



Submission to the

Senate Legal and Constitutional

Affairs Committee

inquiry into the

Copyright Amendment Bill 2025



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Introduction

The Australian Libraries and Archives Copyright Coalition (ALACC) would like to express our appreciation to the Committee for the opportunity to provide feedback on the Copyright Amendment Bill 2025 (the Bill) and applaud the government's commitment to engaging with key stakeholders on complex copyright reform issues.

The ALCC is the main consultative body and policy forum for the discussion of copyright issues affecting Australian libraries and archives. It is a cross-sectoral committee with members representing the following organisations:

- Australian Library and Information Association (ALIA)
- National and State Libraries Australasia (NSLA)
- Council of Australian University Librarians (CAUL)
- Australian Government Libraries Information Network (AGLIN)
- Australian School Library Association (ASLA)
- NSW Public Library Association (NSWPLA)
- Australian Society of Archivists (ASA)
- Council of Australasian Archives and Records Authorities (CAARA)
- Australian Law Librarians Association (ALLA)

Our members in the libraries and archives community are the largest holders of orphan works in Australia, and have a strong interest in their management and reuse. We support the orphan works scheme set out in the Bill as providing a balanced and effective solution to the orphan works dilemma. We congratulate the government on progressing the Bill after so many years of discussion of the issues and on the thorough consultation process undertaken to determine the key aspects of the final scheme.

If enacted in its proposed form, the orphan works scheme will benefit society significantly, providing greater legal certainty for cultural institutions and users of orphan material alike. The scheme as drafted strikes an appropriate balance between enabling the use of orphan works and respecting the economic and moral rights of creators and other rights holders.

In particular, we support the fact that the scheme as drafted:

- limits the risk for institutions and individuals making use of copyright material, while still providing a path for reasonable payment for identified rights holders
- applies to all users and types of material, including both published and unpublished works
- requires a “reasonably diligent search” to identify the copyright owner before materials can be used, but retains flexibility in what is reasonably diligent

- retains sufficient flexibility in the scheme’s administrative requirements, including requirements for attribution, notification and record keeping
- does not limit the operation of other provisions of the Act, including s200AB
- covers situations where the identity of the copyright owner can be ascertained, but they cannot be contacted or a response cannot be elicited.

ALACC’s members also support the other amendments proposed by the Bill and in particular the remote learning provisions, which are essential to ensure schools and their students can utilise current technologies in sensible and practical ways.

Below we provide a short background discussing orphan works and the problems they cause, before providing more detailed comments on the Bill itself, including key benefits of the proposed orphan works scheme and some comments on the remote learning provisions.

For additional background information, we draw the Committee’s attention to [Unlocking Orphan Works](#) – a series of case studies collected and published by the ALACC in 2023 to demonstrate the unrealised potential of orphan materials. We also draw the Committee’s attention to our previous [Submission in response to the exposure draft of the Copyright Amendment \(Access Reform\) Bill 2021](#), which provides a more thorough discussion of how we believe an orphan works scheme can and should operate in practice.

Background

About Orphan Works

An orphan work is material that is protected by copyright for which the copyright holder is unknown or unlocatable after reasonable enquiries. Works becoming orphaned is extremely common - the British Library, for example, has estimated that over 40 percent of all copyright material in existence is orphaned.¹ A work may be orphaned on its creation if the author is never credited or recorded, or may become orphaned, for example if the author dies without traceable heirs, or if the company that created it ceases to exist. An orphan work can also be abandoned – that is, the details of the likely copyright owner is known, but they will not acknowledge their rights or respond to requests to use the work.

Orphan works may be published or unpublished, works or other subject matter, old or new. Commonly orphaned works include letters, private photographs, diaries, books, audio histories, home movies, corporate reports and ephemera such as menus or pamphlets. They are particularly prevalent in national and state collections that contain older, unpublished or one-off items, though there is a growing body of ‘modern’

¹ The British Library, ‘Orphan Works and Mass Digitisation’, at 1, available at [Wayback Machine](#)

orphans that are non-mainstream, non-commercial materials that have been distributed online without attribution.

Orphan works cover the breadth of human innovation, and although they by definition tend to have little commercial value they are of great public value to education, scholarship and creativity. They provide a rich source of information and insights for researchers wishing to understand and revisit past eras and can be particularly valuable for family historians, documentarians or even pop artists.

BOX 1 – Examples of orphaned and ‘abandoned’ materials

There are a number of different scenarios we would like to highlight that may result in copyright material being explicitly or effectively orphaned or ‘abandoned’.

Some materials are orphaned almost immediately when they are created, simply because the creator was never recorded or identified. This commonly includes:

- Anonymous works
- Ephemera, such as minor publications, pamphlets, leaflets, handbills, invitations, cards, menus, junk mail, theatre programs and retail trade catalogues.
- Historical records such as shipping manifests, wage ledgers or church baptism, marriage and burial records.
- Minutes of unincorporated bodies such as volunteer societies and sporting associations.
- Non-professional photographs and videos.

Other materials may once have had a known rights holder, but over time they become lost or impossible to contact, such as:

- Letters, diaries and journals where the name is unreadable, too generic to identify a specific individual (e.g. the letter’s author is ‘J Smith’), or is a nickname or pseudonym.
- Published material produced by an entity which no longer exists, such as books, newspaper or journals where the publisher has gone out of business

Some materials may be orphaned by default, because the rights become too complex to determine who has the legal right to provide permission. This may include:

- Old magazine or newspaper materials produced by freelance journalists, writers, photographers, illustrators and other contributors, or where there are multiple potential rights holders.
- Old audio-visual material, where the rights holders may be layered or unidentified.

- Published material where the original publisher has been taken over by another entity and the title is difficult to trace.

Still other materials may have an identifiable or even contactable publisher, but they are unwilling or unable to respond to requests for permissions for some reason. This is common in relation to:

- Grey literature such as reports, discussion papers, working papers, technical manuals, fact sheets, instructional information, data sets, infographics, conference papers and other information produced by universities, research centres, think tanks, companies, nonprofit organisations, professional, trade and industry bodies, Commonwealth and State or Territory government departments and agencies, local government authorities and other entities.
- Commercially produced material that is no longer commercially viable, where the publisher may be disinclined to spend time and resources determining the status or providing permission.
- Material produced by large multinational nonprofits such as the United Nations, which produce high volumes of material and may not have the resources to manage their ongoing rights.

The Orphan Work Problem

By definition, orphan works can be used without negatively impacting the creator or copyright owner, as there is no creator or copyright owner to be impacted.

Nevertheless, under Australia's current law it remains "illegal" to use them in most circumstances. This means good actors who are bound to obey the law – such as researchers, creators, educators and cultural institutions – cannot make use of them, unless their use is covered by a narrow band of exceptions that are set out in the *Copyright Act 1968*, such as fair dealings for the purpose of reporting the news or comedy and satire.

For non-orphan works, uses that fall outside these exceptions can be legally undertaken by obtaining the permission of the copyright owner. But for orphan works this is impossible, meaning that the majority of uses either cannot be undertaken, or must be undertaken on a risk analysis basis – does the risk of being sued by a previously unidentified rights holder outweigh the benefit gained from use of the orphan work? As libraries and archives which spend millions investigating and digitising collection materials can attest, it can be hard to justify the investment needed to repurpose heritage material when there is the potential for a copyright owner to emerge who may seek unknown licence fees or worse, stop the use completely. With such uncertain risk,

many potential users abandon plans to use the material or avoid using unknown works in the first place.²

This situation creates a ‘copyright conundrum’ because access to orphan works is impossible to obtain, even though releasing them would create significant public benefits without unreasonably prejudicing any copyright holders. Common uses that provide significant public benefit but which are not currently covered by copyright exceptions in Australia include publication in a research article, inclusion in a historical documentary, uploading to a family history website or use in a remix/collage artwork.

Select groups such as libraries and archives or educational institutions have some freedom to make use of orphan works under specific exceptions provided for them in the Copyright Act. Libraries and archives in particular are increasingly using provisions such as the section 200AB flexible dealing exception to make orphan works contained in their collections available online.³ However, even for such groups a risk remains and the potential for a copyright owner to come forward in the future and object to or claim compensation for the use of the material will often deter libraries or archives from using orphaned content, particularly if they are small, under-resourced or do not have access to copyright expertise. Furthermore, as s200AB does not cover downstream use of the materials, many libraries and archives feel bound not to make material available to clients who may unknowingly use them in a technically illegal way, such as researchers who seek to include them in academic publications or documentaries. Unfortunately, this means orphan works are too often left to languish in the archives of cultural institutions, trapped behind outdated copyright while their cultural, economic and historical value goes to waste.

The scale and impact of the issues posed by orphan works began to reach prominence several decades ago due to the rise of the internet. As public expectation grew that cultural institutions should use digital technologies to make works in their collections, and as institutions began to explore using existing exceptions to meet this demand, the sheer number of orphan works in our national collections became more and more clear, and demand for legitimate avenues for others to use these materials began to emerge.

The true benefit of the proposed orphan works scheme set out in the Copyright Amendment Bill 2025 is not that it makes use of orphan works legal – it does not. Rather, it lowers the risk profile of orphan works, meaning it is more likely to align with

² See Pappalardo, Kylie, Aufderheide, Patricia, Stevens, Jessica, & Suzor, Nicolas (2017) [Imagination foregone: A qualitative study of the reuse practices of Australian creators](#), Queensland University of Technology, Brisbane, Qld.

³ The section 200AB flexible dealing exception permits libraries and archives in non-commercial ways as long as it is for the purpose of maintaining or operating the library or archives and does not unreasonably prejudice the interests of rights holders. For more detailed discussion, see <https://alacc.org.au/libraries-and-archives-exceptions/>.

the risk appetite of institutions and their users. By limiting the practical and financial impact of a copyright owner coming forward, the proposed scheme will embolden institutions and creators alike to realise the value locked inside these materials. We welcome the certainty the proposed provisions will bring, and the flow on effects of that: the release of more collection material for viewing online and the use of those materials by our clients in exciting and innovative new ways.

Support for the Bill

Orphan Works

As well as supporting the introduction of an orphan works scheme in general, the ALACC also welcomes the specific drafting of the scheme in the Copyright Amendment 2025 Bill and the measures in that drafting to protect the interests of both copyright owners and users of these materials. The scheme as proposed will fulfill its policy intent of opening up orphan materials for uses in the public interest while ensuring an appropriate balance with copyright owners' interests.

Below we comment on key aspects of the scheme that we support as crucial to its success.

Application to all materials, users and uses, including published and unpublished material, and commercial and non-commercial use

The utility of the orphan materials scheme will be maximised by its wide application. Applying the orphan works scheme to any orphaned copyright material, any use of that material, and use by any user is essential for the full public benefits of the materials to be unlocked. In an era of digital technologies and the internet there is less reason to differentiate between types of material, the mediums through which material is expressed and the mechanisms used to distribute material. Limiting the material, use or user would make the application of the scheme unnecessarily complex, drawing artificial lines between creators working in different formats.

The majority of orphan works in institutional collections are unpublished letters and diaries, and these are the most unique materials which are in the greatest demand by historical researchers. Excluding them would unnecessarily limit the utility of the scheme and the value it provides to society. Enabling publication of previously unpublished works is, in fact, in our sector's experience the best way to find rights holders.

Similarly, allowing commercial uses of orphan works is essential for the scheme to stimulate economic value from the orphaned content. Permitting commercial uses - such as authors quoting material into books, filmmakers integrating materials in fiction or documentary screen content, or commercial musicians and artists utilising them in

remix works - will ensure that Australia's working creators benefit by having access to orphan materials, not just researchers and non-profit sectors.

Flexible diligent search requirements

Diligent search is a practice that is well established in the library and archive sectors and is an essential step in identifying orphan works. The ALACC therefore supports its inclusion as a prerequisite for use of the scheme. However, it is equally important that the requirements as to what amounts to "diligent search" are flexible to suit the broad range of circumstances which the scheme covers. The scheme's inclusion of a non-exhaustive list of factors to be taken into account in determining whether a search was sufficiently diligent strikes an appropriate balance between minimising barriers to use and ensuring sufficient effort is put into identifying whether a work is truly orphaned.

A contextually relevant search effort must take into account factors such as the nature of the material, the purpose and character of the intended use, and the information available on the rights holder. For example, when a published photograph is to be reproduced commercially it is reasonable to expect a more onerous search effort than when a researcher wishes to quote a shipping manifesto in an academic publication. Some European countries have included strict search requirements in their orphan works schemes that mandate referencing literally hundreds of sources, databases and registers. Experience has shown that such onerous requirements can become a significant disincentive for use of the scheme, with little additional benefit in terms of identifying rights holders.⁴

The ALACC supports the use of industry standards and guidelines to establish best practice as to the level of diligence appropriate for different circumstances, and note that our members have taken the lead in developing such guides for in the library and archives sector.⁵

Judicial oversight of reasonable payment for ongoing use

The ALACC supports the scheme's compromise on payments for past use should a rights holder come forward – that is, the fact that the scheme excludes any payment requirements for past private or domestic use of orphan works, but does leave room for reasonable payment for other past uses.

It is the experience of libraries and archives releasing orphan works under s200AB that very few copyright owners come forward. Nevertheless, the ALACC's members are comfortable with the fact that, should a copyright owner come forward, they will need

⁴ see [Research: Orphan Works Directive does not work for mass digitisation](#)

⁵ see for example [Position statement: Reasonably diligent search for orphan works - National and State Libraries Australasia](#)

to agree terms for any ongoing use, and may have to pay a licence fee for uses they have already made of the material while they believed them to be orphaned.

However, it is essential that the amount of the potential payment is limited, as without this the scheme does little to limit the legal remedies available or to lower the risk of using orphan works. We agree that granting judicial power to determine licence fees in the case that no agreement can be reached will be an effective method of providing this limitation.

Flexible attribution, notification and record keeping requirements

It is appropriate that a user under the orphan materials scheme should be required to provide whatever attribution of the author of a work or maker of a film they are able to ascertain. Similarly, it is reasonable that they provide public notification of their use of the orphan and keep a record of their diligent search for interrogation should a rights holder come forward. However, it is essential that these mechanisms remain flexible to cover the broad range of circumstances to which the scheme is likely to apply.

Strict requirements for attribution, notification or record keeping would rapidly become outdated and run the risk of making it impossible or uneconomical to comply with the scheme.

Explicit protection of s200AB and other exceptions in the Copyright Act

We are particularly grateful for the inclusion of an explicit statement in the Bill that the scheme does not impact the operation of other exceptions in the Act. The exceptions set out in the Act are carefully designed to ensure that copyright does not become a barrier to important public interest uses, such as reporting the news, research and study, and obtaining legal advice. It is essential to the health of Australia's democracy that such uses remain permitted, whether or not the copyright owner of the material is known.

The scheme does not replace the operation of these exceptions for orphan works as, as we have pointed out previously, it does not make the use of orphan works legal, but merely limits the remedies available when they are used. If the scheme were to limit the application of these exceptions to orphan works, it would therefore paradoxically raise, rather than lower, the risks associated with using them. Libraries and archives have used s200AB to make millions of works, orphaned and otherwise, available on services such as Trove, and it would be disastrous to Australian research and culture if such mass digitisation programs were unintentionally made illegal by the introduction of the proposed scheme.

Abandoned works coverage

Finally, we are grateful that the Bill clarifies that it covers situations where the identity of the copyright owner can be ascertained, but they cannot be contacted or a response cannot be elicited. This will reduce confusion in the scheme and increase the

confidence of its users, as it is often impossible to tell if a copyright owner has not been correctly identified, or is merely unwilling to respond.

Remote Learning

The ALACC supports the sensible extension of section 28 to permit the use of copyright materials in teaching to be delivered via remote learning. A large number of students and lifelong learners make use of the public internet provided by libraries and archives every day to participate in classes or complete homework, and we are glad they are now able to participate more fully in their learning experience. Furthermore, librarians and archivists are frequent participants in the educational environments and will frequently be the “other person giving the instruction” contemplated by the provision.

We also note that it is important that these benefits are not limited to students who can watch lessons ‘in real time’. We would therefore support any amendments that are deemed necessary to achieve what we believe to be the policy intent of the Bill, that is, to ensure that the s28 extension also applies to those students who use online learning to catch up on lessons at a later time.