Law Council
OF AUSTRALIA

Business Law Section

8 December 2025

Committee Secretary
Senate Legal and Constitutional Affairs Legislation Committee
PO Box 6100
Parliament House
Canberra ACT 2600

By email: LegCon.Sen@aph.gov.au

Dear Committee Secretary

Copyright Amendment Bill 2025

1. The Intellectual Property Committee of the Business Law Section of the Law Council of Australia (**IPC**) welcomes the opportunity to make a submission to the Committee on the Copyright Amendment Bill 2025 (the **Bill**).

2. The Bill deals with a number of matters, including:

   (a) a proposed "orphan works" scheme;

   (b) expansion of the exception in section 28 of the *Copyright Act 1968* (Cth);

   (c) amendments to the appointment process for the Copyright Tribunal of Australia; and

   (d) amendments to clarify the duration of Crown copyright.

3. The IPC notes that the first two of these proposed amendments have been the subject of discussion over many years, most recently as part of the former Attorney-General's Roundtable on Copyright (at which the IPC was represented by Angus Lang SC).[1] In this brief submission, we confine ourselves to comments on the proposed orphan works scheme contained in Schedule 1 to the Bill.

Schedule 1: Proposed Orphan Works Scheme

4. "Orphan works" refers to copyright material where the copyright owner cannot be identified or located. This creates obstacles in clearing that material for use. A scheme to address this issue has been under discussion in Australia for over 25 years. The IPC welcomes the proposed orphan works scheme contained in Schedule 1 to the Bill as a positive development. We further note that it builds on

[1] Commonwealth Attorney-General's Department, "Outcomes Paper on Orphan Works", 18 December 2023, <https://www.ag.gov.au/rights-and-protections/publications/high-level-summary-fourth-roundtable-copyright>.

amendments made in the *Copyright Amendment (Disability Access and other Measures) Act 2017* (Cth) to remove perpetual copyright protection for unpublished material.

Definition of orphan works

5. Schedule 1 is titled "Orphan works". This term is not defined in the Bill, but it is explained in clause 1.5 of the Explanatory Memorandum. "Work" has a technical meaning under the Copyright Act, and refers to "a literary, dramatic, musical or artistic work" (as opposed to "subject matter other than works").[2] Proposed section 116AAB refers to "copyright" generally and is not linked back to either copyright in works or other subject matter. Other proposed sections (eg sections 116AAC, 116AAD(4)(b)(ii) and 116AAF) refer to "copyright material". This is defined in section 10(1) of the Copyright Act as "anything in which copyright subsists".

6. If the intention of the Bill is that the scheme in Schedule 1 will apply to copyright material generally, we submit that a definition of "orphan works" be inserted into the Bill itself (and not just the Explanatory Memorandum). In our submission, this will minimise potential confusion about the application of the scheme.

The role of industry guidelines

7. We note that the Bill uses terms such as "reasonably diligent search", "reasonable payment" and "prompt" cessation of use. The Explanatory Memorandum provides further explanation of these terms (for example, "promptness" is to be interpreted in relation to the identification of a copyright owner). Nevertheless, we anticipate that further guidance will be necessary to give stakeholders confidence to work with the scheme.

8. The IPC notes that the outcomes of the Attorney-General's Fourth Copyright Roundtable refer to the development of industry guidelines.[3] We further note that "industry guidelines" are one of the conditions referred to in proposed section 116AAE(8)(f) of the Bill. We are aware that some sectors already have orphan works policies and guidelines.[4] The IPC queries whether it is intended that the development of industry guidelines will form part of the implementation of the proposed amendments in Schedule 1 to the Bill—and, if so, what the mechanism for the development of those guidelines will be.

9. In our submission, the development of these guidelines is likely to be an important step in ensuring that the amendments achieve their policy objectives.

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2 *Copyright Act 1968* (Cth), section10(1).
3 See note 1 above.
4 See, for example, SBS "Orphan works policy" <https://www.sbs.com.au/aboutus/orphan-works-policy/>.

Limitation of liability

10. Proposed section 116AAD limits monetary relief for infringements of copyright material covered by the scheme. We further note that proposed section 116AAF(4)(b) refers to the court's ability to grant an injunction in certain circumstances. The Bill appears to be silent on whether declarations are an available remedy. In the IPC's submission, a declaration might be a relevant remedy in certain circumstances.

11. We further note that the Explanatory Memorandum describes this limitation on remedies as a "a balance between the interests of users of orphan works through the giving of legal certainty, and copyright owners by providing access to reasonable payment for uses of their copyright material under the orphan works scheme".

Payment for past use

12. We note that the Bill limits remedies in respect of infringing use but provides that a court may order 'reasonable payment' for past use (section 116AAD).

13. We submit that proposed section 116AAD(3)–(4) should be removed from the Bill and that no payment be required for past infringing use.

14. These provisions would likely act as a serious disincentive to the use and dissemination of orphaned works, and will undermine the policy rationale behind the Bill.[5]

15. If the Committee believes that there is a need for 'reasonable payment' in some circumstances, we submit that section 116AAD(4)(a) be extended to apply not just to 'private and domestic use' but to all 'non-commercial use'. This is consistent with the discussion of the rationale for a reasonable payment carve-out in the Attorney-General Department's Orphan Works Scheme—Design Options paper (August 2024).

Impact on ICIP

16. Finally, we note that these amendments are likely to impact Indigenous Cultural and Intellectual Property (**ICIP**) and should be considered in light of the standalone ICIP legislation that the Government is currently developing. In this context, we note that clause 27(a) of the Explanatory Memorandum states:

> *The nature of the copyright material: higher standards may be expected for use of more recent copyright material or copyright material that has been produced for commercial purposes and for material that may be of a sensitive or private nature. Higher standards would also be expected for material that contains Indigenous Cultural and Intellectual Property (ICIP). In such cases, the user should also seek to get free, prior and informed consent from the cultural groups to whom the ICIP relates, noting they may be different from the copyright owner. This is consistent with First Nations peoples' rights to the protection and development of traditional knowledge and cultural expressions, which are recognised and affirmed in the United Nations Declaration on the Rights of Indigenous Peoples. It is also consistent with the Government's commitment in*

[5] This was the submission of the IPC to the Attorney-General, 9 October 2024, [61]-[65]

Revive, to introduce standalone legislation to protect First Nations peoples' knowledge and cultural expressions. The initial focus of the standalone legislation is in the visual arts and craft sector of ICIP.

17. The IPC supports this position.

Conclusion and further contact

18. The IPC thanks the Committee for the opportunity to make this submission in support of the Copyright Amendment Bill 2025.

19. The IPC would be pleased to discuss any aspect of this submission. Please contact the Chair of the IPC, Richard Hoad, [redacted], if you would like to do so.

Yours sincerely



Adrian Varrasso
Chair, Business Law Section