

Procedural guidelines for reasonably diligent search for orphan works

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Background

Using copyright works generally requires the existence of an appropriate exception, or permission from the rights holder. Orphan works are in-copyright works where the creator (or rights holder) is not identifiable and/or locatable, which makes obtaining permission to use the material impossible. Works produced anonymously or under a pseudonym do not become orphans by default.¹ Similarly, a refusal, or lack of response to a permission request, does not create an ‘orphan work.’

1 Identification of the creator/s of the work

The process of identification of the creator of a work will involve examination of the individual work, any accompanying works and donor files. If this process fails to produce a creator’s name, it is reasonable to treat the work as an orphan unless other conditions apply.

2 Identification of the rights holder/s

As the current rights holder may not be the original creator, this second process requires identifying whether the original rights in the work have been transferred either to a third party or inherited following the death of the creator. Unless there is evidence of a transfer or assignment of rights copyright will remain with the creator (or employer), and will therefore require a search for the creator, any heirs or employer. This search involves consultation of standard genealogical and reference sources.ⁱ Where there is evidence that the work has been published or the rights have transferred to a third party (for example, editorial and/or layout marks on a document or photograph), it is appropriate to search for the publisher as well, for it may have acquired copyright.

3 Locating the copyright holder/s

What constitutes a reasonably diligent search effort to locate contact information for a rights holder will vary case by case. Factors to consider include whether or not the author was a professional or amateur, whether the name is common or not (e.g. John Smith), details associated with the right’s holder’s name (e.g. John Smith is identified as a professor in the field of geology), and whether the work was widely distributed (published) or not (unpublished).

4 Documenting the search

A key strategy in the minimisation of any risks associated with using an orphan work is to document the efforts to locate or identify the creator(s) and rights holders. This provides evidence of that the search effort was conducted in reasonably and diligent manner, and with good intent to locate the copyright holder should a rights holder comes forward in the future.

5 Publishing orphan works online

While Australian copyright does not provide any specific or general exception for orphan works, the flexible dealing exception of the *Copyright Act 1968 (Cth)*, s200AB, is often a viable option for libraries intending to digitise and publish works identified as orphans, providing that a reasonably diligent

¹ For a work to be created anonymously, it means that the author is given as ‘Anonymous’ e.g. by Anonymous, as opposed to the absence of a name (including a pseudonym).

search effort was used to determine orphan work status. Section 200AB applies where the use of the material is non-commercial, and does not harm the creator or damage the market for the work. Orphan works almost by definition have no market, and their publication is generally low risk for the institution.

When publishing orphan works online it is advisable to include information arising from the search process in the institution's metadata framework. This information should identify that the work is by an unknown or untraced author and that use of the work accords with the requirements of s200AB of the *Australian Copyright Act 1968*. Additional public statements should be included to identify where to direct any information about the rights holder. Such strategies will also reduce the risk of the publication under a risk management assessment.

6 When rights holders emerge

It is uncommon for rights holders to come forward in relation to materials identified as orphan. However, it is still important that institutions maintain clear policies for circumstances in which this does occur. These may include, for example, disabling public access to material temporarily while rights in the material are established. However, it is also important to note that it is incumbent on the rights holder of a work previously judged to be an orphan to provide appropriate validation of their ownership. Upon evidence of a valid claim from a rights holder, the institution will work with the rights holder to ensure that appropriate recognition of their copyright and/or moral rights.

7 Preventing future orphans

Orphan works will continue to be a significant problem for libraries, and in the absence of legislative reform in this area, it is important to implement strategies to reduce the number of future orphans in library collections. Preventive measures include:

- Identifying and clearing rights, where possible, at the point of acquisition
- Creating metadata for digital objects
- Recording authors' death dates in name authority files and biographies
- Using persistent electronic identifiers for digital objects
- Ensuring that authors and creators are credited in all types of publications

These procedural guidelines aim to provide guidance and industry standards to support the [NSLA Position Statement on Reasonably Diligent Search for Orphan Works](#); they do not constitute legal advice.



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¹ These may include, for example, published obituaries, electoral roles and sites such as Ancestry.com.