

# Response to the Exposure Draft Copyright Amendment (Access Reform) Bill 2021 & Review of Technological Protection Measures Exceptions

24 FEBRUARY 2022

## About NSLA

National and State Libraries Australasia (NSLA) brings together the knowledge and expertise of 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 National Library of Australia and the Australian Library and Information Association (ALIA), and the joint submission by the Australian Libraries and Archives Copyright Coalition (ALACC) and the Australian Digital Alliance (ADA).

## Executive summary

NSLA libraries welcome the proposed amendments in the interests of public access to national collections.

These important changes address long-held concerns regarding outdated copyright provisions and allow libraries to use the technologies available to us to provide faster and more equitable access to the collections we hold. The urgency of these changes has become particularly apparent in the face of a global pandemic that has seen an exponential increase in the demand for remote access to library collections and educational materials. This demand has not waned even when lockdown restrictions have been lifted.

Improved access to collections is of distinct benefit to all Australians, and particularly so for those who live in regional and remote areas; who have a disability; or who are otherwise prevented from visiting a large library in their state or territory capital.

In particular, NSLA supports:

- the clarification that unfair licensing practices are sufficient to deem materials not commercially available, as part of the commercial availability test
- the quotation exception, provided that it is extended to include unpublished material
- transfer of current TPM exemptions to the new exceptions, and
- retention of broad, flexible guidelines for 'reasonable search' where copyright owners are unknown.

## Positive impacts and limitations of the proposed amendments

### Schedule 1: Limitation on remedies for use of orphan works

NSLA strongly supports the introduction of an orphan works limitation on liability scheme. This scheme will open the large portion of our national and state collections consisting of orphaned works for use in the public interest.

We support the proposal to apply the scheme to all materials and uses, without a commercial limitation. Many potentially beneficial uses of orphan works are commercial or quasi-commercial in nature, including use by our own sector in ticketed exhibitions and trade publications.

An orphan works scheme will be particularly beneficial in easing the administrative burden on the national and

state libraries as we undertake mass digitisation projects. In this context, we note that these provisions will supplement rather than replace s200AB, which supports most of our current digitisation activities. It is important that the two provisions work in harmony to enable digitisation of the full range of collection materials without creating an undue burden in decision-making and administration.

### Diligent Search

We support the proposed flexible definition of diligent search, with factors to be considered rather than set rules or guidelines.

Our extensive experience attempting to track rights holders for materials in our collections demonstrates that what can be considered 'diligent' varies greatly depending on the age of the material, its nature, and the amount of information available about it. For some material (e.g. common ephemera such as pamphlets and menus) a simple search of the material for identifying information and a search of our own records for provenance may be the only steps available.

For others, we may consult a wide variety of resources, such as the electoral role, ancestry databases, the White Pages, or published obituaries. The NSLA takedown statement<sup>1</sup> is applied by all NSLA member libraries. As well as further mitigating risk, it provides an avenue for rights holders to express their support of material remaining available online, particularly when they may not have otherwise known it was included in a library collection.

We also provide cautious support for the current factors being proposed for consideration in deciding if a search was sufficiently diligent. In particular, we applaud the inclusion of the following factors:

- The nature of the material. This will be valuable in supporting digitisation of the large portion of our collections, and even larger portion of our orphan works, that were never intended for commercial use such as personal and organisational archives, and personal photograph collections.
- How the search was conducted. We note the mention of multiple channels of research and support this, but caution that this should only be where multiple channels are available. This is not the case for many materials, such as ephemera about which little or nothing is known about the author, or for older collections where the creator had a common name. A compulsory requirement to consult multiple channels would be difficult for institutions, but it would be particularly detrimental for our users, who often do not have the expertise or resources available to us as libraries.
- Relevant industry codes. As mentioned, NSLA already has existing guidelines around diligent search, and these should be able to be maintained and further developed as part of the implementation of the new scheme.

We do have concerns about the potential impacts of the proposal to explicitly refer to databases and registers. It is important that consulting such tools should not be made compulsory, to avoid the significant dampening effect that compulsory reference to industry databases has had for orphan work schemes in other jurisdictions. Further comments are provided below. We also support the ALACC/ADA's comments on this issue.

### Clarifying statements

We appreciate the inclusion of guidance in the consultation paper clarifying the intended interpretation of several aspects of the scheme. In particular, we welcome explicit statements that:

- shorter investigations based on the outcome of a representative sample of the works may satisfy the requirements of diligent search (p.12). Sampling is an essential part of the rights management strategy for many of the mass digitisation projects which have been so successful for Australia's libraries and archives over the last decade.

<sup>1</sup> <https://www.nsla.org.au/resources/position-statement-takedown>



- an absence of response can, in some circumstances, be sufficient evidence to consider a work orphaned (p.12). The NSLA experience is that “abandoned works” are extremely common - that is works for which a likely rights holder has been identified but for which multiple requests have been unable to elicit a response. For some types of material this is almost as common as works for which an author cannot be identified. For example, older materials owned by large international organisations such as the UN, or materials owned by large content aggregators that are no longer commercially viable.
- it is possible to rely on a prior search by another person to satisfy the scheme (p.12). This will help significantly where a library receives repeat requests for the same materials, as it will allow us to record when a work is identified as orphaned and avoid the resourcing required for repeat diligent searches. It will also allow our clients to rely on our search efforts, which is particularly important when a researcher or creator is working closely with an institution.
- compensation cannot be sought under the scheme for past use of the work (p.10). This is a particular concern for libraries, as we have large collections of orphaned materials already digitised and made available online under s200AB, and plan to upload many more materials over the coming years. We would be concerned if compensation could be sought retrospectively for these materials.

We strongly support the inclusion of similar clarifying statements on each of these matters in the Explanatory Memorandum of the Bill, to ensure the scheme is implemented as intended going forward.

## Schedule 2: New fair dealing exception for non-commercial quotation

NSLA supports the introduction of an exception to allow quotation of copyright material for research and other purposes. This amendment will provide benefits for our members, other libraries and archives, publishers, and the researchers we support.

We support this amendment as a solution to the long running problems associated with publication of research in Australia and the lack of a clear exception to allow inclusion of quotations in research publications. The exception will provide solutions for online publication of PhD theses and other research materials in institutional collections, currently regarded as high risk due to the third-party materials they contain. It will be of great use to our education programs, as well as to staff and clients wishing to present their research in professional conferences.

We support the description of researcher included in the consultation paper, and particularly the direct mention of private researchers such as family historians. Much valuable research is undertaken by people working in their personal capacity, and it would be a pity if this could not be shared with the public through publication.

We are, however, disappointed that the exception does not extend to a broader quotation right that applies to all members of the public, so library materials could be used more effectively by the full Australian community. A simple quotation right would go a long way towards aligning Australian copyright law with the reasonable expectations of the public and would provide benefits in promoting creativity, free speech and the ordinary discourse of a democratic society. See further comments below. We also support ALACC/ADA's comments on this.

## Schedule 3: Update and clarify library and archives exceptions

NSLA strongly supports the proposed updates to the remaining library and archive exceptions. They build on the 2017 amendments to continue modernising the Copyright Act, and will significantly reduce the administrative burden of our daily work supplying material to our clients and other libraries.

As the recent Covid-related lockdowns demonstrated, it is essential that libraries can take advantage of the latest secure technologies to share material with clients who are remote to our facilities. This is particularly important for NSLA libraries due to the historical and unique nature of our collections. These amendments will allow us to meet community expectations that collections will be equally available to all Australians, including those in regional and remote areas, even in times when physical access to libraries is restricted.

### Private and domestic use

Our members particularly support the extension of the existing document delivery exceptions to allow libraries to supply material to clients for 'private and domestic use'. We receive numerous requests each year to access material for purposes that would cause no harm to the rightsholder but which do not clearly qualify under the existing 'research and study' exception. This may include, for example, the supply of recipes and sheet music for personal use, or the provision of articles for display at a funeral. This amendment will reduce uncertainty as to the power of libraries to supply material in such innocuous circumstances, and align the Act more closely with the reasonable expectations of the public.

### Remote online access

NSLA libraries are enthusiastic about the possibilities of the proposed s113KC, which will enable us to better replicate the access we have in the print world in a digital form.

As with current services, we understand that this new exception is not intended to compete with commercial offerings available to the public, and that it is intended for those parts of our collections which are historical, no longer commercially viable, or otherwise difficult to access. The amendments will allow us to explore options for digital supply of such material, such as through virtual reading rooms, which will offer those in remote and regional areas a similar experience of accessing our collections to those who are able to physically visit our facilities.

Finally, we appreciate the time taken in the consultation paper to flesh out the concept of commercial availability in the context of these amendments. We particularly welcome statements regarding how it may apply to materials which are not available for license to libraries or which may only be available at unreasonable cost or on unreasonable terms. We would like to see this clarification that unfair licensing practices equate to lack of commercial availability carried over to the Explanatory Memorandum.

### Contractual override

We welcome the proposed amendment to section 47H to clarify the outcome when contracts and exceptions conflict. We understand that this new language will confirm that the standard rule of legal interpretation does continue to apply under copyright law - that is, that the legislative provision (in this case, the exception) should take precedence over any conflicting contractual clause, and that any contractual clause should be read-down to allow the operation of an exception.

A recent, collective example of licensing practices as a barrier to the public interest is the provision of access to Australian Standards. This vital public resource – 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. Hardcopy editions deposited to the National Library of Australia in Canberra and the State Library of New South Wales in Sydney under legal deposit legislation are the only copies available through Australian libraries. The importance of community-wide access to Australian Standards, particularly those written into legislation, cannot be overstated.

#### ***Example of licensing practices as a barrier to better access to important content***

The State Library of Western Australia was recently approached by a State Government agency to assist them in making access available to the 139 electricity and gas Australian Standards that are prescribed in Western Australian legislation. Wide access to these Standards is essential for both electricity and gas workers and members of the public.

Because of restrictive contract arrangements, the only way for the State Library to make access available equitably is to purchase two copies of each of the relevant Standards; one as a reference copy for in person State Library users and one as a loan copy that is available via inter library loan. The reference copy also



facilitates copying of portions of a document under provisions of the *Copyright Act 1968*. The estimated cost of the printed documents is \$53,000. This does not include the cost of adding the copies to the library's collection (estimated \$5,000) and circulating them to members of the public.

### Discretion not to supply

Our members also appreciate the explicit acknowledgement in the consultation paper (p.25) that libraries and archives will continue to have discretion to refuse to supply material if they believe it is not reasonable to do so. This is an important recognition of the fact that, while cultural institutions aim to provide maximum access to collections, there are many circumstances in which supply of collection material may be inappropriate, due to issues such as cultural sensitivity, defamatory content, privacy, or donor restrictions.

We encourage the government to carry this note over to the Explanatory Memorandum for the final Act to provide clarity and comfort for those organisations within the sector that are not conventional lending institutions or that do not lend parts of their collections, such as galleries and archives. Such organisations may not have the resources or staffing to provide lending services.

## Proposed changes to avoid negative impacts

Below we provide answers to the specific questions in the consultation paper, and recommend changes to further refine the proposed amendments to avoid negative impacts for libraries and public access.

### Quotation: Unpublished material

**Question 2.1:** *Should the proposed new quotation fair dealing exception in section 113FA extend to the quotation of unpublished material or categories of unpublished material?*

The exclusion of unpublished material from the new fair dealing exception for non-commercial quotation (Schedule 2), as set out in the draft, would be detrimental for libraries and researchers almost to the point of making the amendment redundant.

Unpublished material makes up a very significant proportion of our collections. A characteristic of unpublished material is that it is both the material most likely to be quoted from by researchers, being less well known, and the material for which it is most difficult to locate a copyright owner. Restricting the quotation exception to copyright material that has been 'made public' with the copyright owner's permission will exclude large swathes of our most unique heritage material.

Copyright amendments in 2017 (enacted in 2019) removed the distinction between published and unpublished materials in relation to copyright terms and library and archive exceptions, and we see no sense in re-introducing that distinction here.

### Reasonable steps

**Question 3.1:** *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?*

NSLA libraries have very effective measures in place to ensure that a diligent search for copyright owners is undertaken where ownership is not clear. We would recommend against regulations that stipulate further and specific measures such as cross-checking databases and collecting societies as part of this process. The reasons for this are outlined in more detail in the ALACC/ADA submission.

Our members support the inclusion of a requirement to take reasonable steps to prevent copyright infringement when material is supplied to members of the public. Similar restrictions apply when we make material available to

our clients under the current library and archive exceptions and we agree that they operate effectively, finding an appropriate balance between the rights of the public to access material and the commercial interests of rights holders. As far as we are aware, there is no evidence of library-supplied materials being used in an infringing manner.

We also agree that the kinds of 'reasonable steps' listed in the discussion paper may be appropriate, depending on the circumstances of the material, the institution and the user.

Our main comment in response to this question is that it is important that these steps be kept flexible, and not prescribed by regulation. This is essential to maintain the government's central policy of modernising current copyright law and creating technology-neutral legislation that is flexible to adapt to new technologies. It is also essential for exceptions aimed at a sector that spans many different institutions with different capabilities and resources – from large national institutions to small local libraries – and seeks to delivery services to the entire diverse Australian population.

Our libraries take seriously the responsibility to inform users of the rules of copyright for material held in our collections, but a number of statutory provisions have been put in place specifically to limit our liability for client actions. We are not resourced or required to enforce compliance with copyright law by library users. It would be extremely concerning if the new provisions were to have the unintended consequence of imposing liability on libraries to control the actions of our users.

A healthy environment supporting creators and publishers is essential to our work in collecting the publications that document Australian history and culture. We have a good relationship that supports efficient processes for capturing the bulk of Australian published material through the National eDeposit service (NED) and collaborative web archiving. Our members have a close working relationship with publishers as joint stakeholders in NED, and we look forward to continuing this collaborative approach in the implementation of these provisions.

#### ***Example of reasonable steps***

NSLA member libraries have contributed staff time and expertise to develop carefully considered position statements, standards and guidelines for reasonable search for orphan works, and most recently, for access to legacy oral history collections. Statements and guidelines are made public on the NSLA website. See for example:  
<https://www.nsla.org.au/publication/position-statement-reasonable-search-orphan-works>

### Illustrations

**Question 3.2:** *Does proposed new section 113KK, which replaces and simplifies current section 53 but is not intended to make any substantive changes to that section, adequately cover all of the matters set out in current section 53 or are there some potential gaps in coverage?*

The proposed new section 113KK adequately covers requirements for libraries in providing access to illustrations accompanying a literary, dramatic or musical work, article or thesis. This will allow for the release of collections with visual content that may otherwise have been limited to onsite access only.

### Part B: Technical Protection Measures (TPM)

As part of the review of TPM exemptions (Part B), we would want to ensure that the TPM exemptions for the current library and archive exceptions are carried over to the new updated exceptions (i.e. Sections 113KB-KL). This should allow libraries to break TPMs for the purposes of supply as well as for preservation.



We note that this is particularly important with the extension of the document delivery exception to materials that are commonly protected by TPMs, such as audiovisual works. We also note that these exceptions are already designed to target rare and unavailable materials, and contain protections for the interests of rights holders where the material remains commercially available. As such, additional protections in the form of technological locks are unnecessary.

In addition, we would advocate for an expansion of the TPM exemptions to s200AB of the Copyright Act. This would align the rights of libraries with those of schools, who are already able to circumvent TPMs for the purpose of s200AB. It will also ensure that libraries are fully empowered to run the innovative programs necessary to conserve and render complex born digital artefacts widely accessible.

Without TPM exemptions for all library uses, we risk losing valuable cultural and historical materials due to technological obsolescence. As a principle, TPM measures should not override exceptions for libraries under copyright law.

***Example of need for TPM exemptions for s200AB uses***

NSLA is a partner in an ARC LIEF project led by Swinburne University with a group of Australian universities and collecting institutions, beginning in 2022. The project will introduce *Emulation as a Service Infrastructure (EaaSI)* to Australia, allowing partner institutions to provide access to legacy digital collections by emulating the operating systems in which they were created. This project has the potential to open access to Australian web archives, AV and gaming materials that were previously completely inaccessible.

## Recommendations

Based on the exposure draft, recommendations from NSLA libraries are as follows.

1. The quotation exception should be extended to include unpublished material.
2. The 'reasonable steps' to ascertain copyright ownership should remain broadly defined without specific requirements to consult databases or other stipulated sources.
3. The clarifying statements around the application of the new exceptions should be carried over to the Explanatory Memorandum for the Act, particularly with respect to the practical applications of diligent search and commercial availability
4. The current TPM exemptions should be carried over to the new updated library and archive exceptions; and the TPM exemptions should be expanded to the library and archive provisions of s200AB of the Copyright Act.

Finally, we note that it is important that the final iteration of the legislation is set out as clearly and simply as possible to ensure usability by smaller libraries, collecting institutions and members of the public.

Thank you for the opportunity to comment on the exposure draft, and to offer our support for these very important amendments to current legislation.



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