



# **Response to Copyright Enforcement Review Issues Paper**

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## Introduction

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Thank you for the opportunity to participate in this review.

Our role is to facilitate very broad access to content in ways that are easy for content users and support future quality content. The role of enforcement mechanisms is to steer people to legitimate channels and sources of content that support rather than undermine investment in future content. That includes content available under licensing mechanisms such as the ones we manage.

## Context for review

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The issues paper for this review says:

Copyright underpins the vibrancy and value of Australia’s creative industries and supports innovation across many other sectors of the economy.

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Copyright infringement may harm Australia’s creative ecosystem and broader economy by reducing or diverting income that creators of, and investors in, original material rely on for their financial sustainability.

...

The Government is committed to copyright laws that protect Australian artists and enable them to earn a living from their creative works.

The government’s new whole-of-government Cultural Policy say:

The Government is committed to maintaining a strong copyright framework that works in concert with other legal and policy mechanisms – including funding support for the creative industries, our broader intellectual property framework, the regulation of broadcasting and content industries, and celebration and protection of First Nations arts and culture – to support the success and vibrancy of Australia’s cultural and creative sector.

We welcome these statements.

Enforcement mechanisms are one way of helping creators of content (who include all the people who work in various areas of publishing) to recoup their investment of money, time and expertise; mitigate the significant risks associated with making content available to the public (particularly in digital form); and be rewarded for the value to Australian society of the content they produce.

There are also other mechanisms that help to achieve these goals. They include statutory licence provisions in the Copyright Act that legitimise activities that would otherwise infringe, providing legal access to a vast array of content to millions of students, teachers and public servants, while compensating creators of content for the compulsory acquisition of their rights to license uses of their content on their own terms, or to refuse permission.

The ultimate goal is to promote creation of new content, and broad access to content on fair terms. As part of the broader picture, it is important that all elements of the copyright system are working well to achieve this goal.

## Investment in Australian education resources

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The societal benefits of Australian content extend to Australian learning resources for Australian students. The educational publishing industry is part of Australia’s creative industries, employing and engaging large numbers of creative people, including writers and illustrators. In previous review processes, the government has received submissions and other information from people in Australia’s creative industries, including educational publishing, about the investment, risks, processes, staffing and commissioning of content that is involved in producing Australian educational resources.

The Australian market is small. In the school sector, a market can be a single state, to align with a state-based curriculum. This means the risks can be high and the margins very small.

In the higher education sector, textbook piracy is a real problem. It is an additional risk that can be difficult to mitigate, and can have a material impact on willingness to invest.

Copyright payments to people in the Australian educational publishing industry, including from the education statutory licence, are a significant contributor to their willingness and ability to invest money, time and expertise in new content.

Apart from the enforcement mechanisms (e.g. to potentially curb textbook piracy), other mechanisms to steer people to channels of legitimate consumption of content that contribute to the sustainability of Australian content are vital.

### **Piracy in other areas of publishing**

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Book piracy is also a real problem in areas of publishing other than educational publishing: see, for example, the Macmillan Anti Piracy report webpage [here](#), and an alert from the Australian Society of Authors to its members [here](#).

Writers and publishers are also adversely affected by programs such as the US Internet Archive's online publication of digitised books without any payments to writers or publishers (including Australian writers and publishers). The Internet Archives' activities are regarded as infringement by Australian authors and publishers, and it is being sued in the US.

### **'Safe harbour' provisions for education institutions, libraries and institutions assisting people with disabilities**

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In 2018, the Copyright Act was amended to introduce 'safe harbour' provisions for education institutions, libraries and institutions assisting people with disabilities that provide online services. The amendments were not opposed by content creators, and have not, as far as we are aware, created any difficulties in practice.

### **Concerns about 'technical' infringements**

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The 2018 safe harbour amendments resulted from levels of risk aversion in those sectors that tend to be much higher than in other sectors. While the amendments were not opposed by content creators, any new proposals to address concerns about 'technical' infringements should be subjected to the new Impact Assessment Guidelines.

### **The benefit of statutory licences**

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From a teacher's perspective, the education statutory licence provides 'immunity' from infringement for all activities that may otherwise require permission (i.e. all forms of reproduction and communication for educational purposes). That includes activities that are covered by the statutory licence but may not be factored into fee negotiations for various reasons.<sup>1</sup>

The 'immunity' provided by the statutory licence is higher than that from 'free' exceptions, because the scheme as a whole delivers compensation to content creators.

Similarly, public servants have 'immunity' under the government statutory licence. A government cannot be sued for copyright infringement for anything done for government purposes.

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<sup>1</sup> For example, because the activity is not part of data collection arrangements, or because the parties have agreed (e.g. in data processing protocols) that the activity will not be factored in. The fee negotiations result in flat, fixed annual fees for all activities covered by the statutory licence: they are not 'pay per use' fees.

### **Role of Copyright Tribunal**

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The Copyright Tribunal does not deal with infringements, but is a key part of the framework for well-functioning licences (including statutory licences) that enable uses of content that would otherwise infringe. While usually dealing with large matters (relating to licence fees and data collection) between large entities, the Tribunal has also dealt with smaller matters, including for self-represented parties.

The Tribunal works very well provided it is properly resourced, including having sufficient judges and lay members available for references to it. This has not always been the case, which means that resolution of matters can be unnecessarily delayed.

### **First Nations culture**

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The new Cultural Policy recognises the harms of fake art, merchandise and souvenirs that purport to be made or authorised by First Nations people:

... more than half of all purchased merchandise and souvenirs with First Nations art and designs are inauthentic or are made without permission from Traditional Owners to use Indigenous Cultural and Intellectual Property (Productivity Commission 2022). This causes harm to First Nations artists, communities and culture. It also cheats consumers into purchasing inauthentic items. Instances of unfair contract terms, appropriation of cultural expressions and copyright infringement affect the rights, wellbeing and economic returns to First Nations artists and their communities.

We support mechanisms to redress these issues for First Nations people.

### **Small claims process**

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We would support simplified processes for resolving small claims, such as the process recently established by the US Copyright Office.

We are contacted by our writer and artist members from time to time regarding infringements of copyright that have may have deprived them of income. We occasionally take enforcement action regarding an infringement that is relevant to one of our licence schemes, but we do not represent members in relation to other matters, and we would like to refer them to a simple process that may resolve their claim.