



Australian Government
Attorney-General's Department

November 2025

Senate Legal and Constitutional Affairs Legislation Committee

Inquiry into the Copyright Amendment Bill 2025

Attorney-General's Department Submission

Introduction

1. The Attorney-General's Department welcomes the opportunity to provide the Senate Legal and Constitutional Affairs Committee with this submission as part of its inquiry into the Copyright Amendment Bill 2025.
2. The key measures in the Bill propose amendments to the *Copyright Act 1968* to:
 - establish an Australian orphan works scheme, to facilitate the use of copyright material if the copyright owner cannot be identified or located to seek their permission (commonly known as an 'orphan work') after a reasonably diligent search is undertaken, while also providing reasonable scope for copyright owners to assert their rights if they later become aware their work is being used, and
 - clarify the scope of section 28, which allows for the performance and related communication of copyright material by teachers and students in the classroom in the course of educational instruction, to apply to online and hybrid classrooms in the same way as physical classrooms, and facilitate parental and community involvement in such classes.
3. The Bill also makes a number of minor and technical amendments to clarify and update aspects of the Copyright Act.

Current law – the problems to be addressed by the bill

Orphan works scheme

4. Currently, the Copyright Act does not specifically provide for the use of orphan works. This creates legal risks for those that want to use orphan works in a way that engages copyright (for example, including an orphaned photograph in a textbook or an orphaned video clip in a documentary). This is because the Copyright Act generally requires a person to seek permission from the copyright owner and agree terms for the use, before using copyright material. Since orphan works do not have an identifiable and locatable copyright owner from whom to seek permission, using an orphan work may therefore constitute copyright infringement under the Copyright Act, presenting legal risks for users.
5. This is a significant issue for Australia's cultural institutions (libraries, archives, museums and galleries), as they hold large amounts of orphaned material in their collections that could be of cultural, social, educational or creative value, but are generally underused. Uncertainty about the legal status of orphan works can also present significant challenges for broadcasters and documentary filmmakers. As such, this problem potentially impacts a broad section of the community, including researchers, academics, family historians, teachers and students, creators and consumers.
6. Orphan works also present potential problems for copyright owners, who may be unaware their material has become orphaned, and that they are therefore losing potential revenue streams and the opportunity for their work to be more widely appreciated.

Remote learning

7. Currently, section 28 of the Copyright Act permits the performance (i.e. visual or aural presentation) of copyright material *in the course of educational instruction if not given for profit*, and the

communication (i.e. making available online or electronically transmitting) of copyright material if made merely to facilitate such a performance, by teachers or students *in class* or otherwise *in the presence of an audience* limited to persons:

- who are taking part in the instruction, or
 - are otherwise directly connected with *the place where the instruction is given*, however this excludes a person by reason only that they are a *parent or guardian* of a student (subsection (3)).
8. The effect of section 28 is that the performance or communication will be deemed not to be a performance in public or a communication to the public respectively, and therefore it does not require permission of the copyright owner (or agreement to terms such as payment) under the Copyright Act.
 9. The policy intent of section 28 (as illustrated, for example, in the Explanatory Memoranda to the Copyright Amendment Bill 2006, when section 28 was last amended) is to allow the performance (and associated communication) of works and other subject matter in the classroom (that is, a ‘live setting’) without this attracting an obligation to pay remuneration.
 10. With the rise of digital learning, uncertainty has grown over whether the same rules that apply to a physical (‘live setting’) classroom in section 28 also apply to live online or hybrid classroom settings, including when teachers are teaching from home or another place external to the educational institution, or all or some students are participating online. Questions also arise when parents or other persons are helping students with lessons in which copyright materials are used (which is especially important for younger students who need help from a parent or guardian to take part in online learning), or when persons other than professional teachers are involved in lessons such as a guest speaker from the local community or a librarian if the local library runs a story-time class.
 11. This uncertainty does not prevent lessons being conducted online or in a hybrid environment. However, if section 28 was interpreted narrowly, the outcome could be that lessons in which copyright material is performed (presented) in a live online or hybrid class would not be covered by section 28 (and would therefore be remunerable under the Copyright Act), whereas the same performance would be covered (and therefore not remunerable) if given in person in a physical classroom. This different treatment between live physical and online classes is potentially problematic given the rise of digital learning, and inconsistent with the policy intent of section 28, which is to allow the performance (and associated communication) of works and other subject matter in a live classroom setting without this attracting an obligation to pay remuneration.

Stakeholder engagement

12. Across 2023, a series of Ministerial Copyright Roundtables were held that brought together over 40 organisations from a wide range of sectors, including publishing, visual arts and images, broadcasting, screen, music, education, research, cultural collections (libraries, archives, museums and galleries), gaming, technology and legal, to identify and discuss copyright priorities and emerging issues.
13. The aim of the roundtables was to develop practical and achievable copyright reform proposals for the Government’s consideration which could potentially be taken forward with broad stakeholder support.

14. As an outcome of the roundtables, stakeholders generally agreed:
- that there is scope for the Government to implement a scheme to support the reasonable use of orphaned copyright materials that provides greater certainty and reduced legal risk to users without unreasonably prejudicing the interests of copyright owners
 - to the overarching principle that the Copyright Act should treat physical and virtual classrooms in the same way, and that section 28 should cover:
 - live online or remote classes, in the same way it currently applies to live, in person classes
 - a parent or other person assisting a student or students with their lessons, and
 - a person other than a member of school staff (such as a member of the local community) who is involved in a class.
15. Stakeholder views differed on the interpretation of section 28, for example some considered that section 28 could be interpreted more broadly to cover the things noted above. Overall, stakeholders agreed that simple legislative amendments could be designed to implement this overarching principle and put the above issues beyond doubt, without expanding the operation of section 28 into other uses that currently attract remuneration.
16. Following this agreement on 11 April 2024, the Government announced it would consult further on the design of a proposed Australian orphan works scheme. It also announced it would amend the Copyright Act to make clear that the existing rules in section 28 apply to online and hybrid classes and when parents and others are involved in the class.
17. The department has subsequently engaged in further consultation with relevant stakeholders on the design of both measures to balance stakeholders' views and interests and avoid potential unintended consequences.

Overview of the Bill

Schedule 1 – Orphan works

18. The proposed orphan works scheme is intended to balance the public interest in providing greater access to and use of orphan works, while providing clear safeguards to copyright owners, in a way that is simple and not overly burdensome.

Providing certainty to users through a limited remedies scheme

19. The scheme as set out in the Bill would support use of orphan works by limiting the relief that can be sought against a person for infringement of copyright where:
- a reasonably diligent search for the copyright owner/s has been undertaken, and the copyright owner/s are unable to be identified or located
 - the search was conducted within a reasonable time before the orphan work is used, and a record of the search was maintained for a reasonable period, and

- notice is given, in a clear and reasonably prominent manner, that the copyright owner/s could not be identified and located and that the notice is being given for the purposes of the scheme.
20. If these conditions are met by a user in relation to the use of an orphan work and a copyright owner were later to come forward, the scheme as set out in the Bill would limit the remedies available for that past use to reasonable payment (except in the case of private and domestic use, in which case no fee would be payable so long as the user promptly ceased the infringing use or agreed terms with the copyright owner). Importantly, if the conditions are met, a court would not be able to order damages, additional damages, account of profits or other monetary relief that may usually be payable for copyright infringement (clause 116AAD(2)).
21. While allowing a copyright owner to claim a ‘reasonable payment’ for past use would not remove the user’s liability to provide payment to the copyright owner, it reduces risk for users by limiting that liability to something that may be reasonably predictable within the context of industry practice. ‘Reasonable payment’ is intended to be broadly equivalent to the reasonable licensing fee that would have been payable if the copyright owner had been able to be identified and located at the time of the infringing use. This is intended to provide a level of certainty to both prospective users and emergent copyright owners, while allowing flexibility for individual circumstances.
22. The limitation on available remedies where the infringing use was solely for ‘private and domestic use’ is intended to only cover personal use by the user and members of their family or household and would not extend, for example, to any sharing the material via social media or incorporating the material into a new product that is disseminated more widely. This limitation is intended to be narrow and reflects the limited exceptions for private and domestic use already provided in the Copyright Act.

Balancing flexibility with certainty

23. There are a large range of circumstances in which orphan works could be used (for example, ranging from uses like copying a picture for display in the home or copying a poem for inclusion in a community newsletter through to commercial uses like inclusion of an audiovisual clip in a documentary or a photo in a book). The scheme has been designed to have sufficient flexibility for it to be able to adapt to different uses and users, while also providing protection and certainty for users and owners alike.
24. The Bill does this through the ‘reasonableness’ test attached to the conditions that must be satisfied in order for the scheme to apply, combined with number of high-level discretionary factors which are intended to help guide a user, or a court, in determining what would be considered reasonable for the relevant conditions.
25. This approach was supported by stakeholders during consultation.
26. The Bill also provides for the Minister to determine additional matters that may be taken into account in considering what is reasonable under the relevant provisions. This would also allow the Minister to determine matters to further clarify ‘reasonableness’ under the scheme should this be deemed necessary over time.
27. Any such determinations would be legislative instruments, and would be subject to Parliamentary oversight and disallowance.

Protection of rights holder interests

28. The scheme has also been designed to protect rights holder interests, including by requiring a reasonably diligent search which may help reconnect copyright owners with their works that may have unintentionally become orphaned and potentially open new revenue streams.
29. While the conditions a user must meet to rely on the scheme should mean that instances of a copyright owner later being identified or located are rare, if the copyright owner later emerges the scheme would allow them to reasonably assert their rights.
30. Under the Bill, if the copyright owner later emerges:
 - in relation to past use – as noted above, unless the use was solely for ‘private and domestic use’ and the user promptly ceases use or the parties agree on continuing use, the copyright owner would be able to seek ‘reasonable payment’ for that use, and
 - if the user wishes to continue to use the work in the same way – the parties may agree to terms for the continuing use and, if unable to reach agreement, either party would be able to apply to the court to fix ‘reasonable terms’ (including reasonable payment) or grant an injunction on terms the court considers appropriate.
31. The ability for a court to grant an injunction in relation to continuing use was of particular importance to rightsholder stakeholders during consultation.

Interaction with other provisions in the Copyright Act

32. The Bill clarifies that it is not intended to limit the operation of other provisions in the Copyright Act (new subsection 116AAB(2)). For example, the scheme would not impact the moral rights of the author (creator) of the orphaned material, or potential reliance by users on copyright exceptions in the Copyright Act such as the special cases exceptions for bodies administering cultural collections like libraries or archives or educational institutions in section 200AB, and fair dealing exceptions.
33. In accordance with section 29 of the Copyright Act, the publication of an orphan work by a user under the scheme (without the licence of the copyright owner) is not intended to result in the work being treated as having been ‘published’ for the purposes of the Copyright Act (including provisions dealing with copyright duration).

Schedule 2 – Remote learning

Key proposed changes

34. This measure is intended to deliver on the Government’s commitment to ensure that:
- the Copyright Act applies consistently to lessons, regardless of whether they are conducted online, in a hybrid class setting or in the physical classroom, and
 - parents and others (such as members of the local community) can be involved in classes, including in a teaching or supportive role, without impacting copyright rules, enriching the educational experience for students.
35. It does this by amending section 28 of the Copyright Act in the following ways.
- Section 28 would apply to educational instruction conducted in person, using technology that allows a person to take part in the instruction without being physically present, or a combination of both (new subsection 28(9)).
 - This is intended to put beyond doubt that section 28 covers online or hybrid classes, in which the teacher (or other person giving instruction) and some or all of the students may not be physically co-located.
 - This would include, for example, where a teacher is using a laptop provided by the school to deliver educational instruction to students online.
 - A person giving instruction would not be limited to a professionally qualified ‘teacher’ and could include ‘other persons’ (provided the instruction is not given for profit).
 - This may include, for example, a person who runs a class on behalf of a library, museum or gallery, or a guest speaker from the local community such as a member of the local police or a person employed by a community legal centre who gives a presentation to a school class.
 - Consistent with the current operation of section 28, these amendments are not intended to cover circumstances such as private, paid tutoring given to students to assist them with classwork, or individuals or employees of organisations (whether operated for profit or not) who offer educational presentations or excursions on a commercial basis, as section 28 does not apply to lessons given for profit.
 - Persons ‘taking part in’ educational instruction could include parents or other persons assisting or otherwise supporting a teacher or other person giving the instruction, or a student receiving the instruction (new subsection 28(8)).
 - This may include, for example, a parent or guardian who is assisting their child with a virtual lesson in the student’s home, a teacher’s aide or trainee teacher or IT support person.
 - It is also intended to cover persons who are involved in a class in an integral, supportive way but may not be actively assisting in the lesson. This may include, for example, a head teacher overseeing a class, a parent who is invited to sit in on a class activity or is listening in to a

lesson given to a student received via the internet at home, or a child's mental health support worker who may be present during a lesson.

- The 'audience' may comprise (in addition to those who are 'taking part in the instruction') persons who are 'directly connected with' the place where the instruction is given *or the place (that is, the entity) for which, the instruction is given*
 - This is intended to address the potential limitation of current section 28 requiring a direct connection with the physical place where the instruction is given and ensure section 28 can apply to an online or hybrid class in the same way as for an in-person class.

Not intended to impact current licensing arrangements

36. The proposed amendments, which are otherwise not intended to expand the scope of section 28, also make the following clarifying amendments.

- Section 28 continues to apply in a 'live' class setting only, whether given in person or online.
 - This is reflected in new subsection 28(10) which provides that for online or hybrid classes, a person taking part in educational instruction must do so 'at the same time, or at substantially the same time' (to account for any minor technical delays) as the educational instruction is given.
 - It is intended that section 28 cover, for example, lessons given online via a video conference or livestream.
 - It is not intended to cover, for instance, the streaming of recordings of live lessons in which copyright material is performed to students to watch later (for example, as a catch-up lesson), which is remunerable under current licensing arrangements.
 - Delayed streaming/catch up of a class involves a copy of the performance being made, which engages the copyright holder(s) exclusive right of reproduction under the Copyright Act. This has the potential to impact on existing legitimate market(s) in that a recording of the performance of copyright material(s) during a lesson could become a replacement for educational institutions purchasing the original copyright material(s).
 - This is consistent with how section 28 currently applies to physical classrooms, in that it currently only applies to live classes and not classes that are recorded for later viewing or catch up.
 - Recorded classes may be covered by the education statutory licence, other licensing arrangements or other provisions of the Act depending on the circumstances.
- Section 28 remains limited to performances 'in class, or otherwise to an audience' that are given or received 'in the course of educational instruction' which is 'not given for profit'.
 - These changes are not, for example, intended to apply to other, wider school activities like school concerts or sporting events that may involve the performance of copyright material (for which licences may be required).

37. This will enable those providing educational instruction to operate with greater legal certainty in delivering online learning and help build stronger partnerships in education with parents and the community, while not disturbing the licensing frameworks that support the creative and media sector's important contribution to teaching and learning.

Schedule 3 – Other measures

38. These measures make a range of minor and technical amendments to the Copyright Act improve its operation and modernise certain provisions.

Part 1 - Appointments

39. The Bill would amend sections 142 and 170 in the following ways to simplify the processes relating to the appointment of the acting President and the Registrar of the Copyright Tribunal of Australia, while allowing these appointments to be made at an appropriate level.
- The acting President of the Tribunal be appointed by the Minister and not, as currently, the Governor-General.
 - This is because the Copyright Act sets out who can be acting President during a vacancy in that office (namely, 'the senior Deputy President'), without the need for a specific selection process.
 - This amendment would enable a temporary vacancy to be filled promptly, ensuring continuity of the Tribunal's functions.
 - The appointment of the Registrar of the Tribunal by the Chief Executive Officer and Principal Registrar of the Federal Court and not, as currently, the Minister.
 - The Registrar must be a person engaged under the *Public Service Act 1999* or whose services are made available under an arrangement made under that Act.
 - The position has historically been filled by, and has similar duties to, a District Registrar of the Federal Court, who are themselves appointed by the Chief Executive Officer and Principal Registrar of the Federal Court. Typically, the Registrar of the Copyright Tribunal will perform the duties and functions for the Copyright Tribunal alongside other duties and functions they perform the Federal Court.
 - As the Federal Court is responsible for the administration of the Copyright Tribunal, providing it with registry services and administrative support, the Chief Executive Officer and Principal Registrar of the Federal Court is well placed to appoint the Registrar of the Tribunal.

Part 2 –Archives

40. The Bill would amend the definition of 'archives' in paragraph 10(1)(a) to ensure the references in the definition to state and territory archives offices and the legislation under which they were established are up to date and cover all relevant jurisdictions.
41. This is intended to provide greater legal certainty that archival material in the custody of archives offices established under state and territory legislation is captured within the definition of 'archives' for the purposes of the Copyright Act.

Part 3 – Notifiable instruments

42. The Bill is intended to modernise notification requirements in the Copyright Act by replacing references to notices published in the 'Gazette' with 'notifiable instruments'.
43. These instruments would be administrative in nature and, as such, do not create substantive exemptions from the *Legislation Act 2003*. In accordance with section 15G of that Act, notifiable instruments must be lodged for registration in the Federal Register of Legislation as soon as practicable after they are made. This would ensure long-term, public and more easily accessible access to the relevant notice.

Part 4 – Duration of Crown copyright

44. The Bill would clarify the application of section 180, which provides for the duration of copyright in original works, sound recordings and films for which the Commonwealth or a State is the owner.
45. Copyright duration refers to the length of time for which material is protected by copyright. Under section 180, the duration of Crown copyright is 50 years from the date the material is made. Section 180 is located in Part VII, Division 1 of the Copyright Act, under which the Commonwealth or a State is the owner of copyright in materials made or first published by or under the direction of the Commonwealth or a State.
46. The proposed amendments to section 180 are intended to put beyond doubt that section 180 applies only to materials for which the Commonwealth or a State is the owner by virtue of Part VII; and not, for instance, to material that may later be acquired by the Commonwealth or a State from another person.
 - This would ensure that if a government becomes the owner of copyright in material other than under Part VII it does not alter the duration of copyright in such material; this would remain governed by other provisions in the Copyright Act and is generally for a longer period (for example, for works generally the duration of copyright is 70 years after the death of the author).
 - The proposed amendments are intended to address the risk of unintended consequences when copyright is acquired by the Crown in the unlikely case that a court favoured a different interpretation of the current section 180, such as shortening copyright duration and possibly extinguishing it.
47. The proposed amendments would also make clear that if the Commonwealth or a State is the owner of copyright material by virtue of Part VII and later transfers ownership to another person, the duration of copyright for such material would remain governed by section 180.
48. As these proposed amendments are intended to merely clarify the status quo and current intent behind section 180, putting the issue beyond doubt, there is no need to apply the amendments retrospectively.