

November 22, 2021

The Chief Executive
Department of Internal Affairs
Wellington, NZ

VIA E-MAIL

Dear Mr. James:

We write in response to your announcement that the National Library of New Zealand plans to transfer up to 600,000 books from its Overseas Published Collections (OPC) to the Internet Archive, apparently without regard to the fact that Internet Archive has been sued for flagrantly and systematically infringing the copyrights of authors and publishers by copying and distributing millions of books—both fiction and nonfiction—without so much as attempting to seek the licenses that are required by law. As the lawsuit spells out, Internet Archive’s operation far exceeds the bounds of legitimate preservation functions or other calibrated exceptions under U.S. law and the laws of our trading partners.

The Association of American Publishers (AAP) represents the leading book, journal, and education publishers in the United States on matters of law and policy. It goes without saying that publishers are devoted to the lawful distribution of books and other forms of information and creative content and take seriously their investment in authors and service to the public interest. Indeed, publishers worldwide value public libraries as partners in mission, not only devoted to readers of all ages but also respectful of the authors and the rule of law that make books possible in the first place. In opposing the OPC transfer to Internet Archive, the AAP joins a growing chorus of other groups that have made the National Library of New Zealand aware that its impending contribution is highly questionable as a matter of law and shocking for a public institution.

You may be aware that on June 1, 2020, four American publishers filed a lawsuit against Internet Archive to halt its mass scanning, public display, and distribution of entire literary works¹—precisely the conduct it intends to enlarge now with your assistance. The scale of Internet Archive’s scheme is already troubling: through its “Open Library,” it distributes unauthorized digital copies of over 1.3 million books. New Zealand’s coordination and delivery of roughly half a million additional books would significantly contribute to this unlawful activity.

To be clear, we note that Internet Archive’s so-called plan to remove OPC material from its illegal service if requested by rights holders is irrelevant: it does not excuse its actual or intended infringement. Placing an opt-out burden on authors and publishers runs completely counter to

¹ Elizabeth A. Harris, *Publishers Sue Internet Archive Over Free E-Books*, N.Y. TIMES (June 1, 2020), <https://www.nytimes.com/2020/06/01/books/internet-archive-emergency-library-coronavirus.html>.

fundamental principles of copyright law, a law which Internet Archive has no authority to amend to its own liking.

We ask that the Minister, the Department of Internal Affairs, and the National Librarian withdraw from this ill-conceived arrangement with Internet Archive so that the marketplace of ideas remains legal and ethical.

9(2)(a)

Terry Hart
General Counsel
Association of American Publishers

CC: Rachel Esson, National Librarian, Rachel.esson@dia.govt.nz
Hon. Jan Tinetti, Minister for Internal Affairs, Jan.tinetti@parliament.govt.nz

RELEASED UNDER THE OFFICIAL INFORMATION ACT 1982

28 October 2021

Ms Rachel Esson
National Librarian
National Library of New Zealand
PO Box 1467
Wellington 6140
New Zealand

Hon Jan Tinetti
Minister for Internal Affairs
Department of Internal Affairs
PO Box 805
Wellington 6140
New Zealand

Dear Ms Esson and the Hon Jan Tinetti

**NATIONAL LIBRARY OF NEW ZEALAND – INTERNET ARCHIVE – OVERSEAS
PUBLISHED COLLECTION – DIGITISATION AND SUPPLY**

1. We are sending this letter to you concerning the agreement which the National Library of New Zealand (NLNZ) has announced with Internet Archive (IA). We have been alerted to this matter by the Publishers Association of New Zealand, the New Zealand Society of Authors and Copyright Licensing New Zealand.
2. We are aware that under the agreement NLNZ will donate its Overseas Published Collection of 600,000 books to IA. IA proposes to convert these from print copies to electronic copies. Part of the agreement is that NLNZ is requiring IA to make available the digitised versions of the OPC books to New Zealanders via IA's Open Library Scheme.
3. The Open Library Scheme will be available not only to New Zealand users but also users worldwide.
4. Our company is a major international publisher with a huge back catalogue of copyright works. There are many other international publishers like us.

Spread across NLNZ's Overseas Published Collection are multiple titles and imprints for which we are the copyright owners. We know that our fellow publishing houses are in the same position as we are.

6. The fact that NLNZ may own a copy of one of our books as part of its OPC does not confer on NLNZ any rights to deal with the copyright in that book as it thinks fit. It is astonishing to us that a supposedly reputable National Library should enter into the above agreement with IA:
 - (a) Without considering copyright ownership; and
 - (b) Without seeking prior written clearance from copyright owners for the digitisation of their copyright works and the intended making available of those copyright works to the public.
7. We have taken legal advice and consider that NLNZ is liable for copyright infringement in New Zealand by making the OPC available to IA knowing that these copyright works will be digitised and, indeed, requiring that they be made available to users in New Zealand (and elsewhere in the world). There is clearly a common design on the part of NLNZ and IA.
8. Further, the Controlled Digital Lending referred to in NLNZ's communications is not legal nor within the permitted use provisions for libraries in part 4 of the Copyright Act 1994. Further, IA does not qualify for any of the library permitted uses.
9. We are therefore seeking your written undertakings that:
 - (a) NLNZ will carry out a review to determine all the works in the OPC that are still within copyright;
 - (b) Will immediately withdraw from the IA contract and will not be party to any provision of copyright works from the OPC to IA for the purposes of digitisation and supply via the internet without the prior written consent of publishers.
10. Please let us have these undertakings by 30 November 2021.

Yours sincerely

9(2)(a)

Robert Gorman
CEO

9(2)(a)

cc. Paula Browning, Copyright Licensing New Zealand

9(2)(a)



The Chief Executive
Department of Internal Affairs
WELLINGTON

By email to the following email addresses:

Rachel.Esson@dia.govt.nz

Paul.James@dia.govt.nz

Jan.Tinetti@parliament.govt.nz

26th November 2021

Dear Sirs

**NATIONAL LIBRARY OF NEW ZEALAND – INTERNET ARCHIVE – OVERSEAS
PUBLISHED COLLECTION – DIGITISATION AND SUPPLY**

We are sending this letter to you concerning the agreement which the National Library of New Zealand (NLNZ) has announced with Internet Archive (IA). We have been alerted to this matter by the Publishers Association of New Zealand, the New Zealand Society of Authors and Copyright Licensing New Zealand.

Taylor & Francis Group is one of the world's leading publishers of scholarly journals, books, eBooks, text books and reference works, with a history dating back over two centuries. Taylor & Francis Group currently publishes more than 2,500 journals and over 5,000 new books each year, with a books backlist in excess of 120,000 specialist titles. Our content spans all areas of humanities, social sciences, behavioural sciences, science, technology and medicine. Our imprints include Routledge, Garland Science, CRC Press and Psychology Press.

We are aware that under the agreement NLNZ will donate its Overseas Published Collection of 600,000 books to IA. IA proposes to convert these from print copies to electronic copies. Part of the agreement is that NLNZ is requiring IA to make available the digitised versions of the OPC books to New Zealanders via IA's Open Library Scheme. The Open Library Scheme will be available not only to New Zealand users but also users worldwide.

It has come to our attention that the NLNZ's Overseas Published Collection include multiple titles and imprints for which we are the copyright owners. We know that our fellow publishing houses are in the same position as we are.

The fact that NLNZ may own a copy of one of our books as part of its OPC does not confer on NLNZ any rights to deal with the copyright in that book as it thinks fit. It is astonishing to us that a supposedly reputable National Library should enter into the above agreement with IA:



- (a) Without considering copyright ownership; and
- (b) Without seeking prior written clearance from copyright owners for the digitisation of their copyright works and the intended making available of those copyright works to the public.

We have taken legal advice and consider that NLNZ is liable for copyright infringement in New Zealand by making the OPC available to IA knowing that these copyright works will be digitised and, indeed, requiring that they be made available to users in New Zealand (and elsewhere in the world). There is clearly a common design on the part of NLNZ and IA.

Further, the Controlled Digital Lending referred to in NLNZ's communication is not legal nor within the permitted use provisions for libraries in part 3 of the Copyright Act 1994. Further, IA does not qualify for any of the library permitted uses.

We are therefore seeking your written undertakings that:

- (a) NLNZ will carry out a review to determine all the works in the OPC that are still within copyright;
- (b) Will immediately withdraw from the IA contract and will not be party to any provision of copyright works from the OPC to IA for the purposes of digitisation and supply via the internet, without the prior written consent of publishers.

Please let us have these undertakings by immediately, and in any event no later than 1st December 2021.

In the meantime, we reserve all of our legal rights, including in relation to any other publications published or made available by IA that may infringe our rights.

Yours faithfully

Gabriella Groves

9(2)(a)

Informa UK Limited trading as Taylor & Francis Group

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30 October 2018

Hon Kris Faafoi
Minister of Commerce and Consumer Affairs
Via email : kris.faafoi@parliament.govt.nz

Kia ora Minister,

I write on behalf of Copyright Licensing NZ, Publishers Association on New Zealand and New Zealand Society of Authors, to bring to your attention a matter of significant concern to the New Zealand publishing industry.

Open Library, a website established in the USA, is an initiative of an organisation called the Internet Archive. This website is supported by an increasing number of US university libraries, which are digitising books in their physical collections and making these available for online lending via the website. Those behind the website claim their operation is legal under the US fair use copyright regime. The books they are digitising are not limited to USA titles and access is not limited to USA site visitors.

We have searched the website for New Zealand author's books and found a number from Auckland University Press - including those of Keri Hulme, CK Stead, Frank Sargeson and Marilyn Waring. There are also books from Victoria University Press - including works of Catherine Chidgey, Elizabeth Knox, Patrick Evans and Damien Wilkens. Some of these books are less than 10 years old.

Our discovery of this open online library activity comes very soon after we found New Zealand author's and publisher's work on an illegal website - Oceanofpdf.com. The response to this illegal site by publishers in the United Kingdom has resulted in the site being taken down. We are, however, uncertain as to whether this will be permanent as it is reported to have morphed into another site. There is currently no effective mechanism for New Zealand authors and publishers to take action when circumstances such as these occur, either to protect their copyright and insist the work is removed or to block the site via ISP's.

New Zealand authors and publishers work exceptionally hard to bring published work to New Zealand and international readers and cannot afford to have illegal use of their work encroaching on their market and reducing their ability to invest in future work. Arguably, once the work is pirated and made available for free online, it will generate no further income for the New Zealand based author or publisher. Free online content competes directly with ebook editions produced by the publisher and available all over the world, on all platforms at a reasonable price. That undermines publishers' ability to find the next Hulme, Stead or Sargeson.

The Internet Archive are claiming that making these books freely available online is "fair use" and have adopted the take-first, don't-ask approach that is prevalent in fair use territories.

Copyright Licensing Limited

9(2)(a)

E info@copyright.co.nz
www.copyright.co.nz

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We will continue to work with the IP Team at MBIE to highlight these types of issues during the review of the Copyright Act, however we feel it is important that the government be aware of the increasing challenges being faced by the New Zealand publishing industry in the digital environment.

Ngā mihi,

9(2)(a)

Paula Browning
Chief Executive

Cc : Peter Dowling, President, Publishers Association of NZ
Jenny Nagle, CE, NZ Society of Authors
Lincoln Gould, CE, Booksellers Association of NZ
Marcus Smith, Senior Policy Advisor, MBIE

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Hugh Rennie

CBE QC

15 October 2021

Postal address: P.O. Box 10-543, Wellington 6143.
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Wellington 6011, New Zealand.

Email: hugh@rennieqc.nz

Phone: +64 21 653 001

Ms Rachel Esson
National Librarian
National Library of New Zealand
WELLINGTON

By email - Rachel.esson@dia.govt.nz

c.c. Solicitor-General, Crown Law Office

Dear Ms Esson

Transfer of part of the National Library Collection to a known copyright pirate

When your Library's proposal to send a substantial part of its holding out of New Zealand to the Internet Archive was first announced, I wrote to the *Dominion Post* to identify your legal breach. The letter was published. I predicted then that New Zealand authors (who are already extensively pirated by the Archive) would suffer if the Library proceeded further.

I have today been sent a copy of an email by you which in part says:

"We acknowledge that there have also been some concerns about copyright expressed surrounding the donation. Allegations of partnership with an 'internet pirate' were made by the Publishers Association of New Zealand/Te Rau o Tākupu (PANZ) and the New Zealand Society of Authors (NZSA). An international copyright lawyer with Tohatoha released this response to those claims, saying they are unfounded."

The statement I made in my letter is one of law, not allegation. The lawyer you refer to as connected to *Tohatoha* is not a New Zealand lawyer authorised to practice here. His material is at best an argument that New Zealand copyright law should be altered to accord with his view of how copyrights should be dealt with. It is not a statement of current New Zealand copyright law, and provides no support for your contention that the plan you and the Internet Archive has will not breach New Zealand copyright law.

In the Crown sector, especially for a national library holding the public's asset on trust, the requirement is to obtain a formal opinion from the Solicitor-General that your intended action is lawful.

I am forwarding a copy of this letter to the Solicitor-General as in my opinion you are not following the requirement for Crown organisations to take and follow Crown Law Office advice.

Yours sincerely


Hugh Rennie QC



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29 October 2021

Ms Rachel Esson
National Librarian
National Library of New Zealand
PO Box 1467
Wellington 6140
New Zealand
Rachel.Esson@dia.govt.nz

Hon Jan Tinetti
Minister for Internal Affairs
Department of Internal Affairs
PO Box 805
Wellington 6140
New Zealand
Jan.Tinetti@parliament.govt.nz

Dear Ms Esson and the Hon Jan Tinetti

**NATIONAL LIBRARY OF NEW ZEALAND – INTERNET ARCHIVE – OVERSEAS
PUBLISHED COLLECTION – DIGITISATION AND SUPPLY**

1. Allen & Unwin Pty Ltd is the exclusive distributor in New Zealand and Australia for UK publisher **Faber & Faber**, and this letter concerns the Faber & Faber books held in the Overseas Published Collection of the National Library of New Zealand.
2. We are sending this letter to you concerning the agreement which the National Library of New Zealand (NLNZ) has announced with Internet Archive (IA). We have been alerted to this matter by the Publishers Association of New Zealand, the New Zealand Society of Authors and Copyright Licensing New Zealand.
3. We are aware that under the agreement NLNZ will donate its Overseas Published Collection of 600,000 books to IA. IA proposes to convert these from print copies to electronic copies. Part of the agreement is that NLNZ is requiring IA to make available the digitised versions of the OPC books to New Zealanders via IA's Open Library Scheme.
4. The Open Library Scheme will be available not only to New Zealand users but also users worldwide.
5. Our company is a major international publisher with a huge back catalogue of copyright works. There are many other international publishers like us.
6. Spread across NLNZ's Overseas Published Collection are multiple titles and imprints for which we are the copyright owners. We know that our fellow publishing houses are in the same position as we are.

7. The fact that NLNZ may own a copy of one of our books as part of its OPC does not confer on NLNZ any rights to deal with the copyright in that book as it thinks fit. It is astonishing to us that a supposedly reputable National Library should enter into the above agreement with IA:
- (a) Without considering copyright ownership; and
 - (b) Without seeking prior written clearance from copyright owners for the digitisation of their copyright works and the intended making available of those copyright works to the public.
8. We have taken legal advice and consider that NLNZ is liable for copyright infringement in New Zealand by making the OPC available to IA knowing that these copyright works will be digitised and, indeed, requiring that they be made available to users in New Zealand (and elsewhere in the world). There is clearly a common design on the part of NLNZ and IA.
9. Further, the Controlled Digital Lending referred to in NLNZ's communications is not legal nor within the permitted use provisions for libraries in part 2 of the Copyright Act 1994. Further, IA does not qualify for any of the library permitted uses.
10. We are therefore seeking your written undertakings that:
- (a) NLNZ will carry out a review to determine all the works in the OPC that are still within copyright;
 - (b) Will immediately withdraw from the IA contract and will not be party to any provision of copyright works from the OPC to IA for the purposes of digitisation and supply via the internet, without the prior written consent of publishers.
11. Please let us have these undertakings by 30 November 2021.

Yours sincerely

9(2)(a)

Robert Gorman
CEO


9(2)(a)

cc.

Paul James, CE of Dept Internal Affairs Paul.James@dia.govt.nz

Paula Browning, Copyright Licensing New Zealand 9(2)(a)

A NEWS CORPORATION COMPANY

 HarperCollins Publishers
Australia

18 November 2021

Ms Rachel Esson
National Librarian
National Library of New Zealand
PO Box 1467
Wellington 6140
New Zealand

Hon Jan Tinetti
Minister for Internal Affairs
PO Box 805
Wellington 6140
New Zealand

By email to:

rachel.esson@dia.govt.nz

ian.tinetti@parliament.govt.nz

Dear Ms Esson and the Hon Jan Tinetti,

**NATIONAL LIBRARY OF NEW ZEALAND - INTERNET ARCHIVE - OVERSEAS
PUBLISHED COLLECTION - DIGITISATION AND SUPPLY**

1. We are sending this letter to you concerning the agreement which the National Library of New Zealand (NLNZ) has announced with Internet Archive (IA). We have been alerted to this matter by the Publishers Association of New Zealand, the New Zealand Society of Authors and Copyright Licensing New Zealand.
2. We are aware that under the agreement NLNZ will donate its Overseas Published Collection of 600,000 books to IA. IA proposes to convert these from print copies to electronic copies. Part of the agreement is that NLNZ is requiring IA to make available the digitised versions of the OPC books to New Zealanders via IA's Open Library Scheme.
3. The Open Library Scheme will be available not only to New Zealand users but also users worldwide.
4. HarperCollins is a major international publisher with a huge back catalogue of copyright works. There are many other international publishers like us.
5. Spread across NLNZ's Overseas Published Collection are multiple titles and imprints for which we are the copyright owners. We know that our fellow publishing houses are in the same position as we are.

6. The fact that NLNZ may own a copy of one of our books as part of its OPC does not confer on NLNZ any rights to deal with the copyright in that book as it thinks fit. It is astonishing to us that a supposedly reputable National Library should enter into the above agreement with IA:
 - (a) Without considering copyright ownership; and
 - (b) Without seeking prior written clearance from copyright owners for the digitisation of their copyright works and the intended making available of those copyright works to the public.
7. We have taken legal advice and consider that NLNZ is liable for copyright infringement in New Zealand by making the OPC available to IA knowing that these copyright works will be digitised and, indeed, requiring that they be made available to users in New Zealand (and elsewhere in the world). There is clearly a common design on the part of NLNZ and IA.
8. Further, the Controlled Digital Lending referred to in NLNZ's communications is not legal nor within the permitted use provisions for libraries in part 3 of the Copyright Act 1994. Further, IA does not qualify for any of the library permitted uses.
9. We are therefore seeking your written undertakings that:
 - (a) NLNZ will carry out a review to determine all the works in the OPC that are still within copyright;
 - (b) Will immediately withdraw from the IA contract and will not be party to any provision of copyright works from the OPC for the purposes of digitisation and supply via the internet, without the prior written consent of publishers.
10. Please let us have these undertakings by 30 November 2021.

Yours sincerely,

9(2)(a)

Jim Demetriou
Chief Executive Officer
HarperCollins Publishers Australia and New Zealand

Paula Browning, Copyright Licensing New Zealand
by email to: 9(2)(a)

By email only to:

Paul James, Chief Executive, Department of Internal Affairs Paul.James@dia.govt.nz

cc:

Hon Jan Tinetti, Minister for Internal Affairs Jan.Tinetti@parliament.govt.nz

Rachel Esson, National Librarian Rachel.Esson@dia.govt.nz

Tuesday 30th November 2021

Dear Mr James,

NATIONAL LIBRARY OF NEW ZEALAND – INTERNET ARCHIVE – OVERSEAS PUBLISHED COLLECTION – DIGITISATION AND SUPPLY

I am writing to you regarding the agreement between the National Library of New Zealand (NLNZ) and Internet Archive (IA) relating to the “donation” of some 600,000 titles in NLNZ’s Overseas Published Collection (OPC) to Internet Archive. The intention is that these titles will be digitised and made available publicly to internet users worldwide via IA’s Open Library.

The Publishers Association is the member organisation for UK publishing, representing publishers of all sizes and specialisms. Our members produce digital and print books, research journals and educational resources across genres and subjects. In representing members on matters of law and policy, our focus is on ensuring that the value of publishing and its economic and cultural contribution are recognised.

The UK is the largest exporter of books in the world. The value of UK publishing exports to New Zealand in 2020 was approximately of NZD \$20 million. In addition, our members have local operations in New Zealand through which they publish a diversity of local New Zealand authors.

Our members include major international publishers with huge back catalogues of copyright works through to very small publishers entirely reliant on a number of books for their continuing existence. They are all passionate about the capacity for books and reading to make life better for people - to educate, illuminate, inspire and entertain. Part of this mission is making titles available through library collections around the world.

The OPC contains multiple titles and imprints in which our members own or exclusively control copyright. These include titles which are protected by copyright and commercially available in print and digital formats in multiple territories around the world. The fact that NLNZ may own a copy of one of our members’ titles as part of its OPC, however, does not entitle it to deal with the copyright as it sees fit. Copyright confers the exclusive right to undertake a number of restricted acts upon the owner.

We were therefore astonished to discover that NLNZ has entered into this agreement with IA without considering copyright ownership and without authorisation from right holders in respect of the

digitisation and intended making available of the copyright works to the public. An “opt-out” scheme does not amount to authorisation in these circumstances – no permission has been granted in relation to the exclusive rights conferred by copyright. Those that have engaged with it have felt they have no other option and have been forced into the process unfairly.

We are aware of advice received by our counterpart organisations in New Zealand (privilege is not waived) that NLNZ would be liable for copyright infringement in New Zealand by making the OPC available to IA knowing that the copyright works will be digitised without authorisation and requiring that they be made available without authorisation to users in New Zealand (and elsewhere in the world). The concept of Controlled Digital Lending (CDL) under which NLNZ purports to take these steps does not form part of the law of New Zealand (nor that of the UK or EU) nor does it fall within the permitted use provisions. IA also does not qualify for any of the library permitted uses.

Given the intention that the works will be made available worldwide, the activities complained of may also lead to infringements of copyright in other jurisdictions. The unlawful action of IA and its supporters risk harming the legitimate library ebook market and threatening author and publisher income. Publishers are strong supporters of and suppliers to libraries but this cannot continue to be the case for those which unilaterally override copyright laws.

We therefore seek your written undertaking that NLNZ will withdraw from its agreement with IA and not provide any copyright-protected works from the OPC to IA for the purposes of digitisation and supply via the internet without the prior written consent of publishers. We very much hope that you can provide this reassurance and that further action by publishers around the world will not become necessary.

We would respectfully ask for your urgent consideration of this matter and your response no later than 14 December 2021. If you require any further information, please do not hesitate to contact me.

Yours sincerely,

9(2)(a)

Stephen Lotingga, Chief Executive

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Sunday 11 July 2021

Tēnā koe Minister Tinetti,

Members of the New Zealand Society of Authors, and the Publishers Association of New Zealand were shocked to learn on Friday that the National Library apparently plans to handover hundreds of thousands of books from its collection to the Internet Archive.

The Internet Archive's scanning and online distribution of books has been condemned internationally as piracy on a massive scale.¹ This activity by the Internet Archive is currently the subject of a major lawsuit from international publishers, representing authors from around the world, and supported by authors groups.²

We represent thousands of authors and dozens of publishers from across New Zealand. Our members have themselves encountered their creative works being distributed illegally by the Internet Archive. We have previously documented these infringements to government, as illustrated by the **attached** letter to Minister Fafoi (sent as part of the Review of the Copyright Act in October 2018).

This is piracy that challenges the livelihoods of Kiwi authors and publishers, working hard in tough market conditions to bring Aotearoa the stories and creativity we all treasure. If the National Library were to follow through with this plan it would risk jeopardising our standing globally as a place where creative industries can flourish. It amounts to the National Library exporting its problem – washing its hands of it – to become instead the problem of individual authors, publishers, family estates and other rights holders around the world. This is not how New Zealand typically behaves on the world stage, nor does it reflect our values as a responsible global actor.

¹ <https://publishingperspectives.com/2020/06/usa-aap-member-publishers-file-copyright-infringement-lawsuit-against-internet-archive/>

² <https://publishers.org/news/publishers-file-suit-against-internet-archive-for-systematic-mass-scanning-and-distribution-of-literary-works/>

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We understand the National Library intends to operate an 'opt-out' clause for rights holders of books given to the Internet Archive. This mechanism has no standing in law, here or abroad. Amongst other issues, it relies upon a presumed consent that simply does not exist, as shown by the scale of the lawsuit from affected rightsholders. Such a reckless mechanism also strikes us as being alarmingly at odds with the values and behaviour we would expect from our National Library.

For organisations such as ours to discover a decision of this magnitude for our members by chance and at the last minute (through a media release in Scoop³) underlines the sheer inadequacy of any stakeholder consultation from the National Library. Our members invest vast amounts of time, energy and resource into working alongside New Zealand libraries, including the National Library, to provide readers with access to books. The Internet Archive invests nothing. This plan is an affront to our local creative ecosystem and will satisfy no one.

We acknowledge that the National Library is under pressure to find a solution for these books. We implore you to recognise that dumping them with the Internet Archive is not the answer. Instead, we ask that you please withdraw this plan, abandon any partnerships with the Internet Archive, and instead sit down with local stakeholders to find a lasting solution that is legally and ethically sound. We would gladly contribute to such a process.

Ngā mihi nui,

9(2)(a)

Mandy Hager, President, New Zealand Society of Authors

9(2)(a)

Graeme Cosslett, President, Publishers Association of New Zealand

Attached: Letter to Minister Faafoi, 30 October 2018

CC: Paul James, Chief Executive, Department of Internal Affairs

³ <http://wellington.scoop.co.nz/?p=137534>



3rd November 2021

To: Rachel Esson, National Librarian Rachel.Esson@dia.govt.nz
Paul James, Chief Executive, Department of Internal Affairs Paul.James@dia.govt.nz
Hon Jan Tinetti, Minister for Internal Affairs Jan.Tinetti@parliament.govt.nz

NATIONAL LIBRARY OF NEW ZEALAND – INTERNET ARCHIVE – OVERSEAS PUBLISHED COLLECTION – DIGITISATION AND SUPPLY

I am writing to you concerning the agreement announced between the National Library of New Zealand (NLNZ) and the Internet Archive (IA) for the donation of the NLNZ Overseas Published Collection of 600,000 books. The books are to be scanned and digitised by IA and then made available via IA's Open Library Scheme, accessible to internet users around the world.

I am the CEO of Hachette UK Ltd, a leading UK publishing group made up of ten autonomous publishing divisions and over fifty imprints with a rich and diverse history. Hachette UK is owned by Hachette Livre, a global trade and educational publisher, and also has subsidiaries in India, Australia and New Zealand (Hachette Aotearoa New Zealand).

In New Zealand we publish a diverse and celebrated list of local authors and brands including Margaret Mahy, Nalini Singh, Nicky Pellegrino, J.P. Pomare, Donovan Bixley and Edmonds Cookbooks. We are passionate about discovering New Zealand talent, working with established authors and building long careers.

At Hachette UK, our mission is to make it easy for everyone, everywhere to unlock new worlds of ideas, learning, entertainment and opportunity. Part of this mission is to provide our books to library collections around the world, from small primary schools to important national institutions.

We are proud that the NLNZ Overseas Published Collection contains a large volume of titles published by us, our subsidiaries and sister companies. These include titles which remain protected by copyright and are commercially available in print and digital formats in territories around the world. However, the fact a library owns a copy of one of our books does not confer on it any rights to deal with the copyright in that book as it sees fit.

I was therefore astonished to learn from our colleagues at Hachette Aotearoa New Zealand that the NLNZ have made the agreement with IA without asking permission of the copyright owners. The "controlled digital lending" referred to in the NLNZ's announcement of the agreement is illegal – a manufactured concept not part of any permitted use provisions for libraries in New Zealand, the UK or elsewhere. It is the subject of ongoing litigation in the New York District Court against IA in which our sister company, Hachette Book Group (together with HarperCollins, Wiley and Penguin Random House) is the principal plaintiff.

The illegal actions of IA and its supporters risk destroying the legal library ebook market, harming consumer sales and threatening author and publisher income. Many publishers, including Hachette

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UK, are strong supporters of and suppliers to libraries but this cannot continue to be the case for those which unilaterally override copyright laws.

We have received advice (privileged is not waived) that the NLNZ would itself be liable for copyright infringement in New Zealand by making the Overseas Published Collection available to the IA for digitisation and communication to the public. We very much hope for your written confirmation that NLNZ will withdraw from its agreement with IA and that further action from us and our fellow publishers around the world will not become necessary.

Yours sincerely,

9(2)(a)

David Shelley

CEO, Hachette UK Ltd

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ELSEVIER

30 November 2021

Paul James
Chief Executive, Department of Internal Affairs
Paul.James@dia.govt.nz

Hon Jan Tinetti
Minister for Internal Affairs
Jan.Tinetti@parliament.govt.nz

Rachel Esson
National Librarian
Rachel.Esson@dia.govt.nz

Dear Mr. James, Hon. Tinetti, and Ms. Esson:

**NATIONAL LIBRARY OF NEW ZEALAND – INTERNET ARCHIVE – OVERSEAS
PUBLISHED COLLECTION – DIGITISATION AND SUPPLY**

1. I write on behalf of the Elsevier companies worldwide. For more than 140 years, Elsevier has supported the work of its research and health partners. Researchers and healthcare professionals rely on our 2,500+ journals, including [The Lancet](#) and [Cell](#); our 40,000 book titles; and our iconic reference works, such as *Gray's Anatomy*.
2. We are sending this letter to you concerning the agreement which the National Library of New Zealand (NLNZ) has announced with Internet Archive (IA). We have been alerted to this matter by the Publishers Association of New Zealand, the New Zealand Society of Authors and Copyright Licensing New Zealand.

We are aware that under the agreement NLNZ will donate its Overseas Published Collection of 600,000 books to IA. IA proposes to convert these from print copies to electronic copies. Part of the agreement is that NLNZ is requiring IA to make available the digitised versions of the OPC books to New Zealanders via IA's Open Library Scheme.

4. The Open Library Scheme will be available not only to New Zealand users but also users worldwide.

5. Our company is a major international publisher with a huge back catalogue of copyright works. There are many other international publishers like us.
6. Spread across NLNZ's Overseas Published Collection are many titles and imprints for which we are the copyright owners. We know that our fellow publishing houses are in the same position as we are.
7. The fact that NLNZ may own a copy of one of our books as part of its OPC does not confer on NLNZ any rights to deal with the copyright in that book as it thinks fit. It is astonishing to us that a supposedly reputable National Library should enter into the above agreement with IA:
 - (a) Without considering copyright ownership; and
 - (b) Without seeking prior written clearance from copyright owners for the digitisation of their copyright works and the intended making available of those copyright works to the public.
8. We have taken legal advice and consider that NLNZ is liable for copyright infringement in New Zealand by making the OPC available to IA knowing that these copyright works will be digitised and, indeed, requiring that they be made available to users in New Zealand (and elsewhere in the world). There is clearly a common design on the part of NLNZ and IA.
9. Further, the Controlled Digital Lending referred to in NLNZ's communications is not legal nor within the y permitted use provisions for libraries in part 3 of the Copyright Act 1994. Further, IA does not qualify for any of the library permitted uses.
10. We are therefore seeking your written undertakings that:
 - (a) NLNZ will carry out a review to determine all the works in the OPC that are still within copyright;
 - (b) Will immediately withdraw from the IA contract and will not be party to any provision of copyright works from the OPC to IA for the purposes of digitisation and supply via the internet, without the prior written consent of publishers.
11. Please let us have these undertakings by 14 December 2021.

Yours faithfully

William K. Zobrist

Vice President, Commercial & Sales Operations
Elsevier

9(2)(a)



November 23, 2021

The Chief Executive
Department of Internal Affairs
Wellington, NZ
VIA EMAIL: Paul.james@dia.govt.nz

Dear Mr. James:

I am the Chief Executive Officer for Hachette Book Group, Inc (HBG). On behalf of HBG, I write in response to your announcement that the National Library of New Zealand plans to transfer 600,000 books from its Overseas Published Collections (OPC) to the Internet Archive (IA). My understanding is that the books are to be scanned and digitized by IA, then distributed for free around the world through IA's Open Library website.

HBG is a leading US trade publisher. In one year, HBG publishes more than 1,550 adult books and 420 books for young readers. We distribute those books in the US but in many cases also around the world, and we sell these works through a variety of channels, including to library collections and schools. Indeed HBG and its predecessor entities have long partnered with libraries to provide communities with access to literary content, and HBG strongly supports equitable access for all to a vibrant and diverse collection of literary resources.

While IA misleadingly holds itself out as a library, we believe its digitization scheme is blatant copyright infringement. As you are now no doubt aware, HBG and other US publishers have sued IA for copyright infringement. The illegal distribution of these digitized books risks destroying the legal ebook market, which would have a dramatic impact not only author and publisher income, but also on the very ability of publishers to invest in the creation of the content that libraries wish to bring to their patrons. I will not belabor the point, as I understand that the Association of American Publishers has already sent you a detailed letter setting out the illegality of IA's scheme. HBG joins strongly in that letter, and stands with our sister publishers at Hachette UK, Hachette Aotearoa New Zealand, and around the world to ask that the Minister, the Department of Internal Affairs, and the National Librarian withdraw from the announced arrangement with IA. To proceed otherwise would dramatically accelerate the damage already being caused by IA's illegal activities.

To be clear, IA is not authorized to digitize or distribute any titles for which HBG and its divisions (including but in no way limited to titles published by Grand Central Publishing; Little, Brown and Company; Little Brown Books for Young Readers; Hachette Nashville; Orbit; Perseus Books, including for example Basic Books and PublicAffairs; Workman; Storey; and Timber Press) hold the copyright. HBG reserves all rights with respect to these works. Should

NZLZ continue with its plan to donate works to IA, HBG's titles should not be included in that donation.

Respectfully Submitted,

DocuSigned by:
9(2)(a)

Michael Pietsch

Cc:

Hon. Jan Tinetti, Minister for Internal Affairs (via email: Jan.tinetti@parliament.govt.nz)

Rachel Esson, National Librarian (via email: Rachel.esson@dia.govt.nz)

OPC notice address (via email: opcmanagement@dia.govt.nz)

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The Chief Executive
Department of Internal Affairs
WELLINGTON

28 November 2021

Dear Sir/Madam,

**NATIONAL LIBRARY OF NEW ZEALAND - INTERNET ARCHIVE -
OVERSEAS PUBLISHED COLLECTION - DIGITISATION AND SUPPLY**

1. We are sending this letter to you concerning the agreement which the National Library of New Zealand (NLNZ) has announced with Internet Archive (IA). We have been alerted to this matter by the Publishers Association of New Zealand, the New Zealand Society of Authors and Copyright Licensing New Zealand.
2. We are aware that under the agreement NLNZ will donate its Overseas Published Collection of 600,000 books to IA. IA proposes to convert these from print copies to electronic copies. Part of the agreement is that NLNZ is requiring IA to make available the digitised versions of the OPC books to New Zealanders via IA's Open Library Scheme.
3. The Open Library Scheme will be available not only to New Zealand users but also users worldwide.
4. Our company is an independent publisher with a huge back catalogue of copyright works.
5. Spread across NLNZ's Overseas Published Collection are multiple titles and imprints for which we are the copyright owners. We know that our fellow publishing houses are in the same position as we are.
6. The fact that NLNZ may own a copy of one of our books as part of its OPC does not confer on NLNZ any rights to deal with the copyright in that book as it thinks fit. It is astonishing to us that a supposedly reputable National Library should enter into the above agreement with IA:

- (a) Without considering copyright ownership; and

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- (b) Without seeking prior written clearance from copyright owners for the digitisation of their copyright works and the intended making available of those copyright works to the public.
7. We have taken legal advice and consider that NLNZ is liable for copyright infringement in New Zealand by making the OPC available to IA knowing that these copyright works will be digitised and, indeed, requiring that they be made available to users in New Zealand (and elsewhere in the world). There is clearly a common design on the part of NLNZ and IA.
8. Further, the Controlled Digital Lending referred to in NLNZ's communications is not legal nor within the permitted use provisions for libraries in part 3 of the Copyright Act 1994. Further, IA does not qualify for any of the library permitted uses.
9. We are therefore seeking your written undertakings that:
- (a) NLNZ will carry out a review to determine all the works in the OPC that are still within copyright;
- (b) Will immediately withdraw from the IA contract and will not be party to any provision of copyright works from the OPC to IA for the purposes of digitisation and supply via the internet, without the prior written consent of publishers.
10. Please let us have these undertakings by 15 December 2021.

Yours faithfully

DocuSigned by:
9(2)(a)

Mary Cannam
Managing Director

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info@pearson.com
pearson.com

Paul James
Chief Executive
Department of Internal Affairs
WELLINGTON
New Zealand

30 November 2021

Dear Mr. James,

**NATIONAL LIBRARY OF NEW ZEALAND – INTERNET ARCHIVE – OVERSEAS PUBLISHED COLLECTION –
DIGITISATION AND SUPPLY**

We are sending this letter to you concerning the agreement which the National Library of New Zealand (NLNZ) has announced with Internet Archive (IA) under which NLNZ plans to donate its Overseas Published Collection (OPC) of 600,000 books to IA. We have been alerted to this matter by the Publishers Association of New Zealand, the New Zealand Society of Authors and Copyright Licensing New Zealand. We also have learned that the NLNZ has now announced that it intends to reconsider its plans for the OPC given the copyright concerns raised by interested parties.

We are aware that under the agreement with IA, IA proposes to convert OPC books from print copies to electronic copies. Part of the agreement is that NLNZ is requiring IA to make available the digitised versions of the OPC books to New Zealanders via IA's Open Library Scheme. The Open Library Scheme will be available not only to New Zealand users but also users worldwide.

Our company is a major international publisher with a huge back catalogue of copyright works. There are many other international publishers like us. Spread across NLNZ's Overseas Published Collection are multiple titles and imprints for which we are the copyright owners. We know that our fellow publishing houses are in the same position as we are. The fact that NLNZ may own a copy of one of our books as part of its OPC does not confer on NLNZ any rights to deal with the copyright in that book as it thinks fit. It is surprising to us that a reputable National Library should enter into the above agreement with IA without considering copyright ownership and seeking prior written clearance from copyright owners for the digitisation of their copyright works and the intended making available of those copyright works to the public.

We consider the NLNZ plans with respect to the OPC as a violation of New Zealand copyright laws by making the OPC available to IA knowing that these copyright works will be digitised and, indeed, requiring that they be made available to users in New Zealand (and elsewhere in the world). Further,

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the Controlled Digital Lending referred to in NLNZ's communications is not legal nor within the permitted use provisions for libraries in part 3 of the Copyright Act 1994. Further, IA does not qualify for any of the library permitted uses.

In your reconsideration of the NLNZ plans, we are seeking your written undertakings that:

- (a) NLNZ will carry out a review to determine all the works in the OPC that are still within copyright;
- (b) Will immediately withdraw from the IA contract and will not be party to any provision of copyright works from the OPC to IA for the purposes of digitisation and supply via the internet, without the prior written consent of publishers.

Please let us have these undertakings by 15 December 2021.

Yours faithfully,

9(2)(a)

Sharon Hague
Managing Director
UK Schools

cc. Hon Jan Tinetti, Minister for Internal Affairs Jan.Tinetti@parliament.govt.nz

Rachel Esson, National Librarian Rachel.Esson@dia.govt.nz

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To Hon Jan Tinetti – Minister for Internal Affairs
Rachel Esson – National Librarian

30 September 2021

Dear Jan Tinetti and Rachel Esson,

The Society of Authors (UK) is very concerned to hear about the plans to digitise 600,000+ books from the National Library of New Zealand's collection for use by Internet Archive, irrespective of whether or not they're in copyright. Members of our Society, as well as many authors who are not members, greatly value the copyright laws that make it possible for us to earn a living from our work. This right seems to be so basic a natural good, so obviously and clearly just and proper, that it's impossible to imagine a scheme like this being proposed in any other field of human life.

'Yes, we know you cure the sick, but you'd probably go on doing it even without a salary. So, from this week on, no more pay.'

'Just carry on making cars. That's fine. But we're not going to pay you for them, because then they'd cost much more to the general public.'

'You're doing a great job on your farm. Good healthy food for everyone. We'll take it away for nothing, and we won't even charge you for the transport costs.'

Libraries are the very heart of a nation and a culture's knowledge of itself and understanding of the world. It's impossible to overstate their value. We authors who write the books on your shelves are inveterate, habitual, lifelong users of libraries, and all of us share a gratitude and appreciation of the work that librarians do in preserving our work and promoting reading in every part of society. The one thing that makes this link between us so valuable is our sense that libraries understand the nature of our work, that they know that the vast majority of authors do not make fortunes from their books, that they share with us the belief that a modest but secure reward can be the foundation for works of imperishable greatness.

To find that a great national library like that of New Zealand is collaborating in a scheme to break the cherished copyright laws and give our work away for nothing is profoundly shocking. None of our 11,000+ members have been consulted about this plan or asked for their consent. Digitising old out-of-copyright books is one thing, and we can all see the benefit of that; but taking rightfully earned money out of the pockets of living writers is quite another. Please let us, and writers in every part of the world whose works you are planning to use for nothing, know that you're going to change your mind about this iniquitous scheme, and return to the principle of paying fairly for the use of our work.

9(2)(a)

Philip Pullman

President of the Society of Authors United Kingdom

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15 September 2021

The Minister of Internal Affairs,
Hon Jan Tinetti

Chief Executive, Department of Internal Affairs
Mr Paul James

Via email : Jan.Tinetti@parliament.govt.nz
Paul.james@dia.govt.nz

Tēnā kōrua,

NATIONAL LIBRARY OF NEW ZEALAND – INTERNET ARCHIVE – AGREEMENT TO DISPOSE OF OVERSEAS PUBLISHED COLLECTIONS

1. We are writing to you concerning the written agreement which the National Library of New Zealand (NLNZ) has entered into with the Internet Archive (IA) in relation to the Overseas Published Collections (OPC) held by NLNZ.

Background

2. From reviewing the material available on this agreement as well as various public statements and correspondence from both the National Librarian and the Minister, it has become very clear to us that, prior to entering into this agreement, NLNZ has failed to adequately consider the issue of copyright infringement liability.
3. As a result of this agreement, NLNZ is now unquestionably liable for copyright infringement in the New Zealand courts. This is a very serious issue and we are writing to put DIA and the Minister on notice of that liability and the consequences.
4. This letter is being sent on behalf of the Publishers Association of New Zealand, New Zealand Society of Authors and Copyright Licensing New Zealand.
5. We have alerted our three organisations' equivalents in other countries to this illegal action and are collating their written support. These organisations represent the owners of copyright in books which make up the OPC, being some 600,000 books purchased and held by NLNZ.
6. We have obtained a full list of the OPC. It is clear that a very significant proportion of the books are still in copyright.

(1) The Agreement with IA

7. The terms of the agreement and the intended joint actions of NLNZ and IA have been made very clear in various public statements by the National Librarian and in letters written by Minister Tinetti.
8. NLNZ has agreed to donate the OPC to IA. As part of the agreement, IA will take the books from NLNZ and digitise these to convert them from print copies to electronic copies. NLNZ has obtained assurances from IA that it will make available the digitised versions of the OPC books to New Zealand users via its Open Library Service. Minister Tinetti's correspondence (referred to later) confirms all of this.
9. It is clear that, as part of meeting the undertakings and commitments to NLNZ, IA will make available the digitally-copied books via its Open Library Service website. In order for New Zealand users to have access to the digitised books, IA will need to "communicate" these works to New Zealand users by enabling New Zealand users to view these works online. In doing so, users in New Zealand will download the works temporarily on to their computers, tablets, mobile phones and devices for subsequent download, use and re-communication of parts (or the whole) of the digitised books.

(2) Digitising and Use of Copyright Works Without Consent

10. The intended outcome of NLNZ's agreement with IA unquestionably involves copyright infringement in New Zealand. Copyright owners (authors and/or publishers of each individual work) have, under the Copyright Act 1994, the exclusive right to digitise (copy) their works.¹ Also copyright owners have the exclusive right to "communicate" their works in New Zealand - i.e. to transmit or make available the works electronically via the internet to users.²
11. At no time have copyright owners in works comprising the OPC given consent to NLNZ or to IA to the digitising (copying) of their works.
12. At no time have copyright owners in works comprising the OPC given their consent to communication of their copyright works by IA to users in New Zealand.
13. NLNZ may possibly have thought that, because it is not digitising the works and because it will not be communicating the books to users in New Zealand, that it has no liability. If this were the case, NLNZ is sadly mistaken.
14. The following is now well-established law.

(3) Joint Tortfeasor Liability

15. It is clear that NLNZ is furthering the acts which will amount to copyright infringement in New Zealand by making the books available to IA, knowing that they will be digitised and indeed requiring IA to make these available to users in New Zealand. Further, there is clearly a *common design* on the part of NLNZ and IA. The very arguments that NLNZ and the Minister are now using to "sell" to the public and to authors and publishers on the "advantage" of the agreement show that common design. These are set out on

¹ Copyright Act 1994 s 30
² Copyright Act 1994. s 33

NLNZ's website and in letters from Minister Tinetti in August 2021 to various stakeholders (which we have seen). The NLNZ website states:

"We have reached agreement with Internet Archive to donate books that are removed from the Overseas Published Collections (OPC) for digitisation, which will ensure free future online access for New Zealanders. "

16. These communications unquestionably establish common design.

(4) *Infringing Acts in New Zealand*

17. There is also clear legal authority both in the UK and in New Zealand that communicating the digitised books to users in New Zealand involves infringing acts not only from wherever IA's servers are located, but also in New Zealand where the end users of IA's intended services are located. Precedents arising out of the unauthorised streaming of music and film, premier league football and P2P file sharing cases have established a wealth of legal authority confirming this.

18. End users of the intended service will also infringe copyright in the digitised books by downloading the works or parts of them in New Zealand.

(5) *Conclusion*

19. The purpose of this letter is to put NLNZ, the Department and the Minister on notice of the joint liability that NLNZ is now facing for copyright infringement. Owners of copyright in books comprising the OPC are gearing up for legal action.

20. It is not too late for NLNZ to halt the unwise and infringing steps it has embarked on by cancelling the contract and not making the OPC available to IA.

21. Now that you are on notice, we seek undertakings (on behalf of copyright owners) that NLNZ will reconsider its intended actions and will retreat from the path of infringing activity that it has embarked on and cancel the contract.

22. Please let us have a response by **28 September 2021**.

9(2)(a)

Graeme Cosslett
President
Publishers Association of NZ

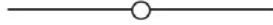
Jenny Nagle
Chief Executive
NZ Society of Authors

Paula Browning
Chief Executive
Copyright Licensing NZ

cc. Andrew Brown QC
Jack Oliver-Hood

asa

AUSTRALIAN
SOCIETY OF
AUTHORS



AUSTRALIAN
PUBLISHERS
ASSOCIATION

Rachel Esson

National Librarian

Te Puna Mātauranga o Aotearoa | National Library of New Zealand

By email: Rachel.Esson@dia.govt.nz

27 October 2021

Dear Rachel,

Thank you for your email dated 13 October and I apologise for the delay in responding to you.

As you will know from the letter from the Australian Society of Authors (**ASA**) dated 27 July 2021 to the Minister for Arts, Culture and Heritage and the Minister of Internal Affairs and copied to you, the ASA was disappointed to hear of the decision of the National Library of New Zealand (**NLNZ**) to gift titles from its Overseas Publications Collection to Internet Archive. Similarly, the Australian Publishers Association (**APA**) does not support this plan.

The ASA and APA have no objection to the sharing of any out-of-copyright works, for which permission is no longer necessary. It is the view of the ASA and APA, however, that in scanning physical books still under copyright and making those books available for download by users, without permission from rights holders, the Internet Archive is infringing copyright. We are not comforted by the Internet Archive's assertion of 'Controlled Digital Lending', which is simply loaning the book to one user at a time.

We do not agree that this is "much like your public library does with eBook" as our public libraries obtain ebooks under *licences* from publishers and pay the publisher a licence fee for every ebook, a portion of which is on-paid to authors. Internet Archive does not enter into any licences with authors or publishers and pays no such fee.

We regard libraries as allies of authors and publishers; and are dismayed at the decision by the NLNZ to supply the Internet Archive.

I understand the NLNZ is offering an opt-out to rights holders of books who do not wish for their books to be donated, if those rights holders email you with a request and provide proof of rights. In our view, this approach is unreasonably shifting the onus of responsibility onto

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publishers and authors, rather than proactively seeking permission. It is an onerous and impracticable task for each Australian publisher to search the OPC spreadsheet you have made available on your website for every title for which they hold exclusive rights, confer with the relevant author (and illustrator if relevant), and then request that title not be included, and send copies of contracts for each relevant title to the NLNZ.

While we cannot speak for every Australian author, illustrator and publisher, it's the policy of the ASA and APA not to support this decision, and we request the NLNZ instead seeks consent from the rights holders of those titles you wish to transfer to Internet Archive. We support similar requests made by the New Zealand Society of Authors and Publishers Association of New Zealand.

We are happy to engage in a conversation over the phone if that would be useful.

Best regards

9(2)(a)

Olivia Lanchester

CEO, ASA

Dr Stuart Glover

Government Relations Manager, APA

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