

## **Submission to the House of Representatives Standing Committee on Communications and the Arts – Inquiry into Australia’s creative and cultural industries and institutions**

### **Copyright barriers faced in creative and cultural industries and institutions**

Thank you for the opportunity to make this joint submission to the Standing Committee on Communications and the Arts’ inquiry into Australia’s creative and cultural industries and institutions.

The Australian Digital Alliance (ADA) and the Australian Libraries Copyright Committee (ALCC) agree with the statement made by Committee Chair Dr David Gillespie MP that our country’s cultural and creative industries are at a point of significant change as we adapt to life in a pandemic. COVID-19 has changed the way that the Australian public engages with cultural works, and has therefore inevitably changed the way that those works are created and shared. For artists, producers and venues, COVID-19 has disrupted how artistic works are created and presented. COVID-19 has also accelerated the pace of digital transformation in the way the Australian community wishes to engage with creative and cultural works, including via cultural institutions and libraries.

For many artists and institutions the closure of physical venues has led to an increased reliance on digital technologies to connect with audiences. Zoom video conferencing and YouTube live streams have replaced theatres and concert halls; online and interactive collections have complemented in-person visits to galleries and museums; and more users are now relying on e-books and other digital resources made available through libraries.

However, there are significant barriers that creators and cultural institutions<sup>1</sup> face when trying to provide online access to creative works as a result of outdated copyright laws. This is because most of the Copyright Act was written in the pre-digital age and is no longer fit for purpose in the digital world. For example, the Copyright Act permits the copying of video tapes onto a computer for personal use, but not DVDs;<sup>2</sup> and it is still illegal to film your child’s dance performance, even if you do not upload the video to social media.<sup>3</sup>

This submission outlines some of the impacts that creators, institutions and audiences have faced during the coronavirus pandemic as a result of Australia’s outdated and inflexible copyright laws. Many of these problems will be solved by the Government’s recently announced [copyright access reforms](#). The ADA and ALCC call on the Committee to recommend the introduction of the copyright access legislation as a priority.

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<sup>1</sup> Note that for the purpose of this submission we use the term ‘cultural institutions’ to mean National Cultural Institutions as well as galleries, libraries, archives and museums.

<sup>2</sup> See Section s110AA Copyright Act 1968 - the section specifically refers to “videotapes” and therefore does not apply to digital formats.

<sup>3</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>.

## 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 our 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.

## About the Australian Libraries Copyright Committee

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. It is a cross-sectoral committee with members representing the following organisations:

- [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)

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

The ALCC 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.

## Direct response to terms of reference

### 1. The economic and non-economic benefits of Australian creative and cultural industries and institutions

Australia's creative industries and cultural institutions provide immeasurable benefits to the national economy and the community. The [Creating Our Future report](#), recently published by the Australia Council for the Arts, outlines the role of the arts in terms of its direct economic contribution, as well as

its contribution to health, tourism and education. The report also identifies how arts participation supports noneconomic objectives such as freedom of expression, inclusion, and social cohesion.

Supporting the creative practices, galleries, libraries, archives and museums are critical services that allow the Australian public to access our rich cultural heritage and support Australian artists and creators. In 2018–19 our national cultural institutions alone attracted 10.9 million in-person visitors and received 49.5 million visits to their websites.<sup>4</sup> Australian libraries spend over \$400 million every year purchasing books and resources, and the federal government spends over \$22 million a year supporting authors and illustrators through the Lending Rights Scheme.<sup>5</sup> This is in addition to the immeasurable economic and non-economic impact that galleries, museums and archives have on our society, providing access to the arts and cultural works of Australian creators.

With the beginning of mandatory lockdowns and Australians no longer able to physically access their collections, it remained crucial that libraries, galleries and archives continued to provide their services throughout the pandemic. Indeed their role in supporting education, lifelong learning and social cohesion arguably became more important in a locked down world, with many seeking to reskill or link to local community services as a result of the economic downturn. As the Australian economy transitions out of the pandemic, it is crucial that our creative industries and cultural institutions continue to work together to provide their essential services to the public in an increasingly online world. The following part of this submission outlines some of the roadblocks to the delivery of online access posed by outdated copyright laws.

## **2. The impact of COVID-19 on the creative industries and cultural institutions**

During the coronavirus pandemic, the mandatory closure of physical facilities put particular stress on Australia's artists and cultural institutions. In a sector built on an assumption of physical access, demand for online services has skyrocketed. Libraries in particular have seen a demonstrable rise in demand since the beginning of the pandemic. For example, the State Library of Western Australia saw more than a 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 is now apparent, neither the sector nor legislators could have anticipated that online access would so rapidly become the expected norm.

The sudden move to online services has exposed the inadequacy of Australia's current law to deal with the digital delivery of copyright-protected content. Broadly, these issues arise because:

- Some copyright laws designed to apply to hardcopy materials do not apply when those materials are digitised.
- Similarly, some copyright laws only apply when the activity is done in person and cease to apply when a recording is made or the activity is done online through platforms such as Zoom.
- In many cases, it is unlawful to use material where the owner of that material cannot be found and attributed (see discussion below - the 'orphan works' issue).

While the Government has in recent years made some progress in modernising the *Copyright Act*, these reforms have not addressed the underlying issues which make providing digital access to

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<sup>4</sup> See a breakdown of these figures at: <https://www.transparency.gov.au/annual-reports/department-communications-and-arts/reporting-year/2018-2019-19>.

<sup>5</sup> An overview of this scheme is available at: <https://www.arts.gov.au/funding-and-support/lending-rights>.

copyright material difficult. For example, recent legislative changes mean that the Act provides relatively robust and flexible exceptions for certain core onsite functions of libraries and archives, such as preservation.<sup>6</sup> However, there have been few changes to allow the remote supply of collections, leaving the services most in demand under COVID-19 subject to the most outdated laws.

These barriers to online access exist largely because copyright laws have historically been written to apply either to physical uses of copyright material or digital uses. It was not anticipated when the laws were drafted that the world would one day be rapidly forced to move many everyday activities online. This creates huge problems for artists and creators as well as their audiences and users of copyright material.

For example, in some cases, an activity that would be perfectly lawful in hardcopy (such as loaning a book) can become an infringement when done using digital technologies. This is because every digital use, right down to viewing a document on a screen, requires material to be copied and communicated. However, the default setting of Australia's copyright law is that permission is required for all copying. This means any time copyright materials are reproduced or shared electronically permission must be obtained from the copyright owner, unless the Act provides an exception that directly permits the use. These exceptions are often very specific and outdated - for example, the Act permits the copying of video tapes onto a computer for personal use, but not DVDs. In a world where the VCR has long since been abandoned, there is very little practical use for an exception for this sort of use. This is just one example of the many ways in which inflexible and outdated copyright laws are unable to adapt to modern uses and changing circumstances such as COVID-19.

Other examples in the educational context mean that some activities that have been perfectly legal in classrooms for decades may not be permitted if a teacher is using Zoom, or even if parents and guardians are involved with helping children with their online studies.<sup>7</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>8</sup> Creating mashups, remixes and other innovative uses of existing material without a licence is therefore prohibited, stifling an entire genre of artists from emerging in Australia. As Deloitte Access Economics has found:

*“major new uses of copyright material are occurring outside of any clear, supportive legal framework, including vitally important growth areas such as text and data mining and cloud computing; at the same time, the allowed scope of transformative uses of creative materials, such as digital remixing, remains shrouded in uncertainty and hindered by unnecessarily high transaction costs, leaving smaller, individual creators and public institutions such as universities vulnerable to litigation that seeks, or inadvertently seeks, to stymie innovation and creativity.”<sup>9</sup>*

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<sup>6</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>7</sup> See Section 28 Copyright Act 1968.

<sup>8</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).

<sup>9</sup> Deloitte Access Economics, Copyright in the digital age: Levelling the playing field (February 2018) pg 5 <https://www2.deloitte.com/au/en/pages/economics/articles/copyright-digital-age-google.htm>.

More absurdly, it is still unlawful 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 laws have been forced into absurd compromises, such as online dance performances with no music.<sup>10</sup> Sadly, we will never know what creative opportunities have been missed because they could not be accommodated by Australian copyright law.

## 2.1 Countries with flexible copyright adapt faster

Copyright law provides legal rights to authors and creators, as well as exceptions to those rights for some socially beneficial purposes. For example, Australian law permits the use of certain material without a license for 'research or study', 'criticism or review', or 'reporting the news' among other purposes which serve the public interest. However, the list of purposes for which copyright material may be used is rigid and ill suited to the modern age where innovative new uses are being developed all the time. Unless an activity falls within one of the fixed categories of allowable uses under the Act, it is prohibited.

'Flexible' copyright exceptions available in other jurisdictions have enabled physical services to transition to digital delivery quickly and seamlessly in ways that Australian creators and institutions 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.<sup>11</sup> As a result, kids stuck at home in lockdown had uninterrupted access to this vital service offered by libraries using books that are bought and held in the library's collection.
- Organisations such as [Cineteca Milano](#) and the [British Film Institute](#) have leveraged online historic cinema collections that are no longer commercially available to meet demand for access during shutdown. Cineteca Milano reported an increase from 300 users to its site each day to more than 4 million users during this period.<sup>12</sup>
- US and Canadian schools and universities were able to rely on advice from copyright experts to move classes smoothly online without negotiating additional licences.<sup>13</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.

## 2.2 What about industry agreements and licensing?

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<sup>10</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>11</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>12</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-australi-as-movie-trove-isnt-even-online-137169>.

<sup>13</sup> See Public Statement of Library Copyright Specialists: Fair Use & Emergency Remote Teaching & Research (March 13, 2020) <https://tinyurl.com/tvnty3a>.

The current emergency has resulted in some innovative solutions in terms of new industry agreements and 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 livestream and post recordings of children’s storytimes during the COVID-19 pandemic to online sharing platforms. This industry agreement was initially negotiated between the Australian Library and Information Association, the Australian Society of Authors and the Australian Publishers Association,<sup>14</sup> then extended to schools through the efforts of the COAG National Copyright Unit.<sup>15</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. The agreement has since been replicated internationally and cited as a model for best practice guidelines for such agreements globally by the International Federation of Library Associations and Institutions. There are also a large number of individual authors and illustrators who are providing free online videos and other resources.<sup>16</sup>

Despite these positive examples, the COVID-19 shutdown also exposed the shortcomings of a copyright system that relies on licensing to deal with new uses of material. Overall the licensing responses have been piecemeal, slow and, in many cases, required significant investments of time and resources 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 or other online resources.

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, be flexible to adapt quickly as circumstances change and protected from contractual override.

### **3. Avenues for increasing access and opportunities for Australia's creative and cultural industries through innovation and the digital environment**

In order to unlock the full potential of Australia’s creative industries and cultural institutions the Government must ‘future proof’ copyright laws. This means ensuring that copyright laws are capable of adapting to changes in the way that people create and use arts and culture. Proposed amendments to the *Copyright Act* announced by the Government in August would improve the position of Australia’s creative and cultural industries in the face of future challenges by:

- Creating more flexibility for cultural institutions allowing them to provide digital access to more of their collections and reduce the administrative burden on staff.
- Allowing cultural collections, government agencies, academics and researchers to quote words from a book, a passage from a piece of music or a visual image taken from an artwork.

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<sup>14</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>15</sup> Schools Storytime Agreement (7 April 2020, Books Create Australia) <https://bookscreate.com.au/books-create-australias-schools-storytime-arrangement/>.

<sup>16</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>.

- Establishing a scheme to allow for the use of 'orphan works' (works where the copyright owner cannot be found) by the cultural, educational and broadcasting sectors.

These reforms will enable more access to cultural collections, particularly by rural and remote communities that are so often prevented from accessing parts of Australia's cultural heritage. In order to protect the interests of copyright owners, institutions will be required to take steps to ensure that users accessing online collections do so in a way that does not infringe copyright in the material. This will allow access to be provided to members of the public without harming the livelihoods of authors and creators.

The announcement of these changes by Minister Fletcher was welcomed by the ADA and the ALCC,<sup>17</sup> and we look forward to working with the Government to achieve these sensible reforms. We anticipate that these changes will solve several of the known issues within Australia's copyright law that serve as roadblocks to innovation in the creative industries. We also look forward to continuing to work with the Government to address the remaining issues that the ADA and the ALCC have raised in submissions to inquiries by the Australian Law Reform Commission, the Productivity Commission, and the Government's Copyright Modernisation Review.

The ADA and the ALCC would welcome the opportunity to discuss these issues in more detail with the Committee. For more information please contact our Executive Officer Ben Rice at [ben@digital.org.au](mailto:ben@digital.org.au).

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<sup>17</sup> See media releases by the ADA and the ALCC: <https://digital.org.au/2020/08/13/access-reforms-announcement-media-release/> and <https://libcopyright.org.au/access-reforms-announcement-media-release/>.