

UNIVERSITIES AUSTRALIA SUBMISSION

UNIVERSITIES AUSTRALIA SUBMISSION TO COPYRIGHT MODERNISATION CONSULTATION

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EXECUTIVE SUMMARY

Universities Australia is pleased to provide this response to the Copyright Modernisation Review consultation paper.

Universities Australia strongly supports the reform options proposed by the Australian Law Reform Commission (ALRC) and the Productivity Commission to replace inflexible copyright exceptions with a flexible fair use exception and to unlock access to orphan works. Universities Australia urges the Government to proceed with these reforms so that the *Copyright Act 1968* can serve our needs in the digital age.

Copyright law reform is no longer just a matter relevant to cultural policy. It is fundamental to fulfilling the research, education and innovation policy goals clearly articulated by the Government. If our copyright laws do not enable Australia to compete internationally in critical emerging fields of inquiry, we will suffer economically.

The ALRC and Productivity Commission recommended urgency to modernise copyright and Universities Australia believes this opportunity to underpin our economic growth cannot be missed.

Universities Australia submits that modernising Australian copyright law by enacting a flexible fair use exception is long overdue to support current and future innovation, teaching and research. It would ensure that the technologies and innovations of the future are enabled, rather than being automatically ruled out by a restrictive list of purpose-based exceptions.

This submission outlines specific instances where Australian universities and researchers are being held hostage by outdated, inflexible copyright laws that are inappropriate for research and education in a digital age.

This submission also provides evidence that refutes the false and misleading claims promulgated by rights holder groups that the introduction of a fair dealing exception in Canada has negatively affected the publishing industry in that country.

INTRODUCTION

The Government is faced with an important choice in the Copyright Modernisation Review (the Review): to accept – or reject – the recommendations of the expert bodies that have weighed up the evidence and set out a roadmap for modernising and future proofing copyright law.

Universities Australia strongly urges the Government to disregard the rhetoric that has been an unfortunate feature of the copyright reform debate in Australia to date, and to follow the evidence.

There is currently a stark mismatch between Australia’s education and innovation policy goals and what our inflexible copyright law actually permits.

For example, the Government’s education and innovation policies each recognise the importance of artificial intelligence (AI) technologies such as machine learning and text and data mining technologies, in achieving Australia’s aim of being a world class research nation, and of being counted in the top tier of innovation nations by 2030. AI and machine learning have been identified as a priority area for research by the Australian Research Council.

What is often forgotten, however, is that copyright reform is **absolutely central** to achieving this goal. All these new technologies involve making copies, and the existing copyright regime greatly limits the ways in which those copies can be utilised in this country.

While machine learning and text data mining does occur in Australia, researchers – and industry – face **much greater limitations** to how they can make full use of these cutting-edge technologies than their counterparts in jurisdictions with more flexible copyright law.

As United States copyright academic Matthew Sag recently observed:

“Right now, there are technologies being developed and research being done in the United States that either can’t be done in other countries, or can only be done by particular people subject to various arbitrary restrictions.”¹

Copyright law is no longer just of relevance to cultural policy. It is a central plank of education and innovation policy and reform is required for Australia to achieve its research and innovation goals. Reform must take place in accordance with *broader economic policy considerations* to ensure that copyright is not used for purposes that go beyond its intended scope in ways that block innovation.

The current reality is that Australia’s prescriptive, purpose-based copyright exceptions put our universities and our innovative industries at a competitive disadvantage. They are standing in the way of research. They are obstructing academic engagement and collaboration between universities and industry. They are impeding innovation and making Australia a less attractive choice for internet-based businesses.

Do we want to continue to be a country where cutting edge technologies such as cloud computing, machine learning, and text and data mining are stymied by copyright law, and where it is not legally safe to operate a search engine?

Do we want to continue to be a country where universities are forced to remove content from higher degree theses before making them publicly accessible, because the copyright

¹ Sag, M. *Text Mining, Non-Expressive Use and the Technological Advantage of Fair Use*, 25 May 2017 at <http://matthewsag.com/?p=1704>.

exception that permitted the student to include the content in the thesis does not apply when the university uploads that same thesis to a publicly accessible repository?

Do we want to continue to be a country where copyright law operates as a roadblock to collaboration between universities and industry?

If not, this review is an opportunity to fix that.

Opposition to sensible copyright reform in Australia has for the most part been led by large overseas-based publishers (many of whom benefit from fair use in the United States but are happy to oppose it in Australia) and copyright collecting societies. These groups have claimed – falsely – that copyright reform in Canada has “decimated” the Canadian publishing industry, and that the same would happen in Australia if a fair use or fair dealing for education exception were enacted. Their claims are provably false and need to be exposed as wrong and misleading.

Following the enactment of a fair dealing for education exception in Canada in 2012, it is true that payments to the copyright collecting society (Access Copyright) decreased. However, this is not because universities are no longer paying to use content. Spending by Canadian universities on copyright content ***increased significantly***.²

Canadian universities are now accessing content via direct commercial licences and through direct dealings with publishers, rather than through a blanket collective copyright licence. Collective licences are becoming licences of last resort. They are no longer a major way for universities to access content.

This trend is also apparent in Australia and should be welcomed by rights holders, even if not by collecting societies (who view it as a threat to their business model). This trend has nothing to do with copyright reform.

It would be an incredible setback for this country if copyright reform was, once again, put into the ‘too hard basket’ due to the vocal – and in many respects misleading – objections of one stakeholder group.

Copyright reform must be evidence-based, not rhetoric-based.

² See ‘Section 4 - Setting the record straight on what happened in Canada’ below.

1 THE POLICY CASE FOR FLEXIBLE COPYRIGHT EXCEPTIONS

The *Australia 2030: Prosperity Through Innovation* report sets out a roadmap for Australia to be counted in the “top tier of innovation nations” by 2030. One of the central recommendations of the report is for the Government to “create a more flexible regulatory environment that fosters innovation”.³ Copyright law – particularly flexible copyright exceptions – is central to achieving this goal. Yet surprisingly, the report does not mention it.

Australia cannot hope to achieve world-leading status as an innovative nation when it is not legally safe, for example, to operate a search engine; when cloud computing, text and data mining, and machine learning technologies are at the mercy of inflexible and antiquated copyright exceptions.

In universities, copyright officers must constantly advise academics that it is these inflexible copyright laws that are preventing them from using copyright content in their teaching, research and broader community engagement. This is despite the fact that their intended uses would in no way harm copyright owners and would be permissible in comparable jurisdictions as such as the United States, South Korea, the Philippines, Singapore and Canada.

Sharing content with fellow academics for collaborative research

Innovation starts with research and collaboration. Existing copyright exceptions may be able to facilitate the first, but they stifle the second.

The *Copyright Act 1968* (the Act) contains fair dealing exceptions that permit use of copyright content for the purpose of research or study.⁴ Academics and students are free to rely on this exception when using small amounts of content for the purpose of their own research.

But what about when a group of academics is writing a paper together? In a submission to Government, Copyright Agency made it clear that in its view, there is *no scope* for academics to rely on the fair dealing exception for this purpose. Copyright Agency submitted that:

“the transmission of copyright works for discussion with colleagues could not be a fair dealing for research or study purposes.”⁵

While we do not necessarily agree with this legal analysis, a very real, chilling effect is imposed by uncertainty about how the fair dealing exception would be applied in this kind of case. Copyright Agency can assert that the fair dealing exception applies in such a narrow way because that is how purpose-based exceptions work. Rather than simply asking whether the use is ‘fair’, Australian courts must first be satisfied that:

³ Department of Industry, Innovation and Science, *Australia 2030: Prosperity Through Innovation*, at <https://industry.gov.au/Innovation-and-Science-Australia/Documents/Australia-2030-Prosperity-through-Innovation-Full-Report.pdf> recommendation 11, page 103.

⁴ *Copyright Act 1968*, sections 40 and 103C.

⁵ Copyright Agency submission to the Department of Attorney General in relation to the *Copyright Amendment (Digital Agenda) Bill 1999*, 19 March 1999, paragraph 33.

1. The copying was carried out for the relevant purpose (in this case, research or study);
and

2. The person making the copy had the relevant purpose (in this case, that the copying was being done for the *copier's own research or study*).

The public policy implications of this are ludicrous. Universities are risk averse institutions and tend to adopt a conservative approach to applying copyright law. An activity that would cause no market harm and which is manifestly in the public interest, is automatically ruled out because of inflexible copyright exceptions that do not allow the right question to be asked -- that is 'is this use fair?'

A fit for purpose copyright law would facilitate collaborative academic research, not impose arbitrary roadblocks to uses that cause no market harm.

1.1 SHARING CONTENT WITH INDUSTRY COLLABORATORS

The *Australia 2030: Prosperity Through Innovation* report calls for greater collaboration between universities and industry. The existing copyright exceptions framework does not support this.

As discussed in the example above, the fair dealing for research and study exception is unlikely to apply to this kind of activity, regardless of how 'fair' it is. Collaboration between university and industry cannot rely on existing copyright exceptions when making fair uses of copyright content.

1.2 TEXT AND DATA MINING PROJECTS

Text and data mining technologies are transforming scientific research. They enable automated searches of vast quantities of text and data to look for patterns, trends and other useful information. They encourage innovation and allow additional value to be extracted from the publicly funded research base.

Data and text mining technologies are also rapidly transforming research in the humanities. A new field of research known as digital humanities has emerged, using these new technologies to find patterns across large text collections.

These technologies involve the reproduction of works at many levels, including digitally scanning and reformatting works to enable them to be searched. They have the potential to infringe copyright if done without permission. Australian university researchers are hugely restricted from making full use of texts they wish to study.

One Australian university provides this advice to its academics:

"Copyright provisions may not adequately cover your intended use of the resource and it may not be easy to establish absolute access rights with the publisher."

Two recent research projects have been blocked by inflexible copyright exceptions.

- Academic A wanted to download publicly available reviews from the Internet and use an algorithm to mine the text of the reviews. The website terms of use stated that nothing on the website could be copied without permission. Given the nature of the intended project (which could potentially have involved criticism of the company operating the review

website), it was unlikely that permission would have been granted. The research project in this case was to respond to an existing article by a United States academic who had undertaken her own mass analysis of the same online reviews. The United States academic was able to do her research in reliance on the United States fair use exception. The Australian academic could not.

- Research student B wanted to use text mining methods to analyse publicly accessible Twitter feeds and Facebook posts. The project would have involved obtaining a 'data dump', which is forbidden by the terms of use of these platform operators.

One copyright officer commented:

"Many times I hear from staff that they didn't even bother to even ask me if they could do this, because they knew the answer would be 'no'."

It is possible that some text and data mining would be permitted by the research and study fair dealing exception in s 40 of the Act, although this is far from certain given that the use would very often involve copying an entire work.⁶

It is also possible that some text and data mining undertaken by a university for the purpose of *educational instruction* (that is, teaching) may fall within the so-called 'flexible dealing' exception in s 200AB of the Act. Much of this activity, however, would likely be research-based (as opposed to being for the purpose of educational instruction) and therefore fall outside of the scope of s 200AB.

What is clear is that there is *very real uncertainty* regarding the circumstances in which, if ever, an exception would be available to a researcher engaging in this activity.

It is often the case that where a person or entity has obtained a licence to use content, the commercial content licence will either be silent on the question of whether text or data mining is a permitted activity, or it will expressly prohibit such use. Universities Australia is concerned that potentially valuable data and text mining would infringe copyright if undertaken in Australia unless a specific licence is in place with the content owners.

A 2012 study by the Joint Information System Committee in the United Kingdom noted the following:

*"...a single researcher had undertaken some text mining activity on an experimental basis without realising it may not be permitted. This single incident caused all institutional access to a complete set of journals being suspended by the content provider for a week (even though it was ambiguous whether contractually text mining was permissible or not). Such penalties can have severe implications for the ongoing business of a university."*⁷

It is clear that the risks faced by universities in this regard are significant.

1.3 ARTIFICIAL INTELLIGENCE AND MACHINE LEARNING

The *Australia 2030: Prosperity Through Innovation* report includes the following statement:

⁶ On the potential benefit of using whole articles as opposed to abstracts for conducting text-based computational research see Cohen, B. et al, *The Structural and Content Aspects of Abstracts Versus Bodies of Full Text Journal Articles are Different*, BMC Bioinformatics, 2010, at <http://www.biomedcentral.com/1471-2105/11/492> paragraph 11:492.

⁷ Joint Information System Committee, *The Value and Benefits of Text Mining to UK Further and Higher Education*, 2012 at <https://www.jisc.ac.uk/sites/default/files/value-text-mining.pdf> page 21.

“The government’s priority should be to position Australia as a leading nation in the research, development and exploitation of AI and machine learning (ML) across the digital economy.”⁸

What the report does not say, however, is that ‘machine learning’ – that is, the process of using algorithms that enable computers to make predictions and conclusions on the basis of data – involves making **copies**, and that involves **copyright**. Machines only ‘learn’ when they are fed data, and lots of it.

The copyright status of machine learning in Australia is equivalent to text and data mining. In many cases, none of the existing exceptions apply. This means that if the content is protected by copyright, the underlying copying can only be done with permission.

That is not to say that machine learning is not occurring in Australia, but it can only occur legally if the data that the computer needs in order to ‘learn’ is not subject to copyright⁹ or if the rights holder has granted a licence for the data to be used for this purpose. This imposes very real restrictions on the data sets that can be used to enable machines to learn. It also puts Australia in a significantly different position to jurisdictions that have flexible copyright exceptions where the only relevant question is: ‘is this use fair?’

1.4 JOURNAL PUBLICATIONS AND SEMINAR PRESENTATIONS

It is widely acknowledged that *“the creation of new knowledge is only made possible by access to pre-existing knowledge to build upon, test, assimilate and incorporate”*.¹⁰ And yet, Australian academics and students are greatly limited in how they can engage with the academic community when their work incorporates third party content.

For example, some journal publishers allow text mining for internal or personal research, but do not permit the results of that research to be published or shared with other universities. This makes the research rather pointless.

As one copyright officer commented:

“It is vital that the analysed resources and associated metadata are available to other academics. Because of the nature of national and international collaboration, the research outputs cannot be restricted to use within one university.”

Another example is an academic who wants to include small amounts of third party material in a journal article or conference paper that will be placed in an online repository. If that use amounts to a ‘criticism or review’ within the meaning of s 41 of the Act, then use of this content would be permitted subject to the use being fair. If the content is being included merely as a support for the academic points being made, then there is very real uncertainty as to whether the research and study exception in ss 40 and 103C of the Act could apply.

Vital early stages of research, such as conferences, group presentations, peer symposia, collegial discussions and other peer testing of research material may not be covered by the research and study fair dealing exception.

⁸ Department of Industry, Innovation and Science, *Australia 2030: Prosperity Through Innovation*, at <https://industry.gov.au/Innovation-and-Science-Australia/Documents/Australia-2030-Prosperity-through-Innovation-Full-Report.pdf> recommendation 11, page 52.

⁹ For example, some forms of non-textual data.

¹⁰ Priest, E. *Copyright and the Harvard Open Access Mandate*, 2012, *Northwestern Journal of Technology and Intellectual Property* Volume 10 at <http://scholarlycommons.law.northwestern.edu/njtjp/vol10/iss7/1> page 377.

One university copyright officer has commented:

“Very often researchers are faced with a difficult decision: use the material most relevant to their research and risk litigation, or replace it with something less appropriate. These activities are vital to the development of finished concepts and useful research outcomes.”

As a result of our existing purpose-based fair dealing regime, a commercial news program is permitted to use third party content for the purposes of “criticism and review” (in reliance on s 41 or 103A of the Act), but an academic may well be prevented from using the **same** content in a conference paper or journal article unless the use can truly be said to amount to ‘criticism and review’ as opposed to ‘research and study’. Universities Australia submits that this is highly problematic.

1.5 THESES

Universities require higher degree students to publish their theses in an online repository. This is an important aspect of the dissemination of knowledge that is central to the university mission.

Students are permitted to use third party content in their theses in reliance on the fair dealing exception in s 40 of the Act. This content might include, for example, small excerpts from a text such as an illustration, table, diagram, or thumbnail image. However, as interpreted by the Federal Court in *De Garis v Neville Jeffress Pidler*¹¹, the university is arguably prevented from relying on that same exception to make student theses available in an online repository. Inflexible copyright exceptions mean that universities risk being sued for copyright infringement if they upload this content to a digital repository and enable users to access it.

To avoid this risk, universities generally require their students to obtain permission for the use of third party content. This can be prohibitively expensive, and in many cases impossible. Alternatively, the content is required to be removed from the thesis before publication. This compromises the integrity of the work and the academic community is denied the opportunity to fully engage with it. No such impediment existed in the pre-digital environment. A university could allow any person to have access to theses in which the author had included third party content in reliance on his or her own fair dealing exception.

¹¹ *De Garis v Neville Jeffress Pidler Pty Ltd* (1990) 95 ALR 625.

2 THE MOST APPROPRIATE MODEL TO MODERNISE AND FUTURE PROOF COPYRIGHT LAW

The consultation paper for this Review notes that

“without the continued evolution of exceptions, copyright law may fail to ensure that emerging activities and outcomes resulting from changing community, technology and business standards can be achieved. Acknowledging this, copyright exceptions have been proposed, added and amended over time.”¹²

It is true that ensuring the “continued evolution of exceptions” could be approached by adding new exceptions and tweaking existing exceptions to address known problems. However, this would be short sighted. In the digital age, virtually every use of content involves making a copy, and is thus impacted by copyright law. Fixing today’s problems will only get us so far. Before long, copyright will once again become a roadblock to research innovation as the next new technology, and the one that comes after that, runs up against inflexible copyright exceptions.

We don’t just need to *modernise* copyright law. We need to *future proof* it to avoid having the same conversation in five or 10 years’ time. That can only be done by injecting *flexibility* into the exceptions regime.

2.1 NEW FAIR DEALING EXCEPTIONS ARE NOT THE BEST WAY TO DELIVER THE FLEXIBILITY THAT THE GOVERNMENT HAS ACKNOWLEDGED IS NEEDED

In its response to the Productivity Commission’s *Inquiry into Intellectual Property Arrangements* the Government set out its aim to “create a modernised copyright exceptions framework that keeps pace with technological changes and is **flexible** to adapt to future changes”¹³ and foreshadowed this Review to consider how best to do that.

Purpose-based exceptions – by their very nature – are inflexible. They are not capable of adapting as technology and usage changes. If new technologies or uses fall outside the scope of a purpose-based fair dealing exception then they are not permitted, regardless of how fair they are.

2.2 ADDITIONAL FAIR DEALING EXCEPTIONS DO NOT FULLY ADDRESS TODAY’S KNOWN PROBLEMS, LET ALONE UNFORSEEN PROBLEMS

We have carefully considered whether Option 1 in the Review consultation paper – adding additional fair dealing exceptions – would fix the problems that we have outlined above. For the reasons set out below, we consider that the reforms envisaged in Option 1 would be a second-best way to fix today’s ‘known problems’ and would not future proof copyright law.

¹² Department of Communications and the Arts, *Copyright modernisation consultation paper*, March 2018 at <https://www.communications.gov.au/file/34991/download?token=AseAjJWg> page 9.

¹³ Department of Industry, Innovation and Science, *Australian Government Response to the Productivity Commission Inquiry into Intellectual Property Arrangements*, August 2017 at <https://www.industry.gov.au/innovation/Intellectual-Property/Documents/Government-Response-to-PC-Inquiry-into-IP.pdf> page 7.

2.2.1 SHARING CONTENT WITH FELLOW ACADEMICS FOR THE PURPOSE OF COLLABORATIVE RESEARCH

The research and study exception applies when an academic undertakes copying for the purpose of their own research or study. It is problematic however that it arguably does not apply when an academic is making copies to sharing content with fellow academics, with whom he or she is collaborating.

It is unclear whether the proposed quotation fair dealing exception would fix this problem: the copying in question would not be done “for the purpose of quotation”.

There is no such limitation with fair use. The only question to be asked would be: is this use fair?

2.2.2 SHARING CONTENT WITH INDUSTRY COLLABORATORS

None of the existing fair dealing exceptions allow an academic to copy content for the purpose of sharing with industry collaborators. There is an automatic ‘no’ to the question of whether a university-industry collaborative project could rely on existing copyright exceptions when making fair uses of copyright content.

For the reasons discussed above regarding collaboration with fellow academics, the proposed fair dealing for quotation exception is unlikely to solve this problem given that the copying would not be done “for the purpose of quotation”. There would also be a real risk that any new exception for educational copying would not apply to this kind of university-industry collaboration in the absence of a very clear statement to the effect that Parliament intended the exception to be construed broadly; that is, that it does not ‘stop at the door’ of the educational institution.

There is no such limitation with fair use. The only question to be asked would be: is this use fair?

2.2.3 TEXT AND DATA MINING PROJECTS

None of the existing copyright exceptions apply to text and data mining.

The consultation paper seeks comment on a proposed fair dealing for “incidental or technical use” exception that is proposed to apply to “text and data mining for non-commercial purposes”.

A text and data mining exception that is limited to non-commercial purposes potentially would not apply to the university-industry collaboration that the Government is seeking to promote. At the very least, it would give rise to a great deal of uncertainty about boundaries between commercial and non-commercial purposes when it comes to collaborations between universities and industry.

Universities Australia believes that there is no sound policy reason to restrict a text and data mining exception to non-commercial activities. To illustrate, under the proposed model, commercial text and data mining would be automatically prohibited (in the absence of a licence) regardless of whether it is ‘fair’. Australia would lose the benefit of commercial activity, including by innovative start-ups, that would cause no harm to rights holders, simply because the use would not fall within the scope of an exception limited to non-commercial purposes. That is misaligned with the strategy set out in the *Australia 2030: Prosperity Through Innovation* report to

“make Australia one of the best places in the world in which to undertake innovation, science and research, and to maximise the spread of benefits to all Australians.”¹⁴

¹⁴ *Australia 2030: Prosperity Through Innovation*, recommendation 11 at <https://industry.gov.au/Innovation-and-Science-Australia/Documents/Australia-2030-Prosperity-through-Innovation-Full-Report.pdf> page 2.

When considering how copyright law should apply to text and data mining it is important to go back to basics and ask: ‘*what is the purpose of copyright protection?*’

Professor Ian Hargreaves, the author of the *Hargreaves Review of Intellectual Property and Growth* in the United Kingdom, noted that new technical uses – such as caching, search and text and mining – happen to fall within the scope of United Kingdom copyright law essentially as a side effect of how copyright has been defined, rather than being directly relevant to what copyright is supposed to protect.¹⁵

The real cost of failing to enact laws that facilitate text and data mining

A recent policy paper by the Lisbon Council¹⁶ highlighted the cost of failing to enact copyright laws that facilitate text and data mining technologies.

The authors commented on the 2015 European Union (EU) proposal for a mandatory text and data mining exception for member states, but their observations are of equal relevance to Australia.

They noted that in the absence of a text and data mining exception, European scholars were being forced to “*outsource their text and data-mining needs to researchers elsewhere in the world*”.

They referred to reports of “*university and research bureaux deliberately adding researchers in North America or Asia to consortia because those researchers will be able to do basic text and data mining so much more easily than in the EU.*”

They said there was “*increasing evidence that European research institutions are being forced to reach outside of Europe to build better teams for text-and-data-mining related consortia – not because the foreigners’ researchers are more able, but because their laws are smarter and more straightforward than the ragged patchwork of rules which apply in Europe.*”

They noted that: “*the doctrine of fair use, deployed in countries like Israel, Republic of Korea, Singapore and the US, has enabled researchers and the organisations that employ researchers to see deployment of text and data mining as an acceptable business risk, in legal terms. European researchers and the organisations which employ them, by contrast, face a maze of restrictions, which are in themselves often detrimental, but which in aggregate generate confusion and undermine the self-confidence of the research community. The publishing industry itself continues to put a premium on ‘licensing’, preferring to retain control – and potentially the right to collect rents – over every use, reuse and even derivative use of any material they may have helped put into the public arena. The result is a minefield of hidden obstacles for European researchers, forcing them to avoid the kind of technology-driven value creation which is routine in North America and surging in Asia.*”

It is likely that a similar study in Australia would result in the same findings.

¹⁵ Hargreaves, I. *Digital Opportunity: A Review of Intellectual Property and Growth* at <http://www.ipo.gov.uk/ipreview-finalreport.pdf> paragraph 5.24.

¹⁶ Filippov, S. and Hofheinz, P. *Text and Data Mining for Research and Innovation: What Europe Must do Next*, Lisbon Council, 2016 at <https://lisboncouncil.net/publication/publication/134-text-and-data-mining-for-research-and-innovation-.html>.

The authors of another 2015 study found that "[data mining] makes up a significantly lower share of total research output" in countries where researchers are required to obtain the express consent of rights holders to undertake this activity. The authors noted:

*"The number of research articles is a reasonable indicator of innovation by academic researchers. To our knowledge, this is the first instance where an empirical study identifies a significant negative association between copyright protection and the supply of new copyright works of any type. Regarding [data mining] research, copyright seems to have a negative net effect on innovation...."*¹⁷

There is no such limitation with fair use. The only question to be asked would be: is this use fair?

2.2.4 ARTIFICIAL INTELLIGENCE AND MACHINE LEARNING

No existing exception enables the copying that is an essential element of machine learning.

It is unclear from the material that the Government has released during this consultation process whether the proposed fair dealing exception for incidental and technical use is intended to be restricted to non-commercial machine learning. If so, our comments above regarding the proposal to limit a text and data mining exception in this way apply equally.

2.2.5 THESES

No existing fair dealing exception enables a university to allow public access via an online repository to a thesis that contains content that was copied in reliance on the research and study fair dealing exception.

It is unclear whether the proposed education or quotation fair dealing exceptions would enable this activity. The Department has proposed that if a fair dealing for quotation exception is enacted, "*the Explanatory Memorandum would clarify the exception is not intended to prevent or significantly reduce licensing of quotation of copyright material. It is intended to enable more quotation where licensing is not available.*" A statement to this effect in the Explanatory Memorandum would **greatly diminish** the usefulness of a quotation exception. As noted above, there are two reasons why universities are forced to remove content from theses before uploading them onto digital repositories:

- The rights holder cannot be located or is unwilling to grant a licence for this use; or
- The rights holder *is* willing to grant a licence, but the licence fee is unaffordable.

As a matter of public policy, why is it allowable for rights holders to demand payment for this kind of use?

Rights holders cannot demand payment from the student who included the content in reliance on their own fair dealing rights.¹⁸ Under the model being proposed in the consultation paper for this Review however, the university would potentially be required to pay a licence fee to ensure that this content does not have to be removed prior to making theses publicly accessible via digital repositories.

¹⁷ Handke, C. Guibault, L. and Vallbé, J. *Is Europe Falling Behind in Data Mining? Copyright's Impact on Data Mining in Academic Research* 7 June 2015 at <https://ssrn.com/abstract=2608513>.

¹⁸ Under the current fair dealing for research or study exception copying up to a "reasonable portion" of a work is deemed to be fair (see *Copyright Act 1968* s 40(5)).

Compare this with the position in the United States. The Association of Research Libraries provides the following advice to its members:

“It is fair use for a library to receive material for its institutional repository, and make deposited works publicly available in unredacted form, including items that contain copyrighted material that is included on the basis of fair use.”¹⁹

2.2.6 WHAT FAIRNESS FACTORS SHOULD APPLY?

The Review consultation paper seeks comment on what fairness factors should apply to any new fair use or fair dealing exceptions. Notwithstanding this, the Department appears to have taken as its starting point that the five factors that are set out in ss 40(2) and 103C(2) of the Act should apply.

We are concerned that the debate over whether or not to include the factor in s 40(2)(c) – “the possibility of obtaining the work or adaptation within a reasonable time at an ordinary commercial price” – has proceeded on a number of false premises.

Firstly, those who support the inclusion of this factor appear to believe that a use could never be fair if the work in question was readily available for purpose. That is a **fundamental** misunderstanding of how the market availability factor currently applies in relation to the current fair dealing for the purpose of research and study exception. To illustrate:

- Reproducing up to one article in a periodical publication is deemed to be fair.²⁰
- Reproducing no more than a “reasonable portion” of a work that is not a periodical publication is deemed to be fair. A reasonable portion is generally 10 per cent of the work or one chapter.²¹
- A person relying in this exception only needs to apply the fairness factors if they wish to copy in excess of these limits.

It is clear from this that there was no Parliamentary intention that the mere availability of a licence for a work, or part of a work, should rule out reliance on the “research and study” fair dealing exception. Rather, the market availability factor would come into play only if a person wanted to copy *in excess* of a reasonable portion.

Secondly, it is clear from the legislative history of the research and study exception that the prescribed fairness factors – including the market availability factor – were inserted into s 40 in 1980 at the recommendation of the *Copyright Law Committee on Reprographic Reproduction* (the Franki Committee), which itself was responding to a request from the university sector.

In submissions to the Franki Committee, the predecessor to Universities Australia, the Australian Vice-Chancellors’ Committee outlined the sector’s concerns regarding the fact that academic publications were typically not available for purchase in Australia for many months, if not years, after their initial publication. Universities were seeking greater certainty that it would be ‘fair’ in these circumstances to copy the whole work for educational purposes, including for the purpose of research or study.

In its report, the Franki Committee noted that the unavailability of texts, and the unreliability when texts were ordered from overseas, was “*putting Australia at a serious disadvantage compared*

¹⁹ Association of Research Libraries, *Code of Best Practices in Fair Use for Academic and Research Libraries*, January 2012, at <http://www.arl.org/storage/documents/publications/code-of-best-practices-fair-use.pdf> page 23.

²⁰ *Copyright Act 1968* s 40(3).

²¹ *Id.* s 40(5).

with many other countries”.²² The Committee said “*some responsibility rests upon copyright owners to meet demand in a practical way as a condition of unrestricted enjoyment of their rights*”.²³

This legislative history clearly explains why the Franki Committee recommended the inclusion of the market availability factor, notwithstanding that this factor did not appear in the United States’ list of fairness factors which the Committee was aware of (in draft form) at the time it made its recommendations. The particular circumstances prevailing in Australia at that time were simply not relevant in the United States. Clearly, the circumstances that led to the inclusion of the market availability factor no longer apply. In the digital environment works are typically available in Australia at the same time that they are made available in other jurisdictions.

There is a similar legislative history in Singapore, which also includes the commercial availability factor in its open-ended fair dealing exception. This was set out in a 2016 discussion paper released by the Singapore Government as part of its ongoing review of copyright exceptions.²⁴ The discussion paper notes that while the Singapore fair use exception was “adopted from the United States”, the inclusion of the commercial availability factor

“came at a time when copyright works were still largely distributed in a physical medium” which meant that “*it might have been difficult to obtain a legal copy of the work if it was not being officially distributed within Singapore, and thus a copy made without permission might have been considered ‘fair’ due to unavailability*”.²⁵

The Singapore Government has proposed removing this factor on the ground that

“the current technology landscape as well as globalisation means that true unavailability of copyrighted works is less common”,

and that

“the last factor seems to have less relevance in light of certain new platforms and uses for content creation and distribution, such as the use of music in the background of home videos put up online”.²⁶

The discussion paper noted that courts would still be free to “*consider the situation in the last factor on a case-by-case basis, but it will no longer be specifically identified in the [Copyright Act]*”.²⁷ The Singapore review is continuing.

We strongly urge the Government to consider this legislative history when determining what fairness factors should apply to any new exception. The approach that is being suggested by rights holder groups risks creating a situation where there is no scope for fair use or fair dealing to apply at all whenever a licence is available for the use in question. Neither fair use, nor fair dealing, operates that way anywhere else in the world.

We do not seek to suggest that the availability of a licence is not a relevant factor when determining whether an intended use is fair. However, as noted by the Australian Law Reform

²² *Report of the Copyright Law Committee on Reprographic Reproduction*, October 1976, at <https://static-copyright-com-au.s3.amazonaws.com/uploads/2015/05/R00507-Franki-Report.pdf>, paragraph 1.51.

²³ *Ibid.*

²⁴ Singapore Ministry of Law and the Intellectual Property Office of Singapore, *Public Consultation on Proposed Changes to Singapore’s Copyright Regime*, 23 August 2016, at <https://www.mlaw.gov.sg/content/dam/minlaw/corp/assets/documents/Public%20Consultation%20Paper%20on%20Proposed%20Changes%20to%20Copyright%20Regime%20in%20Singapore%20August%202016.pdf>.

²⁵ *Id.* paragraph 3.49.

²⁶ *Id.* paragraph 3.50.

²⁷ *Id.* paragraph 3.51.

Committee (ALRC) in its consideration of what fairness factors should apply, it is not necessary to include a “possibility of obtaining the work” factor given that it is “related to, or possibly a subset of” the fourth factor concerning market effect.²⁸ In other words, to the extent that it is relevant, it will already be considered as part of a fairness determination.

The ALRC also noted:

- That the factor may not be appropriate in determining the fairness of a range of uses including, for example, “criticism or review” and “parody or satire”²⁹; and
- While the factor is said by rightsholder groups to be derived from case law on fair dealing, “there is little such case law, compared with that concerning the other fairness factors”.³⁰

Universities Australia submits that another argument in favour of adopting the ALRC’s proposed four fairness factors test is that this is the test that currently applies to the fair dealing for the purpose of disability exception in s 113E of the Act. Departing from this test is likely to lead to confusion about how a new exception should be applied.

It is clear from the Explanatory Memorandum to the *Copyright Amendment (Disability Access and Other Measures) Act 2017* that Parliament intended that the third factor in s 113E³¹ **would** require consideration of whether the material is commercially available. The Explanatory Memorandum states:

*“If material is commercially available, factors one, two and four become more important, noting that a use may still be considered fair even if the material is commercially available. Only a substantial market harm from the individual use should be considered unfair.”*³²

In light of this, how would a court construe a list of fairness factors for a new exception that included the additional factor that is proposed in the consultation paper? What is the difference between material being “commercially available” and being available “within a reasonable time at an ordinary commercial price”? The likely consequence of imposing a different set of fairness factors for any new fair use or fair dealing exception would, in our submission, be the injection of incoherence and uncertainty into the Act.

What is potentially at stake if the mere availability of a licence rules out reliance on fair use or fair dealing?

In its *Simplification Review*, the Copyright Law Review Committee heard – and rejected – arguments that the mere availability of a licence should rule out reliance on fair dealing. It said:

“The Committee is aware that digital technology has the potential for allowing copyright owners, through their respective collecting societies, to monitor and license the individual uses of copyright material in a way that was not previously possible. It also is aware that this has created new markets for the use of copyright materials, both whole and in part.

²⁸ Australian Law Reform Commission, *Copyright and the Digital Economy Final Report* (ALRC Report 122), 13 February 2014, at <https://www.alrc.gov.au/publications/copyright-report-122> paragraph 5.99.

²⁹ Id. paragraph 5.104.

³⁰ Id. paragraph 5.105.

³¹ The effect of the dealing upon the potential market for or value of the material.

³² *Copyright Amendment (Disability Access and Other Measures) Bill 2017 Explanatory Memorandum* at http://parlinfo.aph.gov.au/parlInfo/download/legislation/ems/r5832_ems_6286f247-9092-48bd-aac1-d771a2c7ee30/upload_pdf/625196.pdf;fileType=application%2Fpdf page 15.

“The Committee majority does not consider, however, that this new capacity to monitor and license uses of copyright materials justifies a limitation on the application of fair dealing so as not to apply to copyright material in the digital environment. On the contrary, the majority believes that the fair dealing provisions are needed to ensure the free use of copyright material in the digital environment for purposes that are socially desirable, especially given that digital technology has the potential to restrict such use so as to enforce voluntary licensing agreements...”

“...Submissions from publishers assert that in the digital environment all possible uses of copyright materials, including the use of short extracts, will potentially be the subject of commercial exploitation and for this reason the scope of fair dealing should be constrained. This view is also supported by the Committee member in the minority.

“The majority of the Committee agrees in principle, however, with the submission by the Australian Council of Library and Information Services, which stated that in the interests of all Australians it is essential that a market in words and sentences, as seems to be advocated by some copyright owner representatives, be avoided and that the use of short extracts be considered fair. The Committee notes, though, that uses of such extracts as are a substantial part of the copyright material would have to fall within fair dealing before they were an exception to copyright.

“The Committee notes CAL’s [Copyright Agency Limited] argument that a position often put forward to justify the fair dealing provisions is that it is impossible to monitor or collect remuneration for copying and that because of changes in technology this justification no longer applies. In support of this argument, CAL makes reference to the Franki report, which stated in relation to photocopying under the fair dealing provisions, ‘... we consider there are insuperable practical difficulties in obtaining permission from, and in paying remuneration to, the copyright owners in these circumstances.’

“Importantly, however, CAL failed to acknowledge that this statement was qualified by the sentence that immediately precedes it:

‘... we are satisfied that as a matter of principle a measure of photocopying should be permitted without remuneration, for purposes such as private study, to an extent which at least falls within the present limits of ‘fair dealing’.’

“The majority of the Committee agrees with the Franki Committee on this point.”³³

We strongly urge the Government to accept the recommendation of the ALRC and to incorporate the four factors currently set out at s 113E of the Act into a new fair use or fair dealing exception.

³³ Copyright Law Review Committee, *Simplification of the Copyright Act Part 1*, September 1998, at <http://www.austlii.edu.au/au/other/clrc/4.html> Chapter 6.

3 ENSURING THAT UNIVERSITIES CAN RELY ON EXCEPTIONS

In its *Copyright and the Digital Economy* report, the ALRC identified a fundamental flaw in the existing educational copyright regime: there is no scope for Australian schools and universities to rely on non-remunerable exceptions for any use that would be covered by the statutory licence, regardless of how ‘fair’ that use would be. The result of this was that even if fair use was enacted, universities and schools would not have been able to rely on the exception if a use was covered by the statutory licence.

The ALRC said:

*“It is sometimes argued that where a licence is available, unremunerated exceptions should not apply. ...In the ALRC’s view, the availability of a licence is an important consideration, both in crafting exceptions and in the application of fair use—but it is **not determinative**. Other matters, including questions of the public interest, are also relevant.*

*“The ALRC considers that it would be **unjustified and inequitable** if educational institutions, institutions assisting people with disability, and governments could not rely on unremunerated exceptions such as fair use. **Statutory licences should be negotiated in the context of which uses are permitted under unremunerated exceptions, including fair use and the new fair dealing exception.** If the parties agree, or a court determines, that a particular use is fair, for example, then educational institutions and governments should not be required to buy a licence for that particular use. Licences negotiated on this more reasonable footing may also be more attractive to other licensees.”³⁴*

The ALRC made it clear that it was **not** suggesting that all uses currently licensed under the statutory licence would, or should, be free if fair use was enacted:

“...There are many uses of copyright material under the statutory licences that would clearly not be fair use or permitted under other exceptions, and for which users will need to continue to obtain a licence.”³⁵

The ALRC was, however, highly critical of the overbroad nature of the then Part VB statutory licence, which had been construed as preventing educational institutions from relying on an exception if the use in question came within its scope. This resulted in schools and universities paying millions of dollars a year for uses that cause no harm to rights holders, including use of freely available internet content and orphan works.

The Government took the **first step** to address this flaw when it implemented the streamlined educational statutory licence recommended by the ALRC. The new statutory licence contains a provision – s 113Q(2) – that clarifies that a university need only rely on the statutory licence if the copying/communication cannot otherwise be done under another exception or licence. This provision sends a very clear message that Parliament intended to make a departure from the position that applied under the Part VB licence.

³⁴ Id. paragraphs 8.59 – 8.60.

³⁵ Id. paragraph 8.61.

Universities Australia welcomed this step. It clarified the position that that universities will be able to take advantage of any new fair use or fair dealing exceptions that are enacted as a result of this Review.

There is another crucial step that needs to be taken however. It must be made clear that it is Parliament's intention that the existence of a statutory licence does not rule out reliance on exceptions by universities and schools. This is important because there is existing case law dealing with the interaction between the fair dealing exceptions and the statutory licence – *CAL v Haines*³⁶ – that could be used to argue that the statutory licence captures any use that could potentially come within its scope. If this argument were to be accepted, there would be no scope for a non-remunerable exception to apply, rendering s 113Q(2) of no practical use. In the absence of a clear Parliamentary intention that the existence of the statutory licences does not preclude reliance on a non-remunerable exception, it is likely that universities (and schools) will be subject to costly litigation to have this question determined by the courts.

Universities Australia submits that the overbroad nature of the educational statutory licence helps explain why Australian universities are currently paying more than \$35 per full time equivalent (FTE) student for educational copying when universities in the United Kingdom, Canada and New Zealand are paying a **fraction** of that price for a broadly equivalent licence.

Australia is significantly out of step with the rest of the world:

Country	Price per FTE for the statutory licence or broadly equivalent licence
Australia	\$35.64
UK	£7.37 (\$A 13.11)
NZ	\$23.45 (\$A 21.56)
Canada	<p>In 2011, a number of Canadian universities entered into a licence with Access Copyright at \$26 per full-time equivalent student (\$A26.80). The licence permits copying that exceeds what is permitted under the Australian statutory licence (up to 20 per cent of a work as opposed to the 10 per cent that is permitted under the Australian licence).</p> <p>In response to the failure of many Canadian universities to take up the licence at this price, Access Copyright began offering a new licence, permitting the same amount of copying, on the following terms:</p> <ul style="list-style-type: none"> • 1 Year - \$18 FTE (\$A18.39) • 3 years - \$15 FTE (\$A15.32) • 5 years - \$12 FTE (\$A12.26)

Copyright Agency has commented that there is no comparison between what Australian educational institutions pay under the statutory licence and what educational institutions in other jurisdictions are paying because the licences are not 'equivalent'. That claim should be rejected.

³⁶ *CAL v Haines* [1982] 1 NSWLR 182.

There are some differences at the margins – the main one being that collecting societies in other jurisdictions can only grant a licence for content that is within their repertoire. But the repertoires of the United Kingdom, Canadian and New Zealand collecting societies are extensive.

The *practical* difference between what Australian universities get for their money, and what their foreign counterparts get, is minimal and cannot in any way justify the enormous difference in the amount that is paid.

4 SETTING THE RECORD STRAIGHT ON WHAT HAPPENED IN CANADA

There is a false narrative about copyright reform in Canada, and the impact it has had on publishers and authors.

In a submission to the Productivity Commission's Draft Report of its *Inquiry into Intellectual Property Arrangements*, Copyright Agency made the following claims:

"In Canada, the education sector has decided that changes to the law mean that it no longer needs to pay licence fees to Canadian publishers and authors. The courts may eventually take a different view, but in the meantime the actions of the education sector are having a significant deleterious effect on Canadian educational publishing that are probably irreversible.

"It is a fact that the Canadian education sector stopped paying licence fees, and that as a direct result, revenue to Canadian publishers and authors declined to a significant extent.

"The Australian education sector seeks the introduction of a United States style 'fair use' exception in order to reduce its licence fees. The effect on Australian publishing of Australian resources may in fact be worse than it has been in Canada because the markets and margins are even smaller here. The result is fewer Australian resources for Australian students."³⁷

These claims are **provably false**. This highly misleading scare campaign must not be allowed to derail the possibility of fair and sensible copyright reform in Australia.

It is **not** true that Canadian universities are spending less on content following the 2012 copyright reforms. Data from universities, as well as from Statistics Canada, makes it clear that **spend on content has increased significantly** since 2012 and that this trend is continuing.

It is **not** true that the Canadian publishing market has been harmed by copyright reform. Data from Statistics Canada shows that the **Canadian publishing market has been largely unaffected** by the 2012 reforms.

It **is** true that payments to the collecting society Access Copyright have dropped sharply, but that is **not because of copyright reforms**. Evidence from Canadian universities shows that they are dealing directly with content owners such as publishers. They are accessing content via direct commercial licences rather than through the Access Copyright blanket collective licence. They are using more open access content. The same thing is happening in Australia.

Canadian commentator, Russell McOrmand, made the following observations about the absurdity of a collecting society complaining – and calling for the law to be changed – simply because universities are no longer using it as the middleman to pay rightsholders:

"If a large number of homeowners who had mortgages with Scotiabank decided to switch to BMO, Scotiabank would never be allowed to claim that there was a crisis in the mortgage business or home ownership, and lobby the government to try to force home owners to take out mortgages from Scotiabank.

³⁷ Copyright Agency, *Submission to Productivity Commission Intellectual Property Arrangements Draft Report*, June 2016, at <https://static-copyright-com-au.s3.amazonaws.com/uploads/2015/05/R01619-PC-draft-report-response-2016-06-03.pdf> pages 15 –16.

*“This is essentially the argument that certain collective societies have been making for many years in Canada. **Copyright holders and educational institutions have been migrating to directly licensing works through a wide variety of online services** where there is a direct flow of money from the institutions to the copyright holders.*

*“This is the reality of the marketplace today: **the overwhelming majority of works used within an educational setting are directly licensed.** What remains to be sorted between collective licensing and fair dealings is decreasing in size all the time, and it is this modernisation that bogus “studies” by PricewaterhouseCoopers failed to take into consideration.*

*“**The fact that revenues flowing through collectives has decreased is not an indication of a failure, but an indication of a successful ongoing transition to more direct licensing models...***

“...As collectives exist in a competitive marketplace, and authors and users are switching to better licensing models, you will see collectives fighting against these competitive pressures. An analogy might be having the employees and management of Ford picketing outside Chrysler headquarters complaining to Chrysler employees that Ford isn't getting paid because people are switching to purchasing Chrysler vehicles rather than Ford. It is an odd mentality, and it violates much of what a union normally stands for as you have workers from one employer picketing against the workers from another employer, in solidarity with their management rather than their fellow workers.”³⁸

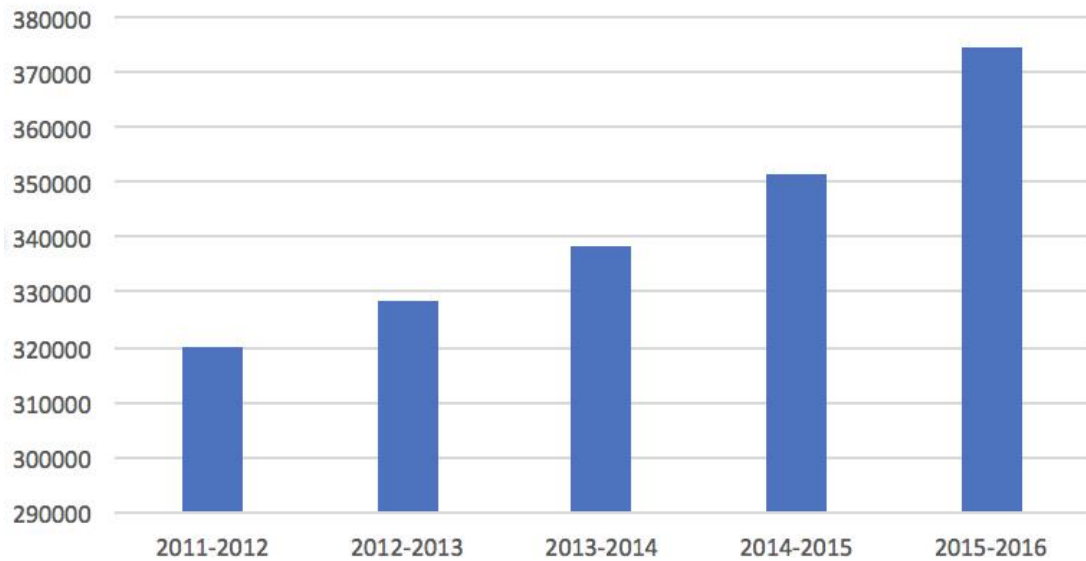
4.1 THE FACTS: CANADIAN UNIVERSITY SPENDING ON CONTENT HAS INCREASED SIGNIFICANTLY SINCE THE 2012 REFORMS

Canadian academic, Dr Michael Geist, compiled data on Canadian university spending on content since the 2012 copyright reforms, including the following table which is based on data from Statistics Canada³⁹:

³⁸ McOrmond, R. *Intervention in opposition of the Bell Coalition’s “Fairplay” site blocking proposal*, 28 February 2018, at <http://mccormond.blogspot.com.au/search/label/fair%20dealings>.

³⁹ Geist, M. *Canadian Copyright, OA, and OER: Why the Open Access Road Still Leads Back to Copyright*, 26 October 2017, at <http://www.michaelgeist.ca/2017/10/canadian-copyright-oa-oer-open-access-road-still-leads-back-copyright/>.

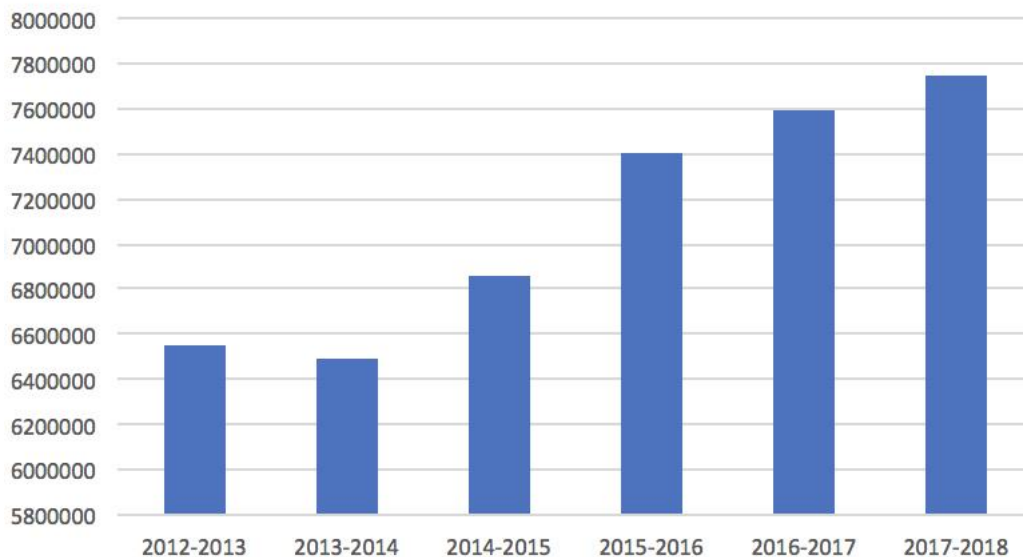
Library Acquisitions (Statistics Canada, 2017)



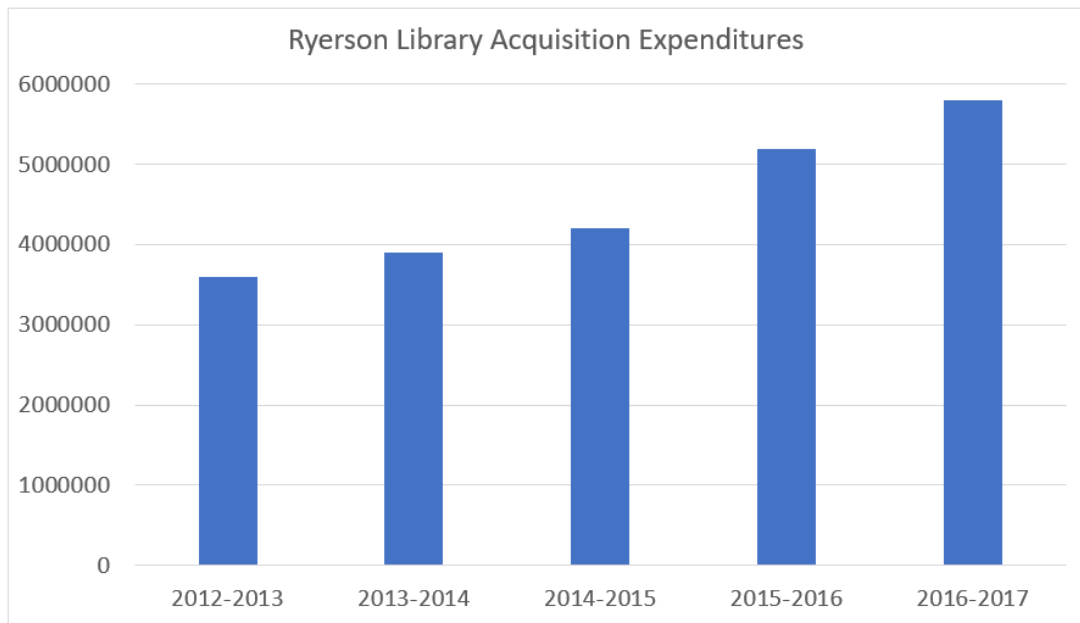
(Note: This graph represents spending on acquisitions in CAD at multiple universities based on data from the Canadian Association of University Business Officers.)

Geist also compiled data from individual universities:

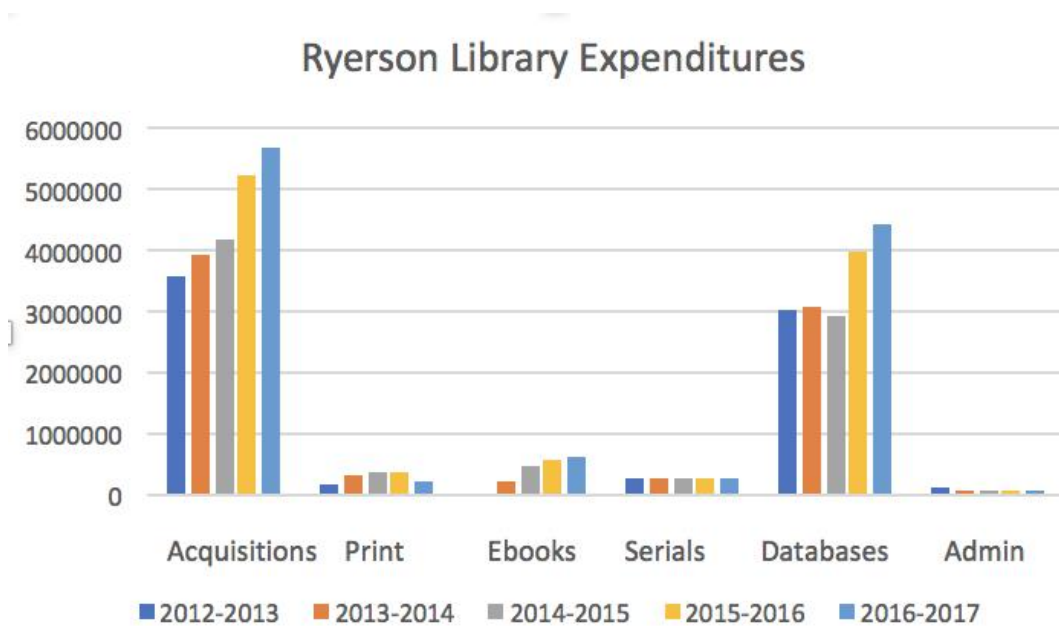
Dalhousie Library Acquisition Expenditures



(Note: This graph represents expenditure on acquisitions at Dalhousie University in CAD year on year.)



(Note: This graph represents expenditure on acquisitions at Ryerson University in CAD year on year.)



(Note: This graph represents expenditure in CAD at Ryerson University library broken down by expenditure type.)

It is clear from this data that the picture that rights holder groups have painted – of a Canadian university sector that took advantage of the 2012 copyright reforms to stop paying for content – is misleading.

Geist noted:

*“Data from Canadian universities conclusively shows that [there has been] a **shift (not a decline) in spending**, with more dollars are being spent on licensing as schools invest heavily in access that can be used in the classroom and for research purposes.”⁴⁰*

Referring to the significantly increased spending by Canadian universities on direct commercial licences, Geist said:

*“It is these licences, together with open access and freely available online materials, that have **largely replaced the Access Copyright licence**, with fair dealing playing a secondary role.*

“Site licensing now comprises the lion share of acquisition budgets at Canadian libraries, who have widely adopted digital-first policies. The specific terms of the licences vary, but most grant rights for use in course management systems or e-reserves, which effectively replaces photocopies with paid digital access.

*“Moreover, many licences are purchased in perpetuity, meaning that the rights to the works have been fully compensated for an unlimited period. **The vast majority of these licences have been purchased since 2012, yet another confirmation that fair dealing has not resulted in less spending on copyright works.**”⁴¹*

Geist also noted that some of the publishers that have been most critical of fair dealing for education are also the ones who have benefited the most from licensing their e-books directly with universities. In other words, they are blaming declining Access Copyright payments on copyright reform but failing to mention that they are now being paid directly by universities. Their content is not being used for free as they claim.

For example, Dundurn Press – a vocal critic of the 2012 reforms on the alleged grounds that it has harmed publishers – *is* being paid by universities for use of its content, just not via Access Copyright:

“The University of Ottawa has licensed access to over 98 per cent of the Dundurn Press e-books that are available through DesLibris: 1,933 Dundurn Press e-books of a total of 1,965 available e-books through the database. Dundurn has also sold 459 e-books under perpetual licences to the university.”⁴²

If Canadian universities really do see fair dealing for education as a ‘free for all’ as Access Copyright claims, why are they taking out site licences?

Geist pointed to similar data from other Canadian publishers that have claimed that universities have stopped paying to use their content:

*“ECW Press, whose site says it has published ‘close to 1,000 books’, told the industry committee last week that it has lost significant educational adoption revenues. The University of Ottawa has **licensed over 99 per cent of the available ECW e-books from DesLibris**: 685 out of a total 690. ECW has also sold 339 e-books – about a third of its entire catalogue – under **perpetual licences** to the university.*

⁴⁰ Geist, M. *Canadian Copyright, OA, and OER: Why the Open Access Road Still Leads Back to Copyright*, 26 October 2017, at <http://www.michaelgeist.ca/2017/10/canadian-copyright-oa-oer-open-access-road-still-leads-back-copyright/>.

⁴¹ Geist, M. *Canadian Copyright, Fair Dealing and Education, Part Three: Exploring the Impact of Site Licensing at Canadian Universities*, 24 May 2018, at <http://www.michaelgeist.ca/2018/05/copyrightfairdealingeducationpartthree/>.

⁴² Ibid.

“Fernwood Publishing, a Canadian publisher that started in Halifax and expanded to Winnipeg, was also discussed during last week’s hearing. It says it has published over 450 titles over the past 20 years. Last week, the committee heard that the educational component of its publishing program has decreased from 70 per cent of sales to about half. The University of Ottawa has licensed 86 per cent of the available Fernwood e-book on DesLibris: 254 out of a total of 295. Fernwood has also sold 186 e-books under perpetual licences to the university.

“The data is replicated at many Canadian publishers, who criticise fair dealing yet remain silent on the new revenues from site licensing their e-books and on the fact that those licences typically mean that potential copying of their works is paid copying, not copying based on fair dealing.”⁴³

4.2 THE FACTS: COPYRIGHT REFORMS HAVE NOT HARMED CANADIAN PUBLISHERS

Data compiled by Geist dispels claims that copyright reform has harmed Canadian publishers:

“The Canadian publisher data from Statistics Canada that shows the Canadian publishing market largely unaffected by fair dealing given the other changes taking place in the market. The data released in late March of this year shows that Canadian publisher operating profit margin has increased since the copyright reforms in 2012 as it stood at [9.4 per cent in 2012](#), [9.6 per cent in 2014](#), and [10.2 per cent in 2016](#).

“As for the education publishing market, the Statscan data shows sales increasing for [educational titles from Canadian publishers](#): \$376.6 million in 2014 to \$395.1 million in 2016. The data shows similar increases for children’s books from Canadian publishers.

“Interestingly, there is a parallel decline for educational sales as agents, suggesting that the educational market overall has seen little change other than a shift toward Canadian titles. The success of Canadian authors is mirrored by the Statscan data on nationality of sales with Canadian authors seeing a [significant increase in sales](#) in Canada, whereas foreign authors have experienced a slight decline. In considering [new titles published](#), there is a slight decline among Canadian authors of about six per cent, but the rate of decline is far higher – nearly 13 per cent – for foreign authors.”⁴⁴

Geist notes that educational publishers around the world are facing pressures that have nothing to do with copyright reform. These include the increasing popularity of open access content and changing purchasing models. Geist cites the following excerpt from the Cambridge University Press annual report:

“The Higher Education market is going through rapid change and challenges, including the rise of open educational resources, disruptive technologies and shifts in purchasing habits, which have hit particularly hard at the entry level undergraduate market.”

and the Oxford University Press annual report:

“This year market conditions continued to challenge academic and research publishers. Libraries continue to make evidence-based purchasing decisions, with their budgets growing very slowly. Higher Education (HE) rental models are growing in popularity, and

⁴³ Ibid.

⁴⁴ Geist, M. *Canadian Copyright, Fair Dealing and Education, Part One: Making Sense of the Spending*, 22 May 2018, at <http://www.michaelgeist.ca/2018/05/copyrightfairdealingeducationpartone/>.

*there is an increasing demand from funders for Open Access or Open Educational Resources.*⁴⁵

4.3 THE FACTS: WHY CANADIAN UNIVERSITIES HAVE ABANDONED THE ACCESS COPYRIGHT COLLECTIVE LICENCE

It is true that many Canadian universities no longer subscribe to the collective licence administered by Access Copyright, and that Access Copyright revenues have declined significantly as a result. What is not true, however, is that universities have abandoned the Access Copyright licence because they no longer want to pay to use content.

The Access Copyright licence is a blanket licence. There is no option for universities to purchase the content they need – and *only* the content they need – on a transactional basis. In an environment where universities are increasingly relying on commercial site licences and open access licences to obtain content, a blanket licence is increasingly unattractive. It makes no economic sense for a university to continue to pay a collecting society for a blanket licence for content that it neither wants or needs.

Canadian copyright commentator Russell McOrmand made the following observations:

“Prior to modern communication technology like the internet it was very hard and expensive to get licensing for copyrighted works. To solve this problem Collective Societies were created that offered blanket licensing at fixed fees no matter how many works required licensing. These fixed fees were then distributed to copyright holders based on estimates from surveys.

...

“Modern technology provided many opportunities. Copyright holders can now directly license their works on a variety of business models. Large databases are the bulk of what educational institutions are using for licensing, and this is a great win for copyright holders who no longer need to rely on inaccurate surveys and large transaction fees but accurate computer generated statistics of usage.

“Another growing model is open access where the costs of creating the work are paid up-front to the authors, editors and reviewers, with later access being royalty free. This also allows for friction free derivatives, enabling things such as low cost localization [sic] where a textbook authored by an international community can be cheaply Canadianized [sic].

“While these modernisations are good for authors, the educational sector, and taxpayers who are ultimately paying for all of this, it is opposed by Access Copyright promoters.

“While it is important to waive the flag, it is important to recognise which flag people are flying. Those who support these modern advances are benefiting Canadian authors, Canadian educators, Canadian students, and Canadian taxpayers while those who promote the conflicting interests of Access Copyright are primarily promoting the interests of foreign educational publishers.”⁴⁶

⁴⁵ Geist, M. *Canadian Copyright, Fair Dealing and Education, Part Three: Exploring the Impact of Site Licensing at Canadian Universities*, 24 May 2018, at <http://www.michaelgeist.ca/2018/05/copyrightfairdealingeducationpartthree/>.

⁴⁶ McOrmond, R. *“Copyright-free” material is not edging out Canadian educational texts*, 25 June 2016, at <http://mcormond.blogspot.com.au/2016/06/copyright-free-material-is-not-edging.html>.

McOrmand makes the point that Access Copyright’s refusal to grant transactional licences has actually harmed authors:

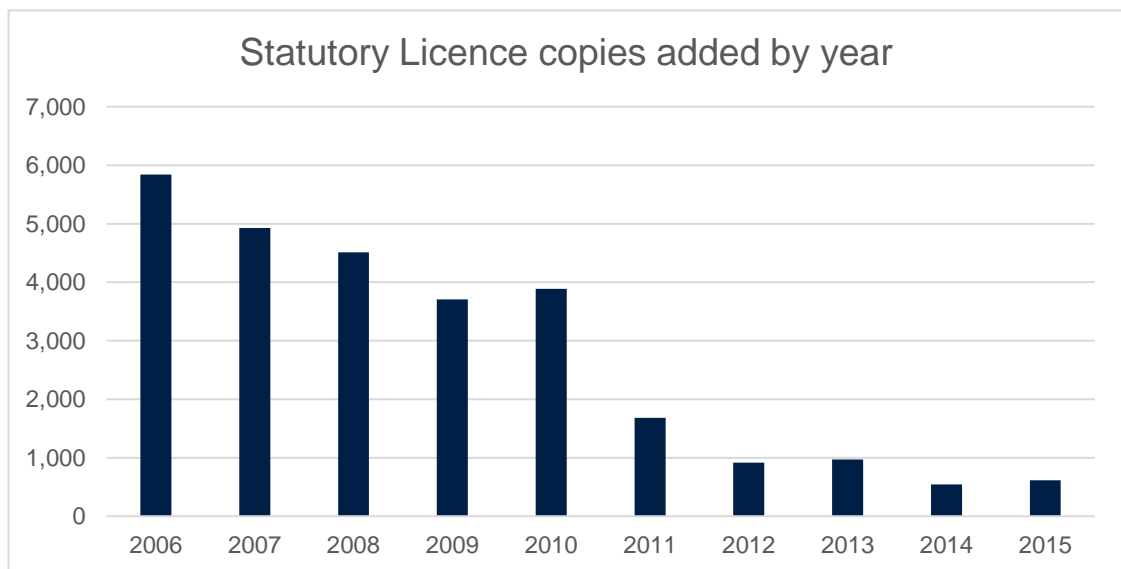
“What educational institutions have been asking for is a mechanism to provide transactional licensing for those instances where a work that is used in an educational setting is not already available through direct licensing, and where the copyright holder is in the repertoire of a collective society. As the marketplace advances these instances are becoming less common, but this service would still provide value to copyright holders and their potential customers.

“Unfortunately, some collective societies have been fighting against this eventuality for decades. They want to offer blanket licensing (an expensive per-student price, regardless of what copyrighted works are ever used), and refuse to offer transactional licensing except to those institutions that already have a blanket licensing.

“Like the frustration consumers have with other unfair bundles like much hated cable packages leading people to ‘cut the cord’, this failure caused by collective societies are inducing more and more institutions to cease any type of licensing with the collectives.”⁴⁷

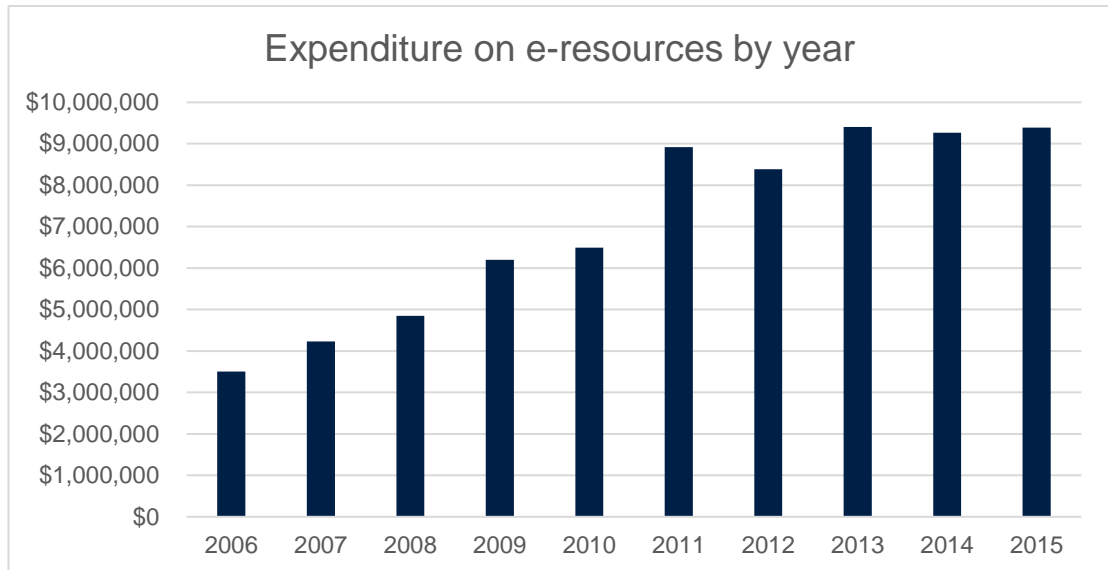
The same trend is occurring in Australia. Universities currently pay Copyright Agency a fixed fee for a sector-wide blanket licence. This model has been in place for more than 15 years, and the licence fee has never been adjusted downwards to account for changing circumstances in which universities obtain a huge amount of content in ways that are outside the scope of the statutory licence. Universities are increasingly treating the statutory licence as a licence of last resort.

One university provided the following data to illustrate the shifting balance between the statutory licence and alternative licences:



(Note: This graph represents the number of copies added to the university’s e-reserve system year on year.)

⁴⁷ Ibid.



(Note: This graph represents the amount spent in AUD on e-resources year on year by the university.)

The current agreement with Copyright Agency expires on 31 December 2018. Universities have informed Copyright Agency that they will be demanding a licensing model and associated fee that take into account the fact that the statutory licence has a diminishing value to the sector.

5 ENSURING THAT CONTRACTS AND TECHNOLOGICAL PROTECTION MEASURES CANNOT BE USED TO OVERRIDE COPYRIGHT EXCEPTIONS

Universities Australia was pleased to see that in its response to the Productivity Commission's *Inquiry into Intellectual Property Arrangements* the Government acknowledged the importance of ensuring that statutory rights to deal fairly with copyright material are protected.

Copyright exceptions are central to striking an appropriate balance between rights holders and users of copyright content. That balance is struck by Parliament, and it should not be allowable for rights holders to skew the balance using technological protection measures (TPMs) or imposing contractual terms that prevent users from relying on exceptions.

In the pre-digital age, the risk of this occurring was minimal. It was the Act, not a private contract or a digital lock, that determined what a user could do with a book. In the digital environment, copyright content is increasingly obtained via contract. This has the potential to transfer power from Parliament to copyright owners to determine what exceptions should apply.

5.1 CONTRACTUAL OVERRIDE

The consultation paper seeks comment on whether limitations on contracting out should apply to all exceptions, or to certain "prescribed purpose" exceptions only. In our submission, the Act should be amended to prevent contracts from being used to override **any** of the exceptions or limitations, including any new exceptions enacted as a result of this review.

We are concerned that the alternative option set out in the consultation paper – a prohibition on contracting out that is restricted to certain exceptions only – could lead to unintended consequences. For example, as a matter of law, the question of whether a contractual provision that purports to exclude reliance on an exception currently remains unsettled. This uncertainty is due in part to the existence of s 47H of the Act⁴⁸ and the possibility that a court could apply the legal maxim *expressio unius exclusio alterius* – an express reference to one matter indicates that other matters are excluded – to conclude that Parliament intended that other exceptions could be overridden by contract.

Universities Australia is concerned that by enacting another provision that expressly prohibits contracting out of certain exceptions only, Parliament might inadvertently be taken to be settling the question as to whether contractual terms excluding other exceptions should *necessarily* be enforceable.

In our submission, the most appropriate model to achieve the Government's intention of ensuring that statutory rights are protected is s 2(10) of the Irish Copyright Act:

"Where an act which would otherwise infringe any of the rights conferred by this Act is permitted under this Act it is irrelevant whether or not there exists any term or condition in an agreement which purports to prohibit or restrict that act."

⁴⁸ *Copyright Act 1968* s 47H contains an express provision against contracting out in relation to computer programs.

Alternatively, the language used in the United Kingdom *Copyright, Designs and Patent Act* could be used:

“To the extent that a term of a contract purports to prevent or restrict the doing of any act which, by virtue of this section, would not infringe copyright, that term is unenforceable.”

5.2 TECHNOLOGICAL PROTECTION MEASURES

As the Review consultation paper notes, preventing the contractual override of exceptions will be of little practical use unless rights holders are also prevented from using TPMs to achieve the same purpose. It is imperative to ensure that the necessary administrative steps are undertaken to enable the Government to enact new TPM exceptions to apply to any new copyright exceptions enacted as a result of this review.

6 ORPHAN WORKS

There are two major orphan works problems in the university environment.

First, in the case of print and graphic works used for teaching, universities can use the works, but they are required to pay for the use under the educational statutory licence even though the owners of the works are, by definition, difficult if not impossible to identify and/or locate. The problem is not being unable to use the works, but rather a case of being unfairly ‘taxed’ to use them.

Clearly, the remuneration collected for the copying of orphan works cannot be distributed to the relevant rights holders. Instead, it has been used by Copyright Agency to fund its advocacy against sensible copyright reform. A system that taxes publicly beneficial uses of works when such uses would cause no harm to rights holders cannot be objectively justified.

The second orphan works problem in universities relates to copyright materials and uses such as text mining and copying by academics that are not covered by the statutory licence. In these cases, universities are in the same position as other users. They are prevented from using the content for research purposes or transformative uses. Given the estimates regarding the number of orphan works – the British Library estimates that over 40 per cent of all creative works (whether in Britain or overseas) are orphan works⁴⁹ – this is clearly an issue of significant concern.

In its submission to the Productivity Commission review The University of Sydney provided the following example:

“...the University of Sydney Library plans to undertake digitisation of the complete collection of Honi Soit, the free weekly student newspaper published by the University’s Student Representative Council since 1929. Honi Soit is a significant and popular source of primary information for researchers and members of the public with an interest in Australian political and public figures. During its long history, many notable authors have contributed articles to Honi Soit while other authors have chosen to remain anonymous. Past contributors include Prime Minister Malcolm Turnbull, writer and feminist Germaine Greer, journalist Robert ‘Bob’ Ellis, media personality Clive James, author Madeline St John, art critic Robert Hughes and High Court Judge Michael Kirby.

“Despite the popularity and significance of the Honi Soit collection, the digitisation program was delayed multiple times due to legal uncertainties around providing access to anonymous (orphan) articles and unpublished supplementary material such as notes, manuscripts and sketches.”⁵⁰

Another example provided by a university to Universities Australia is:

“Researcher A’s area of interest is of images of advertising and changes over time. She is publishing articles that need to include images as examples of the points she is making in the article. Because of the uncertainty of the limits of fair dealing and whether

⁴⁹ *Copyright, and the Regulation of Orphan Works: A comparative review of seven jurisdictions and a rights clearance simulation* at https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/312779/ipresearch-orphan-201307.pdf page 9.

⁵⁰ The University of Sydney, Submission to Productivity Commission *Inquiry into Intellectual Property Arrangements*, 14 December 2015, at http://www.pc.gov.au/_data/assets/pdf_file/0004/194863/sub104-intellectual-property.pdf page 14. Universities Australia notes that The University of Sydney is not the only university that has encountered issues when wishing to digitise student union-created materials.

publishing these images would fall under research and study or criticism and review, Academic A tries to obtain permission wherever possible.

“However, many of the images she wishes to use are orphans. Her experience has been that some companies don't reply to permission requests and others say they can't grant permission because they are not sure who owns the rights. Quite often the advertising firm or company whose products are being promoted no longer exist. It is often difficult to find out if a company's assets were taken over by another.

“There are images that she would like to use as the best examples for her research. They are important historically to show the changing attitudes and social developments, but they are not being used because of these copyright issues.”

These are considerations that researchers in the United States, Canada and United Kingdom do not have to waste time grappling with.

A flexible fair exception such as fair use can work to solve the orphan works problem, particularly in the education sector, but there is also a need for an orphan works scheme to ensure that the potential education, cultural and commercial benefits of orphan works can be fully realised.

Universities Australia submits that the most appropriate model for this is a full statutory exception to provide that copyright remedies would not be enforceable where an owner cannot be found. This could be conditional upon reasonable efforts being made to trace the ownership of the work.

7 CONCLUSION

The expert bodies that have been asked by the Government to advise on how best to inject flexibility into Australian copyright law are unanimous in their view that a flexible, adaptable, fair use exception is preferable to incremental reform through the enactment of new fair dealing exceptions.

Fair use is the only way to ensure that we are not having this discussion again in the near future.

It would be incredibly disappointing if the vocal – and in many respects misleading – objections of one group of stakeholders successfully hijacked the sensible, evidence-based copyright reform that is urgently needed for the Government to achieve its education and innovation policy goals.

Universities Australia strongly urges the Government to disregard the rhetoric that has characterised this debate for too long, and to enact a flexible, adaptable fair use exception to modernise and future proof Australian copyright law.