



An Integrated Framework for Providing Access to Orphan Works in Malaysia

Muhamad Helmi Muhamad Khair¹, Mohd Haris Abdul Rani¹, Maruf Billah¹, Azlina Mohd Hussain², Mohd Syahrul Ab. Ghani³

¹ UiTM Shah Alam, Malaysia

² UiTM Negeri Sembilan, Malaysia

³ Jabatan Muzium Malaysia, Kementerian Pelancongan, Seni dan Budaya Malaysia
muham8041@uitm.edu.my

Abstract. Orphan work has nothing to do with orphan children. Orphan works are copyright-protected works with unidentifiable, untraceable, and unlocatable copyright holders. Prospective users such as individuals and cultural heritage institutions must obtain permission from the copyright holders before using their works. This is in line with the principle of respect under copyright law. Unfortunately, in an orphan work situation, the authorisation from the copyright holders can't be obtained despite a thorough search. For fear of legal suits, most law-abiding individuals and organisations chose to abandon the works from exploitation activities, leaving the orphan works to stay stagnant in the copyright orphanage. Therefore, this research aimed to explore and propose an innovative strategy that could help unlock the orphan work from such a situation, especially in the Malaysian context. In achieving the aforementioned aims, this research employed a combination of doctrinal analysis and library-based research. This paper eventually proposed an integrated framework (incorporating the elements of adverse possession doctrine into the licensing regime) for the exploitation of orphan works which may be considered by policy makers and legislators in formulating a solution for interested parties to use the orphan works. It is hoped that this finding will instill confidence in any interested parties, especially in exploiting and managing risky materials such as orphan works, thereby releasing the same from the copyright orphanage.

Keywords: Intellectual Property, Copyright Law, Orphan Works, Orphan Works Licensing, Adverse Possession Doctrine

1 Introduction

The principle of respect is critical in the context of copyright law. Before using copyright-protected works (e.g., photos, paintings, novels, songs, and movies), permission from the copyright holders is required. Prospective users may, however, be unable to identify, locate, or contact them for copyright clearance in some cases. These works are known as "orphans," or copyright-protected works with unlocatable or unidentified copyright holders (US Copyright Office, 2006, 2015).

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Articles 2 and 5 of the Berne Convention provide for the presumption that the work is still protected by copyright (in-copyright). These two provisions establish that when original works are fixed in tangible form, they are protected by copyright law. A prospective user must assume that the works he wishes to exploit are protected by copyright. As a result, any interested parties must make an effort to locate and contact the rights holders before using the works. Given the foregoing, orphan works are defined in this paper as original works of authorship that are presumably still protected by copyright but whose rights holders are either unknown or untraceable. As a result, while all types of works may be affected and potentially at issue, they will only be recognised as "orphan" if they meet the following criteria: (i) in-copyright and (ii) a good-faith user cannot identify or trace the copyright holders.

The phenomenon of orphan works is said to be caused by the lack of work registration requirements (Greisman, 2012; Lu, 2013). Because registration is not required under Malaysia's Copyright Act, the law falls short of creating a comprehensive database of authorship. This is based on Article 5 of the Berne Convention, which requires state members (including Malaysia) to provide formality-free protection to both foreign and domestic authors. Another reason for the rise of orphan work is rapid digital and technological advancement, which has created a wide window of opportunity for works to be quickly disseminated on the Internet, making it difficult to locate and identify the authors of the works for their authorisation (Colangelo & Lincesson, 2012; Young 2016).

Many potential users, including individuals, businesses, and cultural heritage institutions, face difficulties as a result of this situation. The threat of legal action from reappearing copyright holders may impede activities such as intellectual resource preservation, digitisation, restoration, adaptation, modification, or commercialisation. As a result, the works may be abandoned from the aforementioned activities, resulting in a massive loss to society because the orphan works' cultural and social benefits cannot be leveraged further. The orphan work problem is also present on a global scale. In China, for example, a woman gave the Shanghai Movie Museum the only known copy of the 1940s film "Fake Phoenix" (Li, 2018). However, the restoration process was hampered because the museum was unsure of the true identity of the film's copyright holder. Several photographs of Jewish families were discovered in an abandoned hotel room in Germany shortly after World War II (Sarwate, 2008). The photographs were then given to the US Holocaust Museum for safekeeping. Nonetheless, because the photographers' copyright holders were unknown, obtaining permission to use the images was difficult. In the United States, Billy Mize's grandson planned to use his grandfather's music for a documentary (Crispino, 2019). However, the plan was also interrupted as he could not identify the music's copyright holders (the record companies that originally owned the rights were no longer exist).

International organisations have worked to determine the number and size of orphan works housed in memory, culture, and heritage institutions (such as museums, libraries, and art galleries). In the United Kingdom, for example, the Collections Trust and the Strategic Content Alliances surveyed 500 institutional respondents and estimate that they have 13 million orphan works in their collections (Korn, 2009). A 2011 study by

Wilkin found that the body of orphan works in the HathiTrust collection could potentially reach 2.5 million, with more than 800,000 are US orphan works (Wilkin, 2011). Malaysia, like other countries, is also grappling with the issue of orphan works. Preliminary findings from interviews with Malaysia's major memory institutions indicate that orphan works account for between 1% and 20% of their collections (Muhamad Khair, 2022). This is a clear indication that Malaysian memory institutions also keep works that are at risk, such as orphan works, and that must be well managed.

2 Problem Statement

The proprietary model currently used in copyright regimes is regarded as deficient and insufficient for maximising the exploitation of copyright-protected works (Marlin-Bennet, 2004) – and thus, orphan works by extension. For example, under the Malaysian copyright regime, Section 13(1)(a)-(f) of the Copyright Act 1987 protects the orphan works as copyright-protected works and prohibits the orphan works from being reproduced, commercialised, rented, shown, played, distributed and rented to the public without the copyright owner's authorisation. The said section also prohibits the re-use of orphan works as derivative works that impede translations, adaptations, arrangements, compilations, and other transformations of orphan works.

The above activities require express consent from the copyright holder, whereby the potential users need to identify and locate the rights holder. The problem persists in the orphan works as the copyright owner cannot be located, hampering efforts to exploit the orphan works, resulting in the orphan works being left abandoned. While admittedly, the law provides a legal defence called “fair dealing” – e.g Section 13(2)(a) of the Copyright Act 1987 (Malaysia), Section 29 and 30 of the Copyright, Designs and Patents Act 1988 (UK) and “fair use” e.g 17 U.S.C. § 107 (US) – which may protect any unauthorised uses of the orphan works, the application of this legal defence is still subject to its statutory test and requirements. In other words, it is not an automatic saviour. Due to the uncertainty arising from the restrictive scope of fair dealing, fair use, and its test, the users still face the risk of legal suits. The subjective application of the fair dealing and fair use exceptions may discourage the potential users of the orphan works, further hampering the efforts to exploit the orphan works.

In Malaysia specifically, despite the fact that Section 26(4)(c) of the Copyright Act 1987 deals with the copyright of an unknown author of unpublished work, it is observed that the application of the said section is restrictive. Detail analysis of Section 26(4)(c) reveals that the section only covers unpublished works with unknown authors who are presumed to be a citizen of Malaysia. It effectively excludes published orphan works as well unpublished orphan works whose authors are non-Malaysian. Besides being restrictive, the section also automatically revokes the user's rights to exploit the unpublished orphan works once the unknown author is known, leaving the users of the works in a state of uncertainty. Due to the restrictive and uncertain nature of Section 26(4) of the Copyright Act 1987, it is observed that the section fails to promote the use and re-use of orphan works in Malaysia.

In view of the above, this research aimed to propose an innovative strategy for providing access to orphan works by exploring the licensing scheme mechanism and adverse possession doctrine. It is hoped that this research will instill confidence in organisations that house orphan works in order to manage and exploit them legally and efficiently. Additionally, it is also hoped that this research will serve as a catalyst for the development of a comprehensive legal framework for the exploitation of orphan works, especially in countries where mechanisms for the same are not yet developed or implemented.

3 Literature Review

A literature review revealed a plethora of approaches to resolving the issue of orphan works. Concerning the fair use defence, Leval (1990) stated that the fair use legal doctrine is applicable to orphan works subject to the fulfilment of the four conditions stipulated under the law. Conceding Leval, US Copyright Office (2015) also acknowledged the application of the fair use doctrine to new fact patterns such as orphan works. While admittedly fair use doctrine may be applicable to orphan works, the fair dealing exception under the Malaysian copyright regime Subsequent paragraphs, however, are indented. is narrower than the fair use defence. In addition, the literature also revealed the use of Open Innovation concept in permitting the use of orphan works (Muhamad Khair & Mohamad Hashim, 2021). Such a proposal has still not been implemented in any jurisdictions, thereby opening up further discussions on other alternatives that can be further studied.

The literature on orphan works also explored the prospect of licensing scheme for orphan works. Most literature proposed for the potential users to apply for a licence to exploit the orphan works from a government-appointed body upon confirmation of the status of a copyrighted work as an orphan work and payment of a sum of money to the relevant governing body. Ahmed and Al-Salihi (2020) acknowledged the centrally granted licence as the most appropriate approach for orphan works because the government will manage and deal with licensing applications fairly, thereby reducing the possibility of biased decisions. In a similar vein, Gompel and Hugenholtz (2010) acknowledged that the centralised licensing approach is safer because the competent authority only issues the license after going through a series of procedures, potentially limiting the risk of being sued by reappearing copyright owners. The most relevant literature is as cited by Meeks (2013), who opined that the adverse possession doctrine could be applied in the context of orphan works, but with slight modifications and a very specific application. Meeks justified the application of the adverse possession doctrine by stating that it permits the exploitation of orphan works in the form of new uses without fear of legal repercussions. The application of the adverse possession doctrines is interesting, further encouraging further exploration (via this present research) as to its suitability and application in the orphan works context.

Despite the abundance of literature on orphan works at the international level, there is still a dearth of such literature in Malaysia. So far, an article by Muhamad Khair &

Mohamad Hashim (2021) explored the viability of Chesbrough's Open Innovation concept for the exploitation of orphan works, and an article by Muhamad Khair, Mohamad Hashim & Anagnostopoulou (2021) discussed the Public Good theory justification for the use of orphan works. There was also a report by the Copyright Committee of the Asian Patent Attorney Association (2015) and an article by Khong (2006) dominated the local literature on orphan works. The 2015 report emphasised the significance of striking a balance of rights between the users and the copyright owners of orphan works. Khong in his work, proposed that a copyright registration and renewal system, as well as a statutory licensing scheme, be implemented in Malaysia. Since then, there have been no public consultations or legislative actions, much less policies for orphan works. Thus, this research aspired to expand the discussion by focusing on the potential application of a modified licensing framework in the context of orphan works.

4 Methodology

The research design was exploratory, as it aimed to explore the fundamental principles governing the exploitation of orphan works, and ultimately to propose a modified framework for their exploitation. Due to the exploratory nature of this study, this research employed a combination of two components: (i) doctrinal analysis, and (ii) library-based research. The doctrinal approach was adopted because this research required an examination of legislation pertaining to orphan works in Malaysia and selected jurisdictions such as the UK, Canada, and India. This approach served two purposes, (i) clarified the current legal treatment of orphan works issues, and (ii) established a legal foundation for formulating the proposed integrated framework. Next, library-based research was employed as this research required the researchers to understand the adverse possession doctrine and its suitability to be applied in the orphan works context. The overall research process can be described in three phases. The first phase addressed the first research question, "What is the current legal treatment of the orphan works issue?" This stage began with an examination of several primary legal sources (doctrinal analysis), which include statutes, directives, and regulations from the selected jurisdictions. The second phase addressed the second research question, "To what extent adverse possession doctrine can be applied so as to permit orphan works exploitations?" This stage primarily employed library-based research – examining textbooks, journal articles in order to understand the nature of adverse possession doctrine and examine the suitability of the same to be applied in the orphan works context. The final phase addressed the third research question, "How should the integrated framework for the exploitation of orphan works be developed?" The findings from Phase 1 and Phase 2 were used as inputs for the development of the proposed integrated framework. The next section will present and discuss the findings from the analysis exercise.

5 Findings and Discussions

The proposed modified licensing framework for the exploitation of orphan works is illustrated in Figure 1 below.

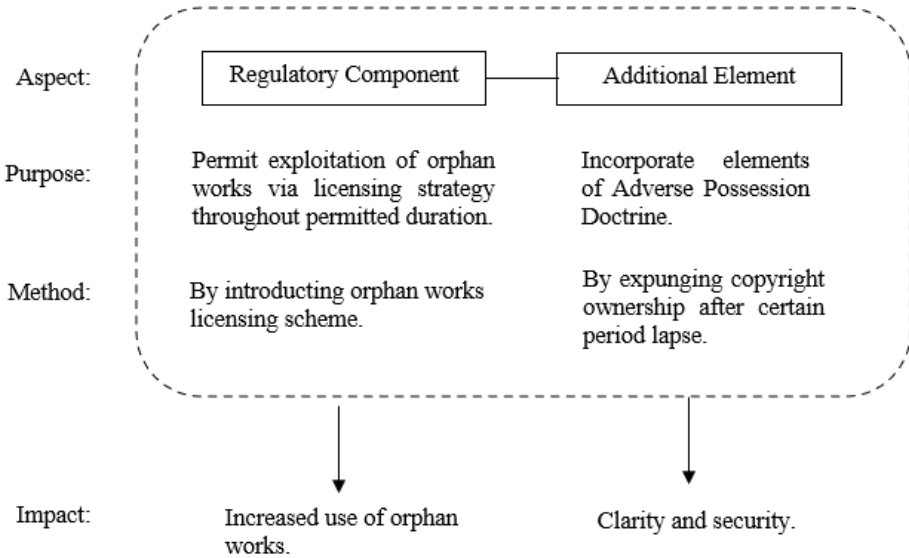


Fig. 1. An Integrated Framework for the Exploitation of Orphan Works in Malaysia

The diagram above depicts the proposed integrated framework for the exploitation of orphan works. Essentially, it operates with two different and integrated components. Firstly, the regulatory component which is proposed for the purpose of permitting the exploitation of orphan works by any prospective users. The function of this component is to facilitate the use of orphan works through an orphan works licensing scheme. Secondly and finally, the component of additional elements which suggests incorporating the element of adverse possession doctrine. This is done by removing copyright ownership once a certain duration lapses. Overall, the proposed framework aims to achieve a two-pronged purpose. On the one hand, it aims to lessen the burden of a governing body vis a vis the operation of an orphan works licensing scheme. On the other hand, it aims to expand the size of public domain works so they can be used by prospective users without fear of legal suits. The next section will discuss the two components of the proposed integrated framework accordingly.

5.1 Regulatory Component

Licensing is a system that is typically regulated by the government or a public authority permitting a party to engage in an activity that is otherwise prohibited (Rose, 2017). It serves several purposes, including establishing minimum standards that an applicant must follow in carrying out the activities applied under such a licence, monitoring those activities on an ongoing basis, and increasing public revenue or recouping administrative costs involved (Rose, 2017). The proposed licensing framework in this present context is primarily adapted from the orphan works regulations of the UK, Canada, and India. To begin with, the authority to oversee the orphan works licensing scheme in Malaysia is proposed to be vested in the Intellectual Property Corporation of Malaysia

(MyIPO) through its Copyright Office. This suggestion is consistent with the UK, Canada and India's practice of which relevant and competent bodies such as the UK's Comptroller (Regulation 6 of the Copyright and Rights in Performances Regulations), Copyright Board of Canada (Section 77 of the Copyright Act Canada), and India's Appellate Board (Section 31A of the Copyright Act India). A convenient one-stop center for effective management of the licensing scheme may also be achieved through this suggestion that is by appointing one single dedicated governmental agency so it would be beneficial for all prospective users.

Next, in terms of applicant and proposed use, the proposed orphan works licensing scheme is open to any party interested in exploiting the said materials in Malaysia. The rationale for this suggestion is to broaden the categories of prospective users (ranging from individuals to commercial and non-commercial entities), thereby increasing the possibility of orphan work being exploited by interested parties. Furthermore, similar to the approach implemented in the UK and India, the categories of orphan works covered by the proposed licensing scheme are not limited to certain, specific classes. In other words, it will cover both published and unpublished orphan works, regardless of their types – as long as they are copyright works. This proposal is critical in ensuring that no orphan work is excluded from the benefits of the licensing scheme, thus reducing the likelihood of the orphan work being abandoned from the system.

Additionally, the proposed orphan works licensing scheme should permit the licensee to exploit the orphan works through the activities specified in Section 13(1)(a)-(f) of the Copyright Act 1987, as if the copyright owner himself used the orphan works. In the present context, the aforementioned activities will cover the reproduction of orphan works in any material form, the communication, and the performance of orphan works to the public, the distribution of orphan work copies by sale or other transfer of ownership, and the commercial rental of the orphan works to the public. For the purpose of the proposed orphan works licensing scheme, the applicant will apply for the licence by using forms as prescribed by the Copyright Office. To assist the Copyright Office in evaluating the application, the applicant must furnish a list of information that includes the applicant's background (individual or organisation), the details on the orphan works, and the description of proposed use (e.g., commercial or non-commercial/personal use or for joint venture).

This particular aspect is the most critical component discussed in the discourse of the orphan work, so much so, has become a standard pre-requisite of orphan works licensing schemes in the UK, Canada, and India. Overall, the legal analysis found that the applicant must attempt to communicate with the copyright owner before applying for the orphan work licence. The requirement of searching for the copyright holder of orphan work is evident in all selected jurisdictions, denoting the importance of this aspect in orphan work matters. The result of such a search must also be furnished with the licensing authority (MyIPO in this present context) as proof of the endeavour to locate the copyright owner. Nevertheless, it should be reiterated that the proposed orphan work licensing scheme will not emulate Canada's search approach of "reasonable efforts". While it may be convenient not to place an unnecessary burden (e.g. costs incurred in tracing the copyright owner) on the prospective user (De Beer & Bouchard, 2010), the diligent search approach is preferable to avoid deliberate infringing uses of

orphan works under the pretext of a reasonable search. Therefore, in this present context, the licensing authority will be empowered to issue guidelines and provide assistance for the applicant in conducting a search. The proposed guidelines by MyIPO will ensure that the prospective users are better guided when applying for a licence under Malaysia's orphan works licensing scheme. In view of the foregoing discussions, the requirement of diligent search in Malaysia is set as a prerequisite for the application of the orphan work licence, and the Copyright Office will have the authority to issue search guidance.

In terms of licence fees and royalties, the use of an orphan work under a licence is subject to licence fee and/or royalty payments. For non-commercial use, the licence fee is nominal, which must be balanced with its potential effect on the markets for works with identifiable copyright owners (Hargreaves, 2011), and for commercial exploitation – payment of both licence fees and royalties. In this present context, the proceeds (licence fees and royalties) from the exploitation of orphan works should be kept by the authority in a special account for orphan works for a fixed period of time, which is calculated from the grant of the relevant licence. Unlike India, this method (which is currently implemented in the UK and Canada) is preferable because it is transparent (in view of the appointed body acting as a trustee) and specific (in view of the time limitation to hold the monies and for the copyright owner to make a claim). In the event that the copyright owner does not reappear to claim the royalties within a stipulated time, the authority may utilise the unclaimed proceeds for two specific purposes: (a) recouping the reasonable costs of establishing and maintaining the licensing scheme, and (b) funding any educational, social, and cultural development activities. It is hoped that by implementing these strategies, the unclaimed proceeds will not sit idly for an indefinite period of time and will instead be used for beneficial purposes. In other words, such funds can help to keep the licensing system running smoothly while also channeling the proceeds to educational, cultural and social development. This model is similar to the approaches implemented in the UK and Canada. Despite the minor differences in terms of its implementation by both jurisdictions, the general idea remains the same: to allow the trustee to utilise a reasonable portion of the unclaimed proceeds for legitimate and beneficial purposes.

Finally, in terms of duration it is proposed that it should be limited. This is in line with the practice in the UK, Canada, and India which limits the duration of a licence to a certain specific period, the validity of which is determined at the authority's discretion. Having said that, it should be emphasised that the licence duration is not specifically spelt out by the licensing regulations in Canada and India. Instead, the authority has the sole discretion to set the limit as it deems fit. In contrast, the UK's licensing regulations specifically set the limit to a term of not exceeding 7 years.

5.2 Additional Element

It is also proposed that the adverse possession doctrine be incorporated into the licensing regime for orphan works. The doctrine of adverse possession is a land law principle that acts as a mechanism to resolve competing claims to land that arise when an owner fails to assert his rights for many years, thereby allowing a trespasser to assume control

of the land as if it were his own (Merril, 1985). In other words, it penalises landowners who fail to maintain, monitor or act to exclude others from their property. This doctrine summarily serves as a threat to encourage a landowner to be a diligent steward of his property so as not to be a nuisance to other people (Epstein, 1986).

In the copyright law context, this doctrine could be applied in the situation of the orphan works but with a prerequisite of diligent search requirement (Meeks, 2013; Bibb, 2009). Meeks claimed that the application of the adverse possession doctrine could encourage the copyright owners to be vigilant in preventing their works from falling into the copyright orphanage (Meeks, 2013). Just as the doctrine would remind the landowners to be watchful custodians of their land, the doctrine could also instruct the copyright owners to be vigilant owners so as not to abandon their works and to most importantly, maintain a public presence, especially for copyright clearance. The failure to do this would render copyright ownership be removed and make the work fall into the public domain. In other words, the proposal of incorporating the adverse possession doctrine into the licensing regime might function as a threat that will help to shape the conduct of the copyright owners in maintaining the public presence.

It is argued that removing copyright ownership from unlocatable copyright holders will increase the size of the public domain works, thereby permitting any copyright holders to use them without legal impediments. This is in line with Meeks (2013)'s contention that it could return the orphan works to the market, encouraging the interested parties to find new uses for the orphan materials without fear. This doctrine may eliminate the threat of infringement liability, instill confidence in exploiting the orphan works, and help resurrect orphaned materials that have fallen out of circulation. In turn, it will promote fruitful utilisation of orphan works, discard passive neglect of intellectual resources, and eventually reduce the number of orphan works (Meeks, 2013). The above contention is also in line with Bibb (2009)'s argument when she highlighted the aspect of an investment, i.e. the cultural heritage institutions invest many resources (money and staff time) in preserving the orphan materials through various activities such as storing and indexing. Thus, Bibb (2009) believed that the appropriate reward is the ability to exploit the orphan works without fearing liability to those who let their works fall into the orphan works domain, and this can be done with the implementation of the doctrine in the present context.

Summarily, this paper proposes that the incorporation of adverse possession doctrine be incorporated after the licensing period of the relevant orphan work has expired and no copyright holders have reappeared to claim it – instead of allowing the adverse possession doctrine to be effective in silo (as proposed by Meeks and Bibb). As a result, copyright ownership will be removed, and the work will be treated as public domain works. Such work should also be exempt from the procedures outlined in the orphan works licensing scheme, thereby reducing the governing body's responsibilities in monitoring, and processing any future applications by prospective users.

6 Conclusion and Future Directions

This paper highlighted the difficulties that orphan works present to potential users including individuals, private organisations as well as cultural and heritage institutions. The legal uncertainty surrounding this issue tends to discourage potential users to exploit the orphan works, causing them to abandon these works from any exploitation activities. Specifically in Malaysia, the absence of policy and legal mechanisms to provide access to orphan works exposes potential users to legal threats from the reappearing copyright holders. Following the Copyright (Amendment) Act 2022, the proposal to launch a public consultation for developing a legal framework for orphan works is believed in the pipeline. Hence, this paper aimed to explore and propose an innovative solution to this issue. This paper proposes a modified licensing framework for the exploitation of orphan works in Malaysia, based on a doctrinal analysis of the relevant laws pertaining to orphan works especially in the UK, Canada, and India, as well as library research on licensing regime and adverse possession doctrine.

From the preceding analysis, three key points can be deduced. Firstly, the regulatory component, which consists of an orphan works licensing scheme enables the use of orphan works via a centralised system i.e a governing body such as MyIPO, acting as the licensing authority. This is a common practice in jurisdictions such as the UK, Canada, and India. Secondly, the incorporation of the elements of the adverse possession doctrine ensures that orphan works with untraceable copyright holders enter the public domain. This is accomplished by removing copyright ownership after the licensing duration of the relevant orphan work has expired. Thirdly and lastly, the proposed modified licensing framework (i.e licensing regime and adverse possession principle) would help reduce the burden on the authority and expand the number of works in the public domain works that prospective users could access and use.

This paper's implications are also worthy of mention. First, this paper expands the discussion on orphan works, the licensing regime, and the doctrine of adverse possession. This paper contributes to the forum by incorporating the principle of adverse possession into the licensing scheme. In terms of managerial ramifications, the current research informs industry players (particularly intellectual property managers) of a secure way to manage and exploit the orphan works in their portfolios in light of the diligent search requirement. Consequently, the relevant parties are expected to continually update the intellectual property portfolios of their orphan works. In addition, this research reveals new areas to be further investigated (such as assessing the viability of the proposed framework for the exploitation of orphan works in Malaysia), necessitating contributions from creators of works and various stakeholders – thereby creating more opportunities for collaborative arrangements with stakeholders, particularly cultural & heritage institutions that hold orphan works in their repositories. A potential collaborative arrangement with collaborators such as MyIPO, the Department of Museums Malaysia, the National Art Gallery of Malaysia, the National Archive of Malaysia, and other relevant key players is also possible, as this aligns with their vision and mission to educate the public about intellectual property and copyright law. For future research, it is therefore preferable to collect data and responses from them, as such findings would greatly assist policymakers and legislators in formulating the optimal strategy for

providing access to orphan works and further evaluating the viability of applying the adverse possession principle in the context of copyright law.

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