

Orphan Works

This information sheet looks at the issue of “orphan works” (copyright material where the author cannot be identified) and how you might choose to deal with orphan works.

We have assumed that readers of this information sheet are familiar with the general principles of copyright law, as set out in our information sheet *An Introduction to Copyright in Australia*.

The purpose of this information sheet is to give general introductory information about copyright. If you need to know how the law applies in a particular situation, please get advice from a lawyer.

Key points

- Orphan works may be protected by copyright;
- There is no special exception that allows for the use of orphan works in Australia
- If you cannot identify the copyright owner, it is best to use a risk management approach
- There are schemes in place for the use of orphan works in some jurisdictions.

The problem with orphan works

An “orphan work” is one that is potentially protected by copyright but for which the owner cannot be identified and/or located. This can raise problems for people wanting to use the material, as you can't get permission if you can't find out who the copyright owner is, or can't contact them. If you're in this position, and can't rely on an exception, using the material may infringe copyright and you risk legal action if the copyright owner finds out.

Some users of copyright material have long argued that there should be a mechanism by which they can use an orphan work, without risk of being sued for infringement, if they can demonstrate they have taken appropriate steps to try to identify or locate the copyright owner. For example, many museums and similar organisations would like to make digital repositories of their collections or make them available online, but in many cases find it difficult or impossible to identify the owner of copyright in an old or ephemeral artefact.

Some copyright owners, on the other hand, worry that orphan works legislation will affect their ability to control their work and to earn a living from it. This is especially the case for photographers and creators of other images, films and animations, since such material can easily become orphaned, especially if it is distributed over the internet.

Governments in several countries have looked at this issue and introduced or proposed ways to deal with it. Issues governments need to address in such policies include:

- How can you make sure the scheme only applies to material for which the copyright owner genuinely cannot be found (and is not misused to avoid paying licence fees)?
- What steps should the user have to take to be able to rely on an orphan works scheme?

- What should happen if the copyright owner becomes aware of the way his or her material has been used and wants to stop it or be paid compensation?

What's happening in Australia?

There are many exceptions to copyright infringement in the Copyright Act. None of them allows the use of a work without permission merely because it is an orphan work, except for one exception that allows the publication of old unpublished orphan works held in libraries, provided certain conditions are met.

In some cases, an exception may be more likely to apply if the work is an orphan work – for example, section 200AB, an exception available to educational institutions, libraries, collecting institutions and people with a disability.

As part of its inquiry into Copyright and the Digital Economy, the Australian Law Reform Commission (ALRC) considered the issue of orphan works. The ALRC reported to Government in November 2013. The Final Report, which was tabled in Parliament in February 2014, recommended that the remedies available for copyright infringement be limited in respect of the use of orphan works where a reasonably diligent search for the copyright owner has been carried out and, where possible, the author has been attributed. In relation to determining whether a reasonably diligent search had been undertaken, the ALRC recommended the following factors might be considered:

- the nature of the copyright material;
- how and by whom the search was conducted;
- the search technologies, databases and registers available at the time; and
- any guidelines, protocols or industry practices about conducting diligent searches available at the time.

For further information see the ALRC website at <http://www.alrc.gov.au/>

United States

Other jurisdictions have also been discussing the introduction of new measures for orphan works.

In 2006 the U.S. Copyright Office proposed limiting the remedies available for copyright infringement in relation to the use of orphan works by defendants who had used the material in good faith after having taken steps to search for the copyright owner. Ultimately, Congress did not pass the proposals. However, in late 2012, the U.S. Copyright Office commenced further inquiries and, in March 2014, held a two-day public roundtable on orphan works and mass digitisation.

For further updates, please see the U.S. Copyright Office website at:

<http://www.copyright.gov/newsnet/>

The U.S. Department of Commerce's Internet Policy Task Force is currently conducting a review of copyright online, which will cover the problem of orphan works.

Otherwise, it is likely that the problem of orphan works will also be considered as part of broader U.S. copyright reform consultations, following calls from the Register of Copyrights for Congress to consider 'the next great copyright act' in March 2013.

European Union

In 2012, member states of the European Union (EU) adopted Directive 2012/28/EU on limited permitted uses of orphan works held by certain cultural organisations. This came into force in October 2014.

The types of organisations covered by the Directive include:

- publicly accessible libraries, educational establishments, museums;
- archives;
- film or audio heritage institutions; and
- public service broadcasters.

In order to rely on the Directive, institutions must undertake a “diligent search” in good faith to identify and locate the copyright owner, considering appropriate sources. If after conducting a diligent search, no owner is identified, then the material is considered to be an “orphan work”.

Once material is considered to be an orphan work, institutions may then use the orphan work for purposes that “achieve aims related to their public interest mission” without needing permission.

The Directive also allows for right holders to come forward and end the work’s orphan status where they have identified their work being used, and to receive fair compensation based on the nature and purpose of the particular use.

United Kingdom

Under the UK orphan works scheme, the UK Intellectual Property Office (IPO) can grant licences to people or companies wishing to use orphan works – in effect, stepping into the place of the copyright owner as licensor of the material. An up-front fee is paid in accordance with the nature of the material and the proposed use. This is then set-aside for copyright owners that reveal themselves at a later point in time.

In order to qualify as an orphan work, there is a requirement that the owner of copyright has not been found after a “diligent search”; which requires a reasonable search considering relevant sources to identify and locate the rights holder.,

Material that has satisfied the “orphan works” requirement may be then be licensed for both non-commercial and commercial uses. The IPO provides guidelines for rights holders wishing to identify if their material has been used and how to go about notifying the IPO.

In the meantime how should the issue of orphan works be approached?

There are currently no general exceptions for the use of orphan works in Australia.

If you want to use an item protected by copyright and you cannot identify an owner, you will need to make your own risk decision about whether or not you want to go ahead and use the material anyway.

You should think about all the relevant circumstances before going ahead and using an orphan work. Some things you might consider include:

- How old is the material roughly and what are the chances that copyright might have expired anyway?
- Is it really necessary that you use this particular material? Can the material be substituted or edited out?

- Is your proposed use of the material likely to prejudice the interests of the copyright owner? (For example, putting an unpublished book online may be more prejudicial than making one or two hard copies of the item)
- Is the material likely to be highly valuable?
- If an owner did come forward and have an issue, how difficult would it be for you to remove the material from your work or cease using the material?

If you do choose to go ahead and use orphaned material, we recommend you use a “good faith notice” with the material. This is essentially a notice to indicate that you have tried to find the relevant owner/s and which invites any owners to come forward should they have a problem with what you are doing.

Ultimately, this won’t protect you from an infringement action, however if you demonstrate that you are acting in good faith and are willing to negotiate, the other party may be less likely to take a hard-line approach against you. Also, if it’s possible, it would be prudent to put aside a sum of money in case a legitimate owner should come forward and you need to negotiate an appropriate fee for the use.

Some organisations in Australia are adopting publicly available orphan works policies, which set out under what circumstances the organisation will choose to use orphan works. Each organisation should make its own assessments, however, you might find it beneficial to see how other organisations are approaching the issue. Two that we are aware of are:

- The SBS Statement on Orphan Works: www.sbs.com.au/aboutus/corporate/view/id/541/h/SBS-Statement-on-orphan-works-1.0-February-2011
- The National Film & Sound Archive, Statement on Orphan Works: <http://nfsa.gov.au/collection/collection-enquiries/copyright/>

Other organisations are doing research into this area and making recommendations for reform. See for example:

- Screenrights “Orphan Works Discussion Paper”: www.screenrights.org/news/tag/orphan-works
- Communications Law Centre, “The Use of Subject Matter with Missing Owners – Australian Copyright Policy Options” by David Brennan and Michael Fraser: <http://cfsites1.uts.edu.au/law/comslaw/news-events/news-detail.cfm?itemId=30655>

What can you do to prevent your work from being “orphaned”?

- **Put your name on your work.** The most important, but in some ways simplest, way to protect your work is to make sure that anyone with access to it can easily find out who owns the copyright and, ideally, how to contact you. This won’t stop unscrupulous people, of course, but at least it gives people who want to do the right thing a way to identify and contact you. In addition, putting your name on your work makes it easier to prove who owns copyright, including in court, if this is ever in dispute.
- **Use the “copyright notice”.** It is a good idea to put your name on your work in the form of a “copyright notice”. The copyright notice is an internationally recognised form of identification. It consists of the symbol © (or the word “copyright”) and the name of copyright owner and the year of first publication (or the year of creation for unpublished works). You may also provide information such as contact details or a website URL.
- **Make yourself contactable.** Bear in mind that people trying to find copyright owners may contact professional organisations or collecting societies, so being a member of the relevant ones may help.

- **Embed information in digital files.** If your work is in digital form, consider embedding copyright and contact information in the file as well as using the copyright notice. In the case of images, consider using watermarks, captions and meta tags.
- **Use access-control or copy-control measures.** Depending on the type of work you create, and how you are using it, you may also want to consider using technological measures, such as password protection, to prevent unauthorised access and/or copying.
- **Consider registering your work with government agencies such as the U.S. Copyright Office.** Most countries (including the U.S.) are party to one or more of the major copyright treaties, and must therefore give automatic copyright protection to Australian material. However, some countries, including the U.S., have government-run registration systems. If your work is distributed in one of these countries, registering it can provide certain benefits (such as statutory damages if you sue for copyright infringement in the U.S.), and can assist with proving ownership of copyright in Australia. Beware, however, of privately-run registration systems: registering with these may provide no benefit.
- **Search for and act on infringements.** If your work is widely distributed online, you could also do a periodic internet search for infringing copies. One photographer claimed to have recovered £27,000 after a single night of searching the internet for infringing uses of his work.

Frequently Asked Questions

Why are they called ‘orphan works’?

It is a common misconception that orphan works have been abandoned by their creators and can be freely used. ‘Orphan works’ is used to describe material that is likely to be protected by copyright where the owner cannot be identified and/or located by someone wishing to obtain rights to use the material.

If a work is anonymous, or has no copyright notice, can I use it without permission?

Copyright protection is automatic. A work does not need to display a copyright notice or the author’s name on it in order to be protected and you will require the relevant permissions prior to using this material. Whilst the absence of a copyright notice or the author’s name can make it more difficult to obtain permission, the fact that you are unable to identify or locate the copyright owner is not a legal defence against a claim of copyright infringement.

If I am unsuccessful in identifying and locating the copyright owner, can I still use the work?

You may be able to use the work if one of the exceptions to copyright infringement applies or if you can ascertain that copyright has expired (e.g. for photos taken prior to 1955). However, using an orphan work without permission or a licence runs the risk of a claim of copyright infringement being made against you. If you still want to proceed, you should weigh up the risk of using the material before proceeding. Whilst it does not guarantee any protection against infringement, if you do choose to use the work you should consider using a ‘good faith’ notice.

Further information

For further information about copyright, see our website: www.copyright.org.au

A Copyright Council lawyer may be able to give you free preliminary legal advice about an issue not addressed in an information sheet. This service is primarily for professional creators and arts organisations but is also available to staff of educational institutions and libraries. For further information about the service, see: www.copyright.org.au

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About Us

The Australian Copyright Council is an independent, non-profit organisation. Founded in 1968, we represent the peak bodies for professional artists and content creators working in Australia's creative industries and Australia's major copyright collecting societies.

We are advocates for the contribution of creators to Australia's culture and economy; the importance of copyright for the common good. We work to promote understanding of copyright law and its application, lobby for appropriate law reform and foster collaboration between content creators and consumers.

We provide easily accessible and affordable practical, user-friendly information, legal advice, education and forums on Australian copyright law for content creators and consumers.



Australian Government



The Australian Copyright Council has been assisted by the Australian Government through the Australia Council, its arts funding and advisory body.

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