



Roundtable on orphan works

On 11 May 2018, we hosted a roundtable on orphan works as part of our Copyright Modernisation consultation. We have listed the attendees below.

Summary of roundtable

We noted the government's support for the Productivity Commission's (PC) recommendation that the government enact the Australian Law Reform Commission (ALRC) recommendations to limit liability for the use of orphan works, where a user has undertaken a diligent search to locate the relevant rights holder. We noted the purpose of this and other roundtables was to find areas of meaningful reform, not to repeat previous submissions. We recognised the ongoing work of many stakeholders on other copyright policy areas. This included the [Copyright Amendment \(Service Providers\) Bill 2017](#), the review of [Copyright Amendment \(Online Infringement\) Act 2015](#) and the [Review of Code of Conduct for Copyright Collecting Societies](#).

Orphan works

We outlined the orphan works problem. Sometimes, a person cannot find, identify, locate or contact the copyright owner of something they want to use. In addition, there is no copyright exception or licence available to enable that use. When this happens, the person cannot legally use the copyright material.

We explained how the problem of orphan works is far reaching. Copyright users, owners and society at large suffer cultural, social and economic losses. It particularly affects galleries, libraries, archives and museums. It is also a big issue for educational institutions, consumers, creators and copyright owners. A lot of material online, such as digital photos, does not clearly identify the owner. Users face the risk of breaking copyright law and the burden of searching for owners who are difficult or even impossible to find.

We also recognised that rights holders have economic and personal interests in orphan works. The roundtable discussed a range of steps to recognise these interests. We could require users to search diligently for the owner when using orphan works. When they use orphan works, they could include information about the owner and notify an organisation that keeps track of uses. If an owner is found later, they might get a reasonable payment or ask for use of their material to stop. The roundtable agreed that these steps, other than notifying, were appropriate. Some attendees argued that notifying, like in the EU orphan works register, would be a lot of work for users and unlikely to help copyright owners. It would need the register to be a searchable database. This could be costly to establish and maintain.

There was a discussion about whether the existing exception for some library, archive and educational institution uses (s 200AB) improves access to orphan works. Cultural, collecting and educational institutions noted they use this exception but it provides limited access. It only allows an institution to use orphan works. Others, including their clients or patrons, parents and students, could not. External providers working with them could not. Even for institutions, it does not allow commercial use, even if it was unlikely that a copyright owner would ever want to be paid for the use. It might not allow Key Cultural Institutions to use orphaned material in their collections.



The roundtable agreed that cultural and collecting institutions face unique challenges. These institutions wish to use a large number of orphan works but this would be expensive and time-consuming under current law.

The group discussed a range of possible solutions for orphan works:

- 1) A direct exception
- 2) Limiting remedies for infringing copyright in orphan works
- 3) A combination of these two options
- 4) Blanket licensing arrangements for mass digitisation of orphaned material, which the US Copyright Office recommended
- 5) A government-run collective licensing scheme for the use of some orphaned material.

Collecting and cultural institutions sought a direct exception for them to use orphan works. Rights holders were concerned that a direct exception could affect existing or future licences. They noted that there might be unintended consequences. Orphan works (or parts of them) might be put up on an institution's website. They might be used in a new work, which later becomes a commercial success. Some attendees were concerned that a direct exception might encourage people to intentionally orphan content. For example, they might remove information about creators from digital photos. The attendees recognised existing laws help address this issue in several ways. The moral right of attribution was one. Many acknowledged a hybrid model would be an acceptable alternative. This would include two parts. Firstly, there would be a narrow direct exception making non-commercial uses of orphan works legal. Secondly, other uses would still infringe copyright law, but the law would limit court remedies for that infringement. Some institutions agreed with making the direct exception narrower, but were concerned it would allow commercial uses and uses beyond their 'core' functions. Many agreed a hybrid model would help institutions provide better access to orphan works, including to support the creation of other works such as documentaries.

Most rights holders preferred limiting court remedies to any of the other models. They wanted users to make a diligent search. If a rights holder was found after use of an orphan work, they wanted a right to 'reasonable compensation' and to ask that person to stop using and accessing the orphan work.

The attendees discussed how to determine 'reasonable compensation'. They noted that 'reasonable compensation' is not a remedy in the Copyright Act. Some attendees discussed what should be the minimum 'reasonable compensation', such as licence rates set by collecting societies. Others pointed to the different practices and standard licence fees for music, films, writing and other sectors. There was discussion about whether reasonable compensation should cover all uses from the first use, or only from the date a rights holder comes forward. Some noted that the 'reasonable compensation' could be similar to an 'account of profits', and that there could be a similar limit to remedies as in the case when a user does not know they have infringed copyright (s 115(3)). This would exclude damages or additional damages. Some attendees suggested that the Copyright Tribunal could decide what is 'reasonable compensation' if there is a dispute.

The roundtable discussed whether a diligent search should be defined. The roundtable agreed it would be better to have guiding principles rather than defined steps. This would be along the lines of what the ALRC recommended (Recommendation 13-2). Principles would adapt to the purpose of the use, nature of the material, search systems and technologies available and industry and community practices.



Summary and next steps

We recognised that the roundtable showed more common ground for a limitation of liability scheme than a direct exception for the use of orphan works by any user. This limitation could apply to all uses of orphaned material and all users. The roundtable agreed that collecting and cultural institutions face the greatest challenges in using orphan works. There was not consensus on how a hybrid model could accommodate the different uses of institutions and the community at large.

We committed to come back to stakeholders with further material they could take to their members as part of the consultation. This would help us advise government on policy options, the pros and cons, and the level of consensus between different groups. We asked for submissions by 4 June. We noted that we planned to appoint an external reference group. This would represent diverse views across copyright and improve the Department's advice to government.

Attendees

The attendees of the roundtable were:

- Libby Baulch, Policy Director, *Copyright Agency*
- Delia Browne, National Copyright Director, *Copyright Advisory Group to the COAG Education Council*
- Jonathan Carter, Head of Legal, Regulatory and Policy, *APRA AMCOS*
- Jessica Coates, Executive Officer, *Australian Digital Alliance*
- Bronwyn Dowdall, Manager Licensing and Rights, *National Film and Sound Archive*
- Sue Ducker, Reading Room Manager, *Australian War Memorial*
- Lucinda Edwards, Legal Counsel, *Special Broadcasting Service*
- Kate Gilchrist, Senior Lawyer, *Australian Broadcasting Corporation*
- Emily Hudson, Associate Professor, *University of Queensland* (by teleconference)
- Simon Lake, CEO, *Screenrights*
- Grant McAvaney, CEO, *Australian Copyright Council*
- Roxanne Missingham, Executive Committee member, *Council of Australian University Librarians*
- Zoe Rodriguez, Lawyer, *Arts Law Centre* (by teleconference)
- Chris Shain, Board Advisor on Copyright, *Australian Institute of Professional Photography*
- Lynne Small, General Manager, *PPCA*
- Helen Owens, Assistant Secretary, Content and Copyright Branch
- Sam Ahlin, Director, Content and Copyright Branch (by teleconference)
- Erin Driscoll, Assistant Director, Content and Copyright Branch
- Alan Hui, Assistant Director, Content and Copyright Branch
- Hari Sundaesan, Senior Policy Officer, Content and Copyright Branch (by teleconference)

