

Copyright Term Changes Coming 2019

In 2017 the Australian government introduced major changes to the copyright term provisions of the Australian Copyright Act, as part of the [Copyright Amendment \(Disability Access and Other Measures\) Act 2017](#). These changes replace Australia's existing copyright term provisions with new rules that make them more consistent for different materials, and provide clearer rules for materials whose author is not known. As a result the copyright term of materials in Australia will be simpler and fairer and a large number of old materials previously locked up will be freed for use by all.

The new term provisions have been introduced primarily to end the outdated concept of perpetual copyright for unpublished works. This legacy rule meant that unpublished materials like letters and diaries never fell into the public domain. This means that materials that are hundreds of years old - such as the Captain Cook diaries and the Jane Austen letters held in the collection of Australia's National Library - were still protected by copyright in Australia. Under the new rules, materials in Australia will have the same protection whether or not they are published.

The result of these changes is that on 1 January 2019 (when they come into effect) hundreds of thousands, possibly even millions, of theses, diaries, letters and other old unpublished works held in our national collections will instantaneously enter the public domain, making them free for anyone to access and use.

In the Act introducing the perpetual copyright changes, the government also took the opportunity to clarify copyright term for those literary, artistic, dramatic or musical works for which the author is not known. Because the general copyright term for works is based on the death of the author, it was previously extremely difficult to determine the copyright term for anonymous works, pseudonymous works, or works whose copyright owner has become unknown for other reasons (eg due to lack of information). These works are known as orphan works, because while they are still protected by copyright permission to use them cannot practically be obtained, making most uses of them technically illegal.



The new laws

The new provisions provide a set term for such works based on their creation and/or when they were made public, meaning that it is easier to determine when they enter the public domain, and hence when they can be legally used. Once the laws come into effect, the new rules will be as follows:

For films or sound recordings

- If they have been made public within 50 years of creation – 70 years from when they were made public;
- If they have not been made public – 70 years from when they were created.

For literary, artistic, dramatic or musical works (other than computer programs)

- If you know who the author is - the life of the author plus 70 years;
- If the author is not generally known:
 - If they have not been made public - 70 years from creation;
 - if they have been made public within 50 years of creation - 70 years from when they were made public.

There are also transition provisions that are designed to allow copyright owners at risk of losing copyright protection under these new rules a chance to extend their rights. As a result any material that has a known author and that has been made public after its author died but before 1 January 2019 will have a copyright term of 70 years from when it was made public, regardless of when the author died. More details on the transition provisions, and how they will work in effect, will be made available by the Department of Communications and the Arts shortly.

Practical application

In applying these new provisions to works held in a cultural institution's collection, two key new questions will arise:

- Is the author's identity "generally known"? and
- Has the work been made public?

These two questions are crucial to determining which of the above terms apply, but contain concepts new to copyright law in Australia.

Is the author's identity "generally known"?

In many cases - works with famous or well documented authors, or anonymous or pseudonymous works - this will be easy to answer, leading to a straight-forward determination of the work's copyright term. This simplified system is the main point of the new changes.

However, for other works it may be more difficult to determine whether an author is "generally known". For example, you may have a name but no other details; you may know which city they lived in; or you may know their address but not when they died. Determining where along this spectrum an author is "generally known" will be the main issue. As the government has not provided specific guidance on this issue, in the absence of any court decisions (which are not likely to happen quickly) it is likely to be up to the cultural sector to determine its own guidelines on this issue. As a starting point, two good rules of thumb are:

- a name alone, without any other information, is probably not enough for the author's identity to be known;
- a name, address and date on which the work is produced almost certainly is.

All other cases will fall somewhere on a spectrum between these two, depending on all the circumstances.

The question therefore arises as to how much time should be spent trying to find additional details about the author. Luckily, the legislation helps with this, making it clear that only "reasonable inquiries" are required. This is likely to range from a few minutes to a few hours for each work, depending on the amount of information you have to work with. If you're making a high risk use (eg publishing the material in a book for sale) you should spend more time; a low risk use like using a work in an exhibition or supplying it to a single client requires less time.

A good place to start as to what might be appropriate in most circumstances is the [reasonable search for orphan works position statement](#) from [National and State Libraries of Australasia](#).

Has the work been made public?

Again, in most cases it will be clear whether the work has been made public. The legislation makes it clear that it includes where material has been published or posted online, performed in public, or if copies have been sold or offered for sale. It also makes it clear that it is only if this has been done with the copyright owner's authorisation - so actions done by others without permission, even if they are legal under an exception, do not count.

However, when you are dealing with a manuscript or original copy of, say, a letter or diary, it might not always be immediately clear whether it, or a substantial part of it, has been included in a book somewhere, or posted online by someone else. Even if it has, it won't always been clear whether this has been done with the permission of the copyright owner.

In these circumstances it is important to remember that you are not required to prove a negative - you do not have to show that the work has definitely never been made available to the public; you just have to look for evidence that it has. If, after a reasonable search (similar to the above) you cannot find any, it is probably safe to assume it hasn't been made public for the purpose of the provisions and therefore has the term of 70 years from creation.