

# Response to the Copyright Enforcement Review 2023: National and State Libraries Australasia (NSLA)

6 MARCH 2023

## About NSLA

National and State Libraries Australasia (NSLA) is a collaboration between the national, state and territory libraries of Australia and New Zealand. Our ten member libraries hold rich collections that serve the education, research, innovation, and cultural needs of our diverse communities.

NSLA supports submissions by the Australian Library and Information Association (ALIA), the Australian Libraries and Archives Copyright Coalition (ALACC) and the Australian Digital Alliance (ADA).

## Summary statement

NSLA libraries support the regular review of Australia's copyright enforcement measures. Libraries are trusted entities with a strong record of best practice copyright application and enforcement, both in the services we provide to clients and in our dealings with creators.

NSLA libraries support copyright enforcement as part of a broader copyright scheme designed to incentivise and reward creation and distribution in Australia. Such a scheme must recognise the importance of providing legitimate means of accessing and using material alongside tools for preventing and penalising piracy.

With this in mind, we wish to voice our support for continued development of the Access Reforms released previously by the government.<sup>1</sup> We would especially caution against inadvertently closing off access to material by making changes to strengthen copyright enforcement without first addressing the exceptions for education, accessibility, libraries and archives within the Act – particularly as they relate to quotation and orphan works.

## Current copyright infringement challenges

The library sector is not experiencing significant issues with infringement, and considers the industry-driven and statute-based mechanisms to be effective in this regard. NSLA libraries are good actors in the application of copyright, as evidenced by our record of best practice: no penalties under Sections 49 or 50 of the Act (document delivery and interlibrary loan), very few takedown requests (see next section), a strong focus on system and network security, and a long track record of working with creators and publishers.

Nonetheless, we are and will be increasingly challenged in maintaining these policies and practices if our legislative rights and obligations are not similarly maintained.

Over the COVID era, remote access has shifted from being an important component of library services to an essential one. The way in which library users seek to interact with Australian documentary heritage and published content has shifted, and the gap between legislation and everyday actions that people reasonably believe to be legal (such as non-commercial quotation of copyright material) is widening.

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<sup>1</sup> See: <https://www.nsla.org.au/resources/submission-copyright-amendment-access-reform-bill-2021>

‘Technical’ infringements, where acts are illegal but have immaterial commercial impact, might include such innocuous activity as including short quotes in a blog post; capturing incidental music in the background of an interview; or using anonymous historical material in a documentary. The flexibility made possible by updated orphan works and quotation exceptions would go a long way to addressing this, reducing the kind of confusion and disincentive to comply that can undermine respect for the law.

Public knowledge and compliance around copyright would be vastly improved by simplifying and modernising the Act, aligning it with reasonable expectations and behaviours, and updating current exceptions to suit the rapidly changing contexts in which content is accessed and used.

### Licensing of ebook and digital content

We suggest that the recent downward trend in demand for unlicensed television shows, films and music highlighted in the consultation paper (p.7) can be partially explained by the emergence of streaming services that provide easy and legal access to these materials. We therefore argue that one important tool to combat the corresponding rise in piracy of ebooks should be regulation to address the complexity and inconsistency of the current ebook licensing marketplace, particularly as it relates to licensing of ebooks by libraries.

#### **The ebook market**

Libraries provide access to ebooks through individual or consortium licence agreements with primarily international digital publishing platforms. These licence agreements are notoriously expensive, complex and inconsistent – as demonstrated by the recent Australian Research Council Linkage Project on e-lending.<sup>2</sup> Despite the high licence fees, this same project provided compelling evidence that library use does not reduce commercial sales for publishers. Yet many commercial publishers continue to refuse to license ebooks to libraries, or provide them only under onerous and unsustainable terms.<sup>3</sup>

Moreover, in their acclaimed 2022 book, *Chokepoint Capitalism*<sup>4</sup>, Australian law professor Rebecca Giblin and Canadian journalist Cory Doctorow reveal that earnings passed on to authors and creators constitute a minuscule proportion of takings from the digital platforms that publish their work and that, in most cases, publish on condition of becoming the rights holder and impose controlling TPMs.

One of the most practical ways in which libraries have supported authors and creators is through the public lending right. The proposed introduction of a digital lending right is welcomed and will help to ensure that the benefits of ebook licensing for both the public and authors are better recognised. In implementing this commitment, we urge the government to consider ebook licences and the impact they have on authors, libraries and readers alike; and to consider options to address the current failures in the ebook market.

#### **Australian Standards**

Beyond ebooks, a clear example of licensing failure which encourages piracy and has serious consequences for the Australian public is access to Australian Standards. This vital, publicly-funded resource – which relies entirely upon in-kind expertise from industry professionals (including libraries), and is essential for community health and safety, industry training, enterprise and innovation – is not currently available in NSLA libraries due to extortionate subscription costs demanded by commercial providers, and a refusal to include remote access in subscription offers.

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<sup>2</sup> <https://elendingproject.org/>

<sup>3</sup> See *Available, but not accessible? Investigating publishers' e-lending licensing practices* by Rebecca Giblin, Jenny Kennedy, Kimberlee Weatherall, Daniel Gilbert, Julian Thomas and François Petitjean (Information Research vol. 24 no. 3, September, 2019) available at <https://informationr.net/ir/24-3/paper837.html> and summarised at <https://www.ifla.org/news/availability-license-terms-and-pricing-of-ebooks-an-interview-with-rebecca-giblin/>

<sup>4</sup> <https://chokepointcapitalism.com/>

## Indigenous Cultural and Intellectual Property (ICIP)

We note the lack of ICIP protections for First Nations collection material where copyright is held by non-Indigenous creators, even where this is not constituting infringement under the current system. We recognise the efforts of the current government to introduce stand-alone legislation to protect and commercialise Indigenous knowledge.<sup>5</sup> We caution against any measures designed to strengthen copyright enforcement that may inadvertently make access or provision of access to First Nations peoples any more legally risky, or that may introduce barriers to the recognition of ICIP in these materials.

## Effectiveness of current enforcement framework

### INDUSTRY-DRIVEN MECHANISMS

#### Notices and takedown measures

NSLA libraries take our takedown responsibilities seriously, and our responsiveness to takedown requests compares very favourably with that of large digital platforms. NSLA member libraries are committed to a joint takedown position statement and guidelines<sup>6</sup>, with individual libraries providing further information and clear mechanisms for any member of the public seeking to make a claim.

Member libraries are asked to contribute details of any takedown request to a joint register to ensure consistency of response, and to track any trends or new issues arising. This careful record-keeping tells us that copyright is rarely the driver of takedown requests, and that the overall number of requests is incredibly low.

In the five years between 2017-2022, just **72** takedown requests were recorded by the national, state and territory libraries of Australia (nine libraries in total). Of those:

- 49 were for privacy or other personal reasons including author regret
- 5 were about defamation
- 2 were about ICIP (both taken down)
- 8 were regarding out-of-date or superseded content
- 4 related to protected government data
- 4 were filed for copyright reasons

Of the **four** requests received over five years across nine libraries that related to copyright, one is under review and three did not result in a takedown of material as they did not meet the criteria for copyright infringement. Just over one third (26) of the total requests did result in a takedown of material, in some cases on a temporary basis, and 14 resulted in a suppression of, or change to, a catalogue record.

### STATUTE-BASED MECHANISMS

#### Safe harbour scheme

The safe harbour scheme provides valuable assurance to libraries, increasing our confidence in provision of platforms that feature content uploaded by third parties. Examples include:

- At a local level, the State Library of Queensland's *Corley Explorer*: featuring photographs of suburban Queensland homes from the 1960s and 70s – with viewers able to tag and describe images, and share their own stories and images<sup>7</sup>
- At a national level, the National edeposit service (NED): a portal for collection and preservation of all electronic publications in Australia, deposited by publishers under legal deposit legislation<sup>8</sup>

<sup>5</sup> <https://www.nsla.org.au/resources/response-indigenous-knowledge-2022>

<sup>6</sup> <https://www.nsla.org.au/publication/position-statement-takedown>

<sup>7</sup> <https://explorer.corley.slq.qld.gov.au/>

<sup>8</sup> <https://ned.gov.au/ned/>

- At a national level, the Australian Web Archive: comprising annual or bi-annual collections of all websites in the .au domain<sup>9</sup>

As outlined above, however, the experience of NSLA libraries is that takedown requests are relatively rare and are almost never about copyright. A formal request under the safe harbour scheme has never been issued for material available through NED.

This may be interpreted as indicating problems with the safe harbour scheme, e.g. that rights holders are either unaware of the scheme or find it bureaucratically cumbersome. Equally, it may indicate satisfaction with or a preference for the direct content management options provided by NED itself. Indeed, it is interesting to note that over 50 per cent of materials deposited in NED (currently holding over 90,000 publications) have been nominated for open access by publishers. It follows that up to 50 per cent of legal deposit material collected in prior decades and in physical form may also not have been intended to be withheld from use.

## Changes to current enforcement framework

NSLA libraries support the lowering of barriers to small rights holders enforcing their rights. In designing any small claims court, however, we would strongly recommend that Australia observe and take lessons from systems implemented in other countries such as the United States and the United Kingdom. We also contend that other mechanisms designed to simplify copyright may be equally or more effective in empowering creators.

Alongside documenting our national heritage, NSLA libraries' reason for being is to enable equitable public access to collections that can inform, educate, and inspire the creation of new works. That puts us on the frontline of copyright, working with both copyright holders and content creators. We offer scholarships and artist-in-resident programs expressly designed to foster new work that takes inspiration from older or contemporary work.

Amendments to simplify exceptions already in the Copyright Act, such as the document delivery and interlibrary loan exceptions in Sections 49 and 50, would support enforcement by reducing knowledge barriers and corresponding inefficiencies in copyright compliance. Similarly, legislative amendments designed to modernise Australian copyright law, such the introduction of exceptions for orphan works and quotation, will reduce inadvertent infringement and increase understanding of and respect for the law. In addition, they will provide direct benefit to creators by setting clearer boundaries around the use of materials in their own works, and by aligning the law with the widely-held belief that they can use reasonable quotes without permission.<sup>10</sup>

Thank you for the opportunity to comment on the copyright enforcement review.

### **Vicki McDonald AM FALIA**

Chair, National and State Libraries Australasia

President, International Federation of Library Associations and Institutions (IFLA)

State Librarian and CEO, State Library of Queensland

<sup>9</sup> <https://webarchive.nla.gov.au/collection>

<sup>10</sup> See, for example, the findings of *Imagination foregone : A qualitative study of the reuse practices of Australian creators* by Kylie Pappalardo, Patricia Aufderheide, Jessica Stevens & Suzor, Nicolas (2017). Queensland University of Technology, Brisbane, Qld. Available at <https://eprints.qut.edu.au/115940/> and summarized at <https://www.authorsalliance.org/2018/03/13/imagination-foregone-a-study-of-the-reuse-practices-of-australian-creators/>