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28.11.2025

Committee Secretary
Legal and Constitutional Affairs Legislation Committee
Department of the Senate

By email: legcon.sen@aph.gov.au

To the Legal and Constitutional Affairs Legislation Committee,

Indigenous Art Code Ltd (**lartC**) welcomes the opportunity to respond to the draft Copyright Amendment Bill 2025 (**Bill**), specifically in relation to orphan works in so far as those draft provisions potentially apply to works created by Aboriginal or Torres Strait Islander people.

Our submission will:

1. provide a brief description of the work we do (and its relevance to the Indigenous art copyright “space”),
2. outline our position on the draft Bill, and
3. suggest amendments to the draft Bill.

We invite you to contact us with any questions arising from this submission, or from your consideration of the issues relating to orphaned Aboriginal or Torres Strait Islander works. We are not experts in the copyright field but are happy to contribute to your process where that is helpful.

1. Indigenous Art Code Ltd – Our work

Indigenous Art Code Ltd (**lartC**) is the national organisation responsible for administering a voluntary industry code of conduct for art dealers and other entities who trade in or deal with Aboriginal and Torres Strait Islander artists and their art. lartC is a limited liability public company led by a Board of Directors drawn from the Aboriginal and Torres Strait Islander visual arts industry and the wider community. lartC is also a registered Charity through the Australian Charities and Not-For Profits Commission.

lartC supports artists who contact us directly with issues or concerns about commercial dealings they have entered into or are considering entering into. Frequently, these concerns and potential arrangements involve dealings with not only an artist’s physical artworks (like paintings), but also the Indigenous Cultural Intellectual Property (ICIP), copyright and moral rights in the artist’s work. We facilitate transparent communication between artists and member businesses, providing guidance and, when required, referrals to other support organisations.

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Through our Code Signatory membership process, IartC promotes best practice standards and behaviour change, strengthening the Aboriginal and Torres Strait Islander visual arts sector and helping to create a fairer market for artists to engage with. Additionally, IartC advocates for our members, addressing the issues and challenges that impact them and the broader Aboriginal and Torres Strait Islander visual arts sector. Key campaigns IartC has helped develop and champion include the Fake Art Harms Culture Campaign and Our Art is Our Lifeline, which responded to market fluctuations caused by the COVID-19 pandemic.

2. Our concerns about the proposed “orphan work” amendments

Our input relates specifically to the possible impact of the proposed orphan work amendments on **Aboriginal and Torres Strait Islander copyright holders** including Indigenous artists and, where they are deceased, the beneficiaries of their copyright.

2.1 Aboriginal and Torres Strait Islander works are more likely to be considered “orphaned”

As the Committee is likely aware, there is an increased likelihood that the works created by Aboriginal and Torres Strait Islander peoples may be treated as ‘orphaned’. This is in part because the dispossessing effects of colonisation disrupts not only cultural connection, but often physical possession and copyright control of works created by Aboriginal and Torres Strait Islander people.

A further compounding factor increasing the likelihood that Aboriginal and Torres Strait Islander artworks are considered “orphaned” is that they are often created by Artists who (during their lifetime) lived, or are living, in regional or remote communities. These artists or their beneficiaries face barriers to receiving communication, such as limited or no access to postal services, internet, email, or phone reception. In these situations, a copyright user might be able to demonstrate that they have taken reasonable steps to identify and contact the copyright owner, even though the owner may never receive the enquiry.

2.2 ICIP in Aboriginal or Torres Strait Islander artworks warrants specific attention as part of a “reasonable search” by the defendant

Orphan works created by Aboriginal and Torres Strait Islander People are likely to embody, communicate or contain Indigenous Cultural and Intellectual Property (ICIP). In the absence of a valid copyright permission or licence in respect of these works, ICIP may be vulnerable to being used in ways that are inappropriate or undertaken without meaningful consultation with traditional custodians. In the absence of any legislation which effectively protects ICIP – no matter how narrow or extensive those protections might be when introduced and implemented – orphan works created by Aboriginal and Torres Strait Islander people warrant particular consideration and protection, and a higher standard of “reasonable search” ought to have been undertaken by the defendant before any limitation of remedies is available to them.

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Before outlining our proposed amendments, here is a hypothetical (but in our experience, realistic) scenario which might assist the Committee in considering why the amendments proposed are required:

Mary was an Aboriginal woman who created artwork during her lifetime. She was forcibly removed as a child and painted artworks of her Country while detained on the mission. In her adult life, she moved among several remote Aboriginal communities and continued painting the stories her community shared with her. Mary's artworks were kept by some of the staff on the mission she was on as a child. Later in her life, she sold a few artworks without contracts of sale for cash. Mary had children and passed away with no will. Some of Mary's work from the mission has been digitised by a museum and has since been accessed by a business that creates products. That business has used a process for seeking licensors out before, which has worked well for various artists. They make a number of phone calls to the museum, who don't know the identity of the creator of Mary's works. They contact the land council, which they believe has a connection to the area where the work was "found," according to the museum, but find no connection to the author of the work. The business uses the artworks on various products.

Mary's community (including members of her family) discovers the works have been used. Her family are concerned that their copyright (as beneficiaries) has been used, and that no one has contacted them or sought their permission. Her community is also deeply harmed and saddened by the use of these works, which embody cultural heritage specific to their community and signify great pain and suffering in the life of Mary and other Aboriginal people, as they were created on a Mission.

3. Proposed amendments:

In essence, we propose that for a defendant to rely on the limitation of remedies available, they demonstrate that their reasonable search has adequately addressed or considered a broader list of "matters to be taken into account", and that those "matters" explicitly include:

- 1) Whether (the defendant ought reasonably to have believed that) the owner or owners of the copyright are likely to be an Aboriginal or Torres Strait Islander person;
- 2) Whether (the defendant ought reasonably to have believed that) the work was either created in, or owner/s of the copyright in the work might live in, a remote or regional location of Australia;
- 3) Whether (the defendant ought reasonably to have believed that) the work embodies [cultural heritage and or traditional knowledge] [Indigenous Cultural Intellectual Property (ICIP)];

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Our suggested amendments to 116 AAE (8) are below, though we are of course open to working with the Committee to further refine these proposed amendments and ensure their alignment with the rest of the Bill.

116 AAE (8) Matters to be taken into account regarding search

(8) For the purposes of determining whether a condition mentioned in subsection (2) or (3) is satisfied, the following matters may be taken into account:

- (a) the nature of the copyright material, including whether the material embodies [Alt 1: Indigenous Cultural Intellectual Property (ICIP)] [Alt 2: traditional knowledge, cultural heritage or any other cultural information] ;
- (b) the nature, purpose and character of the infringing use;
- (c) whether the owner or owners of the copyright are likely to be:
 - (i) located in a foreign country; or
 - (ii) located in a remote or regional location in Australia, and/or
 - (iii) Aboriginal or Torres Strait Islander people/s
- (d) the actual or likely impact of the infringing use on the copyright owner or owners including in respect of any cultural harm caused by the infringing use;
- (e) the way the search was conducted;
- (f) any relevant industry guidelines;
- (g) any matters determined by the Minister under subsection (13).

(9) The matters mentioned in subsection (8) do not limit the matters that may be taken into account.

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We welcome any conversations, discussion or further opportunity for input from the Committee and hope that you have found our submission helpful in considering and reporting on the Bill. Please contact us at info@indigenousartcode.org if lartC can be of assistance.