

Orphan works

Orphan works are copyright works whose copyright owners are not easily identifiable or contactable. GLAM sector institutions often have extensive collections of these works but are not always able to use them. We would like to hear from you to better understand what problems with orphan works you have experienced, or what prevents your organisation from using these works.

Conversation-starters:

- › How does your organisation deal with 'orphan works'?
- › Can you tell us more about how much time and resources you need to invest in clearing 'orphan works'? Please provide an example.
- › What needs to change to make it easier to manage 'orphan works', both for your organisation and copyright holders?

Notes recorded by workshop groups

Theme/sub-topic	Comments recorded
Definition	<ul style="list-style-type: none"> › Distinction between orphan works and works that have an uncontactable/unresponsive author › Accidentally orphaned works [eg photographs that have metadata removed] › Orphan works are very important to GLAMs regarding their objectives › Separate 'access' and 'use'; 'reuse' is a better term › [what is] Articulation and definition of orphan works in other jurisdictions? › Orphan works are not necessarily old, eg [they can have been created] 1980s – last year › Orphan works - a failure of market to disseminate
Identification of copyright holders	<ul style="list-style-type: none"> › Tracking provenance of digital files can be problematic, hard to track down copyright holder = inhibits issue = rights holder negatively affected › Duration when tracking down copyright holder ie defunct publisher hard to track down: <ul style="list-style-type: none"> › Cannot copy for supply to the public › Access to digitisation › With digital images far more difficult to source author › Photographic work can become orphaned work so easily [this refers to instances when metadata has been removed] › Unable to trace producer



Theme/sub-topic	Comments recorded
	<ul style="list-style-type: none">› A lot of resources can spent on tracing rights holders: unfeasible for many institutions especially smaller GLAMs› Records on ownership of works not always accessible/available› Rights change over time and the original copyright owner is not necessarily the owner you need to contact for permission now› Using a 'no known copyright owner' statement aims to help to find the copyright owner when publishing orphan works online› Processes for trying to identify copyright owners can be onerous and time-consuming› Sometimes the commissioning rule and the 'works created in employment' situation complicates finding the right owner› Sometimes you need to publish a work to find an owner and that's risky› Untraceable heirs / rights owners› Finding a copyright owner after the author has died is really hard› Copyright owners more likely to discover works if they are online› Companies who got out of business – [not clear] who owns IP [these days]
Term of protection for industrial designs	<ul style="list-style-type: none">› If orphan work exception is introduced, it shouldn't include commercial use› Would GLAMs use an orphan work registry if it was created?<ul style="list-style-type: none">› Need to do due diligence anyway. So why pay [this refers to the UK scheme]› No UK licensing scheme please – too heavily handed› Legislation should take into account 'social good', non-commercial, access› Mechanism for specific organisations to act on behalf of public to make [orphan works] accessible after reasonable enquiry› Collections where rights clearance is likely to be easier are prioritised as collections are wanted to be made available with open rights› Other territories that have an orphan works scheme may not have the cultural lens that is important to New Zealanders› No orphan works provision in the Copyright Act› Rightsstatements.org – European Suite of copyright statements – [should be] adopted for NZ› Sensitive to reproducing Taonga Māori works online. Challenge is the lack of diversity.› Lack of harmonisation of copyright duration is confusing; [it is] confusing for organisations that license works› [we should develop/adopt an] orphan works/rights holders register



Theme/sub-topic	Comments recorded
	<ul style="list-style-type: none">› [we need to introduce a] fair dealing exception that includes orphan works› Small claims court [to be] introduced to NZ› UK scheme for orphan works (7 year licence 'immunity from damages') is less appropriate for GLAM/heritage, but more appropriate for the commercial sector› Damages for use of orphan works limit to current licence fees› Have a preservation exception [ie this exception should be applicable to orphan works]› Law needs to cover ethical/high value organisations› Exceptions for public good copying of works, eg GLAM, education vs copying for commercial purposes› Can an exception cover GLAM sector for commercial liability where all practicable steps have been made to comply with legislation?
Crown Copyright	<ul style="list-style-type: none">› Crown copyright – issues with government departments no longer existing – who owns it?› Section 67 – not covering Crown copyright› Crown copyright – lift it retrospectively (bold and brave)› Abolish Crown copyright. Exceptions:<ul style="list-style-type: none">› NZ standards› Privacy issues / Act
Due diligence search	<ul style="list-style-type: none">› If 'diligent effort' is too high, it will reduce use as well› Should heritage organisations perform 'diligent search' on material they have a (legislative) right to protect› Due diligence is usually easier for some formats, eg fine artists , and harder for others, eg photographs (studio photographs – not sure who commissioned)› Due diligence:<ul style="list-style-type: none">› What does it mean?› Guidelines needed?› What is diligent search, and what are its principles?› Principles of due diligence need to be spelled out, but not too specific, around media, eg book specific› Best practice guidelines for diligent search would be good› If you perform a diligent search, then copy/use/digitise, [you may still be breaching the law]› When should diligent search occur for net benefit of NZ?

Theme/sub-topic	Comments recorded
	<ul style="list-style-type: none"> › Orphan works exception for GLAMs/ education: <ul style="list-style-type: none"> › Non-commercial use › Due diligence search conducted first › Due diligence guidelines – UK model works well › Put liability onto users if providing an orphan work for reuse after due diligence – recommend to provide a statement when reusing › [What is] the cost of due diligence?
Dealing with orphan works: time, money, staffing, clearance	<ul style="list-style-type: none"> › Rights clearances is an enormous admin burden – we become clearance houses › In the music world “Warsaw works” (?) for orphan works – when a music recording lacks metadata to identify copyright holder › Current legislation can force GLAMs to break the law copying works with no traceable rights holder – need an exception/indemnity › Many rights holders when located (eg descendants of deceased creators) are ‘bemused’ about why they are being contacted › Enhance provenance by making [orphan works] available online – copyright holder can make contact › If creator cannot be identified, use creates real risk › Is scanning a photograph the creation of a new work? › Sometimes, especially with images, if you can’t find the owner, you won’t use it › Risk profile for commercial use of orphan works is different to non-commercial uses (eg museums) › Acknowledgement / referencing any known source of the work is good practice › Lots of images where the copyright isn’t known can’t be used › GLAM institutions holding funds to pay for any possible future claims on rights issues › Have to be careful how rights are communicated in online images › GLAM institutions want to be able to make images available (in physical displays and online) › Different organisations have different risk appetites for using works where copyright is unknown › Attribution and referencing of subsequent uses of orphan works is important › Work effort of the rights clearance process needs to be balanced with the value of making each work available › Risk averse – if cannot find owner, we don’t use it › Institutions have rights statements stating if a work is an orphan work › Universities don’t have the resources to find orphan works owners. Use alternative options › Universities/students advised not to use orphan works in published research

Theme/sub-topic	Feedback
Clarity	<ul style="list-style-type: none"> › Clear orphan works statements for online collections – plain language › Type of use and process different for everyday users and commercial organisations › Donor agreements – not always the copyright owner › Very rarely any commercial value in orphan works but culturally/socially important › Ephemera – catalogues/pamphlets collected by GLAMs: › Authorship not clear on posters/cards › Not intended as artistic work › Putting orphan works online with right of take down available [as an option of dealing with/processing the existing orphan works] › Some media decay – [which results in] loss of digital heritage › Cultural heritage is possibly lost/hidden because credits no longer exist, and work cannot be used/reused › Risk averse organisations will not use orphan works, including digitisation › Orphan works can be of all formats: photos, sound recordings, paintings, data sets, non-published works › Explosion of copyright rights due to number of fixing devices (phones) [leads] to an increase in orphan works › [Scope]: 1 organisation – 55,000 orphan works – 6 complaints in 15 years › What is the underlying purpose of use of orphan works between commercial and heritage organisation? › Differences between reuse of orphan work and preservation › What about out of print items? › Snippets/abstracts: have we lost this right under new agreements? › What content to digitise? › Time and effort cost