



Orphan Works

This fact sheet looks at the issue of 'orphan works' (copyright material where the author cannot be identified or located) and how you might choose to deal with orphan works.

We have assumed that readers of this fact sheet are familiar with the general principles of copyright law, as set out in our fact sheet [An Introduction to Copyright in Australia](#).

Our [Copyright Essentials](#) book provides in-depth guidance on the provisions of the *Copyright Act 1968* (Cth) (Copyright Act) set out in this fact sheet. It is available for purchase from our website: copyright.org.au. Information about our education programs is available [here](#).

The purpose of this fact 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.

1. 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 those 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 their material has been used and wants to stop it or be paid compensation?

2. What's happening in Australia?

There are several exceptions to copyright infringement in the Copyright Act. None of them allow the use of a work without permission merely because it is an orphan work. 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. See our fact sheet, [Section 200AB: the Special Case or Flexible Dealing Exception](#).

The issue of orphan works was considered by the Australian Law Reform Commission (ALRC) as part of its inquiry into Copyright and the Digital Economy. The Final Report of the ALRC, 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 alrc.gov.au.

In December 2021, the federal government released a discussion paper and Exposure Draft for its Copyright Amendment (Access Reform) Bill. The Exposure Draft outlined the proposed establishment of a limited liability scheme to allow all uses (including commercial use) of literary, dramatic, musical and artistic works, and films, by all users, where the copyright owner(s) could not be identified or contacted after a 'reasonably diligent search', and the author was attributed if it was 'reasonably practicable'. The consultation period for the Exposure Draft closed in February 2022 with a significant number of submissions (over 120) received. That Bill did not proceed further but information about it may be accessed on the website of the Attorney-General's Department [here](#).

3. United States

The U. S. Copyright Office has long shared the concern with many in the copyright community that the uncertainty surrounding the ownership status of orphan works does not serve the objectives of the copyright system. For good faith users, orphan works are a frustration, a liability risk, and a major cause of gridlock in the digital marketplace.

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. 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. The Office released its final analysis and recommendation entitled Orphan Works and Mass Digitization: A Report of the Register of Copyrights in June 2015.

For further updates, see the U.S. Copyright Office website at: copyright.gov/newstet.

In 2018, the Music Modernization Act established a framework for orphan work sound recordings to be used: the user must submit the orphan work to the United States Copyright Office, at which point any copyright holder will be given 90 days to come forward and object to its use. If no rights holder emerges, or if the user successfully establishes the use is a non-commercial fair use of the recording, the recording may be used freely.

4. 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.

5. 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 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.

6. 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?

7. Good faith notice

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. Three that we are aware of are:

- The [SBS Statement on Orphan Works](#).
- The [National Film & Sound Archive, Statement on Orphan Works](#).
- National and State Libraries of Australia, [Position Statement, Reasonably Diligent Search for Orphan Works](#).

8. 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). For example, © Jo Smith 2023. 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. See our fact sheet [Copyright Collecting Societies](#) for more information.
- **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, 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.

Frequently Asked Questions (FAQs)

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. It is important to note that there are no provisions in the Copyright Act that compel a copyright owner to assign, license or otherwise deal with their material. Copyright owners are free to choose if and how they deal with their copyright 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

We also have a range of other fact sheets on a number of topics and publish books that focus on specific interest groups. Check our website for information about our publications [here](#) and details of our seminar/webinar program [here](#).

We can provide this fact sheet in an accessible format or in hard copy on request.

An Australian Copyright Council lawyer may be able to give you free preliminary legal advice about an issue not addressed in a fact 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 [Legal Advice](#) on our website copyright.org.au.

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Our fact sheets are regularly updated. Please check our website to ensure you are accessing the most current version. Should you wish to use this fact sheet for any purpose other than your reference, please contact us for assistance.

About Us

The Australian Copyright Council is an independent, not-for-profit, non-government 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. Our objectives include:

- to assist creators and other copyright owners to exercise their rights effectively
- to raise awareness in the community about the importance of copyright
- to identify and research areas of copyright law which are inadequate or unfair
- to seek changes to law and practice to enhance the effectiveness and fairness of copyright
- to foster co-operation amongst bodies representing creators and owners of copyright.

The Australian Copyright Council respectfully acknowledges the Gadigal people, the owners and custodians of the land on which our office is located. We pay our respects to the elders and to all First Nations elders: past, present and emerging. This always was and always will be Aboriginal land.



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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