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Author: Ikechukwu P. Ugwu, Ifeanyi C. Ogbodo

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ARTICLE

STATUS OF ORPHAN WORKS UNDER NIGERIAN COPYRIGHT LEGAL REGIME

Ifeanyi C. Ogbodo* and Ikechukwu P. Ugwu**

Abstract

A consequence of intellectual property right regarding a copyrighted work is the benefit that accrues to a copyright owner when another seeks to utilise the property in good faith. However, there seems to be a clog where works are “orphaned”, and the owner is unknown. Any original work of authorship for which a good faith prospective user cannot quickly identify and/or locate the copyright holder in a scenario where the copyright owner's permission is required by law is considered an orphan work. The complexities of orphan works give rise to social, economic, and religious perspectives. Particularly, orphan works in relation to copyright seem to present this hardship more as against the other genre of intellectual property; the reason being that works in these other aspects of intellectual property are not likely to be orphaned because of the requirement of registration and shorter duration. An attempt is made at examining the legal framework of orphan works in Nigeria and Canada.



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Keywords: Copyright, Law, Nigeria, Orphan works

1. Conceptual clarification

1.1. Meaning of 'orphan works'

Orphan works are copyrighted works for which the author cannot be identified or located. 'Orphan works' refer to a circumstance in which a copyright holder cannot be identified and located by someone who wants to use the work in a way that requires the copyright owner's permission.¹ However, a larger issue-the impossibility to connect copyright owners with potential users-has led some to see orphan works as a problematic aspect of copyright enforcement.²

1.2. Orphan Works under the Copyright Act

The philosophical argument behind copyright protection is the idea that every person should be guaranteed the fruits of his or her labour and that no one should be allowed to explore another person's work without permission.³ The artist, writer, or musician deserves to have the product of their mental and physical exertion protected from unauthorised exploitation. This has long been settled. What happens where an artist, writer or musician does not intend, *ab initio*, to firmly manage the rights in their work or be found by persons desirous of obtaining permission for the exploration of those rights? The Act⁴ is silent in this regard. Most orphan works offend the eligibility provisions of the Act.

For Copyright to be conferred on a work in Nigeria, such work must satisfy the requirements enshrined in sections 2, 3 and 4 of the Act. These provisions deal with the different linkages that must exist between the author or work, as the case may be, and the territory of Nigeria.

Considering the provision relating to the status of the author and making/first publication in Nigeria, every work that is eligible under section 1(1) of the Act is protected by copyright where the author, or in the case of a work of joint authorship, any of the authors, is at the time when the work is made a citizen of or is domiciled in Nigeria. The next provision requires that it must be made or first published in Nigeria.

*Partner, V.C Aniako & Partners (Legal Practitioners and Arbitrators)

**Doctoral Researcher at the University of Silesia in Katowice, Poland.

¹ Work that is out-of-print or not commercially available is within the category of orphan works.

²Lifshitz-Goldberg, Y. Orphan Work. World Intellectual Property Organisation Seminar May 2010 Lecture Summary. 3-

12.<www.wipo.int/edocs/mdocs/sme/en/...ge.../wipo_smes_ge_10_ref_theme11_02.pdf> accessed 26 May, 2021,

³ Per Justice Belgore, *Oladipo Yemitan v. Daily Times of Nigeria* 1980) F.H.C.R 186 at 190 where he said "it must be stated that the legal position is that copyright belongs to the author, who is the one that actually expended the work, labour, knowledge and skill."

⁴Copyright Act, CAP 28, Laws of the Federation 2004

It will be difficult for some works in blogs and digital mediums without a definite or verifiable address of authors and publishers to satisfy this statutory requirement. In some cases, the names of the originators or right holders are known, yet it is impossible to contact them because additional details cannot be found in their works.

Advancing the argument towards the principle of national treatment, the Act stipulates that in determining if a work has copyright under section 5, consideration must be given first to the authors' citizenship or domicile, or the place of first publication or making, and then to whether the country to which the author or the work is so connected is one with which Nigeria has a treaty obligation as far as copyright is concerned. If such determination touching on an author's full identity and nationality is made, work in this class cannot be said to be orphaned.

Moreso, the Berne⁵ and Rome Conventions⁶ as well as the TRIPS Agreement⁷ are all silent on Orphan works and their status. Nigeria is not a signatory to any other known accord which stipulates the conferment of copyright on any species of orphan work.

Inference can be drawn from the provision relating to duration⁸ of Copyright that the Act itself is tolerant of authors of orphan works and seeks to preserve rights in such works. The Act recognises works by unknown, anonymous, or pseudonymous writers. If the author of a literary, musical, or artistic work is unknown or pseudonymous, the copyright Act nonetheless allows the work to be protected for seventy years from the start of the year succeeding the year in which it was first published.⁹ However, the Act allows the term of copyright to be computed from the year immediately following the author's death, regardless of whether the author's true identity was discovered during his lifetime or after his death.¹⁰

It is also worth noting that in a copyright infringement case, the Court will presume, in the absence of any proof to the contrary, that the name appearing on a work purporting to be the author's name is the author's name. Unless no name appears on the work or the name used is clearly a pseudonym, a work cannot be deemed pseudonymous or anonymous. Simple initials or pen names may be treated as pseudonyms unless they are widely acknowledged to correspond to a well-known author, and the absence of a known author does not constitute the work a pseudonymous work. This could occur for a variety of reasons. For example, where the author's identity was never revealed, the work was either published anonymously or never at all. Also, the author's identity may have been known at one time, but the information has since been forgotten. For

⁵ Berne Convention for the Protection of Literary and Artistic Works: Texts. Geneva: World Intellectual Property Organization, 1982. Print.

⁶ Rome Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organisations, 496 U.N.T.S 43,

⁷ TRIPS: Agreement on Trade-Related Aspects of Intellectual Property Rights, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, 1869 U.N.T.S. 299, 33 I.L.M. 1197 (1994)

⁸ Copyright Act, First Schedule to S. 2.

⁹ Copyright Act 2004, s. 2(3)

¹⁰ Copyright Act 2004, s. 2(4)

example, it is not always possible to figure out who inherited the copyright and now owns it. When the owner of a copyrighted work cannot be found, the work becomes "orphaned".¹¹

Another example of orphan works are works that are essentially informal, collaborative, or amorphous. In today's digital environment, such works are prevalent. Blogs, online pages, and wikis are developed informally, typically through the collaborative efforts of dozens of people who are difficult to track down.

2. Moral Rights

The two heads of moral rights are commonly referred to as the right of paternity and the right of integrity.¹² The rights are available to the author, and they are about works for which copyright subsists.¹³ Moral rights were introduced in the Rome revision of the Berne Convention, and made an obligatory provision in the Brussels revision in 1948, requiring member states to grant authors their moral rights, irrespective of their economic rights and even after the former had been transferred.¹⁴

While the material containing a copyrighted work may be destroyed, the copyright itself is intact, even if the copyright's existence may be reduced to a bare right. However, as long as the copyright satisfies all legal requirements for continued existence, it cannot be terminated merely due to the owner's action or anyone else. The rule of law determines the continuation of its existence. The owner of a copyright may issue a general license to others to use it without permission or deliberately refuse to pursue his rights; such actions may appear to be abandonment, but they do not result in copyright loss.¹⁵

A work can become orphaned when rights holders are unaware of their holding, or their demise occurs (e.g., deceased persons or defunct companies) and establishing inheritance has proved impracticable. Can an author be robbed of his moral right because his work is not eligible for conferment of copyright? The answer is in the positive.

Having established above, orphan works are not exactly eligible to copyright conferment under the Act, although the Act seeks to save such works in its provision relating to duration if the author steps out.

Section 12 of the Copyright Act elaborates the extent of right an author of a work enjoys. However, for this section, a work's author is defined more broadly to include his

¹¹ Old images or documents that have been held in library collections for years or that have lately been found are examples of orphaned works

¹² See Adolf Dietz, ALAI Congress: Antwerp 1993 The Moral Right of the Author: Moral Rights and the Civil Law Countries, 19 COLUM.-VLA J.L. & ARTS 199 (1995)

¹³ Jerry Brito & Bridget Dooling, An Orphan Works Affirmative Defense to Copyright Infringement Actions, 12 *Mich. Telecomm. & Tech. L. Rev.* 75 (2005). Available at: <http://repository.law.umich.edu/mttlr/vol12/iss1/2>. Accessed 28 July, 2021.

¹⁴ Ibid

¹⁵ See Mira T Sundara Rajan "Moral Rights in the Digital Age: New Possibilities for the Democratization of Culture", *International Review of Law Computers & Technology*, Volume 16, 2002, No 2, 187–197,

heirs and successors-in-title. The rights are perpetual, inalienable, and imprescriptible, according to Section 12(2). When taken together, this means that an author's moral right cannot be transferred while he is still alive (if an individual) or while a business is still operating (if a corporate author).¹⁶ Having been expressly declared by the Act to be perpetual in duration, does it stand to reason that this species of rights is not limited to the duration of the copyright in the works to which they are attached? It might be claimed that because the right belongs to the creator of a work protected by copyright, it should expire when the term of protection expires.¹⁷ Section 12(2), on the other hand, states unequivocally that the rights referred to in subsection (1) are permanent, implying that the moral right may outlive the economic rights.

Nonetheless, it can be safely argued that despite the provision relating to duration, the irregularities surrounding orphan works make it impossible for economic rights to be enjoyed from them. However, there is a growing corpus of research examining how current law might be adapted to apply to orphan work uses, such as the idea of fair use to orphan works, which is already in use by several libraries and archives. Others include the use of defences founded on the concepts of equality and fairness.¹⁸ These arguments are unconnected with the Act as they are merely academic, at best.

3. Fair Use and Best Practices

In recent years, fair use has become one of the most popular techniques employed by non-profit digitisers to promote providing online access to orphan works. Although no court has specifically addressed how fair use will apply to orphan works, a growing number of academics,¹⁹ librarian, and archivist membership associations, as well as libraries and archives themselves, have written about how fair use can support open access to orphan works, both individually²⁰ and collectively²¹. The fair use defence is one of the most widely cited in practice regarding free access to orphan works. It will almost certainly remain an essential component of any approach to manage orphan works, especially for open access usage supporting research and scholarship.

Fair use is a flexible limitation on copyright that allows and requires Courts to avoid rigid application of the copyright statute, and it is a complete defence to a claim of

¹⁶ Gbenga Odugbemi, *Moral Rights in Nigeria—Lessons from More Developed Jurisdictions*, 2017. <https://www.google.com/url?sa=t&source=web&rct=j&url=http://infusionlawyers.com/wp-content/uploads/2017/05/Moral-Rights-in-Nigeria%25E2%2580%2594Lessons-from-More-Developed-Jurisdictions.pdf&cved=2ahUKEwi33ozYgJDyAhUD2-AKHVKnAbAQFjALegQIFRAC&cusg=AOvVaw0x6vyD4HlkMmK23zPUH4z0&csid=1627827577038> Accessed 30 July, 2021

¹⁷ Ibid.

¹⁸ GINSBURG, J. "Moral Rights in a Common Law System" *Entertainment Law Review*, 1990, p 121, 128; L. BENTLY & B SHERMAN, *Intellectual Property Law*, 4th ed, Oxford, OUP, 2014, 276, 283-4.

¹⁹Urban, J.. How Fair Use Can Help Solve the Orphan Works Problem, 27 *Berkeley Technology Law Journal* 1379. (2012) <<https://perma.cc/C7KT-GLAK>> accessed 2 May, 2021

²⁰Stanford University Library, *Comments on Orphan Works & Mass Digitization Report* Oct. 9, 2015, <<https://perma.cc/GUL4-YJB4>> accessed 11 April 2021

²¹Statement of best practices in fair use of collections containing orphan works for libraries, archives, and other memory institutions 7 (2014), < <https://perma.cc/JU4L-Q5CB>>

infringement; if fair use is found, it is “not an infringement of copyright” according to the Copyright Act, while it is an “exception from copyright control”²² according to the Act.

4. Notable Litigation involving Orphan Works

4.1. Google Books Litigation

In 2004, Google embarked on a massive operation to digitise millions of books possessed by several big libraries, including many still copyrighted. Google donated digital copies of the scanned volumes to partner libraries as part of the ‘Google Books’ project, and the texts of the books were made available for internet searching. Users were able to read ‘snippets’ of digitised books that were still copyright protected and download complete copies of books already in the public domain.²³ Google did not obtain prior permission from the authors or publishers of the books. As revealed in documents filed in Court, one of its reasons was that many of the works were orphaned, and attempts have been unsuccessful in locating the writers. The Authors Guild and a group of authors initiated a class-action suit in the Southern District of New York in September 2005, alleging wilful copyright infringement by Google Books. Later that year, many publishers filed a similar lawsuit against Google in the same Court.

The writers, publishers, and Google signed a settlement deal in October 2008. In November 2009, the parties filed a revised settlement agreement in response to many objections from individual writers, stakeholder groups, and foreign governments. Unless the applicable copyright owner opts out, Google might scan, digitise, and exploit out-of-print books through various new commercial relationships under the modified settlement. Online access, the use of books in subscription databases, and the use of adverts in connection with these services were all part of these business partnerships. The settlement also proposed the creation of a ‘Books Rights Registry,’ which would maintain a database of rights holders and determine how proceeds from the scanned books would be distributed. Google committed to making payments on behalf of rightsholders to the Registry, which would then distribute the cash to the registered rightsholders.²⁴ If no copyright holders came forward to claim the money after a set period of time, the money might be used to cover the costs of looking for copyright owners or donated to literacy-related charity.

In March 2011, Judge Denny Chin rejected the amended settlement agreement. The Court, amongst other things, upheld the argument of the United States Government and expressed concern over the settlement’s treatment of orphan works, concluding that the question of who should be entrusted with guardianship over orphan books, under

²² Copyright Law of the United States of America and Related Laws Contained in Title 17 of the United States Code 2003, Section 107; Copyright Act Cap C28 LFN 2004, Paragraph (a) Second Schedule.

²³ A ‘snippet’ was an excerpt consisting of one-eighth of a page. Google implemented security measures to limit the portion of any book accessible through snippet views, including only three snippets in response to any given search query and ‘blacklisting’ (i.e., making unavailable) certain snippets and entire pages.

²⁴The amended settlement agreement covered photographs and other pictorial works contained in books only where a party holding a copyright interest in the image also held a copyright interest in the book.

what terms and with what safeguards, are matters more appropriately decided by congress than among private, self-interested parties.

5. Social Perspective of Orphan Works

The writer asserts that orphan poses a real problem for users who want to use such works, whether for commercial or non-commercial purposes²⁵. The following are some of the social issues arising from the use or intending use of orphan works.

5.1. Time consuming and expensive

If a potential user wants to use an orphan work, they must have to put in a lot of effort to find the owner. The procedure is usually exceedingly expensive and time-consuming, and it frequently fails to provide any benefits. Furthermore, if the user decides to utilise the work after undertaking the arduous search, he faces either substantial monetary damages or an injunction. As a result, the cost of searching, combined with the risk of being held liable for infringement, becomes prohibitive. As a result, researchers, artists, authors, and other creators will avoid using the work, even though in many situations, orphan work copyright holders do not exist or would not object to their works being used.

An example is the challenge that a historian faces while researching a collection of ancient photographs or maps. Because the researcher is unlikely to have the financial, legal, or human resources to bear the potentially crippling consequences of a lawsuit, he will not use the works at all. A library that wants to do digital preservation has a similar issue. Thousands of images of British servicemen from the First and Second World Wars, for example, are housed in the British Library.²⁶ Despite the evident usefulness of these photographs to scholars, they cannot be digitized and made accessible since their owners cannot be found.

As a result, neither the owner nor the user enjoys the job, creating a "lose-lose" situation. The potential user lost out on the possibility to create and profit from a new work, the copyright owner misses out on the opportunity to collect a license fee, and the public is denied access to the new and future works made by the new user. According to the British Library, orphan works account for 40% of all print publications²⁷. Furthermore, the problem is projected to worsen as more and more works "age" into orphan status, and new digitally orphaned works are created on a regular basis.

5.2. Preservation of Cultural History

²⁵ Dinusha Mendis and Pinar Oruç, "Orphan Works" (Copyright User.Org)

<<https://www.copyrightuser.org/understand/exceptions/orphan-works/>> Accessed 30 July, 2021.

²⁶ Many of them have been digitised and updated onto this British Library website: <https://www.bl.uk/>. An example of world war pictures on the BL website is over at <https://www.bl.uk/world-war-one/themes/life-as-a-soldier>

²⁷ Rosati, E 2013 The Orphan Works Directive, or Throwing a Stone and Hiding the Hand. *Journal of Intellectual Property Law & Practice*, 8(4): 303–310. Accessed 3 April, 2021. DOI: <https://doi.org/10.1093/jiplp/jpt015>

Countless individuals and organizations are dedicated to the daily task of archiving and preserving vast volumes of intellectual property. Countless volumes of items, including books, magazines, films, sound recordings, and fine art, are amassed by these preservationists over time. Many of the pieces are no longer available commercially, and a large number are deteriorating.²⁸ The public's ability to learn about and apply the ideas and knowledge contained in those works is contingent on their continuous availability.

Many public and private libraries, archives, and museums are now working on preservation projects.²⁹ The purpose of these institutions is to preserve the information in their collections by utilizing the instruments afforded by current technology. Even though these organizations only possess the copyrights to a small portion of their holdings, copyright nonetheless protects a significant portion of those holdings. A large percentage of such copyright-protected works would be classified orphan works, which cannot be made available to the public (unless for individual research viewing) or utilised to earn cash.

Orphan works pose a significant preservation challenge because the institution is unable to make the saved works available outside of its gates. Archives, museums, and libraries will frequently choose to preserve just those materials that they may subsequently sell to recoup their preservation costs. Copyright holders who are difficult to locate or identify make incorporating copyrighted items into public programs a difficult undertaking.

5.3. New Expression Stifled

It is widely understood that progress is made by challenging or expanding on what has previously been learnt or found.³⁰ This truism is reflected in the Nigerian Copyright Act, which protects expression rather than ideas and limits the author's exclusive rights to certain "fair uses."³¹ Orphan works, on the other hand, have been found to obstruct the development of new works by both producers and later users of copyrighted content. These persons' works were unable to be completed or distributed because they were based on an orphan work, or the orphan work constituted an essential component of their project. Collage, found-object art, and sampling have all gained popularity among modern artists during the last few decades. These kinds of artistic expression necessitate the incorporation of an existing work into a new creation.

While some of these uses may be considered "fair use," most of them will not. Nevertheless, obtaining permission for use from the copyright owners is common

²⁸Comment by Michael Hughes, Library of Congress, on Orphan Works March 25, 2005, <<http://www.copyright.gov/orphan/comments/index.html>> accessed 3 April, 2021

²⁹ Mirandah, G. Copyright Law revamped for the digital age, *Managing Intellectual Property*, 2009.

³⁰Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 575 (1994) "[F]ew, if any, things . . . are strictly new and original throughout. Every book in literature, science and art, borrows, and must necessarily borrow." (quoting Emerson v. Davies, 8 F. Cas. 615, 619 (C.C.D. Mass. 1845) (No. 4436);

³¹ . Section 102 Copyright Law of the United States of America and Related Laws Contained in Title 17 of the United States code 2003 provides "in no case does copyright protection for an original work of authorship extend to any idea."

procedure.³² This permission cannot be obtained in the case of orphan works. As a result, orphan works obstruct the creation of new works.

Scholars, historians, and educators have discussed³³ how orphan efforts forced them to drastically change or discard the fruits of their labours. Scholarly works encompass a wide range of subjects and can improve the public's knowledge and understanding in a variety of ways. It is not uncommon for scholars to come across something in a library or archive that has significant cultural or historical significance despite its lack of commercial value. Orphan works and current copyright restrictions provide a significant challenge for these individuals in bringing their discoveries to the public's attention.

6. Comparative Study of Orphan Works in Canada

Section 77 of the Copyright Act of Canada recognises orphan works in Canada. Works are considered "orphaned" where the "author cannot be located". The granting of a non-exclusive licence³⁴ for the use and exploitation of orphan works is subject to terms and conditions³⁵ and lies with the Copyright Board of Canada (hereinafter the Board) which is an economic regulatory body empowered to establish, either mandatorily or at the request of an interested party, the royalties to be paid for the use of copyright works and has the power to issue licences for the use of works when the copyright owner cannot be located.³⁶ The licence granted by the Board for the use and exploitation of orphan works is valid only in Canada. On the separate point of foreign works, it has been stated³⁷ that the Supreme Court of Canada has ruled that the Board has the jurisdiction to authorize tariffs that apply to people or activities with a "real and substantial relationship" to Canada,³⁸ provided that the Board's license is for the utilization of an orphan work owned by an unlocatable foreign national in Canada.

According to the Act, the Board may grant the applicant a license to perform one of the acts listed in sections 3, 15, 18, or 21. Each of these provisions relates to the concept of "substantiality," implying that the Board has no authority to provide licenses for "insubstantial parts," and has in fact denied applications on this basis. Accordingly,

³³ Ryan Andrews, Note: Contracting Out of the Orphan Works Problem: How the Google Book Search Settlement Serves as a Private Solution to the Orphan Works Problem and why it should Matter to Policy Makers, 19 S. CAL. INTERDIS. L. J., 97 (2009).

³⁴ A non-exclusive licence fulfils two purposes: firstly, it accounts for the possibility that the missing owner may have issued (or may later issue) a licence to another user; and secondly, it stops the Board from granting a licence that would amount to a monopoly on the use of a particular orphan work.

³⁵Section 77(2) Copyright Act 1985 (as amended).

³⁶Copyright Board of Canada, Unlocatable Copyright Owners, What is the Copyright Board of Canada? <<http://www.cb-cda.gc.ca/unlocatable-introuvables/brochure2-e.html>> accessed 15 June, 2021,

³⁷De Beer, J., &Bouchard, M. 2010. Canada's "Orphan Works" Regime: Unlocatable Copyright Owners and the Copyright Board. *Oxford University Commonwealth Law Journal*, 10(2). 215-256.Copyright Board of Canada at <<http://www.cb-cda.gc.ca/about-apropos/2010-11-19-newstudy.pdf>> accessed 21 May,2021

³⁸ Society of Composers, Authors and Music Publishers of Canada v. Canadian Assn. Of Internet Providers, [2004] 2 S.C.R. 427, 2004 SCC 45, at paras. 60-61.)

legislation on orphan works applies to all categories of works including performances³⁹, sound recordings⁴⁰, and broadcasts⁴¹. These parts refer to 'unpublished works,' or works that have not been 'fixed.' However, in the case of orphan works under section 77, it is critical that the orphan work and sound recording be "published," as well as performances and communication signals being fixed.⁴²

A license may not be necessary if the work is no longer protected by copyright – the typical rule in Canada is that copyright expires 50 years after the creator's death, though this might vary depending on the categories of works – or if what the applicant proposes to do is not protected by copyright. Concerning the second issue, the exploitation of orphan work is allowed without obtaining a license from the Board if the use falls within the category of "fair dealing for the purposes of research or private study".⁴³ However, unlike in cases of insubstantiality, it appears that "the Board's jurisdiction to grant a license has no technical legislative limit." As a result, the Board's refusal to grant an application may need to be justified as the exercise of its residual discretion. In fact, the Board has established over time and by precedent that it will not issue a license where none is clearly required.

Before submitting an application to the Board, an applicant must conduct the requisite search for the work's author and show "reasonable efforts" in line with section 77(1), which states that the Board must be satisfied that the applicant has made "reasonable efforts" to identify the copyright owner and that the owner cannot be found.⁴⁴ Because Section 77 does not set clear criteria, the Board has a lot of leeway in deciding what constitutes "reasonable efforts," which has led to the Board not establishing formal regulations. Due to the lack of formal regulations, the Board has developed informal norms to evaluate an applicant's search efforts over time. These are some of them:

- a. Adequacy of the search on a case-by-case basis;
- b. Nature of the applicant i.e., is the applicant an individual, a commercial entity, not-for-profit organisation;
- c. Proposed use; is it for a commercial or non-commercial use;
- d. Whether the search was reasonable in the circumstances; and
- e. Nature of the work and information about its owner – a book may have an initial owner whilst a photograph may not have such information.⁴⁵

An applicant will also demonstrate that they have carried out 'reasonable efforts' to locate a copyright owner. These include:

³⁹ Section 15

⁴⁰ Section 17

⁴¹ Section 21

⁴² It is important to note that "fixation" is not the same as publication. A fixed performance or communication may never have been made available to the public.

⁴³ Section 29

⁴⁴ Section 77(1) it is possible that the copyright owner has been located, but has not responded to a request for a licence or insisted on terms that are unacceptable to a licence. These are not orphan works problems. The Board may only issue a licence pursuant to section 77 if the owner is actually unlocatable.

⁴⁵ Ibid

- a. Consulting the repertoires of copyright licensing agencies and collecting societies;
- b. Consulting national libraries' indices, copyright offices' registration records, publishing houses and corporate records;
- c. Internet search, searching through old phone books and through death certificates and estate records;
- d. Extend search beyond Canadian borders if it is probable that the owner of the copyright may be located abroad.⁴⁶

Applicants were formerly required to produce an affidavit explaining all procedures taken to discover the copyright owner, in addition to producing evidence in support of the above-mentioned "reasonable efforts." The Board no longer follows this stringent approach.

Where the Board is satisfied that an applicant has carried out a search and reasonable efforts have been employed to locate an author who continues to be unlocatable, the Board 'may' issue a licence⁴⁷ which means the Board can also reject an application.

Although there does not appear to be a register or database for documenting "suspected orphan works," the Board maintains a list of licenses granted or refused for used orphan works. The Board has also concluded that forms of publication (for example, a photograph of a current event in a newspaper) are almost always done with the copyright owner's consent.⁴⁸ The Board grounds its decisions on the conduct of other similarly situated copyright owners or general market practices when considering whether to grant or refuse a license.

If the Board decides to grant a license, the terms and conditions of the license, the period of the license, the price (tariff), and payment will be considered next. The Board will consider a variety of considerations when determining the terms and conditions of a license on a case-by-case basis, including:

- a. the number of copies requested;
- b. the level of expected profit;
- c. the proposed use; and
- d. the nature of the applicant.

While a license's duration is not defined in law, the Board will suggest one in accordance with usual practice, taking into consideration section 77(3), which establishes a five-year limitation period for a copyright owner to recover royalties.

If the right holder is located as stated below, the relevant collecting society will play a substantial role in determining the payment and distributing royalties under the Canadian system. A collecting society may suggest a mechanism for determining the amount of royalties or tariffs, or the underlying objective of the license may affect the

⁴⁶ Ibid

⁴⁷ Section 77(1) – "... the Board may issue to the applicant a licence to do an act mentioned in section 3, 15, 18 or 21, as the case may be"

⁴⁸ Ibid

Board's own fee assessment.⁴⁹ The Board will examine several factors for deciding the appropriate royalty rate, including, for example, current information on the price charged by collecting organizations to license their own repertoire for proposed uses of specific/similar types of works. It is typically possible to discern a commonly accepted market practice in areas where collective licensing does not exist.

Previously, the collecting society would retain the money in trust for five years (as required by section 77(3)) until a copyright owner could be found. When a copyright owner is not identified, the collecting society is free to utilise the money for whatever purpose it sees fit after the five-year time has expired. This approach was deemed to be excessively demanding for the amounts involved, particularly where right holders fail to attend on a regular basis, resulting in a build-up of royalties. Currently, collecting societies are free to use unlocatable owners' royalties as they see fit from the start, if the collective agrees to compensate the owner if and when the owner appears.⁵⁰

When a previously unlocatable copyright owner reappears, the only recourse is to demand payment of the royalties stipulated under the license. The owner may request that the licensee cease using the work; however, unless the agreement expressly states otherwise, this will not be possible. The application will be abandoned if the copyright owner cannot be discovered during the application stage, which is normally done with the help of the Copyright Board and collecting societies.

7. Conclusion and Recommendation.

Nigeria could embrace a strong regime as seen in other countries; as such, orphan work legislation should be incorporated in our copyright statute or the provision on licensing should be expanded to accommodate orphan works. In the proposed orphan works legislation, limitation on liability should address the needs of both commercial and non-commercial use alike, and appropriately takes into account global developments. It has the benefit of providing considerable legal certainty to those users who want or need it for certain projects, while being fully compatible with fair use. In sum, the proposed orphan works legislative framework should incorporate the following:

1. Establish a limitation on remedies for copyright infringement for eligible users who can prove they have engaged in good faith diligent search for the owner of a copyright and have been unable to identify or locate him or her;
2. Define a diligent search as, at a minimum, searching Copyright Commission⁵¹ records; searching sources of copyright authorship, ownership, and licensing;

⁴⁹Copyright Board of Canada, Unlocatable Copyright Owners, Preparing Your Application. Retrieved 21 July, 2021, from <http://www.cb-cda.gc.ca/unlocatable-introuvables/brochure2-c.html> Gervais, D.j., 2001. Collective Management of Copyright and neighbouring rights in Canada: An International Perspective. Report Prepared for the Department of Canadian Heritage. Retrieved 21 July, 2021 from http://aix1.uottawa.ca/~dgervais/publications/collective_management.pdf

⁵⁰Copyright Board of Canada Different collectives have different practices. Some, including Access Copyright, will pay the copyright owner even if they make a claim after the expiry of the period set out in the Act. <<http://www.cb-cda.gc.ca/about-apropos/2010-11-19-newstudy.pdf>> accessed 21 July, 2021

⁵¹ Asein, J.O.: Nigerian Copyright Law and Practice, (2nd ed, Books and Gavel Publishing, Abuja 2021).

- using technology tools; and using databases, all as reasonable and appropriate under the circumstances;
3. Require the Copyright commission to maintain and update Recommended Practices for diligent searches⁵² for various categories of works, through public consultation with interested stakeholders;
 4. In addition to a diligent search, condition eligibility on a user filing of a Notice of Use with the Copyright Commission,⁵³ providing the appropriate moral right, and engaging in negotiation for reasonable compensation with copyright owners who file a Notice of Claim of Infringement, among other requirements;
 5. Limit monetary relief for infringement of an orphan work by an eligible user to the amount that a willing buyer and a willing seller would have agreed upon immediately before the use began;
 6. Bar monetary relief for infringements of orphan works by eligible non-profit educational institutions, museums, libraries, archives, or public broadcasters,⁵⁴ for non-commercial educational, religious, or charitable purposes, provided the eligible entity promptly ceases the infringing use;
 7. Condition injunctive relief for infringement of orphan works by accounting for any harm the relief would cause the infringer due to its reliance on its eligibility for limitations on remedies;
 8. Limit the scope of injunctions against the infringement of an orphan work if it is combined reasonable compensation for past and future uses and provides moral right;
 9. Allow a Court to impose injunctive relief for the interpolation of an orphan work into a new derivative work, provided the harm to the owner-author is reputational in nature and not otherwise compensable.

⁵² Nigerian Copyright Commission (2012), 'Programmes, Achievements, and Challenges in 2012' available online at <http://www.copyright.gov.ng/index.php/downloads/file/22-ncc-2012-annual-report> accessed 30 July, 2021.

⁵³ Ibid

⁵⁴ Alaba Market No Longer Haven for Piracy – Ezekude' Being a transcript of Interview conducted for the Director-General of the Nigerian Copyright Commission by Miebi Senge and published in the Nigeria Communications Week of April 2, 2012, available online at <http://www.nigeriacommunicationsweek.com.ng/e-guest/alaba-market-no-longer-haven-for-piracy-ezekude> accessed 30 July, 2021.