

# **Senate Select Committee on the Australian Government's response to the COVID-19 pandemic**

## **Submission from the Australian Libraries Copyright Committee May 2020**

The Australian Libraries Copyright Committee (ALCC) welcomes the opportunity to provide comments to the Senate Select Committee on the Australian Government's response to the COVID-19 pandemic.

The ALCC is the main consultative body and policy forum for the discussion of copyright issues affecting Australian libraries and archives. It is a cross-sectoral committee with members representing the following organisations:

- [Australian Library and Information Association \(ALIA\)](#)
- [National and State Libraries Australasia \(NSLA\)](#)
- [Council of Australian University Librarians \(CAUL\)](#)
- [National Library of Australia \(NLA\)](#)
- [Australian Government Libraries Information Network \(AGLIN\)](#)
- [National Archives of Australia \(NAA\)](#)
- [Australian Society of Archivists \(ASA\)](#)
- [Australian School Library Association \(ASLA\)](#)
- [NSW Public Library Association \(NSWPLA\)](#)

COVID-19 and the lockdown measures have had a significant impact on all sectors of Australian society, including libraries and archives. This submission deals particularly with the copyright related impacts on the library and archives sector, and calls on the government to progress long-overdue amendments to the *Copyright Act 1968* to improve the ability of these sectors to respond to emergencies of this nature in future.

## Executive Summary

- The mandatory closure of physical facilities has put particular stress on Australia’s libraries and archives. In a sector built on assumptions of physical access, demand for online services has skyrocketed during shutdown. Neither the sector nor legislators could possibly have anticipated that online access would so rapidly become the norm.
- This sudden move to online services has exposed the inadequacy of Australia’s current copyright system to deal with digital delivery of public assets.
- These problems have been understood for many years and catalogued by successive government reviews. However, insufficient priority has been given to them under “business as usual” conditions, as Australia has never before needed to face a “digital first” way of engaging with a range of activities and services.
- Flexible copyright exceptions available in other jurisdictions have enabled physical services to transition to digital quickly and seamlessly. This has, for example, enabled US universities to provide online access to large portions of their collections. However, Australia’s outdated laws mean that similar approaches are not available locally.
- Licensing solutions negotiated between cultural institutions and rights holders, such as the Virtual Storytime agreement,<sup>1</sup> have instead been relied on in Australia. All parties should be congratulated for the success of such initiatives.
- However, such agreements, though welcome, cover only a tiny part of Australia’s national collections and services.
- More fundamental systemic changes are required to enable our libraries and archives to provide truly effective and comprehensive digital support for education, business, social cohesion and communities.
- The government undertook to modernise the Copyright Act as part of its response to the Productivity Commission’s Inquiry into Australia’s Intellectual Property Arrangements,<sup>2</sup> and has an open consultation on the matter. It is essential that these modernisation amendments are introduced urgently, to ensure that our copyright system is capable of meeting the ongoing challenges of the global pandemic and public expectations in a post-COVID world.

### Recommendation

That the government act urgently to complete the Copyright Modernisation Consultation and introduce amendments to increase the flexibility and adaptability of the *Copyright Act 1968* within this term of Parliament.

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<sup>1</sup> *Book Industry Partners come to Agreement on Copyright* (19 March 2020, Books Create Australia)

<https://bookscreate.com.au/book-industry-partners-come-to-agreement-on-copyright/>

<sup>2</sup> *Intellectual Property Arrangements*, Productivity Commission Inquiry Report No.78 (23 September 2016)

<https://www.pc.gov.au/inquiries/completed/intellectual-property#report>

## COVID-19 impact on libraries

The closing of public institutions and the move to remote access was a radical change for Australia's libraries and archives. Our institutions and the systems that support them have been built around assumptions of physical access. Despite a move to improve digital access in recent years, cost and capacity has meant that only a small portion of our national collections have been digitised, in general less than 1%.<sup>3</sup> Thus the primary use of historic and lending collections in both public and research libraries is still in physical form.

Coronavirus created a huge shock to this system. With Australians no longer able to physically access their collections, it remained crucial that libraries and archives continued to provide their services. Indeed their role in supporting education, lifelong learning and social cohesion arguably became more important in a lockdown world, with many seeking to reskill or link to local community services as a result of the economic downturn. Libraries have seen a demonstrable rise in demand during lockdown, with the State Library of Western Australia, for example, seeing a more than 100 percent increase in monthly membership applications, and a 50 percent increase in online and phone enquiries. This increase was, unsurprisingly, greatest across online resources, as the below table demonstrates.

**Use of State Library of Western Australia Online Services to April 2020**

<b>Usage (State-wide)</b>	<b>January</b>	<b>February</b>	<b>March</b>	<b>April</b>
Borrowbox ebooks	84,752	79,303	94,970	115,077
RBDigital ebooks and emagazines	17,773	18,277	19,973	44,146
Overdrive ebooks	73,800	66,222	72,189	89,535
Kanopy film streaming	6,887	6,528	9,507	14,761
<b>Total</b>	<b>183,212</b>	<b>170,330</b>	<b>196,639</b>	<b>263,519</b>

Particularly profound was the effect on education, with both schools and universities scrambling to provide ongoing access to collections for students who were not only unable to come into the library but often had returned home to locations that had unreliable internet connections or, in the case of universities, were overseas.

Whilst the easing of lockdown has allowed some institutions to begin to return to face-to-face services, ongoing restrictions mean that we cannot return to "business as usual" and are unlikely to be able to do so for some time. The change in demand for digital services is almost

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<sup>3</sup> A survey of our members has returned digitisation rates of between 0.003 percent and 12 percent, depending on the collection and the calculation method. Even universities, whose current titles are often available through digital subscriptions, report that less than 0.1 percent of existing collections have been digitised.

certain to continue in a post-COVID world. In the case of education, it looks like schools and universities will need to cater for both remote and 'at school' learning for some time, perhaps forever. The lockdown has highlighted the potential for digital to enhance our existing services, and has created a desire in the community and the sector to better explore the potential of online delivery.

## Copyright and the digital environment

Restrictive copyright, however, challenges the ability of libraries and archives to optimise online offerings. In some cases, activities that are perfectly lawful with hard copy materials (such as loaning books) can become infringing if the same activity is done using digital technologies. This is because every digital use, right down to viewing a document on a screen, requires material to be copied. However, the default setting of Australia's copyright law is that permission is required for all copying; any time copyright materials are reproduced or shared electronically permission must be obtained from the copyright owner, unless the Copyright Act provides an exception that directly permits the use. These exceptions are often very specific - for example, the Copyright Act permits the copying of video tapes onto a computer for personal use, but not DVDs.<sup>4</sup>

Copyright poses less of a challenge to digital services in countries that have flexible exceptions built into their copyright systems - for example, fair use in countries like the US, Singapore, South Korea and Israel. In these countries copyright is able to adapt as uses and situations change without the need for legislative intervention. Permissions are not required for new uses as long as the use is still fundamentally fair, that is it either does not harm copyright owners or the harm to copyright owners is balanced by the benefits to society. When services from the offline world - such as children's storytime - moved online as part of the COVID-19 response, the libraries and archives in these countries were able to feel confident that the activity would remain "fair" (and hence legal) in the new circumstances.<sup>5</sup>

The narrower exceptions relied on by Australia's copyright system, however, do not adapt so easily, and often require legislative updates to deal with new uses and technologies - updates which are often slow or low priority. This is why it remained illegal to use a VCR in Australia until 2006,<sup>6</sup> and it is still illegal to film your child's dance performance, even for personal use.<sup>7</sup>

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<sup>4</sup> See Section s110AA *Copyright Act 1968*

<sup>5</sup> See Sarah Ostman, *Online Story Time & Coronavirus: It's Fair Use, Folks* (24 March 2020, Programming Librarian)

<https://programminglibrarian.org/articles/online-story-time-coronavirus-it%E2%80%99s-fair-use-folks>

<sup>6</sup> Section 111 of the *Copyright Act 1968* was amended to allow personal recording of television broadcasts by the *Copyright Amendment Act 2006*. See description in Australian Copyright Council Information Sheet G096v09 (June 2017)

[https://www.copyright.org.au/ACC\\_Prod/ACC/Information\\_Sheets/Copyright%20Amendment%20Act%202006.aspx](https://www.copyright.org.au/ACC_Prod/ACC/Information_Sheets/Copyright%20Amendment%20Act%202006.aspx)

<sup>7</sup> See discussion in Ben Collins, "You are probably breaking the law when you film your child performing" (21 November 2018, ABC Kimberley)

<https://www.abc.net.au/news/2018-11-21/copyright-on-childrens-performances/10515302>

## Government modernisation of copyright

The inadequacy of the Australian copyright system to deal with the digital environment has been identified by successive government reviews over the last 20 years.<sup>8</sup> Most recently, the Productivity Commission's Inquiry in Australia's Intellectual Property Arrangements<sup>9</sup> and the Australian Law Review Committee's Digital Economy Review<sup>10</sup> both recommended substantial changes to increase the flexibility and adaptability of Australia's copyright law to better meet digital needs.

In its response to the PC Inquiry the government acknowledged that "Australia's current exceptions for fair dealing are restrictive when compared with international counterparts and may not permit some reasonable fair uses of copyright material" and supported the creation of "a modernised copyright exceptions framework that keeps pace with technological advances and is flexible to adapt to future changes."<sup>11</sup> It committed to consult on options to address this issue and launched the Copyright Modernisation Consultation in March 2018. This consultation remains open.

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<sup>8</sup> Six reviews since 1998 have concluded that Australian copyright law needs more flexibility in the digital age. See:

- Copyright Law Review Committee report on Simplification of the Copyright Act Part 1: Exceptions to the Exclusive Rights of Copyright Owners (1998) para 6.10;
- Joint Standing Committee on Treaties, Report 61 Australia - United States Free Trade Agreement, para 16.50;
- Senate Select Committee on the Free Trade Agreement between Australia and the United States of America Final Report (2004) p72;
- House of Representatives Standing Committee on Infrastructure and Communications, At What Cost? IT pricing and the Australia tax (July 2013) at xiii;
- Australian Law Review Commission, Report 122, Copyright and the Digital Economy (2014) Recommendation 4-1;
- Productivity Commission, *Intellectual Property Arrangements*, Inquiry Report No.78 (23 September 2016) Recommendation 6.1

<sup>9</sup> Productivity Commission, *Intellectual Property Arrangements*, Inquiry Report No.78 (23 September 2016) Recommendation 6.1 <https://www.pc.gov.au/inquiries/completed/intellectual-property#report>. See discussion in Chapter 6: Fair use or fair dealing — what is fair for Australia?

<sup>10</sup> Australian Law Review Commission, Report 122, Copyright and the Digital Economy (2014) Recommendation 4-1,

<https://www.alrc.gov.au/publication/copyright-and-the-digital-economy-alrc-report-122/recommendations-6/>. See also discussion in Chapter 4. The Case for Fair Use

<sup>11</sup> Australian Government Response to the Productivity Commission Inquiry into Intellectual Property Arrangements (August 2017) p.7

<https://www.pc.gov.au/inquiries/completed/intellectual-property/intellectual-property-government-response.pdf>

## How COVID-19 has exposed the cracks

The COVID-19 shutdown has created a perfect test case, highlighting the problems already identified by these reviews.

Institutions in countries with more flexible copyright regimes have been able to seamlessly adapt their services in ways institutions in Australia have not. For example:

- US libraries were able to move immediately to providing online storytimes when the pandemic was declared, without the need for an agreement with publishers or authors. Their storytimes are also more flexible than those enabled by Australia's Virtual Storytime agreement, for example allowing use of copyrighted music where it has an educational purpose.<sup>12</sup>
- The US-based HathiTrust digital library, which provides digitisation services for its university members, has announced an Emergency Temporary Access Service (ETAS), which allows students, faculty, and staff from eligible member libraries to have online reading access to materials that are held in their library collections but are currently unavailable to them.<sup>13</sup> That is, if a patron would usually be able to read a book onsite at the library but is unable to because of closures, they can now access an online version of that book if it is held in HathiTrust's digital collection. This service has been made available to 171 campuses in the US and Canada under their fair use and fair dealing exceptions respectively.
- Organisations such as Cineteca Milano and the British Film Institute have leveraged online historic cinema collections created under more flexible copyright laws to meet demand for access now their doors are closed. Cineteca Milano has reported an increase from 300 users to its site each day to more than 4 million users during shutdown.<sup>14</sup>
- US and Canadian schools and universities have been able to rely on advice from copyright experts to smoothly move classes online without negotiating additional licences. For example, dozens of US copyright experts have signed onto a statement that:  
making materials available and accessible to students in this time of crisis will almost always be a fair use... The fair use doctrine accommodates the flexibility required by our shared public health crisis, enabling society to function and progress while protecting human life and safety.<sup>15</sup>

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<sup>12</sup> See Sarah Ostman, *Online Story Time & Coronavirus: It's Fair Use, Folks* (24 March 2020, Programming Librarian)

<https://programminglibrarian.org/articles/online-story-time-coronavirus-it%E2%80%99s-fair-use-folks>

<sup>13</sup> *HathiTrust Response to Covid-19*, <https://www.hathitrust.org/covid-19-response>

<sup>14</sup> See discussed in detail in Victoria Duckett, "International film archives are streaming up a storm during lockdown. Australia's movie trove isn't even online" (18 May 2020, *The Conversation*)

<https://theconversation.com/international-film-archives-are-streaming-up-a-storm-during-lockdown-australias-movie-trove-isnt-even-online-137169>

<sup>15</sup> See *Public Statement of Library Copyright Specialists: Fair Use & Emergency Remote Teaching & Research* (March 13, 2020) <https://tinyurl.com/tvnty3a> discussed in Kara Yorio, *A Crisis—as in School Closures Due to Coronavirus—Justifies Fair Use, Say Librarians* (14 March 2020, *School Library Journal*) <https://www.schoollibraryjournal.com/?detailStory=librarians-address-copyright-concerns-argue-fair-use-appeals-amid-academic-closures-coronavirus-covid19>

Canadian experts have provided similar public endorsement of online education activities during the crisis under their fair dealing provisions.<sup>16</sup>

These initiatives cannot be replicated in Australia because they are either not supported by our existing law or fall into a copyright grey area which places a high legal risk on institutions.

While the Australian government has in recent years made some progress in modernising our Copyright Act, this progress has been inconsistent. Recent legislative changes mean that the Australian Copyright Act provides relatively robust and flexible exceptions for certain core onsite functions of libraries and archives, such as preservation.<sup>17</sup> However, this modernisation has not reached the exceptions used to provide remote supply to collections or publish material online, leaving the services most in demand under COVID-19 subject to the most outdated laws.

Similarly, while the move to online education has perhaps been the most prominent aspect of the COVID-19 response, the laws that apply to our education system were largely written in the 1960s and 1980s and are woefully inadequate to deal with the challenges of modern education. For example, the exception that allows teachers to show content to students in class does not apply if the teacher is recording a lesson via Zoom from his or her home, or if the students are doing remote learning with their parents at home.<sup>18</sup>

Arguably those in the worst position under Australian copyright law are artists and creators themselves. There are few exceptions that permit creative use of material (online or offline) without direct permission, and the only recent amendments to increase the flexibility of creative uses were limited to parody and satire.<sup>19</sup> It is still, therefore, illegal in most circumstances to include copyright images or quotes in powerpoint presentations without direct permission - meaning it is likely that many of the people providing webinars under COVID-19 are breaking the law without even realising it. Likewise, creators seeking to provide online offerings whilst complying with strict copyright have been forced into absurd compromises, such as online

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<sup>16</sup> See Samuel E. Trosow and Lisa Macklem, "What is fair dealing in copyright? Here's why it matters when moving classes online due to coronavirus" (April 29, 2020, *The Conversation*) <https://theconversation.com/what-is-fair-dealing-in-copyright-heres-why-it-matters-when-moving-classes-online-due-to-coronavirus-134510>. The same authors provide more detailed analysis in *Fair Dealing and Emergency Remote Teaching in Canada* (24 March 2020, Infojustice) <http://infojustice.org/archives/42120>

<sup>17</sup> See discussion of these recent changes at ALCC, *Disability Access and Other Measures Act Fact Sheets*, <https://libcopyright.org.au/disability-and-other-measures-act-fact-sheets/>

<sup>18</sup> Section 28 *Copyright Act 1968*

<sup>19</sup> See Sections 41A and 103AA of the *Copyright Act 1968* permitting fair dealings for parody and satire were introduced by the *Copyright Amendment Act 2006*. See description in Australian Copyright Council Information Sheet G096v09 (June 2017) [https://www.copyright.org.au/ACC\\_Prod/ACC/Information\\_Sheets/Copyright%20Amendment%20Act%202006.aspx](https://www.copyright.org.au/ACC_Prod/ACC/Information_Sheets/Copyright%20Amendment%20Act%202006.aspx)

dance performances with no music.<sup>20</sup> We will never know what creative opportunities have been missed because they could not be accommodated by Australian copyright law.

### **The role of permissions in promoting access**

The current emergency has resulted in some innovative solutions in terms of new licensing initiatives that have sought to maintain access to materials.

The vanguard of these is the Virtual Storytime agreement, which grants Australian libraries temporary permission to stream children's storytimes during the COVID-19 pandemic. The agreement was initially negotiated between the Australian Library and Information Association, the Australian Society of Authors and the Australian Publishers Association,<sup>21</sup> then extended to schools through the efforts of the COAG National Copyright Unit.<sup>22</sup> It was announced on 18 March, only 7 days after the World Health Organisation declared COVID-19 to be a pandemic and is believed to be the first of its kind in the world.<sup>23</sup> Its quick adoption can be seen as the product of many years of effort by these organisations to work more collaboratively in the interests of championing Australian books and authors and promoting higher rates of literacy in Australia, through initiatives such as the Australian Government-supported Australia Reads<sup>24</sup> (through the Office for the Arts), National Simultaneous Storytime<sup>25</sup> and the Australian Inclusive Publishing Initiative.<sup>26</sup> It has been replicated internationally<sup>27</sup> and cited as a model for best practice guidelines for such agreements globally by the International Federation of Library Associations and Institutions.<sup>28</sup>

Some copyright owner groups have been proactive in providing options for those seeking to move services online during COVID-19. In some cases this has been in the form of additional

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<sup>20</sup> See, for example, dance performances in the Arts Front *Little Lunch Online* series. As the performances were shown on the Arts Front website, were not limited to Australian audiences, and were recorded for later use, they did not comply with licences available through APRA AMCOS and so were forced to mute their music. See *Little Lunch Online #2* (25 March 2020, Arts Front) <https://artsfront.com/event/37103-little-lunch-online-llol/session/37206-little-lunch-online-2> and *Little Lunch Online #9* (6 April 2020, Arts Front)

<https://artsfront.com/event/37103-little-lunch-online-llol/session/39135-little-lunch-online-9>.

<sup>21</sup> *Book Industry Partners come to Agreement on Copyright* (19 March 2020, Books Create Australia) <https://bookscreate.com.au/book-industry-partners-come-to-agreement-on-copyright/>

<sup>22</sup> *Schools Storytime Agreement* (7 April 2020, Books Create Australia)

<https://bookscreate.com.au/books-create-australias-schools-storytime-arrangement/>

<sup>23</sup> See *ALIA Negotiates Special Agreement on Copyright* (18 March 2020, ALIA) <https://www.alia.org.au/copyright-during-covid-19>

<sup>24</sup> <https://australiareads.org.au/>

<sup>25</sup> <https://www.alia.org.au/nss>

<sup>26</sup> <https://aipi.com.au/>

<sup>27</sup> See for example the *Read Aloud Canadian Books Program*, <https://www.accesscopyright.ca/read-aloud/>

<sup>28</sup> See *IFLA CLM Principles for Library Associations and Libraries in Approaches to Rightholders during the COVID-19 Pandemic*

[https://www.ifla.org/files/assets/hq/topics/exceptions-limitations/documents/principles\\_for\\_library\\_associations\\_and\\_libraries\\_in\\_approaches\\_to\\_rightholders.pdf](https://www.ifla.org/files/assets/hq/topics/exceptions-limitations/documents/principles_for_library_associations_and_libraries_in_approaches_to_rightholders.pdf)

information resources or fact sheets clarifying existing law and licensing options<sup>29</sup> while others have gone so far as to provide new resources or additional permissions for the period of the pandemic. Examples include:

- Ancestry.com, which has enabled remote user access through licensed libraries for no additional cost until the end of June 2020. Normally use of this resource is limited to within the library building. Usage (downloads) of the database in Western Australia went from 57,781 in March 2020 to 215,053 in April and created a very positive response from patrons.
- RB Digital, which has made all its 3,500 emagazine titles, including many in languages other than English, available to library subscribers for no additional cost;
- Cambridge University Press, which is providing temporary online access to all its higher education textbooks;<sup>30</sup>
- Kanopy, which is making its selection of children's films available for download at no cost;
- A large number of individual authors and illustrators who are providing free online videos and other resources.<sup>31</sup>

The crisis has also led to sector-wide initiatives such as the Open COVID Pledge, spearheaded by Creative Commons, which has seen global leaders such as Intel, Microsoft and NASA JPL use specialist licences to make their intellectual property available free of charge for use in ending the COVID-19 pandemic and minimizing the impact of the disease.<sup>32</sup>

### **The shortcomings of licensing**

Despite these positive examples, the COVID-19 shutdown has also exposed the shortcomings of a copyright system that relies on licensing to address unexpected circumstances.

Overall the licensing responses have been piecemeal, slow and, in many cases, required significant library staff effort to negotiate. While some publishers chose to make their works available online as needed, or adjusted licences to provide additional access, many have not. In some cases, texts are simply not available in digital form from publishers; in others the publisher has actively decided as a matter of policy not to provide ebook licences to Australian libraries.<sup>33</sup>

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<sup>29</sup> See, for example, *Live streaming music licensing under COVID-19 lock down* (27 March 2020, APRA AMCOS)

<https://apraamcos.com.au/news/2020/march/apra-amcos-australia-and-live-streaming-music-licensing-under-covid-19-lock-down/>

<sup>30</sup> *Cambridge gives free access to HE textbooks and coronavirus research* (19 March 2020, Research Information)

<https://www.researchinformation.info/news/cambridge-gives-free-access-he-textbooks-and-coronavirus-research>

<sup>31</sup> A good list of examples can be found at

<https://www.smartcopying.edu.au/educational-resources/covid-19-copyright-issues/free-author-and-illustrator-resources-and-virtual-story-times-available-online>

<sup>32</sup> <https://opencovidpledge.org/>

<sup>33</sup> For full discussion of ebook availability to Australian libraries, see the ongoing ARC Linkage project, the Elending Project (<http://elendingproject.org/>). Note that it confirms that at least one publisher, Hachette, still does not sell ebooks to Australian libraries. The issue is also discussed in the Australian Library and Information Association's *Submission to the Australian Law Reform Commission's discussion*

This is an ongoing issue. As a result, students' access to textbooks (for example) may be reliant on decisions made by the lecturer months or even years ago.

Many publishers who do provide materials in digital format have been unwilling to temporarily remove licence restrictions that make the material inaccessible during lockdown (eg by restricting access to onsite users). These include vendors where libraries and archives have paid extremely high annual licensing fees for what is essentially now a useless service. Some vendors who did offer extensions only did so partially. For example, legal resource provider CCH agreed to offer remote access to subscribed works for library staff, but not for clients. This is of limited value for libraries whose primary audience for high cost, tax-payer funded resources are community members and not staff.

Publisher restrictions have also impacted the government library sector, meaning it has impacted the ability of government agencies to get reliable evidence to support their work during the COVID-19 pandemic. Of Government libraries recently polled<sup>34</sup> 14 percent were unable to provide some digital material to agency staff working from home and 3 percent had to spend time renegotiating licences.

There have also been reports that the "restrictiveness" of the Australian copyright system has caused problems for institutions negotiating temporary extensions on existing digital licences, as vendors are reluctant to alter licences for the Australian market alone when other jurisdictions with more flexible laws are not requesting similar extensions.

Even goodwill agreements that have been specifically put in place as COVID-19 responses are rarely comprehensive. For example, some of the common questions received about the Virtual Storytime agreement, and their answers, include:

- Does it cover chapter books, young adult or adult storytimes? No, it only applies to children's picture books.
- Does it allow podcasts or audio recordings of picture books? No, it only covers storytime videos.
- Can music be used as part of a storytime? Yes, but only if you are performing the music yourself and streaming the session over Youtube or Facebook. If you want to use pre-recorded music or want to record the storytime you will need to get permission from the copyright owner. If you want to stream it via your own website, you will also need to obtain a mini-license from APRA.<sup>35</sup>
- Can we keep videos of the storytimes to use onsite later? No.<sup>36</sup>

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*paper relating to Copyright and the Digital Economy* (28 August 2013)

<http://www.alia.org.au/sites/default/files/documents/advocacy/ALIA%20ALRC%20EBook%20Submission%20August%202013.pdf>

<sup>34</sup> Poll held during Australian Government Library Information Network Zoom seminar, 28 May 2020.

<sup>35</sup> *Live streaming music licensing under COVID-19 lock down* (27 March 2020, APRA AMCOS)

<https://apraamcos.com.au/news/2020/march/apra-amcos-australia-and-live-streaming-music-licensing-under-covid-19-lock-down/>

<sup>36</sup> Some of these questions are asked and answered in *Virtual Storytime FAQ* (ALIA)

<https://www.alia.org.au/sites/default/files/Virtual%20storytime%20FAQ.pdf>. Others are extrapolated from

### **Case Study: Standards Australia**

A key example that should be of particular interest to the Inquiry is the difficulties that the National and State Libraries Australia (NSLA) consortium has had attempting to negotiate reasonable online access to Australian Standards through NSLA libraries.

Despite being public interest documents that govern everything from building safety to cot mattresses and in many cases have legislative force,<sup>37</sup> the Australian Standards are not owned by the Australian government or made freely available to the Australian public. Instead, they are developed and owned by the non-profit Standards Australia, who make them available via their website and via two commercial distributors - SAI Global (a commercial spin off of Standards Australia who until recently had an exclusive distribution licence) and Techstreet (an independent commercial provider). Fees to access the Standards are generally high, costing between \$50-500 per Standard.<sup>38</sup>

Since 2016 NSLA has been in a stalemate seeking to negotiate access to the Standards for Australian libraries. Although price and quality of service have also been an issue, the primary sticking point in negotiations has been access restrictions. The licences proposed by Standards Australia and its providers prohibit any offsite access to the Standards as well as all uses ordinarily permitted under the Australian Copyright Act, such as printing for research.

Under the last access proposal received from Standards Australia, no access to Standards would have been available to patrons while libraries were closed to the public. This is despite the resource being funded by Australian taxpayers and primarily developed by volunteers, who are often government employees.

The COVID-19 crisis reinforces the position of NSLA libraries that remote access to Australian Standards is essential so that all Australians can access this critical information from their business premises and/or homes.<sup>39</sup> Reasonable public access to the Standards is needed not only to support small business and promote public safety requirements, but also because a central premise of our legal system is that all Australian's must be able access the laws to

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the information about the agreement available at *Book Industry Partners come to Agreement on Copyright* (19 March 2020, Books Create Australia)

<https://bookscreate.com.au/book-industry-partners-come-to-agreement-on-copyright/>

<sup>37</sup> Legislative references mean that Australian companies, from multinationals to small owner operators to individuals, are legally required to comply with the Standards. The WA Delegated Legislation Committee's review on access to the Standards identified numerous potential scenarios where non-compliance with a Standard may result in penalties or sanctions. See paragraph 2.17 in Chapter 2 and paragraphs 6.30–6.34 in Chapter 6 in Report 84 of the Joint Standing Committee on Delegated Legislation – Access to Australian Standards Adopted in Delegated Legislation, pp.64–65

<sup>38</sup> Prices are available at <https://www.techstreet.com/publishers/as>

<sup>39</sup> For more information, see the joint submission of the ALCC, NSLA and ALIA to Standards Australia's 2019 Standards Distribution and Licensing consultation, available at

<https://libcopyright.org.au/standards-distribution-and-licensing-consultation-joint-submission/>

which they are subject. At least one legal case has already been dismissed on the basis that the person in question did not have reasonable access to the Standards.<sup>40</sup>

### **What Australia can do to future proof our copyright system**

As the above examples show, while licensing agreements are welcome and can provide some relief in a restrictive copyright regime, they are inadequate to provide the equitable, consistent and flexible solutions needed to keep public services running in a time of national crisis.

This emphasises the essentialness of a robust system of copyright exceptions to enable use of content without permission in unforeseeable circumstances. Such exceptions must apply equally to all copyright materials and uses, including online use, and be flexible to adapt quickly as circumstances change.

The government's Modernisation Consultation has been looking at just such amendments for the last several years. Many of the options on the table - whether it be fair use, fair dealing for quotation or specific amendments relating to remote supply - would have solved the problems discussed above, or provided alternative options to those seeking to meet the demand for online services.

Amendments already being discussed that would improve the position of Australian society in the face of future challenges include:

- Replacement of the outdated and confusing s200AB exception for cultural and educational institutions with more modern fair dealings for libraries and archives or educational use;
- Provision of an exception to permit use of quotes in flexible circumstances, such as in presentations or creative works;
- Protection of essential exceptions, including exceptions for educational and library and archive uses, from being excluded by contracts;
- Extension of existing exceptions to permit remote supply of all library and archive materials to researchers or other institutions where those materials cannot reasonably be purchased; and
- Introduction of exceptions to allow use of orphan works (ie works for which a copyright owner cannot be identified) by both cultural institutions and creators, to increase the historic materials available for free and flexible use by all Australians.

COVID-19 has been a test for Australian copyright law - it is vital that the government take heed of the lessons learned, and forward its Modernisation Consultation within this term of Parliament.

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<sup>40</sup> See *Maurice Blackburn wins helmet camera appeal in County Court* (12 February 2016) <https://www.mauriceblackburn.com.au/about/media-centre/media-statements/2016/maurice-blackburn-wins-helmet-camera-appeal-in-county-court/>.