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**PUBLIC GOOD THEORY: A THEORETICAL
JUSTIFICATION FOR PERMISSIVE LICENCE
TO USE AND RE-USE ORPHAN WORKS**

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ABSTRACT

This paper explored the adoption of Paul Samuelson's Public Good Theory as a theoretical justification for a permissive licencing scheme that enables the use and re-use of orphan works in Malaysia. Orphan works are copyright-protected works with unlocatable or unidentified right holders, and are currently on the rise due to the proliferation of unregistered, anonymous, and abandoned copyrighted works. The literature denotes the challenges arising from the difficulty faced by potential users in obtaining the permission for creative and innovative use of orphan works as required under the copyright law. Such challenges impede the potential use and re-use of orphan works for the purpose of knowledge dissemination, progress in the arts,

preservation, and digitisation activities. This paper contributes to the current body of knowledge by canvassing two important issues. The first issue focused on the challenges faced by potential users to use and re-use orphan works in Malaysia. The second was Paul Samuelson's Public Good Theory as a theoretical justification for permissive licence to use and re-use orphan works. It is anticipated that a legislative reform grounded on Paul Samuelson's Public Good Theory will spur grassroots innovations, creativity, and entrepreneurialism among members of the public. The permissive licencing scheme supports global calls for legislative reform of the copyright law to facilitate the use and re-use of orphan works.

Keywords: Copyright law, orphan works, public good theory, licencing, innovation.

INTRODUCTION

The US Copyright Office (2015) defined orphan works as works in which copyright still subsists, but their right holders are unlocatable or unidentified. Among the most common forms of orphan works are books, photographs, films, and sound recordings. Orphan works exist due to the absence of a statutory requirement of formal registration (Giblin, 2017; Sullivan, 2012), the extension of copyright duration (Varian, 2006; Brito & Dooling, 2005), and proliferation of copyrighted works in digital format over the Internet (Young, 2016). These factors inadvertently create an incomplete copyright ownership database, making it challenging to identify and track the authors and right holders of the copyrighted works.

Under the existing copyright licencing regime, the potential users of copyrighted works such as individuals, memory organisations, and cultural heritage institutions are required to obtain the permission of copyright holders prior to using and re-using the copyrighted works that are not covered under the fair dealing provisions. As the right holders are unlocatable, unidentifiable or both, obtaining permission to use and re-use orphan works is very difficult, if not impossible (Hansen, 2016). As a result, potential users will likely abandon the works for fear of threat of legal suits. The inability to obtain permission to use and re-use orphan works impedes copyright preservation and mass digitisation efforts, as well as thwarts efficient dissemination

of knowledge and progress of the arts (Goldenfein & Hunter, 2017; Hansen, 2016).

The problem around orphan works has led to failed opportunity of using and re-using literary, musical, and artistic works, as well as films, sound recordings, and broadcasts. The inability to use and re-use orphan works is also a manifestation of the inefficiency and inflexibility of the copyright system at national and international levels in dealing with the emergence of a new copyright culture. It is widely anticipated that the number of orphan works will grow exponentially due to the Internet and technological advancement that enable copyrighted works to be easily created (Wilkin, 2011; Colangelo & Lincesson, 2012; Padfield, 2010). In the United States (US) alone, it was estimated that there were more than 800,000 orphan works in 2011, which could potentially increase to 2.5 million orphan works in the years to come (Wilkin, 2011). The Strategic Content Alliance and the Collections Trust of the United Kingdom (UK) reported that globally, there were 13 million orphan works held by 503 institutions in their databases (Korn, 2009).

Many countries have begun to realise the cultural, educational, and economic losses caused by the inability to use and re-use orphan works, and have taken legal and policy measures to accommodate this (Wilkin, 2011). Canada, for instance, has re-examined the compulsory licencing regime under Section 77 of the Canadian Copyright Act to accommodate the use and re-use of orphan works (De Beer & Bouchard, 2010). Malaysia is reported to be at the preliminary discussion stage. The country has yet to come up with a legal or policy measure to address the shortfall of the existing copyright law in dealing with orphan works. As Singapore has already started with the consultation process towards formulating a solution to the issues surrounding orphan works, it is anticipated that Malaysia will soon be moving towards the same direction.

It is observed that an extant literature surrounding orphan work is centred around proposing solutions to the problem. For example, the application of the blockchain-based system (Goldenfein & Hunter, 2017), the use of the reversionary copyright concept (Favale, 2019), and the employment of Chesbrough's open innovation concept (Muhamad Khair & Mohamad Hashim, in press). However, a theoretical discourse supporting the basis for such solutions is still scarce. This

paper endeavours to contribute to the current body of knowledge by exploring the challenges to exploit orphan works in Malaysia, as well as the need to exploit orphan works from Samuelson's Public Good Theory standpoint. The novelty of this paper is grounded on the extension of the Public Good Theory as a justification for permissive licencing to use and re-use orphan works in Malaysia. The purpose of this paper is not to explore legal and policy measures for using and re-using orphan works in Malaysia, as local and international literature have extensively examined those measures. Instead, the objective of this paper is to provide a strong theoretical justification for amendments to the Malaysian copyright law to facilitate the use and re-use of orphan works either held by institutions or found in the public domain. The ensuing part will proceed with the methodology that this paper has adopted to achieve the above objective.

METHODOLOGY

The research design was exploratory as it endeavoured to investigate the difficulties in exploiting orphan works in Malaysia, and further propose the adoption of Paul Samuelson's Public Good Theory as a theoretical justification for permissive licencing in enabling the use and re-use of orphan works. Two research questions were duly raised, namely: (1) What are the challenges faced by potential users to use and re-use orphan works under the current Malaysian copyright licencing regime? and (2) How does Paul Samuelson's Public Good Theory justify a permissive licence to use and re-use orphan works? As this was an exploratory study, the research methodology was purely doctrinal and theoretical. The research strategy was mainly based on library research, focusing on reading and analysing relevant provisions of the Malaysian Copyright Act 1987 and published materials such as journal articles, textbooks, and reports on orphan works and Paul Samuelson's Public Good Theory. The following section will answer the first question by examining the Copyright Act 1987.

CHALLENGES FACED BY POTENTIAL USERS TO USE AND RE-USE ORPHAN WORKS IN MALAYSIA

This section explores the challenges faced by potential users to obtain permission to use and re-use orphan works by underlining the legal

uncertainties enshrined in the Copyright Act 1987. The proprietary model of the intellectual property (IP) system grants a bundle of exclusive rights to copyright holders to control how their works can be used and re-used by other users. These exclusive rights include the right to make copies and perform the works to the public. However, the right of the public to enjoy cultural and artistic values from copyrighted works may be problematised by an overly protective proprietary model of a copyright law system (Marlin-Bennet, 2004). The proprietary model is a deficient model for optimising the exploitation of orphan works as it treats orphan works similarly to other copyrighted works, where the right holders assert their proprietary rights (Ilie, 2014).

As Malaysia adopts a similar copyright system, orphan works are locked up behind this proprietary regime, posing significant challenges for potential users to use and re-use orphan works outside the parameters allowed under the fair dealing exceptions. The first challenge lies in Section 13(1)(a)–(f) that protects orphan works that are copyright protected from being reproduced, commercialised, rented, shown, played, and distributed to the public without the owner’s permission. The section also prohibits the re-use of orphan works as derivative works, which further impedes activities such as translations, adaptations, arrangements, and other kinds of transformation of orphan works. These activities require potential users to obtain permission to use the work (through licences) from the copyright holder. They must identify and contact the copyright holder to negotiate the terms of use and payment of royalty (Guibault & Schroff, 2018). With this aspect of “permission” in mind, potential users of the orphan works may face the risk of copyright infringement if they proceed to use the works without obtaining the required authorisation from the copyright holder. In this present context, since the copyright holder of the orphan work cannot be reached or located for licencing arrangement, the efforts to exploit the orphan work through the said activities will be thwarted by Section 13(1).

The second challenge comes from Section 25(2)(a) and (b). Through this section, the Malaysian proprietary model recognises the author’s moral rights (i.e. the rights of paternity and integrity), and these rights are exercisable at their option via the phrase “*no person may, without the consent of the author, do or authorise the doing of any the following acts*”. In other words, the section grants the author some

kind of control as to how their work may be identified or dealt with. The section further prohibits the presentation of the work without identifying the author or under a name other than that of the author. The section also prohibits distortion, mutilation or other modification of the work that significantly alters the work and might reasonably be regarded as adversely affecting the author's honour or reputation. Be that as it may, the application of the section in the context of orphan works may be problematised. Since the author of the orphan works is unable to be identified and located by potential users, the ideal way to respect the moral rights of the works remains questionable as the section does not address it.

The third challenge arises from Section 13(2)(a) that underpins the defence of fair dealing. This section exempts certain uses of copyrighted works from any infringement claims if such uses are conducted for research, private study, criticism, review, reporting of current events, or under any other acceptable circumstances (due to the word "including" in the said provision). In the present context, it appears that this legal defence might exonerate some unauthorised uses of orphan works. Nevertheless, upon careful reading of the provision, it seems that the application of Section 13(2)(a) is not as easy as one may perceive. In other words, it is not an automatic saviour. This is due to the fact that such a defence must always be assessed with the four-factor statutory test as enshrined in Section 13(2A) (Khaw & Tay, 2017). The said factors are the purpose of the dealing, the nature of the copyrighted work, the amount and substantiality of the portion used, and the effect of the dealing on the potential market.

Historically, the above view was also acknowledged by Nallini J (as she then was) when commenting on the said defence in *Mediacorp News Pte Ltd & Ors v. Mediabanc (Johore Bharu) Sdn Bhd & Ors* [2010] 6 MLJ 657. It should be mentioned that at that point of time, the Copyright Act 1987 did not clearly spell out the factors that were supposed to be taken into consideration when determining the question of fairness in such a defence. In view of this, Nallini J stated that the practice of other foreign jurisdictions, such as the UK and the US, might be taken into consideration when interpreting the fair dealing exception to provide a better picture of the same. She eventually proposed six factors (the motive of the party in its dealing with the work was also a relevant factor) that could be considered when

determining the question of fairness. Overall, in this present context, her suggestion reflects the nature of this legal defence that depends on the abovesaid factors (which are now cemented in Section 13(2A)), thus reflecting the challenging measures that one must consider when dealing with the use and re-use of orphan works.

In view of this statutory test, the US Copyright Office (2015) and Urban (2012) opined that this legal mechanism might provide room for flexibility, especially in covering new fact patterns such as orphan works. In other words, the statutory test of the fair dealing defence is a blessing in disguise, in the sense that it is flexible to cater to new problems that might not have existed in previous years. They posited that the employment of the same should not be undermined or overlooked by legislators and policymakers. The said argument for the employment of the fair dealing defence is further supported by Urban (2012). The commentator hailed the legal mechanism as a cost-saving approach, given that the government or the relevant authority is not required to develop a separate licencing system that may incur substantial budgets and costs to run. This approach will eventually result in a reduction or elimination of administrative and transactional costs, thereby expediting the endeavour to permit the use and re-use of orphan works.

The above argument for the employment of the fair dealing defence may appear compelling at first blush. However, if viewed from another perspective, the use and re-use of orphan works (being copyrighted works) still remain a risky and challenging task as the favourable outcome of using the fair dealing defence is dependent on the four-factor statutory test. Simply put, there is no guarantee of success, as potential users are still exposed to a state of uncertainty, which Hansen et al. (2013) viewed as a threat. Furthermore, the fair use defence does not nullify the right of the owner to bring legal suits, and in the event that it happens, the parties relying on Section 13(2) (a) have to go through the necessary hurdles to prove their case in a court of law. While the fair dealing may strike a balance between the copyright owner's interest and the society's need to progress in the development of creativity and ideas, the employment of this legal defence must be applied with caution. It is understood that the section is not a default provision that could automatically absolve potential users from liability in their use of orphan works as the court is obliged

to determine the case in a context-specific inquiry in light of the four-factor statutory test. Therefore, it can be argued that while the Malaysian copyright regime provides an avenue for potential users to escape liability from copyright infringement, they are still exposed to the risk of legal suits due to the provision's subjective application, thereby suppressing their confidence and eventually possibly impeding efforts to exploit orphan works.

The fourth and last challenge relates to Section 26(4)(c), which deals with unpublished works by unknown authors. Despite the absence of an express definition for the term 'orphan works', this section is perhaps the closest statutory provision to the orphan works problem in Malaysia. However, its application is restrictive, ambiguous, and uncertain due to the following reasons. Firstly, the copyright of the unpublished works with unknown authors is vested in the Ministry charged with the responsibility for culture. Effectively, the section excludes published (orphan) works from its scope, thereby restricting the application of the same. Secondly, the section applies if the unknown author is presumed to be a citizen of Malaysia. Having said that, it does not explain as to whose presumption is deemed relevant for this purpose, thus making this provision rather ambiguous. Lastly, Section 26(5) states that the section ceases to apply when the identity of the author becomes known. However, there are no statutory mechanisms devised in the section as to when and how to identify the known authors, creating uncertainty to the individuals and organisations who are interested in exploiting the unpublished works. The problems of this section continue to exist to this present day as the Ministry of Tourism, Arts, and Culture Malaysia has yet to introduce any regulations or guidelines on the exploitation of unpublished works. Therefore, due to the restrictive, ambiguous, and uncertain nature of Section 26(4)(c), this paper views that the provision fails to promote the use of orphan works in Malaysia.

In summary, the above discussion has disclosed the drawbacks of the Copyright Act 1987 in facilitating the use and re-use of orphan works. While relevant provisions are available in permitting the use of orphan works, they are still insufficient to provide legal certainty to safeguard potential users from prospective liability. As a result, the position of orphan works in Malaysia seems to be in limbo and trapped within the proprietary licencing regime. Before any legislative or non-legislative solution is proposed to close the gaps and address the said

challenges, this paper attempts to provide a theoretical justification for the permissive use of orphan works by examining Paul Samuelson's Public Good Theory.

PUBLIC GOOD THEORY

The preceding discussion focused on the theoretical foundation for the use of orphan works. This paper chose Paul Samuelson's Public Good Theory due to its close connection with the concept of copyright and dissemination of knowledge. The theory was postulated by Paul Samuelson through his seminal work, which was then subsequently expanded by later economists (Samuleson, 1954; Holcombe, 2000). Generally, public goods (also known as collective goods) are identified as products with two defining characteristics, namely: (1) non-rivalry; and (2) non-excludability (Samuelson, 1954; Musgrave, 1969). The *non-rivalry* characteristic refers to the quality of a product that can be shared by many people without requiring another person to temporarily or permanently surrender their part of the enjoyment over the same product (Stiglitz, 1999). Meanwhile, the *non-excludability* characteristic refers to the impossibility or difficulty of the producer to prevent other people from using the same goods (Stiglitz, 1999). The importance of public goods has been highlighted by Kallhoff (2014) as a medium to strengthen social inclusion and a means to connect people. Paul Samuelson's Public Good Theory denotes a close link between copyright, knowledge, and public goods, which is further examined below.

Copyright and Knowledge

The connection between copyright and knowledge can be traced to one of the oldest codified copyright statutes in the world, the Statute of Anne 1710. The Statute was enacted during the emergence of printing technologies, and it was also promulgated for the promotion of knowledge. The grant of copyright under the Statute of Anne was not solely based on the recognition of the author's natural right over their works. Instead, the grant of the same was also emphasised on the achievement of the encouragement of learning and the spread of knowledge (Kittredge, 2015). To achieve that purpose, nine copies of the author's books would be deposited with selected important libraries in England and Scotland. These educational institutions

were prohibited from later printing them because the books were only meant for advancement of knowledge (Seville, 2010; Dureja, 2015).

Oliar (2009) and Madison (2010) also succinctly summarised that the primary function of copyright law was to serve as a catalyst to provide economic motivation to teach people about their worldview in shaping a knowledgeable and cultured generation. It is observed that the word “teach” in their analysis was crucial because it stressed the role of copyright in society as a medium to disseminate knowledge. This contention has its support in the celebrated case of *Harper v Row Publishers v Nation Enterprises (1985)*. In the said case, the US Supreme Court judges had noted that copyright law helps to increase the harvest of knowledge by fostering original works that provide the seed of this harvest, and eventually offering an economic return to the creators who had contributed to the wealth of knowledge. Furthermore, Madison (2009) viewed copyright-protected works (e.g. books, films, and computer programmes) as a form of knowledge. The most interesting part of his view is the inclusion of intellectual creations (such as books and artworks) as the diverse product of knowledge, which can be regarded as knowledge of art and science. His view reflects the core value of Aristotle’s theory of knowledge (known as practical wisdom in his seminal work), which includes intellectual, perceptual creativity, and creative expression as part of knowledge (Erwin, 1999; Eflin, 2003; Rooney et al., 2006).

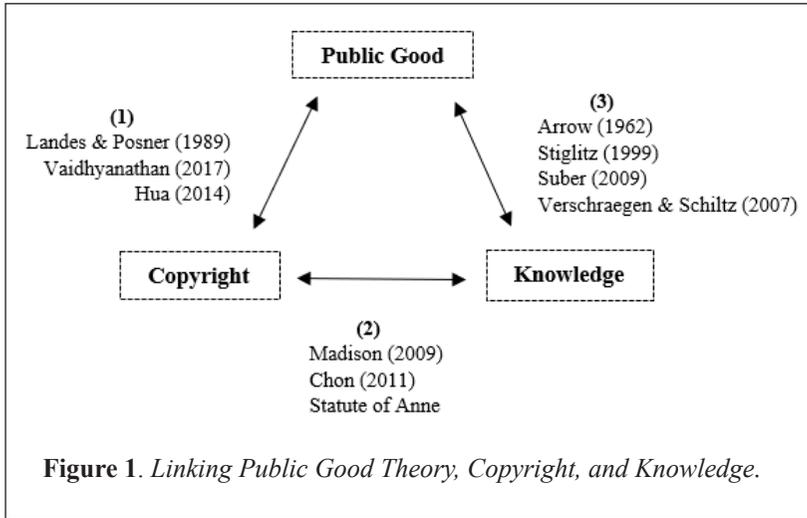
Spillover of knowledge may also be promoted via derivative works of the original copyrighted work. Chon (2011) posited that the shift of knowledge from the original work in textual form (such as a novel) to a motion picture (such as a movie) would positively promote the spillover of knowledge, and might eventually benefit members of the public. Madison and Chon’s views underscore the importance of copyright law in promoting the progress of knowledge and the arts. The production of intellectual goods is not merely to channel the copyright owner’s identity and creative expression; it is also a repository of knowledge that should be enjoyed by the society through derivative goods.

Knowledge and Public Goods

In connecting knowledge with public goods, prominent economists such as Kenneth Arrow (1962) and Joseph Stiglitz (1999) have long

recognised the notion of knowledge as a public good. This is due to the fact that knowledge fulfils the two attributes of a public good mentioned in the above discussions (Suber, 2009; Verschraegen & Schiltz, 2007). Simply put, one's knowledge about a subject and concurrent uses of the same would not adversely affect the existing pool of knowledge, thereby making it non-rivalrous. Furthermore, any attempt to halt access to such knowledge would be likely ineffective, thereby making it non-excludable. Due to its non-rivalry and non-excludable nature, any attempt to impede access to knowledge is likely to be ineffective (Suber, 2009; Verschraegen & Schiltz, 2007). Consider this situation as an example: if a person shares a new teaching method during the Covid-19 pandemic, the vast number of teachers in the world who might have come across it can implement the same knowledge without depleting the source of the same from the original contributor. It would also be highly impractical for the original contributor to stop those who do not contribute to the development of the content.

The same analogy may be applied in the copyright context. Suppose that a photographer took several images of an indigenous tribe who lives by the Rajang River in Sarawak. Assume that those photos are an important source of knowledge for the study of aborigines in Malaysia. If such photos are licensed by the photographer to a potential user, both parties (the photographer and the user) can enjoy the social advantages that are derived from the photos. The photographer still has possession of the pictures, and the user is able to use them for research or documentary purposes (non-rivalrous consumption). If the photos are stolen, copied, and shared by other users, the photographer cannot exclude them from benefitting the knowledge emancipated from his works (non-excludable). Similarly, assume that a software engineer develops a new programme that could assist businesses and corporations with their day-to-day activities. If the engineer permits a company to use the software (either on a free or licencing basis), both parties could enjoy the use of the said programme simultaneously. Once the software is shared and copied by the users, the engineer is no longer able to exclude others from using his product. Now, suppose that the said items (the photos and the software) are orphans, it is clear that there is not much difference as to the extension of the analogy. As these are copyright-protected works as previously discussed by Vaidhyanathan (2017) and Landes and Posner (1989), it is argued that the same effects will likely ensue. Figure 1 further summarises the literature that links copyright with knowledge and public good.

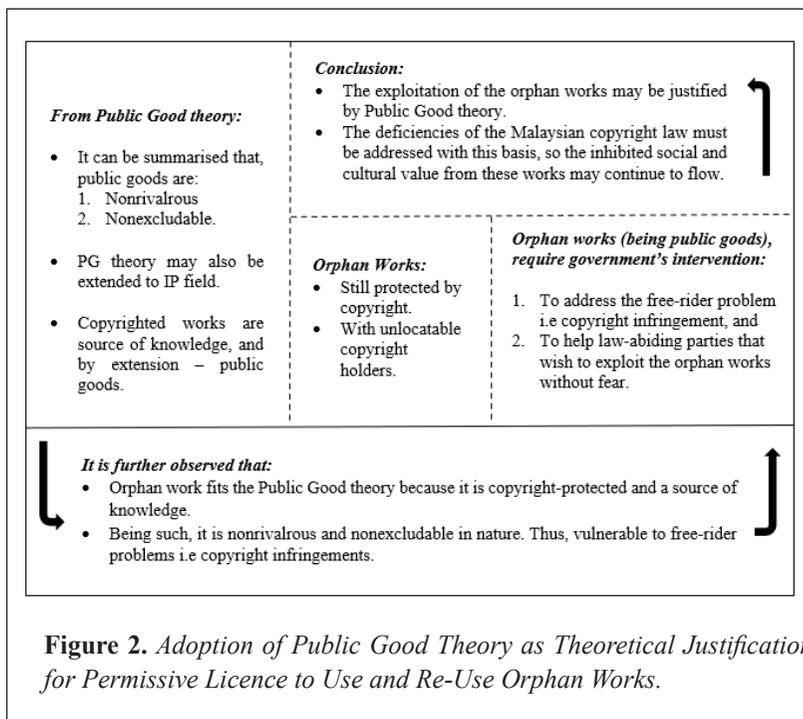


From the above illustration, it is observed that the concept of copyright extends beyond what is generally understood. In other words, it is not just a legal framework to reward monetary remuneration to content creators; it also coheres with the Public Good premise. Being part and parcel of knowledge, copyright-protected works may be seen as public goods that serve as a repository of knowledge and a means to promote the progress of the arts. By extension, the works protected under its purview (including orphan works being works in which copyright still subsists) are an important source of knowledge for research and culture, as well as building blocks for derivative works (Hansen, 2016; Hansen et al., 2013; Gompel & Hugenholtz, 2010). For this reason, Madison (2010) urged the society to view copyright and its intellectual creations from its status as knowledge rather than perceiving it as creativity law *per se*.

THEORETICAL JUSTIFICATION

This section of the paper will now proceed to answer the final question: How does Paul Samuelson's Public Good Theory justify a permissive licence to use and re-use the orphan works? Similar to other copyrighted works, orphan works are public goods as they are non-rivalrous. However, unlike other copyrighted works, orphan works are non-excludable as they are already abandoned in the

public domain. This renders the Public Good Theory to be suitable in justifying the grant of permissive licence to use and re-use orphan works. Figure 2 illustrates the theoretical justification for permissive licence to use and re-use orphan works.



In the present context, the legal uncertainties surrounding the orphan works issue, especially in Malaysia, must be addressed so that potential users such as individuals and organisations will not be in a precarious position or unsure of the legality of their activities concerning orphan works. While potential users might abandon the use of orphan works due to the legal uncertainties or fear of legal suits, some quarters also choose to take drastic and risky actions by proceeding with the exploitation of the same (Colangelo & Lincesson, 2012). In other words, they might continue using orphan works without prior action to locate the copyright owners and obtain their permission. This is exactly what copyright infringement encapsulates. Phillips (2007) denoted the occurrence of such an infringing act in the context of orphan works by stating that the chance of the vast

majority of copyright owners to resurface is simply slim, and nothing adverse will happen if they continue to use and exploit orphan works. This might be the motivation that drives them to take advantage of the situation, deriving benefits from orphan works without getting prior permission from the copyright holder.

This problem can be addressed by revisiting the copyright legal framework and strengthening protection wherever required (Stiglitz, 1999). Such reforms may be guided by the utilitarian perspective that can possibly help in shaping a more balanced legal framework. In this regard, Bentham (1789) and Mill's (1863) views are helpful for their insights: "*Laws and policies should be modelled based on the promotion of the greatest happiness for the community of people affected*". In light of this present context, the law and policy-making process, especially in unlocking access to orphan works, should be modelled by a premise that induces citizens to behave in ways that would contribute positively to the benefit of the copyright owner and the pleasure of the society as a whole.

The legal or policy intervention to facilitate permissive licence to use and re-use orphan works is not only necessary to keep infringement cases at bay. It also helps to secure the rights of the copyright holder of the orphan works in question, and facilitate individuals or organisations to use and re-use orphan works for the public good. The permissive licence could be devised in the form of a special licencing scheme (De Beer & Bourchard, 2010), exclusive orphan works legislation (Lu, 2013), adverse possession-based solution (Meeks, 2013; Bibb, 2009), or reversionary copyright approach (Favale, 2019). To elaborate more on this aspect is not within the scope of this paper; however, it is suffice to note that Malaysia could learn from the international experience of various jurisdictions.

CONCLUSION

This paper highlighted the shortfalls of Malaysian copyright law in facilitating the use and re-use of orphan works by potential users. The statutory analysis indicated that Section 13(1), Section 13(2), and Section 26(4)(c) of the Copyright Act 1987 are strict, narrow, and restrictive, and have thrown great challenges in the path of potential users to use and re-use orphan works. The ambiguity surrounding fair

dealing exceptions in Malaysia creates a further challenge for the use and re-use of orphan works in the country. In light of this scenario, potential users have two options; either to abandon the orphan works from their activities or just proceed with the exploitation of the same. Both options are not viable as the former leads to the orphan works being abandoned, while the latter risks legal suits to the potential users.

Based on the above observations, this paper proposes for legislators and policymakers to look into the matter from the perspective of the Public Good Theory as a justification to grant permissive licence to use and re-use orphan works in the public domain. It builds upon the argument that copyright-protected works (such as orphan works) are valuable sources of knowledge, and by extension, public goods. If the orphan works are not used and re-used, they will still be prone to exploitation by interested parties without the copyright owners' consent. Such a situation will never be good either to the members of the public or the creators and right holders of the orphan works. Therefore, legal or policy intervention is required to facilitate the use and re-use of orphan works through a permissive licencing scheme that could release orphan works for creative and innovative use and re-use of the works. Through a permissive licence to use and re-use orphan works, members of the public will be able to use and re-use orphan works without fear of legal implications. Finally, it is hoped that with this contribution, there will be a stronger justification for permissive licence to use and re-use orphan works protected under the Malaysian copyright law.

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REFERENCES

- Arrow, K. (1962). Economic welfare and the allocation of resources for invention. In R. Nelson (Ed.), *The rate and direction of inventive activity: Economics and social factors*. Princeton University Press.

- Bentham, J. (1789). *An introduction to the principles of morals and legislation* (J. Bennet, Trans.). <http://www.earlymoderntexts.com/assets/pdfs/bentham1780.pdf>
- Bibb, M. L. (2009). Applying old theories to new problems: How adverse possession can help solve the orphan works crisis. *Vanderbilt Journal of Entertainment and Technology Law*, 12(1), 149–181.
- Bracha, O. (2010). The adventures of the Statute of Anne in the land of unlimited possibilities: The life a legal transplant. *Berkeley Technology Law Journal*, 25(3), 1427–1473.
- Brito, J., & Dooling, B. C. E. (2005). An orphan works affirmative defense to copyright infringement actions. *Michigan Telecommunications and Technology Law Review*, 12(1), 75–113.
- Buchanan, J. M. (1968). *The demand and supply of public goods*. Rand McNally & Co.
- Chon, M. (2011). Sticky knowledge and copyright. *Wisconsin Law Review*, 177–217. Seattle University School of Law Research Paper No. 11–23, SSRN: <https://ssrn.com/abstract=1839907>
- Colangelo, G., & Lincesson, I. (2012). Law versus technology: Looking for a solution to the orphan works’ problem. *International Journal of Law and Information Technology*, 20(2), 178–202.
- The Copyright Act (Malaysia). (1987).
- De Beer, J., & Bouchard, M. (2010). Canada’s orphan works regime: Unlocatable copyright owners and the copyright board. *Oxford University Commonwealth Law Journal*, 10(2), 215–254.
- Desmarais-Tremblay, M. (2017). A genealogy of the concept of merit wants. *The European Journal of the History of Economic Thought*, 24(3), 409–440. <https://doi.org/10.1080/09672567.2016.1186202>
- Dureja, C. (2015). Historical development of copyright law in India. *International Journal of Advanced Research in Management and Social Sciences*, 4(1), 50–59.
- Eflin, J. (2003). Epistemic presuppositions and their consequences. *Metaphilosophy*, 34(1–2), 48–68.
- Erwin, T. (1999). *Nicomachean Ethics/Aristotle: Translated with introduction, notes, and glossary*. Hackett Publishing Company.
- Favale, M. (2019). Bouncing back from oblivion: Can reversionary copyright help unlocking orphan works? *European Intellectual Property Review*, 41(6), 339–346.

- Filippetti, D. A. a. A. (2015). Knowledge as global public good. In D. A. a. A. Filippetti (Ed.), *The Handbook of Global Science, Technology, and Innovation* (pp. 479–504). Wiley Blackwell.
- Giblin, R. (2017). Reimagining copyright's duration. In R. Giblin & K. Weatherall (Eds.), *What if we could reimagine copyright?* ANU Press.
- Goldenfein, J., & Hunter, D. (2017). Blockchains, orphan works, and the public domain. *Columbia Journal of Law & the Arts*, 41, 1–43.
- Gompel, S. V., & Hugenholtz, P. B. (2010). The orphan works problem: The copyright conundrum of digitizing large-scale audiovisual archives, and how to solve it. *Popular Communication The International Journal of Media and Culture*, 8(1), 61–71.
- Gowers, A. (2006). *Gowers review of intellectual property*.
- Guibault, L., & Schroff, S. (2018). Extended collective licensing for the use of out-of-commerce work in Europe: A matter of legitimacy vis-a-vis rights holders. *International Review of Intellectual Property and Competition Law*, 49(8), 916–939.
- Hansen, D. R. (2016). *Digitizing orphan works: Legal strategies to reduce risks for open access in Copyrighted Orphan Works*. Harvard Library. <https://books.google.com.my/books?id=DAeOAQAACAAJ>
- Hansen, D. R., Hashimoto, K., Hinze, G., Samuelson, P., Urban, J. M. (2013). Solving the orphan works problems for the United States. *Columbia Journal of Law & the Arts*, 37, 1–55.
- Holcombe, R. G. (2000). Public goods theory and public policy. *The Journal of Value Inquiry*, 34, 273–286. (Kluwer Academic Publishers).
- Hua, J. J. (2014). *Toward a more balanced approach : Rethinking and readjusting copyright systems in the digital network era*. Springer New York.
- Ilie, L. (2014). Intellectual property rights: An economic approach. *Procedia Economics and Finance*, 16, 548–552.
- Kallhoff, A. (2014). Why Societies need public goods. *Critical Review of International Social and Political Philosophy*, 17(6), 635–651.
- Khong, D. W. K. (2006). The historical law and economics of the first Copyright Act. *Erasmus Law and Economics Review*, 2(1), 35–69.
- Kittredge, R. (2015). *Origins of copyright – The Statute of Anne*. <https://rkip.ca/2015/04/17/early-history-of-copyright-part-2-the-statute-of-anne/>

- Korn, N. (2009). *In from the cold: An assessment of the scope of 'orphan works' and its impact on the delivery of services to the public*. <https://books.google.com.my/books?id=SH05ygEACAAJ>
- Kretschmer, M. (2005, 6–8 July). *Access and reward in the information society: Regulating the collective management of copyright*. Society for Economic Research on Copyright Issues. Montreal, Canada.
- Khaw, L. T., & Tay, P. S. (2017). *Khaw on Copyright Law in Malaysia* (4th ed.). Lexis Nexis.
- Lu, B. (2013). The orphan works copyright issue: Suggestions for international response. *Journal of the Copyright Society of the USA*, 60, 255–284.
- Madison, M. J. (2009). Notes on geography of knowledge. *Fordham Law Review*, 77(55), 2039–2085.
- Madison, M. J. (2010). Beyond creativity: Copyright as knowledge law. *Vanderbilt Journal of Entertainment and Technology Law*, 12(4), 817–851.
- Marlin-Bennett, R. (2004). *Knowledge power: Intellectual property, information & privacy*. Lynne Rienner.
- Mediacorp News Pte Ltd & Ors v. Mediabanc (Johore Bharu) Sdn Bhd & Ors [2010] 6 MLJ 657
- Meeks, K. M. (2013). Adverse possession of orphan works. *Loyola of Los Angeles Entertainment Law Review*, 33(1), 1–37.
- Mill, J. S. (1863). *Utilitarianism* (J. Bannet, Trans.). <http://www.earlymoderntexts.com/assets/pdfs/mill1863.pdf>
- Muhamad Khair, M. H., & Mohamad Hashim, H. N. (in press). Exploring the suitability of Chesbrough's open innovation concept for the exploitation and management of orphan works under copyright law. *International Journal of Intellectual Property Management*. <https://doi.org/10.1504/IJIPM.2020.10031142>
- Musgrave, R. A. (1939). The voluntary exchange theory of public economy. *The Quarterly Journal of Economics*, 53(2), 213–237. <https://doi.org/10.2307/1882886>
- Musgrave, R. A. (1969). Provision for social goods. In J. Margolis & H. Guitton (Eds.), *Public economics: An analysis of public production and consumption and their relations to the private sectors*. Macmillan.
- Oliar, D. (2009). The (Constitutional) convention on IP : A new reading. *UCLA Law Review*, 57, 421–480.
- Padfield, T. (2010). Preserving and accessing our cultural heritage - Issues for cultural sector institutions: Archives, libraries,

- museums, and galleries. In E. Derclaye (Ed.), *Copyright and cultural heritage preservation and access to works in a digital world* (pp.63–78). Edward Elgar.
- Phillips, J. (2007). Killing the orphans. *Journal of Intellectual Property Law & Practice*, 2(10), 633-634.
- Posner, W. M. L. R. A. (1989). An economic analysis of copyright law. *The Journal of Legal Studies*, 18(2), 325–363.
- Rooney, D., McKenna, B., & Keenan, T. (2006). Copyright and cultural production: A knowledge and wisdom theory perspective on education policy. *Policy Futures in Education*, 4, 380–395.
- Samuelson, P. A. (1954). The pure theory of public expenditure. *The Review of Economics and Statistics*, 36(4), 387–389.
- Seville, C. (2010). The Statute of Anne: Rhetoric and reception in the nineteenth century. *Houston Law Review*, 47(4).
- Statute of Anne, (1710). *Copyright*. <https://www.britannica.com/topic/copyright#ref157947>
- Stiglitz, J. E. (1999). Knowledge as a global public good. In I. Kaul, I. Grunberg, & M. A. Stern (Eds.), *Global public goods – International cooperation in the 21st century* (pp. 308–325). Oxford University Press.
- Suber, P. (2009). *Knowledge as public good* [Online Newsletter]. <http://legacy.earlham.edu/~peters/fos/newsletter/11-02-09.htm>
- Sullivan, K. L. (2012). Orphan works at the dawn of digitization. *Richmond Journal of Law & Technology*, XVIII(2), 1–41.
- US Copyright Office (2015). *Orphan works and mass digitization: A report of the registrar of copyrights*.
- Urban, J. M. (2012). How fair use can help solve the orphan works problem. *Berkeley Technology Law Journal*, 27, 1379–1430.
- Varian, H. R. (2006). Copyright term extension and orphan works. *Industrial and Corporate Change*, 15(6), 965–980. <https://doi.org/10.1093/icc/dtl026>
- Verschraegen, G., & Schiltz, M. (2007). Knowledge as a global public good: The role and importance of open access. *Societies Without Borders*, 2, 157–174.
- Wilkin, J. P. (2011). *Bibliographic indeterminacy and the scale of problems and opportunities of rights in digital collection building*. C. o. L. a. I. Resources. <https://www.clir.org/pubs/ruminations/wilkin/>
- Young, A. C. (2016). Copyright’s not so little secret: The orphan works problem and proposed orphan works legislation. *Cybaris Intellectual Property Law Review*, 7, 203–247.