

APA Talking Points for Publisher Responses to the exposure draft of the Copyright Amendment (Access Reforms) Bill 2021

1. Observations on the business of publishing and the role of copyright within it (*Please personalise to reflect the realities of your business*)

- Publishers – the oldest and arguably still the most fundamental of the creative industries – take risks to contract, develop and publish manuscripts in a host of forms, including print, ebooks, audio books, and digital serials.
- Publishing in Australia turns over \$2 billion a year, employs 4000 people directly and approximately another 30,000 people indirectly, as authors, editors, agents, distributors, booksellers, and librarians. Australian publishers bring forth around 7,000 new titles per year. They serve general readers, thinkers of all sorts, children, school and university students, and researchers. Collectively, publishers produce and transmit the Australian cultural estate.
- Copyright underpins everything that publishers do. The publishing industry was only established at scale with the arrival of copyright in the early 18th century.
- Copyright enables publishers to risk capital to engage authors, designers, photographers, editors, and others in a speculation that a book (or other published object) will find a reader and serve a variety of possible ends: entertainment, cultural enlightenment, education, research, or public debate.
- Publishers are in the business of providing access to copyright material, and the thrust of copyright law from its inception to the present has been about placing decisions in relation to how, when and where material should be published in the hands of the copyright owner (and, from them, with publishers).
- These commercial decisions are made in a context of ensuring that access – which too is important – does not undermine or cannibalise the viability of either the publisher or the creators they support.
- The copyright system underpins the business of publishers: it is copyright which ensures that the implicit rights of creators and publishers are acknowledged. And likewise, it is copyright that ensures that a published object can be commodified and sold—and then used and enjoyed. Without copyright many kinds of cultural, educational, media, and aesthetic goods would not or could not be produced.
- It is vital that the Australian government acts in ways to stimulate the contribution of the creative industries to the economy, education, our increasingly diverse culture, and scientific advancement.
- Publishers understand the demands for access; however, the creative industries should not have to forgo reasonable payment for – or the right to control the use of– the works they have created.

2. General notes on the current drafting

- Publishers are concerned that the Department has not produced a draft that is consistent with the aims of the reforms as announced by the Minister. While we note the Minister’s statements in support of the creative industries and in support of copyright, the publishing industry is concerned about the unintentional effects of some of the drafting—and likewise we are concerned about a lack of clarity in the explanatory notes.
- Publishers are concerned that the draft represents a continuing drift in copyright law towards greater user “rights” at the expense of (and subsidised by) authors/creators and publishers. The language in the discussion paper describes current copyright law as “outdated”. The proposed new exceptions suggest the drafters have taken a pro-user position where additional access should be provided forgoing entirely appropriate costs to users or to the government. Some of the provisions for libraries and archives would undermine commercial decisions by copyright holders about how their material might be used.
- Publishers are concerned at the extent of the exceptions as drafted. Exceptions should be just that. We are concerned that some of the drafting would result in carve-outs of unprecedented uses of copyright material, particularly 1) unpriced-use of copyright materials and ii) exceptions which undermine publishers’ ability to control materials over which they have rights.
- Our legal advisors are concerned that the exceptions exceed what is permitted under the international treaties and conventions to which Australia is a party, as well as free trade agreements, such as the recent FTA with the UK, which impose specific obligations on Australia to continue to abide by such treaties.

3. Impact of the drafting

- A fundamental consequence of the proposed drafting would be a widening of exceptions to copyright to facilitate new forms of access for libraries and educators: but widening and enabling access should not be confused with free access. Reducing payments to creative industries does not increase access; instead, it will eventually suppress the extent and diversity of material that is available in the market.
- Likewise, access should not be confused with giving libraries the ability to assume a new right to produce their own versions of previously published material at the cost to publishers’ and creators’ commercially exploitable rights.
- Publishers are concerned the current drafting would result in changes far broader than announced by the Minister: copyright law exceptions should not be an attempt to reduce the cost of governmental or institutional access to copyrighted materials. The current fees charged to the Government under the statutory licence are modest. Yet, the cuts in payments – that would result from the way the Department has drafted the Exposure Draft – would likely have a substantial impact on publishers and

the creative industries, which already face precarious revenue flows.

- Copyright legislation should be used to create the legal framework for copyright owners to develop new markets for new goods. We are concerned that draft will undermine existing markets and gift access of copyrighted materials to users or intermediaries who undertake none of the risks publishers undertake when publishing material.

4. Orphan works

- Publishers, particularly educational publishers, are concerned that the current drafting removes orphan works from the scope of the statutory licences. The aim of the amendments – according to the Minister’s statement – is to increase access, but the potential removal of orphan works from the statutory licence does nothing to increase access.
- Rather, the current drafting would replace a thorough and expert search by the relevant collecting society for the copyright owners with a much more haphazard attempt by people ill-equipped and untrained in the task. We do not expect that it is in anyone’s interest that teachers spend their time trying to identify the copyright holders of apparently orphan works. We believe that orphan works, and apparently orphaned works, should remain under the statutory education and government licences.

5. Quotations

- Publishers (and other copyright owners) believe the current fair dealing provisions in relation to quotations are sufficient. Publishers have practical, workable arrangements in place for managing quotations in publications.
- In particular, educational institutions and government--to the extent they are able to rely on statutory licences – have no access problems, and so the drafting of any broader “non-commercial quotation” provision should expressly limit the exception to situations not covered by a statutory licence.
- We are concerned that the first example in the discussion paper – ‘Excerpts of collection material to support screen producers and other researchers’ – suggests that the proposed exception for quotation would mean libraries could supply an ‘excerpt’ from material in the collection for other than research, study or private use. Instead, publishers argue that people wanting copies of material for uses other than these should look to acquire the material either by buying a copy or by seeking a licence.
- Publishers are also concerned that some of the non-commercial uses – including research and study – are fundamental to the business models of scholarly and educational publishers who sell published goods into research and student markets.

6. Library and Archives exceptions

- Publishers have a number of concerns about the drafting of the library and archives exceptions:
 1. First, publishers are worried that drafting expands the definition of libraries beyond publicly funded, public-facing collections to include entities in the education, government, and the private sectors (both for profit and not for profit).
 2. Second, publishers are concerned about the impact of the current drafting of 113KC, which in its current form would allow owners of collections (that is libraries and archives of all sorts) to publish material on the internet, including
 - a. material ‘acquired in electronic form’. (There is concern that the current national electronic provisions that the NLA and state libraries have in place for legal deposit may provide unintended back-door access to material which is held as part of the national literary estate.
 - b. material ‘acquired in hardcopy form’ and digitised
 - c. preservation copies
 - d. orphan works
 - e. In the view of publishers, the obligation on a library to take “reasonable steps” to avoid down-stream infringements is inadequate and not likely to provide any real safeguard to our interests being undermined.
 3. Third, in particular, publishers are concerned about libraries appropriating the right to produce electronic versions/editions of materials of already published print and electronic materials (see 113KC). Publishers often make decisions about format and availability for cultural or commercial reasons or both:
 - Libraries would, under the proposed drafting, be gifted a right which would see them act as publisher—in competition with the actual publisher but without the burden of the infrastructure costs (including paying creators such as authors, photographers and designers) borne by publishers.
 - The proposed drafting of the new library exceptions would also conflict with the licensing activities of copyright holders with the potential also to spoil publishers’ commercial markets.
 - The recent example of the international opprobrium heaped on the National Library of New Zealand (for its plans to scan and make available online for free works it holds in its physical collections) should serve as a caution to the Australian government against the exceptions as drafted.

7. Education Exceptions

- Publishers understand that the Minister’s intention is to enable on-line learning as an everyday part of Australian teaching and learning. But while the Minister's intention is minor technical changes, the drafting is unintentionally broad.
- Publishers are concerned that the education exceptions have been drafted in a distorted reaction to COVID that does not acknowledge the practicality and appropriateness of the current arrangements under the statutory licence. Publishers individually, as a group, and in concert with their collecting agencies have shown tremendous ingenuity and flexibility in serving the needs of schools, teachers and students. [PLEASE ADD AN EXAMPLE OR TWO FROM YOUR FIRM]
- At the same time the government needs to understand that payments from the educational statutory licence support our businesses. No arguments have been presented for the proposed changes.
- Australia is the beneficiary of the world’s best statutory licence scheme, which facilitates access to high quality learning materials at a very modest cost in the education sector. This scheme is able to be reworked easily to meet changing needs—in a way that can never be true of legislative reform.
- Educational institutions already have access to copyright material both under statutory licence and licences from publishers, and publishers are concerned that the breadth of the proposed drafting for the education exceptions (as detailed in S113MA) grants educators access to materials without appropriate remuneration to rights-holders, and far beyond the stated intention announced by the Minister of minor technical amendments.
- The new exceptions deny rights-holders the ordinary opportunity to earn revenues from the commercial exploitation of their works. This exploitation of value is an ordinary thing that publishers do and is at the centre of our business models. It is reasonable that educators pay for access to and use of copyrighted materials in teaching and learning.
- Government should be looking to include any extensions of the use of learning materials – including allowing the digital representation of print-based materials – under the statutory licence rather than seeking to legislate carve-outs of educational material.

8. Concluding remarks

- Publishers welcome government attention to copyright legislation to encourage the best use of the works we (and our authors and illustrators) create. But the value of those materials should be respected and remunerated. The purpose of copyright is to respect creators’ rights to control the uses of their work and to ensure appropriate remuneration. The nation is best served by such an approach.