

Statement on Orphan Works



PART ONE: *The Orphan Problem*

The National Film and Sound Archive (NFSA) rarely owns copyright in works in the national collection and is therefore obliged to observe the rights of a large number of copyright holders. Like many other archives, museums, galleries and libraries, in Australia and overseas, the NFSA inevitably faces problems dealing with the many orphan works in its collection.

Orphan works are works which are, or are likely to be, protected by copyright and where it has been impossible to identify, locate or contact the copyright owner. The use of such works without a licence or permission from the copyright owner, where a copyright exception is not otherwise available would therefore be an infringement of copyright. In terms of audiovisual collections, orphan works include sound recordings or films where copyright may be expired in the work as a whole, but rights may continue to subsist in the underlying works (such as in the script or music accompanying the film).

The NFSA estimates about 20% of the national audiovisual collection is orphaned or abandoned. While the Copyright Act has many excellent provisions the NFSA may rely on to protect and preserve our audiovisual history, it is limited in terms of its ability to provide access to orphan works. The extension of the copyright term in Australia following the Australia-United States Free Trade Agreement (AUSFTA)¹ and the fact Australia does not have a system of copyright registration has further exacerbated the orphan work problem. Works are in copyright for longer and, as a result, there is greater opportunity for them to become orphaned.

As well as being an issue for cultural institutions such as the NFSA, orphan works are problematic for copyright holders who may not be aware of their existence within the collections of libraries, galleries, archives and museums, and are often unable to enjoy and use the rights they own in the work. This results in a catch-22 situation where a work cannot be identified and therefore rights cannot be cleared for the work to be communicated publicly, however public communication may be the only way a work is able to be identified. It is therefore in the best interest of both the NFSA and the copyright owner to find “parents” for these orphan works.

The NFSA respects creators’ rights. But what of the works where the owner has no interest in exploiting them and has no objection to their being used or does not wish to claim or exercise ownership? These works remain “locked up” indefinitely due to concerns around the copyright status of the material, when in fact the owner may not be concerned about enforcing their rights.

Much of the dialogue around the orphan works problem is often based on two presumptions: 1) that the copyright owner, if known, would not permit the use or, 2) that they would charge a fee. The practical reality from past licensing experience of the NFSA is that, for more obscure and less commercial works, it is uncommon for rights holders to deny permission or charge a fee for the use of a work in which they own the copyright when the use is for a non-commercial purpose. There is also the possibility the NFSA can rely on the “flexible dealing” exception under s.200AB of the *Copyright Act 1968* (Copyright Act) when using and providing access to orphan works for non-commercial purposes, subject to certain pre-conditions being met. However, the practical and

¹ For a round-up of the effect of the AUSFTA on Australian copyright law, see the Attorney-General’s Department “*Issues and Reviews: AUSFTA Free Trade Agreement*”

http://www.ag.gov.au/www/agd/agd.nsf/Page/Copyright_IssuesandReviews_AUSFTAFreeTradeAgreement

legal limitations around accessing orphan works are especially an issue for the NFSA in the commercial use of such works.

Under the *National Film and Sound Archive Act 2008*, the NFSA has a mission to develop, promote and provide access to the national collection of audiovisual heritage.² This dictates that, in considering the orphan works problem, the NFSA must weigh up the public interest imperatives and social benefits of making these works available against the rights of copyright holders who may or may not approve of such use.

As the US copyright academic Lawrence Lessig has stated: *All around us are the consequences of the most significant technological, and hence cultural, revolution in generations.*³ The digital age is well-advanced, our language is changing, as are our methods and modes of communication and engagement. The availability of knowledge is immediate, and our ways of interpreting these works and this knowledge is becoming increasingly public and user-focused. Within these brave new worlds of access, reuse, re-mix and homage, orphan works are often off-limits and locked up, running counter to the aspirations for Government 2.0⁴ and many cultural institutions' goals, missions and reasons for being.

Orphan works are an international problem. In the United States, two different orphan works bills have been introduced with one making it through the US Senate but neither progressing any further.⁵ In Canada, under s77 of their Copyright Act, an orphan works licensing scheme is administered by their Copyright Board and prospective users of orphan works can apply for a licence to use the work with a royalty fee held in trust in the event that a copyright owner comes forward.⁶

The United Kingdom has also taken some steps towards rectifying the problem by proposing the introduction of a similar licensing scheme and an orphan works register through the Digital Economy Bill that was passed by the House of Lords and is for consideration by the House of Commons.⁷ In 2006, the Attorney-General's Department in Australia indicated an intention to conduct an inquiry into the issue of orphan works, but instead s200AB was introduced into the Copyright Act. In May 2010, the Australian Government response to the Government 2.0 taskforce report has recommended an examination of the current state of orphan works.⁸

PART TWO: Practicalities

The practical impact of the orphan works problem on the NFSA's national collection of audiovisual works is that many are simply not available for use or re-use. Imagine the significant home movie footage of a landmark historical event which cannot be used because the filmmaker cannot be traced. Or the agit-prop film co-operatively and anonymously made to protest the Vietnam War using mash-ups of images and sounds. The television series where the network cannot approve

² S.6 *National Film and Sound Archive Act 2008*.

³ Lessig, Lawrence "The Future of Ideas" at http://thefutureofideas.s3.amazonaws.com/lessig_FOI.pdf p5.

⁴ Government 2.0 Taskforce, "Engage: Getting on with Government 2.0" at <http://www.finance.gov.au/publications/gov20taskforcereport/doc/Government20TaskforceReport.pdf>, p57.

⁵ See S.2913 - *Shawn Bentley Orphan Works Act of 2008* at <http://www.opencongress.org/bill/110-s2913/show> and H.R.5889 - *Orphan Works Act of 2008* at <http://www.opencongress.org/bill/110-h5889/show>

⁶ See Copyright Board of Canada "Unlocatable Copyright Owners" at <http://www.cb-cda.gc.ca/unlocatable-introuvables/brochure2-e.html>

⁷ See clause 42, s116, Digital Economy Bill [HL] 2009-10 at <http://www.publications.parliament.uk/pa/ld200910/ldbills/032/10032.i-ii.html>

⁸ See "The Government Response to the report of the Government 2.0 Taskforce" at <http://www.finance.gov.au/publications/govresponse20report/index.html>, p11

use as chain of title cannot be located, or an early recording of a jazz great which cannot be identified. All of these are examples of orphans in the NFSA collection, and show how issues with underlying rights can “orphan” a work.

There are some piecemeal solutions that may apply in certain circumstances and, in lieu of orphan works legislation, the NFSA is exploring practical approaches to the orphan works problem.

These include combining a range of solutions, including relying on Copyright Act provisions and exceptions, assisting users and staff with resources and search guidelines on how to effectively track down copyright holders and, where possible, ensuring the collection is safeguarded as much as possible against the risk of a work becoming orphaned by collecting and documenting comprehensive copyright information at the time of acquisition.

Copyright Act Provisions

Provisions in the Copyright Act allow for preservation work to be carried out on orphan works as part of general preservation-copying provisions for material in the collection. However these are restricted to preservation work and limited access scenarios.⁹

A new provision was introduced through the *Copyright Amendment Act 2006* specifically as a flexible provision for libraries and archives to allow use of copyright material for “certain socially useful purposes”. Section 200AB allows for this use in limited circumstances, provided a prescribed “three-step” test is met, being that:

- the use will not prejudice the copyright holder
- the use will not compete with, or take profit from, the copyright holder
- the use is a special case.

Recently, a number of Australian cultural institutions collaborated on developing a Statement of Principles for the interpretation of s200AB, to assist each cultural institution to determine whether their proposed use fits within this exception.

The ‘fair dealing provisions’ also provide defences for some interpreted use of collection items provided the dealing is for one of the purposes outlined, the uses fulfill the tests outlined in the legislation, and the use is “fair”.¹⁰

While these provisions are invaluable for the work of the NFSA and artists and scholars, they do not necessarily offer a complete solution to the orphan works problem, particularly if the item is to be used for commercial purposes by the NFSA or its clients. In many ways, these Copyright Act provisions are limited, and legislative reform is necessary for the NFSA to fulfill its public interest obligations.

Copyright Holder Search Resources

The NFSA is custodian of an extremely wide range of material – from scripts to glass slides, home movies to feature films, oral history recordings, TV and radio broadcasts through to commercial sound recordings and websites.

Looking after such a diverse range of works is a privilege and the NFSA recognises there are different degrees of commercial potential associated with the works. For example, a recent piece of composed and recorded music is likely to have greater commercial potential than an illustrated

⁹ See ss51 and 110, *Copyright Act 1968*.

¹⁰ See ss40-43, *Copyright Act 1968 and ss 103A – 103C*.

sing-along glass slide from the 1930s. In this way, not all orphans are created equal and the risk to the copyright owner and the NFSA (in terms of a potential claim for infringing copyright) will vary depending on the nature of the work. In certain circumstances it may be appropriate for the NFSA or its clients to use or provide access to orphan works but this will depend on the particular circumstances of the work and the nature of the use.

The different range of works in the collection makes it difficult to prescribe precise search guidelines for orphan works but a variety of approaches can be considered. Two interesting search guidelines include those proposed by the Society of American Archivists¹¹ and the European Digital Libraries Initiative¹². The Society of American Archivists propose “common sense” as a cornerstone of any due diligence search, and the NFSA supports “scalable” searches where the cost and effort of a search is weighed against the proposed use. Developing instructive search guidelines is integral to any solution to the orphan works problem, as it presents the best opportunity to reunite orphans and copyright holders. The NFSA is refining its own ‘diligent search’ guidelines for internal use by NFSA staff.

With this in mind, the NFSA has developed an information sheet for users wishing to access an orphan work with hints and tips on how to go about tracking down a copyright holder.

Safeguards against the Orphaning of Works

The NFSA endeavours to protect works in the national collection from becoming orphans by collecting as much information as possible at the point of acquisition and ensuring that information is entered and maintained in the collection management system. However, this is just the tip of the iceberg – rights holders move, businesses wind up, and a work may have a great deal of cultural significance but only part of it may be extant, or it may come into the collection with no provenance.

While copyright protection is automatic, the ability to contact an individual or company is not. NFSA staff therefore constantly update contact information when it is discovered, following rights searches by staff and clients and receipt of corrections from rights holders and the public.

What can the industry, artists, filmmakers, distributors, recording artists, and companies do to help to protect your works from becoming orphans? Always keep your contact details up to date, stay contactable through industry associations and collecting societies, and be clear from the outset as to how you want your works to be treated while they are in the national collection. The NFSA provides an avenue through email corrections@nfsa.gov.au to allow creators, copyright owners and other rights holders (e.g. Indigenous Intellectual and Cultural Property claimants) to update the information on the catalogue of the national collection. Similarly, the NFSA offers a takedown policy, available on the website, which sets out steps for any rights holder who believes their rights have been infringed by the NFSA.

PART THREE: A Commitment to the Future

Like many other cultural institutions, broadcasters, producers, scholars and artists, the NFSA is committed to lobbying for law reform around orphan works.

¹¹ Society of American Archivists, “Orphan Works: Statement of Best Practices”, Jan 12 2009, rev June 17, 2009 at <http://www.archivists.org/standards/OWBP-V4.pdf>

¹² The European Digital Libraries Initiative “Sector-Specific Guidelines on Due Diligence Criteria for Orphan Works” at http://ec.europa.eu/information_society/activities/digital_libraries/doc/hleg/orphan/guidelines.pdf

Although the NFSA has recourse to limited relief for the orphan works problem through s200AB of the Copyright Act, there are many creators who wish to use orphan works yet cannot take the risk. This results in not only practical considerations such as skyrocketing insurance costs and prohibitive search expenses, but also the risk of a real loss to the rich fabric of our cultural heritage through orphan works being locked up for fear of a copyright infringement claim.

Given the nature of our substantial audiovisual collection, the NFSA is committed to working towards a solution to the orphan works problem. This is important not only for cultural institutions, but also for the creators and copyright holders whose future artistic contributions to the national collection may be compromised by their inability to access orphan works.

This commitment addresses:

- Lobbying for legislative reform to the Copyright Act to facilitate use of orphan works through a general exception for the use of orphan works for non-commercial purposes and a cap or limitation on liability for the commercial use of orphan works;
- Continuing to research and work with cultural and other institutions in developing new ways of handling the orphan work problem and in developing collaborative solutions;
- Safeguarding, where possible, against future orphan works by capturing and storing as much information as possible at the time of acquisition and accessioning copyright material into the national collection;
- Ensuring information and contact details of copyright owners, as well as donors and depositors are consistently updated when available. Encouraging rights holders to contact the NFSA whenever there are any changes to contact details or ownership;
- Maintaining an orphan works register;
- Exploring possible insurance solutions to the use of orphan works; and
- Working with broadcasters and the audiovisual industries to develop cross-sector best practice search guidelines to assist users to find copyright owners.

The NFSA's position on orphan works is reflected in this commitment to the future. The NFSA will also use opportunities and consider practical options – such as Copyright Act exceptions, regular rights auditing, due diligence searching – to maximise access to the NFSA's culturally and historically significant national audiovisual collection.