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Universities Australia Submission to Productivity Commission Issues Paper: Intellectual Property Arrangements

01 December 2015

Introduction

Universities Australia is pleased to have the opportunity to contribute to the Productivity Commission's Issues Paper on Intellectual Property Arrangements. The paper is part of the Commission's Inquiry into Australia's intellectual property arrangements including their effect on investment, competition, trade, innovation and consumer welfare.

In particular, Universities Australia welcomes the Commission's consideration of the patent system and its role in stimulating innovation in Australia and whether the existing prescriptive copyright system is sufficiently flexible to efficiently cope with rapid technological change.

Universities Australia

Universities Australia is the peak body representing Australia's 39 universities in the public interest both nationally and internationally. The sector employs more than 120,000 people, attracts more than one million students and earns around $18 billion in export income through international education.

Recommendations

(i) The introduction of a broadly applicable, flexible copyright exception such as fair use.
(ii) Streamlining and modernising the copyright educational exceptions and statutory licences.
(iii) Extending the current ISP safe harbours to other service providers.
(iv) Amending Australia's anti-circumvention provisions to limit them to technologies that prevent copyright infringement.

Patents

The patent system provides an important mechanism for further leveraging Australia's world class research capabilities for broader benefits, including through the translation and commercialisation of research.

Universities Australia welcomes the Commission's intention of examining the economic value of intellectual property protection. Australia's intellectual property rights are important national assets. A clear understanding of their value is crucial to assessing the benefits and implications of free trade agreements and other international treaties, and ensuring we strike the right balance between strengthening Australia's trade interests and protecting key intellectual property rights. It is critical that any changes made to the intellectual property system take into account the constraints of existing global frameworks and bilateral and regional trade agreements.

Improvements to the intellectual property system will be most effective when they are delivered as part of a larger holistic strategy to increase Australia's innovation capabilities.

Copyright

Universities Australia endorses the Commission's view expressed in its Issues Paper that the intellectual property system should be principles-based and meet four clear broad principles.

The intellectual property system should be: effective, efficient, adaptable and accountable in order to meet its overarching objective of maximising the wellbeing of Australians.

An effective, efficient, adaptable and accountable copyright system should both safeguard the rights of copyright owners as well as provide access for users for the purposes of education and research which benefit the economy and society more broadly.

The existing prescriptive and complex copyright system is not effective, efficient or adaptable – particularly in the digital era – and there is little transparency in how the system has evolved and how it operates in practice.

It imposes significant costs on the higher education sector both in terms of statutory licence fees and heavy administrative compliance costs. It also acts as a roadblock to universities achieving significant national policy objectives outlined by the Federal Government.

The Turnbull Government has identified as an overarching ambition, the important role of innovation, flexibility and adaptability in shaping a nation and an economy that is well suited to a rapidly changing global environment in which changing technology infuses all development.

"The Australia of the future has to be a nation that is agile, that is innovative, that is creative. We can't be defensive, we can't future-proof ourselves. We have to recognise that the disruption that we see driven by technology, the volatility in change is our friend, if we are agile and smart enough to take advantage of it," the Hon Malcolm Turnbull MP said soon after becoming Prime Minister in September 2015.

The Government has highlighted the important role it sees for an innovative higher education sector in bringing about this ongoing transformation.

"Central to securing that agility and those smarts are systems of world class education and training, including an adaptive, innovative and high quality higher education sector", the Minister for Education and Training, Senator the Hon Simon Birmingham said at a conference in October 2015.

However, the existing copyright system is acting as a significant barrier to universities developing as adaptive, innovative, technology-based institutions able to successfully compete with higher education institutions around the world.

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The technologies and markets used to create and deliver copyright works have changed significantly, yet Australian copyright law has not moved to accommodate these changes. Instead it frequently prevents Australian universities creating and disseminating knowledge.

The "one size fits all" approach of Australia's copyright system applies a lowest denominator approach to access to all creative works, even where high levels of protection are not intended or appropriate.

This is compounded in the digital environment where almost every use of technology will involve making copies. In this environment, the existing copyright exceptions have proved to be insufficiently flexible to distinguish between those uses that are at the core of copyright and those uses that are not.

As a result, innovative and useful technologies and new ways of using content in socially beneficial ways automatically infringe copyright unless their use falls within one of the existing narrow purpose-based exceptions.

This either impedes or adds significantly to the compliance costs of universities creating and delivering teaching courses to their students, including in competition with universities around the world.

For instance, Australian universities have much less flexibility than their United States counterparts when determining what kinds of content will be included in courses offered via online delivery platforms, including Massive Open Online Courses (MOOCs).

Such courses have also resulted in universities spending considerable resources in seeking copyright permissions for content used.

Universities typically spend between 1250-1740 staff hours for copyright permissions and clearances for use of content for Massive Open Online Courses (MOOCs).

Copyright concerns are also operating as a roadblock in the use of search technologies such as data and text mining in Australian universities.

These technologies are transforming scientific research by enabling automated searches of vast quantities of text and data to look for patterns, trends and other useful information.

The Federal Government has also identified as a major policy priority, lifting the level of engagement between universities and business and industry.

The sector is increasingly global with academic and research engagement with international institutions growing rapidly.

However, academic engagement is being stifled by Australia's copyright regime which limits the use of third party content in academic work.

For instance, this may impact on publishing higher degree theses online – an important aspect of the dissemination of knowledge – and on early stages in research such as conferences, group presentations, peer symposia and other peer testing of research material.

These limitations all put Australian universities at a global disadvantage, especially compared with institutions operating in fair use copyright jurisdictions such as the United States, Israel and South Korea.

For these reasons, a broadly applicable, flexible copyright system such as fair use, should replace the existing prescriptive regime to enable universities to make full use of technology, innovation and new markets to create, use and disseminate knowledge and maximise the drive for an innovative competitive economy.

In its *Copyright and the Digital Economy Report,* tabled in Parliament in 2014, the Australian Law Reform Commission defined fair use as a defence to copyright infringement that essentially asks of any particular use: Is this fair? In deciding whether a use is fair, a number of principles, or 'fairness factors', must be considered. These include the purpose and character of the use and any harm that might be done to a rights holder's interests by the use.

The Law Reform Commission noted that, fair use differs from most current exceptions to copyright in Australia in that it is a broad standard that incorporates principles, rather than detailed prescriptive rules. It stated that this gives it a flexibility and adaptability that prescriptive rules lack.

Fair use can therefore be applied to new technologies and new uses, without having to wait for consideration by the legislature.

A fair use copyright regime would far more consistently meet the principles of effectiveness, efficiency, adaptability and accountability by making it technology-neutral and transparent.

UA includes as attachments two submissions which it prepared for the Australian Law Reform Commission's *Copyright and the Digital Economy* review.

Response to the ALRC Issues Paper: Copyright and the Digital Economy

November 2012

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Further inquiries should be made to the Chief Executive:

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Summary of this submission

Universities Australia is pleased to have this opportunity to contribute to the discussion on how Australia can develop a copyright exceptions regime that is fit for purpose in the digital environment.

Copyright is rapidly emerging as the next major intellectual property challenge for all leading industrialised economies due to the ever-increasing pervasiveness of digital technology. The same challenges are arising in the higher education sector. Teaching, learning and research increasingly rely on the Internet for access to and dissemination of information. As this review takes place, policy makers around the world are actively reconsidering the relationship between copyright exceptions and innovation, research, and economic growth, with a view to ensuring that their economies are capable of fully utilising digital technology to remain competitive in a global market.

In our submission, a copyright regime that safeguards the rights of copyright owners and encourages research and innovation is not inconsistent with a regime that acknowledges the special position of users, particularly education sector users. A flourishing digital economy is one based not only on the production and distribution of knowledge, but also on its use.

The Issues Paper asks whether the existing exceptions regime is adequate in the digital environment, and whether there is a need to inject greater flexibility into copyright law.

In summary, Universities Australia makes the following submissions:

- Reform of the existing exceptions regime should be assessed in light not only of possible impacts on rights holders, but also, and equally importantly, in light of possible benefits to society generally in a digital economy.

- Reform must also be guided by the principle that society reaps benefits from knowledge and learning which in many cases outweigh limitations on the rights of owners to earn income from educational uses. This principle has long been recognised in copyright law. It is reflected in the special status given to education in international copyright treaties. The special role of education – in particular its central role of knowledge creation and dissemination – must be reflected fully in any copyright regime.

- In a digital environment, almost every use of technology will involve making copies. The existing copyright exceptions have proved to be insufficiently flexible to distinguish between those uses that are at the core of copyright, and those uses that are not. As a result, innovative and useful technologies, and new ways of using content in socially beneficial ways, automatically infringe copyright unless their use falls within one of the existing narrow, purposed-based exceptions.

- The landscape has changed considerably since 2005 when the Government last considered whether there was a need to inject greater flexibility into copyright law. New digital technologies such as cloud computing and text mining highlight the shortcomings of the existing exceptions regime. There is an urgent need for change that provides greater flexibility.

- Inflexible exceptions are affecting the ability of Australian universities to create and disseminate knowledge. The use of new search technologies such as data mining and text mining have led

to new fields of academic endeavour such as the digital humanities, but copyright is operating as a roadblock. Australian researchers and innovators are prevented from making full use of technology that their colleagues in regimes with more flexible copyright exceptions take for granted. Australian universities have much less flexibility than their US counterparts when determining what kinds of content will be included in courses offered via new Massive Open Online Course (**MOOC**) delivery platforms.

- Copyright law is also standing in the way of Australian students taking full advantage of technology. Today it is text and data mining that is being blocked by copyright. Any new technologies that emerge will also be impeded by Australia's outdated and inflexible copyright regime. The best and brightest research students will be drawn to an environment where innovation can flourish, and in the digital age, copyright increasingly plays a vital part in that.

- The shortcomings of a purpose-based fair dealing regime are such that reform efforts should be directed to replacing this regime with a more flexible regime rather than tweaking or simplifying the existing fair dealing exceptions. While there may be a continuing role for some specific exceptions, these should operate as prescribed minimum standards that may be exceeded if the use in question satisfies a fairness test. As a general rule, purpose-based exceptions are unlikely to be sufficiently future-proofed to be appropriate in a rapidly developing technological environment.

- The exception in s 200AB of the Copyright Act has not delivered the flexibility that was envisaged when it was introduced. It has been of limited use to universities wanting to use works in ways that would most likely be considered "fair" if analysed according to a fairness test. It is more limited in scope than the US fair use exception.

- There is an urgent need for a new exception that is sufficiently flexible to allow courts to determine that uses that are unanticipated at the time that the exception is introduced come within the scope of the exception if found to be fair. It should be technologically neutral. It should also potentially apply to any person subject only to a fairness test. There should be a clear legislative intention that the exception is a "users' right", and that the reasoning of the Federal Court in *De Garis v Neville Jeffress Pidler Pty Ltd* does not apply.

- There should be a clear legislative intention that the new exception can be relied on by educational institutions, including for but not limited to the purpose of educational instruction, subject only to a fairness test.

- There should be a clear legislative intention that commercial uses are not per se unfair. This is particularly important in the digital environment, where universities - in line with the Government's innovation policy - are forging closer relationships with industry to drive research and innovation. Knowledge transfer encompasses interaction between academia and wider society, including industry.

- The educational statutory licences in Parts VA and VB of the *Copyright Act* should be repealed. Fundamental changes in the way that content is used in universities have rendered the statutory licences increasingly irrelevant. While these licences served rights holders and the

education sector reasonably well for many years, developments in recent years have rendered them no longer necessary or appropriate in the digital environment. The vast majority of content used in Australian universities is purchased via direct licences with publishers. There is also a global move towards publishing academic content in open access repositories with the objective of enabling the content to be accessed and used without payment and without the need for a statutory licence.

- The statutory licences are also economically inefficient. They have led to the creation of a false market that has imposed unreasonable costs on Australian universities. They have led to highly inefficient practices that are out of step with emerging international norms, and have put Australian universities at a competitive disadvantage in a global education market. They have effectively removed any scope for fair dealing within Australian universities, which has led to Australian universities paying for uses that amount to fair use or fair dealing in comparable jurisdictions such as the US, Canada, Israel, South Korea, Singapore and the Philippines.

- There is an urgent need to address the orphan works problem. A broad, flexible exception would go some way towards achieving this, particularly with respect to educational and research uses of orphan works. If an orphan works scheme is introduced, this should be done by way of a full statutory exception to provide that copyright remedies would not be enforceable where an owner cannot be found.

- Contracts and technological protection measures are being used by rights holders to override copyright exceptions and rewrite the copyright balance determined by parliament. The recommendations made by the Copyright Law Review Committee in its Copyright and Contract report should be adopted. The reforms requested by Universities Australia in its submission to the Government's review of Technological Protection Measure exceptions should be adopted.

- There is an urgent need to expand the copyright safe harbours to include service providers such as universities. Along with exceptions, safe harbours are an important mechanism for balancing the rights of rights holders, end users and intermediaries.

See **Annexure C** to this submission for a guide as to where, in the submission, we respond to questions raised in the Issues Paper.

Part 1: Overview

This part provides an overview of the Australian higher education sector and its role as a driver of innovation in the digital economy.

1. Who we are

Universities Australia is the peak body representing Australia's 39 universities in the public interest, both nationally and internationally. These universities employ more than 100,000 staff, and educate more than one million students.

We have a significant interest in copyright law and policy. University staff and students are both users and creators of copyright works. Striking an appropriate balance between providing sufficient incentives to ensure the continued production of works while ensuring sufficient breathing space for teaching, research and innovation is of central importance.

We are also major contributors to the copyright industries. In 2011, universities paid more than $30 million to copyright collecting societies for use of copyright works and broadcasts for educational purposes under the educational statutory licences contained in Parts VA and VB of the *Copyright Act* (the **Act**). In addition universities paid close to $2 million to collecting societies under voluntary licences. In the same year, university libraries spent $256.7 million on library resources. Nearly 80 per cent of this was on e-resources such as electronic journal subscriptions and e-books.

2. Higher education is a driver of innovation, research and the digital economy

Speaking at a forum on the digital economy earlier this year, the Prime Minister, Julia Gillard, said that knowledge will be the most precious commodity in the 21st century, "more valuable even than iron ore" and that "the way we create and share knowledge will be a key determinant of our success in the Asian century".

In a 2009 submission to the House of Representatives Standing Committee on Economics Inquiry into *Raising the Level of Productivity Growth in the Australian Economy*, the Department of Innovation, Industry, Science and Research highlighted the economic contribution of knowledge creation:

> *The economics literature argues that long term growth and productivity increases are largely driven by endogenous technical change, where investment in new ideas, including through R&D, and some forms of physical and human capital (such as infrastructure and education and training) generate positive spill-overs that can be used by other firms and so generate productivity and economic growth.*[1]
>
> *Basic research provides a common stock of useful knowledge. It is a public good that, in codified, or written, form is inexpensive to distribute. This means that firms and other organisations are able to draw on the new ideas developed in public research institutions to develop their own new products*

[1] The Department of Innovation, Industry, Science and Research's submission to the House of Representatives Standing Committee on Economics Inquiry into Raising the Level of Productivity Growth in the Australian Economy in September 2009
http://www.innovation.gov.au/Innovation/ReportsandStudies/Documents/InnovationandRaisingAustraliasProductivityGrowth.pdf

> *and processes. Public research institutions can also stimulate the flow of useful knowledge by acting as access points into the international network of knowledge and new ideas.* **Because the research sector is dedicated to increasing the common stock of useful knowledge, action to expand its capacity will yield high returns.** *Evidence for this can be seen in international research which suggests that up to three-quarters of private sector patents draw on public sector research.*

The Government's innovation statement[2] has identified specific policy goals to drive the innovation that will ensure Australia's success in what the Prime Minister has referred to as the "Asian century", including:

- increasing the number of Australian research groups performing at world-class levels;
- boosting international research collaboration by Australian universities;
- significantly increasing the number of students completing higher degrees by research over the next decade; and
- doubling the level of collaboration between Australian businesses, universities and publicly-funded research agencies.

Announcing plans to invest more than $1.6 billion in research and training in Australia's higher education sector under this year's university block grant funding allocation, the Minister for Tertiary Education, Skills, Science and Research, Senator Chris Evans, said that the Government "is committed to supporting public sector research that drives excellence, collaboration and diversity and to training Australia's research workforce, which will ensure we have a skilled and smarter economy". [3]

This review of copyright exceptions in the digital environment will be of central importance in ensuring that the Government's innovation, research and digital economy goals are met. A big part of that will be future-proofing our copyright regime. Prime Minister Gillard recently admitted that she was not exactly sure what the benefits of fully utilising the digital economy would look like, adding

> *"no one is - and that's the point. You just have to be ready with the skills and infrastructure in place to create and capture the change".* [4]

We would add that creating a legal environment conducive to innovation and research will be just as important as providing the necessary technical infrastructure. As the Prime Minister acknowledged; we just don't know what the digital economy will look like. We cannot possibly anticipate what new digital technologies will emerge over the coming years and decades. One thing we can be sure about, though, is that very many of them will be impacted by copyright law, whether directly or indirectly.

It is therefore imperative that Australia puts in place an intellectual property framework that supports rather than hinders investment in the digital economy and that is sufficiently flexible to provide breathing space for the research and development that is essential to innovation without the need for constant readjustment. Universities Australia is concerned that failure to do this may hamper our

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[2] Powering Ideas: An Innovation Agenda for the 21st Century
http://www.innovation.gov.au/innovation/policy/pages/PoweringIdeas.aspx
[3] University Funding Boost will Create a Smarter and Stronger Australia, 16 Feb 2012
http://minister.innovation.gov.au/chrisevans/MediaReleases/Pages/UniversityfundingboostwillcreateasmarterandstrongerAustralia.aspx
[4] Opening Remarks to the Digital Economy Forum, 5 October 2012
http://www.pm.gov.au/press-office/opening-remarks-digital-economy-forum

ability to develop a critical mass in leading research fields as would-be-innovators, and would-be research students, look towards jurisdictions with more flexible copyright regimes to conduct collaborative research with universities. In our own region, Singapore, the Philippines and Korea have all adopted a broad, flexible fair use exception.

We are also concerned that the ability of Australian universities to deliver a world-class education may be diminished as a result of our copyright regime placing us at a competitive disadvantage with universities in jurisdictions with more education-friendly copyright regulation. The benefits of international education to Australia are substantial yet often go unheeded by those outside of the sector. As well as the much touted economic contribution (including over $15 billion in export dollars [5]) international students enhance the social and cultural fabric of the universities at which they study and the communities in which they live. Their presence fosters a mutual appreciation and respect for other cultures and experiences, and helps cement Australia's reputation as one of the most innovative and educated nations in the world. As the Government has noted in its recently released *White Paper on Australia in the Asian Century*:

> *An internationally competitive higher education sector with increased participation and higher attainment levels will ensure we can make the most of the opportunities in the Asian century.*[6]

[5] https://aei.gov.au/research/Research-Snapshots/Documents/Export%20Income%202011-12.pdf

[6] Australia in the Asian Century Fact Sheet: World Class Higher Education System http://asiancentury.dpmc.gov.au/sites/default/files/fact-sheets/14.-World-Class-Education-System.pdf

Part 2: Copyright exceptions

In this part we discuss the ways in which the existing exceptions regime is standing in the way of innovation in Australian universities, and the reforms that we think are necessary in order to address this.

1. The relationship between copyright exceptions and innovation

The focus of this review is to consider whether the existing exceptions and limitations to copyright are adequate and appropriate in the digital environment. Universities Australia submits that the existing copyright exceptions and limitations are not adequate and appropriate in the digital environment, and are impeding rather than supporting the Government's digital economy goals.

Again, in its innovation statement, the Government stressed the importance of ensuring that the right balance is struck between too much and too little protection of intellectual property rights:

> *The function of the intellectual property system is to stimulate innovation. Patents, trademarks, copyright and other protections exist to give creators a reasonable chance of profiting from their investment in whatever it is they have created — typically by granting them an exclusive right to exploit the creation for a specified time. The trick is to get the balance right: too little protection will discourage people from innovating because the returns are uncertain; too much protection may discourage people from innovating because the pathways to discovery are blocked by other intellectual property owners.*[7]

Universities Australia submits that the balance currently is *not* right, and that the pathways to discovery *are* being blocked by rights holders relying on a copyright regime that lacks sufficient flexibility and enables them to control virtually every use of a work.

Just about every online or digital activity involves making copies. The very nature of the Internet is to make and disseminate copies of information. And yet, as we discuss below, activities such as caching and search - the basic activities that underlie the operation of digital technology and the Internet - may infringe copyright if carried out in Australia.

Professor Ian Hargreaves, the author of the UK Review of Intellectual Property and Growth (the **Hargreaves Report**), noted that the fact that new technical uses - such as caching, search and data/text mining - happen to fall within the scope of copyright under UK law is

> *essentially a side effect of how copyright has been defined rather than being directly relevant to what copyright is supposed to protect.*[8]

A similar observation has been made Professor Jessica Litman:

> *As technology has enabled individuals to enjoy works in new ways, however, copyright owners have asked for greatly enhanced control over their works. Copyright owners have insisted … that, because*

[7] Powering Ideas: An Innovation Agenda for the 21st Century http://www.innovation.gov.au/innovation/policy/pages/PoweringIdeas.aspx

[8] Ian Hargreaves, Digital Opportunity: A Review of Intellectual Property and Growth (the Hargreaves Review) para 5.24 http://www.ipo.gov.uk/ipreview-finalreport.pdf

copyrights are their property, nobody should be allowed to make a valuable use of a copyrighted work without paying the copyright owner.[9]

We think these statements highlight the importance of keeping the purpose of copyright clearly in sight when framing appropriate exceptions and limitations for an age where copying is ubiquitous.

Policy makers around the world are currently reconsidering the relationship between copyright exceptions, innovation and economic growth. The central theme in reviews that have occurred or are still occurring in Canada, the UK, Ireland, the Netherlands and the EU is the need to inject greater flexibility into copyright law. This growing international reflection on the economic and social costs of inflexible copyright laws is a watershed moment in the history of copyright. Most recently, the Vice-President of the European Commission responsible for the Digital Agenda, Neelie Kroes, made the following comments regarding the need to reform copyright law to promote digital innovation and growth in the EU:

> *...the world has changed, and is changing still. The change is rapid, it is profound, and it is a huge opportunity for the creative sector.*
>
> *Each day we fail to respond, we are missing out. Consumers miss out on easy, legal access to their favourite products. The creative sector misses out on new markets, new innovations, new opportunities. We all miss out on new ways to share, recognise, and appreciate our cultural heritage. And our economy overall misses out on the chance of new growth.*
>
> *Even today we see the consequences of that loss. The initiatives we can't seize. The potentially high-flying ideas that get stuck on the runway. The glory and the benefits taken by American companies, not European. And every day that passes we put ourselves in a yet worse position. I'm afraid Europe can't afford that, not at the moment.*
>
> *The world is changing fast. Let's not wait for ever faster technology to be ever more constrained by ever more out dated legislation. Let's not wait for the USA to speed ahead of Europe. Let's act right now: for artists, consumers, for our economy.*

These comments, which might just have been made about Australia, underscore the importance of developing policy settings and copyright exceptions that are appropriate in an age of rapid technological change. As we discuss in detail below, Australia's inflexible copyright regime is standing in the way of innovative new technologies such as cloud computing; it is blocking creative and transformative uses of works in universities such as search and text mining; it is locking up orphan works; it is preventing Australian academics from engaging fully in research and innovation activities that their colleagues in the US take for granted; and it is imposing unnecessary inefficiencies and unreasonable costs on access to knowledge in Australian universities.

2. What principles should inform this review?

The ALRC has set out guiding principles to inform its approach to this inquiry. Universities Australia broadly supports these principles. We would, however, make the following further comments:

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[9] Jessica Litman, 'Real Copyright Reform' (2010) *Iowa Law Review* Vol 96:1 p 14 http://www.uiowa.edu/~ilr/issues/ILR_96-1_Litman.pdf

2.1 *The importance of ensuring that copyright does not overstep its purpose*

The Issues Paper asks whether it is appropriate to reconsider the desirable ends of copyright, and whether the function of copyright in the digital environment is as traditionally understood. [10] Universities Australia submits that there is not so much a need to reconsider the desirable ends of copyright, but rather to reflect on how, in the digital environment, copyright has lost sight of those ends.

We have already referred to the comment made by Professor Ian Hargreaves to the effect that the fact that new technical uses (such as caching, search and data/text mining) happen to fall within the scope of copyright under UK law is "essentially a side effect of how copyright has been defined rather than being directly relevant to what copyright is supposed to protect".[11] This observation is in our view of critical importance to this review. The scope and nature of the grant of copyright was stated succinctly by the Copyright Law Review Committee in its 1959 *Report to Consider what Alterations are Desirable in the Copyright Law of the Commonwealth* (the **Spicer Report**):

> *The primary end of the law on this subject is to give to the author of a creative work his just reward for the benefit he has bestowed on the community and also to encourage the making of further creative works. On the other hand, as copyright is in the nature of a monopoly, the law should ensure, as far as possible, that the rights conferred are not abused and that study, research and education are not unduly hampered.*[12]

This conception of copyright - as a policy instrument whose purpose is to provide an incentive for the creation of works while ensuring that the rights granted are limited in nature and not abused - is reflected in the preamble to the WIPO Copyright Treaty, which states:

> *[r]ecognising the need to maintain a balance between the rights of authors and the larger public interest, particularly education, research and access to information, as reflected in the Berne Convention...*

In 1996, the late Mr Justice Hugh Laddie drew attention to what he saw as a worrying trend of Anglo-Australian copyright law overstepping this purpose:

> *Let me offer you an illustration of the lack of balance in our law. You can libel a dead author to your heart's content, but if you want to honor him by publishing a commemorative edition of his letters, 50, 60 or 69 years after his death, you will infringe copyright and may have to pay exemplary damages.* [13]

As we discuss below, Australian universities will not infringe if they copy a dead author's letters, but they will have to pay for this under the educational statutory licence in Part VB of the Act. Echoing the sentiment expressed by Mr Justice Laddie, Universities Australia submits that a guiding principle of this review should be to ensure that copyright does not result in over regulation of activities that do not prejudice the central objective of copyright, namely the provision of incentives to creators. As

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[10] Issues Paper para 11

[11] Ian Hargreaves, Digital Opportunity: A Review of Intellectual Property and Growth (the Hargreaves Review) para 5.24 http://www.ipo.gov.uk/ipreview-finalreport.pdf

[12] Report to Consider what Alterations are Desirable in the Copyright Law of the Commonwealth, 1959 http://www.ag.gov.au/Copyright/CopyrightLawReviewCommittee/Reports/Pages/ReporttoConsiderwhatAlterationsareDesirableintheCopyrightLawoftheCommonwealth.aspx

[13] Mr Justice Laddie, Copyright: Over-strength, Over-regulated, Over-rated?, [1996] 5 European Intellectual Property Review 253, p 257

Neelie Kroes says, "*let's not wait for ever faster technology to be ever more constrained by ever more outdated legislation*" before we address the distortions that are being created by a regime of limitations and exceptions that is no longer fit for purpose in a digital environment.

2.2 *Copyright is an aspect of economic policy*

The Intellectual Property and Competition Review Committee (**Ergas Committee**) highlighted the importance of recognising that intellectual property rights, including copyright, can be used for anticompetitive ends, and that this occurs when the rights are used to claim "super-normal profits that arise from market power unrelated to creation". [14] Copyright reform must take place in accordance with broader economic policy considerations so as to ensure that copyright is not used for purposes that go beyond the intended scope of the grant in ways that block innovation, creativity and the development of the digital economy.

Universities Australia submits that a guiding principle of this review should be to ensure that proposed new exceptions are assessed in light not only of possible cost to rights holders, but also in light of possible benefits to society generally.

Competition principles are also highly relevant to the operation of the statutory licences. Universities Australia submits that any review of the efficiency of the educational statutory licences must have regard to competition principles.

2.3 *The special role of education*

In its report, the Ergas Committee noted that:

> *In the short term, limitations placed on the rights of owners may seem to affect the income stream available to rights holders. However in the long term, it must be substantially in the interests of rights holders as a group to have a population and an economy capable of making productive use of ideas and information, thereby generating the income needed to cover the costs of developing new ideas. The dynamic effect of these limitations on the demand and value of rights, and/or the total stock of rights, is therefore likely to be substantially positive.*[15]

The principle that society reaps benefits from knowledge and learning which in many cases outweigh limitations on the rights of owners to earn income from educational uses has long been recognised in copyright law. It is reflected in the special status given to education in the Berne Treaty[16]. It is also reflected in the Preamble to the WIPO Copyright Treaty that we have referred to above.

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[14] Ergas Committee Report, September 2000
http://www.ag.gov.au/Documents/Review%20of%20intellectual%20property%20legislation%20under%20the%20Competition%20Principles%20Agreement,%20(September%202000).pdf

[15] Ergas Committee Report, September 2000 p 96
http://www.ag.gov.au/Documents/Review%20of%20intellectual%20property%20legislation%20under%20the%20Competition%20Principles%20Agreement,%20(September%202000).pdf

[16] See Article 10(2) of the Berne Treaty which expressly refers to "fair" uses of copyright material for the purpose of teaching.

In Australia, that special treatment is currently reflected in the fair dealing exceptions contained in ss 40 and 103 of the Act. [17] In the US, education is given express recognition in the fair use exception in s 107 of the US Copyright Act that is open ended but refers expressly to "teaching (including multiple copies for classroom use)" as well as "scholarship or research". In Israel, the fair use exception in s 19 of the Copyright Act 2007 is open-ended but also refers expressly to "instruction and examination by an educational institution". In the Philippines, the fair use exception in s 185 of the Intellectual Property Code is open-ended but also refers expressly to "teaching including multiple copies for classroom use" as well as "scholarship and research". In South Korea, the fair use exception is open ended but refers expressly to "education and research"[18],The Canadian Parliament has also recently recognized the special status of education by introducing a new exception: fair dealing for the purpose of education.[19]

Universities Australia submits that the special role of education – in particular its central role of knowledge creation and dissemination – must be reflected fully in any copyright regime.

3. What kinds of innovation are being stifled by copyright in the higher education sector?

Since the ALRC review of Copyright and the Digital Economy was announced, various rights holders representatives have commented publicly that there is no need for reform of copyright exceptions. They have suggested that the existing exceptions are operating adequately in a digital environment, and that innovation is not being stifled by copyright. Some rights holders groups have challenged those seeking reform to identify what it is that they would like to do that is being blocked by copyright.

There is a great deal that universities would like to do that is being blocked by copyright. Narrow purpose-based exceptions are stifling innovation and research in the Australian higher education sector on a daily basis. The scope of what is possible is increasingly limited by what is permitted by copyright law. In what follows in this section, we set out some of the ways in which this is occurring.

3.1 Copyright is a roadblock to the use of efficient search and indexing technologies

In her opening address to the Digital Economy Forum at the University of New South Wales in October 2012, Prime Minister Gillard noted that there "isn't an industry that won't benefit from finding more effective use of digital infrastructure." [20] That is certainly true, but the expected benefits will be lost if inflexible copyright exceptions block universities and others from making more effective use of digital technologies.

One such technology is search.

The Issues Paper seeks comment on the impact of copyright on search technologies in two contexts. Firstly, the Issues Paper asks whether reforms are need to ensure that the basic functions of the

[17] As well as numerous education specific exceptions, and the educational statutory licences in Parts VA and VB of the Act.
[18] Clause 35-3, Korean Copyright Act
[19] Section 29, Canadian Copyright Act
[20] Opening Remarks to the Digital Economy Forum, 5 October 2012 http://www.pm.gov.au/press-office/opening-remarks-digital-economy-forum

internet - ie caching, indexing and search - are not impeded. Secondly, the Issues Paper asks whether the use of data mining and text mining tools (which are an application of search technology) are being impeded by copyright. In our submission, the intersection between search technologies and Australian copyright law provides one of the starkest examples of how the current exceptions regime is no longer fit for purpose.

Caching, indexing and other internet functions

The basic functions of the internet - caching, indexing and search - may well infringe copyright in Australia. That this is so was very clearly outlined by Associate Professor Kim Weatherall in a policy paper prepared for the Australian Digital Alliance.[21] Commenting on the legal uncertainty regarding the status of web search, Associate Professor Weatherall said:

> *Australian exceptions (for temporary reproductions) may not provide satisfactory protections for search engines, as they:*
>
> - do not apply where the source is infringing, making the exceptions not very useful in cases where search engines are most likely to be sued;[22]
> - *are confined to reproductions made "as part of the technical process of making or receiving a communication". It could be argued this applies to a search engine's internal cache copy, but the situation is unclear;*
> - *apply to copies "incidentally made as a necessary part of a technical process of using a copy of the work".* [23] *This does not obviously apply to copies in a search engine' externally supplied cache; and*
> - *both apply only to "temporary" copies – which may imply a shorter duration than the days (or longer) that search engine cache copies may be retained.*

Associate Professor Weatherall also highlighted the legal uncertainty regarding the status of caching, noting that there are real doubts as to whether the highly qualified, technical legal language of the temporary copy exceptions in ss 43A and 111A of the Act would effectively enable all common forms of caching.

Similar concerns had been raised in 2000 by the *Intellectual Property Competition and Review Committee* (the **Ergas Review**).[24] The Ergas Review found that caching was "of considerable significance to the efficiency of the internet", and recommended that the Government amend the Act

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[21] Kim Weatherall, Internet Intermediaries and Copyright: An Australian Agenda for Reform, April 2011 http://digital.org.au/sites/digital.org.au/files/documents/Weatherall-InternetIntermediariesandCopyright.pdf

[22] Most US proceedings relating to caches have been brought by copyright owners complaining that infringements could be located using the search engine: Perfect 10 Inc v Amazon Inc 487 F 3d 701 (9th Cir 2007).

[23] The better view is that s 43B was intended to benefit consumers using legitimate copies of works, for example, on DVD: the Explanatory Memorandum to the US Free Trade Agreement Implementation Act 2004 (Cth), noted that the exception was needed owing to the expanded definition of "material form", which included "electronic copies of a transitory nature made in the random access memory (RAM) of digital devices such as computers, DVD and compact disc players". Thus "[i]n order that users of copyright material are not potentially liable for copyright infringement for the normal use of non-infringing copyright material an exception is required".

[24] Ergas Committee Report, Review of Intellectual Property Legislation Under the Competition Principles Agreement, September 2000 http://www.ag.gov.au/Documents/Review%20of%20intellectual%20property%20legislation%20under%20the%20Competition%20Principles%20Agreement,%20(September%202000).pdf

to "ensure that this efficiency enhancing activity is not prohibited". [25]This recommendation was not taken up. While the Act was amended in 2006 to include a caching safe harbour for Carriage Service Providers, the safe harbour does not currently apply to online intermediaries that are not Carriage Service Providers within the meaning of the *Telecommunications Act 1997*. This excludes most universities, as well as most search engine operators, from the safe harbour. It is true that educational institutions currently have the benefit of an express caching exception in s 200AAA of the Act, but this applies only to certain kinds of caching, and only on computer systems operated "by or on behalf of a body administering an educational institution". As the digital activities of universities and other educational institutions increasingly migrate from systems "operated by or on behalf of" the university to cloud based systems, this education-specific exception may well come under challenge.

Data mining and text mining

Concerns regarding copyright are also operating as a roadblock to the use of data mining and text mining technologies in Australian universities.

As the Issues Paper notes, these technologies are transforming scientific research by enabling automated searches of vast quantities of text and data to look for patterns, trends and other useful information. They encourage innovation by allowing for additional value to be extracted from the publicly funded research base. Data mining 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.

A recent report by the UK Joint Information System Committee (**JISC**) found that the benefits of data mining and text mining include:

> *…increased researcher efficiency; unlocking hidden information and developing new knowledge; exploring new horizons; improved research and evidence base; and improving the research process and quality. Broader economic and societal benefits include cost savings and productivity gains, innovative new service development, new business models and new medical treatments.*[26]

Those findings apply equally to Australia.

As data mining and text mining involve reproduction of works at many levels (including digital scanning of works to enable them to be searched and reformatting of works into a similar format) these technologies have the potential to infringe copyright if done without permission.

We've already discussed the limitations with respect to the temporary copy exceptions in ss 43 A and 111 A of the Act with respect to caching, indexing and search. The same limitations apply to data mining and text mining.

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[25] Ergas Committee Report, Review of Intellectual Property Legislation Under the Competition Principles Agreement, September 2000 p 113
http://www.ag.gov.au/Documents/Review%20of%20intellectual%20property%20legislation%20under%20the%20Competition%20Principles%20Agreement,%20(September%202000).pdf

[26] Joint Information System Committee, The Value and Benefits of Text Mining to UK Further and Higher Education, 2012

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 will very often involve copying an entire work. [27]

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

It is clear from the above that there is very real uncertainty as to the circumstances in which, if ever, an exception would be available to a researcher engaged in this activity. Universities Australia is concerned that much potentially valuable data and text mining would infringe copyright if undertaken in Australia. This will often be the case even where the person or entity doing the mining has obtained a licence to use the content that is being mined: many commercial content licences are either silent on the question of whether text or data mining is a permitted activity or they expressly prohibit such mining.

Professor Deb Verhoeven, Associate Head of School (Research), School of Communication and the Creative Arts at Deakin University heads up the Humanities Networked Infrastructure (HuNI) Virtual Laboratory. This is a two-year project that will provide researchers around the world with access to the combined resources of Australia's major cultural datasets and information assets. It will be the first national, cross-disciplinary virtual laboratory for the humanities to be established anywhere in the world. Professor Verhoeven is concerned that copyright may restrict the ability of researchers to undertake this work. She says:

> *"There are at least three proposed research activities at Deakin University which will use the new humanities research methodologies such as data-mining, algorithmic criticism and natural language processing to enable interrogation of text-based corpora in innovative ways. Copyright management is a key consideration, and will potentially severely limit the value of corpus that can be created and analysed, thus affecting the value of research benefits that can be realised. In order to be 'mined', text must be accessed, copied, analysed, annotated and related to existing information and understanding. Even if the user has access rights to the content being mined, making annotated copies can infringe copyright unless we have the permission of the copyright owner. "*

The risks faced by universities in this regard are significant. The JISC study we refer to above gave the following example:

> *…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.*[28]

The economic implications of allowing copyright to stand in the way of data mining and text mining are also significant. A recent report by the UK All-Party Parliamentary Group on Medical Research

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

[28] Joint Information System Committee, The Value and Benefits of Text Mining to UK Further and Higher Education, 2012

referred to a study by M*cKinsey International* that estimated that "big data" technologies, including text and data mining, could inject E250 billion to the European economy each year "*if copyright restrictions did not get in the way*"[29]. While Australia is some way behind the UK with respect to use of these technologies, the need to ensure that copyright does not operate as a roadblock is no less urgent.

3.2 Copyright is impeding the development and use of cloud based services

The Issues Paper seeks comment on whether copyright law is impeding the development or delivery of cloud computing services. Uncertainty with respect to the copyright implications of using cloud-based services is a matter of great concern to universities.

In 2011, Associate Professor Kim Weatherall wrote that operating and using cloud computing resources in Australia creates a higher risk of copyright liability than in other jurisdictions. [30]

> *"...Australia's very technology-specific exceptions inhibit the cloud computing model for individuals and create elevated risks for both consumers and Internet Intermediaries."*

This has been borne out in the Optus TV Now decision,[31] in which the Full Federal Court found that the provider of a cloud computing service was itself the "maker" of a copy stored on a remote server. In reaching this view, the Court had regard to the following factors:

- The Optus system captured the broadcast and embodied its images and sounds in an Optus hard disk. Although this process was automated, the court said it was highly relevant to determining who does the act of copying.
- Optus' conduct in creating the TV Now system, and keeping it in constant readiness to record a program when requested by a subscriber, was also relevant. It could not be said that Optus did not engage in any "volitional" conduct.
- Optus was "not merely making available its system to another who uses it to copy a broadcast…rather it captures, copies, stores and makes available for reward, a program for later viewing by another".
- At all times, Optus retained possession, ownership and control of the physical copies made on its hard disk until they were deleted by Optus 30 days after having been made.

The Full Court stressed that its decision should not be taken to say that *any* cloud-based service would necessarily infringe copyright. The Court said:

> *"…our concerns here have been limited to the* **particular service provider-subscriber relationship** *of Optus and its subscribers to the TV Now Service and to the* **nature and operation of the particular technology** *used to provide the service in question. We accept that different relationships and differing technologies may well yield different conclusions to the "who makes the copy" question".*

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[29] How Data Saves Lives - Unlocking the Research Potential of Information, All-Party Parliamentary Group on Medical Research, July 2012

[30] Kim Weatherall, Internet Intermediaries and Copyright: An Australian Agenda for Reform, April 2011 http://digital.org.au/sites/digital.org.au/files/documents/Weatherall-InternetIntermediariesandCopyright.pdf

[31] *National Rugby League Investments v Singtel Optus* [2012] FCAFC 59

Universities do not provide staff or students with copying or cloud based services for reward, but they do provide staff and students with copying and storage systems that are highly sophisticated. For example, many digital copiers retain a copy of the material that is copied, and cloud-based document storage systems result in content being transmitted from the cloud whenever it is accessed. To this extent, they share some of the features of the Optus TV Now services. There is very little in the Full Court's decision to provide universities – or other providers of cloud-based services – with guidance as to where the line is to be drawn between the mere provision of a service or facility that can be used to copy (ie a photocopying machine in a university library) versus a degree of involvement in the whole process that will lead to a finding that the person providing the service or facility has itself made the copy and or communication. This leads to real uncertainty as to whether a university may be treated as the "maker" of copies made on university owned systems by staff or students relying on their own fair dealing rights. It also leads to uncertainty as to whether a third party cloud service provider used by a university may itself be treated as the "maker" of copies made by staff or students using this services, and whether the university may be taken to have "authorised" such copies. On the current state of the law with respect to fair dealing – which directs a court to look to the purpose of the person *making* the copy rather than the actual *user* of the copy[32] – the "maker" of the copy in either of the above two scenarios may not be in a position to claim the benefit of the fair dealing exception. This is a matter of real concern to universities.

3.3 Copyright is impacting on the ability of Australian universities to deliver content via MOOC platforms

A recent development in the higher education landscape is MOOCs: online courses that are free and available to anyone who wants to register. Australian universities offering courses via a MOOC platform are in a very different position to their US counterparts with respect to the content that they can make available.

In many cases, US universities using MOOC platforms to deliver content will be able to do so in reliance on the fair use exception. The US Association of Research Libraries (**ARL**) recently published a paper[33] setting out the copyright issues relating to the use of third party content on MOOCs. The ALR does not suggest that fair use will apply to all content used in MOOC teaching. On the contrary, the ARL says that universities using these platforms will be required to pay licence fees for some uses. Importantly, however, the ARL says that fair use is likely to apply in many cases where MOOCs are used to deliver lectures and make course content available to anyone who wants to sign up for the course.

The position in Australia is quite different. Australian universities currently pay more than $200 million a year to commercial publishers for access to academic journals, e-books etc, as well as more than $30 million a year to make content available to their students under the educational statutory licences. In the absence of a fair use exception, however, it is likely that none of this content can be used to deliver courses via MOOCs.

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[32] *De Garis v Neville Jeffress Pidler Pty Ltd* (1990) 95 ALR 625

[33] Association of Research Libraries, Issue Brief, Massive Online Open Courses: Legal and Policy Issues for Research Libraries, October 2012 http://www.arl.org/bm~doc/issuebrief-mooc-22oct12.pdf

3.4 *Copyright is stifling academic engagement*

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". [34] And yet, Australian academics and students are greatly limited in the way in which they can engage with the academic community when their work incorporates third party content.

One example of this is student 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 such a central part of the university mission. A student may have included small excerpts from a text (such as an illustration, table, diagram etc), or perhaps thumbnail images, in reliance on the fair dealing exception in s 40 of the Act. However, as that exception has been interpreted by the Federal Court in *De Garis v Neville Jeffress Pidler*[35] , the university is arguably prevented from relying on this same exception to make the thesis available on an online repository. In the absence of a broad fair use style exception, universities risk being sued for copyright infringement if they upload this content into a digital repository and enable users to access it. To avoid this risk, they generally require their students to obtain permission for use of third party content (which can be highly costly, and in many cases impossible) or, alternatively, to remove this content from their thesis. The result is that the integrity of the thesis is compromised, and the academic community is denied the opportunity to engage fully with the work. No such impediment existed, of course, in the pre-digital environment. A university was free to 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.

Another example is where an academic wishes to include small amounts of third party material in a journal article or conference paper that will be placed in an online repository. If the use amounts to a "criticism or review" within the meaning of s 41 of the Act, then use of this content will be permitted subject to the use being fair. But 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 103 C of the Act applies. Vital early stages in 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.

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 103 A 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.

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[34] Eric Priest, 'Copyright and the Harvard Open Access Mandate' (2012) 10 *Northwestern Journal of Technology and Intellectual Property*. 377 http://scholarlycommons.law.northwestern.edu/njtip/vol10/iss7/1

[35] *De Garis v Neville Jeffress Pidler Pty Ltd* (1990) 95 ALR 625

In a digital environment, universities are also often in the position of having to advise staff that they cannot engage with other researchers using new communications technologies such wikis, blogs and social media because of the risks of copyright infringement. This is the case even when it is clear that the use of third party content would cause no prejudice to the rights holder. If the use cannot be pigeon-holed within the fair dealing exceptions then it is not permitted, however "fair" it might be and whatever social benefit may flow from the use.

A university copyright officer provided this example:

> *A higher degree student wanted to use some extracts from a state Hansard and state government media releases in her play. The extracts would be used as illustrations and merely referred to, not analyzed in detail. The website licence terms only allowed for personal, non-commercial use and this play was to be performed for a paying audience – so the licence did not apply. Permission could have been sought, but the lecturer in the subject - who was from the US where a broader fair use exception may well have allowed this use - was surprised to hear that this was necessary and that none of the Australian exceptions in fair dealing was likely to apply. This is an example of where Australian creators and teachers are at a disadvantage compared to the US.*

In the words of another university copyright officer:

> *Academic staff are placed in an impossible position: either they risk infringement by supporting creativity in new fields of endeavour; or they decline to engage with new approaches to learning, teaching and research offered by technological advances, at the risk of decreasing relevance and student engagement. This dilemma decreases respect for copyright law by both staff and students.*

We've already discussed the impact of inflexible exceptions on the emerging field of digital humanities. Copyright is also impacting on the way that academics engaged in this field (and other fields) can interact with each other. By way of example, a researcher may receive advice that her own use of a work to undertake a digital textual analysis falls within the research and study fair dealing exception in s 40 of the Act. But what if she wants to collaborate with a colleague, or simply seek input and comment from a colleague or group of colleagues? Doing so will require her to copy and communicate the works or parts of works that she has used in her analysis. In a submission to Government in 1999, Copyright Agency Limited (CAL) suggested that fair dealing would not apply here. CAL said:

> *"The transmission of copyright works for discussion with colleagues could not be a fair dealing for research or study purposes".* [36]

One copyright officer has commented that some journal publishers allow text mining "for internal or personal research", but do not permit the results of this research to be published or shared with academics in other universities. This makes the research rather pointless. As the copyright officer says:

> *"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".*

[36] CAL submission to the Department of Attorney General in relation to Copyright Amendment (Digital Agenda) Bill 1999, 19 March 1999, para 33

If our Australian-based researchers were collaborating with US-based researchers, they would find their US colleagues expressing great surprise at the limitations imposed by Australian copyright law on researchers who wish to share the results of their digital reuse of works. [37]

3.5 Copyright is impacting on the ability of Australian universities to compete in a global education market

The limitations that we have described above put Australian universities at a global disadvantage. Today, copyright law is standing in the way of our students taking full advantage of text and data mining technologies. It is impacting on the kinds of content that can be used in courses offered via MOOCs. Who knows what new technologies will emerge in the years and decades to come? The best and brightest research students will be drawn to an environment where innovation can flourish, and in the digital age, copyright plays a very big part in that.

In a recent submission to the UK Intellectual Property Office in response to the recommendations of the Hargreaves Review, JISC made the following comments (which are equally applicable to Australia) regarding the impact of inflexible copyright exceptions on the international competitiveness of UK universities:

> *[Inflexible exceptions] may tend to give a competitive advantage to those countries that have a more liberal or flexible approach to copyright (such as those with a 'Fair Use' approach such as the USA), which could enable text mining usage in non-commercial research to take place under a 'Fair Use' defence rather than needing explicit permissions.*
>
> *In an overview of copyright exceptions globally, only one example was found of explicit reference to text mining, and it is worth noting that this example comes from one of the leading innovation countries and a major UK competitor – Japan. The Japan Copyright Act (2011) makes explicit provision to allow text mining, with Article 47 making a limitation to copyright:*
>
> > *'For the purpose of information analysis ('information analysis' means to extract information, concerned with languages, sounds, images or other elements constituting such information, from many works or other much information, and to make a comparison, a classification or other statistical analysis of such information; the same shall apply hereinafter in this Article) by using a computer, it shall be permissible to make recording on a memory, or to make adaptation (including a recording of a derivative work created by such adaptation), of a work, to the extent deemed necessary'*[38]

4. What kind of exceptions regime is appropriate in a digital environment?

Universities Australia submits that there are two main criteria for an exceptions regime to be appropriate in the digital environment. Firstly, it must be capable of ensuring that copyright does not overstep its purpose of creating incentives for the continued creation of works. In a digital

[37] See, for example, University of Texas copyright guidelines which discuss the ways in which academics and students can rely on fair use http://copyright.lib.utexas.edu/copypol2.html

[38] Appendix A, Japan Copyright Act 2011 http://www.jisc.ac.uk/media/documents/publications/reports/2012/text-mining-appendix-a2.pdf

environment - where just about every use of technology will involve the making of copies - that becomes critical. Secondly, it must be able to "think on its feet". [39] The two are interrelated, as we discuss below.

4.1 Exceptions and the purpose of copyright

Policy makers around the world are asking how a law that was designed more than 300 years ago with the aim of creating economic incentives for innovation now appears to be standing in the way of innovation in so many ways. How did copyright come to encroach upon non-expressive uses of works such as caching, web search, and text mining? What do these uses of content have to do with the purpose of copyright?

There is in our view an urgent need to address these questions as part of this review. The answer, in our submission, is to ensure that a new exceptions regime is properly aligned with the purpose of copyright: the provision of a sufficient incentive to ensure the continued creation of works.

4.2 Copyright must be able to "think on its feet"

The second criteria for an exceptions regime to be appropriate in the digital environment is that it is sufficiently flexible to "think on its feet". This expression was used by economist Antony Dnes to describe the US fair use exception in contradistinction to an Anglo-Australian fair dealing regime.[40] Professor Dnes was commissioned by the UK Intellectual Property Office (**IPO**) to prepare a law and economics analysis of US fair use and UK fair dealing. In his report to the IPO (which we discuss in greater detail below) Professor Dnes referred to the ability of the US fair use regime to "absorb high-tech developments as they unfold, apparently mitigating problems attached to innovation based on copyright-using industries". [41] The ability to "absorb high-tech developments as they unfold" is in our submission an essential criteria for an exceptions regime in a digital environment. As we note above, our existing exceptions regime has not been able to meet this criteria.

5. Can fair dealing be made fit for purpose for a digital environment?

The Issues Paper seeks comment on what reforms might be needed to make the existing fair dealing exceptions more appropriate to a digital environment. For the reasons we set out below, Universities Australia has formed the view that the shortcomings of a purpose-based fair dealing regime are such that reform efforts should be directed to replacing this regime with a more flexible regime – where fairness is the only touchstone - rather than tweaking or simplifying the existing fair dealing exceptions.

5.1 Risk of overreach would remain

A purely purpose-based approach to determining whether any particular use will be treated as falling in or outside of the grant of copyright has been shown to be incapable of preventing the overreach that has led to activities such as caching, indexing and search as being within the control of rights

[39] Antony Dnes, A Law and Economics Analysis of Fair Use Differences Comparing the US and UK, Report for the Review of IP and Growth, April 2011 http://www.ipo.gov.uk/ipreview-doc-j.pdf
[40] Ibid
[41] Ibid, p 27

holders. This is because purpose-based exceptions are insufficiently nuanced. They have proved to be incapable of distinguishing between uses that have the potential to prejudice the central objectives of copyright (and which should therefore permitted only to the extent that they are "fair") and uses that have absolutely no connection with the central objectives of copyright.

Commenting on the UK fair dealing regime (which is in many respects the same as the Australian regime), Professor Antony Dnes has observed that while fair dealing adopts a "rule of reason" to the question of what is "fair", "the scope for applying that rule of reason is very limited because of the careful specification of permitted purposes..."[42] Removing the purpose element would allow the rule of reason to prevail.

5.2 *No scope to deal with change*

Nor is a purpose-based regime capable of "thinking on its feet". There is no scope for the courts to deal with changes in technology: new kinds of copying which have become possible due to advancing digital technology but which don't fit within one of the existing purposes are automatically unlawful. As Dnes commented in his report to the UK IPO, "continuing review by Parliament of statutory exceptions could amount to little more than catching up after the event, such that the current lacunae simply remained." He adds that "Parliaments are also subject to attention from pressure groups, which an independent judiciary can ignore". [43]

In the Optus TV Now case the Full Court commented on the limits of purpose-based exceptions. Noting that the Act was intended to operate in a technologically neutral way, the Court said that when the language of a purpose-based exception did not appear to have been intended to apply to a new technological development, judges were powerless to adapt the exception to have regard to the new technology.[44] Universities Australia submits that this observation highlights the limitation of purpose-based exceptions, and the need for greater flexibility.

Contrast this with fair use:

> *"The flexible doctrine of fair use can be especially helpful in this time of change, because its general terms can accommodate an indefinite number of new situations and enable important new uses where specific exemptions stop short.*[45]

5.3 *Narrow application of purpose test has further limited the scope of exceptions*

The way in which the Federal Court has construed the research and study fair dealing exception in s 40 of the Act arguably limits the scope for users to benefit from it in cases where they cannot themselves do the actual copying. In *De Garis v Neville Jeffress Pidler*[46] , Beaumont J held that a commercial copying service could not rely on the fair dealing exception in order to make news clippings on behalf of users, regardless of whether or not the user had the relevant purpose. This

[42] Antony Dnes, A Law and Economics Analysis of Fair Use Differences Comparing the US and UK, Report for the Review of IP and Growth, 2011 p 15-16 http://www.ipo.gov.uk/ipreview-doc-j.pdf
[43] Ibid p 27
[44] *National Rugby League Investments v Singtel Optus* [2012] FCAFC 59, paras 95-96
[45] Adler et al, Fair Use Challenges in Academic and Research Libraries, December 2010 http://www.arl.org/bm~doc/arl_csm_fairusereport.pdf
[46] *De Garis v Neville Jeffress Pidler Pty Ltd* (1990) 95 ALR 625

decision has been widely construed as effectively preventing even non-commercial third parties such as universities, schools and libraries, from copying for another person in reliance on fair dealing, regardless of whether or not the circumstances of the copying satisfy the fairness requirements of the exception. While this limitation arguably arises as a result of a judicial interpretation of what Parliament *intended* by a purpose test rather than the purpose test *per se,* we think it illustrates the way in which purpose-based exceptions inevitably deflect attention away from what ought to be the central inquiry; ie whether the use in question is fair. [47]

In jurisdictions such as the US, Singapore, South Korea, the Philippines and Israel, where purpose-based exceptions have been replaced with a broad, flexible exception, the only relevant question is whether the use is fair, regardless of who is doing the copying and for what purpose.

5.4 There is no impediment to Australia replacing purpose-based exceptions with a broad, flexible exception

Finally, it is important to keep in mind that Australia - unlike countries that are bound by EU law - has a great degree of flexibility in determining what exceptions regime is appropriate, subject only to complying with its obligations under the Berne Convention, WIPO Copyright Treaty and the World Trade Organisation Agreement on Trade-Related Aspects of Intellectual Property Rights (**TRIPS Agreement**).

This, in our view, is significant. In his recent view of UK copyright law, Professor Ian Hargreaves lamented the extent to which UK policy makers appear constrained by the EU Copyright Directive (which confines exceptions to a pre-established and closed list of categories) in the way in which they can reform copyright law to make it more suitable to the digital environment. He said:

> *In order to make progress at the necessary rate, the UK needs to adopt a twin track approach: pursuing urgently specific exceptions where these are feasible within the current EU framework, and, at the same time, exploring with our EU partners a new mechanism in copyright law to create a built-in adaptability to future technologies which, by definition, cannot be foreseen in precise detail by today's policy makers. This latter change will need to be made at EU level, as it does not fall within the current exceptions permitted under EU law. We strongly commend it to the Government: the alternative, a policy process whereby every beneficial new copying application of digital technology waits years for a bespoke exception, will be a poor second best.* [48]

Australian policy makers are not shackled in the way that European policy makers appear to be when it comes to reforming copyright exceptions. Australia should take full advantage of this to inject maximum flexibility into its exceptions regime. We think the words of the late Mr Justice Hugh Laddie

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[47] The Canadian Supreme Court recently considered the reasoning in *De Garis,* and said that it was only appropriate when the copier was "hiding behind the shield of a user's allowable purpose" in order to engage in a separate purpose, such as operating a commercial copying service. The question arose in the context of a dispute between Canadian schools and collective rights agency, Access Copyright, as to whether schools could rely on the fair dealing for private research and study exception to copy for their students. The Court confirmed that fair dealing is a "users' right" that must be given a "large and liberal interpretation". The Court held that the teachers "had no ulterior commercial purpose when providing copies to students", but rather were facilitating the students' own research and study purpose by enabling them to have the material they needed for the purpose of study: *Alberta (Education) v. Canadian Copyright Licensing Agency (Access Copyright)* 2012 SCC 37.

[48] Ian Hargreaves, Digital Opportunity: A Review of Intellectual Property and Growth (the Hargreaves Review) para 5.23 http://www.ipo.gov.uk/ipreview-finalreport.pdf

are particularly pertinent when considering whether purpose-based fair dealing exceptions can be made fit for purpose in a digital environment. Comparing the US fair use exception to fair dealing he said:

> *Compare that with our legislation. Rigidity is the rule. It is as if every tiny exception to the grasp of the copyright monopoly has had to be fought hard for, prized out of the unwilling hand of the legislature and once conceded, defined precisely and confined within high and immutable walls. This approach also assumed that Parliament can foresee, and therefore legislate for, all possible circumstances in which allowing copyright to be enforced would be unjustified.* [49]

6. The need for a broad, flexible exception

Universities Australia submits that a broad, flexible exception would be much better placed than our existing purpose-based fair dealing regime to strike an appropriate balance in a rapidly developing technological environment and to enable universities and their students to make full use of technology to create and disseminate knowledge.

To test this, we have considered how two activities that are currently largely blocked by Australian copyright law would fare under a broad, flexible exception:

6.1 Large scale digitisation to enable search and other computational uses of works

The recent litigation between the US Authors Guild and the HathiTrust[50] illustrates the very different copyright treatment of large scale digitisation by universities under a flexible exception such as fair use versus the existing Australian copyright regime.

The HathiTrust is a collaboration of five US university research libraries that joined forces to build a digital archive of books and journals. The purposes of the project were:

- to enable preservation of the works;
- to enable non-expressive uses by researchers, such as using text mining technology to conduct word searches; and
- to facilitate access by users who are blind or visually impaired.

The Authors Guild sued the HathiTrust and the universities for copyright infringement. Earlier this year, the Authors Guild applied to have the proceedings dealt with summarily on the basis that there were no grounds on which the HathiTrust could defend the claims of infringement.

The US District Court judge hearing the case, Judge Baer, refused to grant the motion for summary judgment. He held that the digitization for the purposes of the HathiTrust project amounted to a fair use under US copyright law. In particular:

- Universities had an obligation to digitize works if this was necessary to provide access to print disabled students. This could be done under fair use.

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[49] Mr Justice Laddie, Copyright: Over-strength, Over-regulated, Over-rated?, [1996] 5 *European Intellectual Property Review* 253, p 258

[50] *Authors Guild v HathiTrust* No 11-CV-6351 2012 (SDNY 10 October 2012)

- The fact that the digitization exercise exceeded what would have been permitted under the library preservation copying provisions in s 108 of the US Copyright Act did not prevent the HathiTrust from relying on fair use.
- Digitization to create a search index amounted to a transformative use, and was, on balance, fair use.
- Claims by the Authors Guild that the project put the scanned works at risk of being used by unauthorised users was "speculative and unproven".

Judge Baer said:

> *Mass digitization allows new areas of non-expressive computational and statistical research, … One example of text mining is research that compares the frequency with which authors used "is" to refer to the United States rather than "are" over time. See Digital Humanities Amicus Br. 7 ("[I]t was only in the latter half of the Nineteenth Century that the conception of the United States as a single, indivisible entity was reflected in the way a majority of writers referred to the nation.").*

The Authors Guild sought to distinguish earlier cases - that had held that search engines could rely on fair use to copy websites in the process indexing online content to create the search engine - by arguing that the reasoning in these cases did not apply to digitizing print works for the purpose of enabling the works to be electronically searched etc. Judge Baer rejected this argument:

> *"Plaintiffs assert that the decisions in Perfect 10 and Arriba Soft are distinguishable because in those cases the works were already available on the internet, … I fail to see why that is a difference that makes a difference."*[51]

How would the same activity fare under Australian copyright law?

Section 200AB

The exception in s 200AB of the Act is unlikely to apply to large scale digitization of works of the kind in question in the HathiTrust litigation: Firstly, Subsection 200AB(1)(a) limits the availability of this exception to a use which amounts to "a certain special case". It is possible that digitizing a small number of works for the purpose of enabling an identifiable print disabled student (or students) to have access to the works for the purposes of educational instruction would be permitted. However, there is very real uncertainty as to whether the exception would be found by an Australian court to apply to the kind of "just in case" digitization undertaken by the HathiTrust.

Secondly, Subsection 200AB(3)(b) limits the use of s 200AB to "educational instruction". Digitizing works for the purpose of creating a searchable digital database is unlikely to satisfy this requirement unless the activity occurs in the context of a particular course of instruction and is done to enable an identifiable group of students to use the scanned works for the purpose of the course.

Fair dealing for the purpose of research or study

It is possible that an individual researcher or group of researchers could rely on the fair dealing exception in s 40 of the Act to digitize works for the purpose of their own research or study. There

[51] Ibid

is, however, real uncertainty as to whether an Australian court would find that large scale copying whole works could ever be fair for the purpose of this exception.

A further limitation is the decision in the *De Garis* case. [52] As we have already discussed, the Federal Court held that a commercial copy shop could not rely on the fair dealing exception in s 40 of the Act to copy news clippings that were required by customers for the purpose of their own research or study. While the decision on its face applies to commercial copiers only, it has been widely construed as foreclosing any opportunity for a third party to rely on the fair dealing exceptions in the Act in order to copy for another person. The court in the *De Garis* case held that the relevant purpose was the purpose of the person doing the copying, not the purpose of the actual user of the copy. If this principle were applied, a university may be prevented from relying on the research and study fair dealing exception in order to digitize works to enable library academics and students to engage in their own research and study. No such limitation applies to the US fair use exception.

Should we be concerned about this?

Universities Australia submits that the limitations discussed above place Australian researchers at a very real disadvantage to their counterparts in jurisdictions such as the US, Israel and Singapore who have the benefit of a broad, flexible fair use exception. A project such as the HathiTrust project - described by the US judge hearing the litigation between the Authors Guild and the HathiTrust as allowing "new areas of non-expressive computational and statistical research" - could simply not get off the ground in Australia. The uses that are enabled by this kind of large scale digitization are vital to the progress of human knowledge in the digital age. Realising this potential requires access to digitized texts.

A university copyright officer has provided the following example:

> *Our university holds a number of research collections in hard copy format. We would like to make them more accessible to researchers. Despite the fact that they contain material of no likely commercial value, we are prevented from undertaking mass digitization or format shifting of this content due to the narrow scope of s 200AB. The same problem applies to collections of audiovisual material housed in performing arts departments and the library. Much of this content is in obsolete formats, but we are concerned that a mass format shifting project would not satisfy the "special case" requirement under s 200AB. The requirement to assess and justify each item on an individual basis before copying it onto a more accessible format makes large scale format shifting projects untenable. As a result, the content remains largely inaccessible.*

6.2 Text mining

US universities engaged in data mining and text mining have had the benefit of a body of case law regarding the fair use status of "copy-reliant technologies" such as internet search engines and plagiarism detection software which, "although they do not read, understand or enjoy copyrighted works, necessarily copy them in large quantities".[53] As we discuss above, this case law was relied on by Judge Baer in the HathiTrust case to find that large scale digitisation that would facilitate text mining by researchers amounted to a fair use.

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[52] (1990) 95 ALR 625

[53] Matthew Sag, 'Copyright and Copy-Reliant Technology' (2009) 103 *Northwestern University Law Review* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1257086

In our own region, universities in Singapore and South Korea have the benefit of an open-ended flexible exception that could be relied on for text mining and, as we've discussed in section 3.5 above, universities in Japan can rely on an express text mining exception.

The position under Australian law would be as we have set out above with respect to large scale digitisation: ie it is likely that in many cases the use will fall outside the scope of either s 200AB or the research and study fair dealing exception. Absent a licence, data mining and text mining will in many cases expose a university to a real risk of being sued for copyright infringement.

We are aware that in the UK, some rights holders have objected to the proposal by the Hargreaves Review that the UK introduce an exception for data mining and text mining lest this undermine the possibility of a licensing market emerging. Universities Australia submits that licensing is not a suitable alternative to an exception that would permit data mining and text mining. Firstly, in cases where a researcher wants to mine many thousands of articles, the transaction costs associated with seeking permission will often be prohibitive. Secondly, regardless of whether most journal publishers agree to allow this use of their works, the integrity of a socially valuable project can effectively be undermined if just one publisher refuses to permit relevant data to be mined. Thirdly, the technical, non-consumptive use of works that is involved in data mining and text mining is completely unconnected with the purpose of copyright law. As Professor Hargreaves notes, the treatment of copies made in the process of data mining and text mining of works as falling within the scope of copyright is "*essentially a side effect of how copyright has been defined rather than being directly relevant to what copyright is supposed to protect*".[54] Fourthly, as we discuss below in Part 3, the content in academic journals has for the most part been written and peer reviewed by academics and paid for by university libraries. It comprises a publicly funded research base. As a matter of principle, it should not be open to commercial publishers, who have obtained this content for free, to extract a further payment when academics wish to use content - for which their institutions have already paid – for socially useful purposes.

7. Would flexibility lead to uncertainty?

A criticism that is sometimes made of open-ended exceptions is that the outcome in any particular case is unpredictable: ie that fair use is no more than the "right to hire a lawyer". Recent scholarship focused on the US fair use exception has challenged this.

A detailed empirical study by Associate Professor Matthew Sag[55] found that fair use doctrine is more rational and consistent than is commonly assumed. Sag reviewed 280 fair use cases decided in U.S. District Courts between January 1, 1978 and May 31, 2011 in order to determine whether intuitions regarding the unpredictability of fair use were well founded. The results of his study suggest that fair use is much more than merely the right to hire a lawyer and take one's chances. "Properly understood, fair use jurisprudence is fairly useful" at predicting the outcome in a particular case. Commenting on the UK Hargreaves Report, in which Professor Hargreaves expressed the view that fair use was inherently uncertain, Sag said:

[54] Ian Hargreaves, Digital Opportunity: A Review of Intellectual Property and Growth (the Hargreaves Review) para 5.24 http://www.ipo.gov.uk/ipreview-finalreport.pdf

[55] Matthew Sag, 'Predicting Fair Use' (2012) 73:1 *Ohio State Law Journal*, 47-91 http://ssrn.com/abstract=1769130

> *Although the Hargreaves Commission appears to have accurately understood the potential benefits of fair use, it, like many American commentators, has misunderstood and exaggerated the costs. Standards are not necessarily more unpredictable than rules, nor is flexibility the same thing as unpredictability. The evidence presented in this Article suggests that fair use is not nearly so incoherent or unpredictable as is conventionally assumed.* [56]

Similar work undertaken by Professors Barton Bebee[57] and Pamela Samuelson[58] provides further support for the view that US fair jurisprudence is in fact more coherent and predictable than its critics have suggested.

While it is true that this predictability has emerged over time as US courts have decided fair use cases, if Australia were to introduce an open-ended flexible exception our courts would not necessarily be starting with a blank slate. We do not suggest that US jurisprudence would be exported in its entirety to Australia, but our courts would certainly be able to draw upon the rich body of US fair use jurisprudence. It should also be kept in mind that US fair use exception gives statutory recognition to the *common law* fair use doctrine upon which the fairness factors set out in s 40(2) of our Act are largely based.

In summary, we think the criticism of fair use that it is unpredictable and uncertain is overstated.

8. What model is appropriate?

The Issues Paper seeks comment on how a broad, flexible exception should be framed. Universities Australia submits that a new flexible exception should have at least the following features:

- It should be technologically neutral.
- It should be sufficiently flexible to allow courts to determine that uses that are not expressly referred to in any opening words or preamble are nevertheless permitted subject only to a fairness test. In particular, it should be sufficiently flexible to allow courts to determine that uses that are unanticipated at the time that the exception is introduced come within the scope of the exception if found to be fair.
- It should potentially apply to any person subject only to a fairness test. There should be a clear legislative intention that the exception is a "users' right", and that the reasoning of the Federal Court in the *De Garis* case does not apply. [59]
- There should be a clear legislative intention that the exception can be relied on by educational institutions, for purposes including but not limited to the purpose of educational instruction, subject only to a fairness test. In the US, the fair use exception in s 107 of the Copyright Act is open-ended, but refers expressly to "teaching (including multiple copies for classroom use)" as well as "scholarship or research". In Israel, the fair use exception in s 19 of the Copyright Act 2007 is open-ended but also refers expressly to "instruction and examination by an

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[56] Ibid p 87
[57] Barton Bebee, 'An Empirical Study of US Copyright Fair Use Opinions 1978-2005' (2008) 156 *University of Pennsylvania Law Review* p 549
[58] Pamela Samuelson, 'Unbundling Fair Uses' (2009) 77 *Fordham Law Review* 2537
[59] See section 9 below for a discussion of Users' Rights

educational institution". In the Philippines, the fair use exception in s 185 of the Intellectual Property Code is open-ended but also refers expressly to "teaching including multiple copies for classroom use" as well as "scholarship and research".

- It may be desirable to set out a non-exclusive list of factors to be considered by a court when determining if a particular use is fair. Universities Australia submits that the "fairness factors" that are set out in the US fair use exception in s 107 are an appropriate model. These factors, which are based largely on the common law, have been adopted in substantially the same form by Israel and the Philippines. They are also substantially the same as the fairness factors contained in s 40(2) of the Act, and therefore familiar to academics and students who have relied on the fair dealing exception to undertaken their own research and study. Adopting these factors would also have the advantage of enabling Australian courts to have regard to a rich body of US jurisprudence, as well as the fair use jurisprudence that will continue to emerge in other jurisdictions that have adopted this model.

- There should be a clear legislative intention to the effect that commercial uses are not per se unfair. This is in our view particularly important in the digital environment, where universities - in line with the Government's innovation policy - are forging closer relationships with industry to drive research and innovation. The knowledge transfer that will increasingly drive the digital economy encompasses interaction between academia and wider society, including industry. Earlier this year, the Minister for Tertiary Education, Skills, Science and Research, Senator Chris Evans, announced Government plans to build greater links between Australian industry and universities. Announcing research funding of $1.63 billion, Senator Evans said that the Government needed to ensure that research undertaken in Australian universities "translates into benefits for Australians, by pushing the innovation down into Australian industries". He said that "2012 marks an exciting new stage in building the essential links between Australian industry and universities".[60] In this regard we note that in the 2004 *Genes and Ingenuity* Report, the ALRC recommended that the Act be amended to provide that research with a commercial purpose or objective is "research" in the context of the research and study exception in ss 40 and 103 C of the Act. [61] We also note that commercial uses are not per se unfair in the US. The commercial/non-commercial nature of a use is just one factor that is taken into account by a court when determining if the use amounts to a fair use.

- Finally, we think it would be appropriate to include what Professor Lionel Bently has referred to as an "explanatory rubric" to guide courts in interpreting any new open-ended exception and to "point away from a narrow construction". In his submission to the UK Hargreaves Review, Professor Bently suggested that the UK Copyright, Designs and Patent Act include the following words to guide UK courts interpreting the UK fair dealing exceptions:

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[60] 'University Funding Boost Will Create a Smarter and Stronger Australia' (Media Release, 16 February 2012) http://minister.innovation.gov.au/chrisevans/MediaReleases/Pages/UniversityfundingboostwillcreateasmarterandstrongerAustralia.aspx

[61] See also Matthew Sag, 'Predicting Fair Use' (2012) 73:1 *Ohio State Law Journal* 47-91 http://ssrn.com/abstract=1769130 Sag, who conducted a detailed empirical study of US fair use cases, found that there "was no anticommercial bias in fair use". On the contrary, "….fair use …makes it possible for large commercial entities to build tools such as search engines that make the Internet work and to create platforms such as YouTube and Facebook for sharing individual self-expression." p 85

'Recognising that copyright is intended to encourage and not to impede authorship, creativity, or innovation;

Recognising the need to maintain a fair balance between the rights of authors and the rights of users;

Recognising the large public interest, particularly education, research and access to information. [62]

9. Exceptions as "users' rights"

In a digital environment, it is sometimes suggested that there is no need for copyright exceptions; ie that the lowering of transactions costs has eliminated the justification for exceptions. Universities Australia submits that such a "market failure" approach to determining the scope of exceptions is to misunderstand the nature of exceptions as a central aspect of copyright law.

We have already referred to the Franki Committee rejection of CAL's argument that its willingness to licence library copying by university students should defeat any claim that such copying could be done in reliance on fair dealing. The Franki Committee rejected this argument on the ground that "*as a* ***matter of principle*** *a measure of photocopying should be permitted without remuneration...to an extent which at least falls within the present limits of fair dealing".* [63] In other words, the Committee's understanding of exceptions such as fair dealing was that they were a carve out of the grant of copyright that operated as a *matter of principle,* and were not subject to elimination merely because the rights holder was willing to grant a licence.

Understood in this way, the principle enshrined in fair dealing (and fair use) is that the exception should apply where the negative effects on the rights holder are outweighed by external benefits such as education.

Robert Burrell and Allison Coleman suggest that new "exceptions", should be styled as "users' rights" rather than exceptions. [64] They say that adopting the language of "users' rights" would reinforce that "provisions provided for the benefit of users" are a central aspect of copyright law. [65]

As we discuss below, there is increasing international acknowledgement of the role played by exceptions in ensuring a proper balance between the rights of rights holders and users.

Canada

In 2004, the Canadian Supreme Court declared that fair dealing was a "users' right"[66] . In *CCH Canadian Limited v. Law Society of Upper Canada*, the court said:

> *Before reviewing the scope of the fair dealing exception under the Copyright Act, it is important to clarify some general considerations about exceptions to copyright infringement. Procedurally, a defen-*

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[62] Exploring the Flexibilities Available to UK Law, Submission by Professor Lionel Bently to UK Hargreaves Review http://www.ipo.gov.uk/ipreview-c4e-sub-bently.pdf

[63] Copyright Law Committee on Reprographic Reproduction, October 1976 (Franki Report) para 6.24 http://www.ag.gov.au/Copyright/CopyrightLawReviewCommittee/Reports/Pages/CopyrightLawCommitteeonReprographicReproduction.aspx

[64] Robert Burrell and Allison Coleman, Copyright Exceptions: The Digital Impact (Cambridge University Press, 2005) p 279

[65] Ibid

[66] *CCH Canadian Limited v. Law Society of Upper Canada* 2004 SCC 13

dant is required to prove that his or her dealing with a work has been fair; however, the fair dealing exception is perhaps more properly understood as an integral part of the Copyright Act than simply a defence. Any act falling within the fair dealing exception will not be an infringement of copyright. The fair dealing exception, like other exceptions in the Copyright Act, is a user's right. In order to maintain the proper balance between the rights of a copyright owner and users' interests, it must not be interpreted restrictively.

This led the Court to find that the availability of a licence was not itself determinative of whether or not a use was fair:

The availability of a licence is not relevant to deciding whether a dealing has been fair. As discussed, fair dealing is an integral part of the scheme of copyright law in Canada. Any act falling within the fair dealing exception will not infringe copyright. If a copyright owner were allowed to license people to use its work and then point to a person's decision not to obtain a licence as proof that his or her dealings were not fair, this would extend the scope of the owner's monopoly over the use of his or her work in a manner that would not be consistent with the Copyright Act's balance between owner's rights and user's interests.[67]

In a series of decisions earlier this year, the Canadian Supreme Court reaffirmed this principle of fair dealing as a "users' right".

In *Council of Ministers for Education v Access Copyright*[68], the Court was considering the extent to which it was permissible for schools to copy works for distribution to their students in reliance on the students' own fair dealing exception in circumstances where Access Copyright was prepared to grant the school a licence for this use. A majority of the Court held that schools could did not need to pay a licence for this copying, but could copy on behalf of their students in reliance on the *students'* fair dealing rights. Fair dealing was a users' right, and it was open to the schools to copy on behalf of the actual users; ie their students. In reaching this conclusion, the Supreme Court rejected the narrow construction of fair dealing adopted by the Australian Federal Court in the *De Garis* case. Commenting on the implications of this decision for Canadian higher education institutions, an Ontario government body, Contact North, said:

The Court has provided considerable clarity on users' rights and opened the door to more aggressive reliance on those rights in developing educational copyright policies.[69]

In *Society of Composers, Authors and Music Publishers of Canada v. Bell Canada,* [70]the Court was considering whether an online music publisher had infringed copyright by allowing potential purchasers to stream short, low quality previews of musical works for free. The Court said:

CCH confirmed that users' rights are an essential part of furthering the public interest objectives of the Copyright Act. One of the tools employed to achieve the proper balance between protection and

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[67] Ibid para 70

[68] *Alberta (Education) v. Canadian Copyright Licensing Agency (Access Copyright)* 2012 SCC 37 http://utlibrarians.files.wordpress.com/2012/07/supreme-courtruling-fairdealing-jul2012.pdf

[69] The Perfect Storm: Canadian Copyright Law 2012 - Making Sense of the Dramatic Changes and the Far-Reaching Implications for Online Learning http://www.contactnorth.ca/sites/default/files/contactNorth/files/pdf/publications/the_perfect_storm_-_canadian_copyright_2012.pdf

[70] 2012 SCC 36

access in the Act is the concept of fair dealing, which allows users to engage in some activities that might otherwise amount to copyright infringement. In order to maintain the proper balance between these interests, the fair dealing provision "must not be interpreted restrictively"

The US

US courts have also rejected a pure market failure approach to determining whether a use was fair. In the most recent US fair use decision, *Cambridge University Press v Georgia State University*[71], the US District Court for the Northern District of Georgia was required to determine whether Georgia State University could rely on the fair use exception for excerpts of works that had been uploaded onto a password protected e-reserve system to be accessed (viewed, downloaded, copied etc) by students. The publishers in this case asked the court to find that where a commercial licence was available – even for a single page or paragraph of a work – unpaid uses could never be "fair". GSU argued that fair use would become a meaningless exception if publishers could seek to override it by developing a licensing scheme that can charge users for a single page, paragraph etc. The court said that it would involve "circular reasoning" to determine the fair use question merely on the basis of whether a licence was or was not available for the use in question. [72]Rather, the proper approach was to consider (a) whether the failure of the educational institution to pay a licence fee for excerpts of this kind would create a disincentive for authors to create works and (b) whether it would lead to less works being made available. Having regard to these factors, the court found that Georgia State University's copying was fair, despite the publishers leading evidence to the effect they were willing to grant licences to cover the uses.

See also B*ill Graham Archives v. Dorling Kindersley Ltd*[73]*.* In this case, which involved a dispute over whether the publisher of a history of the Grateful Dead could rely on fair use

to reprint thumbnail-size reproductions of copyrighted concert posters despite the fact that the publisher was willing to grant a licence for this use, the US Court of Appeals for the Second Circuit said:

[A] copyright holder cannot prevent others from entering fair use markets merely by developing or licensing a market for parody, news reporting, educational or other transformative uses of its own creative work.[74]

Israel

Israel has also adopted a "users' rights" approach to fair use. The Israeli Copyright Act contains a chapter setting out "Permissible Uses". These include the fair use exception in s 19 of the Act.

Dotan et al say that this approach:

…offers a new legal framework for conceptualizing users' rights [that] marks a significant shift away from the old copyright regime which primarily focused on the exclusive rights of the right holders. The 2007 Act provides a privileged status to permissible uses, enabling one to interpret a permissible use as

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[71] *Cambridge University Press v Georgia State University Civ. Action* No 1:o8-CV-1425-ODE .http://www.tc.umn.edu/~nasims/GSU-opinion.pdf
[72] Ibid p 81
[73] *Bill Graham Archives v. Dorling Kindersley Ltd* 448 F 3d 605 (2d Cir 2006)
[74] Ibid p 614-15

a right of users rather than merely an exception or a legal defence, and thereby recognizing users' rights as an integral part of the copyright regime and as an essential means for achieving its goals.[75]

Universities Australia submits that in a digital environment it is imperative that Parliament convey a clear legislative intention that exceptions, including any new flexible exception, are to be understood as users' rights which are not be construed narrowly. This could be achieved by way of an explanatory rubric of the kind we have discussed in section 8 above. As we discuss in section 12 below, we consider that such an approach would be compatible with Australia's international law obligations. It would also be in line with the international developments discussed above.

10. The shortcomings of s 200AB

The Issues Paper seeks comment on whether s 200AB should be amended.

In explanatory material for the *Copyright Amendment Bill 2006*, the Government stated that s 200AB was introduced in response to its review of whether Australia should have an exception based on the principles of fair use.[76] This suggests that the Government had in mind that s 200AB would operate as a kind of "fair use for education" exception; ie that it would be relied on by educational institutions to undertake uses that were 'fair'.

Unfortunately, the way in which s 200AB was drafted – in particular the incorporation of the three step test – has rendered the exception of limited practical use to universities. As a result, uses that would almost certainly be found to be "fair" under a fair use analysis are not being undertaken in Australian universities. This outcome would appear to be quite contrary to the legislative intention.

What are the problems with s 200AB?

Principle 7 of the Issues Paper suggests that reform should promote clarity and certainty. Section 200AB is neither clear nor certain.

Firstly, the incorporation of the three step test into s 200AB requires users to adopt a framework that is completely unfamiliar to Australian users. Academics and university copyright officers, who have long been used to applying a fairness analysis (ie when determining whether a particular use amounts to a fair dealing for the purpose of research or study, or the purpose of criticism or review), are now required to apply a framework that is completely foreign to Australian copyright law. This has created enormous uncertainty. In many universities, that uncertainty has translated into "self-censorship": the exception is simply not relied on due to uncertainty as to how it is intended to operate. It is interesting to note that Dr Emily Hudson has suggested that an exception such as 200AB that merely incorporates the language of the three step test might itself be non-compliant with the three step test on the basis that it might be thought to be insufficient interpretative guidance to courts and users regarding the scope of the exception. [77]

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[75] Amira Dotan, Niva Elkin-Koren, Orit Fischman-Afori, Ronit Haramati-Alpern, Fair Use Best Practices for Higher Education Institutions: The Israeli Experience (2010) http://www.colman.ac.il/English/AcademicUnits/Law/Faculty/Orit_Fishman_Afori/Documents/Fair%20Use%20Best%20Practices%20Israel%20SSRN.pdf

[76] Copyright Amendment Bill 2006, Explanatory materials for *Exceptions and other Digital Agenda Review Measures* p 5

[77] JE Hudson, Copyright Exceptions: The Experiences of Cultural Institutions in the United States, Canada and Australia (2011) PhD thesis, Law, The University of Melbourne p 29

Secondly, subsection 200AB(7) appears to require users to have regard to international law when construing s 200AB. Subsection (7) provides that the words 'conflict with a normal exploitation', 'special case' and 'unreasonably prejudice the legitimate interests' are intended to have the same meaning as in Article 13 of TRIPS. An exception that requires users to have regard to and to understand international law can hardly be said to be "clear".

Thirdly, the international law that a user is required to have regard to when construing s 200AB is *itself* highly unclear and uncertain. There has been a great deal of academic commentary on the three step test, but to date there has been only one international adjudicative decision on the scope of Article 13 of TRIPS - the WTO Panel decision in the *Homestyle* case.[78] This defined the three-step test in a narrow and restrictive fashion. Professor Jane Ginsburg has commented that the WTO Panel interpretation of the 'normal exploitation' limb of the test may result in "*even traditionally privileged uses such as scholarship...[being] deemed 'normal exploitations, assuming copyright owners could develop a low transactions cost method of charging for them.'*"[79], [80].

Fourthly, Subsection 200AB(3)(b) limits the use of s.200AB to 'educational instruction'. As we have already discussed above, this arguably means that the exception cannot be relied on by academics engaged in research, as opposed to teaching. This is a major shortcoming for any exception that is intended to be relied on by educational institutions.

Fifthly, the "special case" requirement in s 200AB (1)(a) has given rise to real uncertainty as to whether the exception can be relied on for large scale digitization projects such as that undertaken by the HathiTrust in reliance on the US fair use exception. For example, the Australian Copyright Council advises librarians that they should "*be wary of relying on the 'special case' provision to format shift 'just in case' someone wants to borrow items in your collection, [as] you cannot apply the provision without considering on a tape-by-tape basis whether the provision is available to you*".[81] The ACC also advises that a library would need to "*consider whether the case was 'special' in relation to each title*" before it could undertake format shifting in reliance on s 200AB.[82] Section 200AB effectively imposes two levels of "special case": the use firstly has to be for one of the purposes in subsections (2), (3) or (4), and <u>also</u> has to amount to a "special case" . As a result, the exception operates in a much more narrow fashion than either fair dealing or fair use. As we discuss below, this additional hurdle is in our view not necessary to ensure that the exception complies with Australia's international law obligations.

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[78] World Trade Organisation, Report of the Panel, United States - Section 110(5), US Copyright Act, 15 June 2000 http://www.google.com/url?q=http%3A%2F%2Fwww.wto.org%2Fenglish%2Ftratop_e%2Fdispu_e%2F1234da.pdf&sa=D&sntz=1&usg=AFQjCNEWpkLt4uyfpCcNy7t9o0oNAX3lIg .

[79] Jane C Ginsburg, 'Towards Supranational Copyright Law? The WTO Panel Decision and the 'Three-Step Test' for Copyryright Exceptions' (2001) *Revue Internationale du Droit d'Auteur* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=253867

[80] Some commentators have suggested that the three-step test as set out in the WIPO Copyright Treaty may allow for application of more generous limitations than the test as articulated in Article 13 of TRIPS, in light of the preamble to the WIPO treaty that refers expressly to the "*balance between the rights of authors and the larger public interest, particularly education, research and access to information, as reflected in the Berne Convention*". A similar preamble does not exist in the TRIPS agreement.

[81] Australian Copyright Council FAQs for Librarians and Archivists http://www.copyright.org.au/find-an-answer/browse-by-what-you-do/librarians-archivists/

[82] Ibid

Sixthly, subsection 200AB(6)(b) provides that the exception cannot be relied on if the use would be covered by another exception or statutory licence. Again, this considerably narrows the scope of s 200AB. It means, for example, that use of orphan print and graphic works does not come within s 200AB because this use is covered by the Part VB statutory licence. Regardless of the fact that the work is an "orphan", universities cannot rely on the free exception in s 200AB to use the work, but must instead rely on the statutory licence.

While not related to the drafting of s 200AB, a further limitation is that s 200AB cannot be relied on to use a work that is protected by an access control technological protection measure (TPM). As more and more content is made available only in formats that are protected by TPMs, copyright owners, not Parliament, are defining the scope of this exception that was intended to benefit educational users. This is despite the fact that educational institutions have a long history of protecting and respecting the rights of copyright owners. We understand that consideration of exceptions relating to TPMs is outside of the scope of this review. That said, we think that any consideration of how s 200AB has operated in practice would be incomplete without consideration of how the lack of a TPM exception is impacting on the scope of the exception. It has meant, for example, that universities cannot rely on s 200AB to enable text-to-speech functionality on TPM protected e-books in order to make these accessible to sight-impaired students. Failure to provide this content in an accessible format may cause a university to be in breach of its obligations under the Commonwealth Disability Discrimination Act 1992 and equivalent State laws not to discriminate against students with a disability in the provision of course content. Universities Australia has raised these concerns in its submission to the Government review of TPM exceptions. In that submission Universities Australia has requested an exception permitting circumvention of a TPM to enable use of a copyright work or other subject matter by or on behalf of a body administering an educational institution in the circumstances mentioned in ss 200AB (3) and 200AB (4) of the Act.

In summary, Universities Australia submits that s 200AB has not lived up to its stated goal of providing a flexible and open-ended exception. We acknowledge, of course, that it is in the nature of any flexible exception that there will be *some* uncertainty about how it operates at the margins, or with respect to new kinds of uses. In our submission, however, the degree of uncertainty that has resulted from the incorporation of the three step into a domestic copyright exception has rendered the exception of limited practical use. The exception also operates in a much more narrow way than fair use. In our submission, s 200AB should be repealed in favour of a broad, flexible exception. This would place Australian universities on the same footing as universities in other fair use jurisdictions.

We have had an opportunity to review the report on s 200AB prepared for the Australian Digital Alliance by Policy Australia which is included as an Appendix to the ADA submission. The findings in that report align with our own view on the shortcomings of s 200AB and the need for a broad, flexible exception.

11. Transformative use

The Issues Paper seeks comment on whether exceptions should allow "transformative, innovative and collaborative" use of copyright materials to create and deliver new products and services.

In the education context, transformative uses of works include the use of content in teaching materials, digitisation of works for the purpose of enabling works to be searched, and "user generated

content" created by students. In our submission, a broad, flexible exception of the kind we propose would be the most appropriate means of creating breathing space for such transformative uses of works. The HathiTrust case that we have discussed above is a good example of how a fair use exception can achieve this without the need for a purpose-based transformative use exception.

In the event that the Commission is minded to recommend a purpose-based transformative use exception, we think it would be inappropriate to confine such exception to non-commercial uses. As we have already discussed, collaborations between the higher education sector and industry contribute in very many ways to the development of the digital economy. It would be both unduly restrictive - and in many cases practically impossible - to seek to draw bright lines between commercial and non-commercial uses. Universities Australia submits that the approach adopted by the US and other fair use jurisdictions - whereby the fact that a use is commercial is but one factor taken into account in considering whether the use is "fair" - is not only appropriate, but also the only practical way of determining what kinds of transformative uses are deserving of protection.

Universities Australia also submits that it would be inappropriate to set "thresholds of originality or innovation" for a use to be considered "transformative". Such an approach adopts an overly narrow and restrictive approach to the question of what kind of "transformation" is necessary to ground an exception. Again, we refer to the HathiTrust case, in which the court held that using an entire work for a different *purpose* to that for which the work was created could itself amount to a "transformative" use of that work. In a digital environment, where just about every use of a work will involve making a reproduction, it is imperative to provide sufficient flexibility for a court to determine that a use that involves using a work for a different purpose - such as digitising, indexing etc to facilitate the work being searched - is just as capable of amounting a transformative use as is a use that results in the creation of a new work.

12. Would a flexible exception comply with international law?

Universities Australia acknowledges that some rights holders and academics have expressed the view that a fair use exception would not comply with the three step test. For the reasons discussed below, we think there is a strong and respectable argument in favour of the view that there is no requirement or limitation in either the Berne Convention, the WIPO Copyright Treaty or the TRIPS Agreement that would prevent Australia from adopting an open-ended fair exception. That was clearly the view of the Singapore, Israeli, South Korean and Philippines governments when they followed the lead of the US and adopted a US-style fair use exception.

Professor Martin Senftleben has undertaken a detailed study of the negotiations that led to the introduction of the three step test. He has shown that the test - which he describes as a 'high level abstraction' - was in fact intended to reconcile the many different types of exceptions that already existed when it was introduced:

"A comparison of the various observations made by the members countries elicits the specific quality of the abstract formula...: due to its openness, it gains the capacity to encompass a wide range of exceptions and forms a proper basis for the reconciliation of contrary opinions."[83]

In other words, far from intending to introduce a test that limited the capacity of member states to introduce flexible exceptions, the three step was intended to be an abstract, open formula that could accommodate a ''wide range of exceptions''. Professor Senftleben has urged the introduction of an EU fair use law, and suggests that the three step test provides a sound basis for doing this. [84]

Further support for this view comes from Dr Christophe Geiger, who also suggests that the history of the three step test provides a strong basis for concluding that the test was intended to operate flexibly, and can readily accommodate open ended, flexible exceptions.[85]

Bill Patry, author of a seven volume treatise on US copyright law, has noted that in the many hearings leading up to US becoming a signatory to the Berne Treaty, no concerns regarding fair use were raised by any of the WIPO and European copyright experts who took part:

WIPO and European copyright experts testified before the U.S. Congress during the hearings on U.S. adherence to Berne, hearings that spanned four years: 1985, 1986, 1987, and 1988: there was no lack of time or opportunity to raise any concerns. Congress even went to Geneva and convened a round table discussion there on November 25 and 26, 1987 with WIPO and European copyright experts, the sole purpose of which was to determine which parts of U.S. law needed to be amended to permit Berne adherence. Not once at this round table or during four years of hearings were the words "fair use" ever raised by a foreign expert who appeared before Congress nor did any domestic witness (of whom there were many dozens) consider there to be a potential problem. [86]

Patry also notes that then WIPO Director-General, Arpad Bogsch, said that the only aspect of the United States copyright law that made it incompatible with the Berne Convention was the notice and registration requirements that existed at that time. [87]

Similarly, Hugenholtz and Senftleben have noted that that the Minutes of Main Committee for the 1996 WIPO Diplomatic Conference (that led to the adoption of the WIPO Internet Treaties) provide evidence of "the determination to shelter use privileges", including determination on the part of the US to "safeguard the fair use doctrine". [88]

Finally, in any consideration of whether a fair use exception complies with international law, it must be kept in mind that certain Berne Convention provisions - including Article 10, which allows member states to permit free use of literary or artistic works for teaching provided such use is fair - are *not* subject to the three step test.

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[83] Martin Senftleben, Copyright, Limitations, and the Three-Step Test: Analysis of the Three-Step Test in International and EC Copyright Law (Kluwer Law International, 2004)

[84] Martin Senftleben, 'The International Three-Step Test: A Model Provision for EC Fair Use Legislation' (2010) (2010) 1 *Journal of Intellectual Property, Information, Technology and E-Commerce Law,* 67 http://www.jipitec.eu/issues/jipitec-1-2-2010/2605/JIPITEC%202%20-%20Senftleben-Three%20Step%20Test.pdf

[85] Christophe Geiger, 'The Role of the Three Step Test in the Adaptation of Copyright Law to the Information Society' (January-March 2007) *UNESCO e-Copyright Bulletin* 1 http://unesdoc.unesco.org/images/0015/001578/157848e.pdf

[86] William Patry, Fair Use, the Three-Step Test, and the Counter-Reformation 2 April 2008 http://williampatry.blogspot.com.au/2008/04/fair-use-three-step-test-and-european.html

[87] Ibid

[88] Bernt Hugenholtz and Martin Senftleben, Fair use In Europe: In search of Flexibilities, November 2011 http://www.ivir.nl/publications/hugenholtz/Fair%20Use%20Report%20PUB.pdf p 22

Part 3: Educational statutory licences

In this part, we address the questions raised in the Issues Paper regarding the educational statutory licences. In sections1.1 to 1.11 below we discuss the Part VB statutory licence, and in section 1.12 we discuss the Part VA statutory licence.

1. Introduction

The Commission has asked whether the educational statutory licence schemes contained in Parts VA and VB of the Act are adequate and appropriate in the digital environment. These licences were last reviewed more than 12 years ago by the Ergas Committee. At that time, the Committee recommended that the licences remain unchanged, but it expressed concerns regarding "the collective administration of rights … associated with these licences". [89] In particular, the Committee raised concerns regarding possible anti-competitive effects arising from the way in which the licences were administered.

While the statutory licences served rights holders and the education sector reasonably well for many years, Universities Australia submits that developments in recent years have rendered the licences no longer appropriate in the digital environment. As they operate today, they are standing in the way of the emergence of a competitive and efficient market for educational content. They have led to highly inefficient cost structures that place the Australian higher education sector at a global competitive disadvantage. They are also becoming increasingly irrelevant as high quality educational content is increasingly made available on open access formats. This includes academic journals published on an open access basis as well as educational content made freely available via video sharing platforms such as YouTube. The move towards open access is gathering considerable momentum in North America and Europe as rising costs of accessing information increasingly impact on university budgets.

Universities Australia has given very detailed consideration to whether the shortcomings in the statutory licences - which we discuss in detail below - are capable of being addressed without repealing the entire statutory licensing model. For example, there are technical shortcomings in the Part VB licence in particular that are arguably capable of being overcome by amending the relevant provisions. We have set these out in **Annexure A** to this submission. We have come to the view, however, that even if these technical problems were to be addressed, the statutory licence model itself is not appropriate in the digital environment. This view has not been reached lightly.

In the comments that follow, Universities Australia does not seek to suggest that either Copyright Agency Limited (**CAL**) or Screenrights has acted inappropriately in seeking to ensure that all possible remunerable uses are paid for under the statutory licences. We do however suggest that the statutory licensing model is simply inappropriate in the digital environment, and that the claims that have been made by CAL and Screenrights regarding the scope of these licences underscores that fact.

[89] Ergas Report p 118

1.1 The Part VB statutory licence

The Part VB licence[90] was introduced in 1980 as a result of recommendations made by the Copyright Law Committee on Reprographic Reproduction (**Franki Committee**). The Government appointed the Franki Committee in response to concerns by rights holders that some educational institutions were making multiple copies of works for distribution to students in amounts that exceeded what was permitted under the fair dealing exception for the purpose of research and study in s 40 of the Act.

The Franki Committee concluded that there was a need for an efficient means by which universities and other educational institutions could use works, in ways that exceeded what was permitted under fair dealing, without the need to obtain permission from rights holders. It recommended the introduction of a statutory licence permitting educational institutions to use parts of a work, and in some cases the whole of a work, for educational purposes.

Significantly:

- The Franki Committee did not intend the statutory licence to replace fair dealing in universities. On the contrary, the Franki Committee recommended dropping the word "private" from the fair dealing exception - which at that time applied to "research and *private* study" - saying that "so long as the photocopying of material for educational use is qualified, for the purposes of section 40, by the requirement of fair dealing, we think that the removal of the limitation to private study will not prejudice owners of copyright".[91] The Committee said: "There is … widespread exclusion from the rights given to authors of various rights of copying of a fair dealing or public benefit nature by libraries, educational bodies, research establishments and individuals. In other words, it has always been the policy of the law that the monopoly granted to the author is of a limited nature. Historically therefore the author is not in a position to maintain his claim with regard to copying of published works from a position of absolute right."[92] The Committee also said "the entitlement of an educational establishment to make multiple copies of a work under this scheme would, of course, be in addition to whatever might be done under the fair dealing provision."[93] The Committee noted that the evidence before it showed that "much of the photocopying that takes place" in educational institutions is likely to be within fair dealing limits.[94]

- The statutory licence recommended by the Franki Committee was intended to compensate rights holders for lost sales due to copying that exceeded what was permissible under fair

[90] The first print and graphic educational statutory licence was contained in ss 53B and 53D of the Act. These provisions were repealed in 1989 when the current statutory licence contained in Part VB of the Act was introduced.
[91] Copyright Law Committee on Reprographic Reproduction, October 1976 (Franki Report) para 6.66, 2.64 http://www.ag.gov.au/Copyright/CopyrightLawReviewCommittee/Reports/Pages/CopyrightLawCommitteeonReprographicReproduction.aspx
[92] Copyright Law Committee on Reprographic Reproduction, October 1976 (Franki Report) para 1.09 http://www.ag.gov.au/Copyright/CopyrightLawReviewCommittee/Reports/Pages/CopyrightLawCommitteeonReprographicReproduction.aspx
[93] Copyright Law Committee on Reprographic Reproduction, October 1976 (Franki Report) para 6.66 http://www.ag.gov.au/Copyright/CopyrightLawReviewCommittee/Reports/Pages/CopyrightLawCommitteeonReprographicReproduction.aspx
[94] Copyright Law Committee on Reprographic Reproduction, October 1976 (Franki Report) para 1.22 http://www.ag.gov.au/Copyright/CopyrightLawReviewCommittee/Reports/Pages/CopyrightLawCommitteeonReprographicReproduction.aspx

dealing, particularly where a work had been specifically written for use in schools. [95] There was no intention that the licence be used to create a "market" for works where none existed.

- The Franki Committee intended that an obligation to pay remuneration would only arise if a rights holder or their representative claimed payment within a prescribed time. [96] There does not appear to have been any intention that universities would pay remuneration to a collecting society regardless of whether or not a rights holder had any intention of commercially exploiting the work copied. On the contrary, the Committee noted that while some books being copied in universities were written with a view to the author earning incomes from sale, most educational photocopying was of material that had been written by academic authors who were seeking widespread dissemination of their ideas, and "who would not want to restrict copying, whether remunerated or not".

It is clear from the Second Reading speech introducing the statutory licence that the Government intended to give effect to the Franki Committee recommendations. [97] Introducing the Copyright Amendment Bill into the House of Representatives in 1980, the then Minister for Employment and Youth Affairs, Ian Viner, said "The most extensive provisions to the Bill … arise out of the recommendations of the [Franki Committee]". [98]

1.2 How the Part VB statutory licence is operating in practice in a digital environment

In 2012, universities who are party to the Universities Australia agreement with CAL paid $26.4 million under the Part VB statutory licence. As we set out below, the licence is operating very differently to what was envisaged by the Franki Committee when it made its recommendations in 1980.

1.3 The Part VB statutory licence impedes new technologies and educational uses

A feature of the statutory licence is that it relies on surveys of copying and communication in a certain number of universities each year to determine *what* works are copied and communicated, as well *how much* copying and communication occurs, so that the relevant rights holders can be paid. [99] In the event that CAL and the universities cannot agree on how much universities should pay for this copying and communication, the Copyright Tribunal is required to determine the amount that it considers to be equitable remuneration for the making of "a licensed copy or licensed communication".[100] In other words, the system is designed to measure the "amount" of copying and

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[95] Copyright Law Committee on Reprographic Reproduction, October 1976 (Franki Report) para 1.52 http://www.ag.gov.au/Copyright/CopyrightLawReviewCommittee/Reports/Pages/CopyrightLawCommitteeonReprographicReproduction.aspx
[96] Copyright Law Committee on Reprographic Reproduction, October 1976 (Franki Report) para 6.57 http://www.ag.gov.au/Copyright/CopyrightLawReviewCommittee/Reports/Pages/CopyrightLawCommitteeonReprographicReproduction.aspx
[97] Ibid
[98] Second Reading Speech, Copyright Amendment Bill 1980, 9 September 1980
[99] In the case of electronic copying and communication, the parties must agree, or failing that the Tribunal must determine an Electronic Use System for this purpose: s 135ZXA
[100] s 135ZWA(1), s 153C(2)

communication that occurs, and the Tribunal is required to determine a rate for the making of a copy or communication.

This "per copy" method of determining remuneration may well have made sense in a print environment, but it has become highly artificial in a digital environment. In a digital environment, copying is ubiquitous. The existence of the statutory licence provides an opportunity for CAL to seek a price hike for every technological advance that results in digital "copies" being made.

For example, in a speech to rights holders on Copyright in the Digital Age in May 2006, then CAL CEO, Michael Fraser, explained that "new technology brings new uses ...such as caching" and that this provided opportunities for rights holders to seek payment. [101] CAL in fact did argue that universities should be required to pay under the statutory licence for proxy caching. The education sector was required to lobby government to amend the Act to include an exception in s 200AAA for caching by educational institutions to ensure that they were not required to pay for this activity.

Another example of CAL seeking to rely on the statutory licence to seek increased payments for the use of new technology was its claim in 2006 that the mere act of clicking on a hypertext link to view material online amounted to an exercise of the right of communication. CAL raised this argument in Copyright Tribunal proceedings with the schools sector, and was seeking to persuade the Tribunal that teachers who directed students to view material online were authorising those students to exercise the communication right. Again, educational institutions were forced to seek a legislative amendment to ensure that the statutory licence could not be used in this way. At the request of the education sector, the *Copyright Amendment Act* 2006, which came into force on 1 January 2007, contained a new s 22 (6A) which makes clear that a person is not taken to be exercising the right of communication merely because the person takes one or more steps for the purpose of gaining access to what is made available online by someone else in the communication or by receiving the electronic transmission of which the communication consists.

It is instructive to compare CAL's approach to seeking increased payments based on technological advances with the approach of the Canadian Supreme Court. In *Entertainment Software Association of Canada v. SOCAN*[102] (which involved payment for music featured in a downloaded video game) the Canadian Supreme Court articulated a principle of "technological neutrality" that operates to prevent rights holders from seeking an increase in payment based purely on changes in technological means of delivering or using works:

> *The principle of technological neutrality is reflected in s. 3(1) of the Act, which describes a right to produce or reproduce a work "in any material form whatever". In our view, there is no practical difference between buying a durable copy of the work in a store, receiving a copy in the mail, or downloading an identical copy using the Internet.* **The Internet is simply a technological taxi that delivers a durable copy of the same work to the end user.** *The principle of technological neutrality requires that, absent evidence of Parliamentary intent to the contrary, we interpret the Copyright Act in a way that avoids imposing an additional layer of protections and fees based solely on the method of delivery of*

[101] Michael Fraser, Copyright in the Digital Age, May 2006
http://www.google.com.au/url?sa=t&rct=j&q=&esrc=s&source=web&cd=3&ved=0CD0QFjAC&url=http%3A%2F%2Fwww.copyright.com.au%2Fassets%2Fdocuments%2FSeminars%2FSessionOne_DigitalEnvironment_May2006.pdf%2Fat_download%2Ffile&ei=y_-yUIbiGK2PiAfy0YDIAw&usg=AFQjCNEpzp2OKCykP6JIfTqebrFM0HC-8w

[102] 2012 SCC 34

the work to the end user. To do otherwise ***would effectively impose a gratuitous cost for the use of more efficient, Internet-based technologies.*** *(Our emphasis)*

It seems inevitable that for so long as the statutory licence continues to operate, Australian universities will continue to face claims from CAL for increased payments based on an argument that technological advances have led to new ways of universities "using" works that warrant an increase in payment.

1.4 The Part VB statutory licence does not reflect modern teaching methods

One of the greatest advantages that digital technology has delivered in the educational environment is the opportunity for universities to make an almost endless array of content available to their students. Some students will choose to access this content, others will not. Of the students who access an article, some may browse the article for a minute or two before deciding it is not what they want; others may read the entire article and perhaps even print a copy for future reference.

The statutory licence model for determining remuneration is firmly based in a "per-copy-per-view-per-payment" paradigm. As we discuss above, a survey is used to measure the "amount" of electronic copying and communication that occurs, and the Tribunal is required to determine a rate for the making of "a copy" and "a communication". This model for determining remuneration takes no account of the realities of the modern educational environment.

Universities have for some years been operating under an agreement with CAL whereby remuneration is determined on a "commercial" basis; ie without direct reference to the amount of copying and communication that has actually occurred in the relevant period. That agreement expires on 31 December 2013. CAL has put universities on notice that it considers that the "amount" of copying and communication that has occurred in the intervening period - as determined by the surveys that have been carried out in universities - will be relevant to determining what it considers universities should pay under any new agreement. In other words, a highly artificial measure - being the number of articles and other content that a lecturer has uploaded onto an e-reserve or otherwise made available for access by students - will be taken as a proxy for each student who was potentially able to access that content having actually read it. The dilemma that universities face is: do we take full advantage of digital technology to provide our students with access to the widest possible array of content (knowing that CAL will seek payment based on the number of articles etc made available multiplied by the number of students who *could* have accessed that article) or do we revert to the old print model of selecting a small range of articles etc for each class because this will inevitably cost less under the statutory licence? The very fact that universities are having to ask these questions underscores the unsuitability of the statutory licence to a digital educational environment.

1.5 The Part VB statutory licence removes incentives for rights holders to develop innovative and competitive licensing models for educational content

In a digital environment, there is no longer any real need for a declared collecting society to stand between rights holders and education sector licensees, but the statutory licence model for determining remuneration makes it attractive for rights holders (and CAL) to continue to operate this way. For as long as the statutory licence continues - providing rights holders with an income stream

based on an artificial per-copy-per-view-per-payment model, and providing the means for CAL to seek an increase in payment with each new technological advance - there will be little incentive for them to develop innovative and competitive licensing models. Even those rights holders such as journal publishers who licence their content directly to universities have an incentive to see the statutory licence retained: they are the recipients of "over payments" due to the statutory licence. This occurs when a lecturer copies journal content for his or her students during a period when the university's copying is being surveyed by CAL. While the university is not required to rely on the statutory licence for this copying (as it has already been paid for), the practical reality of the system used to measure Part VB copying in universities means that this already-paid-for content is often reported as having been copied in reliance on the statutory licence, thereby artificially inflating the amount of remunerable copying. This could result in CAL seeking a higher payment, thus providing a windfall benefit to rights holders.

1.6 The Part VB statutory licence has created a false market: Australian universities are paying to copy works that no one ever wanted or expected to be paid for

The theory behind a statutory licence is that it provides an efficient mechanism for rights holders and users to transact by lowering the transaction costs. In practice, however, the statutory licence has created a market in works where none would exist *but for* the statutory licence.

How has this occurred?

We've already discussed the way in which the statutory licence was used by CAL to seek payment for caching and viewing online: ie uses that the actual rights holders had not sought to exploit. It was necessary to seek legislative intervention to address CAL's "new technology brings new uses"[103] approach to administering the statutory licence.

Similarly, CAL has used the statutory licence to treat copying of freely available Internet material as 'remunerable'. This content is copied freely by people in homes and businesses throughout Australia. No one is seeking to be paid for it. On the contrary, they have made it freely available to anyone who wishes to access it. Despite this, CAL considers this copying as falling within the statutory licence and therefore as copying that universities must pay for. CAL is only in a position to do this because of the statutory licence.

Universities also pay under the statutory licence to copy orphan works. By definition, there is no market in these works *other than* the statutory licence.

1.7 The Part VB statutory licence has removed any scope for fair dealing and has led to an unintended shift in the copyright balance

The statutory licence has effectively resulted in Australian universities paying for copying that is treated as fair use or fair dealing in other jurisdictions. It has led to an unintended shift in the copyright balance in favour of rights holders, and put Australian universities out of step with their global counterparts.

[103] Michael Fraser, Copyright in the Digital Age, May 2006 http://www.google.com.au/url?sa=t&rct=j&q=&esrc=s&source=web&cd=17&ved=0CFoQFjAGOAo&url=http%3A%2F%2Fwww.copyright.com.au%2Fassets%2Fdocuments%2FSeminars%2FSessionOne_DigitalEnvironment_May2006.pdf%2Fat_download%2Ffile&ei=FGRzUO-4LvCaiAfLqYGIAw&usg=AFQjCNEpzp2OKCykP6JIfTqebrFM0HC-8w

Australian universities play a unique role in promoting the goals of copyright law, and yet as a result of the statutory licences have less scope to rely on fair dealing than do commercial enterprises such as commercial news publishers and broadcasters (who can copy in reliance on the "reporting news" fair dealing exceptions in ss 42 and 103B of the Act and the "criticism and review" fair dealing exceptions in ss 41 and 103A of the Act) and commercial law firms (who can copy in reliance on the "judicial proceedings or professional advice" fair dealing exceptions in ss 43 and 104 of the Act).

How has this happened?

It certainly wasn't what the Franki Committee had in mind when it recommended the statutory licence regime. As we've discussed above, the Franki Committee anticipated that universities *and their students* would continue to rely on the fair dealing exception following the introduction of the statutory licence. Not only did the Committee find that "much of the copying done by individual students on self-service machines in the libraries of universities and elsewhere would be a fair dealing", [104] it also recommended that university libraries be free to copy, without payment, up to six copies of a journal article in order to facilitate student fair dealing copying when a lecturer had asked an entire class to read a particular journal article. The Committee considered, and rejected, a submission by the Australian Copyright Council that student copying on university-owned photocopying machines be subject to a royalty payment. [105]

Despite this very clear intention to exclude student fair dealing copying from the scope of the statutory licence, universities have faced claims by CAL that when a student copies a work that is included in a course reading list etc, the student copying is remunerable and must be paid for by the university.

For example, in Copyright Tribunal proceedings in 1999[106], CAL sought payment under the statutory licence for copies made by students in the closed reserve section of university libraries. Universities submitted that the copying was done not "by or on behalf of the university", but rather by students in reliance on their own fair dealing rights. CAL submitted that fair dealing did not apply, and that the universities would be exposed to a claim for copyright infringement unless they agreed to pay for the copying under the statutory licence. The then President of the Copyright Tribunal, Justice Burchett, said that the question would need to be determined by the Federal Court. While CAL has not yet sought clarification from the Federal Court, it has reserved its right to include this copying within the scope of a new agreement. In its submission to the Attorney General in relation to the Copyright Amendment (Digital Agenda) Bill 1999 CAL submitted that universities should be required to rely on the statutory licence whenever their students copy or communicate works "identified by the [university] as related to or relevant to the course of study being undertaken by that student"[107]. We are not aware of any other jurisdiction in which rights holders have sought to be remunerated by

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[104] Copyright Law Committee on Reprographic Reproduction, October 1976 (Franki Report) para 1.22 http://www.ag.gov.au/Copyright/CopyrightLawReviewCommittee/Reports/Pages/CopyrightLawCommitteeonReprographicReproduction.aspx

[105] Copyright Law Committee on Reprographic Reproduction, October 1976 (Franki Report) para 1.23 http://www.ag.gov.au/Copyright/CopyrightLawReviewCommittee/Reports/Pages/CopyrightLawCommitteeonReprographicReproduction.aspx

[106] *Copyright Agency Ltd v University of Adelaide* [1999] ACopyT 1 http://www.austlii.edu.au/au/cases/cth/ACopyT/1999/1.html#Heading1

[107] CAL submission to the Department of Attorney General in relation to Copyright Amendment (Digital Agenda) Bill 1999, 19 March 1999, para 174

educational institutions for copying undertaken by their students. In the US, the UK and Canada, for example, students are free to make copies within fair use or fair dealing limits. The mere fact that this copying is undertaken on the premises of a university, or that a lecturer has recommended the reading, does not lead to a claim by rights holders for payment. In Australia, on the other hand, the existence of the statutory licence has been relied on by CAL to seek payment from universities when students themselves copy works that have been made available in a library reserve.

The expansionist approach to the Part VB statutory licence began in 1982. In *CAL v Haines*[108], CAL commenced proceedings against the NSW Department of Education seeking orders that had the effect of preventing educational institutions from relying on fair dealing for any print and graphic copying. The case arose from a memorandum sent to state schools by the NSW Director General of Education that advised schools principals that:

- schools could choose whether or not to rely on the statutory licence;
- the fair dealing exception in s 40 of the Act permitted virtually the same amount and type of copying as that permitted under the statutory licence;
- teachers could continue to rely on the fair dealing exception in s 40 to prepare their own materials;
- students could continue to rely on the fair dealing exception in s 40 to do their own photocopying on copying machines in the school's library; and
- teachers could act as agents and undertake fair dealing copying on behalf of students where:
  - the student was prevented by physical or other disability from copying himself or herself; or
  - the student requested the teacher to act as his or her agent to undertake the copying.

At first instance, McLelland J found that the memorandum was "inaccurate and misleading". While acknowledging that there may be *some* overlap between the statutory licence and the fair dealing exception in s 40 of the Act, McLelleand J said that "much copying" which could be carried out under the statutory licence would not constitute fair dealing. In reaching this conclusion, McLelland J said that the fact that schools could now rely on the statutory licence to undertake copying in return for equitable remuneration "must have an influence upon what amount and type of copying done in a school could properly be regarded as fair dealing under s 40".[109] The Department was ordered to correct the memorandum to reflect the Court's finding. On appeal, the Full Court directed that the memorandum be withdrawn and destroyed.

The Court in *Haines* case did not go so far as to say that there was *no* potential overlap between the statutory licence and fair dealing: the Full Court expressly noted that it was not necessary to decide this question. As a practical matter, however, CAL has relied on *Haines* case to seek to prevent universities from relying on fair dealing in any of the circumstances set out in the Department of Education memorandum that was in issue in that case.

This approach puts Australia out of step with other jurisdictions:

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[108] *CAL v Haines* [1982] 1 NSWLR 182
[109] Ibid p 190

Canada

As discussed in section 9 above, in Alberta (Education) v Access Copyright [110] the Canadian Supreme Court held that schools can rely on the private research and study fair dealing exception to make multiple copies, within fair dealing limits, for distribution to students. Schools did not need to obtain a licence for this copying.

The reasoning in this case will apply to universities as well as schools.

The Court declared, in very clear terms, that fair dealing is a "users' right" that must be given "a large and liberal interpretation".

It said that when deciding whether an educational institution could rely on fair dealing when copying works for distribution to its students, the court should look to the purpose of the users of the copy (ie the students) rather than the purpose of the person doing the copying (ie the teacher).

Commenting on the decision, Contact North, an Ontario government body involved in distance higher education, said that Canadian higher education institutions are now "well positioned to adopt copyright policies with fair dealing playing a central role….It will be very difficult for educational institutions to justify the Access Copyright licence in light of these decisions. This is not to say that entire books will be copied without compensation. They clearly won't since that copying would likely fail on most of the factors of the stage two six - factor test. However, for shorter excerpts - earlier case law indicated as much as a full article or chapter in a book - this copying will benefit from a strong fair dealing argument"."[111]

The US

US universities can rely on the fair use exception in s 107 of the US Copyright Act to make multiple copies for distribution to students.

As discussed in section 9 above, the full scope of this exception was tested recently when a group of publishers sued Georgia State University for copyright infringement.[112] GSU had a long-standing practice of making content available to students via a password protected e-reserve system in reliance on fair use. This included whole chapters of books. The publishers claimed that this exceeded fair use limits and required a licence.

The Court held that GSU was entitled to rely on the fair use exception for copying and making available to students up to 10 per cent of a work.

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[110] *Alberta (Education) v. Canadian Copyright Licensing Agency (Access Copyright)* 2012 SCC 37 http://utlibrarians.files.wordpress.com/2012/07/supreme-courtruling-fairdealing-jul2012.pdf

[111] The Perfect Storm: Canadian Copyright Law 2012 - Making Sense of the Dramatic Changes and the Far-Reaching Implications for Online Learning http://www.contactnorth.ca/sites/default/files/contactNorth/files/pdf/publications/the_perfect_storm_-_canadian_copyright_2012.pdf

[112] *Cambridge University Press et al v Georgia State University* No 1:o8-CV-1425-ODE http://www.tc.umn.edu/~nasims/GSU-opinion.pdf

The publishers in this case sought to defeat the fair use argument by claim that when a book was an edited collection of essays by different authors, each essay in the book was a separate "work". If accepted, this argument would have meant that the university would have copied 100 per cent of a work if it copied one essay from a book. The Court said that if the publishers were permitted to treat a particular chapter as a separate work it would "choke out educational non-profit use of the chapter as a fair use". It said that publishers cannot seek to defeat the fair use defence by treating each chapter as a separate work.

US Universities rely on the reasoning in this decision to include single articles from a periodical, chapters of books etc in course packs and e-reserves.[113]

1.8 The Part VB statutory licence is economically inefficient

In a critique of what he described as copyright overreach, the late Mr Justice Hugh Laddie said in 1996:

> *We should not be handing out monopolies like confetti while muttering 'this won't hurt'. I suggest we should approach monopolies from the other direction. We should say, as our predecessors did, that the basic rule is that no monopoly should exist unless it is shown to be objectively justified.* [114]

Like any other monopoly, the statutory licence, administered by a monopoly collecting society declared under the Act, can only be justified to the extent that the inherent restraint on competition is justified by the benefits that tit delivers to society at large. While the licence may have been "objectively justified" when it was first introduced in 1980, and possibly even 12 years ago when it was reviewed by the Ergas Committee, Universities Australia submits that it cannot be objectively justified in today's digital environment. Reasons for this include the following:

The statutory licence is not necessary to ensure continued creation of content used in universities

The vast majority of content that is paid for by universities under the statutory licence would continue to be created regardless of whether or not the uses were remunerated. Academics are paid to generate the material that is copied in reliance on the statutory licence, and are required to do so as part of the conditions of their employment.

The Copyright Tribunal has acknowledged the fact that the statutory licence is a blunt instrument, incapable of differentiating between uses that have economic significance and those that do not. For example, in proceedings between CAL and the schools' sector in 1985, the then President of the Copyright Tribunal, Justice Sheppard, said:

> *I think there is some significance in the distinction which exists between, the use of the work of authors who are in the general field of writing and those who write for educational purposes or, at least for general academic purposes, alone. Especially is that so in the tertiary area. There, many writers have an interest in their works being widely used for teaching purposes. It is one way in which their own careers are advanced. Unquestionably, selection committees put a premium on the amount of*

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[113] See, for example, the University of Texas Cpyright Guidelines http://copyright.lib.utexas.edu/copypol2.html
[114] Mr Justice Laddie, 'Copyright: Over-strength, Over-regulated, Over-rated?' [1996] 5 *European Intellectual Property Review* 253, p260

publishing candidates for academic promotion have done. There are views that this is overdone and that more attention needs to be paid to teaching ability, but at the moment publishing is a widely accepted criterion which may, in a close contest, tip the balance in favour of a candidate for promotion who has published more widely than his rival.

…..

There was no challenge to this evidence and I accept it.

…...

The difficulty is to fix on a rate which is fair to all parties in all circumstances for all copying in educational institutions. Earlier I referred to the fact that some authors write to further their careers. It is something which they are expected to do. They have an interest in their works being read and referred to by others. That interest is not the economic interest they might have in financial gain to be made from the copying of some pages of their work. It is the interest they have in maintaining and furthering their academic standing and in achieving promotions and appointments. In a given case where these circumstances prevailed, one might take these matters into account in determining fair remuneration. ***But it is very difficult to have regard to them in an exercise which involves the fixing of the same remuneration for authors who write generally and whose works only find some of their use in the educational field and for other authors or publisher copyright owners who, although they write and publish only in the educational area, do so purely for commercial reasons.*** *(Emphasis added)*[115]

Universities Australia submits that this observation by Justice Sheppard underscores the inefficiency of the statutory licence. Since Justice Sheppard made these comments in 1985, the academic landscape has developed such that the importance of publications to academic recognition and promotion has only increased. The drivers for academics to have their research published and cited by other authors include the following:

- University funding is partly dependent upon research publications output. Each year, the Government collects Higher Education Research Data which includes data from each university regarding the publications by its academics in that year. Relevant publications include journal articles, books and book chapters. The Government uses this data in part to determine the amount of research funding for each university. [116]
- At each university, internal grant funding is directly linked in part to publication output.
- Publication output is an important criteria for academic promotion within universities.
- Government funding bodies such the National Health and Medical Research Council require grant recipients to publish research output.
- Internationally, institutional research performance through metrics and peer surveys is increasingly important in determining institutional and disciplinary rankings.

These international and domestic developments are driving institutional performance management policies.

[115] *Copyright Agency Ltd v Department of Education of NSW* [1985] ACopyT 1 http://www.austlii.edu.au/au/cases/cth/ACopyT/1985/1.html

[116] See Higher Education Research Data Collection http://www.innovation.gov.au/Research/ResearchBlockGrants/Pages/HigherEducationResearchDataCollection.aspx

Commenting recently on the costs incurred by universities in using content that has been generated by their own academics, Professor Tom Cochrane, Deputy Vice-Chancellor Technology, Information and Learning Support at Queensland University said:

> *The fact is that the overwhelming majority of articles published in the traditional journal literature are given away by their authors, are refereed gratis by colleagues in the peer review process and are then published. There is no individual return to the author. There is no return to the referee. But there is significant revenue generated for publishers reselling this content back to the institutions where the vast majority of scholarly authors work and reside.*[117]

As Professor Cochrane notes, most of this content is *given away*.by the academics. The standard publishing agreements required to be entered into by academics whose work is published by major academic publishers Elsevier[118], Wiley-Blackwell[119], Springer[120], and IGI Global[121] do not grant any royalties to authors.

In the words of Scott Aaronson, Professor of Electrical Engineering and Computer Science at MIT:

> *At the risk of stating the obvious, we in the academic community create the ideas in our papers. We write the papers. We typeset the papers. We review the papers. We proofread the papers. We accept or reject the papers. We electronically archive and distribute the papers. If commercial publishers once played an essential role in this process, today their role is mostly to own the copyrights and to collect money from the universities.*[122]

The ongoing litigation over the Google Books project provides a useful illustration of the factors that drive academic scholarship. The US Authors Guild Inc, and two individual authors, were recently granted class status in these proceedings. That class status has been challenged by a group of academic authors (led by Professor Pamela Samuelson) who assert that academic authors have very different interests to general authors when it comes to the question of whether a third party such as Google should be free to digitise their works for the purpose of creating a searchable database and making small parts of the works freely available. The parties to the Amicus brief point to empirical studies that show that scholarly works predominate in the collections being digitized by Google. They say that while the Authors Guild is "institutionally committed to maximising profits", most academics are instead "committed to maximising access to knowledge" and do not object to their works being used in this way. [123]They say also that a "win" for the Authors Guild in its litigation to shut down the Google Books project would be a "loss"

[117] Tom Cochrane, Copyright or Copywrong? How Journals Control Access to Research, The Conversation, 28 July 2011 http://theconversation.edu.au/copyright-or-copywrong-how-journals-control-access-to-research-2517
[118] http://www.elsevier.com/framework_authors/pdfs/JPA-v17.pdf
[119] http://authorservices.wiley.com/bauthor/faqs_copyright.asp#1.6
[120] http://www.springer.com/authors/journal+authors/helpdesk?SGWID=0-1723213-12-808004-0
[121] http://www.igi-global.com/publish/faq/#royalties-book-editing
[122] Scott Aaraonson, Review of The Access Principle by John Willinsky http://www.scottaaronson.com/writings/journal.html
[123] Pamela Samuelson and David Hansen, 'Brief of Amici Curiae Academic Authors in Support of Defendant-Appellant and Reversal', 16 November 2012 http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2177032

> for academic authors who seek the kind of broad public access to works that this project aims to achieve.
>
> We think this highlights the importance of having regard to the factors that drive academic scholarship when considering the appropriateness of an educational copying regime.

The statutory licence results in educational use of works being taxed without any corresponding benefit to the rights holders

Under the Part VB statutory licence, Australian universities and other educational institutions are paying to use orphan works and freely available internet material.

It goes without saying that the royalties collected for the copying of orphan works will not be distributed to the relevant rights holders. Instead, this money is held on trust by CAL for four years, after which it is distributed to rights holders who have **no connection** with the works copied.

Universities Australia also understands that a large percentage of the royalties collected for copying of freely available internet content is not distributed to the relevant rights holders due to CAL being unable to identify and/or locate- the rights holders.. In other words, a large amount of freely available internet content that is copied in universities is essentially "orphaned".

Even if CAL were to agree to exclude this content during a survey of Part VB copying, there is simply no easy way for a university to ensure that copying of freely available content is not caught up in a CAL survey and treated as remunerable. A system that taxes publicly beneficial uses of works - where such uses would cause no harm to rights holders - cannot be objectively justified.

The statutory licence results in significant administrative costs being incurred without any corresponding benefit to rights holders

CAL incurs significant costs in administering the statutory licence. Universities also incur significant costs in managing and complying with their obligations under the statutory licences. To the extent that these costs do not result in any corresponding benefit to rights holders - as is the case in particular with respect to freely available internet content and orphan works - they are economically inefficient.

1.9 Developments that have rendered the Part VB statutory licence less relevant

There have been significant changes in the educational landscape since the introduction of the Part statutory licence that have rendered the licence increasingly less relevant in the delivery of educational content to Australian university students.

These include the following:

Direct licences with publishers

The vast majority of educational content used for teaching purposes in Australian universities is purchased directly via commercial licences. This is a very different situation compared with when the statutory licence was first introduced.

Data from the Council of Australian University Libraries shows that in 2011, Australian university libraries spent $256.7 million on library resources. Nearly 80 per cent of this was on e-resources such as electronic journal subscriptions and e-books.

One university copyright officer said:

> *Academics are becoming more reliant on subscription databases and open access, and in many cases avoid having to use the statutory licence due to its complicated, restrictive and convoluted requirements in the digital environment.*

Open access publishing

There is a global move towards making high quality educational content freely available. This includes academic research (which is increasingly published in open access repositories) as well as course materials that have been made freely available by universities and privately funded public interest institutions.

Open access publishing of academic content potentially has significant economic implications for Australia. In a finding that underscores the economic contribution of the scholarly research undertaken in Australian universities, a recent study has found that the move towards providing free access to publicly funded academic research has the potential to deliver a $9 billion dollar increase in returns on R&D investment over a twenty year period. [124]

The move towards open access publishing also has significant implications for the continued relevance of the statutory licence. Universities and their students now have access to an unprecedented amount of free, high quality, educational content. See **Annexure B** where we have set out just some of the material that is freely available and being used for teaching and learning in Australian universities. This includes not only journal articles, but also e-books.

> Acknowledging that the move towards open access was a trend that was set to continue, one of the largest academic publishing companies, Pearson, recently launched a search engine to help academics locate free educational content from popular open education resources repositories.[125] The service allows lecturers and teachers to search for e-book chapters, videos and online exercise software from more than 25 repositories, including Harvard Open Courses, Connexions, OER Commons, the Massachusetts Institute of Technology's Open Courseware, Carnegie Mellon's Open Learning Initiative, and Wikiversity. Search queries will also turn up results for content that can be purchased from Pearson.

One driver for open access publishing was concern that academic journals were becoming increasingly unaffordable for even the most well-funded universities. Professor Simon Marginson, professor of higher education at Melbourne University commented recently:

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[124] John Houghton and Peter Sheehan, 'Estimating the Potential Impacts of Open Access to Research Findings' (2009) 39(1) *Economic Analysis & Policy* 127 p 138 http://vuir.vu.edu.au/15221/

[125] http://www.pearsonlearningsolutions.com/pearson-bluesky/

Few universities can afford to maintain the full set of minimum necessary journals to be able to provide research infrastructure on a comprehensive basis. Indeed, even the strongest Australian university libraries are forced to do without material they need to hold.[126]

Another driver for the open access publishing movement, however, was a desire on the part of universities and public funding bodies to ensure that publicly-funded research was made as widely available as possible in order to advance the public interest. Many research funders, including the National Health and Medical Research Council, now make it a requirement of the receipt of a grant that research results be made available on an open access basis.[127]

Commenting publicly on this development, Professor Tom Cochrane has noted:

Evidence is developing that citation frequency increases with the greater visibility of research. Other benefits include stronger linkages between researchers and wider communities and the attraction of higher degree research students based on greater visibility of existing research fields. …[A] tipping point may be reached with the provision of material through institutional and, in some cases, disciplinary repositories. It is hard to make precise predictions but the overall trend is undeniable.

The world of traditional scholarly publishing may well co-exist for a while, adding value to scholarly material in a way that national and international academic communities are willing to pay for. Alternatively, publishers may abandon journal titles per se as a unit of economic (and quality) currency, and seek new business in which they extend their role in providing sophisticated and reliable integrity checks on the quality of research articles.[128]

One university reports that the size of its open access research repository has increased from a mere 3368 articles, chapters etc in 2008 to 330,515 works as at October 2012. This is just one example: the rapid growth in open access content is taking place throughout the university sector.

While Australian universities are in theory free to use open access content without relying on the statutory licence, the very existence of the statutory licence has meant that Australian universities often end up paying for this freely available content. If a university lecturer makes this content available to his or her students it is treated as having been made available "by the university" and therefore as having been made under the statutory licence. This is notwithstanding that it was made freely available to anyone and can be used without payment by universities in any other jurisdiction.

In the words of one university copyright officer:

"Copying of these publications should not be caught in a CAL survey and treated as remunerable, but there is no effective way of filtering them out in the current system."

[126] Simon Marginson, Putting a Price on Knowledge: The High Cost of Academic Journals, The Conversation, 25 July 2011 http://theconversation.edu.au/putting-a-price-on-knowledge-the-high-cost-of-academic-journals-2475
[127] Revised Policy on Dissemination of Research Findings, 22 February 2012 http://www.nhmrc.gov.au/media/notices/2012/revised-policy-dissemination-research-findings
[128] Tom Cochrane, Copyright or Copywrong? How journals control access to research, The Conversation, 28 July 2011 http://theconversation.edu.au/copyright-or-copywrong-how-journals-control-access-to-research-2517

Universities Australia submits that the growing international move towards open access publishing is a significant argument in favour of abolishing the statutory licence.

Increased emphasis on student-directed learning

Changes in teaching methods are also rendering the statutory licence increasingly less relevant.

When the statutory licence was introduced in 1980, the dominant teaching model was as follows: lecturers would provide students with a course outline that directed them to various resources (some of which they were required to read and others which they choose to read if they were writing an essay etc on a particular topic) as well as a printed set of photocopied readings.

That model is rapidly disappearing. There are major cultural changes taking place in the university teaching and learning environment. There has been a move away from a 'push' teaching and learning model - where lecturers recommend a set text and provide a set 'package' of unit course materials, whether in paper format or e-copy - towards a model where student initiative, and exchanges among peers, drive the learning process, and where academics are much less providers of set course materials and more the providers of expert guidance. Under this "community of learners" model, the role of academic staff is that of moderator and mentor, directing and assessing student efforts, helping students to find, analyse and evaluate content, and providing learning challenges in relation to the content students find for themselves and their peers.

What does this mean for the future of the statutory licence?

It is clear that the Franki Committee did not intend that universities be required to pay under the statutory licence for any copying done by students themselves.

Firstly, the Committee recommended that university libraries be permitted to make up to six copies of a journal article in order to facilitate students relying on the fair dealing exception in s 40 of the Act to make copies of journal articles etc that had been included in a course outline or reading list:

> *We also recommend that limited multiple copying of single articles in any periodical for use in the libraries of non-profit educational establishments be allowed without remuneration to copyright owners. A serious need for this facility has been demonstrated to us in our inspection of libraries at universities and institutes of technology in cases where a lecturer has included a particular periodical article in a reading list for a large class. In such cases it is quite impossible for students to have access to this material unless additional copies are available in the library. Because of the freedom lecturers enjoy in their choice of material we consider that it is not possible for a university library to subscribe for sufficient multiple copies of the many possibly relevant journals which exist and articles from any of which might be chosen in a reading list. ...We are satisfied that the advantages to education of this recommendation are considerable and we think there would be no significant detriment to copyright owners.*[129]

[129] Copyright Law Committee on Reprographic Reproduction, October 1976 (Franki Report) para 1.46 http://www.ag.gov.au/Copyright/CopyrightLawReviewCommittee/Reports/Pages/CopyrightLawCommitteeonReprographicReproduction.aspx

Secondly, as we've already noted above, the Committee rejected a submission by the Australian Copyright Council to the effect that all photocopying that took place in university libraries should be subject to remuneration. The Committee said:

> *...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'.*[130] (Emphasis added)

Despite this, the existence of the statutory licence has provided CAL with a basis to argue that any copying that occurs within a university - whether copying "by" the university or copying within fair dealing limits "by" students - falls within the statutory licence and must be paid for by the university. Universities Australia takes the view that student copying is properly characterised as copying by students in reliance on their *own* fair dealing rights. That is the way in which the copying would be characterised in other jurisdictions. Universities Australia submits that the increasing trend towards student directed learning is one more reason why the statutory licence is rapidly becoming redundant.

For so long as the statutory licence remains in force, CAL will continue to be in a position to argue that student copying must be paid for by the university.

1.10 What regime would replace the statutory licence?

It is worth stressing that in seeking the abolition of the statutory licence, Australian universities are simply asking to be placed in the same position as universities in comparable jurisdictions.

We anticipate that the educational copying regime under the model that we have proposed would look something like this:

- Universities will continue to invest heavily in resources such as e-books and electronic journals, and students will continue to use this content in ways that are permitted by the commercial licence entered into by the university. The abolition of the statutory licences would have no impact on this. Publishers will continue to benefit from this model: licence fees flow directly from the educational sector to the creators and publishers of the content.
- Universities and their students will rely increasingly on open access content. This is a global development, and represents a major paradigm shift in the way in which educational content is distributed and accessed. While the open access publishing movement is a matter of concern to some commercial publishers, the abolition of the statutory licences would have no impact on this development other than, perhaps, to accelerate the move towards use of this content by Australian universities. Major commercial publishers, such as Pearsons and Springer, are adapting to this shift by developing open access distribution models that are not dependent upon the publisher owing copyright in the content. A good example of this is SpringerOpen books.[131] Under this model, academic authors (or their institutions) pay for the content of e-books to be published on an open access platform.

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[130] Copyright Law Committee on Reprographic Reproduction, October 1976 (Franki Report) para 2.18 http://www.ag.gov.au/Copyright/CopyrightLawReviewCommittee/Reports/Pages/CopyrightLawCommitteeonReprographicReproduction.aspx

[131] http://www.springeropen.com/books

- Students will rely on their own fair dealing (or fair use) rights to access and use content (such as book chapters) that has been digitised by the university within fair dealing/fair use limits and made available on an e-reserve etc.
- In the event that no fair use exception is introduced, universities would rely on the student's fair dealing rights to make this content available within fair dealing limits.[132] In the event that a fair use exception is introduced, the university would rely on the fair use exception for this activity.
- As in other fair use/fair dealing jurisdictions, universities would also rely on voluntary licences for uses that exceed fair dealing/fair use limits.

Universities Australia submits that the educational copying regime described above would be both fairer and more efficient than the existing regime. It is likely that many of the uses that are currently paid for under the statutory licence would continue to be paid for under voluntary licensing arrangements (either directly with copyright owners or collectively through blanket licence arrangements). Publishers would have a greater incentive to develop innovative and competitive distribution models. There would also be scope for universities and their students to take full advantage of the exceptions that play a central role in striking an appropriate balance between the interests of rights holders and those of the education sector in comparable jurisdictions.

This model would place Australian universities on a more equal footing with universities in comparable jurisdictions.

1.11 Addressing possible objections to the abolition of the Part VB statutory licence

Universities Australia anticipates that any proposal to abolish the statutory licence will meet strong resistance from CAL and some rights holders. In what follows we seek to address some of the likely objections:

Abolition of the statutory licence will cause unreasonable prejudice to rights holders

Universities Australia acknowledges that abolition of the statutory licence is likely to result in some loss of licensing revenue for commercial publishers as some copying that is currently paid for by universities is done in reliance on fair dealing or fair use. This does not, in our submission, warrant retention of the statutory licence.

Firstly, we note that in response to a submission by the Copyright Council that permitting students to copy journal articles in reliance on fair use would cause harm to journal publishers, the Franki Committee said:

> *We do not think we should recommend any reduction in the existing limits of permitted copying merely because that copying may make the publication of an existing journal uneconomic. We do not think that any such recommendation would be of practical value to authors.* ***If the publication of a***

[132] See above at section [ ] for a discussion of "users' rights".

journal is for a commercial purpose the publisher must be prepared to meet the commercial problems which always arise with changes in technology and in the habits of the community.[133] (Our emphasis)

These comments are pertinent today. Changes in teaching and learning methods have led to decreasing reliance on "push" teaching methods. To the extent that this change in "habits in the community" leads to a reduction in licensing income for commercial publishers, it does not warrant imposing a royalty on copying that is properly characterised as fair dealing.

Secondly, it is important to keep in mind that the most significant economic impact on publishers is likely to come not from the abolition of the statutory licence, but rather from the global move towards open access publishing. Publishers are already adapting to this change.

Finally, as we've discussed above, any reduction in licensing revenue will have little if any impact on authors in general, who for the most part, particularly university academic authors, do not share in the payments received under the statutory licence and in fact give their content away.

Abolition of the statutory licence will lead to a reduction in the creation of educational content

Any argument to the effect that abolition of the statutory licence will lead to a reduction in the creation of educational content is completely without merit. In section 1.8 above we set out the reasons why academics will continue to produce academic content regardless of whether or not this content attracts payment under the statutory licence. They are already giving it away for free, and will continue to do so.

It is also pertinent that in its recent review of copyright, the UK Intellectual Property Office commented that there appears to be no evidence that fair dealing and fair use exceptions have led to reduced incentive to create works in the US and other jurisdictions where they are relied on by educational institutions to copy for their students.[134]

Copying by universities (as opposed to students) can never be "fair"

When the statutory licence was introduced in 1980, it was intended to apply to multiple copying by educational institutions that exceeded what would have been permissible in reliance on fair dealing.[135] As we have discussed above, the impact of the decision of the Federal Court in *Haines'* case has been that - contrary to the apparent intention of the Franki Committee - the existence of the statutory licence has been treated as ruling out any scope for universities to rely on fair dealing when they copy for teaching purposes.

In our submission there is no justification for continuing with a regime that leaves no scope for fair dealing (or fair use) copying by universities. Australia is currently out of step with comparable

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[133] Copyright Law Committee on Reprographic Reproduction, October 1976 (Franki Report) para 1.47 http://www.ag.gov.au/Copyright/CopyrightLawReviewCommittee/Reports/Pages/CopyrightLawCommitteeonReprographicReproduction.aspx

[134] Impact Assessment: Extending Copyright Exceptions for Educational Use, UK IPO, November 2011 http://www.ipo.gov.uk/consult-ia-bis0317.pdf

[135] Copyright Law Committee on Reprographic Reproduction, October 1976 (Franki Report) http://www.ag.gov.au/Copyright/CopyrightLawReviewCommittee/Reports/Pages/CopyrightLawCommitteeonReprographicReproduction.aspx

jurisdictions in this regard. Each of the jurisdictions set out below recognises that copying by universities, for their students, can amount to fair dealing/fair use:

- In the US, the fair use exception in s 107 of the Copyright Act refers expressly to multiple copying for classroom use. A US court has recently confirmed that this exception can be relied on by universities to upload up to 10 per cent of a chapter of a book, or an entire article from a journal, onto an e-reserve for access by students.136
- In Canada, the US Supreme Court has held that fair dealing is a "users' right", and that educational institutions can copy on behalf of their students in reliance on the students' fair dealing rights. [137] The Canadian Parliament has also introduced a new "fair dealing for education" exception that will permit multiple copying by educational institutions for educational purposes. Since these two developments, Canadian universities have begun to advise their staff that they can rely on fair dealing to copy individual journal articles and up to 10 per cent of a book (and perhaps more) for distribution to their students. [138]
- In Israel, the fair use exception in s 19 of the Copyright Act 2007 (which was based on the US fair use exception) refers to "instruction and examination by an educational institution". Universities rely on this exception to copy for educational purposes.
- In the Philippines, the fair use exception in s 185 of the Intellectual Property Code is open-ended but also refers expressly to "teaching including multiple copies for classroom use" as well as "scholarship and research". Universities rely on this exception to copy for educational purposes.
- In South Korea, the fair use exception is open-ended but refers expressly to "education and research"[139], Universities rely on this exception to copy for educational purposes.
- The UK Intellectual Property Office has sought comment on a proposal to permit educational institutions to make multiple copies of works (up to 5 per cent of a work per quarter) for educational purposes without the need for a licence. [140]

Universities Australia submits that it is no longer tenable to assert that copying by universities can never be "fair". To the extent that this argument has held sway in Australia following *Haines* case, it represents a distortion of the educational copying regime that was envisaged by the Franki Committee.

Universities and their academics cannot be trusted to decide when copying falls within fair dealing/fair use limits

It is sometimes suggested by rights holders' representatives that fair use (and fair dealing) are simply too complex to allow for academics to make judgments about what is and is not permissible. These

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[136] *Cambridge University Press et al v Georgia State University* No 1:o8-CV-1425-ODE http://www.tc.umn.edu/~nasims/GSU-opinion.pdf
[137] *Alberta (Education) v. Canadian Copyright Licensing Agency (Access Copyright)* 2012 SCC 37 http://www.tc.umn.edu/~nasims/GSU-opinion.pdf
[138] See, for example, University of Toronto Copyright Guidelines: http://www.provost.utoronto.ca/Assets/Provost+Digital+Assets/26.pdf
[139] Clause 35-3, Korean Copyright Act
[140] Impact Assessment: Extending Copyright Exceptions for Educational Use, UK IPO, November 2011 http://www.ipo.gov.uk/consult-ia-bis0317.pdf

critics suggest that uncertainty about the proper scope of fair use will lead to academics exceeding fair use limits and therefore infringing copyright.

Universities Australia submits that this argument overstates the complexity involved in a fair use analysis. We think it is instructive to consider what steps have been taken by the higher education sectors in other jurisdictions to ensure that their academics and university librarians are armed with the guidance that they need to make appropriate judgments about what is permitted under fair use. In the US and Israel, these sectors have developed Codes of Practice that are relied on by universities and university libraries on a day to day basis to guide their decision making. In Canada, education sector groups have also produced guidelines following the introduction of the new "fair dealing for the purpose of education" exception as well as the decision of the Canadian Supreme Court in the Access Copyright case.

The US

In the US, the Association of Research Libraries (ARL) has developed a Code of Best Practices in Fair Use for Academic and Research Libraries.[141] This document was developed following detailed consultation with research and academic librarians regarding the ways in which they were using copyright works. The authors received input from a panel of copyright experts.

The document is intended to operate as a guide to help inform decision making at an institutional level.

Israel

In Israel, the higher education sector has produced a Code of Fair Use Best Practices for the use of copyrighted material in Higher Education Institutions[142]. Like the ARL Code discussed above, this document was the product of wide ranging consultation amongst relevant higher education stakeholders.

It is intended to provide a shared understanding of fair use in higher education that can be used at an institutional level to provide greater certainty as to what is and is not permissible.

Canada

In Canada, most universities are now reviewing their internal copyright guidelines in light of the law reform developments that we have already discussed. One example is the University of Toronto Copyright Fair Dealing Guidelines[143]. The University says that the Guidelines "should provide a 'safe harbour' for a considerable range of copying that occurs in the teaching and research activities of members of our community".

Guidelines in substantially the same form have been published by the Ontario Public School Board[144] and the Canadian Association of Community Colleges. [145]

Universities Australia submits that codes or guidelines, such as those discussed above, are perfectly capable of providing the necessary guidance to enable university staff (including academics, librarians

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[141] http://www.arl.org/pp/ppcopyright/codefairuse/code/index.shtml
[142] http://lib.haifa.ac.il/english/images/stories/pdf/code%20of%20best%20practices%20english%20translation.pdf
[143] http://www.provost.utoronto.ca/Assets/Provost+Digital+Assets/26.pdf
[144] http://www.michaelgeist.ca/component/option,com_docman/task,doc_download/gid,116/
[145] http://www.michaelgeist.ca/component/option,com_docman/task,doc_download/gid,115/

and copyright officers) to make day-to-day decisions about what is permissible under fair use. Each of these documents acknowledge that there will be circumstances where the position is not clear cut, and where it will be necessary to seek advice from the university lawyer, copyright officer etc. That is no different to the position in Australian universities today: ie there are some activities that are clearly covered by one of the statutory licences or exceptions, and other uses where the position is not clear cut.

In our submission, the suggestion that academics cannot be trusted to determine when a particular use will be fair does not withstand scrutiny.

1.12 The Part VA statutory licence

Under the Part VA statutory licence, universities pay to copy and communicate free to air broadcasts for educational purposes. The cost in 2012 was $4.6 million. The content that is paid for under this licence includes the content of free to air broadcasts that have been made available online by the broadcaster.

Outside of educational institutions - in homes throughout Australia - it is permissible to record broadcasts for the purpose of watching the broadcast at a more convenient time. [146] Far from seeing time shifting as a loss of potential licensing opportunities, free to air broadcasters are themselves facilitating free "catch up" viewing by making increasing amounts of content freely available on the internet. In a recent report,[147] the Australian Communications and Media Authority (ACMA) provided a detailed analysis of the factors driving changes in how video content is delivered. In a section dealing with Australian free-to-air broadcasters, ACMA said:

> *Since 2010, Australia's FTA channels have provided catch-up television content to viewers free-of-charge, with the exception of metering charges applied by the viewer's ISP. Content offerings vary between broadcaster sites, with the highest being offered by the Nine Network at an average of 345 hours per week, due in part to its substantial back catalogue of Australian drama.*
>
> *Audience figures for catch-up television programs are rising—an estimated 1.5 million users during June 2012 compared to just over one million during June 2011. Growth in usage is likely to have been influenced by lower data costs and partnerships between content providers and ISPs that have seen metering charges removed entirely for customers of certain providers.*
>
> *The development of formats compatible with portable media devices, such as tablets and smartphones, has enabled consumers to view its video content when not at home, further encouraging audiences to view or download OVC.*
>
> *ABC iView continues to be one of the more innovative catch-up providers, negotiating meter-free downloads with 12 ISPs and offering applications and multi-platform content that can be viewed on several different devices through iCloud storage. The Seven Network has also made inroads in this area, indicating that their business strategy is focused on 'four screen delivery'—PC, mobile, tablets and connected*

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[146] Section 111 of the Act

[147] ACMA, Report 1—Online Video Content Services in Australia: Latest Developments in the Supply and Use of Professionally Produced Online Video Services, October 2012 http://www.acma.gov.au/webwr/_assets/main/lib310665/report%201_online_video_content_in_australia.pdf

Universities Australia submits that it is no longer appropriate to require universities and other educational institutions to pay to use free to air broadcasts. No one but the education sector is paying to time-shift this content. The payments extracted from the education sector for educational use of this freely available content cannot in an any way be said to be necessary to provide an incentive for the continued creation of the content.

In the US, universities can rely on the fair use exception to use free to air broadcasts for educational purposes.

In the UK, the Intellectual Property Office has sought comment on a proposal to permit educational institutions to copy free to air broadcasts for educational purposes, with the obligation to obtain a licence only arising if the institution wishes to archive the broadcast for an extended period. [148]

In Singapore, educational institutions can copy broadcasts for educational purposes without payment under s 115 of the Singapore Copyright Act.

In Canada, universities can copy news programs and news commentary programs for educational use without payment. It is likely that the new Canadian fair dealing for education exception will permit even greater free educational use of broadcasts.

Repeal of the Part VA licence, together with a broad and flexible exception as proposed by Universities Australia, would put Australian universities in the same position as universities in these other jurisdictions.

Universities Australia understands that Screenrights intends to seek an extension of the Part VA statutory licence beyond broadcasts to include other kinds of freely available online audio-visual content, including content on blogs and video sharing platforms such as YouTube.[149] Extending the Part VA licence in this way would have the effect of requiring the Australian education sector to pay to use content that is currently used freely in classroom and homes in Australia and throughout the world.

We are particularly concerned that at the very time that a wide range of high quality audio-visual resources are being made freely available - such as content on YouTube EDU[150] and the Open University on iTunesU[151] - Screenrights is proposing to seek extension of the Part VA licence that may result in content of this kind becoming remunerable in Australia.

[148] [ref]
[149] See Screenrights Strategic Plan 2012-13
[150] http://www.youtube.com/education?b=400
[151] http://www.open.edu/itunes/

Part 4: Other matters of concern to universities

In this part, we discuss three other matters of concern to universities: orphan works, the use of contracts and technological protection measures to effectively override copyright exceptions, and the lack of a copyright safe harbour for universities.

1. Orphan works

The Issues Paper seeks comment on the extent of the orphan works problem in Australia, and how this problem should be addressed.

There are two kinds of orphan works "problem" in the university environment. In the case of print and graphic works used for teaching, universities can use the works, but they are required to pay for this under the Part VB statutory licence notwithstanding that the owners of the works are by definition difficult if not impossible to identify and/or locate. In other words, the problem is not the usual one of not being able to use the works, but rather a case of being unfairly "taxed" to use works. This problem will be addressed by repeal of the statutory licence. In the case of works - and uses of works such as text mining - not covered by the statutory licence, universities are in the same position as other users; ie they are prevented from making use of the works.

In its recently published paper, *Orphan Works: Balancing the Rights of Owners with Access to Works*,[152] the Government outlined the scope of the orphan works problem in Australia: a copyright regime which effectively restricts access to orphan works is stifling productivity. Orphan works cannot be made available for research purposes or transformative uses such as text mining. Given estimates regarding the number of orphan works - the British Library estimates that over 40% of all creative works (whether in Britain or overseas) are orphan works and the National Film and Sound Archive estimates about 20 per cent of the national audio-visual collection may be orphaned - this is clearly an issue of significant concern.

The Government has put forward a range of possible reform options in its Orphan Works paper.[153] These include a full statutory exception as well as various statutory or extended licensing arrangements. Other reform proposals have been put forward, including a licensing proposal by Professors David Brennan and Michael Fraser [154] and a proposal by the Copyright Council Expert's Group. [155]

The US Copyright Office is also conducting a review of orphan works,[156] although US courts have begun to address the question of whether fair use provides a partial solution to the orphan works problem. In the HathiTrust case that we have already referred to, mass digitisation of works - including orphan works - for the purpose of enabling the works to be searched, and to facilitate access to print disabled users, was found to be permissible under fair use. In other words, this use was permissible *without* the need for a stand-alone orphan works exception.

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[152] Revised June 2012
[153] Ibid
[154] David Brennan and Michael Fraser, *The Use of Subject Matter with Missing Owners - Australian Copyright Policy Options* (2012), p 7
[155] Copyright Council Expert Group, *Directions in Copyright Reform in Australia* (2011), pp 8–9
[156] http://www.copyright.gov/orphan/

Universities Australia submits that a flexible fair use-style exception of the kind that we have proposed would go a long way towards solving the orphan works problem, particularly in the education sector.

Having said that, we consider that there is a need for an orphan works scheme to ensure that the potential education, cultural and commercial benefits of orphan works can be fully realized. In our submission, 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. There should not, however, be any requirement to comply with a prescribed procedure for reasonable search. Any such procedural requirements are likely to be insufficiently nuanced to accommodate the very different circumstances in which institutions are likely to be wanting to use orphan works, and run the risk of imposing unworkable burdens on institutional users who in any event can be relied upon to act in good faith. They also impose an unnecessary administrative burden.

Universities Australia also submits that there is no justification for introducing a licensing scheme, such as that proposed by Brennan and Fraser, to deal with the orphan works problem. The Government Orphan Works paper questions whether it would be appropriate to confer the rights of orphan works owners on collecting societies, which "may prioritise corporate advantages ahead of author or user interests" [157]. The paper also notes that collecting societies would stand to gain substantial advantages if they were given a role in facilitating access to orphan works, especially if the payments for use of unclaimed orphan works were absorbed the collecting societies rather than being held in trust by another entity or the Government. [158] Universities Australia shares these concerns. So too do US observers. Professor Pamela Samuelson recently warned that anyone considering introducing statutory or collecting licensing to permit mass digitisation of out of print works in the US should have regard to the Australian experience with statutory licensing, which she said "has shown that even if prices and terms are reasonable at the outset, they may incrementally rise to unreasonable levels as time goes on". [159]

Until the orphan works problem is addressed, Australian users of orphan works - unlike users in the US and other fair use jurisdictions - must heed the following advice by CAL:

> *… the fact that you have been unable to locate the rights holder is no excuse for copying without permission. If you do not obtain permission, any copying you do* **will be** *a copyright infringement. You should obtain legal advice before deciding to take this step. (Our emphasis)*[160]

2. Contracts and TPMs

The Issues Paper seeks comment on whether contracts are being used to exclude the operation of exceptions, and asks whether the Act should be amended to prevent this.

In what follows in this section we comment on the ways in which not only contracts, but also TPMs, are being used to override exceptions and rewrite the copyright balance determined by parliament. We are of course aware that the review of exceptions to the anti-circumvention regime in the Act is

[157] Ibid, p 19
[158] Ibid
[159] Pamela Samuelson, Reforming Copyright Is Possible, and it's the only way to create a national digital library, The Chronicle Review, July 9, 2012 http://chronicle.com/article/Reforming-Copyright-Is/132751/
[160] CAL:http://www.copyright.com.au/assets/documents/Permission%20to%20copy.pdf

being considered separately by the Government, and falls outside of the scope of this review, but in our submission there is little point discussing how contracts are being used to override copyright exceptions without also discussing how TPMs are being used to achieve the same outcome. The reason for this is that any legislative solution to the problem of contractual override could be sidestepped by rights holders using TPMs to achieve the same purpose. Balanced copyright policy will not be achieved if it is left to rights holders to re-write the balance through the use of contracts *or* digital locks. In its report on *Simplification of the Copyright Act*, the Australian Copyright Law Review Committee commented that "fair dealing is not a defence to infringement; rather it defines the boundaries of copyright owners' rights".[161] Those rights have been greatly expanded by the use of contracts and TPMs.

Contractual override of exceptions is still occurring

It is 10 years since the Copyright Law Review Committee (*CLRC)* identified contracts that purport to exclude or modify copyright exceptions as a threat to the so-called copyright balance.[162] The CLRC found that contracts were being used to exclude or modify copyright exceptions, and that existing remedies were not adequate to prevent this. The CLRC recommended that the Act be amended to prohibit contracting out of the fair dealing and library/archive provisions.[163]

Since the CLRC made this recommendation, rights holders have continued to use contracts to seek to exclude copyright exceptions and limitations. While practices vary from publisher to publisher, the most common form of contractual limitations on commercially published journal content are as follows:

- Prohibition on use of content in course packs. This is otherwise permitted by the Part VB statutory licence.
- Prohibition on use of material for interlibrary loans. This is otherwise permitted by the library copying provisions in ss 49 and 50 of the Act.
- Prohibition on electronic transmission of content between authorised users. This may otherwise be permitted by the fair dealing provisions in ss 40 and 41 of the Act.
- Prohibition on use of content for the purpose of data mining or text mining.
- Some broadcasters who have made the content of their broadcasts available via their websites purport to limit use of this content to "personal use", which has the effect of purporting to exclude the operation of the Part VA statutory licence which otherwise permits a university to use this content.

Universities Australia submits that the CLRC recommendations should be adopted.

[161] Copyright Law Review Committee, *Simplification of the Copyright Act 1968 Part 1: Exceptions to the Exclusive Rights of Copyright Owners,* Canberra, 1998
[162] Copyright and Contract Report (*CLRC Report*), Copyright Law Review Committee 2002
[163] The CLRC recommended that the Act be amended to provide that an agreement, or a provision of an agreement, that excludes or modifies, or has the effect of excluding or modifying, the operation of ss. 40, 41, 42, 43, 43A, 48A, 49, 50, 51, 51AA, 51A, 52, 103A, 103B, 103C, 104, 110A, 110B, 111A of the Act, has no effect.

Technological override of exceptions is also occurring

Increasingly, TPMs are also being used in ways that prevent universities and their students from using works for purposes otherwise permitted by copyright law. Technology has dramatically transformed the educational landscape. Content that only a few years ago was available in unprotected formats such as VHS for video and non-digital for books can now only be obtained in formats that are subject to TPMs. This has impacted not only on the ability of university teachers to make use of digital content in the course of *teaching*, it has also limited the ways in which academics and other university research staff (such as post-doctoral students) can use content for research purposes, and the ways in which students can incorporate content into class presentations and assignments. It is important to note here that we are talking about uses that would be *non-infringing* if undertaken by research staff or students in reliance on their own fair dealing rights.

Universities Australia fully accepts and supports the need to safeguard the rights of copyright owners and creators. Indeed, University sector teachers (and students) are both users and creators of copyright material. We are, however, greatly concerned that the anti-circumvention regime in the Act is hindering the ability of Australian universities to deliver a quality education to Australian and overseas students. The anti-circumvention regime is preventing the education sector from taking full advantage of the exceptions in the Act that are intended to benefit educational institutions and their students. Universities cannot exercise their rights under s 200AB or under the Part VA statutory licence, and students cannot exercise their fair dealing rights, due to works being protected by TPMs.

For example:

- The exception in s 200AB would permit a university to format shift a work to ensure that sight and hearing impaired students have access to course content in formats that are accessible to them, but the exception cannot be relied on if doing so would require circumventing a TPM. Increasingly, content formats such as e-books are protected by TPMs. This has meant in practice that universities are prevented from relying on s 200AB to do things like activating text-to-speech functionality on e-books in order to make these accessible to sight-impaired students.
- The Part VA statutory licence - for which universities pay more than $4.5 million a year - allows universities to copy and communicate the content of broadcasts that have been made available online by the broadcaster. Typically, however, this content will be subject to encryption that restricts access to the website of the broadcaster and prevents the content from being downloaded. Depending on the technology used, this encryption operates as a TPM, which means that universities are blocked from using it in ways permitted by the Part VA statutory licence.
- For a generation of "digital natives", the limitations imposed by the anti-circumvention regime are resulting in an increasing disconnect between what technology enables and what copyright law permits. If a work is protected by a TPM, students are prevented from using any part of that work - however insubstantial - for incorporation into an assignment. It is important to note here that we are talking about uses that would be *non-infringing* if undertaken by students in reliance on their own fair dealing rights.

Universities Australia submits that the reforms that it requested in its submission to the Government's review of TPM exceptions[164] should be adopted.

Fair use may trump contract and anti-circumvention regime in the US

A US District Court decision handed down on 20 November 2012 provides a stark illustration of the difference between the US and Australian copyright regimes when it comes to the matter of rights holders seeking to exclude educational reliance on fair use.

In *Association for Information Media and Equipment (AIME) v University of California (UCLA)*[165], the US District Court for the Central District of California granted a motion to dismiss a claim brought by AIME against UCLA alleging breach of contract, copyright infringement and breach of the anti-circumvention provisions in Digital Millennium Copyright Act arising from UCLA's practice of uploading DVDs onto an intranet and streaming the entire contents of the DVD to staff and students at remote locations. In essence, AIME's case was that one of its members had licensed the DVD content for certain limited purposes, and these did not include streaming the content to students outside of a classroom. AIME submitted that UCLA could not rely on fair use: firstly, because the use was not "fair", and secondly, because the contractual terms overrode any fair use argument. AIME also submitted that UCLA had unlawfully circumvented a TPM when it used streaming software to make the content available to students.

While the case against UCLA was dismissed on largely technical grounds (partly regarding AIME's standing the bring the complaint), there was nevertheless useful guidance for US universities who wish to rely on the fair use exception to stream the contents of commercially purchased DVDs to students outside of a classroom environment:

- The court was not required to make a final determination as to whether the use in this case was fair. Rather, the question the court had to decide was whether it was reasonably open to UCLA to have reached the view that it was entitled to rely on fair use for this activity. The court held that it was.
- The fact that the DVDs had been obtained pursuant to a licence that purported to govern their terms of use did not prevent UCLA from relying on fair use for uses that fell outside the scope of the licence, provided that these uses were fair.
- If a DVD has been lawfully obtained (as it had in this case) the rights holder cannot rely on the anti-circumvention provisions to prevent a user from exercising fair use rights.

It can be seen that US universities are in a much better position than their Australian counterparts when it comes to resisting attempts by rights holders to override copyright exceptions through reliance on contracts and TPMs.

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[164] http://www.ag.gov.au/Consultationsreformsandreviews/Documents/Universities%20Australia%20Submission.doc

[165] Available at http://www.scribd.com/doc/114021241/UCLA-dismissedWithPrej-pdf

3. Safe harbours

Universities Australia was disappointed that the safe harbour regimes was excluded from the ALRC review.

For many years now Universities Australia has urged the Government to expand the copyright safe harbours to include facilities providers such as universities. As noted in our submissions to Government, modern universities must have large, sophisticated information technology facilities in order to provide educational and research services and support across multiple campuses to thousands of students and staff in a range of learning environments in flexible ways. To be competitive they must provide staff and students with access to and use of these facilities, including the ability to access and use the Internet via university servers and other university IT infrastructure. If universities are to continue to pursue excellence and remain competitive they must be able to continue to make innovative and efficient use of information technology and the Internet.

Like exceptions, safe harbour regimes are an important mechanism for balancing the rights of right holders, end users, and intermediaries. Universities Australia submits that providing certainty around the potential liability of service providers is a crucial element of any successful copyright regime. The Attorney-General's Department recently released submissions received in response to its own review of the safe harbour regime, and announced that it would be considering these submissions in the light of the High Court's decision in *Roadshow Films Pty Ltd & ors v iiNet Ltd* and "other online copyright issues". Universities Australia is concerned to note that some submitters to the Government's safe harbours review have submitted that universities should continue to be excluded from the safe harbour regime. We urge the ALRC to make recommendations to Government regarding the importance of amending the safe harbours to provide certainty for universities.

Annexure A

Drafting anomalies in the statutory licence impose unnecessary constraints on the use of works in electronic form, and inhibit the ability of universities to rely on digital technology to deliver educational material to students.

Online communication of works - s135ZMD(3)

The statutory licence contains different rules regarding how much of a work can be made available to students depending upon whether this is done by making the content available online as opposed to distributing printed course materials.

To illustrate:

Lecturer A can photocopy a reasonable portion (in most cases up to 10 per cent) of a text book and distribute this to his students. Lecturer B can photocopy a different portion of the same text book and distribute this to her students in a different course.

However, if a lecturer wants to make this content available online to his or her students, very different rules apply. The effect of s 135ZMD(3) of the Act is that a university can make only one part of a work (other than an article contained in a periodical publication) available online at one time.

Say, for example, that the Arts faculty has copied a chapter of Patrick White's Voss, and made this available on-line to students enrolled in Australian Literature 101. No other faculty in the university can make another part of the same work available on-line in reliance on the statutory licence until this first part is taken down.

This is the case even if the Arts faculty has used less than 10 per cent of Voss. In other words, the effect of s135ZMD (3) is that a university is prevented from making available two different parts of a work at the same time, **even if the two parts taken together do not exceed 10 per cent of the work.**

The legislative intention appears to have been prevent universities from simultaneously making available online more than one portion of the same work[166]. The fact that this rule applies even where access is limited to students in a particular class creates enormous practical difficulties in universities. It has resulted in a 'first in best dressed situation'. Once one lecturer has asked for a portion of a work to be made available to his or her students, the university is faced with having to tell other lecturers that they and their students have missed out.

In the words of one copyright officer:

> *"Every year the Library receives requests to upload different chapters of text books for different cohorts of students. It is often a delicate task to explain to our academics that despite the fact that the university pays more than $2 million a year for the right to reproduce and communicate works, we are not able to upload even one chapter of a book for their particular class because another lecturer has got in first and requested that a different part of the same book be made available. It is even more difficult to explain to staff that you can actually provide more material for students if you distribute in paper format. This is completely irrational: the online system, with its password protection and restricted access, is in many ways more secure than handing out photocopies in class".*

[166] See the Explanatory Memorandum to the *Copyright Amendment (Digital Agenda) Bill 1999* p 80

The operation of s 135ZMD(3) highlights the way in which the Part VB statutory licence is entirely unsuited to a digital environment. Compliance with s 135ZMD(3) also represents a substantial cost impost on universities.

Copying from different parts of the same work - s135ZMB(5)

The statutory licence contain "insubstantial copying" provisions that give effect to the general copyright principle that copying of less than a substantial part of a work does not infringe copyright. Copying that amounts to insubstantial copying pursuant to these provisions is not remunerable.

However, once again, hard copy copying and digital copying are treated differently.

Firstly, Where the work is in electronic form, a lecturer can copy up to 1% of the pages of the work or two pages (whichever is greater) if the work is paginated, or 1% of the words in the work if the work is not paginated. Where the work is in hardcopy form, a lecturer can copy up to two pages of the work.[167]

Secondly, where the work is hardcopy form, it does not matter whether the pages copied are from consecutive parts of the work. However, if the work is in electronic form, an insubstantial amount cannot be comprised of different parts of the work. The two pages (or 1 per cent of words if the work is not paginated) must be consecutive. If the pages that are copied are not consecutive, the second page will be considered a separate copy and must be paid for, notwithstanding that under general principles of copyright law the total amount copied may well be considered insubstantial and therefore not infringe copyright.

No scope for record-keeping with respect to electronic copying and communication

A further shortcoming of the statutory licence is that there is no option for educational institutions to operate under a record-keeping scheme with respect to electronic copying and communication. This significantly limits the opportunity for universities to seek to ensure that they are not paying under the statutory licence for content that is not strictly remunerable. It also deprives universities of an administratively simple solution to measuring the amount of copying and communication that must be paid for under the statutory licence.

To illustrate:

Prior to the Digital Agenda Act amendments to the statutory licence, universities had the option of choosing to operate under a sampling system or a record-keeping system. Under a sampling system, the amount of remuneration payable to CAL for copying by the entire university sector was determined on the basis of surveys conducted over a period of weeks in a number of universities. Under a record-keeping system, each university was required to keep full records of all copying done in reliance on the statutory licence, and the amount payable was determined on the basis of those records.

Another difference between a sampling system and a record-keeping system is that the procedure for operating under a record-keeping system is set out in the Copyright Regulations, while the procedure for a sampling system needs to be agreed between the universities and CAL, or failing that, by the Copyright Tribunal.

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[167] See s.135ZG

When the statutory licence was extended to include electronic copying and communication, there was no provision for universities to operate under a record-keeping system. Rather, the system to determine equitable remuneration for electronic copying and communication is described as an "electronic use system". As with a sampling system, the procedure for operating an electronic use system must be agreed between the universities and CAL or determined by the Copyright Tribunal.

Universities Australia submits that this is a significant shortcoming with the statutory licence. As discussed in our submission, we are concerned that the system that is currently used to measure electronic copying and communication - which is essentially based on a sampling system - potentially results in artificially inflated copying levels being reported to CAL. For so long as a statutory licence is retained, it should be open to any university to adopt a record-keeping system whereby it record - and pay for - only that copying and communication that is truly done in reliance on the statutory licence.

Annexure B

In recent years, there has been a massive increase in the amount of free, high quality educational content. Increasingly, this content is replacing commercially licenced content, and content copied in reliance on the statutory licence, in courses taught in Australian universities. This trend is not confined to Australia: it represents a global paradigm shift in the distribution and use of academic content in universities.

Set out below is a very small sample of the content that is now freely available for use in teaching by Australian universities.

Open Access Journals

An increasing number of academic journals have adopted an open access model (ie a model that does not charge readers or their institutions for access to the published content).

One of the major commercial publishers, Springer, launched an open access platform - SpringerOpen[168] - in 2010. It currently includes a portfolio of more than 100 peer-reviewed fully open access journals.

Open access journal content is increasingly easy to locate. The *Directory of Open Access Journals* (DOAJ)[169] is an online resource that directs users to open access scientific and scholarly journals that use a quality control system such as peer review to guarantee the content. The DOAJ describes itself as a "one stop shop" for users seeking to locate open access journals. According the DOAJ, Australia has created 121 open access journals, across a range of disciplines, since 2002. In that time, the number of US open access journals has increased from 16 to 1264 and the number of UK open access journals has increased from 5 to 574.

Open Access e-books

In August 2012, Springer launched an open access e-book platform. [170]

As with journal content, open access books are increasingly easy to find. The Directory of Open Access Books[171] is an online resource that provides links to more than 1250 academic peer-reviewed books from 34 publishers.

Open academic collaboration

New tools such as The Synaptic Leap[172] are facilitating online research communities that enable open source research. The content on The Synaptic Leap website is made available through the Creative Commons licenses. Dr Matthew Todd from the University of Sydney's School of Chemistry led a project using Synaptic Leap that discovered a new way to produce medicine now used worldwide for the treatment of Bilharzia, a parasitic disease that afflicts millions of the world's poorest people. This project was innovative in applying open source principles to experimental research by freely sharing ideas and making results available online.

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[168] http://www.springeropen.com/about
[169] Directory of Open Access Journals http://www.doaj.org/doaj?func=loadTempl&templ=about&uiLanguage=en
[170] http://www.springeropen.com/books
[171] http://www.doabooks.org/
[172] http://www.thesynapticleap.org/

Open course content

There is now a vast array of online resources providing access to free, high quality course content. A few examples include:

- Boundless[173] – a website that provides easy access to high quality, openly licensed, and free educational content that has been created by leading educators and institutions over the last 20 years. Content is sourced from resources that include MIT Opencourseware, the Genome Project, and Princeton University. The content is vetted by experts in leading US universities, including Harvard, Columbia, UC, Berkeley, and Princeton.
- MIT Opencourseware[174] - a free, web-based publication of virtually all MIT course content.
- U-Now Open Courseware[175] - the University of Nottingham's collection of open educational materials that have been openly licenced for anyone to use.

Open access repositories

Open access repositories are websites that provide free access to individual journal articles, book chapters etc. Journal articles are in essentially in the same form as they appear in the commercial journals in which they will eventually be published. In many cases, the version of the work that is made available for access on these repositories is the 'accepted manuscript'; ie the author's final draft version, as accepted for publication following peer review. In some cases, the version available will be the published version; ie copy-edited, formatted and paginated by the publisher. Either way, these repositories enable users to have access to essentially the same content that will appear in a commercial journal that in many cases will behind a pay-wall.

A number of Australian universities have a digital repository providing free access to the research outputs of their academics and research students. For a full list of Australian university open access repositories, see Ranking of World Repositories.[176]

Other examples of open access repositories include:

- Social Science Research Network (SSRN)[177] – a collection of more than 366,700 downloadable full text documents.
- Open Research Online[178] - the Open University's repository of research publications and other research outputs.
- University of California e-scholarship repository [179] - the University of California's repository of research publications.

[173] https://www.boundless.com/
[174] http://ocw.mit.edu/index.htm
[175] http://unow.nottingham.ac.uk/
[176] http://repositories.webometrics.info/en/Oceania/Australia
[177] http://www.ssrn.com/
[178] http://oro.open.ac.uk/
[179] http://escholarship.org/

Annexure C

ISSUES PAPER QUESTION	REFERENCE IN UNIVERSITIES AUSTRALIA SUBMISSION
Questions 1-2	Part 1 Part 2: section 2
CACHING, INDEXING AND OTHER INTERNET FUNCTIONS	
Questions 3-4	Part 2: sections 3.1, 3.4, 3.5
CLOUD COMPUTING	
Questions 5-6	Part 2: section 3.2
TRANSFORMATIVE USE	
Questions 14-17	Part 2: section 11
ORPHAN WORKS	
Questions 23-24	Part 4: section 1
DATA MINING AND TEXT MINING	
Questions 25-27	Part 2: section 3.1 Part 6: sections 6.1, 6.2
EDUCATIONAL INSTITUTIONS	
Questions 28-31	Part 2: section 10 Part 3
FAIR DEALING EXCEPTIONS	
Questions 45-47	Part 2: sections 4 and 5
FAIR USE	
Questions 52-53	Part 2: sections 3, 6, 7, 8, 9 and 12
CONTRACTING OUT	
Questions 54-55	Part 4: section 2

Submission in response to the Australian Law Reform Commission discussion paper on Copyright and the Digital Economy

July 2013

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Further inquiries should be made to the Chief Executive:

GPO Box 1142
CANBERRA ACT 2601
Ph: +61 2 6285 8100
Fax: +61 2 6285 8101
Email: contact@universitiesaustralia.edu.au
Web: www.universitiesaustralia.edu.au
ABN: 53 008 502 930

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Introduction

Universities Australia is pleased to have this opportunity to respond to the proposals for reform outlined in the ALRC's Discussion Paper.

In our response to the Issues Paper, Universities Australia submitted that Australia's inflexible copyright exceptions, together with the educational statutory licences, were affecting the ability of Australian universities to create and disseminate knowledge, and placing the Australian higher education sector at an international competitive disadvantage.

The principles-based regime outlined in the Discussion Paper would go a long way towards addressing the problems highlighted in our earlier submission. If enacted, it would deliver the flexibility that is so urgently needed to encourage research and innovation, while still protecting the rights of copyright owners. It would remove obstacles that currently stand in the way of Australian universities fully utilising digital technology, and would bring Australian copyright law in line with comparable jurisdictions with more adaptive copyright regimes. The proposed reforms would put Australian universities on a level playing field as they seek to attract the best and brightest students in an increasingly globalised and competitive higher education market.

Since the ALRC Discussion Paper was released in May 2013, some rights holder groups have embarked on a misleading public campaign claiming that the reforms proposed by the ALRC would be harmful for authors. The campaign being waged by these groups contains misinformation and aims to spread unnecessary fear among authors about the proposed abolition of the statutory licences. We respond to these claims in detail in this submission. We think it is instructive, however, that at the very time that these groups are claiming that fair use is inherently uncertain, and harmful to rights holders, the US Department of Commerce has released a report Copyright, Policy, Creativity and Innovation in the Digital Economy[1] that highlights the central role that fair use plays in striking a balance between the rights of copyright owners and users, and in ensuring that copyright does not operate as a roadblock to technological development:

> The fair use doctrine, developed by the courts and codified in the 1976 Copyright Act, is a fundamental linchpin of the U.S. copyright system.
>
> …the fair use doctrine is a critical means of balancing "the interests of authors and inventors in the control and exploitation of their writings and discoveries on the one hand, and society's competing interest in the free flow of ideas, information, and commerce on the other hand."
>
> …the doctrine is highly adaptable to new technologies and has already played an important role in the online environment. Fair use has been applied by the courts to enable, among other things, the use of thumbnail images in Internet search results, caching of web pages by a search engine, and a digital plagiarism detection service.
>
> [User communities] have undertaken efforts to develop fair use guidelines for various user communities. American University's Centre for Social Media, in conjunction with the University's Washington College of Law, has created a set of tools for creators, teachers, and researchers to better understand the application of fair use to their particular disciplines. The Copyright Advisory Office established at Columbia University in 2008 has collected and developed resources on the relationship between copyright law and the work of the university community, including a fair use checklist. And the College Art Association recently announced a major grant to develop a code of best practices for fair use "in the creation and curation of artworks and scholarly publishing in the visual arts."

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[1] Copyright policy, creativity, and innovation in the digital economy, the Department of Commerce, Internet Policy Task Force, July 2013 http://www.uspto.gov.news/publications/copyrightgreenpaper.pdf

> The Task Force supports private efforts to explore the parameters of fair use, and notes that best practices produced with input from both user groups and right holders can offer the greatest certainty.
>
> Non-profit and educational organizations too are increasingly focusing on copyright education, including the benefits of fair use, working with a variety of audiences.
> (Our emphasis)[2]

The reforms that have been proposed by the ALRC would mean that Australians could make the same claims about our copyright system as the US Department of Commerce has made in its long-awaited report. Presently, we cannot.

Universities Australia strongly supports the regime that that is outlined in the Discussion Paper.

Summary

- Universities Australia strongly supports the proposal to replace the current purpose-based fair dealing exceptions with a broad and flexible fair use exception. The proposed fair use exception, and in particular the proposed inclusion of education as an illustrative purpose, would restore balance to copyright by reflecting the special status given to education in international treaties.
- Universities Australia supports fair use not so that universities can avoid having to pay rights holders - as has been suggested by some rights holder groups - but because fair use would result in a fairer and more flexible copyright regime. Fair use would remove roadblocks to Australian universities competing with North American universities for the best and brightest researchers and students, and would facilitate our academics using copyright content in ways that their peers in the US and other fair use jurisdictions can. This includes using innovative technologies such as data mining and text mining that in many cases would currently infringe copyright in Australia.
- Fair use would not mean that universities could copy everything for free. It would place Australian universities in the same position as their peers in the USA, Canada, Singapore and other fair use jurisdictions who can copy for educational purposes in ways that are "fair" and do not cause undue harm to rights holders. This is imperative if Australian universities are to remain competitive in an increasingly globalised higher education market.
- Fair use would not create undue uncertainty for rights holders, users or courts. On the contrary, Universities Australia believes that the proposed fair use exception could result in greater certainty than currently exists with respect to the purpose-based fair dealing exceptions. The proposed list of illustrative purposes would provide guidance to rights holders and users regarding the purposes or uses that would be likely to come within a fair use exception; but the open-endedness of the exception would greatly reduce the uncertainty that has resulted from having to pigeonhole a particular use into one of the purposes set out in the Act.
- Expanding the existing fair dealing exceptions would address some of the shortcomings highlighted in the Discussion Paper, but it would be very much a second-best option to replacing these exceptions with fair use.
- Universities Australia strongly supports the proposal to replace the educational statutory licences with voluntary licensing. We agree with the ALRC that voluntary licensing would

[2] Ibid p 21 and 75

be "less prescriptive, more efficient and better suited to a digital age" than the statutory licences.

- Replacing statutory licensing with voluntary licensing would not result in universities "getting away with having to pay fees to authors", as has been suggested by some rights holder groups. Nor would it mean that universities would have the choice of volunteering whether or not to pay for uses that exceeded what was permitted under fair use. Universities Australia unequivocally rejects the suggestion that the university sector cannot be trusted to act in good faith when it comes to use of copyright content. The sector has a long history of dealing in good faith with rights holders and collecting societies.
- In 2011, university libraries spent $256.7 million on library resources. This amount is over and above the amount spent on the statutory licences. Repeal of the statutory licences would have no impact on this spending. These licence fees flow directly from the universities to the rights holders and will continue to do so, regardless of whether or not the ALRC's proposed reforms are enacted.
- Repeal of the statutory licences would not mean the end of collective licensing. There would still be a role for collective licensing, as there is in most other jurisdictions in the world and it would be more efficient and flexible than the existing statutory licences.
- Some of the content that universities currently pay for under the statutory licences, and which is likely to fall within a fair use exception, includes freely available internet content, (including content uploaded onto blogs and freely available wikis that no one ever expected to be paid for) and orphan works. Currently, the money paid by universities for this content is eventually paid to Copyright Agency members who have no connection to the works that were copied. That is because Copyright Agency has no one else to distribute it to. In other words, these members benefit from a windfall payment - at the expense of publicly funded education institutions - due to the inefficiencies of the statutory licence. The loss of this windfall payment if the statutory licences were repealed could not in any way be said to cause them unreasonable prejudice.
- Universities Australia agrees with the ALRC that the benefits of any new fair use (or fair dealing) exception may be seriously compromised if copyright licensing agreements include terms that exclude fair uses. However, we are concerned that the framework that the ALRC has proposed for preventing "contracting out" of exceptions would have serious unintended consequences that would undermine the objectives that the ALRC has sought to achieve through its proposed reform of copyright exceptions. We have put forward a proposed alternative model for dealing with contracting out.
- Universities Australia strongly supports repeal of the Part VA statutory licence. In the event that the statutory licence is retained, we would oppose any expansion of Part VA.
- Universities Australia strongly supports the ALRC's proposal for addressing the orphan works problem. The proposed orphan works regime strikes an appropriate balance between facilitating greater use of the vast trove of content that is currently effectively "locked up", while at the same time protecting the interests of rights holders who are subsequently identified.

1. Fair use

Universities Australia strongly supports the proposal to replace the existing purpose-based fair dealing exceptions with a flexible and open-ended fair use exception.

1.1 Why we support fair use

The ALRC has received submissions from rights holder groups that suggest that the education sector favours fair use because it wants to avoid having to pay to use third party content. It is true that Universities Australia has highlighted how existing educational copying regime results in Australian universities paying for uses that do not attract payment in other jurisdictions. Our support for fair use has much less to do with the cost of using content than it does with ensuring that inflexible copyright exceptions do not stand in the way of research and innovation in this country. Universities support a fair use exception not so that they can avoid having to pay rights holders, but because fair use would result in a fairer and more flexible copyright regime. It would remove roadblocks to competing with North American universities for the best and brightest students, and would facilitate our academics using innovative technologies to engage in internationally competitive research. This is imperative if Australian universities are to remain competitive in an increasingly globalised higher education market.

We think it is worth setting out in some detail the very significant benefits that would flow to the digital economy generally, and the Australian higher education sector in particular, from the proposed fair use exception outlined in the Discussion Paper.

Providing much needed flexibility for universities to take advantage of new technologies

MOOCs

Higher education is undergoing a major transition as a result of digital technologies. The most recent illustration of this is massive open online courses (MOOCs). MOOCs were unheard of before 2011, when Harvard University and MIT first began running free, open, online courses. Less than two years later, new MOOCs are emerging almost daily. This disruptive technology is rapidly changing the way that universities throughout the world engage with their students, and is creating new opportunities for Australian universities to operate on a world stage.

While it is still very early days in the MOOC phenomenon, copyright has already emerged as an issue that is limiting the way in which Australian universities - as opposed to their counterparts in fair use jurisdictions - can deliver course content via MOOCs. That is because universities operating MOOCs in fair use jurisdictions - such as the US - can rely on fair use when incorporating third party content into MOOC courses. As outlined in our submission in response to the ALRC's Issues Paper, the existing purpose-based fair dealing exceptions are insufficiently flexible to allow this kind of use[3]. Nor does the existing Part VB statutory licence apply to content that is publicly accessible, regardless of whether it has been made available for educational purposes.

The ALRC's proposed fair use exception would mean that Australian academics - like their US counterparts - could make "fair" uses of content that did not unreasonably harm the interests of rights holders, when putting a MOOC together.

It is important to stress that fair use is not a "free for all" for US universities operating MOOCs, and nor would it be if this exception were enacted in Australia. Some US copyright experts have suggested that the open nature of MOOCs will mean that fair use will operate in a more limited way than it does with password protected university e-reserves. For example, Lauren Schoenthaler, senior University Counsel for Stanford University, has advised academics that they can rely on fair use when

[3] http://www.alrc.gov.au/sites.default/files/subs/246._org_universitiesaustralia.pdf p 16

incorporating images and limited portions of text "that demonstrate or illustrate the educational concept at issue", but these must be used "sparingly and appropriately".

Importantly, however, Ms Schoenthaler adds:

> ...In the end though, copyright concerns are definitely surmountable and should never present a barrier. ..If we have good ideas and material that we think is useful for our students or we want to make available publicly, there are ways to do that that use the law to protect us and allow us to do the things that we want to do.[4]

In other words, copyright enables, rather than blocks, appropriate use of limited portions of text and other content in teaching and learning, including in the creation of MOOCs. Universities Australia welcomes the proposal to put Australian universities in the same position as their US counterparts to use third party content "sparingly and appropriately" when engaging in their core mission of creating and distributing knowledge using new and innovative digital technologies.

Text and data mining

As outlined in our response to the Issues Paper, the existing exceptions regime stands in the way of Australian universities taking advantage of new text and data mining technologies to undertake socially valuable research in the sciences and humanities. The Discussion Paper highlights the uncertainty that currently surrounds the application of any of the existing copyright exceptions to much text and data mining.

The proposed fair use exception will put Australian universities on a level playing field with their counterparts in the US (who rely on fair use to engage in non-consumptive uses such as data mining and text mining for socially useful purposes[5]) as well as the UK (who will soon have the benefit of a stand-alone exception for non-commercial data mining and text mining).[6]

Universities Australia welcomes the proposal not to confine the availability of the exception to non-commercial data mining and text mining. We agree with the Commonwealth Scientific and Industrial Research Organisation (CSIRO) that a commercial/non-commercial distinction is not useful. As the CSIRO noted in its submission in response to the Issues Paper:

> such a limitation would seem to mean that 'commercial research' must duplicate effort and would be at odds with a goal of making information (as opposed to illegal copies of journal articles, for example) efficiently available to researchers …
>
> [M]uch research is conducted through international collaboration. If the laws in Australia are more restrictive than elsewhere or if the administration of any rights system is cumbersome or onerous and creates excessive cost for research, then that might be expected to impact on the desirability of Australia as a research destination.[7]

Facilitating academic engagement

The proposed fair use exception would enable Australian academics to more freely engage with their peers and the wider community in ways that do not undermine the interests of rights holders. It would help bridge the gap that currently exists between the ways in which Australian academics, and

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4 http://www.stanforddaily.com/2012/11/01/intellectual-property-concerns-for-moocs-persist/

5 In The Authors Guild v HathiTrust, the trial judge found that non-expressive uses such as text searching and computational analysis are fair use and therefore do not infringe the copyright in the underlying material. Authors Guild v HathiTrust No 11-CV-6351 2012 (SDNY 10 October 2012)

6 The UK Government has proposed to amend the Copyright, Designs and Patents Act 1988 (UK) so that 'it is not an infringement of copyright for a person who already has a right to access the work (whether under a licence or otherwise) to copy the work as part of a technical process of analysis and synthesis of the content of the work for the sole purpose of non-commercial research'. UK Government, Modernising Copyright: A Modern, Robust and Flexible Framework (2012), 37

7 CSIRO submission in response to the Issues Paper

their US counterparts, can engage with each other and the wider public for socially beneficial purposes.

As set out in our response to the Issues Paper, while our academics and students can rely on the existing research and study fair dealing exception to incorporate third party content into their own work, they risk infringing copyright if they present that same work at conferences, group presentations, peer symposia etc., or share the work to seek input from a group of colleagues:

> In a submission to Government in 1999, Copyright Agency submitted that that "the transmission of copyright works for discussion with colleagues could not be a fair dealing for research or study purposes".[8]

This is due to the very narrow way in which the purpose-based exceptions operate.[9] 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.

In our submission in response to the Issues Paper we gave the example of a higher degree student from the US who wanted to use some extracts from a state Hansard and state government media releases in her play. Coming from the US, she had assumed that this would be permissible, and was surprised to be advised by the university officer that there was no exception that applied, and that she would need to seek permission or cut the content from her play.[10]

Another example is student theses. Universities require higher degree students to publish their theses in an online repository, but in order to avoid a risk of infringement, they generally require students to obtain permission for use of third party content (which can be highly costly, and in many cases impossible) or, alternatively, to remove this content from their thesis. The result is that the integrity of the thesis is compromised, and the academic community is denied the opportunity to engage fully with the work.

Universities Australia submits that the existing limitations on academic research and engagement are unacceptable in a knowledge economy. The proposed fair use exception would facilitate vital early stages in research, such as collaboration between colleagues, and allow for the wide dissemination of knowledge that is a central part of the university mission.

Restoring balance to copyright

The Discussion Paper has highlighted how Australian universities are not only in a worse position compared with their counterparts in comparable jurisdictions; they are also in a worse position compared with large commercial enterprises when it comes to using third party content for socially beneficial purposes.

For example, commercial news organisations can rely on a specific exception to make fair uses of third party content if their use is for the purpose of, or associated with, reporting news. We do not at all suggest that this is not a socially beneficial purpose that should be the subject of an exception. It clearly is. What we do say, however, is that the existing regime is flawed to the extent that it does not permit universities and other educational institutions to make fair uses of content for educational purposes. There is currently no exception that permits this. As the ALRC notes in the Discussion

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[8] CAL submission to the Department of Attorney General in relation to Copyright Amendment (Digital Agenda) Bill 1999, 19 March 1999, para 33

[9] This is discussed detail in our submission in response to the Issues Paper: http://www.alrc.gov.au/sites/default/files/subs/246._org_universitiesaustralia.pdf p 17

[10] http://www.alrc.gov.au/sites/default/files/subs/246._org_universitiesaustralia.pdf p 18

Paper, this results in educational institutions being required to pay licences for "uses that others, including commercial enterprises, do not have to pay for".[11]

From a policy perspective, this makes little sense. As was noted by the Intellectual Property and Competition Review Committee (Ergas Committee):

> The principle that society reaps benefits from knowledge and learning which in many cases outweigh limitations on the rights of owners to earn income from educational uses has long been recognised in copyright law. It is reflected in the special status given to education in the Berne Treaty. It is also reflected in the Preamble to the WIPO Copyright Treaty that we have referred to above.[12]

The proposed fair use exception, and in particular the proposed inclusion of education as an illustrative purpose, would restore balance to copyright by reflecting the special status given to education in international treaties.

Helping ensure that Australian universities remain internationally competitive

Universities Australia agrees with the view expressed by JISC in a recent submission to the UK Intellectual Property Office in response to the recommendations of the Hargreaves Review. Commenting on the impact of copyright law on the international competitiveness of UK universities, JISC said:

> [Inflexible exceptions] may tend to give a competitive advantage to those countries that have a more liberal or flexible approach to copyright (such as those with a fair use approach such as the USA), which could enable text mining usage in non-commercial research to take place under a fair use defence rather than needing explicit permissions.[13]

This comment is equally applicable to Australia.

Today, copyright law is standing in the way of our students taking full advantage of text and data mining technologies. It is impacting on the kinds of content that can be used in MOOCs. Who knows what new technologies will emerge in the years and decades to come that would blocked by inflexible copyright exceptions?

The proposed fair use exception would help ensure that Australian universities are able to attract the best and brightest research students. These students will be drawn to an environment where innovation can flourish, and in the digital age, copyright plays a very big part in that.

1.2 Our response to fair use "sceptics"

The ALRC has received many submissions from parties who are concerned that a fair use exception would cause harm to rights holders and create uncertainty for users. Universities Australia considers that many of these objections are based on a misunderstanding of a how fair use exception would operate.

Fair use would not create undue uncertainty

An argument that is often raised by those who object to the introduction of fair use in Australia is that it would be much more uncertain than the existing fair dealing exceptions. For the reasons we discuss below, we think these concerns are without foundation.

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[11] DP para 6.97

[12] Ergas Committee Report, September 2000 http://www.ag.gov.au/Documents/Review%20of%20intellectual%20property%20legislation%20under%20the%20Competition%20Principles%20Agreement,%20(September%202000).pdf

[13] http://www.jisc.ac.uk/media/documents/publications/reports/2012/text-mining-appendix-a2.pdf

A two-step test would become a one-step test

Under the existing purpose-based exceptions regime, a user must ask two questions:

1. Is my intended use for one of the fair dealing purposes set out in the Act? If so,
2. Is my intended use "fair"?

While the first step may sound relatively straightforward, it has proved in practice to be anything but straightforward. For example, In TCN Channel Nine v Network Ten (the Panel case),[14] the judge at first instance, and three appeal court judges, reached different views as to whether particular excerpts from television programs could be said to come within the purpose of either "reporting news" or "criticism or review".

In our submission, the ALRC's proposed approach - ie setting out a list of non-exclusive illustrative purposes or uses - would have the great advantage of simplifying the process for determining whether an exception applies. The proposed list of illustrative purposes would provide guidance to rights holders and users as to the kinds of purposes or uses that would be likely to come within a fair use exception, but the open-endedness of the exception would greatly reduce the uncertainty that has resulted from having to pigeonhole a particular use into one of the purposes set out in the Act.

The practical result of this change would be to shift the main focus of the inquiry to whether or not the use is fair.

There is nothing new or novel about the proposed fairness factors

Some rights holder groups have suggested that a fair use exception would be essentially US-centric, and thus give rise to uncertainty for owners and users who are not familiar with US fair use jurisprudence.

This is based on a misunderstanding of the very great similarity between the US fair use exception and the existing fair dealing exceptions. The ALRC's proposed "fairness factors" - which largely mirror the US fairness factors - are already an entrenched part of Australian copyright law. They are substantially the same as the factors that were incorporated into s 40(2) of the Act as a result of a recommendation by the Copyright Law Committee on Reprographic Reproduction (the Franki Committee).[15]

The absence of an express reference to these factors in the sections of the Act that addresses fair dealings for other purposes has never meant that those same factors do not also apply when determining whether dealings for these other purposes are fair. Copyright expert Professor Sam Ricketson has noted that "by and large, [the factors in s 40(2)] are similar to the types of factors taken into account in the case law dealing with fair dealing prior to this amendment".[16]

See also the Copyright Law Review Committee's 1998 Simplification Report. The CLRC considered the fairness factors set out in s 40(2) of the Act and said that these factors apply - as a matter of common law - to all fair dealings, not just dealings for the purpose of research and study.[17]

The upshot of this is that the only substantive difference between fair use and fair dealing is that fair use is open-ended and fair dealing is not. Apart from that, the factors that are relied on to determine whether a use is "fair" in the US are essentially the same factors that have always been relied on to determine whether a dealing is "fair" in Australia.

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[14] TCN Channel Nine v Network Ten (2002) 118 FCR 417, TCN Channel Nine Pty Ltd v Network Ten Pty Limited [2002] FCAFC 146

[15] The Franki Committee said while it would be "quite impracticable" to attempt to seek to precisely define fair dealing, it would be "useful" to set out a list of factors that could provide assistance to users when determining whether a reproduction for the purpose of research or study was fair.

[16] S Ricketson, The Law of Intellectual Property: Copyright, Designs and Confidential Information, Lawbook Co para 11.35

[17] CLRC Simplification Report para 6.36

There is nothing new or novel about courts construing open-ended standards such as fairness

Courts are very well used to construing open-ended standards such as "fairness". Examples of such open-ended standards in existing law include the concept of "reasonable care" in the law of negligence, and the concepts of "unfair contract" and "unconscionable conduct" in consumer law.

The Australian Competition and Consumer Commission provides the following guidance on its website: "Unconscionable conduct does not have a precise legal definition as it is a concept that has been developed on a case-by-case basis by courts over time." The ACCC also sets out a non-exhaustive list of factors that it says a court will consider when assessing whether conduct is unconscionable. This sounds a lot like the concept of fairness in copyright law: ie a concept that does not have a precise legal definition, and that has been developed on a case-by-case basis by courts over time having regard to a non-exhaustive list of factors.

Guidelines and protocols will be developed

As the ALRC notes, it is likely that guidelines and industry protocols developed by peak bodies, as well as internal procedures etc., would greatly assist in providing certainty to those relying on fair use.[18]

The potential for industry guidelines and codes of practice as an appropriate policy tool in Australia, including in relation to copyright law, has been recognised for many years. An example is s 101(1A)(c) of the Act which provides that one factor in determining whether a person has authorised another to infringe copyright is "whether the person took any reasonable steps to prevent or avoid the doing of the act, including whether the person complied with any relevant industry codes of practice ".

Commercial entities who rely on fair dealing on a regular basis have also developed guidelines that assist in determining whether a particular use is "fair". See for example the News Limited supplementary submission in response to the Issues Paper, where News Limited discusses the code of practice for sports news reporting that emerged from discussions between news and sports organisations, with the assistance of the ACCC, and which is relied on by media companies when deciding how much sporting footage they can use in reliance on the fair dealing exception for reporting news. These companies, and those advising them, routinely rely on these guidelines to make decisions about how close they are to the line between infringement and fair dealing.

In the US, industry-specific fair use codes of practice have greatly enhanced certainty and reduced the risk of litigation.

A good example is the Documentary Filmmakers' Statement of Best Practice in Fair Use.[19] This document, which was developed in 2005 by documentary filmmakers with the assistance of legal advisors, contains a clearly understandable set of guidelines that are easy for filmmakers to apply. Prior to the development of the Statement of Best Practice, filmmakers who included third party content in their films in reliance on fair use often found it difficult and expensive to obtain "errors and omissions" insurance. Media/Professional Insurance, the largest insurer of media risks in the US, now recognises this document as an effective guide to fair use principles, and offers errors and omissions insurance to filmmakers who comply with it when using unlicensed copyright content in films.[20] Filmmakers say that this has had a major impact on their ability to use small amounts of archival footage etc. in ways that are fair.[21]

Other examples of industry specific guidelines are the Code of Best Practices in Fair Use for Online Video[22]; the Code of Best Practices in Fair Use for Media Literacy Education[23]; and the Association of

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[18] DP para 4.129
[19] http://www.centerforsocialmedia.org/fair-use/best-practices/documentary/documentary-filmmakers-statement-best-practices-fair-use
[20] http://cyberlaw.stanford.edu/projects/documentary-film-program/faq
[21] http://nofilmschool.com/2013/03/fair-use-fbi-our-nixon-white-house-super-8-movies/
[22] http://www.centerforsocialmedia.org/fair-use/related-materials/codes/code-best-practices-fair-use-online-video
[23] http://www.centerforsocialmedia.org/fair-use/best-practices/code-best-practices-fair-use-media-literacy-education

Research Libraries' Code of Best Practice for Fair Use.[24] These codes of practice have been used by user communities to "educate themselves, bring together disparate sources of information and state a common position"[25] in order to enhance certainty within a particular community. They contain real-world examples that assist members of the relevant community (i.e. academics, teachers, librarians) to answer the question: "what is fair use?" US copyright experts familiar with these codes of practice have suggested that they "appear to function as a prophylactic against unnecessary litigation".[26]

These guidelines, and others like them, have been lauded by the US Department of Commerce in its recent Copyright, Policy, Creativity and Innovation in the Digital Economy[27] report:

> [User communities] have undertaken efforts to develop fair use guidelines for various user communities. American University's Centre for Social Media, in conjunction with the University's Washington College of Law, has created a set of tools for creators, teachers, and researchers to better understand the application of fair use to their particular disciplines. The Copyright Advisory Office established at Columbia University in 2008 has collected and developed resources on the relationship between copyright law and the work of the university community, including a fair use checklist. And the College Art Association recently announced a major grant to develop a code of best practices for fair use "in the creation and curation of artworks and scholarly publishing in the visual arts."
>
> The Task Force supports private efforts to explore the parameters of fair use, and notes that best practices produced with input from both user groups and right holders can offer the greatest certainty.
>
> Nonprofit and educational organizations too are increasingly focusing on copyright education, including the benefits of fair use, working with a variety of audiences.
> (Our emphasis)[28]

In the US, rights holders themselves have also developed Codes of Practice to guide users - including educational users - as to what practices they consider to be fair when it comes to use of their works. The Code of Best Practice for Poetry[29] was created by poets themselves. It includes the following:

> Members of the poetry community recognize that whether or not it qualifies as "criticism," the teaching of poetry at every level of the educational system benefits the field. They recognize that whether teachers accomplish it through the use of anthologies and textbooks, photocopied materials, or online course sites, giving students' meaningful access to the texts under discussion is critical to the educational enterprise...
>
> Under fair use, instructors at all levels who devote class time to teaching examples of published poetry may reproduce those poems fully or partially in their teaching materials and make them available to students using the conventional educational technologies most appropriate for their instructional purposes...
>
> Teachers' selections of poems should not substantially duplicate those of existing, commercially available anthologies or textbooks. Teachers should avoid reproducing all or most of the contents of a volume of poetry that is reasonably available for purchase by students.

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[24] http://www.arl.org/focus-areas/copyright-ip/fair-use/code-of-best-practices
[25] The Fair Use Doctrine in the United States - A Response to the Kernochan Report, Gwen Hinze, Peter Jaszi & Matthew Sag, July 26, 2013 p 10
[26] Ibid
[27] COPYRIGHT POLICY, CREATIVITY, AND INNOVATION IN THE DIGITAL ECONOMY, THE DEPARTMENT OF COMMERCE, INTERNET POLICY TASK FORCE, July 2013 http://http://www.uspto.gov/news/publications/copyrightgreenpaper.pdf
[28] Ibid p 21 and 75
[29] http://www.poetryfoundation.org/downloads/FairUsePoetryBooklet_singlepg_2.pdf

In summary, we think that rights holders, users and courts would be well placed to make decisions about what uses are "fair" in the event that a fair use exception is introduced, and that claims that fair use would give rise to undue uncertainty do not withstand scrutiny.

Fair use would not cause undue harm to rights holders

The ALRC has received submissions from commercial publishers and industry groups warning that the introduction of fair use in Australia would unreasonably harm the interests of rights holders. Universities Australia submits that those submissions should be considered in the context of what has actually occurred in fair use jurisdictions such as the US.

As we outlined in our response to the Issues Paper, universities and other users of copyright material in the US have for many years routinely relied on fair use for socially beneficial purposes such as facilitating data mining and text mining and using small excerpts of works in teaching. Fair use has "enabled a wide range of time-honoured educational practices to flourish, and facilitated others to emerge".[30] And yet, the availability of this exception in the US has not adversely affected the publishing industry, nor has it limited the opportunities available to US authors.

In fact, a recent article on the website for the American Society of Journalists and Authors highlighted the growing opportunities for authors and freelance writers to create content for a booming online education sector:

> The incredible growth of online education represents the largest financial opportunity for freelance writers in history. Online education in the U.S. is a $60 billion industry and analysts predict it will double in size over the next two years and globally it is a $4.4 trillion industry. Once relegated to for-profit distance education, online learning is now used in corporations, high schools, traditional four-year institutions, and graduate schools. Many of these institutions previously relied solely on PhDs and Subject Matter Experts (SMEs) for content, now they are abandoning that model and outsourcing to professional writers.[31]

There is no doubt that academic publishers are coming under commercial pressure as a result of the global move towards open access publishing[32], which we discuss further below, but there is no evidence to suggest that the existence of a fair use exception has caused these publishers, or their authors, undue harm. Educational fair use has not, for example, displaced the market for sale and licensing of textbooks in the US. US scholars familiar with the way in which fair use operates in the US education sector say that this is because it is clear from the US fair use case law that the exception allows

> "a relatively narrow scope for unlicensed illustrative quotations in teaching materials...educational fair use in the US provides some room for innovation in teaching but none for wholesale appropriation of copyrighted content".[33]

In a lecture delivered earlier this year, the US Register of Copyrights, Maria Pallante, said:

> "It is a point of pride for the United States that our past great copyright laws have served the Nation so well. American experts are fond of pointing out that we have the most balanced

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[30] The Fair Use Doctrine in the United States - A Response to the Kernochan Report, Gwen Hinze, Peter Jaszi & Matthew Sag, July 26, 2013 p 11

[31] Laura Town, Freelance Writing Meets Online Education: How to get Involved, American Society of Journalists and Authors webiste, July 17 2013 http://www.asja.org/theword/2013/07/17/freelance-writing-meets-online-education-how-to-get-involved/#more-834

[32] See Universities Australia submission in response to Issues Paper, p 50

[33] The Fair Use Doctrine in the United States - A Response to the Kernochan Report, Gwen Hinze, Peter Jaszi & Matthew Sag, July 26, 2013, p 11

copyright law in the world, as well as a robust environment of free expression and an equally robust copyright economy".[34]

That statement certainly suggests that the US Register of Copyrights considers that fair use - which is an essential aspect of the "balance" in US copyright law - has not undermined a "robust copyright economy".

It is also instructive, in our view, that many of the same publishers who have raised concerns about fair use in Australia are themselves the beneficiaries of fair use in their own commercial activities here and in the US.

For example, the International Publishers Association (IPA), an industry body that includes amongst its members the global publishing conglomerate Reed Elsevier (Reed), submitted to the ALRC that a fair use exception would create legal uncertainty and operate as an obstacle to both use and creation. That submission is somewhat in conflict with the position adopted by Reed in litigation that is currently taking place in the US. LexisNexis, a division of Reed, recently relied on the US fair use exception to defend its use of legal briefs and motions filed with US courts in a commercial database which it markets to lawyers. The product can be used by LexisNexis customers to "research how other litigators have framed similar, successful arguments' and to "gain a better understanding of emerging issues or unfamiliar areas of law". Reed submitted to the court that its use of the works was transformative (and therefore more likely to be fair) because it had made the works searchable by adding links to and from related opinions, expert testimony and other relevant materials. Reed also submitted that the mere fact that the rights holder in this case was prepared to grant them a licence did not mean that it was unfair for them to use the work without payment:

> ...it is a given in every fair use case that plaintiff suffers a loss of a potential market if that potential is defined as the theoretical market for licensing the very use at bar. To avoid this "danger of circularity," courts have held that market harm for purposes of a fair use analysis does not take into account any market created by the transformative use.[35]

Reed could not have created this useful research tool in Australia: it needed a fair use exception to do so. Universities Australia submits that the arguments relied on by Reed to support its use of third party materials are a very good illustration of the way in which the ALRC's proposed fair use exception could be expected to permit socially beneficial uses of works that did not unreasonably harm rights holders. Fair use would also ensure that Australian based publishers had the same scope of business opportunity as their US counterparts.

Fair use would not be in breach of the three step test

We agree with the ALRC - for the reasons that are set out at paragraph 4.138 of the Discussion Paper, that its proposed fair use exception would be not be incompatible with the three-step test.

We note that the ALRC received submissions from some rights holder groups to the effect that advances in digital technology, which have facilitated the licensing of small parts of works in ways that previously would have been economically unviable, have meant that a fair use exception "conflicts with a normal exploitation of the work" and "unreasonably prejudices the legitimate interests of the rights holder". Taken to its logical conclusion, this is an entirely circular argument: any use which a rights holder is prepared to licence would be per se "unfair" if done without permission.

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[34] Maria Pallante, The Next Great Copyright Act, Twenty-Sixth Horace S. Manges Lecture, extended version of a lecture delivered at Columbia University March 4, 2013, 37 COLUM.J.L. & Arts (forthcoming Spring 2013), p29

[35] Reed's Memorandum of Law in Opposition to Motion for Summary Judgement, p 4

We agree with the ALRC that international copyright agreements do not mandate such a principle, and that the three-step test provides only that free use exceptions should not unreasonably prejudice the legitimate interests of an author.[36]

A similar approach has recently been adopted in the United Kingdom. In its response to the 2011 Intellectual Property Office Consultation on Copyright, the Government stated:

> [T]he existence or otherwise of a licence may be an important factor in deciding whether a particular act of copying would constitute 'fair dealing' and hence be permitted. However, the Government believes that other factors are important: the terms on which the licence is available, including the ease with which it may be obtained, the value of the permitted acts to society as a whole, and the likelihood and extent of any harm to right holders. For this reason, the Government rejects the argument that the mere availability of a licence should automatically require licensing a permitted act.

US Courts have also stressed the importance of avoiding the circularity that would arise if any use that could potentially be licensed was for that reason alone incapable of amounting to a fair use. A recent example involved a claim by publishers, including John Wiley & Sons Inc, that a law firm had infringed copyright in scientific journal articles when the firm made copies of entire articles for the purpose of making patent applications to the US Patent and Trademark Office on behalf of its clients. The publishers claimed that the use was not capable of coming within the fair use exception because they were prepared to grant a licence for the use. The court rejected this argument. The court acknowledged that there was, of course, some impact on the market for scientific articles if law firms did not pay fees that the publisher was seeking, but added:

> …this is not the sort of negative effect on the market that weighs heavily against a finding of fair use. If it were, then the market factor would always weigh in favor of the copyright holder and render the analysis of this factor meaningless.
>
> Therefore, the fact that the Publishers may have lost licensing revenue from Schwegman's copying is not determinative and does not create a fact issue for trial. The fact that the Publishers made licenses to copy works from their journals available to law firms, and that some patent law firms paid for licenses, does not transform patent law firms into a traditional, reasonable, or likely to be developed market.[37]

Universities Australia submits that it may be appropriate to make it clear on the face of the Act that the mere availability of a licence is not determinative of whether a fair use (or fair dealing) exception applies. We suggest the following words in any new fair use or fair dealing exception:

> The fact that a license is available for the contested use shall not itself bar a finding of fair use [fair dealing] if such finding is made upon consideration of all relevant factors.

Commercial use

Universities Australia notes that the proposed fair use exception would be capable of applying to commercial uses.

This is in our view particularly important in the digital environment, where universities - in line with the Government's innovation policy - are forging closer relationships with industry to drive research and innovation. The knowledge transfer that will increasingly drive the digital economy encompasses interaction between academia and wider society, including industry.

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[36] DP para 13.56

[37] American Institute of Physics & Ors v Schwegman Lundberg & Woessner, P.A & Ors US District Court, District of Minnesota, Case 0:12-cv-00528-RHK-JJK Document 250 Filed 07/30/13
http://www.aipla.org/resources2/reports/2013/Documents/Schwegman.pdf

1.3 Fair use and the existing educational exceptions

The ALRC has proposed replacing the existing educational exceptions with fair use.

This is a different approach to that adopted in other jurisdictions, including fair use jurisdictions such as the US. In the US, educational uses are covered by a range of specific purpose based exceptions, with fair use operating as a backup exception for uses that while fair, do not fall squarely within any of the purpose based exceptions. By way of example, the US Copyright Act contains purpose based teaching exceptions in s 110 of the Act. Universities can rely on these exceptions, which apply to face to face teaching and distance education, provided that they comply with obligations that are set out in the relevant provisions. Only if their use falls outside of the literal terms of these exceptions do they need to rely on fair use. We note that US copyright academics have submitted that the complementary relationship between specific exceptions and fair use has "sustained the usefulness of specific exceptions in United States law in times of rapid technological change".[38]

While we acknowledge the importance of flexibility, and agree with the ALRC that confined and specific exceptions should generally only be necessary to remove any doubt with respect to uses that have a particularly important public interest,[39] we would be concerned if a shift from specific educational exceptions to fair use resulted in a narrowing of the scope that currently exists for unremunerated educational uses of copyright content. As the ALRC has itself noted, education has been called "one of the clearest examples of a strong public interest in limiting copyright protection".[40]

Universities Australia notes and welcomes the ALRC's acknowledgement that most educational uses that are currently covered by an exception would continue to be covered by a fair use exception.[41]

We also welcome the ALRC's statement to the effect that the Act should not provide that free use exceptions automatically do not apply to copyright material that can be licensed.[42] This is line with the position in the US and Canada where the mere availability of a licence is a relevant but not determinative factor in deciding whether an educational institution can rely on fair use or fair dealing.[43] A fair use or fair dealing exception would mean nothing if it applied only to those uses for which publishers have not yet developed a market to charge fees for the use of a given portion, however small.

On this basis, we support the proposal to replace existing educational exceptions with fair use.

1.4 Third parties

In Chapter 5 of the Discussion Paper, the ALRC discusses the way in which the existing fair dealing exceptions have been construed by the Federal Court in De Garis v Neville Jeffress Pidler Pty Ltd as applying only when the person doing the copying etc. has the relevant purpose.[44]

In the education context, this aspect of fair dealing law has given rise to the rather absurd result that a university student can copy for his or her own research purposes in reliance on the research and study fair dealing exception, but no exception applies if the university - for reasons of convenience - copies the very same work on behalf of the student, regardless of how "fair" this might otherwise be.

Replacing purpose based fair dealing exceptions with fair use would remove what is in our submission an artificial distinction between dealings by a person for their own research or study and dealings by a person undertaking the very same copying on their behalf. From the perspective of the rights holder,

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38 The Fair Use Doctrine in the United States - A Response to the Kernochan Report, Gwen Hinze, Peter Jaszi & Matthew Sag, July 26, 2013
39 DP para 13.70
40 DP para 13.6
41 DP para 13.69
42 DP para 13.57
43 See our submission in response to the Issues Paper, pp 30-31, for a discussion of the relevant Canadian and US case law.
44 (1990) 95 ALR 625

the only relevant question should be "is the copying fair?" The proposed fair use exception would bring about this result.

1.5 Expanding fair dealing would be very much a second best reform option

Universities Australia agrees with the ALRC that retaining and expanding the existing fair dealing exceptions would address some of the shortcomings highlighted in the Discussion Paper, but that it would be very much a second-best option to replacing these exceptions with fair use.

In our response to the Issues Paper we outlined the ways in which purpose-based exceptions had proved to be insufficiently nuanced to deal with changing uses of content in a rapidly changing technological environment. We referred to the comments made by Professor Antony Dnes on the UK fair dealing regime (which is in many respects the same as the Australian regime) to the effect that while fair dealing adopts a "rule of reason" to the question of what is fair, "the scope for applying that rule of reason is very limited because of the careful specification of permitted purposes."[45]

The need for greater flexibility in copyright law was recognised by the Copyright Law Review Committee in 1998. In its Simplification Report, the CLRC said that a flexible exception would:

- strike a fair balance between the competing interests of copyright owners and users and describe the limits to copyright owners' rights in a manner that maximises the public interest;
- simplify the Act;
- offer greater flexibility in allowing courts to determine new circumstances to which the exception can apply in response to changing technology; and
- provide greater certainty in the determination of 'fairness' through the general application of a non-exclusive set of considerations applicable to all uses.[46]

Since the CLRC made its recommendations, the need for flexibility has only become more urgent. We strongly agree with the ALRC that:

> ...copyright law that is conducive to new and innovative services and technologies should at least ask for the question of fairness to be asked.[47]

However, in the event that the Government does not enact a fair use exception, Universities Australia submits that it would be imperative to expand the fair dealing exceptions in the way proposed in chapter seven of the Discussion Paper, and in particular to enact fair dealing exceptions for education, non-consumptive use and quotation.

Fair dealing for education

We have already discussed the way in which the existing fair dealing exceptions have been interpreted so as to prevent universities and other educational institutions from relying on them.[48] This continues to put Australian universities at a real disadvantage to comparable jurisdictions such as Canada, the US and Singapore, where universities can rely on fair dealing or fair use to undertake copying for educational purposes - including for the purpose of distribution to students - provided only that the copying is "fair".[49] For that reason, we consider it is imperative that if fair use is not

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[45] Antony Dnes, A Law and Economics Analysis of Fair Use Differences Comparing the US and UK, Report for the Review of IP and Growth, 2011 p 15-16 http://www.ipo.gov.uk/ipreview-doc-j.pdf

[46] Copyright Law Review Committee Simplification of the Copyright Act 1968 Part 1 Exceptions to the Exclusive Rights of Copyright Owners, paragraph 6.12

[47] Discussion Paper para 5.46

[48] This is also discussed in the Discussion Paper at para 13.63

[49] See Universities Australia submission in response to the Issues Paper at pp 42 - 46 for a discussion of the relevant case law

enacted, the Act be amended to include a new fair dealing exception that can be relied on by universities and other educational institutions for educational purposes.

It should also be made clear that there is no per se restriction on third parties such as universities relying on fair dealing to undertake uses on behalf of persons who were themselves entitled to rely on the exception. This is the position in Canada, where universities can rely on their students' research and study fair dealing exception to undertake copying that is intended to facilitate the students' research and study. In Alberta (Education) v Canadian Copyright Licensing Agency,[50] the Canadian Supreme Court considered the English case law on which the decision in the De Garis case was based, and found - contrary to what had been argued - that these cases did not stand for the proposition that research and study was inconsistent with instructional purposes, but rather the more limited principle that "copiers cannot camouflage their own distinct purpose by purporting to conflate it with the research or study purpose of the ultimate user".[51] While the inclusion of "education" as an illustrative purpose would most likely achieve the same result in the education context, we submit that it would also be appropriate to expressly "overrule" the principle in the De Garis case, with the effect that it was made clear on the face of the Act that there was no per se restriction on a third party relying on fair dealing to undertake uses on behalf of persons who were themselves entitled to rely on the exception.

Fair dealing by universities

As set out in our submission in response to the Issues Paper, in 1976, the Franki Committee recommended dropping the word "private" from what was at that time the "research and private study" fair dealing exception. The Committee's stated rationale was to ensure that the exception would be broad enough to cover fair dealings for "classroom instruction" and "educational purposes". The Franki Committee said that the entitlement of an educational institution to make multiple copies in reliance on a statutory licence should be "in addition to whatever might be done under the fair dealing provision".[52]

In other words, the Franki Committee had in mind that educational institutions would be in the same position as are Canadian educational institutions following the decision of the Canadian Supreme Court in Alberta (Education) v Canadian Copyright Licensing Agency.[53]

The Franki Committee's recommendations were implemented by Parliament in 1980, when the word "private" was dropped from the research and study fair dealing exception and the statutory licence was introduced.

Australian copyright scholars have queried the correctness of the Federal Court's decision in the De Garis case, noting that the distinction the Federal Court drew in that case between acts by a researcher and acts by the facilitator "is not required by the Act and is unnecessarily restrictive".[54]

Looked at in this light, the proposed expansion of fair dealing to include education would merely bring the law back in line with what appears to have been intended at the time that Parliament implemented the Franki Committee recommendations.

Finally, Universities Australia submits that it should be made clear that the mere existence of a licence - whether statutory or voluntary - is not determinative of whether or not a use that fell within the scope of the licence was nevertheless fair. While such clarification may be considered unnecessary, we

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50 2012 SCC 37

51 Ibid para 21

52 Copyright Law Committee on Reprographic Reproduction, October 1976 (Franki Report) para 2.64 http://www.ag.gov.au/Copyright/CopyrightLawReviewCommittee/Reports/Pages/CopyrightLawCommitteeonReprographicReproduction.aspx

53 2012 SCC 37

54 Submission in response to the Issues Paper by Robert Burrell, Michael Handler, Emily Hudson and Kimberlee Weatherall, p 14

note that in its Supplementary Submission to the Issues paper, the Copyright Agency submitted that any new exception should not apply if a licence was available "on reasonable terms".[55]

Fair dealing for the purpose of non-consumptive uses

Universities Australia also submits that in the event that fair use is not enacted, it would be imperative to introduce a new fair dealing exception for the purpose of non-consumptive use. As outlined in our submission in response to the Issues Paper, under the current educational copying regime, all copies and communications, no matter how incidental or necessary to the use of technology, are treated as remunerable.[56] We also outlined the way in which the lack of an available exception was standing in the way of universities making full use of new technologies such as data mining and text mining.[57]

While it is likely that an exception that permitted fair dealing for the purpose of education would cover non-consumptive uses by universities, Universities Australia submits that there is a strong public interest argument in favour of a general exception that applied to non-consumptive uses of works by any user, subject only to a fairness test. In our submission, if fair use is not enacted, a failure to expand fair dealing to include non-consumptive uses would amount to a missed opportunity to ensure that Australian copyright law was fit for purpose in a digital environment, where almost every use of a work involves making copies. Universities are increasingly engaged with the private sector in collaborative research and development projects that involve the use of copy reliant technologies - such as data mining and text mining - which copy works for non-expressive aims. As has been noted by Professor Ian Hargreaves, the author of the UK Review of Intellectual Property and Growth (the Hargreaves Report), the fact that these new technical uses happen to fall within the scope of copyright under UK law is "essentially a side effect of how copyright has been defined rather than being directly relevant to what copyright is supposed to protect".[58] We consider it of great importance to ensure that not only the education sector, but also the wider community, is in a position to use works in ways that do not trade on the underlying creative and expressive purpose of the material without risking infringing copyright.

Again, it would be desirable and appropriate for it to be made abundantly clear that the mere existence of a licence purporting to permit a non-consumptive use was not determinative of whether or not such use was nevertheless fair.

Quotation

Universities Australia agrees with the ALRC that there are strong arguments in favour of Australian copyright law providing more scope for quotation of copyright material, particularly where there is little or no effect on the potential market for, or value of, the copyright material.[59]

In the event that fair use is not enacted, we support the introduction of a new fair dealing exception for the purpose of quotation. As the ALRC notes, fair uses of copyright content for the purpose of quotation have been permitted under US copyright law long before the codification of fair use in s 107 of the US Copyright Act.

The ALRC has sought comment on whether referring to quotation without reference to a particular purpose (such as criticism or review) may lack meaning. Universities Australia submits that unshackling the purpose of quotation from the purpose of either criticism or review, or research or study, would inject much needed flexibility for academic users in particular. In our submission in response to the Issues Paper, we noted that under the existing exceptions 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

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[55] Copyright Agency Supplementary Submission in response to Issues Paper, p 13
[56] Universities Australia submission in response to Issues Paper, p 40
[57] Ibid p 13
[58] Ian Hargreaves, Digital Opportunity: A Review of Intellectual Property and Growth (the Hargreaves Review) para 5.24 http://www.ipo.gov.uk/ipreview-finalreport.pdf
[59] DP para 10.111

103 A 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". Universities Australia submits that this limitation is highly problematic. In the absence of a fair use exception, enacting a fair dealing exception for the purpose of quotation would go some way to addressing this anomaly.

2. Replacing statutory licences with voluntary licensing

Universities Australia strongly supports the proposal to repeal the educational statutory licences.

We agree with the ALRC that voluntary licensing would be "less prescriptive, more efficient and better suited to a digital age" than the statutory licences.[60]

The statutory licence operates as an insurance policy against possible use of copyright material, as opposed to a fair and efficient means of paying for actual use. In our submission, this approach to the use of copyright content in universities can no longer be justified.

Since the release of the Issues Paper, there has been a largely negative response from Copyright Agency and Screenrights, as well as some of their members, to the proposal to repeal the statutory licences. The concerns expressed by these groups appear to fall into two categories. Firstly, rights holder groups have suggested that the education sector seeks repeal of the statutory licences in order to be able to copy everything for free. Secondly, the claim is made that even if voluntary licences replace the statutory licences, they will be less efficient than statutory licensing.

As we set out below, each of these criticisms is unfounded.

2.1 The "everything would be free" claim

There has been a great deal of misinformation circulated by some rights holder groups about how the educational copying landscape would operate in the event that the statutory licences were repealed.

Unfortunately, this has generated misunderstanding - and misplaced fear - among the members and constituents of these groups.

The Australian Society of Authors (ASA) has warned its members that:

> The [Discussion] Paper argues that statutory licensing could be replaced with 'voluntary' licensing – but consider how much 'voluntary' [educational institutions] are going to enter into if they can get away with not having to pay fees to authors ... One practical consequence of removal of these statutes will be a radical diminution if not complete destruction of the Copyright Agency as our major collecting society.[61]

Copyright Agency has warned its members:

> Your rights and income are being seriously challenged by a proposal that suggests, amongst other things, the repeal of the Statutory Licence.
>
> The Law Reform Commission has produced a discussion paper that is heavily influenced by those who argue that free and cheap distribution of content is a characteristic of the digital age and the future and therefore should be enshrined in law.
>
> ...they are making recommendations that would reduce the incomes of writers and publishers and have the potential to create chaos and litigation in the industry and education sector.
>
> The new recommendations would ...put the onus on creators to protect their rights and prove abuse. ...The Statutory Licence means there is neither misunderstanding nor illegal

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60 DP para 6.3

61 http://us6.campaign-archive2.com/?u=c26dc641565f5d18273cad4dd&id=c057ec0659&e=a466c5e84d

usage. It is a system worth maintaining and a system that fairly compensates our members each year for the content they create.

...we need you to raise your voices now and write to the ALRC before 31 July.[62]

Many authors appear to have taken Copyright Agency's statements at face value, and have been persuaded by Copyright Agency that the proposed reforms will take away their right to rely on collective licensing to earn an income from educational use of their content. One submission to the ALRC suggested that the proposed reforms would mean that content would be "there for the taking" by educational institutions because "authors would have little or no chance of licensing the material…"[63]

Universities Australia is greatly concerned by what we see as mischievous and misleading information being circulated by Copyright Agency and other rights holder groups. We have set out some of this correspondence at Annexure A to this submission.

These groups have advised their members and constituents - wrongly - that their livelihoods are at stake if the statutory licences are repealed. They have suggested - wrongly - that repeal of the statutory licences would mean the end of collective licensing for educational content, and the end of educational institutions paying to use such content.

Repeal of the statutory licences would not result in universities "getting away with having to pay fees to authors", nor would it mean that universities would have the choice of "volunteering" whether or not to pay for uses that exceeded what was permitted under fair use. Nor would this proposed reform "have the potential to create chaos and litigation in the industry and education sector". It certainly would not mean that authors would be forced to licence their material directly with universities.

The university sector is and will remain a major contributor to the copyright industries.

These are the facts:

- In 2011, university libraries spent $256.7 million on library resources. Nearly 80 per cent of this was on e-resources such as electronic journal subscriptions. Repeal of the statutory licences would have no impact on this spending. These licence fees flow directly from universities to the rights holders and will continue to do so.
- Universities also pay to use content under the educational statutory licences. In 2012, universities paid more than $30 million to Copyright Agency and Screenrights for copying and communication under these licences. We do not resile from the fact that some of what is currently paid for under the statutory licences would most likely come within a fair use exception if enacted. However, we note that the ALRC has proposed that even if the statutory licences are not repealed, the Act should be amended to clarify that "fair uses of copyright material, or uses otherwise covered by a free use exception", need not be licenced. In other words, the ALRC has acknowledged that the unfair position in which the Australian education sector now finds itself should be addressed regardless of whether or not the statutory licences are repealed. The result would be Universities would no longer be required to pay for minor, non-harmful uses of copyright materials that are recognised around the world as being free and fair uses of copyright materials. This would not be a case of universities "getting away with not having to pay authors". Rather, it would be a case of rights holders no longer being able to rely on the existence of a statutory licence to seek to be remunerated for uses that are otherwise "fair".

62 Letter to Copyright Agency members from Chairman, Sandy Grant

63 Submission in response to Discussion Paper from Naher Agency

- Repeal of the statutory licences would not mean the end of collective licensing, and it would certainly not result in the "complete destruction of the Copyright Agency" as suggested by the ASA. We discuss this further below.

The "voluntary" in voluntary licensing

In addressing the misinformation that has been circulated by some rights holder groups, it is important to clarify what Universities Australia means when we refer to voluntary licensing.

The ASA appears to be suggesting to its members that a "voluntary licence" equates to a licence where educational institutions would have the choice of "volunteering" - or not - to pay for use of copyright works. In other words, the suggestion is that a university could use a copyright work and then decide whether or not it wished to "volunteer" to pay the rights holder for use of the work.

It is hardly surprising that some ASA members have expressed concern about this. We think they will be greatly relieved to learn that the "voluntary" in voluntary licensing refers to their right to choose whether or not to grant a licence (whether directly or through Copyright Agency), not a university's right to choose whether or not to pay.

We are confident that once this is made clear to authors and other rights holders they will view the proposal to replace statutory licensing with voluntary licensing in a different light.

2.2 The "voluntary licensing would be inefficient" claim

The other major criticism that some rights holder groups have made is that replacing the statutory licences with voluntary licensing would be less efficient for both rights holders and users.

This criticism is due to a misunderstanding as to how voluntary licensing would operate in the event that the statutory licences were repealed. We address rights holder concerns below.

There would still be an important role for collective licensing

Authors and small publishers in particular have expressed great concern that repeal of the statutory licences would impose an undue burden on them in having to deal directly with education sector users of their content. They have also expressed concern that this might lead to them not being paid at all for uses of their works.

The confusion seems to have arisen as a result of statements made by the collecting societies themselves following the release of the ALRC's Discussion Paper.

Screenrights

Screenrights has informed its members that:

> Screenrights will strongly oppose the introduction of a vague fair use provision in favour of effective statutory licences, which currently allow easy and flexible access to broadcast material. ...The broad ranging fair use proposal will create great pressure on copyright owners to try and identify uses of their work and confirm through the courts their right to protect this use. This could result in an unequal bargaining position, between copyright owners and large institutional users, leading to unfair outcomes and ultimately economic harm.[64]

This statement could be taken to suggest that fair use would "replace" the Part VA statutory licence, and that there would be no role for Screenrights in dealing with education sector users on a collective basis. It is not surprising that this has generated concern on the part of some Screenrights members who have taken the claims at face value.

[64] http://www.screenrights.org/news/2013/06/fair-does-not-equal-the-abolishment-of-rights

Universities Australia has never suggested that fair use should "replace" the statutory licence, nor that there should be no role for collective licensing of broadcasts. We have, however, submitted that universities should only need to obtain a licence for uses that would exceed what was permitted under fair use (or fair dealing for education in the event that fair use is not enacted). This would put universities in the same position as other users of copyright content.

It is also quite misleading to suggest that there would be "great pressure on copyright owners to try and identify uses of their work and confirm through the courts their right to protect this use". It is true that licensing of broadcasts - which typically contain underlying rights - gives rise to practical difficulties that do not arise when it comes to licensing other kinds of works. There is, however, a simple solution to this that has been adopted in Canada, New Zealand and the UK. In each case, the relevant copyright act contains a provision (s 29.7 Canadian Copyright Act, s 48 of the NZ Copyright Act and s 35 of the UK Act) that provides for a collecting society to be appointed to manage relevant rights (including underlying rights) and to grant a voluntary licence to educational users.

In New Zealand, where there is no statutory licence, Screenrights is the relevant collecting society for educational use of broadcasts. On its own website, it describes the New Zealand voluntary licences as 'versatile and flexible', permitting copying of 'any programme … anywhere … in any format'. There is no basis to suggest that it would not be the same in Australia.

This kind of "statutory extension" model could be adopted to put Screenrights in a position to offer a voluntary licence for uses of broadcasts (and underlying works) that exceeded what would be permitted under fair use. Universities Australia submits that the following provision, which is a modified version of the UK educational copying exception, would address the concerns raised in the Discussion Paper:

> (1) The copyright in a broadcast, or in any work, sound recording or cinematographic film in a broadcast, is not infringed by the making or communication, by or on behalf of an educational institution, of a copy of the broadcast if the copy or communication is made solely for the purposes of the educational institution or another educational institution.
>
> (2) Section (1) does not apply to any use that exceeds fair use if or to the extent that there is a licensing scheme certified for the purposes of this section under section [xx] providing for the grant of licences.

We say more about use of broadcasts in section 4 below.

Copyright Agency

Copyright Agency has also suggested that voluntary licensing would inevitably result in rights holders having to deal with education sector users on an individual basis.[65] Not surprisingly, this has generated concern on the part of authors and small publishers. For example, small publisher Cengage Learning Australia Pty Ltd has submitted that under the reforms proposed by the ALRC:

> there will ...need to be hundreds of separate voluntary licences negotiated by each and every education institution.[66]

Again, however, this is not true.

While universities would continue to enter into direct licences with large commercial publishers for the vast bulk of educational copying and communication, there would be a continuing role for Copyright Agency with respect to smaller rights holders in the event that the statutory licence was repealed.

[65] http://copyrightagency.wordpress.com/2013/06/10/repealing-statutory-licences-some-unintended-consequences/

[66] Cengage Learning Australia Pty Ltd Submission No 320

Universities Australia is really at a loss to understand why Copyright Agency has informed its members that they would be forced to deal directly with the education sector in the event that the statutory licences were repealed. The publishers and authors who have raised their concerns with the ALRC are already members of Copyright Agency. There would be nothing at all to prevent them directing Copyright Agency to act as their agent for claiming payment for uses of their works by universities. This kind of voluntary collective licensing operates very well in other jurisdictions, and there is no reason why it would not also work well in Australia. In fact, Copyright Agency already plays such a role in commercial licensing in Australia. On its website, Copyright Agency says:

> Copyright Agency sells a range of licences to cover the use of copyright material at businesses. The licences are easy to use and administer, and aim to assist businesses to minimise their risk of copyright infringement.[67]

Example of a voluntary collective licence in education

Voluntary collective licensing operates effectively and efficiently in the US, despite the fact that the US has a fair use exception. Universities and other educational institutions rely on a collective licence offered by the Copyright Clearance Centre (CCC) for uses that exceed what would be permissible under fair use, or where they do not wish to undertake a fair use analysis.

The Copyright Clearance Centre (CCC) website contains these testimonials from satisfied users of the licence:[68]

"With the Annual Copyright License, faculty and staff can focus on the business of teaching, while demonstrating the importance of respecting intellectual and creative property of others."

Georgia Harper, Scholarly Communications Advisor, University of Texas at Austin Libraries

"With the license, faculty and staff can go online and quickly determine if they have permission to use the content. It's a much easier process and the license is giving me peace of mind which I didn't have before."

Lorraine Martorana, Director of Library Services, Cecil College

"The Annual Copyright License has given us several advantages. It provides institution-wide coverage while supporting multiple uses, including coursepack creation, e-reserves development and course management system postings. The license provides real efficiencies for our library staff."

Jeffrey R. Rehbach, Policy Advisor for Library & Information Services, Middlebury College

The ALRC has asked whether there would be the need for a "statutory extension" provision of the kind we have proposed for broadcasts.[69] Universities Australia submits that this is neither necessary nor desirable. Unlike broadcasts, there is no "underlying rights" issue with print and graphic works. Copyright Agency has, over many years, built up an extensive repertoire, and would be well placed to administer a collective licence for education sector users wishing to use print and graphic works in ways that were not permitted by fair use (or fair dealing for education). In the absence of a clear need for regulatory intervention, Universities Australia submits that there is no justification for a legislative provision to facilitate collective licensing of works. This is line with the views expressed by the ACCC and the Productivity Commission regarding the benefits of a principles-based regulatory framework.[70]

Copyright Agency has submitted that the scope of rights it would be able to licence would inevitably be more limited under a voluntary licence regime than under a statutory licence regime, and that this

[67] http://www.copyright.com.au/licences/business
[68] http://www.copyright.com/content/cc3/en/toolbar/aboutUs/testimonials.html
[69] DP Question 6-1
[70] DP paras 3.89 - 3.90

is evidence of the "inefficiency" of voluntary licensing. Universities Australia is well aware that one upshot of replacing statutory licensing with voluntary licensing is the possibility that some content may not be available under a licence. We have given this a great deal of consideration, and are confident that this would not prove to be a widespread problem. This is due largely to the extensive scope of Copyright Agency's repertoire.

We also see some advantages in a "less extensive" repertoire: under a voluntary licensing regime, Copyright Agency's repertoire would not extend to freely available internet content (for which no one is seeking payment) and orphan works, which are currently paid for by universities in Australia but used without the need for a licence by universities in comparable jurisdictions.

Copyright Agency has also submitted that it would be impractical for education sector users to have to check its repertoire in order to determine whether a particular work was covered by the licence. We do not anticipate this being a problem. Firstly, universities already direct their staff to check whether content is covered by a direct licence with the publisher before recording it as having been copied under the Part VB statutory licence. Secondly, Universities are quite used to operating under a voluntary licence with the music collecting societies that does not provide comprehensive coverage. There is nothing new, therefore, for universities in having to check for included or excluded content and uses before relying on a licence. Universities are well placed to manage this requirement.

Voluntary music licence with music collecting societies

Universities have been parties to a voluntary licence with music collecting societies APRA/AMCOS, PPCA and ARIA since 2005.

The licence permits use of sound recordings, which are not covered by either of the statutory licences.

This licence has operated successfully for nine years. The universities and the music collecting societies have worked cooperatively to make changes to the agreement to accommodate changed usage practices.

2.3 Why we support repeal of the statutory licences

We think it is important to stress that our support for repeal of the statutory licences is not in any way contingent upon a fair use exception being enacted. Whether or not fair use is introduced, Universities Australia strongly supports the ALRC proposal to repeal the statutory licences.

The statutory licences are highly inefficient

The theory behind a statutory licence is that it provides an efficient mechanism for rights holders and users to transact by lowering the transaction costs.

In practice, however, the educational statutory licences have created a market in works where none would otherwise exist. They have allowed Copyright Agency to collect money from universities for activities that, absent the statutory licence, would have no market value:

- Australian universities are paying to use freely available internet material, including content uploaded onto blogs and freely available wikis. This content is copied freely by people in homes and businesses throughout Australia as well as by universities in other jurisdictions. No one is seeking to be paid for it.

Blogs and wikis

Content of this kind is taking on an increasing importance in the university sector. A study on scholarly communications published in the UK earlier this year found that the "sociology" of scholarly

communication is changing. The authors of the study said that while 'formal' communication through journal articles and monographs remained important, there was an increasing use of 'informal' channels of scholarly communication via blogs, wikis, Twitter etc.[71]

- Australian universities are paying to use orphan works for educational purposes. By definition, there is no one wanting to be paid for these works. But for the statutory licence, universities would be able to rely on the flexible exception in s 200AB of the Act to use print and graphic orphan works for educational purposes. However, as a result of the statutory licence, the free exception in s 200AB does not apply and the copying has to be paid for. The money ends up in the hands of rights holders who have no connection whatsoever with the work that was copied.[72]
- As new technological developments result in new ways of using works, Copyright Agency has relied on the statutory licences to seek greater payment from universities. As set out in our response to the Issues Paper, Copyright Agency even sought to be paid for caching and student viewing online.[73] It was necessary for the education sector to seek legislative intervention to clarify that this was not a remunerable activity, and that the sector was not required to pay under the statutory licence when a teacher or lecturer directed a student to view material online.[74] It seems inevitable that for so long as the statutory licence continues to operate, Australian universities will continue to face claims from Copyright Agency for increased payments based on an argument that technological advances have led to new ways of using works that warrant an increase in payment.

Copyright Agency would not be in a position to make these claims but for the statutory licence.

Windfall gains

It is important to note that the millions of dollars collected each year from educational institutions for copying of freely available internet content and orphan works is likely to be paid to Copyright Agency members who have no connection to the works that were copied.

This is because if Copyright Agency cannot identify the rights holder for a particular website, work, or if the amount payable for an overseas website falls short of $200, the money collected from educational institutions goes to an Undistributed Funds pool where it remains in trust for four years, after which time it is distributed that year as a windfall to Copyright Agency members whose textbooks, journal articles or other works were copied that year.

These members are benefiting - at the expense of publicly funded educational institutions - from the inefficiencies of the statutory licence. Many of them have expressed concern that repeal of the statutory licence would result in a loss of income. The loss of this windfall income could not in way be said to cause them unreasonable prejudice.

Repeal of the statutory licences would create an efficient way to ensure that licences do not apply to uses that that are likely to be fair uses, and which are not the subject of licences in any other sector or jurisdiction.

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[71] http://repository.jisc.ac.uk/5209/1/UK_Survey_of_Academics_2012_FINAL.pdf

[72] As we discuss below, in the section headed "Windfall gains".

[73] Universities Australia submission in response to Issues Paper, p 40

[74] Copyright Agency raised this argument in Copyright Tribunal proceedings with the schools sector, and was seeking to persuade the Tribunal that teachers who directed students to view material online were authorising those students to exercise the communication right. Educational institutions were forced to seek a legislative amendment to ensure that the statutory licence could not be used in this way. At the request of the education sector, the Copyright Amendment Act 2006, which came into force on 1 January 2007, contained a new s 22(6A) which makes clear that a person is not taken to be exercising the right of communication merely because the person takes one or more steps for the purpose of gaining access to what is made available online by someone else in the communication or by receiving the electronic transmission of which the communication consists.

Recently, Copyright Agency has suggested that there is scope to set a "zero" rate for some copying and communication under the statutory licence.[75] In our submission, this concession very clearly highlights the highly inefficient nature of the statutory licence. Under a voluntary licence regime, the parties to the licence reach agreement as to what uses are covered by the licence and therefore remunerable. There is no need for either party to direct resources to monitoring and measuring uses that do not attract remuneration. Under the statutory licence, on the other hand, each and every copy and communication that occurs during a period that a university is surveyed is required to be reported to Copyright Agency, regardless of whether or not Copyright Agency intends to seek remuneration.

Universities Australia submits that it is highly inefficient to impose substantial compliance costs on universities (and Copyright Agency itself) for the purpose of collecting data on copying and communication that Copyright Agency now says is not necessarily even remunerable.

The unnecessary costs associated with collecting and processing data on uses that either fall outside of the scope of the licence, or for which Copyright Agency does not otherwise intend to seek remuneration, represents a significant waste of public resources.

Widespread concern regarding the inefficiencies of statutory licensing

It is not just the education sector that has raised concerns about the inefficiencies of the statutory licences.

In its submission in response to the Issues Paper, the Tasmanian Government said that Copyright Agency had treated copying by Tasmanian schools of brochures from the Tasmanian Department of Health in relation to control of head lice as remunerable. This was despite the fact that the relevant copyright notice would have stated that the material could be used for non-commercial purposes and that both Departments are part of the Tasmanian Government.

It said that this did not appear to be an isolated incident.

No scope for transactional licences

The statutory licence does not accommodate a university that wishes to undertake only minimal electronic copying and communication of content not already covered by a direct commercial licence.

The most efficient way to facilitate licensing of minimal amounts of content that exceed what would be permitted under fair use would be for Copyright Agency to offer a transactional licence of the kind that universities in the US can obtain from the Copyright Clearance Centre (CCC) if they do not wish to enter into a full repertoire licence with CCC.[76] Some of the uses that CCC purports to licence may well be permitted under fair use, but the availability of a transactional licensing option means that universities have the option of taking out a licence in the event that they wish to use content in excess of fair use limits or if they do not wish to undertake a fair use analysis before using the work. The CCC licence is a fully voluntary licence. It has no statutory underpinning.

Compare this with the educational statutory licence. There is no practical scope for a university to transact with Copyright Agency on a work by work basis for electronic copying and communication. Universities wanting to make electronic copies and communications under the statutory licence must issue Copyright Agency with a remuneration notice that signals their agreement to operate under an "electronic use system".[77] This is a system that is used for determining how much universities will pay for copying and communication for so long as the remuneration notice is in force.[78] If the universities

[75] Copyright Agency Supplementary Submission in response to Issues Paper, p 4
[76] http://www.copyright.com/content/cc3/en/toolbar/productsAndSolutions/payPerUsePermissionServices.html
[77] s 135ZU of the Act
[78] s 135ZWA of the Act

cannot reach agreement with Copyright Agency as to the processes for the electronic use system, the Copyright Tribunal must decide what form the electronic use system will take.[79] All of this is a long way from the US CCC model, where a university can contact CCC directly and easily and obtain a licence on a transactional basis.

Changes that are rendering the statutory licence increasingly irrelevant

We have addressed rights holders' concerns that they will no longer be in a position to licence use of their works via collective licences. As we have set out above, we expect that there will be a continuing role for collective licensing for some time.

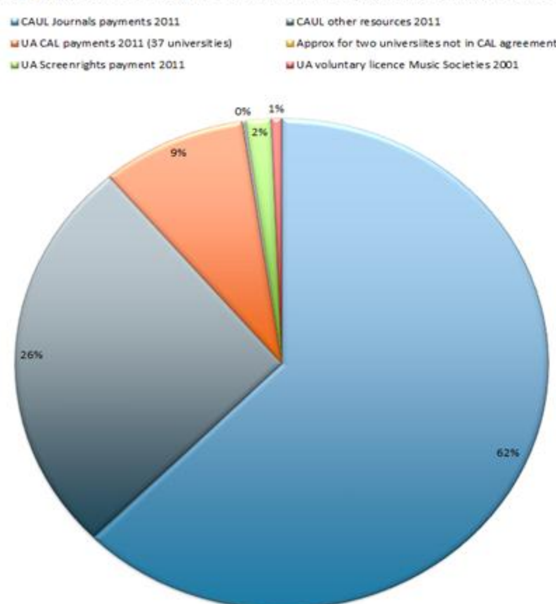
Nevertheless, three changes are having - and will continue to have - a significant impact on the relevance of collective licensing in general and the statutory licence in particular. The first of these is that universities are increasingly purchasing content direct from the publishers on terms that allow them to do the same, or more, than would be permitted under the Part VB statutory licence. This does not mean that universities are not paying to use the content – just that they are paying publishers directly rather than via Copyright Agency. The second major change is that academics are increasingly looking to open access content when deciding what content to use in courses and teaching materials. The third paradigm change is that there has been a move away from a "push" teaching and learning model to a model of student-directed learning.

Content purchased direct from publishers

The vast majority of educational content used for teaching purposes in Australian universities is purchased directly via commercial licences. This is a very different situation compared with when the statutory licence was first introduced.

As we've already noted above, in 2011 university libraries spent $256.7 million, the majority of which was on electronic resources (i.e. journals and e-books). It can be expected that this direct spending will increase over time, especially as a result of the increasing penetration of e-books and their associated add-ons.

The chart below shows the breakdown between money spent by the Australian university sector on direct licences, voluntary licences and the statutory licences in 2011.[80]



[79] s 135ZWA(2) of the Act
[80] CAUL refers to the Council of Australian University Librarians. The figure for "other resources" includes e-books.

Open access publishing

In our submission in response to the Issues Paper, we discussed the global move towards making high quality educational content freely available.[81] Since making this submission, a study on scholarly communications has been released in the UK.[82] The study, which had the backing of JISC and Research Libraries UK, included the following findings that are highly relevant for this review:

- The university library remains an important starting point for academics putting teaching materials together, but "following closely in second place are freely available materials online".
- When an item is not held in the library collection, "the highest share of respondents report that they look for a freely available version online, while the second highest share gives up, both of which outrank using the library's interlending or document supply service".

Rachel Bruce, JISC's innovation director for digital infrastructure, commented on the findings:

> ...this survey confirms that the open web is the first port of call for academics starting research. If an article is not available through the library the majority of academics will go straight to the web to look for a free copy, suggesting that open access is becoming a critical component of the research process.
>
> It also confirms our expectation that libraries have an important role to play in both surfacing open content on the web and ensuring open content is accessible through library systems."[83]

In just a few short years, open access publishing has dramatically changed the scholarly communications landscape. More than 50 funding agencies around the world require open access to peer-reviewed articles arising from the research they fund.[84] According to Dr Peter Suber, Director of the Office for Scholarly Communication at Harvard University, this number is not only growing, but the growth is accelerating.[85] Dr Suber says:

> Funders are charities or philanthropies, and that explains why they grasp the logic of open access. If a research project is worth funding, then its results are worth sharing. Funders have no reason to hold research back, in order to generate a revenue stream or meter it out to paying customers. On the contrary, they have every reason to make it available to everyone who could make use of it.

Dr Suber notes that some commercial publishers - fearful of how open access will affect their business models - have lobbied against open access mandates at public funding agencies. He is quite critical of the position that these publishers have adopted:

> …[It's] equivalent to arguing that public agencies should put the private interests of publishers ahead of the public interest in research, or that the public should compromise and publishers should not compromise. Governments and policy-makers see the need for public agencies to put the public interest first and provide OA to publicly-funded research.
>
> Over the past decade we've seen steady growth in (1) peer-reviewed OA journals, (2) OA repositories, (3) OA policies at funding agencies, (4) OA policies at universities, (5) experiments with OA by traditionally non-OA publishers, and (6) understanding of OA by researchers, librarians, university administrators, funders, and policy-makers. All six of these trends will continue. There's no single "finish line" for OA, and we may never see OA for all new research literature. But within five years we should reach a tipping point at which OA is the default for new research literature.[86]

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81 Universities Australia submission in response to Issues Paper, p 50
82 http://repository.jisc.ac.uk/5209/1/UK_Survey_of_Academics_2012_FINAL.pdf
83 http://www.jisc.ac.uk/news/uk-wide-survey-of-academics-spotlights-researchers-reliance-on-open-access-16-may-2013
84 http://www.springer.com/authors/author+zone?SGWID=0-168002-12-925304-0
85 Ibid
86 Ibid

Universities Australia submits that the rapidly accelerating move towards use of open access content in university teaching and research is a very strong argument in support of repeal of the statutory licences.

Not only is no licence required to use this content, but, as we noted in our earlier submission, the existence of the statutory licence has meant that Australian universities are very often paying under the statutory licence to use this freely available content.[87] This happens because academics often inadvertently report this copying during a survey of university copying, and it is record by Copyright Agency as having been made in reliance on the statutory licence despite the fact that it could have been done for free. In the words of one university copyright officer:

> "Copying of these publications should not be caught in a [Copyright Agency] survey and treated as remunerable, but there is no effective way of filtering them out in the current system."

Any loss of statutory licences fees for this copying is perfectly reasonable: these fees should never have been payable, and reflect the inefficiencies of the statutory licence.

Copyright and scholarly publications

The growth of open access publishing is significant for this review for another reason: it highlights the fact that academic authors do not typically engage in scholarly communications for the purpose of receiving copyright royalties on their writings.

Academic authors have traditionally assigned copyright to commercial publishers, but they have done so without any payment or right to royalties.[88] Their main concern was ensuring that their work would be published, read and cited widely. Until fairly recently, assigning copyright to a commercial publisher - who locked the work away behind a paywall - was the only effective way of achieving this.

The willingness of these academics to make their work available via open access repositories underscores the falsity in claims by commercial publishers that repeal of the statutory licences would lead a dramatic decline in the availability of high quality academic content.

Increased emphasis on student-directed learning

Changes in teaching methods have also rendered the statutory licence increasingly less relevant. When the statutory licence was introduced in 1980, the dominant teaching model was as follows: lecturers would provide students with a course outline that directed them to various resources (some of which they were required to read and others which they may choose to read if they were writing an essay or an assessment task on a particular topic) as well as a printed set of photocopied readings that was paid for under the statutory licence.

That model is rapidly disappearing. There are major cultural changes taking place in the university teaching and learning environment. There has been a move away from a "push" teaching and learning model - where lecturers recommend a set text and provide a set package of unit course materials, whether in paper format or e-copy - towards a model where student initiative, and exchanges among peers, drive the learning process, and where academics are much less providers of set course materials and more the providers of expert guidance.

Under this "community of learners" model, the role of academic staff is that of moderator and mentor, directing and assessing student efforts, helping students to find, analyse and evaluate content, and providing learning challenges in relation to the content students find for themselves and their peers.

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[87] Universities Australia submission in response to Issues Paper p 51

[88] See Universities Australia submission in response to Issues Paper pp 46-49 and 50-51

Universities Australia submits that the increasing trend towards student directed learning is one more reason why the statutory licence is rapidly becoming redundant. Increasingly, there is less need for universities to engage in multiple copying, and less reliance on any particular resource.

2.4 Universities will act in good faith

Some rights holder groups have suggested that universities and other educational institutions will not act in good faith when it comes to use of copyright content, and that they may "seek to get away with having to pay fees to authors" if the ALRC's proposed reforms were enacted.

Universities Australia unequivocally rejects the suggestion that the university sector cannot be trusted to act in good faith when it comes to use of copyright content. It would be nonsensical for universities to compromise the very creative industries on which they rely for learning materials in delivering world-class teaching, education and research.

Universities, academics and students are both users and creators of copyright content. The sector has a long history of compliance with copyright obligations, and takes these obligations very seriously. Universities have worked cooperatively with collecting societies such as Copyright Agency, Screenrights, Australian Performing Right Association (APRA), Australian Mechanical Copyright Owners Society (AMCOS), the Phonographic Performance Company of Australia (PPCA) and the Australian Record Industry Association (ARIA) over many years. None of this would change under the regime that is proposed by the ALRC.

Some rights holders have also suggested that uncertainty about the proper scope of fair use may inadvertently lead to academics exceeding fair use limits and therefore infringing copyright.

Again, we submit that this concern is misplaced. Universities in the US and Canada have developed guidelines to assist their academics in determining what kinds of uses are permissible under fair use (or fair dealing for education in Canada).[89] This would happen in Australia as well. As in these other jurisdictions, there would no doubt be circumstances where the position was not clear-cut, and where it would be necessary to seek advice from the university lawyer, copyright officer or other expert. That is no different to the position in Australian universities today: i.e. there are some activities that are clearly covered by one of the statutory licences or exceptions, and other uses where the position is not clear-cut.

In summary, the claims that universities will seek to avoid copyright obligations, and that academics cannot be trusted to determine when a particular use will be fair, do not withstand scrutiny. Universities Australia devotes significant resources to providing advice and assistance to universities when it comes to copyright compliance, and each university employs staff charged with managing copyright obligations.

The sector is very well placed to meet its obligations under the regime proposed in the Discussion Paper.

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[89] Columbia Universtiy Fair Use Checklist: http://copyright.columbia.edu/copyright/files/2009/10/fairusechecklist.pdf, York Univesity Fair Dealing Guidelines: http://copyright.info.yorku.ca/fair-dealing-requirements-for-york-faculty-and-staff/

3. Copyright and contract

Universities Australia agrees with the ALRC that the benefits of any new fair use (or fair dealing) exception may be seriously compromised if copyright licensing agreements include terms that exclude fair uses.[90] As we noted in our submission in response to the Issues Paper, publishers are seeking to rely on contracts to restrict acts - including use of content for data mining and text mining, and copying by students - that would potentially be permissible in reliance on fair use.

The importance of ensuring that contractual mechanisms cannot be used to exclude the effect of provisions enacted in the public interest was recently recognised by the House of Representatives Standing Committee on Infrastructure and Communications in its At What Cost? report.[91]

In our submission, however, the framework for preventing "contracting out" of exceptions that is set out in the Discussion Paper would have serious unintended consequences which would undermine the objectives that the ALRC has sought to achieve through its proposed reform of copyright exceptions.

3.1 The ALRC's proposed model

The Discussion Paper sets out a proposed model for limiting contractual override of exceptions that would expressly apply only to what the ALRC has described as "core" exceptions: the library and archive exceptions, and fair use or fair dealing to the extent these exceptions apply to use of material for research or study, criticism or review, parody or satire, reporting news, or quotation.

The proposed limitation would not expressly apply to fair use or fair dealing to the extent these exceptions applied to use of material for education, non-consumptive use, private domestic use or public administration.

The ALRC nevertheless proposes that explanatory materials record that Parliament does not intend the existence of an express provision against contracting out of some exceptions to imply that exceptions elsewhere in the Act can necessarily be overridden by contract.[92]

In a nutshell, the ALRC has put forward a model that it says is intended to put beyond doubt the question of whether its proposed core uses can be contracted out of, while leaving for the general law the question of whether contracts are capable of overriding its proposed non-core uses.

3.2 Concerns with the proposed model

Universities Australia has at least the following concerns with this proposed model for preventing contracting out of exceptions:

- Firstly, the ALRC has split exceptions into what it describes as "core" exceptions and (implicitly) non-core exceptions. The relegation of education to a "non-core" exception is at odds with the universal acknowledgement given to the role played by education in advancing the public interest. As the ALRC has acknowledged, education has been called "one of the clearest examples of a strong public interest in limiting copyright protection".[93]
- Secondly, we consider that the proposed "hierarchy of uses" model may have significant unintended consequences, and give rise to legal uncertainty.
- Thirdly, we are concerned that the proposed model would undermine the flexibility that the ALRC has sought to achieve through its proposed reform of exceptions.

[90] DP para 17.118
[91] http://www.aph.gov.au/Parliamentary_Business/Committees/House_of_Representatives_Committees?url=ic/itpricing/report.htm
[92] DP para 17.121
[93] DP para 13.6

Education must be recognised as a core public interest

Universities Australia submits that the implicit relegation of education to a non-core use is completely at odds with the special status given to education in international treaties and in copyright law in comparable jurisdictions.

We have already referred to the comments made by the Ergas Committee to the effect that while limitations placed on the rights of owners may seem to affect their income stream in the short term, in the longer term it is in the interests of rights holders as a group to have a population and an economy capable of making productive use of ideas and information. The Ergas Committee said that:

> The principle that society reaps benefits from knowledge and learning which in many cases outweigh limitations on the rights of owners to earn income from educational uses has long been recognised in copyright law. It is reflected in the special status given to education in the Berne Treaty. It is also reflected in the Preamble to the WIPO Copyright Treaty...[94]

This special treatment is reflected in the law of comparable jurisdictions:

- In the US, education is given express recognition in the fair use exception in s 107 of the US Copyright Act that is open ended but refers expressly to " teaching (including multiple copies for classroom use)"
- In Israel, the fair use exception in s 19 of the Copyright Act 2007 refers expressly to "instruction and examination by an educational institution".
- In the Philippines, the fair use exception in s 185 of the Intellectual Property Code refers expressly to "teaching including multiple copies for classroom use".
- In South Korea, the fair use exception refers expressly to "education and research".
- The Canadian Parliament has also recently recognized the special status of education by introducing a new exception: fair dealing for the purpose of education.

In each of these jurisdictions, the public interest importance of teaching and education is recognised in copyright law.

As the ALRC itself notes, "education has been called 'one of the clearest examples of a strong public interest in limiting copyright protection'.[95] The ALRC also notes that "the use of copyright material for teaching, when fair, has long been recognised as a legitimate type of exception in international law", including in Article 10(2) of the Berne Convention which provides:

> It shall be a matter for legislation in the countries of the Union, and for special agreements existing or to be concluded between them, to permit the utilization, to the extent justified by the purpose, of literary or artistic works by way of illustration in publications, broadcasts or sound or visual recordings for teaching, provided such utilization is compatible with fair practice.[96]

Universities Australia has welcomed the proposal to expressly include education as an illustrative purpose for fair use, or as a fair dealing purpose, but we are concerned that the proposal to treat education as a non-core use for the purpose of express limitations on contracting out of exceptions would put the Australian education sector on an unfair footing compared not only with comparable jurisdictions, but also with commercial organisations. Under the model set out at proposal 17-1, commercial news organisations would have their fair use rights protected from contractual override,

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[94] Ergas Committee Report, September 2000 http://www.ag.gov.au/Documents/Review%20of%20intellectual%20property%20legislation%20under%20the%20Competition%20Principles%20Agreement,%20(September%202000).pdf p 96

[95] DP para 13.6

[96] DP para 13.8

but universities would not. While we acknowledge that there is a strong public interest in retaining an exception that permits fair uses of works for the purpose of reporting news, we question whether a use which is most likely to benefit commercial organisations should be treated as being of a higher order public interest than a use that would benefit universities and their students.

A copyright regime that safeguards the rights of copyright owners and encourages research and innovation is not inconsistent with a regime that acknowledges the special position of education sector users. A flourishing digital economy is one based not only on the production and distribution of knowledge, but also on its use.

Potential for legal uncertainty

Universities Australia is concerned that the model proposed by the ALRC would create a great deal of legal uncertainty and lead to unintended consequences.

Statutory construction

The ALRC says that in proposing limitations applicable to only some exceptions, it is "not indicating that contractual terms excluding other exceptions should necessarily be enforceable". It acknowledges that this question is unsettled, and that this uncertainty is due in part to the existence of s 47H of the Act (which contains an express provision against contracting out in relation to computer programs) and the possibility that a court would apply the legal maxim expressio unius exclusio alterius - i.e. 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.[97]

Universities Australia is concerned that the enactment of further express limitations on contractual override may have the effect of giving rise to an even stronger presumption that in singling out certain exceptions for protection from contractual override, Parliament was indicating a clear intention that other exceptions could be overridden by contract.

We note that the ALRC has proposed that explanatory materials should record that Parliament does not intend this presumption to arise.[98] We are concerned that this may not achieve the outcome the ALRC appears to intend. We refer the ALRC to a recent paper by on statutory interpretation by Justice Spigelman, in which his Honour identifies a recent trend in the High Court towards a more literal approach to statutory interpretation.[99]

In our submission, there is a real likelihood that the model proposed by the ALRC could have the unintended effect of settling the question of whether exceptions can be overridden by contract in the absence of an express provision preventing contracting out. At the very least, we think the proposed model would give rise to even greater uncertainty than currently exists.

Legal interpretative difficulties

Universities Australia submits that the ALRC's proposed approach to contractual override may also give rise to several legal interpretive difficulties.

Firstly, the ALRC has stated that the availability of a licence should be "an important, but not determinative" factor when considering whether <u>any</u> use is "fair".[100] The ALRC says that "other matters, including questions of the public interest, are also relevant" to a fairness analysis.[101] A question arises, however, as to whether a court may find that the availability of a licence was "less relevant" when the use in question fell within one of the ALRC's proposed core uses than it would

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97 DP para 17.26
98 DP para 17.121
99 The Intolerable Wrestle: Developments In Statutory Interpretation Address By The Honourable J J Spigelman Ac Chief Justice Of New South Wales Keynote Address To The Australasian Conference Of Planning And Environment Courts And Tribunals
100 DP para 6.100
101 Ibid

have been had the use been a non-core use such as education. While the ALRC does not appear to have intended such a result, its proposed model for contracting out may lead a court to find that Parliament intended to signal that some uses were per se of greater public interest than others, leading to a finding that these kinds of uses were more likely than others to be "fair", notwithstanding the availability of a licence. Such an outcome would be quite at odds with the flexibility that the ALRC has sought to achieve with its proposal for fair use.

Secondly, legal interpretive difficulties are likely to arise when a user (or court) is required to determine in any case whether a use applied to education, or to research or study, for the purpose of determining whether the use was protected from contractual override. The potential difficulty is highlighted by the way in which the ALRC has referred to education and research throughout the Discussion Paper. For example, in its discussion of the potential application of fair use to data mining and text mining, the ALRC says:

> ...the availability of licensing solutions would be one factor in determining whether a data or text mining use is fair. The fairness factors are intended to provide a framework within which a number of competing interests can be balanced. In respect of data and text mining, these can include but are not limited to:
>
> - the amount of copyright material that was copied;
> - whether the data or text mining will be used for a non-commercial purpose;
> - whether the use is to facilitate education and research;
> - the existence of any agreed industry guidelines...[102]

The concepts of education and research are inextricably linked. Notwithstanding this, Universities Australia is concerned that the ALRC's proposed model will lead to rights holders seeking to draw arbitrary and artificial distinctions between "education" and "research" for the purpose of avoiding the express prohibition on contractual override of core uses. A rights holder seeking to contract to prevent universities from engaging in data mining and text mining in reliance on fair use may well seek to argue that the purpose is "education", rather than "research", and thus not expressly protected from contractual override.

Thirdly, interpretive difficulties are likely to arise in cases where a user is found to have more than one use with respect to any particular act of copying etc. In its discussion of the illustrative purposes, and their relevance in determining whether a fair use exception would be available in any particular case, the ALRC notes:

> The fact that a particular use falls into, or partly falls into, one of the categories of illustrative purpose, does not necessarily mean the use is fair. In fact, it does not even create a presumption that the use is fair. A consideration of the fairness factors is crucial.[103]

In the case of a user who has more than one use - one of which is a core use and another a "non-core use" - how would a user or court determine whether the use was expressly protected from contractual override? Would a use that was found to be partly for the purpose of education and partly for the purpose of research or study be protected from contractual override?

Potential to undermine flexibility of fair use

The last point above highlights another unintended consequence of the ALRC's proposed model: it inevitably directs the inquiry back to the question of "who made the copy and what was their purpose"?

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[102] DP para 8.79
[103] DP para 13.61

For example, under the ALRC's proposed fair use exception, the question of whether a university could rely on fair use to undertake copying on behalf of its students would turn not on the question of whether the university had the relevant purpose, but rather on the question of whether the copying in all the circumstances was fair. But what if a contract purported to prevent the university from permitting students to make copies in reliance on fair use? In determining whether this term was enforceable, a court may find itself having to make artificial distinctions as to whose illustrative purpose was behind the copying, based on who actually made the copy. This would be completely at odds with the proposed shift away from purpose-based exceptions to a flexible fair use exception.

3.3 A proposed solution

Universities Australia has given a great deal of consideration as to how best to ensure that the benefits of the exceptions outlined in the Discussion Paper are not able to be automatically overridden by licensing arrangements that purported to restrict or exclude uses that would otherwise be permitted.

Both the Irish Copyright Review Committee and the UK Intellectual Property Office have also recently considered the question of how best to ensure that contracts cannot be relied on to undermine the operation of exceptions. In its recent Copyright and Innovation Consultation Paper, the Irish Copyright Review Committee said:

> The rights provided to consumers or users by the exceptions to copyright could very easily be set at naught by means of terms and conditions in contracts between rights holders and users.[104]

The proposed solutions put forward by these two bodies are broadly similar:

Irish proposal

The Irish Copyright Review Committee has proposed that the Irish Copyright Act be amended to include the following provision:

Where an act which would otherwise infringe any of the rights conferred by this Act is permitted under this Act, any term or condition in an agreement which purports to prohibit or restrict that act shall be void.

UK proposal

The UK Government has released draft legislation for a range of new and amended exceptions. Some of these exceptions are absolute, or per se exceptions (for example the proposed new exception for non-commercial data mining and text mining[105]) that are not subject to a fairness test, and others (for example the proposed new fair dealing for the purpose of instruction exception[106] and the proposed quotation exception[107]) will only apply if the use is fair. In each case, however, the UK Government has proposed the following provision to prevent rights holders from relying on contracts to override the exception:

To the extent that the term of a contract purports to restrict or prevent the doing of any act which would otherwise be permitted by this section, that term is unenforceable.

In our submission, each of these proposed provisions would operate effectively to ensure that contracts could not be used to automatically rule out reliance on fair use (or fair dealing) in a way that avoided the interpretive difficulties and likely unintended consequences that we have outlined above.

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104 http://www.djei.ie/science/ipr/crc_consultation_paper.pdf p 85
105 http://www.ipo.gov.uk/techreview-data-analysis.pdf
106 http://www.ipo.gov.uk/techreview-education.pdf
107 http://www.ipo.gov.uk/techreview-quotation

Importantly, neither provision would mean that contractual terms that purport to restrict or prevent certain uses would be of no relevance to a fairness analysis. While the term would not be enforceable as a matter of contract law, the existence of the term would still be a matter (amongst other matters) to be taken into account by a court in determining whether a use was fair. If the term was required in return for other rights and benefits granted under the contract, then this might be a relevant factor as to whether or not the doing of the relevant act was fair. If it is not fair, then the contractual term purporting to prevent it may not be void or unenforceable. In every case, the question of whether or not a use was fair would be a matter for a court to determine having regard to a fairness analysis.

Universities Australia considers that this feature of both the Irish and UK proposed models addresses the concern outlined at paragraph 17.119 of the Discussion Paper; i.e. that prescriptive limits on contracting out may unreasonably interfere with future developments in emerging markets and technologies. This approach would not render such clauses per se void or unenforceable, but rather takes an "act by act" approach which allows room for a flexible and full fair use analysis that has due regard to the contractual setting.

We also submit that this model - which does not seek to distinguish between certain kinds of uses - would avoid the interpretive difficulties and likely unintended consequences that we have discussed above.

Universities Australia would support such a model for preventing contractual override of exceptions. However, if the ALRC does not recommend a model that makes no distinction between uses, then Universities Australia submits that the question of whether or not a contractual term is capable of overriding a copyright exception in any particular case should be left as a matter to be determined according to the general law.

4. Broadcasting

The ALRC has asked whether - in the event that the Part VA statutory licence is not repealed - the scope of Part VA should be expanded to apply to the transmission of television and radio programs using the Internet, or perhaps to an even broader range of online content.[108]

As already stated, Universities Australia strongly supports repeal of the Part VA statutory licence. However, in the event that the statutory licence is retained, we would oppose any expansion of Part VA. There are two reasons for this. Firstly, expanding the Part VA licence to include freely available internet content may result in Australian universities paying for content that no one ever expected to be paid for and that can currently be used in reliance on s 200AB. Secondly, even if the intention were to confine an expanded Part VA to "the online equivalent of television or radio programs", we are concerned that the practical effect would be for Part VA to potentially apply to a much broader range of content than the ALRC appears to anticipate, as the line between "TV like" and "other" kinds of video content increasingly blurs.

Paying to use freely available internet content

In our submission in response to the Issues Paper, we outlined the way in which the statutory licences have resulted in Australian educational institutions paying for uses that are not paid for by universities or schools (or other users) anywhere else in the world.

To date, that anomaly has been most obvious with respect to the Part VB statutory licence, as universities have been required to pay to use orphan works and freely available internet content that no one ever wanted or expected to be paid for.

At present, the Part VA statutory licence does not extend to non-broadcast audio-visual content that has been made freely available online on websites, video sharing platforms or other technologies. If

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[108] DP para 16.97

this content is used in a university, it is generally done so in reliance on the free exception in s 200AB of the Act. Universities take great care to ensure that they comply with the requirements of s 200AB when they do so. From a policy perspective, using this content in reliance on a free exception is completely appropriate: the content has been made freely available online by the rights holder in the knowledge that it will be used without payment.

Universities Australia is concerned that any expansion of Part VA to include non-broadcast content that has been made available online would have the potential to result in Australian educational institutions becoming the only bodies in the world paying to use this freely available content. In our submission, there is no policy rationale for extending the Part VA statutory licence in this way, and in fact a strong policy rationale against doing so, particularly at a time when we are witnessing an explosion of freely available, innovative content created with the intention that it be used in educational institutions throughout the world without payment.

No easy way to distinguish between "TV like" content and other kinds of video content

Universities Australia notes that the proposed expansion of Part VA set out in Proposal 16-1 (i) refers only to "the transmission of television or radio programing using the internet". The intention appears to be to expand Part VA to "the online equivalent of television or radio programs".[109]

It appears that the ALRC intends that the concepts of "television program" and "radio program" would apply only to content that has traditionally been consumed offline. In our submission, however, this distinction may become increasingly meaningless. As more made-for-internet content is created, concepts such as "television program" and "radio program" are likely to become more contested, with the result that the ALRC's proposed expansion of Part VA may end up including a much broader range of content than was intended.

5. Orphan Works

Universities Australia strongly supports the ALRC's proposed approach to orphan works.

As we set out in response to the Issues Paper, there are two kinds of orphan works "problem" in the university environment. In the case of print and graphic works used for teaching, universities can use the works, but they are required to pay for this under the Part VB statutory licence notwithstanding that the owners of the works are by definition difficult, if not impossible, to identify and/or locate. In other words, the problem is not the usual one of not being able to use the works, but rather a case of being unfairly "taxed" to use works. In the case of works - and uses of these works in, for example, text mining - not covered by the statutory licence, universities are in the same position as other users; i.e. they are prevented from making use of the works.

Together with the proposed repeal of the Part VB statutory licence, the orphan works regime set out at Chapter 12 of the Discussion Paper would address each of these concerns. In our submission the proposed regime strikes an appropriate balance between facilitating greater use of the vast trove of content that is currently effectively "locked up", while at the same time protecting the interests of rights holders who are subsequently identified.

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[109] DP para 16.97

Annexure A

Letter from the Chair of Copyright Agency, Sandy Grant, to Copyright Agency members

Dear members

It is rare for me to write to you all directly but this is an occasion that more than warrants it.

I am writing to appeal urgently to Copyright Agency Members, and, in fact, to all content creators and publishers, to get involved in the Australian Law Reform Commission's review of copyright. Your rights and income are being seriously challenged by a proposal that suggests, amongst other things, the repeal of the Statutory Licence.

The Law Reform Commission has produced a discussion paper that is heavily influenced by those who argue that free and cheap distribution of content is a characteristic of the digital age and the future and therefore should be enshrined in law. They have set the evidentiary bar incredibly low for the proponents of change. At the same time, they are making recommendations that would reduce the incomes of writers and publishers and have the potential to create chaos and litigation in the industry and education sector.

Our argument is that out of the $10,000-$13,600* it takes to educate a school student every year, less than $17 is spent on copied and shared content (and similar numbers apply to universities and TAFE). The new recommendations would reduce this and put the onus on creators to protect their rights and prove abuse. The Statutory Licence is supported by teachers who find its invisibility and ease of use beneficial in their working day, and by our members. The Statutory Licence means there is neither misunderstanding nor illegal usage.

It is a system worth maintaining and a system that fairly compensates our members each year for the content they create.

The final recommendations of the ALRC inquiry into Copyright and the Digital Economy can still be influenced. But we need you to raise your voices now and write to the ALRC before 31 July.

Australia has a fair and efficient system in place already, one that benefits both the user and the creator.

Changes in technology have already been taken into account by this system. The ALRC is trying to use technological change as an excuse to erode or remove the rights of those who invest time, money and skills into creating material that others wish to use.

It is time for writers, artists and publishers to stand together to make clear to the ALRC Review that we value our work and that we want the same rights as any other group looking to offer intellectual property to the education community. Follow the links below to make a submission by Wednesday 31 July, 2013.

Sincerely yours

Sandy Grant,
Chair

Letter from UQP CEO & Digital Publisher, Greg Bain, to UQP authors, at the prompting of Copyright Agency

Dear UQP author:

As you may have heard through organisations such as Copyright Agency and the Australian Society of Authors, there have recently been troubling changes proposed to the Statutory Rights legislation with regard to copyrighted material in Australia. The Australian Law Reform Commission (ALRC) has released a discussion paper (5 June 2013) proposing sweeping changes to the existing statutory license model.

Currently, "statutory licenses":

- allow use without permission provided fair payment
- allow use of content in the education and government sectors
- allow uses of content for particular purposes (research, critique, reporting news, private use)
- see license revenues collected by Copyright Agency and Screenrights, which are distributed to creators and publishers
- sanction permission provided conditions including attribution and only part usage if work is commercially available

The ALRC's proposals are very concerning. One of the most problematic recommendations is that the statutory licence, which was introduced in response to photocopying with a key objective of ensuring teachers, had access to copyright content, and at the same time that authors and publishers were fairly remunerated, should be repealed. The suggestion is that this would be replaced with voluntary licensing. It is important the ALRC understand the implications of what they are suggesting from evidence of affected people on the ground – there appears to be a chasm between legal theory and actual practice.

Feedback to the ALRC that express your thoughts on the day-to- day implications of removing the statutory licence for you as author / illustrator / content creator will be valuable.

To assist you, the following link from Copyright Agency will guide you further on ways to make a difference.

http://www.copyright.com.au/get-information/alrc-inquiry/alrc-have-your-say

If you wish to make a written submission to the ALRC, the following suggested text is put forward by Copyright Agency to assist:

CONTENT CREATOR SUBMISSION LETTER TO THE ALRC REVIEW OF COPYRIGHT AND THE DIGITAL ECONOMY – Education Statutory Licence Focus

I am an author/journalist/photographer/illustrator/artist who creates content for a living.

I develop something from nothing using my time, creative skills and knowledge and my material is my intellectual property. I own the copyright in my material and I expect people who use it pay for the time and effort I have expended on my creation. Not only do I expect to be paid but I rely on that payment for my income.

The statutory licences that the ALRC is recommending be repealed are very important to me. If my work is copied and shared by teachers in the classroom, I receive a copyright payment from the Copyright Agency.

These payments are recognition of the value of the material I have created, using my time, skill and experience. Just as a supplier sells paper to a school for use in a photocopier – or a retailer sells laptops to a school, my work facilitates education.

The system works very efficiently and quietly with very little administrative requirement from me. However, should the change proposed be made, how will I develop licensing arrangements myself? How will I track down copyright breaches? How will I prosecute breaches? How will I afford to mount a legal case? What compensation will I get for loss of income; to mount legal challenges or for the time it takes me to administer licensing arrangements?

I am a specialist in my field, I have little expertise in the intricacies of copyright law, nor the time to pursue breaches – no matter how concerned I am.

I completely reject the repeal of the very effective and fair Australian educational statutory licence system. Such a recommendation is a personal attack on my rights.

(Name, date, contact details).

The timeline for this inquiry is:

- July 24: online discussion board on fair use
- July 31: deadline for submissions on discussion paper
- November 30: final report

I thank you in anticipation of your support.

Regards,

Greg
Greg Bain
CEO & Digital Publisher
UQP
PO BOX 6042 | ST LUCIA | BRISBANE | QLD 4067
Ph: +61 7 3365 2453 | Fax: +61 7 3365 7579
gregb@uqp.uq.edu.au | www.uqp.com.au | facebook | A State of Writing