



## Reconstruction of the regulation on royalty management of copyrighted works and the economic utilization of orphan works

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### Abstract

Copyright of Works Whose Creators Are Unknown is Held by the State for the Benefit of the Creator, yet there are no technical provisions regulating how the State should implement this mandate. As a result, copyrighted songs, and/or music whose creators are unknown remain freely usable for commercial purposes by any party without royalty payments. In relation to this issue, the following research questions are formulated, how is the implementation in Indonesia and several other countries regarding the management of royalties for copyright works whose creators are unknown? How should the regulation of copyrights for works with unknown creators be reconstructed? This research is normative in nature, utilizing secondary data supported by primary data. The findings of this research are No Mechanism for State's Role in Holding Copyrights with Unknown Creators, Article 39 of Law Number 28 of 2014 on Copyright states that the State holds the copyright of works with unknown creators. However, No Designated Institution Responsible, when the State holds such copyright, its position should be equivalent to that of a copyright holder as referred to in Article 9 of Law No. 28 of 2014 on Copyright. The State may delegate authority to a specific institution to manage royalties for works whose creators are unknown, No Central Database of Orphan Works, Indonesia currently does not have a data system to document copyrighted works, including orphan works. To address the above issues, a reconstruction of the regulation related to works with unknown creators is required, which includes establishment of a Specialized Institution, a dedicated agency or team needs to be formed to strengthen the role of the State in managing royalties for orphan works, development of a Clear and Transparent Mechanism, there must be regulations outlining a detailed mechanism for royalty management, including the process for identifying works with unknown creators, development of a Comprehensive Central Database, a comprehensive database is essential to document all copyrighted works, especially those with unidentified authorship.

**Keywords:** Copyright, works with unknown creators

### Introduction

A musical work or song created by an individual referred to as the Creator is the result of their intellectual effort, possessing unique and personal characteristics. For such a copyrighted work, the creator holds exclusive rights, which consist of moral rights and economic rights. The economic rights pertain to the commercial use of songs and/or music. Therefore, any individual or legal entity using copyrighted songs and/or music for commercial purposes must obtain permission from the Creator or the copyright holder and make royalty payments or provide compensation.

The provisions regarding the mechanism for royalty payments for the use of songs and/or music by commercial-based public services are regulated in Government Regulation Number 56 of 2021 on the Management of Royalties for Copyrighted Songs and/or Music, which serves as the implementation of the management of the economic rights of creators/copyright holders and the economic rights of performers and phonogram producers, as stipulated in Law Number 28 of 2014 on Copyright.

Among the songs and/or musical works used or exploited for commercial purposes, there are works whose creators are unknown, commonly referred to as No Name (NN) works. Copyrights with unknown creators refer to works protected as original creations produced by a creator, but the creator or copyright holder cannot be found or contacted; in some cases, the creator's name may be known, but detailed data is unavailable. Copyrighted songs whose creators are unknown

have the same potential for utilization or commercialization as other songs. Consequently, several countries such as the United States, the United Kingdom, and other European nations have established mechanisms through which the state manages royalties for such works.

In Indonesia, the management of royalties for works with unknown creators is addressed in Article 39 of Law Number 28 of 2014 on Copyright, which stipulates that if the creator of a work is unknown, the copyright for that work shall be held by the State for the benefit of the creator. However, there are no technical provisions regulating the implementation of the State's role in holding such works for the benefit of the creator. As a result, copyrighted songs, and/or music whose creators are unknown can still be freely used for commercial purposes by any party without any royalty being collected.

The problems addressed in this research are how is the implementation in Indonesia and several other countries regarding the management of royalties for copyrights whose creators are unknown? And what are the technical provisions for the state in holding copyrights whose creators are unknown?

### Methodology

This research employs normative and empirical juridical methods, using a descriptive-analytical approach. Accordingly, the research is conducted by examining literature sources and statutory regulations. The collected

materials are reviewed and analysed to draw conclusions that serve as answers to the legal issues formulated in accordance with the title of this paper.

### Material

The provisions regarding copyright of works whose creators are unknown are regulated in Article 39 of Law Number 28 of 2014 on Copyright, which states as follows

1. In the case where the creator of a work is unknown and the work has not been announced, the copyright to the work shall be held by the State for the benefit of the creator.
2. In the case where the work has been announced but the creator is unknown, or only an alias or pseudonym of the creator is provided, the copyright to the work shall be held by the party who made the announcement for the benefit of the creator.
3. In the case where the work has been published but the creator and the party who made the announcement are unknown, the copyright to the work shall be held by the State for the benefit of the creator.
4. The provisions as referred to in paragraphs (1), (2), and (3) shall not apply if the creator and/or the party who made the announcement can prove ownership of the work.
5. The benefit of the creator as referred to in paragraphs (1) and (3) shall be carried out by the Minister.

The above provisions regulate that a work whose creator is unknown shall be held by the State, with the following criteria

1. The creator of the work is unknown and the work has not been announced.
2. The work has been announced, but the creator is unknown or only an alias or pseudonym is provided.
3. The work has been published, but neither the creator nor the announcing party is known.

The criteria for such works do not clarify whether the works are still within their legal protection period or have already passed it. For types of works such as written works, books, and music, the protection period is the lifetime of the creator plus 70 (seventy) years after the creator's death. If a work has passed its protection period and continues to be preserved by the community, the work may become a form of traditional cultural expression, which is considered part of traditional cultural heritage.

Based on the provisions of Article 39 of Law Number 28 of 2014 on Copyright, it can be concluded that there are two types of works held by the state

1. Works that are still within their legal protection period;
2. Works that have expired their protection period but continue to be preserved by surrounding communities, which then become Traditional Cultural Expressions.

In relation to the fundamental concept of copyright protection namely, that copyright is not granted to ideas or concepts, but to the expression of those ideas a work must have a distinctive, personal form and demonstrate originality as a creation born out of creativity or expertise,

and must be capable of being seen, read, or heard. Under the TRIPS Agreement, it is emphasized that copyright protection covers expressions, and does not extend to ideas, procedures, methods of operation, or mathematical concepts. The requirements for a work to entitle its creator to legal protection are as follows

1. Fixation: Ideas are not protected by copyright, in order to be protected, an idea must first be expressed in a tangible form. This is the core of the fixation doctrine.
2. Form: The fixation principle requires that a work must have a specific form or structure.
3. Originality: The work must be original. Originality here does not mean something completely new (genuine), but rather that the work is the result of the author's own intellectual effort and is not merely copied from other works.

The reasons why copyright must be protected are as follows

1. The rights granted to a creator in the fields of science, art, and literature or to an inventor in the field of new technology involving an inventive step represent a form of appreciation and recognition for human achievements in producing innovative works.
2. A copyright protection system that can be easily accessed by other parties.

Creators gain economic benefits from the use of their works by users; therefore, creators have a fundamental right to receive compensation proportional to the value of their contribution. Copyright law provides exclusive rights in the form of economic rights over the use of works created by the author, including fair compensation for the commercialization of their work. Royalties must be paid because songs and/or music are intellectual creations of human beings that are protected by law. If other parties wish to use them, they are expected to request permission from the copyright holder. Royalty payments are a consequence of using someone else's work or service. In daily life, songs serve as one of the supporting tools in business activities. The management of economic rights over a work is an exclusive right of the creator to gain economic benefit from the use of their work. But how should such rights be managed if the creator is unknown? In such cases, the economic rights are held by the State. However, Article 39 of Law Number 28 of 2014 on Copyright does not yet provide technical provisions under the law, making its implementation ineffective.

Similarly, for works whose creators are unknown and are considered Traditional Cultural Expressions (TCEs) or works that have expired protection periods but are still preserved by the community, clear regulations are still lacking. This is because Article 33 paragraphs (3), (4), and (5) of Government Regulation Number 56 of 2022 on Communal Intellectual Property (CIP) do not clearly explain the mechanisms for the use or commercialization of TCEs/CIP. In general, the provisions state that

1. The commercial use of CIP must obtain permission in accordance with the prevailing laws and regulations.
2. The commercial use of CIP must consider benefit-sharing agreements as stipulated by the relevant laws and regulations.

3. The forms and procedures for obtaining permission and for benefit-sharing as referred to above shall be determined by the Minister and relevant ministry/non-ministerial government institutions according to their respective authorities.

Based on the above, the provisions regarding the management of economic rights over a work whose creator is unknown have not yet been regulated in detail in terms of implementation or mechanism. As a comparison, the implementation of copyright regulation for works with unknown creators in other countries particularly the United States and the United Kingdom will be described by the author, as both countries have paid close attention to establishing technical regulations on orphan works.

In the United States, orphan works began to receive attention in 2006, starting with the 109th session of Congress in 2006 and continuing in 2008, where discussions were held to address the issue of orphan works through the enactment of legislation. However, until 2016, Congress had not passed any law specifically addressing orphan works. Several bills had been proposed in the U.S. Congress to address the issue of orphan works, but none had been enacted into law. These draft laws include the Shawn Bentley Orphan Works Act of 2008, the Orphan Works Act of 2006, and the Orphan Works Act of 2008. Some important notes regarding the regulation of orphan works in the United States include

1. No Comprehensive Specific Law: To date, the United States does not have a federal law that specifically

governs orphan works. Several legislative efforts have been proposed in the past, such as the Orphan Works Act of 2006 and the Shawn Bentley Orphan Works Act of 2008, but none have successfully been passed into law.

**Result**

1. The United Kingdom has established regulations regarding the use and licensing of works whose creators are unknown, also referred to as orphan works. Orphan works are creative works or performances that fall under copyright protection and receive legal protection such as diaries, photographs, films, or musical works whose creators or rights holders are unknown or cannot be located. The UK Copyright Office manages the copyright of works with unknown creators by granting licenses or usage permissions to users who wish to utilize such works. The conditions are as follows:  
Licenses or usage permissions for works whose creators are unknown are only valid for use within the UK
  - a. They may be used for commercial or non-commercial purposes;
  - b. The license or permission granted is non-exclusive (not limited to a single licensee);
  - c. The duration of the license or permission is seven (7) years, and it may be renewed or extended.

The license or permission for the use of orphan works is subject to set tariffs, with the following provisions

Number of works	Fee (GBP)	Number of works	Fee (GBP)
1	£20	16	£52
2	£24	17	£54
3	£26	18	£56
4	£28	19	£58
5	£30	20	£60
6	£32	21	£62
7	£34	22	£64
8	£36	23	£66
9	£38	24	£68
10	£40	25	£70
11	£42	26	£72
12	£44	27	£74
13	£46	28	£76
14	£48	29	£78
15	£50	30	£80

The UK Copyright Office has established a fee schedule for users who wish to utilize works whose creators are unknown (orphan works) for either commercial or non-commercial purposes. The amount to be paid is determined based on the number of works for which usage permission is requested.

The number of orphan works—works with unknown creators—recorded by the UK Copyright Office is 1,697, consisting of, among others, 75 musical works, 28 sound recordings, and 579 literary works. Applications to obtain a license for the use of orphan works are submitted online to the UK Copyright Office. Once approved, the license is issued via the applicant's email address. Payments for the use of orphan work licenses are managed by the UK Copyright Office and deposited into a bank account for a period of seven (7) years. If, at a later time, the creator of the work is identified, the funds that have been collected will be handed over to the rightful creator. However, if the creator cannot be identified, the funds will be used for social purposes related to the development of copyright.

## 2. Reconstruction of Article 39 of Law Number 28 of 2014 on Copyright

Several countries have adopted different approaches in addressing works without clearly identified creators. For instance, in the United States, there are provisions that allow such works to remain protected, provided certain requirements are met. The United Kingdom has gone further in regulating orphan works through the active involvement of the state, in this case represented by the UK Intellectual Property Office (IPO-UK). Considering the implementation in the UK, there is an urgent need to reconstruct Indonesia's copyright regulations to be more responsive to such issues. This phenomenon presents increasing challenges in protecting copyright and in creating a legally safe space for creators. Therefore, it is essential to explore how copyright regulations can be reconstructed to be more inclusive and adaptive to modern developments.

Reconstruction of the regulations regarding orphan works must also consider social and economic aspects. Works with unknown creators are often used for commercial purposes without fair compensation to the actual creator. As a culturally and creatively rich nation, Indonesia must develop an effective mechanism to manage royalties for orphan works. One model that could be adopted is the system used in the United Kingdom, which has proven effective in administrating and managing the use of orphan works.

Based on these considerations, a regulatory reconstruction regarding copyright of works with unknown creators is crucial to anticipate legal problems emerging in society. Legal reconstruction is the effort to restructure or rebuild the existing legal system with the aim of creating a legal order that is better, more just, and more aligned with society's needs. Legal reconstruction may be partial or comprehensive, depending on the level of the issue at hand. Mochtar Kusumaatmadja proposed that law functions as a tool for development and social reform. He also stated that without legal certainty and public order—as realized through the law—it would be impossible for individuals to optimally develop their God-given talents and abilities within the society in which they live. Furthermore, he emphasized that law comprises all norms and principles that

regulate human interaction in society, aiming to maintain order and encompassing institutions and processes to ensure those norms are realized in practice.

Even though the Copyright Law provides a legal foundation in Article 39, there are still several weaknesses in its regulation, particularly regarding royalty management mechanisms and the protection of orphan works. Therefore, a regulatory reconstruction is necessary to establish a clearer, fairer, and more effective system. The weaknesses of Article 39 of Law Number 28 of 2014 on Copyright are as follows

- a. No Mechanism for the State's Role in Holding Copyrights of Works with unknown Creators: Article 39 of Law Number 28 of 2014 on Copyright states that the state holds the copyright over works whose creators are unknown. However, the law does not elaborate in detail on how the mechanism for royalty management is to be carried out. There is no explanation on how to identify works with unknown creators, how royalties are to be collected, and how those royalties are to be distributed or utilized. This creates legal uncertainty and the potential for abuse of authority;
- b. No Specific Institution Responsible when the state holds a copyright, it assumes the same position as any copyright holder as referred to in Article 9 of Law No. 28 of 2014 on Copyright. The state may delegate authority to a specific institution to manage royalties for works with unknown creators. Currently, copyright management in Indonesia is handled by Collective Management Organizations (LMK). However, LMKs do not have a specific mandate to manage royalties for orphan works. As a result, many of these works are not properly managed;
- c. Absence of a Central Database for Works with Unknown Creators  
Indonesia currently lacks a database to document copyright-protected works, including those whose creators are unknown. This makes identification and verification processes difficult, resulting in many works that should be protected not being properly recorded.

Reconstruction of Article 39 of Law Number 28 of 2014 on Copyright can be formulated with the following key provisions

- a. In the event that the creator of a work is unknown and the work has not yet been published, the copyright over the work shall be held by the State for the benefit of the creator.
- b. The State is obligated to inventory copyrights whose creators are unknown. All such copyright data must be recorded in the intellectual property database.
- c. If a work has been published but the creator is unknown, or only an alias or pseudonym is listed, the copyright over the work shall be held by the party who published it, for the benefit of the creator, as recorded in the Intellectual Property Database.

- d. If a work has been published but both the creator and the party who published it are unknown, the copyright shall be held by the State for the benefit of the creator.
- e. The State shall grant licenses for the use of works with unknown creators for both commercial and non-commercial purposes through a formal application process.
- f. The State shall establish a special institution or task force for the collection of royalties from works whose creators are unknown.
- g. The above provisions shall not apply if the creator and/or the party who published the work is able to prove ownership of the work and verify their data in the Intellectual Property Database.
- h. The interests of the creator, as mentioned above, shall be carried out by the Minister responsible for intellectual property protection. Further provisions regarding the procedures for application and issuance of licenses for the use of works with unknown creators shall be regulated by Ministerial Regulation.

### Conclusion

The implementation of copyright in managing royalties for musical works used for economic purposes when the creator is unknown has not been fully realized, as Article 39 of Law Number 28 of 2014 on Copyright does not include provisions regarding the management of royalties for works whose creators are unknown. Consequently, there have been cases involving such works which, by law, should fall under the authority of the state for copyright ownership and royalty management, but cannot be implemented.

Currently, royalty collection for works with unknown creators is carried out by Collective Management Organizations (CMOs), categorizing the funds as unclaimed royalties. If within two years the creator is identified, the royalties will be transferred to the rightful owner. However, if the creator remains unidentified, the funds are redirected for social purposes benefiting other creators.

In comparison, the United Kingdom has a more comprehensive orphan works regulation than the United States. The UK allows the use of orphan works if the copyright holder cannot be located after a diligent search. Users must pay a specific fee to the government, which is held in trust until the copyright owner is found. If the owner is never identified, the funds are used for public interest. Therefore, a regulatory reconstruction concerning copyrights of works with unknown creators is urgently needed to anticipate legal issues arising in society. Legal reconstruction is the process of restructuring or rebuilding the existing legal system—in this case, concerning Article 39 of Law Number 28 of 2014 on Copyright—with the goal of creating a legal framework that is clearer, fairer, and better suited to societal needs. Given the many weaknesses in Article 39, the reconstruction of regulations related to this provision is deemed necessary to ensure better legal certainty and more effective copyright protection.

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