

Universities Australia Submission to the Productivity Commission's Draft Report on Intellectual Property Arrangements

3 June 2016

Introduction

Universities Australia is pleased to have this opportunity to respond to the Productivity Commission's Draft Report on Intellectual Property Arrangements (**Report**).

In line with the stated aims of Government to promote the transition to an innovative knowledge based economy as outlined in the recent National Innovation and Science Agenda, universities rely heavily on the latest technology for teaching, learning and research. Yet Australia's inflexible and unbalanced copyright laws are blocking Australian universities from making full use of cutting edge digital technologies such as data and text mining in research. They limit the ways in which Australian universities can deliver innovative content via Massive Open Online Courses (**MOOCs**). They prevent Australian academics from fully engaging with colleagues and the broader community. They stand in the way of Australian universities collaborating with business and industry.

A fair use exception of the kind proposed by the Productivity Commission (**the Commission**) in its Report would address these concerns. It would put Australia on a level playing field with leading digital economies such as the United States, Israel, South Korea and Singapore, each of which have fair use exceptions.

Universities Australia submits that it is now well and truly past the time for policy makers to be asking "do we need an open ended fair use exception?" After 20 years of reviews that have considered this question, the evidence is in: Australia's existing inflexible, purpose-based copyright exceptions are no longer fit for purpose. They are holding Australia back, not just in our universities and schools, but also in our digital industries. Innovative and useful technologies, and new ways of using content in socially beneficial ways, automatically infringe copyright in Australia unless their use falls within one of the existing narrow, purpose-based exceptions.

It is also well past the time to be asking whether a flexible exception such as fair use would unreasonably prejudice Australian authors and publishers. Again, the evidence is in. The fair use scare campaign by some rights holder groups flies in the face of the compelling evidence that

rights holders have nothing to fear from fair use. After all, the educational publishing industry is booming in the USA,¹ the “home” of fair use.

The question our policy makers *should* be asking right now is not “do we need fair use?”, but rather “what fair use model would be best for Australia?” Universities Australia looks forward to contributing to that discussion. We strongly welcome the Commission’s contribution.

Universities Australia also welcomes the Commission’s draft recommendation to expand the copyright safe harbours to apply to all online service providers. This reform is long overdue. Australia will remain in breach of its obligations under the Australia-United States Free Trade Agreement unless and until the safe harbours are expanded to include all online service providers, including universities.

Executive summary

- Universities Australia strongly endorses the Commission’s draft recommendation that Australia enact a fair use exception.

- More than 20 years after the Copyright Law Review Committee recommended an open-ended flexible exception, it is now well past the time to move beyond the “should we/shouldn’t we” debate to begin the important discussion about exactly *how* a flexible fair use exception should be introduced into Australian copyright law.

- Fair use would put Australian universities on a level playing field with universities in comparative jurisdictions such as the USA, Singapore, Israel, and South Korea. It would mean:
 - Australian academics being able to take full advantage of innovative new technologies such as data mining and text mining
 - Australian universities having greater flexibility when creating MOOCs
 - Australian universities no longer having to cut third party content from student theses before making these publicly accessible online
 - Australian academics being free to include small amounts of third party content in conference papers
 - Australian universities not being blocked by copyright when engaging in collaborative projects with business and industry

¹ Armody T “Why Education Publishing is Big Business” *Wired* 2012 available at: <http://www.wired.com/2012/01/why-education-publishing-is-big-business/>

- There has been an extraordinary campaign of misinformation regarding the likely impact of fair use on educational publishers and authors. In this submission we seek to set the record straight. Fair use fear-mongering should not be allowed to railroad this important reform.
- Universities Australia strongly welcomes the proposed expansion of the copyright safe harbours to include all service providers, including universities. As with fair use, this reform is long overdue. We also welcome the Commission's rejection of the proposal by some rights holder groups to link reform of the safe harbours with changes to the law of authorisation.

I. Timely to act on fair use

For more than 20 years now, policy makers have been asking whether Australia's existing copyright exceptions are fit for purpose in a digital environment, and have concluded that they are not:

- 1998 The Copyright Law Review Committee (**CLRC**)² recommended an open-ended flexible exception, where fairness was assessed using the existing fair dealing factors. The CLRC said that the exception would operate in the same way as the US fair use exception.
- 2004 The Parliamentary Joint Standing Committee on Treaties (**JSCOT**)³ recommended replacing Australia's closed list of fair dealing exceptions with a flexible exception that resembled fair use as part of Australia's AUSFTA implementation. The JSCOT said that by agreeing to extend our term of copyright from life plus 50 years to life plus 70 years as required by the AUSFTA, Australia would inevitably alter the copyright balance in favour of rights holders. It said that a fair use exception would to some extent ameliorate this.

² Copyright Law Review Committee report on Simplification of the Copyright Act Part 1: Exceptions to the Exclusive Rights of Copyright Owners, para 6.12.

³ [Joint Standing Committee on Treaties, Report 61 Australia - United States Free Trade Agreement](#), para 16.50

- 2004 The Senate Select Committee on the Free Trade Agreement between Australia and the United States of America⁴ noted the benefits of a fair use system to the Australian economy and that there was nothing in the text of AUSFTA that would prevent Australia adopting a fair use exception.
- 2013 The House of Representatives Standing Committee on Infrastructure and Communications⁵ recommended the introduction of fair use.
- 2014 The Australian Law Reform Commission (ALRC)⁶ recommended the introduction of fair use. The ALRC said that far from being a “radical” exception, fair use is “an extension of Australia’s longstanding and widely accepted fair dealing exceptions”⁷ that would “make Australia a more attractive market for technology investment and innovation”⁸ and benefit Australian universities and schools.⁹

It is not surprising that the Commission has reached the same conclusion as each of these previous reviews. We need to inject much needed flexibility and balance into Australian copyright law by enacting fair use. Universities Australia is hopeful that Australia will soon move beyond the “should we/shouldn’t we” debate to begin the important discussion about exactly how a flexible fair use exception should be introduced into Australian copyright law.

⁴ [Senate Select Committee on the Free Trade Agreement between Australia and the United States of America Final Report \(2004\) p72](#)

⁵ [House of Representatives Standing Committee on Infrastructure and Communications, At What Cost? IT pricing and the Australia tax \(July 2013\) at xiii](#)

⁶ ALRC Report 122 [Copyright and the Digital Economy](#) (2014) para 4.73

⁷ ALRC report 122 para 4.31

⁸ *Ibid*, Executive Summary, p 23

⁹ *Ibid* chapter 14

2. What would fair use mean for Australian universities?

Fair use would put Australian universities on a level playing field with universities in comparative jurisdictions such as the USA, Singapore, Israel, and South Korea. It would mean:

- Australian academics being able to take full advantage of innovative new technologies such as data mining and text mining
- Australian universities having greater flexibility when creating MOOC courses
- Australian universities no longer having to cut third party content from student theses before making these publicly accessible online
- Australian academics being free to include small amounts of third party content in conference papers etc
- Australian universities not being blocked by copyright when engaging in collaborative projects with business and industry

The ability to make full use of innovative text and data mining technologies

Text and data mining 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 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.

Since these technologies 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), they infringe copyright unless the rights holder has granted permission or a copyright exception applies.

Seeking permission is, in many cases, completely impractical (if not impossible) given that a researcher may be mining publicly accessible content that has been obtained from thousands of distributed sources. And in Australia, none of the existing copyright exceptions apply.

This is placing Australian universities and research institutions at a competitive disadvantage when compared with other jurisdictions.¹⁰

¹⁰ See In its submission to the Productivity Commission Intellectual Property review by the University of Sydney , http://www.pc.gov.au/_data/assets/pdf_file/0004/194863/sub104-intellectual-property.pdf p 13

In a submission to the ALRC, the Commonwealth Scientific and Industrial Research Organisation said that if Australian copyright laws are more restrictive than elsewhere, the cost of research would make Australia a less attractive place as a research destination. ¹¹

Fair use would fix this. It would enable Australian researchers and innovators to make full use of innovative text and data mining technologies that their colleagues in regimes with more flexible copyright exceptions take for granted.

Greater flexibility in operating MOOCs

MOOCs are creating new opportunities for Australian universities to operate on a world stage. Copyright, however, is standing in the way. It is limiting the ways in which Australian universities - as opposed to their counterparts in fair use jurisdictions such as the USA - can deliver course content via MOOCs. That is because universities operating MOOCs in fair use jurisdictions can rely on fair use when incorporating third party content into MOOC courses, while **none** of the existing Australian copyright exceptions or statutory licences apply to MOOCs. ¹²

Fair use is not a “free for all” for US universities operating MOOCs, and nor would it be in Australia. Fair use would, however, mean that Australian academics - like their US counterparts - could make “fair” uses of content that did not unreasonably harm the interests of rights holders, when putting a MOOC together. In the US, copyright enables, rather than blocks, appropriate use of limited portions of text and other content in teaching and learning, including in the creation of MOOCs.

¹¹ CSIRO submission to ALRC Discussion Paper, submission 242

¹² Contrary to assertions by Copyright Agency/Viscopy, the Part VB statutory licence does **not** apply to MOOCs. That is because Part VB cannot be relied for content that is made publicly accessible, regardless of whether it this has been done for educational purposes.

Here's the advice that the University of Pennsylvania gives to it's academics regarding MOOCs: ¹³

Instructors can usually rely on fair use if they do the following:

- *Use only brief quotations from the literature of a discipline and incorporate them into a lecture and/or the accompanying slides.*
- *Directly critique or comment on the image in the slide. For instance utilize a graph, and mention in the commentary how the graph relates to a larger point.*
- *Utilise only materials that are "factual," and do not utilise materials that are "creative" in nature. For example, utilising a graph of a study that is only illustrating facts published in a scientific article is more likely to be considered a fair use than using a piece of art, which relies more on creative interpretation rather than factual demonstration.*
- *Use the material in a "transformative" way; that is, the purpose of the use in the course is completely different than the original purpose of the material. Examples of "transformative" use could include juxtaposing images next to each other to show differences, or overlaying commentary or drawings on top of an image to highlight particular features.*

Compare this to the experience of Australian universities:

- One university was required to pay a US\$2,950 licence fee to use an article that had actually been written by the academic running the MOOC course. ¹⁴
- Another university was required to pay a licence fee of \$AUD 235.33 for use of a single table that, once again, had been created by the academic running the course and included in a scholarly journal. ¹⁵
- Yet another university was quoted AUD\$40,000 to include a diagram and short excerpts from a commercial report in a MOOC course. The cost was prohibitive and the university opted not to use the content, with the result that the MOOC presenter

¹³ <http://guides.library.upenn.edu/content.php?pid=244413&sid=3375306>

¹⁴ [Council of Australian University Librarians submission to Productivity Commission Intellectual Property review p.11](#)

¹⁵ *ibid*

was unable to illustrate points regarding a key visual resource and excerpts from an important piece of commercial research.¹⁶

Fair use would fix this. It would enable Australian universities to use third party content sparingly and appropriately when engaging in their core mission of creating and distributing knowledge using new and innovative digital technologies such as MOOCs.

Enabling Australian academics to fully engage with colleagues and the broader community

Unlike their peers in fair use jurisdictions, 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.

Take student theses, for example. 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. But while students can rely on the research and study exception¹⁷ to include small excerpts from a text (such as an illustration, table, diagram etc), or perhaps thumbnail images in their theses, the university itself risks being sued for copyright infringement if it uploads this content into a digital repository and enables other students and members of the public to access it. To avoid this risk, universities generally require a student to obtain permission for use of third party content (which can be highly costly, and in many cases impossible) or, alternatively, to remove this content from their thesis. The result is that the integrity of the thesis is compromised, and the academic community is denied the opportunity to engage fully with the work. Universities in fair use jurisdictions typically rely on the fair use exception for this use.

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", then the use may be permitted by the criticism and review fair dealing exception¹⁸. But if the content is being included merely as a support for the academic points being made, then none of the existing exceptions clearly apply.

¹⁶ University of Sydney submission to Productivity Commission
http://www.pc.gov.au/data/assets/pdf_file/0004/194863/sub104-intellectual-property.pdf

¹⁷ In s 40(1) of the Act

¹⁸ See s 41 of the Act

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.

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 pigeonholed within one of the purpose-based fair dealing exceptions, then it is not permitted, however "fair" it might be and whatever social benefit may flow from the use.

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 review¹⁹, 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". There is no public policy justification for treating commercial organisations more favourably than universities, academics and students.

Copyright is also impacting on the way that academics can interact with each other. In a submission to Government in 1999, Copyright Agency suggested that academics could rely on fair dealing to copy small amounts of work for their own research purposes, fair dealing would not apply if they wanted to share this copy with a colleague, even if this was for the purposes of discussion:

"The transmission of copyright works for discussion with colleagues could not be a fair dealing for research or study purposes".²⁰

Universities Australia submits that the existing limitations on academic research and engagement are unacceptable in a knowledge economy. These limitations place Australian researchers at a

¹⁹ In reliance on s 41 or 103 A of the Act

²⁰ CAL submission to the Department of Attorney General in relation to Copyright Amendment (Digital Agenda) Bill 1999, 19 March 1999, para 33

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. Fair use would facilitate vital early stages in research, such as collaboration between colleagues, and allow for the wide dissemination of knowledge that is a central part of the university mission.

Enabling Australian universities to collaborate with business and industry

Universities are being urged to do better when it comes to research collaboration with industry and engagement with the broader community. See, for example, the recently released Australian Research Council (ARC) Engagement and Impact consultation paper, which seeks feedback on the best ways to measure the engagement and impact of university research.

Fair use is an important lever available to the Government to promote greater collaboration between academia and industry. As we've already discussed in relation to MOOCs, unlike the USA, Israel and other jurisdictions with a fair use exception, our educational exceptions and statutory licences draw a line between uses within the closed confines of an educational institution and uses that involve the broader community or industry. Australia has **no** copyright exception that allows collaborative educational uses. None of the existing fair dealing or educational exceptions or statutory licences permit universities - or their academics - to use small amounts of copyright content when engaging in the kinds of collaborative projects that the Government is seeking to promote.

There is no such limitation with fair use. If the use was "fair", it would be allowed.

3. Responding to fair use scare campaigns by rights holder groups

There has been an extraordinary campaign of misinformation regarding the likely impact of fair use on educational publishers and authors. Universities Australia considers that it is important to set the record straight on these misleading claims:

The claim that universities would rely on fair use for all uses that they currently pay for

Some opponents of fair use have suggested that it could result in "the end of educational licensing".²¹ The CEO of Copyright Agency/Viscopy has said that "fair use would strip millions of dollars away from Australian storytellers and content creators because governments,

²¹ See, for example, "Good for lawyers, bad for creators", ArtsHub, <http://www.artshub.com.au/news-article/opinions-and-analysis/grants-and-funding/adam-suckling/good-for-lawyers-bad-for-creators-251347>

companies and large education institutions, who now pay to use content, would stop paying as much or stop paying at all".²²

These claims are utterly without foundation. Fair use would **not** mean that universities would, or could, copy everything for free. The university sector is and will remain a major contributor to the copyright industries.

These are the facts:

Firstly, in 2014, university libraries spent almost \$300 million on library resources. These licence fees flow directly from universities to the rights holders and will continue to do so regardless of whether or not fair use is enacted.

Secondly, universities currently pay to use content under the educational statutory licences. In 2015, universities paid more than \$35 million to Copyright Agency/Viscopy and Screenrights for copying and communication under these licences. We do not resile from the fact that **some** of what is currently paid for under the statutory licences would most likely come within a fair use exception if enacted. To put this in context, however, some of the content that universities currently pay for under the statutory licences, and which is likely to fall within a fair use exception, includes freely available internet content, (including content uploaded onto blogs and freely available wikis that no one ever expected to be paid for) and orphan works. Currently, the money paid by universities for this content is eventually paid to Copyright Agency/Viscopy members who have **no connection** to the works that were copied. That is because Copyright Agency/Viscopy has no one else to distribute it to. In other words, these members benefit from a windfall payment - at the expense of publicly funded education institutions. The loss of this windfall payment could not in any way be said to cause them unreasonable prejudice.

The claim that fair use “decimated” the Canadian educational publishing industry

As the Commission has itself noted, claims by some fair use opponents that the Canadian educational publishing sector was “decimated” as a result of Canada enacting a fair dealing for education exception have been strongly refuted.

Canadian copyright expert Professor Michael Geist recently provided a much more accurate assessment of the educational copying landscape in Canada, and the reasons why Canadian

²² Ibid

schools and universities are relying less on collective licences from Access Copyright (the Canadian equivalent of Copyright Agency/Viscopy) than they had in the recent past.²³ Universities Australia submits that this analysis underscores the extent to which the “fair use killed Canadian educational publishing” claims are misleading:

1. Canadian educational institutions continue to pay millions of dollars every year to publishers and authors for access to their works. The Canadian Research Knowledge Network - a partnership of 75 Canadian universities representing 1.2 million researchers and students - spent over **\$100 million** in licensing fees for electronic content in 2015. The recent copyright reforms had no impact whatsoever on those payments. Geist notes that these licenses “provide access to an incredible array of electronic journals and primary source content in both the sciences and social sciences and humanities”.
2. Canadian universities spend “**millions more**” on their own site licences or on transactional licences that permit usage for specific works. This spending is not affected by the recent copyright reforms.
3. Canadian students still spend “**millions each year**” on print and electronic books. This spending is not affected by the recent copyright reforms.
4. Transactional licensing is becoming easier and more efficient. “The electronic environment has facilitated cheaper, faster licensing mechanisms that reduce overhead costs and allow institutions to ensure that payments are made where required”. Canadian universities have less need for the collective licence that Access Copyright offers.
5. The emergence of open access publishing has enabled free access (as the author intended) to millions of articles. Geist notes that a European Commission-funded report by Montreal-based Science-Metrix found that more than half of all research publications in some countries and fields of study are now freely available online. He says that Canada “is on the verge of joining those countries, falling just shy at 49 percent.” That percentage is only going to increase in the coming years: last week the EU announced a new open access target which would see all scientific papers freely available by 2020.²⁴

²³ <http://www.academicmatters.ca/2016/01/2279/>

²⁴ <http://www.sciencemag.org/news/2016/05/dramatic-statement-european-leaders-call-immediate-open-access-all-scientific-papers>

6. Universities are incorporating these licensed works - both paid and open access - into course materials. Geist notes that “institutions are paying for so many works that there is frequently a risk of double-payment. According to a Stanford University study in 2013, students were spending over \$100,000 on course materials that the university was already paying millions to license”.

Geist notes:

Access Copyright and its supporters argue that in addition to the millions being spent on access to materials, Canadian educational institutions should pay millions more for an Access Copyright licence to compensate for copying that falls outside of these new forms of access.

Canadian educational institutions would undoubtedly acknowledge that there are works being used that fall outside these new forms of paid access. The issue, however, is whether the usage qualifies as either insubstantial (a small amount that the law says falls outside copyright) or as fair dealing. If either apply, the copying is permitted by the law and no further compensation is required.

The Australian Copyright Council has suggested that the Canadian copyright reforms have resulted in the closure of Canadian publishers and “relocation of distribution activities to the United States”.²⁵ This claim has also been made by publishers in submissions to the Commission.

Universities Australia does not dispute that the Canadian educational publishing sector has been subject to disruption that has resulted in some players departing the Canadian market.

What we do dispute is that this has anything at all to do with copyright reform.

The US has had a fair use exception for much longer than Canada has had its fair dealing for education exception, and the educational publishing sector in that country is booming.²⁶

²⁵ Australian Copyright Council [Fair Use and the Productivity Commission](#) 2016

²⁶ Why Education Publishing Is Big Business <http://www.wired.com/2012/01/why-education-publishing-is-big-business/>

It would make very little sense to exit Canada in favour of a fair use jurisdiction if copyright reform truly was the reason that business in the educational publishing sector was declining in Canada.

The claim that fair use is a threat to Australian authors

Australian authors have been particularly vocal in their opposition to fair use. Universities Australia is concerned that much - if not all - of their opposition to this reform is based on a misunderstanding of how fair use would be relied on in the education sector. That's perhaps not surprising when bodies such as Copyright Agency/Viscopy, and the Australian Society of Authors, are telling them that their livelihoods will be at risk if Australia enacts fair use.

Regardless of how fair use is enacted in Australia, it is patently clear that a significant factor in determining whether a use is "fair" would be whether the use would impact on the rights holder's market. It can hardly be argued that universities using freely available internet material that no one ever expected to be paid for, or orphan works where the owner of copyright is either not able to be identified or located, would impact on anyone's "market". The fact that universities are currently required to pay for these uses is a significant flaw in the existing educational copying regime. Remedying that would cause no unreasonable prejudice to rights holders.

It's also worth noting that the Australian Society of Authors has publicly complained about the fact that under the current educational copying regime, it is publishers, not authors, who benefit the most. A report by the ASA, *Educational Publishing in Australia: What's in it for authors?*²⁷ includes the following:

To bolster declining profits, publishers have turned on authors and used their market dominance to force them to sign over all copyright for a one-off, minimal fixed fee rather than royalties, and forgo their right to additional sources of income such as CAL payments and Lending Rights payments. This means the ability for educational authors in Australia to make a living has been severely curtailed.

²⁷ https://www.asauthors.org/files/lib/pdf/zReports/ASA_Educational_Publishing_Report2008.pdf

Evidence from ASA members suggests that a number of large educational publishers are offering contracts that allocate all or a major portion of CAL payments to themselves. Some educational authors are asked to accept a mere 20% of payments from CAL and other collecting societies.

*The ASA is also aware of older contracts that have no clause covering collection or sharing of CAL payments, with publishers collecting for authors when they have no licence to do so and retaining funds to which they have no legal entitlement. **Authors are therefore being deprived of additional income.***

4. Safe harbours

Universities Australia strongly welcomes the proposed expansion of the copyright safe harbours to include universities and other online service providers. We agree with the Commission that this reform would:

- improve the ability of Australia's copyright regime to adapt as new online services develop;
- be consistent with Australia's international obligations; and
- operate as an important balance to the expanded protections for rights holders that Australia accepted as part of its international agreements.

This is a reform that we have advocated for more than 10 years, and it is now long overdue. In fact Australia is legally *obliged* to enact this reform in order to comply with its obligations under the US-AUSFTA.²⁸ Australia is also out of step with the rest of the world: the Attorney-General's Department has publicly stated that the Australian safe harbour scheme "has a more restricted scope than equivalent safe harbour schemes in the US, Singapore and Korea".²⁹ The EU and New Zealand can also be added to that list.

Some of those who are opposed to expanding the safe harbours have asked why universities are advocating for this. The reason is this: universities provide internet access to millions of students, teachers and academics, and that makes them vulnerable to claims of having authorised any infringements that may be carried out by staff and students using their systems.

²⁸ See Jane Ginsburg and Sam Ricketson, "Separating Sony Sheep from Grokster (and Kazaa) Goats: Reckoning Future Business Plans of Copyright-dependent Technology Entrepreneurs" (2008) 19 *Australian Intellectual Property Journal* 10, 29-30

²⁹ Revising the Scope of the Copyright Safe Harbour Scheme, 2011, Attorney General's Department <http://www.ag.gov.au/Consultations/Documents/Revising+the+Scope+of+the+Copyright+Safe+Harbour+Scheme.pdf>

Universities Australia also strongly welcomes the Commission's rejection of the proposal put forward by some rights holder groups there should be a trade-off between receiving the protection of the safe harbours and being subject to extended authorisation liability. This proposal had no basis in law or in policy and we are pleased to see that it has been rejected by the Commission.

5. Response to Commission's requests for further information

Proposed changes to educational statutory licences

The Commission seeks comment on whether the Government's proposal to simplify and streamline the educational statutory licences would result in an efficient and effective scheme.

Universities Australia strongly supports the proposed simplification of the statutory licences. We worked cooperatively with Copyright Agency/Viscopy, Screenrights, and the schools sector to reach agreement on a streamlined statutory licence that was based on the model recommended by the ALRC in its Copyright and the Digital Economy report. Together with these stakeholders we have communicated our support for the draft *Copyright Amendment (Disability Access and Other Measures) Bill 2016 (draft Bill)* subject to a small number of amendments, most of which are of a technical nature.

This reform would fix one of the flaws that the ALRC identified with the statutory licences; ie the fact that they are inflexible and overly prescriptive.

It is important to keep in mind, however, that the ALRC was also highly critical of the fact that the existing educational copying regime had resulted in universities and schools paying millions of dollars a year in public funds for uses that should be covered by unremunerated exceptions. The ALRC recommended *not only* that the statutory licences be simplified and streamlined, but also that the Act be amended to ensure that universities and schools are no longer required to rely on the statutory licence for uses that would be covered by a fair use exception. Universities Australia agrees with the Commission's observation that "absent broader reforms to Australia's copyright exceptions, simplification [of the statutory licences] will only go so far to reduce the administrative burden on users of the educational statutory licensing scheme".

In summary, while we consider that the proposed reform of the statutory licences is a significant first step in ensuring that the Australian educational copying regime is fit for purpose in a digital environment, there remains an urgent need to enact a fair use exception that can be relied on by universities and schools for uses that are "fair".

How would universities provide guidance for fair use?

The Commission has invited further submission on options that would be available to provide guidance in relation to fair use.

Universities Australia submits that the sectors that would be relying on fair use - including the university sector - would be well placed to develop guidelines, codes of best practice etc to assist in fair use decision making.

There is nothing unusual about this: the potential for industry guidelines and codes of practice as an appropriate policy tool in Australia, including in relation to copyright law, has been recognised for many years. See for example the News Limited supplementary submission in response to the ALRC Issues Paper, where News Limited discusses the code of practice for sports news reporting that emerged from discussions between news and sports organisations, with the assistance of the ACCC, and which is relied on by media companies when deciding how much sporting footage they can use in reliance on the fair dealing exception for reporting news. These companies, and those advising them, routinely rely on these guidelines to make decisions about how close they are to the line between infringement and fair dealing.

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

A good example is the Documentary Filmmakers' Statement of Best Practice in Fair Use'.³⁰ This document, which was developed in 2005 by documentary filmmakers with the assistance of legal advisors, contains a clearly understandable set of guidelines that are easy for filmmakers to apply. Prior to the development of the Statement of Best Practice, filmmakers who included third party content in their films in reliance on fair use often found it difficult and expensive to obtain "errors and omissions" insurance. Within a year of creating the code, "every single such insurer in the US offered it without incremental costs".³¹

³⁰ <http://archive.cmsimpact.org/fair-use/best-practices/documentary/documentary-filmmakers-statement-best-practices-fair-use#statement>

³¹ See Association of Research Libraries Briefing: Success of Fair Use Codes of Practice: http://www.arl.org/focus-areas/copyright-ip/fair-use/code-of-best-practices/2449-briefing-success-of-fair-use-codes-of-best-practices#.V0uUz_19600

Another example is the Association of Research Libraries (ARL) Code of Best Practices in Fair Use for Academic and Research Libraries.³² 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.

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 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.

Copyright and contract

The issues that the Commission has identified with respect to contractual override of exceptions are not confined to the library and archive exceptions.

While practices vary from publisher to publisher, much commercially published journal content is made available subject to contracts that purport to prohibit inclusion of content in course packs (a use that is otherwise permitted by the Part VB statutory licence) and prohibit electronic transmission of content between authorised users (which in many cases would be permitted by the fair dealing exceptions). Many contracts also expressly prohibit use of content for text mining and data mining, which has the potential to undermine the operation of a fair use exception if and when this is enacted.

Universities Australia strongly supports the enactment of a provision that would prevent contractual override of *all* statutory exceptions rather than a provision that was confined to one class of user.

We are also concerned that the enactment of a contractual override provision that applied only to the library and archives exceptions - as flagged by the Commission - would have the potential to cause a great deal of legal uncertainty and lead to unintended consequences. As the ALRC acknowledged in its Copyright and the Digital Economy report, the legal enforceability of contractual provisions that purport to override statutory exceptions remains unsettled.

³² <http://www.arl.org/focus-areas/copyright-ip/fair-use/code-of-best-practices#.V0uWYf9600>

This uncertainty is due in part to the existence of s 47H of the Act (which contains an express provision against contracting out in relation to computer programs) and the possibility that a court would apply the legal maxim *expressio unius exclusio alterius* - i.e. an express reference to one matter indicates that other matters are excluded - to conclude that Parliament intended that other exceptions could be overridden by contract.

Universities Australia is concerned that the enactment of further express limitations on contractual override may have the unintended effect of giving rise to an even stronger presumption that in singling out certain exceptions for protection from contractual override, Parliament was indicating a clear intention that other exceptions could be overridden by contract. At the very least, we think the Commission's draft proposal would give rise to even greater uncertainty than currently exists.

Conclusion

Australia's existing inflexible and unbalanced copyright law is no longer fit for purpose. It is affecting the ability of Australian universities to create and disseminate knowledge and is in urgent need of reform.

It is now more than 10 years since the JSCOT warned that extending our term of copyright by 20 years without also enacting fair use would "alter the balance" between copyright owners and users in a way that was detrimental to the broader public interest. Since then, four further reviews - including this review - have reached the same conclusion. Fair use fear mongering should not be allowed to stand in the way of this long overdue reform. The time has come for us to begin to discuss how, not if, Australia enacts fair use.