives of Canada to implement a risk management approach in its collections that include orphan works (Library and Archives Canada, 2015). This risk management considers the copyright holders' and content users' rights, as well as the consistent application of copyright law. In addition to the institutional policy, the Copyright Board of Canada ruling shaped the policies underlying the exploitation of orphan works in Canada.

The Copyright Board of Canada ruled in 2006 that the purpose of the orphan works licence is to support the Copyright Act's goal of promoting the dissemination of knowledge and content of the works (Sookman, 2019; Copyright Board of Canada, 2006). In justifying their support for the orphan works licence, the Board warned that unlocatable copyright owners would disrupt the copyright clearance process and prevent parties from exploiting their works (Copyright Board of Canada, 2006). In the same year, the Board ruled that it has a statutory duty to grant the licence for the exploitation of orphan works under Section 77 of the Copyright Act. The Board also ruled that it has a duty to conduct a balanced exercise while considering the interests of the copyright owner and public members (Copyright Board of Canada, 2006). The Board recognises that the balancing act should be the guiding principle in addressing the threat posed by the copyright law's exclusivity (Copyright Board of Canada, 2006).

The Board imposed a duty on prospective users, through its ruling, to follow the general principle of copyright law and apply for the orphan works licence before exploiting the same (Copyright Board of Canada, 2006). Furthermore, the Board ruled that the orphan works licencing scheme should not be viewed as a vehicle for prospective users to simply use the orphan works. It was discovered that the policies underlying the exploitation of orphan works in Canada were largely derived from the Copyright Board of Canada's decision for prospective users to apply for orphan work licences. These decisions, as documented in the Board ruling, have become the primary policies governing the exploitation of orphan works.

India

The policies underlying the exploitation of orphan works were documented in India's parliamentary Hansards. According to the Hansards, both Houses agreed that the principles for exploitation of orphan works in India should be based on promoting access to knowledge and avoiding unnecessary legal proceedings. The Hansards also stated that the general public in India should be allowed to exploit published and unpublished orphan works so that the benefits of these works can continue to be enjoyed by the general public (Sabha, 2012). Finally, the Hansards noted that by allowing orphan works to be exploited via a special licencing scheme, unnecessary and wasteful copyright litigation could be avoided (Lok Sabha,

2012). The principles outlined in the Hansards for the exploitation of orphan works were later incorporated into Section 31A of the Copyright Act of India.

The subsequent section shall present the findings pertaining to the research question posed in this paper, "What are the lessons that can be drawn from the orphan works policies of the selected jurisdictions?" As previously stated, this paper examined documents pertaining to orphan works through the lens of policy analysis, with a particular emphasis on the policies' objectives, guiding principles, and strategy for authorising the use of orphan works.

Lessons from the Orphan Works Policies

Aim: Dissemination of Knowledge

The most common goal of orphan work policies is "knowledge dissemination," which has been incorporated into all policies of the selected jurisdictions. To most extent, this objective is in line with the aim of copyright law in striking a balance of rights between the copyright owner, the users, and members of the public. The EU Directive on Orphan Works, the 2008 Green Paper on Copyright, and the Communication from the EU Commission all call for a mechanism to improve access to orphan works in the EU in order to promote free movement of knowledge. This is also supported by the Copyright Board of Canada's decision, which endorsed the orphan works licence's goal of disseminating knowledge from orphan works (Copyright Board of Canada, 2006; Sookman, 2019). Furthermore, the Gowers and Hargreaves reports, which advocated for the use of orphan scientific papers and the creation of educational and creative works from orphan materials for public use, demonstrate this objective as well (Gowers, 2006; Hargreaves, 2011). Finally, Parliamentary Hansards in India have recorded their support for the continued use of orphan works for the benefit of the general public (Sabha, 2012).

The key lesson from the policy analysis regarding this aspect is that it emphasises the critical nature of upholding the intention of copyright law, which is to promote progress of art and knowledge. Given the present issue, the whereabouts (or lack thereof) of the copyright holders of orphan works should not prevent potential from accessing and utilising the works. In other words, the objective of promoting the dissemination of knowledge aligns with the purpose of copyright law, which is to encourage endeavours that utilise intellectual property and ideas derived from copyright-protected works for the betterment of society and the economy (Khair et al, 2019).

Principles: Openness, Fairness, and Adherence

The most common principle that underpins the orphan works policies the selected jurisdictions is the principle of openness. This principle essentially advocates for a more permissive approach and a supportive legal structure that enables the utilisation of orphan works, as opposed to storing them in institutional repositories and disregarding any intentions to exploit them. The finding on this principle is evidenced by the EU Directive and Communication of the EU Commission, which have urged for an improved and open access to knowledge by requiring cultural heritage institutions to make orphan works that have been digitised available to the public (Commission of the European Communities, 2010). This is evidenced by the Hargreaves Report and the UK government's response to the proposal of an orphan works licensing scheme, agreeing that it would create a permissive and conducive

environment to do creative business in the UK, as well as permit the relevant parties in generating income from the use of orphan works (Hargreaves, 2011; UK Intellectual Property Office, 2011b). This is also evidenced by the ruling of the Copyright Board of Canada which has recognised an open and permissive licensing scheme to allow the uses of orphan works and mitigate the threat posed by the unlocatable copyright owner to the goal of the Copyright Act (Copyright Board of Canada, 2006; Sookman, 2019). Finally, Parliamentary Hansards of India have documented a similar agreement in unlocking the proprietary copyright regime by introducing a permissive licencing scheme for both published and unpublished orphan works (Sabha, 2012). The above call in India can be derived from Shri Kapil Sibal's speech, in which he lamented the difficulties in using unpublished orphan works and proposed that the licencing scheme cover both published and unpublished orphan works. This emphasised the importance of making these works available through a licencing scheme.

The policy analysis also reveals other two principles that are worth mentioning. Firstly, the principle of fairness that has been adopted in the UK and Canada policy documents. This principle is closely related to the orphan works licensing scheme and it essentially reminds the governing body not to simply permit the application without considering the rights and interests of the orphan works copyright owners. This is evidenced by the Hargreaves report which condemns the deliberate unauthorised use of orphan works and urged the authorising body in ensuring fair treatment to the absent copyright holder of the orphan works when assessing the licence application (Hargreaves, 2011; UK Intellectual Property Office, 2011b). This is also evidenced by the ruling of the Copyright Board of Canada which has required 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). Secondly, the principle of adherence to law, which has also been emphasised in policy documents from the United Kingdom and Canada. Legally speaking, the copyright holders retain their ownership status of the works so long as they do not explicitly surrender those rights. Therefore, in essence, this principle requires potential users to identify the copyright holder of "orphan works"; they cannot simply presume that the work is "orphan." This is evidenced by the Hargreaves report, which has required prospective users to follow due processes such as diligent search and evaluation by the authorising body before exploiting the orphan works (Hargreaves, 2011; UK Intellectual Property Office, 2011b). This is also evidenced by the ruling of the Copyright Board of Canada which has required prospective users to apply for an orphan works licence before exploiting the same (Copyright Board of Canada, 2006). The Copyright Board of Canada also states that viewing licensing as an afterthought should be avoided (Copyright Board of Canada, 2006).

The critical lessons from the policy analysis on this aspect is that it inadvertently highlights the importance of providing access to orphan works by implementing a more permissive strategy to support the goal of knowledge dissemination and to ensure that this vision is not hampered by orphan works. In exchange, the governing body must still fairly implement the proposed strategy (e.g., licencing scheme) and prospective users must identify and locate the copyright holders of orphan works before using them in any of their exploitation strategies.

Strategy: Licensing Scheme / Outbound Open Innovation

The policy analysis revealed that the most common strategy for the exploitation of orphan works is Outbound Open Innovation strategy i.e via a licensing scheme. The Open Innovation concept, introduced by Henry Chesbrough, advocates greater use of external resources to accelerate the spread of knowledge as well as the sharing of unused ideas and technologies with outsiders (Chesbrough, 2003, 2006). Licensing is one of the mechanisms used in the Outbound Open Innovation strategy, which focuses on knowledge outflow by sharing the institution's unused and underutilised ideas, knowledge, and resources with other entities via intellectual property licencing (Chesbrough & Bogers, 2006; Gassmann & Enkell, 2004). With the exception of the EU, the Outbound Open Innovation strategy has been incorporated into the policy documents of the majority of the selected jurisdictions. This is evidenced by the emphasis on special licencing schemes for orphan works in policy documents from the United Kingdom, Canada, and India, all of which are currently in place under their respective orphan works licencing schemes.

The key takeaway from the policy analysis on this aspect is that there is a strategy (i.e. licencing scheme) that can be used to provide a permissive method for allowing the use of orphan works. In essence, this strategy takes a more balanced approach to protecting the rights of copyright holders (via licencing procedures that potential users must follow) while also allowing users to use the works legally. If implemented successfully, orphan works will no longer be kept in limbo and abandoned in institutional repositories. In the grand scheme of things, the licencing method embodies the aforementioned discussions on the goal of exploitation of orphan works to disseminate knowledge, as well as the principles of openness, fairness, and adherence to the law.

Conclusion

The main objective of this research was to decode the policies pertaining to orphan works in the European Union, the United Kingdom, Canada, and India. Decoding these policies was intended to glean valuable insights regarding the jurisdictions' approaches to addressing the orphan works issue. By using policy analysis, this research examined the policies' objectives, guiding principles, and strategy for authorising the use of orphan works – and identified three important findings. Firstly, the solution to the orphan work problem must be weighed against the purpose of copyright law. The policies of the selected jurisdictions demonstrate that supporting knowledge dissemination is always prioritised, as copyright law always strives to provide a balanced approach in ensuring potential users and members of the public benefit from someone's works (in this case, orphan works). Secondly, any strategies to address the orphan work issue must be capable of striking a balance between the rights of the copyright holders (as the rightful owners) and the public's enjoyment of the works. This can be accomplished, for example, by requiring potential users to first locate the copyright holders and not simply using the works without having fulfilled this requirement. Finally, licensing scheme is observed to be the most appropriate approach for unlocking access to orphan works as it ensures continued use of the works while adhering to the law.

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