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Submission from the Australian Society of Authors in response to Exposure Draft of the Copyright Amendment (Access Reforms) Bill 2021

The Australian Society of Authors (**ASA**) is grateful for the opportunity to make a submission to the Department of Infrastructure, Transport, Regional Development and Communications (**Department**) in response to the Copyright Amendment (Access Reform) Bill 2021 Exposure Draft (**Exposure Draft**).

1. Executive Summary

The ASA considers the Exposure Draft is drafted more broadly than required to achieve the Government's stated policy objectives.

We are deeply concerned about the shifting of remunerated copying of copyright works to new free exceptions to infringement. Our main concern with the Exposure Draft is that "access" has been conflated with "free access", with potentially alarming economic consequences for creators.

In this submission, we endeavour to explain the way authors are remunerated and the reality of low earnings.

To ensure the ongoing incentivisation of copyright creation, the quality of educational materials and the health of our creative economy, the ASA submits that efficient licensing regimes are preferable to new free exceptions.

In summary, the ASA's position is:

Schedule 1: Limitation on remedies for use of Orphan Works

We support a limitation of remedies scheme, conditional upon narrower drafting.

The ASA requests:

- the inclusion of an orphan works register which is searchable by rights holders
- reasonable compensation for past use being available should the rights holder be found, and
- the ongoing right of the copyright owner to control distribution of their work. For the avoidance of doubt, the Bill should make clear that it is open to copyright owners to deny permission for *future* use of their work.

Schedule 2: Fair dealing for quotation

Significantly narrower drafting required.

Our concerns are:

- the unclear purpose of the new fair dealing exception
- the extent of the quotation permitted, and
- the relationship between the new fair dealing exception for quotation and the statutory licences.

Schedule 3: Update and clarify library and archives exceptions

We do not support the new library and archives exceptions.

As currently drafted, sections 1113KC, 113KD and 113KE introduce unremunerated digitisation and would have very serious unintended consequences on the commercial market for authors' works.

Schedule 4: Education

We do not support the introduction of new section 113MA as it undermines the statutory licence schemes.

We support clarification of section 28 of the Copyright Act to ensure "in class" includes a virtual classroom.

2. About the ASA

The ASA has been the national peak professional association, community and voice of Australia's writers and illustrators since it was established in 1963. Our purpose is to support all Australian authors and illustrators to pursue sustainable creative careers through 3 pillars of support:

1. We advocate on behalf of authors and illustrators to government and industry.
2. We provide professional development, training, resources, mentorships, support and advice to our members.
3. We provide our members with connection to a creative community and information about industry news, developments and opportunities.

The ASA is a broad, diverse and growing organisation, with 3,500+ members drawn from every sector of the writing and illustrating world, including novelists, non-fiction writers, biographers, illustrators, academics, cartoonists, comics, scientists, food and wine writers, historians, graphic novelists, educational writers, children’s writers, ghost writers, travel writers, crime writers, science fiction writers, romance writers, editors, bloggers, journalists, poets and more.

In this submission, we try to paint a picture of the lived experiences of authors in order to give context for our objections to the Exposure Draft. It is beyond the resources of the ASA to provide feedback on every aspect of the Exposure Draft (and we refer to and endorse the submissions of the Australian Copyright Council) so we have concentrated our efforts on commenting on those provisions about which we are most concerned on behalf of our members.

3. About Authors

3.1. Background comments about authors’ earnings

The ASA has made previous submissions on the Copyright Modernisation Consultation and the Productivity Commission’s 2016 Intellectual Property Arrangements Inquiry. We have consistently stated that we support modernisation and reform of the *Copyright Act* but that reforms which permit uses of copyright material without the consent of, or payment to, copyright owners must be carefully interrogated. Any impact on creators’ current commercial markets will have serious repercussions for the viability of creative careers.

For context, author earnings are extremely low, with only a tiny few at the top who can make a living, a very long tail of authors who earn virtually nothing and a badly hollowed out middle ground, where incomes are unsustainable:

- According to the ASA's Survey 2020, 80% of respondents are earning less than \$15,000 per annum.
- According to the ASA's Survey 2021, 81% of respondents are earning less than \$15,000 per annum.
- According to a 2015 Macquarie University study, Australian writers' creative incomes have dropped by nearly 50% in the past two decades, from an average of \$22,000 in the early 2000s to just \$12,900 in 2015.¹
- According to the ASA's Surveys in 2020 and 2021, advances² are low: in 2021, 58% of respondents received no advances whatsoever, and only 13% of respondents reported receiving an advance over \$10,000; a marginal decrease from 14.6% in 2020.
- Over 98% of all titles released in 2018 – 2020 sold fewer than 1,000 print copies each year.³

The few success stories of writers at the top obscure the fact that for the vast majority of writers and illustrators, income is precariously low and payments are

¹ Longden, Thomas et al. "Australian Authors - Industry Brief No. 3: Authors' Income." *Australian Authors' Income Report*, Department of Economics, Macquarie University, October 2015.

<https://research-management.mq.edu.au/ws/portalfiles/portal/122625541/3_Authors_Income.pdf>

² An advance is a sum of money paid against future royalties. It is not a separate *additional* payment to an author, it is advancing monies to help sustain them while they write the book. Authors are then not paid again until the advance is "earned out" and royalties begin to flow.

³ Nielsen Book Research Reported commissioned by the Australian Society of Authors, October 2020

irregular. In addition, other than for those who secure advances, the author is the last person in the supply chain to get paid and can wait more than two years from the delivery of their manuscript to their first royalty payment.

3.2. Why are authors' earnings declining?

Members of the ASA who are established and experienced writers are reporting to us that while it has always been challenging to make a living, in former years, a writer of talent, determination and ideas was able to make at least a basic living. Today those writers are struggling. Authors have long accepted the need to develop a portfolio career as a writer, but the following factors over the last decade are placing huge pressure on authors:

- lower advances, tightening backlist ranges
- reduction in supplementary sources of incomes:
 - disruption of the print media which has resulted in fewer freelance writing opportunities and lower payment,
 - shedding of casual teaching staff at Universities due to impact of COVID pandemic
- concern for future Lending Rights payments because of the shift in library borrowings to digital formats
- significant reduction in event opportunities and appearance fees due to COVID
- a significantly higher expectation from publishers that the author will drive the marketing for their book, a role that was previously undertaken primarily by the publisher
- particularly for non-fiction work, an increased reluctance on the part of publishers to take risks on new authors unless they have a strong social

media following/other existing platform, creating a new source of unpaid labour for authors

- the exponential growth of social media content, streaming and other competitive forms of entertainment vying for attention and reading time, further increasing the battle for the leisure dollar
- the shift to a global marketplace as consumers can shop online, including from overseas retailers with loss-leading pricing strategies
- increased challenges in discoverability of new authors by consumers shopping online (a trend accelerated by COVID) when compared to the handselling and championing of Australian authors by independent bookshops.

3.3. Low author earnings inform our concerns about the Exposure Draft

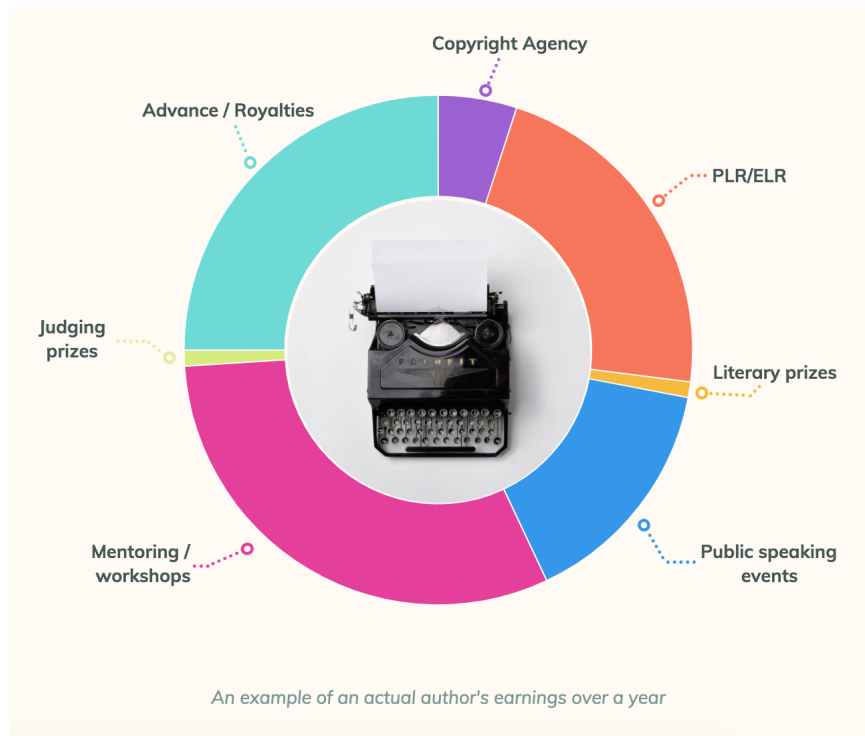
The problem of low author earnings threatens the sustainability of Australian writing, quality educational content for our schools and the proud development of our national culture and identity. The market for Australian authors is precarious and fragile. In the main, authors battle financial insecurity for the whole of their careers and into their old age without the safety net of superannuation. Accordingly, each source of income is precious. This is the context against which the Exposure Draft must be considered and the rest of this submission must be read.

4. About Copyright Agency payments

4.1. What role does Copyright Agency payments play in author earnings?

Authors earnings are typically derived from a portfolio of income streams, including:

- Advances and royalties
- Overseas rights sales and subsidiary rights revenue
- Events and speaking appearances
- Teaching/mentoring/workshops
- PLR / ELR payments
- Copyright Agency payments
- Freelance writing
- Grants and fellowships
- Awards



This pie chart is intended to serve as an example of an author's earnings over a year. The percentage split of each income stream varies widely between authors depending on their level of experience, the category in which they write, whether

they write full-time, whether their work is eligible for grants and awards, whether they teach and so on.

In the context of low earnings, every income stream is critical.

4.2. How much does Copyright Agency pay out each year?

In 2020-2021, Copyright Agency allocated \$102 million to more than 17,000 recipients, many of whom passed on payments to multiple ultimate recipients (e.g. literary agents to their authors) or shared payments with other recipients (e.g. under book publishing contracts).⁴

4.3. How much is paid to Copyright Agency for education licences per student per year?

In 2022, \$13 per student.

This is a very modest amount. Students would spend more on pens each year than the education sector spends per student for unfettered, unlimited copying and use of copyright works.

⁴<https://www.copyright.com.au/about-us/governance/annual-reports/copyright-agency-annual-report-2021/>

4.4. How important are Copyright Agency payments to authors?

Chris Linthorne

Educational author, QLD

“ I have published works with a leading educational publisher since 1998 with over 100 of my mathematics student textbook titles in print. I write for students ranging from Prep to Year 6 (age 5 to 12 years) although some titles are teacher support resources.

Reforms with the ability to diminish the scope of the educational statutory licence administered by the Copyright Agency would have a significant impact on my income, to say the least. I rely on these payments to square the ledger with schools who have bought one copy of my book then photocopy pages rather than booklist the text for all students. To me, Copyright Agency payments represent the income lost to me as the creator every time a teacher colleague places one of my books on the school photocopier and makes 30 copies of a page from a book that the teacher or the school library owns. This happens in hundreds of Australian schools every school day to thousands of pages of my books.

During the past five years Copyright Agency payments have comprised a significant proportion of my creative income, ranging from 25% to 61%.

These figures demonstrate the catastrophic effect that a reduction in scope of the educational statutory licence administered by the Copyright Agency would have on my income. I make a good living as an author these days, but the figures belie the sacrifice made in reaching this point in my career. For most of

my writing career across two decades I have held a full-time school teaching role to support my family, while writing entire series of textbooks on tight deadlines to satisfy a passion and earn a little extra money. The royalty amounts I earn now came about very, very gradually.

As an educator and author I urge those involved in the **Copyright Amendment (Access Reform) Bill 2021** to carefully redraft the provisions, particularly Schedule 4 in relation to educational exceptions, to allow the Copyright Agency to maintain fair compensation for writers who lose significant income every day to educational institutions.

John Barwick

Educational author, NSW

“ Over the previous two decades, copying of my works in schools has grown markedly. Copyright Agency payments have consequently become the most important part of my writing income, easily outstripping royalty payments. Any proposal that would in effect reduce this income stream is extremely concerning.

It is, patently, financially unsustainable for me to devote ten months writing a series of books for which I would receive very little payment. The effect of this, of course, would be that I would stop writing textbooks. If all Australian educational writers did this, Australian schools would simply not have the resources to support the Australian Curriculum. Overseas producers would have neither the expertise nor, given the size of the market, financial incentive to produce works to fill the void.

Sharon Dalgleish

Educational author, NSW

“ Copyright Agency payments made up 25% of my total income for the last 5 years. But in individual years over that 5 year period the percentage has been steadily going down. For example, 5 years ago in the 2016-2017 year, Copyright Agency payments made up 38% of my income. By the 2020-2021 year it had dropped to 18%. Royalties stayed roughly even across the five years, give or take a thousand.

If the payments were reduced it would be devastating. I rely on the CA payments to earn a living. I factor them into whether or not I am able to take on a project. Without them, I just can't earn enough to live on. (Along with ELR and PLR of course!)

Lynne Kelly

Popular science and educational author, VIC

“ I was a teacher for over 40 years, so that feeds a great deal of my thinking and writing, even for trade publishing.

Copyright Agency payments make up about 20% of my overall income.

If payments from Copyright Agency were reduced, it would mean that I earn less from writing, and I would need to rely more heavily on an age pension.

Writers are so underpaid now, to reduce further seems very strange in a time when the knowledge economy is growing and being recognised as crucial to development. We cannot predict the value people take from our books. The

short-sightedness in reducing the dismal pay to authors is instructive on how short-sighted our political leaders can be.

I depend on the ASA to understand and attempt to protect my interests.

Jackie French

Children's, YA, and adult fiction and non-fiction author, NSW

“ Many of my books are used as classroom texts and listed as such in the syllabus.

As an estimate, Copyright Agency payments comprise around 10% of my overall income. The payments I receive from Copyright Agency don't cover the 20 hours a week or more I spend answering questions from schools and students. Copyright Agency payments are at least some recompense for the work expected of a writer when their work is chosen as texts to be studied. I may make 10 cents on 50 'special sales books' for a school, and those 50 copies may be used by 2,000 kids. Without Copyright Agency recompense, both my work, and my time, are 'stolen', as schools don't realise authors don't get all the money paid for a book, nor understand that they are just one of hundreds of schools emailing me. My short stories, in particular, are used mostly as photocopies, not as texts, so that Copyright Agency is the only payment I get.

Most of my work copied in schools is never calculated by Copyright Agency as surveys are indicative, not comprehensive.

It's impossible to keep up with correspondence from teachers and students without paid help. I have to pay for help, but those schools and students don't pay me, except through Copyright Agency. Already Australia is getting a major

free educational resource. Without at least some Copyright Agency payment for this...well, I don't know what. I am almost at the end of my ability to pay for help, and at the end of my stamina to keep answering enquiries.

Perhaps the true answer is: without Copyright Agency payments that pay for at least a small amount of the material used in schools, I will crawl under my desk and cry. The unpaid burden of work is just at the 'I can cope' stage, but with further threats and changes, I suspect Australia will lose me, my export income, and the help I give teachers and students. Even one more small blow to an ever decreasing income will be more than I can cope with.

Kirsty Murray

Children's and YA fiction author, VIC

“ I've been a full-time professional author for over 20 years. Authors need to be constantly nimble and adapt to shifting commercial and cultural landscapes while keeping their focus on creating new work. It's an economically perilous existence and for those of us committed to writing Australian stories for Australian readers, at best, we aspire to a very modest middle-class income.

In my childhood, most of the books I was given in school were British or American. Legislation and initiatives introduced in my lifetime, including the establishment of the Lending Rights scheme and the creation of the Copyright Agency, has made it viable for me and thousands of other Australian authors to create stories specifically for Australian readers. When visiting schools to talk about the importance of Australian stories, I see excerpts from my work and other Australian author's work photocopied, digitised and shared across classrooms, year levels and even entire schools. I am grateful that Australian

kids have access to quality Australian content and that it is possible for me to write for them and still pay my grocery bills. Copyright Agency payments represent approximately 5% of my income in any given year. On a modest income, that 5% is crucial to keeping me at the desk creating new work for my readers. Any changes to the Copyright Act that reduce, imperil or eliminate income streams for Australian writers will result in talented and passionate authors being unable to create new work. An emerging generation of young writers, especially those from diverse and disadvantaged backgrounds, will be silenced if Australia makes it impossibly difficult for authors to receive fair recompense for their creative work.

4.5. Role of publishers in educational publishing

We refer to the submission of the Australian Publishers Association for detail but wish to acknowledge and endorse the crucial contribution made by publishers. Publishers have a creative, curatorial and marketing role to play and bring their professional expertise to every book.

Publishers bear the financial costs of producing a book and the risk of publication. They are responsible for the supply chain that delivers the finished book into the hands of retailers, libraries and educational institutions. They are responsible for the selection of the author's work in the first place and it is their knowledge, enthusiasm and expertise that helps convince the bookseller to stock the book and persuade their customers to buy it.

In educational publishing, publishers are usually actively involved in the creation of content. Sometimes authors approach educational publishers with ideas and outlines for books, other times it is the publisher who researches and identifies a

need in the market (particularly in light of the requirements of the state curriculum). Publishers commission authors, flesh out the book proposal, arrange for academic review, edit the work in successive rounds ensuring accuracy as well as clarity, design the work, lay out the work with a view to logical learning and ease of understanding, proof read the book, arrange for printing and distribution, and arrange for updates of the work at regular intervals.

In other words, authors and publishers are reliant on each other and one group cannot thrive without the other.

4.6. How are Copyright Agency payments divided between author and publisher?

The split of Copyright Agency payments between publisher and author is set in the publishing contract between the parties.

Generally, the industry norms are:

- in trade publishing, Copyright Agency payments are divided:
 - in a 50/50 split between author and publisher or
 - 25-35% to the author, 25-35% to the illustrator and 50-30% to the publisher for illustrated books
- in educational publishing, Copyright Agency payments are usually divided in a 50/50 split between the publisher and author, although the publisher may take up to 70% dependent on the extent of the publisher's investment

(although this is determined by individual contracts and therefore negotiated on a case-by-case basis).

Any decline in licence fees payable to Copyright Agency will mean a decline in payments to publishers, authors and illustrators.

5. ASA comments on Exposure Draft

5.1. Schedule 1: Limitation on remedies for use of Orphan Works

The ASA supports the introduction of a limitation of remedies scheme for orphan works if the drafting were to be amended. We have concerns about two aspects of the proposed scheme:

5.1.1. The ASA strongly objects to the proposal to carve out orphan works from the operation of the statutory licences

We oppose the inclusion of sections 116AJA(4) and 116AJB(2), and the mirror provisions in section 113P(7) for the education statutory licence, and section 183(12) for the government statutory licence.

In our view, the Department has formed the view that schools shouldn't pay for use of a work where the collecting society is unable to identify the copyright owner of that work.

This view erroneously assumes that schools pay collecting societies "per use". Schools pay an upfront fixed and blanket fee to cover all copying and sharing of copyright works. The licence fee is a 'global' payment to allow unfettered copying in educational institutions. Our understanding is that the current annual licence fee was calculated after intense commercial negotiations in which the use of orphan works was *already factored into* the formulation of the final amount payable by schools.

We are concerned that the education sector will opportunistically use sections 116AJA(4) and 116AJB(2) to argue for a reduction in licence fees in the next round of negotiations. This will have a direct and detrimental impact on author earnings. The Discussion Paper states, “Educational institutions and governments (and other statutory licensees) **will not need to pay remuneration** under the statutory licences in the Act for the use of orphan works if they choose to rely on the orphan works scheme and have met the requirements. “

Educational institutions do not pay for orphan works now. Educational institutions pay a global fee per student (currently \$13 per year) for unlimited copying. Lowering the statutory licence fee will not get a single copyright owner of an orphan work paid. It will not improve or change access to copyright works. It will simply result in the creators who are paid a fee by collecting societies receiving less.

Moreover, it makes no sense to move from a statutory licence (certain, clear permission for the user) to a limited remedy scheme in which permission is contingent on positive action, such as a diligent search and then potentially the negotiation of terms down the track. This is creating a new and onerous administrative burden: teachers ought not be required to conduct a ‘diligent search’ for copyright owners; it is not a good use of their time.

Teachers can already use any orphan work they want under the statutory licence.

5.1.2. Section 116AJB provides insufficient reassurance to copyright owners

The ASA agrees that where a copyright owner of an orphan work is later identified, the copyright owner ought to have an avenue to negotiate payment and reasonable terms for ongoing use of that orphan work (as outlined in proposed section 116AJB(1)).

However, we believe the copyright owner should **also** be able to:

- request a reasonable licence fee for past use;
- object to *future* use, even if they can't seek injunctive relief against *past* use of their work.

We note that other jurisdictions around the world (notably the UK and Europe) have set up orphan works schemes which maintain the ability of the copyright owner to be paid if they become found.

Copyright owners have always been free to choose if and how they deal with their copyright material. For example, a feminist poet may not wish to have her work reproduced in a misogynistic song. A Jewish writer may not wish to have their work reproduced by a holocaust denier. The default position in the *Copyright Act* is not permissibility (and in fact this would breach international treaties).

Works can become 'orphaned' through no fault of the author and it is unreasonable to set up a scheme which denies copyright owners the right to decline permission, ever. As currently drafted, the orphan works scheme will operate as forced past and future licensing of copyright works.

In practice, if an orphan work is being used and the copyright owner is subsequently found and seeks to stop the ongoing use of that work but terms cannot be agreed, it will be up to the copyright owner to bring an application to the Copyright Tribunal for the fixing of terms. This is burdensome on the copyright owner and highly unrealistic given that the vast majority of creators won't have the means to do so.

5.1.3. What changes do we want to the orphan works scheme?

As we have stated in previous submissions, the ASA's view is that a 'limitation of remedies' scheme for copyright infringement of orphan works **must not worsen the position of the copyright owner**. The purpose of an orphan works scheme is to facilitate access to, and use of, orphan works but not to permanently remove rights of the copyright owner. A balance must be achieved.

This is why we support:

- an **orphan works register** which is searchable by rights holders (to improve the ability to find parents of orphans)
- **reasonable compensation** for past use being available should the rights holder be found, and
- the **unequivocal ongoing right of the copyright owner to control distribution** of their work. For the avoidance of doubt, the Bill should make clear that it is open to copyright owners to deny permission for *future* use of their work.

Similarly, in proposed section 153B, it should also be open to the Tribunal to give an order denying ongoing permission:

“If an application is made to the Tribunal under section 116AJB, the Tribunal must consider the application and, after giving the parties to the application an opportunity of presenting their cases, must make an order fixing the terms for the doing of the act *or an order that the doing by a person of an act comprised in a copyright is no longer permissible.*” **[our addition]**

I understand from discussions with the Department that it is the *intention* of the government to allow the Tribunal wide discretion in determining orders but this ought to be made unequivocal.

5.2. Schedule 2: Fair dealing for quotation

The ASA does not object to the introduction of a fair dealing exception for quotation but is of the view it should be narrowly and clearly drawn.

Our concerns are:

- the unclear purpose of the new fair dealing exception;
- the extent of the quotation permitted
- the relationship between the new fair dealing exception for quotation and the statutory licences.

5.2.1. Purpose of new fair dealing exception for quotation

The Discussion Paper says that the '[n]ew exception will permit quotation from any copyright material, for the purpose of, *but not limited to*, explanation, illustration, authority or homage'. These examples are picked up in section 113FA(5).

In our view, this is an unacceptably open explanation. Every fair dealing exception in the Copyright Act is defined by reference to a distinct stated purpose – for example, for the purpose of criticism or review; or the purpose of parody or satire etc. This is to enable certainty in application and seek to limit as far as possible subjective assessments.

We are finding it difficult to understand the articulation of purpose in section 113FA. Section 113FA(1)(b)(i) and (ii) permits fair dealing involving the quotation of the whole or a part of a copyright work by:

- libraries
- archives
- educational institutions
- government
- persons or organisations for the purpose of research

provided:

- the quotation is for a non-commercial purpose; or
- the quotation is *for a commercial purpose* in relation to a product or service, but the quotation is immaterial to the value of the product or service.

The ‘purpose’ therefore is either non-commercial or commercial (if the quote is immaterial). In our view, that is not an adequately defined purpose which sits inconsistently with the basis of the existing fair dealing exceptions.

Our main concern is with quotation for a commercial purpose. We anticipate it will be extremely difficult to determine if individual quotations are material to the value of the product or service. This requires a subjective judgement on the value of the quotation. We consider this drafting unworkable in practice. Highly researched non-fiction books sold to a general audience may include many quotes from literary works, or illustrations such as drawings or photographs, the cumulative value of which enhances the saleability and authority of the book. Individually, the quotes may be immaterial but the cumulative effect of those quotes may be material. Are all the quotes then not permitted? Or some permitted but not all? How to determine which quotes are permissible?

We agree that students ought to be able to publish their university thesis on university websites and in university repositories (as stated in the Discussion Paper). However, the new exception extends beyond academia into *commercial publishing*. In relation to ‘quotation by a person or an organisation for the purpose of research’ (section 113FA(1)(a)(vii)), the Discussion Paper gives as examples of permissible uses:

- “Excerpts of copyright material in an academic work published in a journal or book”
- “Excerpts of copyright material in a non-fiction book based on historical facts or real-life events”
- “Excerpts of copyright material in a family history”

These examples include a vast array of books published by commercial publishers (both trade publishers and academic publishers). Given that publishers have established existing processes for permissions and haven't expressed concern about obtaining quotes for non-fiction work, we would prefer an incremental approach, confining the quotation exception to non-commercial purposes only.

5.2.2. Proportionality of quotation

The new exception allows a dealing which “involves a quotation of **the whole** or a part of the copyright material”. The ASA maintains that quotation ought not to be interpreted to mean the entire copyright work. Consistent with the requirements of the Berne Convention, there must be included in the legislation an obligation of proportionality: the extent of quotation “does not exceed that justified by the purpose”.

This proportionality requirement is not cured by the fairness factors in section 113FA(2)(d) which state: “*if only part of the material is dealt with*—the amount and substantiality of the part dealt with, taken in relation to the whole material.” Perversely, if the whole of the copyright material is taken, proportionality need not be considered. This needs to be corrected.

5.2.3. Relationship between new exception for education sector and educational statutory licence

The Discussion Paper gives examples of permissible uses by an educational institution as:

- “Extracts of texts or images in school teaching resources such as Powerpoint presentations”
- “Quotes from academic commentary and professional works in university lectures.”

Both these examples are already permitted by the educational statutory licence.

It is unclear what new permission is being granted for schools by the quotation exception that the educational statutory licence doesn't already cover. The Discussion Paper states: “educational institutions... will be able to use this exception to allow the reasonable quotation of copyright material to support their core functions” but our understanding is that the statutory licence already precisely allows for this. We would like to understand:

- Is the new quotation exception meant to change the operation of the statutory licence?
- Are the fairness factors intended to solve this tension? The fair dealing factors for quotation include “the effect of the dealing upon the potential market for, or value of, the material”. Does that mean that if reproducing a quote from a copyright work is already permitted under the statutory licence, it won't fall under this free exception? In which case all quotation

is covered by the statutory licence and we are unsure why this new fair dealing exception needs to be extended to educational institutions?

Given that access is already granted under the statutory licences, any non-commercial quotation exception should expressly exclude use of copyright works covered by the statutory licences.

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

The ASA submits that including unpublished material in section 113FA would be inconsistent with Australia's obligations under the Berne Convention which states at Article 10:

“It shall be permissible to make quotations from a work which **has already been lawfully made available to the public**, provided that their making is compatible with fair practice, and their extent does not exceed that justified by the purpose, including quotations from newspaper articles and periodicals in the form of press summaries.”

In our view, the right of first publication must be reserved to the author.

We particularly are mindful of First Nations creators who must be empowered with self-determination in relation to their own cultural material and heritage. Any works which include Australian Aboriginal and Torres Strait Islander peoples' language, stories, songs, knowledge (including spiritual and ecological), cultural practices, literary, musical and artistic works, or documentation and recordings

of or about Aboriginal and Torres Strait Islander heritage and peoples ought not be quoted from without the permission of the relevant Aboriginal or Torres Strait Islander community. Any publication of works that incorporate Indigenous cultural and intellectual property (ICIP) must adhere to consultation and consent protocols.⁵

It is imperative that a new quotation exception - or a new orphan works scheme, or use of unpublished copyright material by libraries - does not remove from Traditional Owners control of traditional knowledge, as required by the United Nations Declaration on the Rights of Indigenous Peoples.⁶ We request that a consideration of ICIP principles is undertaken ahead of the finalisation of the drafting of the Bill.

5.3. Schedule 3: Update and clarify library and archives exceptions

The ASA submits that the library and archives exceptions have been drafted more broadly than required to achieve the government’s policy objectives, and, if enacted, would have grave unintended consequences. We are deeply concerned about sections 113KC, 113KD and 113KE. We have constructively conferred with the Australian Library and Information Association (ALIA) and wish to continue to confer on improved drafting.

⁵<https://australiacouncil.gov.au/investment-and-development/protocols-and-resources/protocols-for-using-first-nations-cultural-and-intellectual-property-in-the-arts/>

⁶ As outlined in Article 31 of the United Nations Declaration on the Rights of Indigenous Peoples (the Declaration), Indigenous peoples “have the right to maintain, control, protect and develop their cultural heritage, traditional knowledge and traditional cultural expressions, as well as the manifestations of their sciences, technologies and cultures, including human and genetic resources, seeds, medicines, knowledge of the properties of fauna and flora, oral traditions, literatures, designs, sports and traditional games and visual and performing arts. They also have the right to maintain, control, protect and develop their intellectual property over such cultural heritage, traditional knowledge and traditional cultural expressions”, <https://www.un.org/development/desa/indigenouspeoples/declaration-on-the-rights-of-indigenous-peoples.html>

We understand the government wishes to ensure online access to copyright material for people who cannot visit the premises of libraries, for example if they live remotely or have a disability.

We note that anyone living anywhere in Australia, with access to the internet, can join multiple libraries in their state and borrow from those digital collections. It is free to join and borrow from a public library. We are aware that there might be some items of particular cultural significance held only by, say, the National Library which patrons must travel to Canberra to view. We would be open to discussing a digitisation scheme for these *limited items* but to allow libraries to digitise anything they have ‘acquired’ is disastrous for the publishing industry.

How to define “copyright material acquired as part of the library’s collection”?

Libraries acquire copyright material in many ways, including:

- the purchase of print items from publishers
- the licensing of electronic items from publishers via library aggregators which then run the library’s ebook borrowing platform on the library’s behalf
- via the Legal Deposit scheme under which publishers have a legal obligation to provide a free copy of every publication to ensure a comprehensive collection is preserved for future generations (no remuneration to publisher or author)
- donations from organisations and members of the public (no remuneration to publisher or author).

As proposed by section 113KC, if libraries were allowed to:

- make available online any copyright material from their digital collection
or
- digitise anything from their hardcopy collection where an electronic copy of the copyright material cannot be obtained within a reasonable time at an ordinary commercial price,

the business model of publishing is seriously undermined. If libraries' 'collections' included publications supplied under Legal Deposit, no one need ever pay for a book in Australia again.

We are concerned that the Department may not have appreciated that the supply of digital books to libraries is an existing valuable commercial market for publishers and authors. Publishers supply books to libraries on commercial terms:

- via library suppliers, in print format
- via library aggregators, in digital format (which includes both ebooks and audiobooks).

From the above sales to libraries, authors earn:

- royalties on both print and digital sales to libraries; and
- public lending right (PLR) and educational lending right (ELR) payments⁷ under government-administered schemes with respect to books held in libraries in **print format only**.

⁷ <https://www.arts.gov.au/funding-and-support/lending-rights>

Both categories of income would be detrimentally affected by the proposed library exceptions.

The ASA opposes the digitisation of works by libraries or archives to be made available online or supplied to individual persons for the following reasons:

- 5.3.1. The exception introduces compulsory, irrevocable, unremunerated licensing.** Some authors choose not to publish in digital formats and that is a decision for them. For some books, (particularly older books) the author may not have authorised the publisher to publish in digital format under the terms of the copyright licence granted to the publisher. This exception effectively forces an author to license a library on broader terms than those granted to the publisher, without any remuneration for that licence.
- 5.3.2. The exception undermines legitimate commercial decisions made by Australian publishers and authors.** Some publishers choose not to make digital formats available to libraries as part of their commercial strategy, believing that to do so cannibalises their ebook sales. This is a legitimate commercial decision to maximise earnings on their investment. Publishing is a high risk, low margin business and the reality of publishing in Australia is tough given our small population over a vast geographic country and global competition from bigger markets. This exception cuts across publishers' legitimate sales strategies.
- 5.3.3. The exception effectively establishes a piracy scheme,** under which any print book that doesn't exist as an ebook may be copied and freely given to any member of the community. This is what the Internet Archive (based in the United States) has done: scanned print books to create a digital library which may be accessed by anyone in the world. The Internet Archive has attracted global condemnation by publisher and author organisations and is being sued for

copyright infringement in New York.⁸ This reform would attract similar international condemnation and outrage.

In fact, the National Library of New Zealand has recently paused their proposed donation of books to Internet Archive for this very reason: scanning of print books for free community borrowing, without the permission of, or payment to, rights holders is copyright infringement and undermines legitimate ebook sales.

5.3.4. The exception undercuts both an existing and future market for authors' work. Currently, the ASA, Melbourne University, and national, state and territory library organisations are involved in the *Untapped Project*⁹, a pilot program under which books which have fallen out of print are being licensed in digital format to libraries. This program is making culturally important books available to library patrons as ebooks at the same time as generating an income stream for creators. This demonstrates the commercial market for digital book licensing. The Untapped Project would lose all efficacy and relevance if this new exception was passed into law.

The new exception does not require libraries to destroy electronic copies after supply, meaning they could maintain a digital library (in relation to which the creators and publishers have never been paid). Even worse, due to the operation of inter-library requests, a digital copy once made could be shared between multiple libraries. This potentially obliterates the future library ebook market for publishers and authors.

⁸<https://www.authorsguild.org/industry-advocacy/authors-guild-affirms-support-for-copyright-infringement-lawsuit-against-internet-archive-brought-by-four-leading-book-publishers/>

⁹ <https://untapped.org.au/>

5.3.5. The exception is unsupported by Australia's Lending Rights Scheme. One of the reasons sections 113KC and 113KD are so egregious is that Australian lending rights do not apply to digital formats. Authors are paid public lending right (PLR) and educational lending right (ELR) payments by the government by way of compensation for loss of royalties when their books are held by public and educational libraries. The PLR/ELR schemes do not currently include ebooks or audiobooks. Lending rights are therefore currently only payable on print books.

For some years, the ASA and ALIA have jointly argued that the eligibility criteria for the PLR and ELR payments must be expanded to include digital formats (ebooks and audiobooks). This ask has become increasingly urgent given the acceleration of digital borrowing during the COVID-19 pandemic;¹⁰ it makes no sense for an author to receive a PLR / ELR payment for a physical book but nothing if that same book is held in a digital format. Recently, the House of Representatives Standing Committee of Communications and the Arts, in its report *Sculpting a National Cultural Plan; igniting a post-Covid economy for the arts*, recommended a review of the PLR/ELR schemes to ensure that authors are appropriately compensated for loss of sales when their books are made available to the community via public and educational libraries.

Under the proposed new exception, authors' print books could be digitised by the library and loaned out - for which the author will receive **no** PLR or ELR payments. This is a reversal of the policy intention behind lending rights, for which Australia is internationally admired. For context, authors rely deeply on PLR / ELR income which can account for 20 - 30% of total annual earnings.

¹⁰<https://www.civica.com/en-au/container---news-library/bookworms-turn-to-mystery-and-thriller-novels-throughout-covid-19/>

5.3.6. The exception damages copyright owners' income. The Discussion Paper states: "Extending the ability of libraries and archives to make copyright material in their collections available to view online and remotely will help these institutions provide wider and more equitable access for all Australians, while not harming copyright owners' commercial markets." With respect, we don't agree; commercial markets will be radically damaged by this exception. Libraries could effectively become digital publishers under sections 113KC, 113KD and 113KE without any remuneration back to the creators.

5.3.7. Definition of "library"

For comments on the proposed new definition of 'library' in the Exposure Draft (which includes entities in the private sector), we refer to and endorse the submission of the Copyright Agency.

5.4. Schedule 4 - Education

The policy intent behind the repeal of section 28 and introduction of section 113MA is unclear to us. The proposed expansion of a free education exception will only serve to reduce remuneration otherwise payable to copyright owners under the statutory licence.

5.4.1. Section 28

The Discussion Paper explains that the new exception is to address concerns by the education sector that section 28 of the Copyright Act did not clearly cover the delivery of lessons online, as occurred during COVID lockdowns.

The ASA's position is that the words "in class" in section 28(1) ought to be understood to include a virtual classroom. If that is only implied and not certain, we support amendments to the Copyright Act to clarify this meaning (for example by way of a new definition of "class" or a legislative note.)

The ASA strongly supported seamless delivery of lessons during the pandemic. We drafted and published an Online Storytime policy, along with the Australian Publishers Association and the National Copyright Unit (NCU), designed to give teachers comfort that authors and publishers have no objection to teachers (including teacher librarians) continuing to read stories to students, whether they are learning from the school or at home.¹¹ We believe this action demonstrates our good faith support for home learning.

We have no objection to a parent, family member or friend assisting the student, or a tutor or a guest speaker from the community or industry being invited to speak to the classroom also being covered by section 28.

5.5. Proposed section 113MA

Our concern, then, is that the new section 113MA - intended to replace section 28 - goes far beyond fixing the issue of a virtual classroom or remote learning. The new section 113MA appears to cover, for example, making copies of a poem to be read aloud and then recording the reading of that poem. These actions are ***already allowed*** under the statutory licence.

The new section 113MA also allows the making of an audio recording or an audio-visual recording of the whole or a part of copyright material and making

¹¹ <https://www.asauthors.org/news/new-storytime-agreement-reached-for-schools>

that recording available on a temporary basis to students. This suggests the exception allows for catch-up or repeat lessons to students. Many authors regularly visit schools to provide writing workshops as a way of supplementing their writing income, particularly children’s and YA authors. If their workshops were recorded and retained for future use, even for a relatively short period of time, under a new free exception, their future school bookings (a current legitimate market) will be undermined.

The Discussion Paper states: “New section 113MA will make it clear that ... certain uses of copyright material in the course of giving or receiving lessons **without remuneration** will be considered reasonable.” We would like to understand the Department’s reasoning. Given the fundamental importance of authors’ contribution to our education system, we request the Department ensure their fair recompense.

For technical drafting suggestions to improve section 113MA, we refer to the submission of Copyright Agency.

Clearly, if publishers and authors earn reduced income from copying of educational material, the likely result will be the diminishment and decline in quality Australian educational material.

5.6. Schedule 5 - Streamline the government statutory licensing scheme

The ASA endorses the submissions made by the Australian Copyright Council in relation to Schedule 5.

6. Conclusion

We ask the Department to consider the lived experiences of authors.

If there are problems with access to copyright works, these must be solved, but access does not mean 'free access'. It is wholly inappropriate and unsustainable to ask authors to subsidise our education system or write for free for unfettered community access through libraries.

We are grateful for the opportunity to make this submission and are highly willing to participate in any further discussions or provide further information if that would be useful.

The ASA supports and endorses the submissions of:

- Australian Copyright Council
- Copyright Agency
- Australian Publishers Association

and acknowledges the shared objective among the creative industries generally to reform the Copyright Act for the benefit of the whole society and ensure fair remuneration in the digital space.

7. Contact details

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