COPYRIGHTAGENCY

Response to Exposure Draft Copyright Amendment (Access Reform) Bill 2021

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INTRODUCTION

In announcing the recent consultation process on copyright reforms, the Minister said:

> Australia's copyright system underpins our creative economy and these reforms seek to provide clear and reasonable access to copyright materials, while maintaining the incentives and protections for content creators.[1]

As noted by Austrade:

> The Australian government recognises that a creative economy contributes to cultural diversity, social inclusion, environmental sustainability and technological advancement. Creativity is key to innovation, driving sustainability and prosperity. Creativity and innovation play an important role in Australia's resilience to recent global economic challenges, helping Australia to register 22 years of uninterrupted economic growth.
>
> The arts and creative industries are integral to contemporary Australian values, self-expression, confidence and engagement with the world.[2]

Australia's creative industries include, of course, educational publishing: all the people involved in the end-to-end process of conceiving, developing, collaborating on, producing and distributing Australian educational resources for Australian students.

The beneficiaries of Australia's creative industries, and the copyright system that underpins it, are the people who get to read, view and hear content that has resulted from the time, expertise and money invested by others. In educational publishing, the beneficiaries are teachers and students, who get to access to quality Australian educational resources that would not be produced without the underpinning of the copyright system.

The objectives of the Australian copyright legislation are:

> to give to the author of a creative work his just reward for the benefit he has bestowed on the community and also encourage the making of further creative works.[3]

The copyright system is complex, as are the settings required to ensure the long-term sustainability of creative industries. For example, freelance creators such as writers and illustrators are dependent on publishers to commission, guide, edit, produce, market and sell their work. They cannot make a living in a vacuum. Publishers take on significant risks when commissioning new content. They also employ lots of people, many of them in creative roles, in addition to freelance creators that they engage.

Overall, the system works well in practice. It does not impede access to content on reasonable terms. Those seeking changes to the legislation to 'increase access' are from sectors that seek legislative change as a 'first resort' rather than other solutions. For example, content industry representatives offered a non-legislative collaborative solution for digitisation of orphan works in cultural institutions (that did not involve payment) that representatives of the sector rejected in favour of a long wait for legislative change. Others purporting to seek legislative change to 'increase access' have not articulated what the 'access problem' is, and are actually seeking changes that would reduce the copyright fees that are currently paid to support creative industries.

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[1] https://www.paulfletcher.com.au/media-releases/have-your-say-on-draft-copyright-reform-legislation
[2] https://www.austrade.gov.au/international/buy/australian-industry-capabilities/creative-industries
[3] The Report of the Committee Appointed by the Attorney General of the Commonwealth to Consider What Alterations are Desirable in the Copyright Law of the Commonwealth otherwise known as the Spicer Committee Report of 1959

Nevertheless, we remain willing to work constructively with stakeholders and the government to address concerns that have been raised by various stakeholders.

The Minister's August 2020 announcement regarding copyright reforms refers to 'the Government's previous work on improving access for the disability, education and cultural sectors and reforming safe harbour legislation'.[4] Those developments resulted from joint proposals and consensus amendments.

Unfortunately, the processes that led to those changes were not adopted in this current process. That has led to delays and unnecessary polarisation of stakeholder positions. For the future, we urge the government to follow the successful processes that led to the 2017 consensus amendments.

The current consultation is intended to identify areas of drafting of the Exposure Draft (ED) that do not align with the criteria in the Minister's announcement: maintenance of incentives and protections for creative industries, and reasonableness.

There are aspects of drafting on each issue that do not comply with these criteria. For example, there are many elements of the drafting that do not increase access to content at all, but have the sole consequence of reducing copyright payments to the creative sector. These are principally payments that are made by the education and government sectors. For these sectors, the 'savings' would be tiny proportions of their overall budgets, but the consequences for creative industries would be disproportionately high. It is also very disappointing that a handful people in these sectors have advocated for changes to copyright legislation that are completely at odds with governments' support for Australia's creative industries. Advocating for such changes requires wilful blindness about the effort, expertise, time and investment required to produce and disseminate the materials that those sectors value.

In a letter to stakeholders of 24 December 2021, the Minister said the ED covered: a limited liability scheme for orphan works; fair dealing for non-commercial quotation; amendments to libraries and archives exceptions; and government statutory licensing scheme. In relation to education, he said there were 'minor technical changes to facilitate online learning'. We have a range of concerns with the drafting in the ED that we summarise below and outline in this submission.

We look forward to working constructively with the Department and stakeholders to address concerns that that have been raised with the Department.

That process is more likely to produce outcomes if the government makes it clear that only consensus proposals will proceed. The process that led to the 2017 consensus amendments demonstrated that that process can work with the right settings.

[4] https://www.paulfletcher.com.au/media-releases/media-release-copyright-reforms-to-better-support-the-digital-environment

KEY CONCERNS WITH EXPOSURE DRAFT

drafting	If implemented as drafted
113MA: Use of copyright material in the course of educational instruction	would not constitute 'minor technical changes to facilitate online learning' as intended by the Minister, but reduce copyright payments to the creative sector significantly
other drafting applicable to the education sector: 'orphan works', 'quotations', owners of collections, implied licences	would not increase access but would reduce copyright payments from the education sector to creative industries
113KC: Making material available online	would allow owners of collections (including entities in the education, government and private sectors) to publish material on the internet to the general public, anywhere in the world, including material that they have digitised for that purpose[5]
113H(2): making digitised 'preservation copies' available online	would have the same outcome as proposed s113KC for entities with collections of artistic works
113FA: quotations	purpose for which a quotation can be made not defined; no requirement of proportionality; no clear exclusion of activities covered by licensing arrangements

ABOUT COPYRIGHT AGENCY

We are a not-for-profit private company, with more than 38,000 members, who include writers, artists and publishers. Our members represent a large number of others involved in Australia's creative industries. These members include literary and illustrator agents, Indigenous art centres, and publishers who share payments with their writers and illustrators, both those on staff and freelance.

We are appointed (declared) by the Minister to manage the education statutory licence, and by the Copyright Tribunal to manage the government statutory licence, for text, images and print music. We are also appointed by the Minister to manage the artists' resale royalty scheme. We provide detailed annual reports to the Minister, which are tabled in Parliament and published on our website.[6] We follow the government Guidelines for Declared Collecting Societies.[7] We are also signatories to the Code of Conduct for Copyright Collecting Societies, and we report annually on our compliance with the Code.[8]

There are provisions in the Copyright Act and Regulations regarding governance of declared collecting societies. For example, the Regulations require us to 'exercise reasonable diligence in the collection of amounts of equitable remuneration'.[9] The factors for equitable remuneration under the education statutory licence are set out in the Regulations.[10] This obligation means that, in some cases, we may need seek assistance from the Copyright Tribunal if we are unable to secure equitable remuneration for people in the creative industries through negotiation.

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[5] In this submission we use the term 'publish' in the everyday sense, including material that may have already been made available to the public in some form.

[6] https://www.copyright.com.au/about-us/governance/annual-reports/

[7] https://static-copyright-com-au.s3.amazonaws.com/uploads/2015/04/R00561-Guidelines-for-declaring-Collecting-Societies-2001-1.pdf

[8] The Code Reviewer's reports on compliance, and other information regarding the Code, are available from the Code of Conduct website: https://www.copyrightcodeofconduct.org.au/

[9] Regulation 17(1)(c).

[10] Regulation 73(2)

CONTEXT FOR OUR RESPONSE

Australia's creative industries underpinned by the copyright system

As noted by Austrade:

> The Australian government recognises that a creative economy contributes to cultural diversity, social inclusion, environmental sustainability and technological advancement. Creativity is key to innovation, driving sustainability and prosperity. Creativity and innovation play an important role in Australia's resilience to recent global economic challenges, helping Australia to register 22 years of uninterrupted economic growth.
>
> The arts and creative industries are integral to contemporary Australian values, self-expression, confidence and engagement with the world.[11]

The Bureau of Communications, Arts and Regional Research (BCARR) describes cultural and creative activity as 'activities that involve human creativity as a major input' that include 'activities connected with the arts, media, heritage, design, fashion, and information technology'.[12]

Creative economies are underpinned by copyright systems, as acknowledged by the Minister for Communications, Cyber Security and the Arts in his announcement of the current consultation process.[13]

In a note for the Australian Copyright Council's 50th anniversary, the Minister said:

> The Copyright Act plays a critical role in protecting and sustaining Australia's vibrant creative sector. Our creative sector is not only essential in promoting Australia's identity, it also has significant economic value. In 2015-16, Australia's copyright industries generated economic value of $122.8 billion – the equivalent of 7.4% of gross domestic product. It is important the Act continues providing incentives for our creators to develop and distribute uniquely Australian stories, images, sounds and content[14]

In a 2020 speech,[15] the Minister outlined why 'copyright matters more than ever'. He referred to:

> the global growth of demand for literary, artistic, musical and creative content – linked to increased levels of education, literacy and income around the world.[16]

The United Nations designated 2021 as the International Year of Creative Economy for Sustainable Development.[17] It noted the role of intellectual property:

> IP rights play an important role in supporting a thriving creative economy as they protect creativity … and control the commercial exploitation of the products of scientific, technological and cultural creation. The ability to develop and use such

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[11] https://www.austrade.gov.au/international/buy/australian-industry-capabilities/creative-industries
[12] https://www.infrastructure.gov.au/sites/default/files/documents/faq-cultural-and-creative-activity-in-australia-2009-10-to-2018-19-sep2021.pdf
[13] https://minister.infrastructure.gov.au/fletcher/media-release/have-your-say-draft-copyright-reform-legislation
[14] https://www.copyright.org.au/ACC_Prod/ACC/News_items/2019/Message-_Minister_for_Communications__Cyber_Safety_and_the_Arts_.aspx?WebsiteKey=8a471e74-3f78-4994-9023- 316f0ecef4ef.
[15] https://www.paulfletcher.com.au/portfolio-speeches/speech-to-the-australian-digital-alliance-copyright-in-2020
[16] https://data.worldbank.org/indicator/SE.ADT.LITR.ZS
[17] https://unctad.org/topic/trade-analysis/creative-economy-programme/2021-year-of-the-creative-economy

> products is indeed a key driver of economic growth and for international competition, especially for the production and trade of technology-intensive goods and services.[18]

A range of examples of copyrights in creative industries are set out in Monetization of Copyright Assets by Creative Enterprises, published by the World Intellectual Property Organization (WIPO).[19]

The recent report of the House of Representatives Standing Committee on Communications and the Arts from its inquiry into Australia's creative and cultural industries and institutions, *Sculpting a National Cultural Plan*, recognises the role of intellectual property in creating jobs,[20] and the need for creators to be aware of the intellectual property in their work.[21]

Creative industries both employ creative people, and contract them (e.g.as freelance writers, illustrators, graphic designers). They also employ a whole lot of other people who are integral to the end-to-end process of conceiving, developing and disseminating content.

Without the infrastructures of the creative industries, most forms of creative output would not have mechanisms to reach audiences. For example, people who write educational resources for Australian teachers and students require the expertise of people in curriculum, market research, information technology, product development, marketing, delivery and customer support.

Objectives of copyright system

The Report of the Committee Appointed by the Attorney General of the Commonwealth to Consider What Alterations are Desirable in the Copyright Law of the Commonwealth otherwise known as the Spicer Committee Report of 1959 is commonly cited as setting out the foundation of modern copyright law in Australia. It says:

> The primary end of the law on this subject is to give to the author of a creative work his just reward for the benefit he has bestowed on the community and also encourage the making of further creative works.

The Report goes on to say:

> On the other hand, as copyright is in the nature of a monopoly, the law should ensure, as far as is possible, that the rights conferred are not abused and that study, research and education are not unduly impeded. In weighing up these factors, we must of course have regard to our existing and possible future international obligations.

We outline the international framework below, which include the 'three-step test' for copyright exceptions.

The characterisation of the copyright system as a 'balancing' of us and them (creators v users), while common, is usually unhelpful. All Australians benefit from a well-functioning creative economy, and all have a role in ensuring its long-term sustainability. People who invest their time, expertise and money in creative content want that content to be seen and heard. But people who are net consumers of content created by other people need to recognise that that content results from the expertise, time and investment of others, and that they, as people who consume that content, have a role in ensuring long-term sustainability of creative content.

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[18] https://unctad.org/news/unlocking-potential-intellectual-property-rights-support-creative-economy

[19] https://www.wipo.int/edocs/pubdocs/en/copyright/955/wipo_pub_955.pdf

[20] See [3.13]: "A New Approach (ANA) highlighted the strength of jobs involved in the creation of new intellectual property, which employ 593,840 people with work in this area 'growing at nearly twice the rate of the Australian workforce'".

[21] See [6.79] 'Digital sales, monetisation opportunities and protection of intellectual property will likely be necessary skills and abilities in a future arts landscape.'

Alignment with international norms and practice

Australia is party to numerous international treaties and trade agreements. Most of these require Australia to comply with the 'three-step test', which means that copyright exceptions (provisions that allow people to use other people's content without permission) must not:

- conflict with normal exploitation of the work (including foreseeable future exploitation); or
- unreasonably prejudice the legitimate interests of rightsholders.

The international system takes account of the long-term sustainability of content creation and dissemination, for the benefit of all. It therefore requires consideration of matters beyond 'is the copyright owner selling the content right now?'.

All content requires investment, one way or another

All content requires investment of time and usually money. There is an enormous variety of circumstances in which this occurs, ranging from a person deciding to devote some time to creating a song or piece of art, to a company deciding to make a series of long-term investments in a range of content projects with a view to one of them delivering a financial return. Whatever the circumstances, creative activity is beneficial to a society, and the copyright system supports all forms of creative output.

While the copyright system is largely a framework that provides opportunities for people in creative industries to be rewarded for the value of their time, expertise and investment, it also embodies societal expectations of respect for people who create content that is useful, valuable or enjoyable to you.

Framework for 'exceptions'

As is clear from the international framework, the premise of the copyright system is that there is an inherent value in the creative work produced by others, and that the creators of that content should have an opportunity to benefit from that value.

The circumstances in which people can use other people's content without their permission are therefore regarded as 'exceptions', which require justification and proportionality. It is up to those who wish to use other people's content without permission to make their case, not for creative industries to have to demonstrate why use of their content without permission may cause them 'harm'.

Relationship between education statutory licence and other provisions for education

The following is a summary of provisions for the education sector in the Copyright Act.

Year	Provision	Subsequent amendments
1968	performance in class: s28	amended in 2000 to cover communications to facilitate performance (e.g. video player in resources room)
	question or answer in exam: 200(1)(b)	amended in 2017 (as part of the joint proposal to simplify the education statutory licence) to cover communications as well as copying
	'blackboard' exception: s200(1)(a)	amended in 1980 to expressly exclude copies made using a device capable of producing photocopies
	recording a 'live' broadcast: 200(2)	-
	inclusion of works in collections for use by places of education: s44	-
1980	Education statutory licence introduced	Extensively amended in: • 1989: including data collection arrangements, and governance of collecting societies • 2000: extended to digital content, including from the internet, and communication of content • 2017: simplified, following joint proposal from education and content sector representatives
1982	Haines v Copyright Agency: s40 (fair dealing for research or study) not 'alternative' to education statutory licence[22]	
2006	• New 'flexible' provision for education (s200AB) • Does *not* apply if statutory licence applies: 200AB(6) • Allows activities not expressly covered by other provisions (including statutory licence) provided no harm to rightsholders	• 2017: ss200AB(6AA) added to confirm that s200AB does not apply to activities covered by the education statutory licence

This history shows that the government's policy intent is that most activities in the education sector are covered by the statutory licence. It is a straightforward, simple solution for teachers that enables them to focus on their teaching, knowing that they have immunity from infringement liability.

The education statutory licence does *not* require payment for every single act of copying and communication (even if that were known, which of course it is not). It does, however, give teachers immunity from infringement for all those activities.

Policy intent reflected in factors for equitable remuneration in Regulations

The policy intent for the education statutory licence is reflected in the factors for equitable remuneration set out in Regulation 73(2). Those factors include:

> (c) the need to ensure adequate incentive for the production of educational works, educational sound recordings and educational cinematograph films in Australia

Other factors include:

[22] https://jade.io/article/148690

- the nature of the material;
- the nature of the education institution;
- the purpose and character of the copying or communication; and
- the effect of the copying or communication on the market for, or value of, the material copied or communicated.

These factors indicate that:

- equitable remuneration takes into account the *value of*, as well as the *market for*, content; and
- the statutory licence is intended to be an industry support mechanism that supports the continued production of Australian education resources.

Factor (c) recognises that the education sector has an interest in the continued viability of Australian education resources, including the maintenance of quality, innovation and diversity.

If that industry support is reduced, it will not be replaced by support from other sources: for example, the government is not proposing to replace lost copyright payments with government grants.

Value of statutory licences

The value of statutory licences to licensees is that they do not have to identify, locate and negotiate with rightsholders for the use of their content, or find alternative material if a rightsholder refuses permission. Statutory licences are a derogation from rightsholders' entitlement to manage the use of their content, including in ways that enable and support continued content production. Copyright fees from statutory licences compensate rightsholders for the lost opportunities to license on their own terms, and to refuse a licence.

Statutory licences apply in scenarios of large-scale systematic use of content, such as in the education sector. They enable efficient use of content, with appropriate compensation to rightsholders who will continue to create, invest in and disseminate material that people want to use.

In most cases, copyright fees for copying and sharing under statutory licences are agreed between the collecting society a peak body for the sector. The fees are fixed in advance, not pay-per-use. For example, in the current agreement between Copyright Agency and the school sector, the fee is set at $13 per student for 2022, irrespective of the student's sector (primary/secondary; government/Catholic/private), and irrespective of the extent of copying and sharing of content under the statutory licence. The agreement effectively operates like an 'all you can eat' subscription for Australian teachers to copy and share content from anywhere in the world, without the requirements that would usually apply (identifying, locating, negotiating with rightsholders; finding alternative content if permission not granted).

References to 'commercial markets'

There are numerous references to 'commercial markets' and 'commercial interests' in the Discussion Paper.

Given the context we have outlined above, these references must be interpreted as including:

- licensing revenue
- indirect revenue (e.g. from advertising)
- future as well as immediate revenue

Even with that interpretation, however, it is clear from our international treaty obligations and practice that consideration of 'commercial markets' alone is insufficient. In particular:

- the three-step test refers to 'unreasonable prejudice to the legitimate interests of the rightsholder' in addition to 'conflict with a normal exploitation of the work'; and

- the onus is on those seeking a special exception to make their case, not on creative industries to quantify the 'harm' that the special exception may cause in the shorter and longer term.

Copyright reform not a cost-cutting exercise

Copyright reform should not be a cost-cutting exercise for governments and other institutions. In any event, the money they save by reducing copyright fees is a tiny proportion of their overall expenditure, and should be viewed in that light. On the other hand, reductions in payments have a big impact on creative industries.

It is very disappointing that representatives of governments and taxpayer-funded entities have sought to reduce payments to creative industries via new 'free' exceptions. The existing framework includes mechanisms to ensure that copyright fees are fair and reasonable, and the pursuit of further reductions by a few people in governments and taxpayer-funded entities is at odds with overall government support for the role of the copyright system in supporting Australia's creative industries.

Reducing payments to creative industries does not increase access

It is clear from the Minister's media releases that the ED is intended to increase 'access' to content where that is 'in the public interest'.

Reducing payments to creative industries does not increase access. For example, reducing the copyright fees paid by the education sector by (say) 50% would not increase the content available to teachers and academics to copy and share. It would make a negligible difference to the overall costs of education (about 0.05%), and reduce investment in content creation, with the longer term consequences of less content, and less diversity of content.

EDUCATIONAL USE

Policy intent

The Minister's letter to stakeholders of 24 December 2021 says the ED is intended to make 'minor technical changes to the education exceptions to facilitate online learning'.

The Discussion Paper says the policy intent of the provisions in the ED is to 'update section 28 to be material and technology neutral and support online and remote learning' to address: 'uncertainty about how section 28 of the Act applies to allow the performance and communication of material in class in online and remote settings.'

Section s28 allows live performances (such as singing a song, reciting a poem, performing a play), playing an audio recording, and showing an audiovisual recording like a film. It also allows communications that facilitate a performance.

It does not apply to:

- any reproduction or copying; or
- communication of 'static' text.[23]

Both of these are covered by the education statutory licence, so are already allowed. The Minister's letter to Copyright Agency and other stakeholders of 24 December 2021 makes it clear that the ED is *not* intended to cover static display of text-based material in class.

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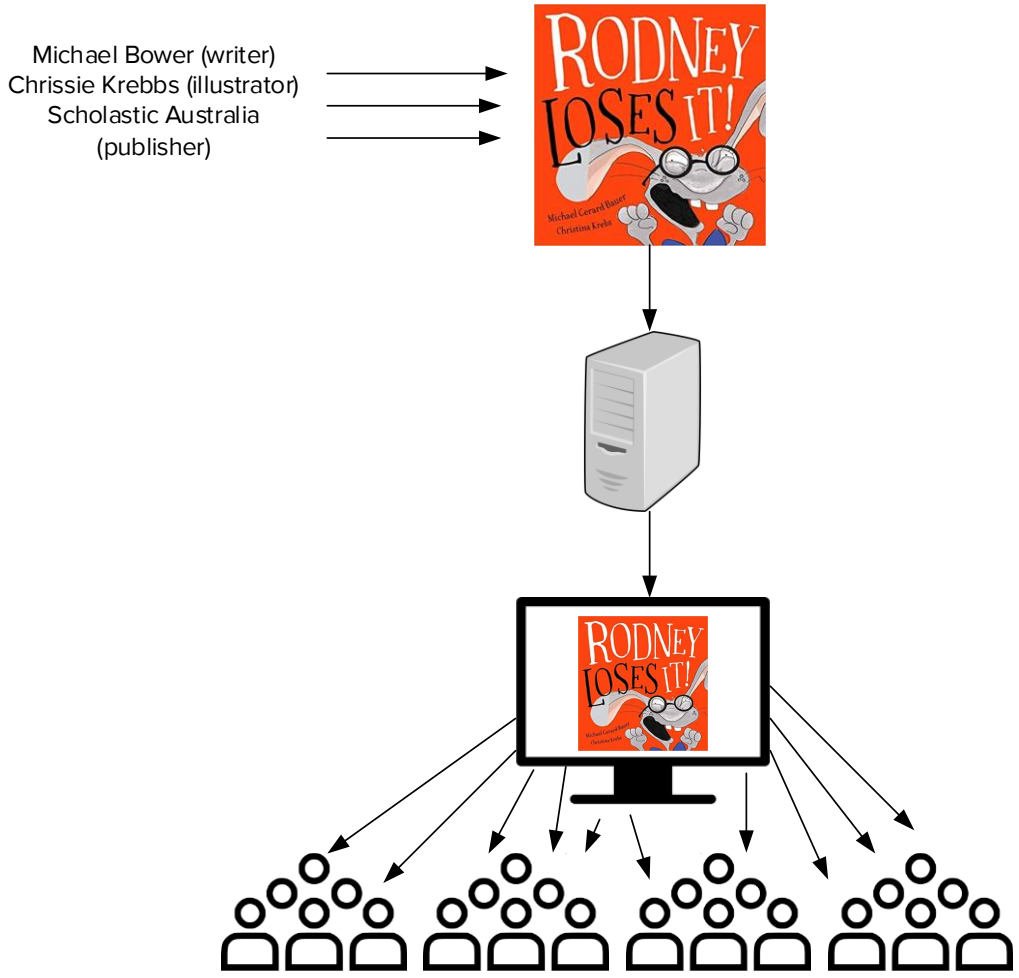
[23] It *does* apply to communication of 'static' artistic works, as a result of a drafting error in a provision that was intended to cover artistic works in broadcasts. This error should be remedied. We have provided the Department with information about this drafting error, but can provide again if helpful.

Section 28 is currently 'material neutral' as it applies to all forms of content. It is also 'technology neutral' as it applies to acts (performances and communications that facilitate performances) irrespective of the technology used. For example, it makes no difference whether an audio recording is played to a class using a vinyl record, cassette, CD or streaming service.

Application of 113MA: example

A teacher:

- borrows a print edition of '**Rodney Loses It**' (written by Michael Bower,[24] illustrated by Chrissie Krebbs,[25] published by Scholastic Australia)[26]
- digitises an excerpt and uploads it to a server[27]
- shows the pages from the server on a screen, rather than providing a copy to each student



[24] https://michaelgerardbauer.com/
[25] https://www.chrissiekrebs.net/
[26] https://www.scholastic.com.au/
[27] The book is only available in print form, not as an eBook.

Comparison: now v 113MA

activity	now	113MA	why
Teacher uploads pages to server	Allowed by statutory licence (remunerable)	Non-remunerable	113MA(1)(iv) (iv) the use is the **copying** or communication of the material, and the use facilitates an act that causes the material to be seen or heard
Teacher communicates pages to students	Allowed by statutory licence (remunerable)	Non-remunerable	113MA(1)(iv) (iv) the use is the copying or **communication** of the material, and the use facilitates an act that causes the material to be seen or heard
Teacher reads text to students	Allowed by s28 (unremunerated)	Allowed	113MA(1)(i) the use is a **performance** of the material
Teacher prints or photocopies pages for each student	Allowed by statutory licence (remunerable)	Unclear	• 113MA(1)(iv) (iv) the use is the **copying** or communication of the material, and the use facilitates an **act that causes the material to be seen or heard** • unclear if 'act' is to be read as 'act comprised in the copyright' given other provisions in the ED refer specifically to 'act comprised in the copyright'

Consequences

now	113MA
Investment of time, expertise and money by writer, illustrator and publisher	same
Teacher and student access to the book	same
Compensation to writer, illustrator and publisher for teacher and student copying and sharing	gone

Perception that section 28 is 'hard to understand'

The Department has been told that section 28 is 'hard to understand'.

We do not agree that section 28 is 'hard to understand', particularly for teachers. Teachers follow guidelines prepared by the National Copyright Unit (NCU) and published on its Smartcopying website.

The Smartcopying website says:

> The National Copyright Unit (NCU) is the specialist copyright team responsible for copyright policy and administration for Australian schools and TAFE. It advises and supports the Copyright Advisory Group (CAG) for schools (CAG Schools) and TAFE (CAG TAFE).
>
> The NCU consists of the National Copyright Director, two National Copyright Leaders, Senior Policy Officer, National Copyright Advisor and Administration and Support Officer. Its primary responsibilities include:

- negotiating and managing statutory and voluntary licences with copyright collecting societies on behalf of schools and TAFE
- liaising with other education sectors and industry bodies on copyright policy issues
- preparing submissions to Government inquiries on educational copyright issues
- providing specialist copyright advice to jurisdictions on copyright issues affecting schools and TAFE

- implementing Smart Copying initiatives, including the use of Open Education Resources, designed to reduce the cost of copying within schools.[28]

Though not explicitly covered by the above description of responsibilities, the NCU's Smartcopying website also includes Information Sheets and Guidelines about the application of current copyright legislation to teachers' activities. NCU's staff includes five lawyers, and it is also advised by an external law firm.

Section 28 clearly applies to students doing remote learning as a virtual class. We do not object, however, to mechanisms that make that clearer to any teachers who may be concerned about the issue.

There has been disagreement between CAG and Copyright Agency about the application of section 28 to the communication of static text for viewing by students. An example is an extract from a textbook stored on a server that the teacher shows to a class on a screen, rather than photocopying the pages for each student and handing them out.

The legislative history and other factors make clear that section 28 does not apply to the communication of static text: it was introduced in 1968 (before the introduction of the statutory licence in 1980) to allow performances in class, such as singing a song, reciting a poem or screening a film. In 2000, the statutory licence was extended to cover communications, so that creative industries would continue to receive fair payment for the widespread, systematic use of their material in the education sector using new technologies. There was also a technical amendment to s28 in 2000 that was intended to provide that the newly introduced 'right of communication' did not apply if a video or recording of a television program was shown in class from a machine in the resources room of a school.

In any event, the position taken by CAG has no consequences at all for access to content for teachers: it relates solely to the copyright fees that are paid to creative industries. It is one of the many matters on the table in the complex commercial negotiations between CAG and Copyright Agency. In the current four-year agreement between CAG and Copyright Agency, reached via commercial negotiation, the copyright fees are fixed for each year, and decrease over the four-year period.

For the university sector, the value of communications was a key issue in the 2020 Copyright Tribunal proceedings: the Tribunal has not yet issued a determination.

Recording lessons is a separate issue

As far as we know, nobody has argued that section 28 could allow recording of lessons: it is a completely separate issue.

Under the current law, the education statutory licence allows the making and retention of recorded lessons that include text, images, print music and broadcast content. Examples are recordings of lessons that include:

- teacher showing class a page from a book
- teacher reading a poem or passage from a play

Recording of lessons containing other material (primarily non-broadcast audiovisual content) can be covered by section 200AB.

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[28] https://smartcopying.edu.au/about-us/. In addition to responding to requests for submissions connected with inquiries, NCU also has an ongoing program of advocating for amendments to copyright legislation to reduce copyright fees.

While recording of lessons has been a relatively new issue for many schools, precipitated by COVID-19 requiring online learning, universities have been recording lessons for years.[29]

Application of 113MA to copies

Given all the existing provisions in the Act, a copy made by an education institution would only infringe if it is *not*:

- temporary;
- covered by the statutory licence; or
- reasonable (that is, not covered by section 200AB)

Existing provisions allowing copies include:

- ss 43A and 111A: Temporary reproductions made in the course of communication
- ss 43Band 111B: Temporary reproductions of works as part of a technical process of use
- s116ABA: service provider exemptions for education institutions
- education statutory licence (for any copies not covered by the above)
- s200AB: if copy not covered by any of above, then no infringement if no harm to rightsholder.

Response to Question 4.1: Education: Online access – 'Reasonable steps'

> For the purposes of new paragraph 113MA(2)(d), what measures do you consider should be undertaken by an educational institution to seek to limit access to copyright material, when made available online in the course of a lesson, to persons taking part in giving or receiving of the lesson, and ensure it is used only for the purposes of the lesson?

We oppose the introduction of 113MA as currently drafted. It is inconsistent with the Minister's letter to stakeholders, which says that any changes would be 'minor' and 'technical'.

The Smartcopying website managed by the NCU provides guidance on the application of the current law. It says:

- ensure the lesson or any recording is only made available to those students who need it as part of their studies (e.g. via a username and password in a closed environment not on an open internet page) rather than making it available to the whole school
- instruct students, where possible, to only watch the lesson or recording when physically located in their homes, not in a community space or their parent's workplace
- make the lesson or recording "view only", so that no further copies can be made or downloaded
- only make recordings available for the period of time for which they are needed
- archive or disable access by students to recordings once they are no longer needed (e.g. when normal teaching resumes).[30]

These appear to be sensible, workable guidelines.

Other proposals that could affect payments to creative industries from education sector

The drafting relating to the following would cover the education sector:

- quotations;
- material in collections (which include collections owned by educational institutions);
- 'orphan works'; and

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[29] Australian National University guidelines say (on p 2) that third party material can be included under a statutory licence: https://anulib.anu.edu.au/files/guidance/copyright-in-lectures-a-guideline-2014.pdf

[30] https://smartcopying.edu.au/covid-19-school-lockdown-copyright-guidance/. Accessed 24 December 2021.

- uses that have been 'impliedly licensed'.

All these areas are covered by the education statutory licence where the use is by an educational institution for educational purposes, so there are no access issues. Overly broad drafting would merely reduce payments to creative industries without delivering any additional access.

There are also some problematic provisions dealing with the relationship between provisions that deliver payments to creative industries and 'free' exceptions.

Statutory licences and 'orphan works'

Proposed section s113P(7) should be deleted altogether from the ED (as should proposed s183(12)):

- the drafting would transform activities that are currently not infringements (i.e. covered by statutory licences) into infringements, because 116AJA only applies where there is an infringement
- part of the value of statutory licences is that teachers do not have to waste time trying to identify and contact rightsholders for the content they are copying and sharing, do not have to find alternative content if permission is not granted, and that they have immunity from liability
- the licence fees paid by the school sector are not 'pay-per-use': they are a fixed, commercially agreed fee, for 'all you can eat' access to content from the world to copy and share
- the fact that, for various reasons, small amounts from distributions are unpaid has no bearing whatsoever on the value of the licence to licensees
- the drafting would seem to provide a perverse incentive for licensees to provide data that is inadequate for distribution

Statutory licence provide immunity from infringement

Proposed s116AJA would apply when someone infringes copyright. It would therefore not apply if a person used material that they did not know the rightsholder for under any of the special exceptions in the Act. For example, proposed s116AJA would be irrelevant to an owner of a collection that published material on the internet under proposed s113KC.

Licensees entitled to rely on statutory licences have complete immunity from infringement. Proposed ss s113P(7) and 183(12) would seem to make education institutions and governments liable for infringement of copyright in circumstances in which they currently have complete immunity.

Copyright fees are fixed upfront by commercial agreement

The licence fees negotiated by CAG for the school sector are fixed for the period of the agreement. For example, CAG and Copyright Agency agreed in 2018 on the fixed fees that would apply for 2019 to 2022.

The agreements are similar to an 'all you can eat' fixed-fee subscription agreement:

- they allow teachers to copy and share content from anywhere in the world
- there is no provision for the upfront agreed fixed fees to vary during the period of the agreement

Data from the school sector

Until March 2020, the school sector was providing usage data from surveys in a very small sample of schools each year for a limited time: 125 schools for a term for photocopying, printing and scanning, and 100 schools for 4 weeks for electronic use.

The data from these surveys was used to *estimate* (not calculate) the overall extent of copying and sharing under the statutory licence. For the purposes of fee negotiations, those estimates were 'rightsholder agnostic': for example, the question was 'what is the estimate of the total number of images copied and shared under the statutory licence in 2018'.

These estimates were just *one* input into the complex commercial negotiations that led to the current agreement. Many issues on the table were negotiated without any quantification estimates.

Data for distribution

We use some of the data provided by the school sector to assist with distribution. Not all of it is suitable for distribution. The time that our researchers spend identifying rightsholders (e.g. a photocopied page from a book where the teacher has not provided the imprint page from the book) must be proportionate to the allocation in order to keep our costs reasonable.

Despite our best efforts, there will usually be a small proportion of licence fees that ends up not being paid out, for a variety of reasons. We provide information about this in our annual reports. In 2020–21, 1% of the licence fees distributed from the school sector in 2016–17 remained unpaid.

This, however, has no bearing whatsoever on the value of the licence to licensees. It has no bearing on teachers' access to content from the world to copy and share, without having to locate and negotiate with rightsholders, or find alternative content if a rightsholder refuses permission.

GOVERNMENT USE

Policy intent

The Minister's media release of August 2020 says the reforms are intended to 'streamline the government statutory licensing scheme'. There is no reference to reducing the copyright fees payable by governments for their use of content under the extraordinarily broad statutory licence, that has no equivalent anywhere in the world.

The Discussion Paper says the proposed reforms are intended to:

> provide for a more flexible and facilitative statutory licensing scheme, that covers both the copying and communication of copyright material which reflects broader usage by governments in the digital environment.

We support the streamlining of the government statutory licence, which would follow the successful consensus amendments to simplify the education statutory licence.

Other drafting relating to governments

The Discussion Paper also refers to two other matters that are not in the Minister's statement:

1. Intersection between the government statutory licence and the operation of other licences or exceptions in the Act is unclear; and
2. Uncertainty as to whether governments can rely upon an implied licence to use copyright material it receives given the statutory licence.

These appear to have been included at the request of one or more governments, with a view to reducing the copyright fees they pay under the extraordinarily broad government statutory licence. The proposals have no effect on how governments can copy and share content (given the breadth of the licence). This is unfortunate signalling by governments that should instead be acting as model citizens and reinforcing the role of the copyright system in sustaining creation of content.

On (1), there is no uncertainty if you start by identifying the true purpose of the use. If the use is for the services of the Crown, then the government statutory licence applies.

On (2), there is also no uncertainty. There was a clear finding by the High Court in Copyright Agency Limited v State of New South Wales[31] on the relationship between the government statutory licences and implied licences.

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[31] [2008] HCA 35; https://jade.io/article/81347

The effect of the drafting would be to reverse a finding of the High Court, in order to reduce copyright fees paid by governments to creative industries, rather than clarification of an uncertainty.

We therefore oppose the drafting associated with these two matters given that they:

- are inconsistent with the policy announced by the Minister;
- would result in relatively small comparative savings to governments, with a much lower impact on governments than the impact on creative industries of reduced payments; and
- signal a lack of support by governments for the copyright system.

Government chooses not to deal exclusively with collecting society

Proposed 183B(1)(f) would allow a government to 'opt out' of dealing with a collecting society in relation to copying or communication of copyright material.

At the moment, governments are not transparent about how they manage their uses of copyright material that are not covered by agreements with collecting societies. Transparency should be required where governments opt out, to maintain confidence that copyright owners are not disadvantaged by the opt-out provisions and that government management of its copyright obligations aligns with best practice.

Terms set by Tribunal must be reasonable

If there is an application to the Copyright Tribunal to fix terms, proposed new ss153E(7) and 153EA(3) requires the terms to be reasonable.

This means that the Tribunal could determine that there be no payment for certain types of use, where it considers that that is reasonable. That is a much better mechanism for addressing classes of use that governments think that they 'should not pay for' than free 'carve-outs' in the legislation (which will inevitably have unintended consequences).

Response to Question 5.1: Government: Use of incoming material

> Does proposed new section 183G contain effective safeguards to avoid unwarranted harm to copyright owners' commercial markets? If not, what other safeguards would assist?

This provision is completely unnecessary, given the breadth of the government statutory licence. It is contrary to the overriding policy intent of simplifying the provisions for government use of content, by introducing unnecessary ambiguity and complexity.

The purpose of the statutory licence is to provide 'safeguards to avoid unwarranted harm to copyright owners', in line with the three-step test in international treaties. As the Department is aware, the three-step test covers harms other than harms to 'commercial markets'.

The government statutory licence does not require payment for each and every act done in reliance on it. It can be (and is) agreed, and the Copyright Tribunal can determine, that certain activities can be done without payment.

If there is disagreement between a collecting society and a government about this (or any other) class of material, then the Copyright Tribunal can fix terms. The ED requires that those terms must be reasonable, which can include that certain types of material or classes of use do not require payment.

Other proposals that could affect payments to creative industries for use by governments

The drafting relating to the following would cover the government sector:

- quotations;

- material in collections (which include collections owned by educational institutions);
- 'orphan works'; and
- uses that have been 'impliedly licensed'.

All these areas are covered by the government statutory licence where the use is for government purposes, so there are no access issues. Overly broad drafting would merely reduce payments to creative industries without delivering any additional access.

There are also some problematic provisions dealing with the relationship between provisions that deliver payments to creative industries and 'free' exceptions.

QUOTATIONS

Policy intent

The Minister's media release of August 2020 says the reforms are intended to 'introduce a fair dealing exception for non-commercial quotation'.

The DP says that the reform proposals aim to '[r]educe time, costs and uncertainty of quotation for academics and researchers'.

It also says that the government wants to:

> support the use of excerpts of copyright material by our public institutions and researchers where this does not interfere with the commercial market for the copyright material.

Licensing revenue, including from statutory licensing arrangements, is part of the commercial market for creative industries. Consequently, the application of the new exception must not undermine licensing revenue that would otherwise be available.

Proposed changes to better align drafting with policy intent

Purpose

The most important requirement is an explicit articulation of purpose. Quotations are already allowed, consistently with Article 10 of the Berne Convention. This is a new provision to allow quotations for purposes other than those already allowed, such as criticism or review. Article 10 requires articulation of a purpose because it requires the quotation to be no more than required for the purpose.

If this issue is addressed properly, as well as the other requirements of Article 10 (such as attribution, proportionality and fair practice), then concerns about other aspects of the proposal are reduced.

Who can rely on the exception

As currently drafted, this provision is very confusing, as are parts of the DP that relate to it.

The specific references to educational institutions and governments will create unnecessary confusion about the relationship between this new exception and existing licensing arrangements. The examples given for education institutions and governments on page 16 of the DP are already allowed by the statutory licences. The use of 'small portions' under statutory licences is already factored into negotiations about licence fees.

The examples given for libraries are confusing:

- The first example – 'Excerpts of collection material to support screen producers and other researchers' – suggests that the quotation exception would somehow operate as an additional

'supply' provision: i.e. a library could provide an 'excerpt' from material in the collection for purposes other than research, study or private use.
- The second example relates to exhibitions outreach programs by the organisation or entity that owns a collection. It also seems to refer to uses of artistic works that are covered by Copyright Agency's licences to public galleries.

The discussion in the DP about the intended application of 'by a person or organisation for the purpose of research' is also confusing. The DP says that this phrase is intended to cover the following scenarios:

1. a PhD thesis published on a university website
2. an academic work published in a journal or book
3. a documentary film, in which excerpts of background music or images are captured
4. a non-fiction book based on historical facts or real-life events
5. a family history, or
6. a presentation of research material at a conference or seminar, to illustrate a point.

None of these listed scenarios is 'for the purposes of research'. Each is an example of a publication or presentation that may include the *outputs* of research, though the reference to 'background music' in (3) would not be a research output. Examples (2) and (4) relate to commercial publishing.

Commercial purpose but 'immaterial to the value of the product or service'

Subpara (b)(ii) should be deleted from the ED.

The examples given in the ED of where this might apply are:

1. text or images cited in scholarly works that are published commercially
2. excerpts of background music or images captured in a documentary that is aired by a commercial broadcaster, or
3. images and diagrams used in papers presented at conferences which people pay to attend.

The first and second examples are odd, given the 'who' requirements in ss(1)(a). The entities listed do not include commercial publishers, film makers or broadcasters.

The third example seems unlikely to be 'commercial' from the point of viewer of the presenters at the conference, unless they are receiving speakers' fees.

Fair dealing

Subsection (2) should be deleted. It is unnecessary given courts' consideration of existing fair dealing provisions, and introduces unnecessary ambiguity because it lists different factors to those in ss40(2) for research or study.[32]

Response to Question 2.1: Quotation: Unpublished material

> Should the proposed new quotation fair dealing exception in section 113FA extend to the quotation of unpublished material or categories of unpublished material?

Existing exceptions for quotation (such as for criticism or review, or reporting news) can apply to unpublished material, but the fact that the material is unpublished is relevant to whether or not the use is fair.

OWNERS OF COLLECTIONS THAT LIBRARY AND ARCHIVES EXCEPTIONS APPLY TO

The terms 'library' and 'archives' refer to collections of material, rather than institutions. Exceptions for libraries and archives apply to people that own or are 'in charge of' a collection. This is not

[32] For example, in 'The Panel' case: *TCN Channel Nine Pty Ltd v Network Ten Pty Ltd* [2002] FCAFC 146

confined to publicly funded institutions, but also includes entities in the education, government private sectors (both for profit and not for profit).

Proposed new definition of 'library' in ED

The ED would introduce a definition of 'library' in section 10(1):

> ***library*** means a library where:
>
> (a) all or part of the collection comprising the library is accessible to members of the public directly or through interlibrary loans; or
>
> (b) the principal purpose of the library is to provide library services for members of a Parliament.

This definition currently applies in ss49, 50, ss113H, 113J, 113K and 116ABA, but not for other references to 'library'. The proposed amendment would apply the definition to all references to 'library' in the Act.

Scope of the proposed definition

We note the following about the proposed definition:

- the nature of the items that comprise the collection is not specified: they can be any item comprising or containing copyright content;
- the collection may be owned and operated by any type of entity, including for-profit corporations, governments and education institutions, that participates in the interlibrary loan system;
- an entity may charge a fee to members of the public for access to the collection;
- an entity may rely on the library exceptions for items in its collection that are not available to the public: i.e. it can get access to all the library exceptions for its entire collection by making a very small part of the collection 'available to the public'.

Policy behind definition when introduced for ss49 and 50 in 2006

The apparent purpose of the definition of 'library' introduced into ss49 and 50 in 2006 was to enable users of collections owned by publicly funded institutions (National, State, Territory and public libraries) to get copies of material held in university and 'special' libraries for research.

Creative industries raised objections at the time that the definition applied too broadly, including because:

- ss49 and 50 could now apply to libraries operated for profit;
- while the policy intent was to allow users of publicly-funded owners of collections (e.g. state and public libraries) to get access to material in other collections, the definition also allowed owners of other collections (including businesses) to get copies of material from publicly funded owners of collections; and
- it allowed education and 'special' libraries to use the library exceptions for their entire collections, even if just part of the collection was available for indirect access via the interlibrary loan system.

For example, it allowed a commercial business (such as a law firm) to acquire copies of material for its collection (such as journal articles) from state libraries, even if only a small part of its collection was available via the inter-library loan system.

Alignment of definitions with policy intent

The definitions of 'library' and 'archives' need to align with the different policy objectives of the many provisions that make references to those terms. The proposal in the ED is not an appropriate solution.

The special exceptions should not be available to entities such as profit-making businesses like law firms, pharmaceutical companies and financial institutions. There are licences available to those businesses.

Section 18 should be repealed. Whatever its purpose in 1968, it is no longer justifiable given the large number of references to 'library' now in the Act.

The policy intent behind the 2006 definition of 'library' for ss49 and 50 could be implemented by allowing publicly funded, Parliamentary and education institution libraries to be supplied with copies of material from other types of libraries for their users' research or study.

The provisions that allow owners of collections to supplement their collections raise different considerations. For example, it is not necessary for libraries in education institutions, because of the definition of 'educational purposes'. We would like to understand more about how 'collection supplementation' works in practice, and what (if any) special exceptions may be needed.

OWNERS OF COLLECTIONS: PUBLISHING MATERIAL ON THE INTERNET

The Act currently allows owners of collections to make some material available online under s200AB.

It also allows educational institutions to make material available online to students and staff for educational purposes, under the educational statutory licence.

The ED would allow owners of collections to publish the following material on the internet:

1. material 'acquired in electronic form'
2. material 'acquired in hardcopy form' and digitised
3. preservation copies
4. orphan works

Policy intent for allowing owners of collections to publish material on the internet

The Minister's media release of August 2020 says the reforms are intended to 'simplify and update copyright exceptions for … cultural institutions'.

The Discussion Paper says the intent is to:

> open up wider community access to a broader range of cultural and educational material held in collections, where this does not encroach on copyright owners' commercial markets and with appropriate precautions to minimise the risk of user infringement.

Any exceptions must, of course, comply with Australia's international treaties, which mean exceptions must not:

- conflict with normal exploitation of the work (including foreseeable future exploitation); or
- unreasonably prejudice the legitimate interests of rightsholders.

The ED would enable owners of collections to be online publishers, in some instances effectively competing with publishers that are not publicly funded, and with publishers that pay creators. While providing greater access to material in cultural collections is, on its face, an understandable objective, it must be considered in the context of the broader copyright system.

The DP says:

> The [ED] will not allow [owners of collections] to become quasi-ebook or streaming services, or displace their acquisition of commercial products where they are available.

But the ED does, in fact, enable owners of collections to offer ebook services.

Application of 113KC(1): example

A publisher	• publishes a book in eBook form
An owner of a collection	• purchases a single copy of an eBook: 113KC(1)(a) • decides that, having regard to 113KC(1) and 47H(2), there would be no breach of contract as a result of its reliance on 113KC(1) • publishes the *entire* eBook to the world on the internet: 113KC(1)

Application of 113KC(2): example

		notes
A publisher	• publishes a book in print form • makes a commercial decision not to simultaneously publish an eBook version	Scenario variation: publisher releases consumer eBook version, but does not offer e-lending licence to this collection owner
An owner of a collection	• purchases a single print copy of the title: 113KC(2)(c) • checks that an eBook version is not available: 113KC(2)(d) • engages an external supplier to digitise the *entire* book: 113KC(2)(a) • publishes the *entire* book to the world on the internet: 113KC(2)(b)	• owner of collection may be entity in education, government or private sectors • in the scenario variation above, the Discussion Paper suggests that the collection owner can digitise and publish on the internet despite the availability of the consumer version
A user of the collection owner's services	• does not read, or does understand, the information provided in connection with access to the book that is intended to avoid infringements • downloads entire book • shares the entire book	The user could be offshore, and not subject to Australian law

Inconsistent with three-step test

The breadth of s113KC makes it clearly inconsistent with the three-step test in Australia's treaty and free trade agreement obligations. The 'commercial availability' test in s113KC(2) is completely inadequate to meet the requirements of that test.

Borrowing of physical items is different

The ED says:

> The Bill will provide libraries and archives with greater flexibility to make material available online for browsing, in a similar way to that of 'borrowing' physical items, but using digital technologies.

It is not an apt analogy. A physical item like a book can only be read by one person at a time. A digital version can be simultaneously viewed by any number of people. The concept of 'borrowing' makes no sense for digital content. The issue for creative industries is how to get a return on investment in content available digital form, given the potential for limitless simultaneous viewers.

Policy intent for s49(5A) when introduced in 2000

Proposed new s113KC is based on existing s49(5A), which was introduced in 2000 as part of the Digital Agenda amendments.

The Explanatory Memorandum to the Digital Agenda Bill 2000 makes clear that s49(5A) was intended to enable visitors to a premises housing a collection to view digital content in the collection, similarly to the way they could view, say, printed books:

> 76. The provision implements the Government's decision that if a library obtains copyright works in digital format, the permission of the copyright owner is not necessary for the library to exercise the new right of communication to the public to make the material available online to users onsite.
>
> 77. By way of comparison, the mere display of hard copy books in a library is not an infringement of copyright. This provision is intended to create a similar exception for material in electronic format that complies with the requirements of new s.49(5A).

The number of simultaneous viewers of a printed book in a collection is limited by the number of copies of the book in the collection. The number of simultaneous viewers of digital content is limited by the number of terminals on a premises available to viewers.

Under the government's proposal for remote online access, there would be no limit on the number of simultaneous viewers.

S113KC compared to s49(5A)

While the starting point for s113KC may have been s49(5A), its scope is massively broader.

Compared to s49(5A), proposed new s113KC would allow:

- communication (by publishing online) of audio and audiovisual material;
- communication of unpublished as well as published material;
- digitisation of material acquired in hardcopy form;
- publication on the internet;
- no limit on simultaneous viewers; and
- copying and communication of the material made available if the owner of the collection has taken 'reasonable steps to ensure that a person who accesses the copyright material does not infringe copyright in the copyright material' (by contrast, s49(5A) does not allow electronic reproduction or communication).

Meaning of 'acquired'

The term 'acquired' was not defined when s49(5A) was introduced. It pre-dated the compulsory acquisition of digital content by the National Library and other libraries.

The provision does not specify that the acquisition must be by purchase.

It is not clear what, if any, limitations there are on the means of acquisition, including:

- compulsory acquisition under 'legal deposit' provisions;
- copies of material acquired from other libraries under s50;
- donated material (which may be subject to donor conditions);
- material acquired with terms of use (contractual or otherwise);
- copies made by the owner of the collection:
    - to supply by communication for research, study or private use
    - supply by communication to an owner of another collection to supplement that collection
    - for preservation

The note to s113KF, which would allow owners of collections to 'retention copies' in connection with supply of material to users and to owners of other collections, specifically allows a retention copy to be published on the internet under s113KC.

> Note: Other uses of the retention copy might not infringe copyright because of other provisions of this Act, such as section 113H (preservation), 113J (research), 113M (preservation) or 113KC (making material available online).

Undertakings and terms of use associated with acquisition

Owners of collections may 'acquire' material subject to undertakings or terms of use about how they will deal with the material, including making the material available online. Those undertakings may be contractual, but may not be.

Owners of collections have long sought a special exception for breaches of contract, similar to that in s47H (that applies to computer programs). The ED would instead make the following amendment to s47H:

> (2) Subsection (1) does not imply that an agreement, or a provision of an agreement, may exclude or limit, or have the effect of excluding or limiting, the operation of a provision of this Act that is not mentioned in that subsection.

It is not clear how this amendment would affect the practices of owners of collections in relation to undertakings related to acquisition of material.

Compulsory deposit of printed and electronic publications

Publishers are required by various provisions in Commonwealth and State legislation to provide copies of printed and digital publications to certain libraries, for free. The National eDeposit (NED) scheme covers all the Commonwealth, State and Territory requirements.[33] It includes access control arrangements. There are no similar access control arrangements for compulsorily acquired printed copies.

It is not clear how the ED would apply to publications that have been compulsorily acquired in either print or digital form. For example, as currently drafted, s113KC would appear to allow the libraries that receive copies via compulsory legal deposit to digitise a printed publication that it has compulsorily acquired, and publish it online, if the publication is not yet available in digital form to the library.

There are currently 13 libraries that receive compulsorily acquired legal deposit copies.[34]

'Commercial availability'

Section 113KC(2) provides that a library may not digitise content 'acquired, in hardcopy form, as part of the collection' if 'the authorised officer is satisfied, after reasonable investigation, that an electronic copy of the copyright material cannot be obtained within a reasonable time at an ordinary commercial price'. This test also applies to other provisions for libraries.

The DP says:

> Many physical items held in collections are not commercially available in electronic form, either because they were not produced in electronic form or e-book licences are not made available to Australian libraries and archives. Other examples of when material may be considered to not be commercially available in electronic form in place of physical items (outside considerations of time or price), include:
>
> • a copy of the material is not commercially available in a resolution or format that is suitable for the purpose, or

[33] https://ned.gov.au/ned/

[34] https://www.nla.gov.au/using-library/services-publishers/legal-deposit/legal-deposit-australia-wide

> • a copy of the material is not able to be purchased individually, and is only available through purchase of a more substantial item or service (for example, through a box set or a subscription covering several titles or volumes).

This means s113KC would apply even if a copyright holder had made a decision, which may be commercial decision, not to publish a digital version of their work at all, or to delay publication in digital form, or to bundle content.

It is not clear if it would also apply to publications that are available to members of the public in digital form (e.g. as an eBook) where a licence is 'not available to Australian libraries and archives'.

Effectively a 'license it or lose it' regime

The proposal would effectively force content creators to license Australian owners of collections (including in the private sector) to publish their content on the internet.

This is a serious intervention, by the government, into the complex arrangements surrounding commercial publishing and other areas of content creation. It is the opposite of 'maintaining the incentives and protections for content creators' referred to in the Minister's announcement.

US Courts have rejected moves by State Parliaments to force publishers to license e-lending in libraries. For example, in a recent case that granted an injunction to prevent legislation in Maryland coming into effect, the court said:

> It is clear the Maryland Act likely stands as an obstacle to the accomplishment of the purposes and objectives of the Copyright Act.
>
> ...
>
> Publishers could avoid the [Maryland] Act's reach only by refraining entirely from offering their ebooks and audiobooks to the public. Forcing publishers to forgo offering their copyrighted works to the public in order to avoid the ambit of the Act interferes with their ability to exercise their exclusive right to distribute. Alternatively, forcing publishers to offer to license their works to public libraries also interferes with their exclusive right to distribute.
>
> ...
>
> The practical impact of the Act is that publishers will be forced to offer their products to libraries—whether they want to or not—lest they face a civil enforcement action or criminal prosecution.

The drafting in the ED would apply an even more extreme sanction than the penalties in the Maryland Act: it would allow owners of collections (including in the education, government and business sectors) to publish books and other material. This includes printed books that owners of collections can lend, and material in digital form that is available directly to consumers (e.g. as an eBook).

No compensation for so-called 'lending' of digital products like eBooks

Public libraries perform an important role in enabling access to content, of course. But the purchase by a library of a book that is available to multiple readers obviously reduces the returns that content creators can get. For physical items, like books, the multiple readers must be consecutive not simultaneous. Even so, the lending right schemes managed by the Office of the Arts result from acknowledgement that books available from libraries reduce sales. The Office of the Arts website says that under the lending rights schemes:

> Australian book publishers or creators—authors, illustrators, editors, translators and compilers—can be compensated for the loss of income through the free multiple use of their work in Australian public and educational lending libraries.[35]

Proposed s113KC would enable simultaneous access to a single digital product (like a eBook) to anyone in the world. There are no provisions for any compensation to anyone for any resulting loss, including lost revenue.

Proposed amendment of s113H to allow publication on the internet of 'preservation copies'

Section 113H currently allows owners of collections to make preservation copies if:

> (i) the authorized officer's library or archives holds the material in original form; OR
>
> (ii) the authorized officer is satisfied that a copy of the material cannot be obtained in a version or format that is required for that purpose, consistent with best practice for preserving such collections.

Section 10(1) provides:

> a library or archives holds copyright material in ***original form*** if the material is held in the collection comprising the library or archives in a form that embodies the material as initially prepared by the author or maker of the material.
>
> Example: A manuscript of a literary, dramatic or musical work.

This definition applies to original versions of artistic works (such as paintings and drawings) as well as to manuscripts.

The provision allows preservation copies of published as a well as 'original' versions, if a copy in a 'preservation suitable' format is not available to the owner of the collection.

Subsection (2) allows the owner of the collection to make an electronic preservation copy available 'available to be accessed at the library or archives' provided the owner of the collection 'takes reasonable steps to ensure that a person who accesses the preservation copy at the library or archives does not infringe copyright in the preservation copy'.

The criteria for a copy suitable for online viewing are obviously different to those for preservation, but subs(2) is not limited by the availability of a copy suitable for online viewing. For example, the requirements for a preservation copy of an original artwork are different to those for a copy suitable for online viewing.

The ED would amend subs(2) to allow owners of collections to publish 'preservation copies' on the internet. This would not be limited by the availability of a copy, including under licence, suitable for online viewing.

Current licensing arrangements for artistic works

Copyright Agency licenses public galleries to make a range of uses of artistic works, including digital and online uses. This is an important revenue stream for artists.

If 113H(2) were implemented as currently drafted, it is likely, based on past submissions, that public galleries would discontinue their licensing arrangements.

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[35] https://www.arts.gov.au/funding-and-support/lending-rights

Response to Question 3.1: Libraries and archives: Online access - 'Reasonable steps'

> For the purposes of new paragraph 113KC(1)(b), what measures do you consider should be undertaken by a library or an archives to seek to limit wider access to copyright material when made available online?

Proposed s113KC should be removed altogether from the ED.

OWNERS OF COLLECTIONS: SUPPLY OF COPIES

Policy intent

The Discussion Paper says the intent is to 'update the provisions [that allow owners of collections to supply copies of material in their collections] to apply equally to all types of copyright material and be technology-neutral'.

The proposals would also extend these provisions by allowing libraries to supply copies for private and domestic use as well as for research or study.

Relationship to 113KC

The relationship between the 'supply' (or 'document delivery') provisions and proposed s113KC is unclear. Given the breadth of 113KC, the circumstances in which the supply provisions would apply seem quite limited. Proposed 113KC would allow people to read material online, and to download and share material if they do not infringe copyright (e.g. where it is a fair dealing for research or study, or for criticism or review). The 'supply' provisions would seem to apply only where a person wanted an offline copy, and the making of that offline copy would otherwise be an infringement of copyright.

Retention of electronic copies made for communication

According to the Explanatory Memorandum to the Digital Agenda Bill 1999, the policy intent behind the requirement to destroy copies made for communication was to:

> [prevent] libraries and archives from building up electronic collections of parts or the whole of articles or works as a result of communicating such works to users under s.49(2) and (2C).[36]

In other words, it was intended to prevent owners of collections from digitising collections 'by the back door' by, for example, aggregating multiple journal articles requested by users, where the owner of the collection is not permitted to digitise those articles for retention under other provisions.

The intended consequence of removing the requirement to delete copies is so that owners of collections:

> will be able to retain any electronic copies of copyright material made for this purpose and use them **to respond to future requests**. This will create efficiencies for libraries and archives by not having to make further supply copies, for example to fulfil requests for a **pool of students and staff** pursuing the same course of study, and in turn reduce costs for users. [emphasis added]

However, the ED does not require that retention copies only be used for further requests. To the contrary, the Note to proposed new s113KF says:

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[36] See [81]

Note: Other uses of the retention copy might not infringe copyright because of other provisions of this Act, such as section 113H (preservation), 113J (research), 113M (preservation) or 113KC (making material available online).

Relationship to education statutory licence

The DP includes the following case study:

> *Case study: University libraries*
>
> The Act currently requires libraries and archives to destroy the electronic copy of a requested item after it is supplied. This means that they are required to repeat the labour intensive process of digitising hardcopy material each time a copy is requested. This is a particular problem for university libraries fulfilling requests for students undertaking the same course of study who require copies of the same material. Removing this requirement will eliminate an unnecessary administrative burden on university libraries, potentially allowing them to respond more rapidly to requests, and reducing costs for students.

Universities are covered by the education statutory licence, which allows them to copy and share content for educational purposes, which is defined in s10(1) to include a copy that 'is made or retained for inclusion, or is included, in the collection of a library of the institution'.

It is apparent from the history of this definition that it was intended that equitable remuneration be payable for copies made and retained by educational institutions for their libraries given that the original proposals to limit the number of copies, and to require deletion, were dropped.

Relationship to commercial licensing arrangements

The current library provisions can create difficulties with commercial licensing of businesses, because businesses can get the benefit of the free library use provisions (by including some items in their collection in the interlibrary loan system), and because there is ambiguity about whether supply of copies for 'research' includes research on behalf of a commercial entity.

The legislation should be amended so that it is clear that free exceptions do not apply to research of behalf of commercial entities, or supply of copies to clients.

ORPHAN WORKS

Policy intent

The Minister's media release of August 2020 says the reforms are intended to 'set up a scheme to allow the use of material if the copyright owner cannot be found'.

The Discussion Paper says the intent is to:

> allow wider use of all orphaned copyright material. This will open up access to a larger collection of cultural, historic and educational works held by our cultural and educational institutions, and enable use of orphaned material in modern creative endeavours.

Relationship to proposed new provisions allowing publication on the internet

The proposed new s113KC would allow owners of collections (including, but not limited to, publicly funded cultural institutions) to publish any 'orphaned' published material on the internet without a diligent search. If s113KC were extended to unpublished material, it would also allow owners of collections to make unpublished material available.

The ED also proposes to amend s113H to allow owners of collections to make 'preservation copies' (including of 'original' artistic works, and published works) available on the internet.

Given the breadth of these proposed provisions, the circumstances in which a diligent search would be required appear quite limited.

Relationship to statutory licences

Given that the intent is to allow 'wider' use of orphan works than under current arrangements, we do not understand this sentence:

> Statutory licences will not apply to use of copyright material covered by the orphan works scheme.

Part of the value of statutory licences is that teachers, public servants and staff of government-related entities can copy and share copyright content without the copyright compliance usually required, including searching for copyright owners. It is difficult to imagine that education authorities would ask teachers to spend time doing diligent searches to identify rightsholders for content that they can copy and share under the statutory licence with minimal compliance requirements.

The following proposed new subsections should therefore be deleted from the ED:

- s113P(7): use of 'orphan works' for educational purposes by educational institutions;
- 135ZZK(6): 'orphan works' in retransmissions of free-to-air broadcasts;
- 135ZZZI(7): orphan works in re-broadcasts by satellite BSA licensees;
- 183(12): use of orphan works by governments for government purposes;
- 116AJA(4) and 116AJB(2)

APPENDIX: DEVELOPMENTS RELEVANT TO 113KC

The following are developments relevant to 113KC.

The Untapped project

The Untapped project is described as:

> a collaboration between authors, libraries and researchers, working together to identify Australia's lost literary treasures and bring them back to life. It creates a new income source for Australian authors, who currently have few options for getting their out-of-print titles available in libraries.[37]

It is supported by the Australian Society of Authors.

It is not clear what consequences the ED would have for this project.

NZ National Library proposal to give books to Internet Archive for digitisation and public release

Authors and publishers were understandably alarmed by the announcement that the National Library of New Zealand intended to 'donate' more than 400,000 books to the Internet Archive (based in the US) for digitisation and release to the public. These include books by Helen Garner, Tom Keneally, Frank Moorhouse, Gerald Murnane, Sally Morgan, David Malouf, Colin Thiele, Mem Fox, Tim Winton.[38] There is a major lawsuit against the Internet Archive in the US for copyright infringement.

The NLNZ subsequently reviewed its position given the outcry, but the matter has created understandable mistrust of libraries by authors and publishers, and has not yet been resolved.

Access to Research project (UK)

The Access to Research project in the UK operates in a similar way to s49(5), but only for public libraries. It allows members of the public to search, from home, for journal articles that are available to view in public libraries. They can then view the articles in a public library.

The project began as a pilot in 2014, following 2012 recommendations from a committee convened by the UK government known as the Finch Group:

> Very few public libraries provide access to journals, for most members of the public, the only way in which they can gain access to journals is through the walk-in service provided by some university libraries. [So the] proposal is that the major subscription-based publishers should license public libraries throughout the UK … to provide access to peer-reviewed journals and conference proceedings at no charge, for 'walk-in' users on library premises.
>
> At a time when public libraries are under severe pressure, such a move will help to strengthen their position in the communities they serve, and lead to increased usage and value. It would have an immediate effect in extending access to the great majority of journals for the benefit of everyone in the country.

There is information about the project on the Publishers Licensing Society website.[39]

According to CILIP, the UK library and information association (UK equivalent to ALIA):

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[37] https://untapped.org.au/
[38] https://www.asauthors.org/news/are-your-books-being-donated-to-internet-archive
[39] https://www.pls.org.uk/services/access-to-research/

> Following the success of the pilot the scheme was re-launched to local authorities across the UK during 2019. As of January 2020, over 95 per cent of local authorities have signed up to offer the service.[40]

The University of Northampton website says:

> Access to Research is an excellent service for members of the public or school students who may wish to access research, but who don't have access via a paid for subscription service. Over 10 million journal articles are now available, free of charge, via participating public libraries across the UK.
>
> From home, you can search via the Access to Research search interface, which will allow you to view abstracts. You can then visit your nearest participating public library, where the Access to Research search interface will allow you to access the electronic full text.[41]

The website of AIMS (Association for Improvements in the Maternity Services) says:

> Using the scheme is very straightforward. There is no need to register. At home, you simply search for the Access to Research website (www.accesstoresearch.org.uk), agree to their terms and conditions and then search the database to locate articles that you are interested in reading. If an article is open access, you can read it immediately. If it is not, you can in any case read the abstract (or brief summary). Confident that the articles you want to read are available, the next step is then to pop into your local library to access the full article on a library pc. All UK local authorities are able to opt their libraries into the scheme for free, so if yours doesn't provide this service, just let them know that you want it!

This project suggests that proposed s113KC far exceeds international best practice.

EU licensing framework for out-of-commerce works

The European Union (EU) Digital Single Market (DSM) Directive includes a framework for 'Out of Commerce works'.

The EU Out-Of-Commerce Works Portal includes this summary of the framework:

- The Directive provides for a **licensing mechanism** that will make it easier for cultural heritage institutions to obtain the necessary licences from collective management organisations representing the relevant rights holders.
- This mechanism is complemented by a **new mandatory exception or limitation** to copyright that will apply in specific cases when there is no representative collective management organisation to negotiate with the institution. The exception will allow cultural heritage institutions to make out-of-commerce works available for non-commercial purposes.
- In order to protect the interests of rights holders, such as authors and publishers, the Directive sets out an **opt-out mechanism** that will enable them to withdraw their works from the out-of-commerce system at any time if they do not want their works to be used this way.
- Under Article 10 of the Directive, the EUIPO is responsible for the establishment and management of a **single publicly accessible online portal** providing information about out-of-commerce works and about the opt-out mechanisms available to rights holders.[42]

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[40] https://www.cilip.org.uk/news/492282/Access-to-Research--a-great-free-digital-resource-for-public-libraries.htm
[41] https://skillshub.northampton.ac.uk/schools_and_community/access-to-research/
[42] https://euipo.europa.eu/ohimportal/en/web/observatory/outofcommerceworks

In line with the EU framework, which has been designed to comply with the international treaties that Australia is a party to, any new provision should *not* apply to material covered by licensing arrangements offered by copyright management organisations, particularly books that are still in copyright but not currently available in digital form. Authors, artists and publishers should also be able to opt out of the licensing arrangements, as they can under the EU scheme.