



UNIVERSITIES
AUSTRALIA

DISCOVER LEARN LEAD

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

November 2012

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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 I: 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 statement² 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

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 dollars⁵) 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.

I. 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.ipa.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:

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

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.ipa.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 Treaty¹⁶. It is also reflected in the Preamble to the WIPO Copyright Treaty that we have referred to above.

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](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](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:

- o 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
- o *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;*
- o *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*
- o *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

²¹ Kim Weatherall, *Internet Intermediaries and Copyright: An Australian Agenda for Reform*, April 2011 <http://digital.org.au/sites/digital.org.au/files/documents/VWeatherall-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](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.

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](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 *McKinsey 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".*

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 copy³² – 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 paper³³ setting out the copyright issues relating to the use of third party content on MOOCs. The ARL 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.

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.

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 as 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 be 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.ipso.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

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.ipso.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 HathiTrust⁵⁰ 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.

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.

⁵² (1990) 95 ALR 625

⁵³ Matthew Sag, 'Copyright and Copy-Reliant Technology' (2009) 103 *Northwestern University Law Review* http://papers.ssm.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 Sag⁵⁵ 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 Bebee⁵⁷ and Pamela Samuelson⁵⁸ 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

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 undertake 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:

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

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

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 *Bill 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

⁷¹ *Cambridge University Press v Georgia State University Civ. Action No 1:08-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 to 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

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*".

⁸¹The 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 also 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.

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&sn_tz=1&usq=AFOjCNEWpkLt4uyfpCcNy7t9o0oNAX3llg .

⁷⁹ Jane C Ginsburg, 'Towards Supranational Copyright Law? The WTO Panel Decision and the 'Three-Step Test' for Copyright Exceptions' (2001) *Revue Internationale du Droit d'Auteur* http://papers.ssm.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.

II. 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.

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.iipitec.eu/issues/iipitec-1-2-2010/2605/IIPITEC%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 Bert 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 sections 1.1 to 1.11 below we discuss the Part VB statutory licence, and in section 1.12 we discuss the Part VA statutory licence.

I. 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 licence⁹⁰ 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

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=0CD00FjAC&url=http%3A%2F%2Fwww.copyright.com.au%2Fassets%2Fdocuments%2FSeminars%2FSessionOne_DigitalEnvironment_May2006.pdf%2Fat_download%2Ffile&ei=y-yUlbGK2PiAfY0YDIaAw&usq=AFOjCNEpzzp2OKCykP6JlftqebrFM0HC-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&usq=AFOjCNEpzp2OKCykP6JlftqabrFM0HC-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 1999¹⁰⁶, 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

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, McLelland 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:

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.

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 1:08-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 it 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

¹¹³ See, for example, [the University of Texas Copyright Guidelines http://copyright.lib.utexas.edu/copypol2.html](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 Elsevier¹¹⁸, Wiley-Blackwell¹¹⁹, Springer¹²⁰, and IGI Global¹²¹ 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 Aaronson, 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.ssm.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 VB 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:

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.

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

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.ipa.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

¹³⁶ *Cambridge University Press et al v Georgia State University* No 1:08-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 Institutions¹⁴². 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 Guidelines¹⁴³. 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 Board¹⁴⁴ 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

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

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 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 EDU¹⁵⁰ and the Open University on iTunesU¹⁵¹ - 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.

I. 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 Fraser¹⁵⁴ 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.

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 exceptions¹⁶⁴ 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 to 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.

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 - s 135ZMD(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 s 135ZMD (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 work¹⁶⁶. 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.

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 - SpringerOpen¹⁶⁸ - 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 to 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 Books¹⁷¹ 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 Leap¹⁷² 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.

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:

- Boundless¹⁷³ – 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 OpenCourseware¹⁷⁴ - a free, web-based publication of virtually all MIT course content.
- U-Now Open Courseware¹⁷⁵ - 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 be 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 Online¹⁷⁸ - the Open University's repository of research publications and other research outputs.
- University of California e-scholarship repository¹⁷⁹ - 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 |