Submission in response to the Copyright Enforcement Review 2022–2023

Submission by the Australian Digital Alliance and the Australian Libraries and Archives Copyright Coalition

Submitted Tuesday 7 March 2023

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Introduction

The Australian Digital Alliance (ADA) and the Australian Libraries and Archives Copyright Coalition (ALACC) welcome the opportunity to make a submission in response to the Attorney-General's Copyright Enforcement Review issues paper. We welcome this scheduled review of copyright enforcement mechanisms, especially given the fast changing digital landscape which dominates how copyright materials are created, marketed, distributed, delivered and consumed. The ADA and ALACC support a balanced copyright system that recognises the importance of authors, creators and distributors, as well as the public benefits that derive from access to and use of copyright materials by users. Enforcement mechanisms need to respect the importance of balanced copyright, incentivising the creation, distribution and use of copyright material. Changes to the enforcement regime must carefully consider potential consequences, including unintended ones.

The context for copyright enforcement is also important to consider. This has changed significantly since the passing of the Copyright Amendment (Online Infringement) Act 2015 (the 2015 Amendment Act).

While there are a number of exceptions for libraries and archives, the majority have not yet been updated for the modern world. This means that these organisations are still often forced to operate in legal grey areas, regularly working within a risk management approach when managing material, for example, when digitising Australian historical materials. This is an acute challenge for smaller organisations which have limited access to expert copyright advice. Updating and simplifying the library and archive exceptions would enable equitable, innovative and resilient online access to the nation's cultural collections. The introduction of a quotation exception would allow authors to quote from these collections without fear of being prosecuted for infringement. We support the submissions and comments from our member organisations including National and State Libraries Australia (NSLA), the Australian Libraries and Information Association (ALIA), Universities Australia (UA) and the Council of Australian University Librarians (CAUL) in relation to these matters.

Libraries and archives pay millions of dollars a year to provide legal access to materials and take this responsibility seriously. Institutions spend significant amounts of money and resources on systems to ensure appropriate access through identity control measures. When Australians have legal access to content – through subscriptions paid for by their public school, TAFE, university or other library – the temptation to resort to piracy is greatly reduced.

We also note that market-driven licensing arrangements, especially in relation to the distribution of digital content, have evolved in response to the ways Australians consume copyright-protected material now. The consumption of content in new ways has been further accelerated by the COVID-19 pandemic and the need for consumers in lockdown to access material online. As we will outline further, in our opinion, a discussion of enforcement must also take into account the role of licensing, especially to the extent that licences purport to override the *Copyright Act*.

When looking to ensure that authors receive income sometimes non-copyright schemes can play an essential role. Direct funding to Australian authors and publishers through the public and educational lending right schemes helps to make a more equitable landscape and ensures that money ends up in creators' pockets. We support the extension of the schemes to include e-books and audiobooks as detailed in the National Cultural Policy — *Revive: a place for every story, a story for every place*.[1]

It is also important to note that non-copyright rights and benefits are extremely important. There is a growing recognition of the importance of Indigenous Cultural Intellectual Property (ICIP), for example, with investment from libraries and archives to work with First Nations experts to develop ICIP protocols and working with Communities to identify and respect cultural materials. The ADA and ALACC note our ongoing support for the Government's work to protect ICIP through stand-alone legislation.[2]

Finally, when considering enforcement provisions, it is also worth noting that a large volume of content is published for reasons other than commercial ones. To illustrate, more than half of the 90,000 publications included in Australia's National eDeposit (NED) collection have been made available by copyright owners for immediate online access.

Both the ADA and the ALACC support, and participated in, the ministerial roundtable discussions initiated by the Attorney-General, The Hon Minister Dreyfus MP KC, and we welcome further opportunities to be involved in discussions to ensure the copyright system is fit-for-purpose, for now and into the future. Should the Department require additional information, the ADA and the ALACC welcome the opportunity to make further comments. Our principal contact with respect to this submission is our Executive Officer, Sarah Powell, who can be reached at sarah@digital.org.au or on 02 6262 1118.

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1 See Commonwealth of Australia, 2023, *Revive: a place for every story, a story for every place – Australia's cultural policy for the next five years*, Canberra, p 58, https://www.arts.gov.au/culturalpolicy.

2 See for example, IP Australia, 2021, Interim Report: Scoping Study on stand-alone legislation to protect and commercialise Indigenous Knowledge, Canberra, https://consultation.ipaustralia.gov.au/policy/stand-alone-legislation-for-indigenous-knowledge/user_uploads/ik-scoping-study-interim-reportoct.pdf. See also Productivity Commission, Aboriginal and Torres Strait Islander visual arts and crafts, Study Report, Canberra, https://www.pc.gov.au/inquiries/completed/indigenous-arts/report/indigenous-arts.pdf, and Commonwealth of Australia, 2023, Revive, p 32.

About the Australian Digital Alliance

The Australian Digital Alliance (ADA) provides a voice for the public interest in access to knowledge, information and culture in copyright reform debates. We are a broad nonprofit coalition of public and private sector groups formed to provide an effective voice for a public interest perspective in copyright policy. The ADA was founded following a meeting of interested parties in Canberra in July 1998, with our first patron being retired Chief Justice Sir Anthony Mason AC KBE QC. More than 20 years later, the ADA continues to be a respected and active participant in the Australian copyright reform debates, regarded for its depth of copyright expertise and advocacy efforts on behalf of a diverse membership.

ADA members span various sectors, and include universities, schools, disability groups, libraries, archives, galleries, museums, research organisations, technology companies and individuals. The ADA unites those who seek copyright laws that both provide reasonable incentives for creators and support the wider public interest in the advancement of learning, innovation and culture.

Committed to copyright reform that enables fair access to content and encourages innovation and growth, the ADA provides policy advice to government and its members, supports research and publications on new copyright law and policy, monitors international trade and IP developments, and facilitates forums to discuss topical copyright issues and progressive reform.

More information about the ADA is available at digital.org.au/about.

About the Australian Libraries and Archives Copyright Coalition

The Australian Libraries and Archives Copyright Coalition (ALACC) (formerly the Australian Libraries Copyright Committee (ALCC)) is the main consultative body and policy forum for the discussion of copyright issues affecting Australian libraries and archives. The ALACC has ten organisational members, each of whom nominates a representative to provide advice and reflect the concerns of their members. The organisational members are:

- Australian Library and Information Association (ALIA)
- Australian Society of Archivists (ASA)
- National and State Libraries Australasia (NSLA)
- Council of Australasian Archives and Records Authorities (CAARA)
- Council of Australian University Librarians (CAUL)
- National Archives of Australia (NAA)
- Australian School Library Association (ASLA)
- NSW Public Library Association (NSWPLA)
- Australian Government Libraries Information Network (AGLIN)
- Australian Law Librarians Association (ALLA)

The ALACC offers informed contributions to domestic and international copyright law and policy discussions and organises copyright education, including training and online information resources targeted at the library and archives sectors.

The ALACC and its members support a copyright framework that appropriately protects the interests of right holders while ensuring access to important cultural, educational and historic content for the public's benefit.

More information about the ALACC is available at alacc.org.au/about.

Copyright licensing

Australians have access to digital content on a greater scale than ever before. Copyright licences are the most common mechanism for facilitating access to digital content, with commercial licensing arrangements increasingly interacting with the enforcement regime. Commercial licences typically outline the nature of the arrangement, including how disputes are to be handled, and when other enforcement mechanisms such as alternative dispute resolution (ADR) or court proceedings can be activated. Given the potentially prohibitive costs of court proceedings, we support out of court options such as ADR as an important alternative.

However, as these commercial licensing practices evolve, it is important that matters such as imbalances in the bargaining power between the negotiating parties are considered. An example of this is the position of libraries that provide access to digital content through expensive and restrictive licence agreements provided by international commercial publishers. These licences are complex, and often include both publishers and platforms. A lack of transparency can mean that authors whose books are being licenced are not able to clearly see their returns from library licensing. As such, we recommend that any discussion of enforcement must also consider licensing and striking the right balance between parties, including through measures such as greater transparency. We feel that other industry-driven mechanisms can work in tandem with licensing. These are discussed below.

We also believe that copyright law should prevail over contracts which purport to exclude provisions set out in legislation. Contracts should be unenforceable to the extent that they are inconsistent with copyright exceptions. We believe that it is crucial that exceptions within the copyright law be preserved as a set of democratically-accountable minimum standards governing access to, and the use of, copyright material.

Industry-driven mechanisms

We note that industry-driven mechanisms are largely working effectively. In particular 'notice and takedown' procedures have been widely adopted as a standard practice. An example of this from the library sector is the National and State Libraries Australasia (NSLA) position statement on takedown.[3] NSLA reported 72 takedown requests from 2017–2022 recorded from nine national, state and territory libraries of Australia. Of these 72 requests, four were filed for copyright reasons, and only one met the criteria for copyright infringement and was therefore taken down.[4]

[3] National and State Libraries Australasia, 2022, NSLA Takedown: Position Statement and Procedure, https://www.nsla.org.au/index.php/resources/position-statement-takedown.

[4] See the submission to this review by National and State Libraries Australasia.

We also note that major platforms have demonstrated their willingness to cooperate and be proactive in relation to monitoring for copyright infringement. Google's Content ID and Meta's Rights Manager on Facebook are two prominent examples.

For the enforcement regime to be most effective, we believe it requires both industry and statute-based mechanisms working in tandem.

Statute-based mechanisms

We believe that statute-based mechanisms are largely working in the way intended for enforcement. However, without certainty for common activities undertaken by libraries and archives – such as the use of orphan materials and quotations – uses that have an immaterial commercial impact may nonetheless be technical breaches of copyright. In the absence of legislative reform, cultural institutions are left in legal grey areas and must rely on risk management processes to handle these kinds of uses. There is a significant public benefit derived from these kinds of uses and, as demonstrated by the take-down figures mentioned above, these uses have not led to a high volume of copyright holders identifying infringement and requesting materials be removed.

When considering penalties, it's important to note that if penalties were to increase without improvement to limitations and exceptions for libraries and archives, then these institutions would have to consider severely restricting, or altogether abandoning digitisation projects, due to the increase of administrative and compliance overheads and increased legal risk – to the detriment of the Australian public.

Galleries, libraries, archives and museums (GLAM) are good actors in this space and tend to be risk averse, especially smaller institutions or volunteer-run organisations who may not have internal copyright expertise.

In addition to these general comments on the statute-based mechanisms, the ADA and the ALACC make further comments on the following specific mechanisms:

- Website blocking;
- Authorisation liability;
- Safe harbour;
- Criminal penalties; and
- Court proceedings and the proposed idea of a 'copyright small claims' process.

Website blocking

The 2015 Amendment Act introduced into the *Copyright Act* a mechanism through which a copyright owner can apply to the Federal Court of Australia for an injunction against an Internet Service Provider (ISP) to take reasonable steps to block access to an online location outside Australia that has the 'primary purpose' of infringing, or facilitating the infringement of, copyright. Further amendments in 2018[5] extended the scope of the website blocking provision to websites outside of Australia with the 'primary purpose or effect' of infringing, or facilitating the infringement, while also reducing judicial oversight and increasing available remedies. At the time, the ADA was concerned that the amendments were pushed through without proper discussion, justification, or the support of the majority of stakeholders, and that the extension of the scheme removed public interest protections and increased the risk of overreach and abuse of the scheme.[6] These risks remain. Given the already broad scope of the website blocking scheme, we do not believe the scheme needs further amendment.

Authorisation liability

In the same vein as website blocking, we believe the current scope of authorisation liability is sufficiently robust, and does not need to be changed. There is a very real risk that any extension of authorisation liability will have little practical effect, while adding to the complexity of the copyright system and upping compliance costs.

Safe harbour

The introduction of the *Copyright Amendment (Service Providers) Act 2018*[7] extended the definition of an ISP to include cultural, educational and disability groups where they provide certain services to the public. Cultural and educational institutions in particular welcomed this extension as it provides certainty in the provisions of online services that include content uploaded by third parties. We support the continued inclusion of cultural and educational institutions, as well as disability organisations, within the operation of the safe harbour scheme.

However, we note that Australia still has an incomplete safe harbour scheme as digital platforms remain excluded. Due to this, Australia continues to be an outlier compared to other markets including the USA,

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5 See *Copyright Amendment (Online Infringement) Act 2018*, https://www.legislation.gov.au/Details/C2018A00157.

6 See Australian Digital Alliance, 2018, Submission to the Parliamentary Inquiry on the Online Infringement Bill 2018, https://digital.org.au/resources/online-infringement-bill-parliamentary-inquiry-submission.

7 See *Copyright Amendment (Service Providers) Act 2018*, https://www.legislation.gov.au/Details/C2018A00071.

Canada, the UK, the EU, South Korea and Singapore. There is a large volume of user-submitted content on platforms. This is a trend that continues to grow. While major platforms have introduced robust copyright enforcement tools, they are operating without the certainty of a legislated safe harbour where appropriate conditions are met. The copyright safe harbours balance the rights of copyright owners, copyright users and service providers in a way that supports innovative creation of new offerings. Expanding the copyright safe harbour to all online service providers, consistent with international peer markets, would level the playing field for Australian platforms and provide legislative underpinning for existing notice and take-down schemes.

Criminal penalties

We support criminal penalties for 'worst case' offenders i.e., commercial dealings/commercial scale infringement, but, we again raise concerns around libraries and archives operating in legally grey areas. To illustrate, where socially beneficial projects such as large-scale digitisation of historic newspapers, magazines and journals – where there is no certainty about who owns rights in millions of individual articles, photographs and other content – may potentially represent commercial scale activity, we do not support an interpretation that sees these types of activities as being within the scope of the criminal penalties. These types of activities undertaken by libraries and archives need to be protected from remedies suited to large scale commercial infringement, even if they look similar in scope and reach. Updating the library and archive exceptions accordingly is the best way to ensure these public interest projects do not get caught up in the criminal penalties outlined in the Act.

Court proceedings and a 'copyright small claims' process

We support court proceedings in the current copyright system and support a review of the effectiveness and practicalities of the Copyright Tribunal process. However we are aware that court proceedings in Australia remain prohibitive to a large number of copyright owners, as well as to parties defending copyright infringement claims against them.

As such, we are open to the establishment of a copyright small claims process, however careful consideration of how such models are working in other jurisdictions must be taken, including the United States Copyright Claims Board (CCB) and the UK's Intellectual Property Enterprise Court (IPEC). We are aware that enforcement and monitoring of copyright is time-consuming and costly for copyright owners. A copyright small claims process could ensure greater accessibility for copyright owners with less resources to pursue infringement action. This in turn could act as a deterrent for lower level offending.

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