

Response to Attorney-General's Department: Orphan Works Scheme – Design Options

20 September 2024

Summary of key points

Explanatory memorandum and other explanatory materials

- the Explanatory Memorandum (EM) needs to make clear that the proposed scheme is intended to apply to scenarios that are not covered by existing public interest exceptions (that include s200AB and statutory licences) because:
 - it does not provide a defence to infringement; and
 - its conditions are different to those for other public interest exceptions, including a search process that is proportionate to the reasonably foreseeable impact on a rightsholder who may later be identified and located
- the EM and other documents should explain that cultural institutions are *already* digitising, publishing and supplying copies of orphan works in their collections and that the new scheme may allow people who source an orphan work from a cultural institution to:
 - rely on the search process already undertaken by the cultural institution, if the rightsholder impact is no greater than that from the cultural institution's activities; and
 - get information about the search process undertaken.

Legislation

- the legislation should not attempt to distinguish 'commercial' from 'non-commercial' activities because:
 - its focus should be on the impact on a rightsholder (which may be greater for certain 'non-commercial' activities than 'commercial' activities);
 - experience has shown that it is difficult to differentiate, legislatively (and otherwise), between 'commercial' and 'non-commercial'; and
 - an attempted distinction can lead to perverse outcomes
- any industry guidelines that would affect the application of the proposed new scheme must be:
 - jointly developed with relevant rightsholder representatives (who have demonstrated both willingness and capability to work constructively on guidelines); and
 - publicly available (e.g. from the Australian Copyright Council)
- there should be an explicit requirement that a use of an orphan work is accompanied by:
 - any information, that the user is reasonably aware of, that may enable the rightsholder to be identified or found by others (for example, where more search may be required for a subsequent use with higher impact); and
 - a disclosure that the work has been used or published in reliance on the scheme
- there should be a higher search requirement for:
 - 'substitutable' content (particularly images), and AGD's explanatory materials should make clear that the scheme is intended to enable the use of non-substitutable material, such as a photograph of the subject of a documentary; and
 - content (particularly images) which is susceptible to stripping of metadata (rights management information), and AGD's explanatory materials should make clear what the indicators for this may be (in consultation with stakeholders such as Image Makers)

Key points

Proposed scheme is limitation on remedies not defence to infringement

It is helpful to bear in mind that the proposed scheme would limit remedies for infringement, rather than providing a defence to infringement. A person who relied on the scheme would still infringe copyright, but the remedies for infringement would be limited if the conditions are met. It is similar in nature to the so-called ‘innocent infringement’ provision – s115(3) – whereby a person who infringes copyright may not need to pay damages (but may need to account for profits) if they were not aware that their activity infringed copyright.

This is relevant when considering the relationship between the proposed scheme and existing public interest exceptions that provide a defence to infringement for the use of orphan works, and do not require diligent search. These public interest exceptions include the fair dealing exceptions, section 200AB, and statutory licences. As the Department is aware, statutory licences are public interest exceptions because they remove the right of rightsholders to refuse or negotiate terms in favour of a public interest activity (such as teaching or government services) and they apply very broadly (with minimal compliance obligations) because there are fair compensation arrangements.

We appreciate AGD’s clarification that a person would need to ‘pick their lane’. However, it is difficult to imagine a scenario in which a person would ‘choose’ to rely on the proposed scheme when an existing provision provides a complete defence and does not require diligent search. For example, a public servant who ‘chose’ the new scheme would be jettisoning the defence to infringement from section 183, and self-imposing a higher administrative burden (proportionate search) than that required by section 183.

We are not proposing an explicit ‘carve-out’, but rather that AGD explain the relationship between the proposed scheme and existing public interest exceptions more clearly than it has.

Interaction with s200AB

Cultural institutions wish to preserve the current application of s200AB to orphan works.

The proposed new scheme would not affect the application of s200AB. Subs200AB(6) provides that s200AB does not apply to an activity that is non-infringing due to the application of another provision in the Act, but the proposed new scheme would not make the use of orphan works non-infringing.

‘Orphan’ is not a ‘status’

The proposed scheme would require a search for a rightsholder that is proportionate to the impact of the proposed use of the work.

This means that work may be treated as ‘orphaned’ for one use (e.g. a limited-scale temporary activity) and not for another (e.g. a large-scale use for which removal of the work is impractical).

One consequence is that reliance on another person’s search is affected by the extent to which their use is comparable to yours.

This is recognised in AGD’s paper, in the section dealing with reliance on someone else’s search.

A search can be affected by:

- the skill of the searcher; and
- the contextual information available to the searcher (which may be different to the contextual information available to another user, for example because they have sourced the work from somewhere else).

Search proportionate to impact

The legislation should make clear that the limitation on remedies is dependent upon the search being proportionate to the reasonably foreseeable impact of the proposed use on a rightsholder who may be subsequently identified.

Factors relevant to impact include:

- extent of dissemination (which may include dissemination outside Australia: for example if the work is published online)
- whether the material can be withdrawn or taken down
- effect on a potential market for the work (which may include ‘non-commercial’ as well as ‘commercial’ uses)

Distinguishing ‘commercial’ from ‘non-commercial’

The concepts of ‘commercial’ and ‘non-commercial’ can be difficult to articulate in legislation and an attempted distinction can lead to perverse results.

The legislation should therefore avoid doing so. It should instead focus on the *impact* of a use on the rightsholder who may subsequently be found. The impact of a use can be greater for a ‘non-commercial use’ than for a ‘commercial use’.

Industry guidelines

We agree that industry guidelines can play a useful role.

The guidelines must, however, result from collaborative processes between relevant representatives of rightsholders and users respectively. An example is the high-level Joint Statement on Orphan Works from the International Federation of Library Associations (IFLA) and International Publishers Association (IPA), available online at <https://www.ifla.org/publications/ifla-ipa-joint-statement-on-orphan-works-2007/>.

The Guidelines should be publicly available for transparency and consistency. They could be published on the Australian Copyright Council’s website, as it is a trusted source of information about the application of copyright for both rightsholders and users.

There may be a role for the Department in facilitating joint guidelines, and publishing links to guidelines from its website.

[The Guidelines could set out licensing fees for certain scenarios, which we think is a better approach than attempting to set licence fees in the legislation or regulations.]

Accompanying information that may assist identification of rightsholder

There should be an express requirement that a use of an orphan work is accompanied by any information, that the user is reasonably aware of, that may enable the rightsholder to be identified or found. It should be similar to the criticism/review and reporting news exceptions (i.e. the defence does not apply if there is not sufficient attribution).

The moral rights provisions are not sufficient, partly because they were not designed for this task, and that information that may assist with identification may be something other than, or additional to, the name of the creator.

Disclosure of reliance on the scheme

There should be an express requirement that the user discloses their reliance on the scheme. Among other things, it signals to subsequent users that they may need to do further search if the impact of their use is greater than that of the initial use.

Questions

Overarching questions

1. *Which of the options relating to a limited liability scheme presented in this paper do you prefer?*

A limited remedies scheme could be workable with the right conditions, to cover situations in which existing public interest exceptions (including statutory licences) do not apply. It is unlikely that a user would 'choose' the proposed new scheme in preference to an existing public interest exception, given that existing exceptions provide a defence to infringement and require diligent search.

We have commented on various aspects of the proposals outlined in the AGD paper above and below.

The current arrangements for statutory licences that we manage cover the use of all works without any requirements to identify or search for rightsholders, as part of the 'all-you-can-eat' fixed fee arrangements, and enable fair compensation for all rightsholders who are identified and located (including a rightsholder who may later come forward with evidence that their work was used under a statutory licence). These are not licensing arrangements specifically for orphan works, but rather arrangements that allow the use of works without any searching, and that compensate identified rightsholders.

2. *Are there any other options not presented in this paper that you suggest should also be considered?*

We have commented on various aspects of the proposals outlined in the AGD paper above and below.

ICIP

Consideration of the extent, if any, to which an orphan works scheme would apply to materials containing Intellectual and Cultural Property (ICIP) should be closely aligned with the consultation currently being undertaken by the Office for the Arts (OFTA) on standalone ICIP legislation. The policy position should reflect the views of First Nations peoples who are affected by it.

Statutory licence Option 1

7. *If the Government were to support Option 1, are there any additional arrangements that could be put in place to support effective interaction between the statutory licensing schemes and the orphan works scheme (either prescribed in legislation or in industry guidelines or other agreements)?*

It is difficult to envisage a scenario in which a person would 'choose' to rely on the proposed scheme for an activity covered by a statutory licence, given that the scheme is not a defence to infringement, and requires diligent search.

For the statutory licence schemes that we manage, we enter into fixed term, fixed price agreements that cover all activities that might otherwise require a licence, with minimal compliance requirements (such as identifying a copyright owner). The requirements are minimal *because* there are fair compensation arrangements in place.

The Government should be concerned if teachers or public servants were 'directed' to rely on the proposed scheme as a matter of 'choice' where a statutory licence applies. It would be an unacceptable waste of time for teachers and public servants, and contrary the policies underlying the statutory licence schemes (which include removing the administrative burden of searching for copyright owners from teachers).

In addition, as explained above, statutory licence arrangements enable fair compensation to a rightsholder who subsequently comes forward with evidence that their work was used under a statutory licence.

Diligent (proportionate) search

It would be helpful if this were described as ‘proportionate search’, that varies in accordance with the impact on a rightsholder who may later be found or come forward.

8. *Are there aspects discussed in this paper under one category that you think would better be addressed under another?*

In the table on page 14:

- High-risk use cases (including sensitive and vulnerable materials): Category 2: the ‘[OR:]’ should be removed (it looks like an error, as this is not an alternative to anything)
- Who can rely on a search: Category 1: it should be clearer that the second user may need to do additional search if the impact of their use is higher than that of the earlier use
- Industry guidelines: Category 2: the ‘[OR:]’ should be removed as it refers to industry guidelines other than those in the Regulations, but it should be clear that these must be jointly developed with relevant rightsholder representatives and publicly disclosed.

9. *Are there any further important aspects of a reasonably diligent search framework that should be addressed?*

As we have said above, any industry guidelines must reflect rightsholder representatives’ views (not just the views of users).

‘Reasonable diligence’: legislative requirements

10. *Are there any other aspects of a ‘reasonably diligent search’ that you consider so fundamental that they should be made mandatory requirements?*

The legislation should make the limitation of remedies conditional upon the user accompanying their use of an orphan work with:

- any information that they are aware of, or ought reasonably be aware of, that may assist with identifying or locating a rightsholder. This includes the creator’s name (if known), but may also be information such as where the user sourced the work; and
- a statement that the use was made under the scheme

The legislation should also require that the search is proportionate to the reasonably foreseeable impact on the rightsholder should the rightsholder be subsequently found.

11. *Conversely, is there any risk that the department’s suggested mandatory requirements could result in potential uses that should be covered by the scheme being unintentionally excluded?*

No.

‘Reasonable diligence’: discretionary matters

12. *Do you think the inclusion in legislation of discretionary factors, as discussed above, would help scheme users to understand what they need to do to as part of a reasonably diligent search, and support a court to reach a fair decision on this issue in an individual case, if needed?*

Yes, but the list in the paper needs to explicitly include the impact on a rightsholder who is later found or comes forward.

13. *Are there any other factors (besides those raised as options below in relation to certain higher-risk uses) that you think should be included if this approach were taken in legislation?*

As above.

High risk use cases

14. *If the Government implemented the option under Category 2 noted above:*

(a) Are there other characteristics of a potential use under the scheme, or of the material to be used, that are significant enough to the degree of risk posed that they should be specifically mentioned among discretionary factors in the legislation?

We disagree that discretionary factors are an alternative to mandatory factors. They can and should be complementary.

As we have said above, the legislation should avoid any references to ‘commercial’ and ‘non-commercial’ as the terms are very difficult to define, and an attempt can lead to perverse outcomes. The focus should instead be on impact.

As noted in AGD’s paper, one of the high risk issues, particularly for photographers, is the stripping out of identifying metadata when images are published online. The Copyright Act has included prohibitions and sanctions regarding this for many years, but they have had limited application in practice since introduced.

The legislation should therefore impose a higher search requirement for images published online that may have had metadata stripped out. There may be indicators for this, that AGD could discuss with stakeholders such as Image Makers.

The factors should also refer explicitly to alternative or substitutable content (particularly images), and impose a higher search obligation where such images are available. AGD’s explanatory materials should also make clear that the scheme is intended to allow the use of non-substitutable images, such as a photo of the subject of a documentary.

(b) Are there other forms of sensitivity (besides those relating to ICIP and cultural sensitivity for Aboriginal and Torres Strait Islander people) on which specific guidance and examples should also be provided in the Explanatory Memorandum?

Unpublished material, as the scheme would effectively remove a copyright owner’s entitlement to choose if, when and how to first publish.

15. *Alternatively, if you think there should be mandatory search requirements in the legislation applying particularly to higher-risk uses (Category 1 option), what should they be, and what high-risk uses should they apply to?*

The limitation of remedies should be conditional upon the search being proportionate to the reasonably foreseeable impact of the use on the rightsholder, should the rightsholder be identified.

The concepts of ‘commercial’ and ‘non-commercial’ are difficult to encapsulate in legislation, and should thus be avoided. A use that may be considered ‘non-commercial’ may have a greater impact than a use that is considered ‘commercial’.

The legislation could set out factors relevant to impact such as:

- extent of dissemination
- whether the material can be withdrawn or taken down
- effect on potential market for work (which may include ‘non-commercial’ as well as ‘commercial’ uses)

16. *If the legislation were to include a requirement that public notice be given of a search in some circumstances, what would generally be a reasonable period of notice before the use could progress (e.g. 3 months or 6 months)? Should a minimum period of notice be prescribed in the legislation?*

Records of search

17. *Do you agree the time periods for retaining records and being able to rely on a search should align?*

Yes.

18. *Is six years from the date of completion of the search a reasonable time period?*

Yes.

19. *Would it be useful to copyright owners and users to set out the general information that should be documented in a search record in the regulations (rather than simply the Explanatory Memorandum)?*

Yes.

Relying on someone else's search

20. *Do you have any concerns about how this option would interact with authorisation liability as provided for by ss. 36 and 101 of the Copyright Act?*

21. *How would this option align with current industry practices, for example in relation to publishing or screen industry assurance and contracting practices relating to chain of title?*

The proposed scheme relates to remedies for copyright infringement. There may be other consequences resulting from other legal arrangements (such as contracts) or legislation, just as there are for any other type of activity.

22. *Are there any particular circumstances in relation to which you think the legislation should explicitly provide that a user can (or cannot) rely on a search conducted by another person, rather than relying on a flexible test of 'reasonableness'?*

A person should not rely solely on a search conducted by someone else if the foreseeable impact of their proposed use is greater than the impact of the use that the earlier search was conducted for.

Notice of use

23. *If the Government implemented the option under Category 2, should a regulation-making power be included in the legislation to allow mandatory guidelines to possibly be prescribed in future (e.g. if early experiences with the scheme indicate that greater certainty is needed on particular matters)?*

Yes.

Assertion of rights by copyright owner

24. *Would it be useful to include a definition of 'commercial' or 'commercial use' in the Copyright Act for the purposes of the orphan works scheme? If so, would you suggest this be defined in any particular way?*

No.

The relevant consideration is the *impact on or consequences for* a copyright owner. Depending on the use, the impact on a copyright owner could be greater from a 'non-commercial' use than a 'commercial' use.

25. *Alternatively, should these terms be left undefined and ‘commercial’ given its ordinary meaning (i.e. of the nature of commercial, trade or business) if used in the legislative provisions establishing the scheme, with guidance on the meaning of ‘commercial use’ provided in the Explanatory Memorandum to the bill?*

There should be any reference to ‘commercial’ or ‘non-commercial’. The relevant consideration is the *impact on or consequences for* a copyright owner.

Remedies – past use

26. *Are there any other options for limiting remedies available in relation to past uses under the scheme that should be considered?*

Guidelines jointly developed with relevant rightsholder representatives can address remedies, including circumstances in which no compensation may be payable (e.g. in certain circumstances, if there is an immediate takedown).

This is a better approach, that can address different types of scenarios, than those set out in the paper.

As we have said above, an attempted distinction between ‘commercial’ and ‘non-commercial’ is problematic for a range of reasons.

27. *Which of these options would be less likely to result in disputes that could require courts and judicial processes, and/or forensic accounting, to resolve?*

A requirement in the legislation that any guidelines be jointly developed with relevant rightsholder representatives would reduce disputes.

28. *If a schedule setting out a range of fixed fees were prescribed for standard uses of materials, who should have authority to set the fees, and who should be consulted in the process?*

An approach like this would not work effectively in legislation. It could work in guidelines developed with rightsholder representatives.

Ongoing use

29. *Would there be value in the legislation setting out matters to which the court is to have regard when considering injunctive relief in respect of ongoing use of a former orphan work?*

Yes.

Legal forum for disputes

30. *Do you think the Copyright Tribunal would be an appropriate forum for hearing monetary claims arising under the orphan works scheme?*

Yes. It has specialised expertise in copyright fee-setting, and experience in dealing with fee determinations on small as well as large scale.

31. *If the Copyright Tribunal were able to hear monetary claims, should these claims be required to be taken to the Copyright Tribunal in the first instance, or only upon agreement of both parties (i.e. the parties could elect to have the matter heard by either the Tribunal or a court)?*

First instance.

32. *Alternatively (if you do not think the Copyright Tribunal would be an appropriate forum), do you think the FCFCOA (Division 2) should be given sole jurisdiction over monetary claims under the orphan works scheme, or have concurrent jurisdiction with the FCA (and State and Territory Supreme Courts) to hear such matters?*

N/A

33. *Do you think the Copyright Tribunal would be an appropriate authority for setting prescribed fees for uses of copyright material under the orphan works scheme (if a schedule of fees were to be prescribed in the legislation)? If not, how else could prescribed fees appropriately be set?*

We do not think a schedule of fees would be workable.