

UNIVERSITIES AUSTRALIA SUBMISSION

UNIVERSITIES AUSTRALIA SUBMISSION
TO COPYRIGHT AMENDMENT (ACCESS
REFORM) BILL 2021 AND REVIEW OF
TECHNOLOGICAL PROTECTION
MEASURES EXCEPTIONS

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INTRODUCTION

Universities Australia (UA) welcomes the opportunity to make a submission to the Government's consultation on the *Copyright Amendment (Access Reform) Bill 2021 and Review of Technical Protection Measures Exceptions* (the Access Reforms). We strongly support the Government's proposed Access Reforms and we are pleased to provide comment on both the Discussion Paper and proposed drafting in this submission.

UA is the peak body representing Australia's 39 universities. Our members are both users and creators of intellectual property. For this reason, Australian universities support the continuation of a robust copyright system that protects the rights of copyright owners, while allowing certain exceptions for publicly beneficial purposes. Copyright law should not be thought of only as part of the Government's creative policy. Copyright law now forms an essential pillar of Australia's education and innovation policies, which are central to the Government's broader digital economy strategy. Reform in this area is key to ensuring that Australia is a leading digital economy by 2030.

As the Government notes in its Discussion Paper, copyright law is an essential incentive for creators and their industries to produce Australian content and receive payment for their creativity. Equally, a well-functioning copyright system includes exceptions and limitations that will drive new creativity and innovation. UA agrees with the Government that encouraging and facilitating reasonable access to content is imperative.

The university sector has been vocal about the fact that the *Copyright Act (1968)* (the Act) is no longer fit for purpose and has not been for some time. The current inflexible exceptions regime operates as a significant roadblock to beneficial uses of copyright material that would cause no harm to rightsholders. Multiple reviews and inquiries over the past twenty years have recognised this and have responded by recommending that Australia introduce flexible exceptions. Both the Productivity Commission (PC) and the Australian Law Reform Commission (ALRC) recommended that Australia implement a fair use exception to ensure that the Act remains fit for purpose in a rapidly evolving environment.

It has been a source of great disappointment to the university sector that the recommendations of these inquiries have so far not been adopted. UA is, however, pleased to see that the Government's proposed Access Reforms are a valuable first step towards injecting that much-needed flexibility. The proposed reforms will enable universities, academics and students to use copyright material in publicly beneficial ways that cause no harm to rightsholders.

UA looks forward to engaging further with the Government to discuss proposed changes to s200AB of the Act. We consider the proposed removal of the current limitations on use of s200AB vital to ensuring that the policy intent behind existing exceptions is fully realised. Without these changes, UA does not consider that the potential of Australian universities' research output and commercialisation can be fully achieved.

We hope to see progress on these proposed reforms, while in the interim remaining committed to ensuring the introduction and passage of the Access Reforms.

UA RESPONSE TO THE EXPOSURE DRAFT ORPHAN WORKS LIMITED LIABILITY SCHEME

An example of the problem

"Our library collection contains physical photographs by unknown photographers. For example, physical photos of famous former politicians when they were younger, likely taken by a family member and then thrown in a shoebox that got donated to us by a friend/relative/collector. We have no way of knowing who took the photo. We would like to be able to scan photos like these and use them in a biography of that person on the library's website, or to promote use of the collection. A researcher may also want to publish a copy in a thesis. Without an orphan works exception, it is currently unlawful for university libraries to publish this sort of material."

UA strongly supports the Government's orphan works proposal. The proposed limited liability scheme strikes an appropriate balance between facilitating greater use of copyright material where no rightsholder can be identified or found, while at the same time protecting the interests of rightsholders who are subsequently identified.

Under the existing copyright regime, significant portions of university library collections remain inaccessible to the public. Universities are risk-averse institutions that will generally refrain from digitising and providing remote access to orphan works for fear of infringing copyright. As a result, content such as historical photos, diaries, letters, audio-visual content and newspaper articles remains effectively locked up. The orphan works scheme will greatly benefit researchers and the broader community as this content becomes publicly accessible.

The Access Reforms will also deliver economic benefits. In a 2016 report for the Department of Communications and the Arts, Ernst and Young estimated economic benefits of between \$10.3 million and \$20.6 million per annum from an Australian exception for orphan works. They also noted that, by definition, such an exception would cause no financial detriment to rightsholders, nor undermine the incentive to create new works.¹

UA is particularly pleased to see that the proposed orphan works scheme is intended to cover all forms of copyright material, including audio-visual material, and that the scheme will cover the commercial use of orphan works. As a protection for copyright owners, UA agrees that it is appropriate for a more comprehensive search to be conducted where there is an intent to use the material commercially.

We are also pleased that the Discussion Paper recognises that an expectation of commercial return is a relevant factor when considering the nature of the copyright material being used. In the university context, much orphaned content that would be of interest has clearly been created without any expectation of commercial return but could have enormous value to Australian researchers and students.

UA welcomes the proposal to permit universities to rely on the orphan works provisions rather than the s113P statutory licence where appropriate. Currently, universities and other educational institutions are required to rely on the statutory licence when using

¹ See <https://www.infrastructure.gov.au/sites/default/files/cost-benefit-analysis-of-changes-to-the-copyright-act-1968.docx>.

orphan works in teaching. The licence fees paid for these uses cannot – by definition – be distributed to the relevant copyright owner. Instead, these fees have been used by Copyright Agency in particular for purposes which include advocating against sensible law reform.² There is simply no policy reason why publicly funded educational institutions should continue to pay to use orphan works.

Ensuring that the scope of this scheme is wide enough to capture the vast array of copyright material currently held in university collections means that the Australian orphan works scheme will avoid the pitfalls of more limited schemes operating internationally. For example, UA is pleased to see that the Australian orphan works scheme does not include a requirement to register the use of orphan works – as is the case under the European Union Orphan Works Directive – or that it will require institutions to apply for a licence to use the orphaned material.

UA anticipates working with universities to develop codes of practice to assist university libraries and others in the sector who will rely on the proposed orphan works regime. We note that several guidelines already exist, including the National and State Libraries Australia (NSLA) ‘Position Statement: Reasonably diligent search for orphan works’³; and the NSLA ‘Procedural Guidelines for reasonably diligent search for orphan works’⁴.

UA makes the following specific comments about aspects of the drafting.

Reasonably diligent search – new s116AJA(2)

The draft bill would introduce new s116AJA(2) which would require a user to conduct a ‘reasonably diligent search for the owner or owners’ of the material being used. UA supports the inclusion of a diligent search requirement within the limited liability scheme. We are also pleased to see that the diligent search requirement is not overly prescriptive, recognising that what amounts to a diligent search will depend on the individual circumstances in each case. For clarity, UA submits that the ‘matters that may be considered’ set out in Table 1 of the Discussion Paper should be included in the bill’s Explanatory Memorandum.

However, as currently drafted, the new scheme would require any search to be conducted within a reasonable period before use is made of the material. UA submits that it should be permissible for a diligent search to be conducted either before or ‘as soon as reasonably practicable’ after the relevant use is made if the circumstances are appropriate. This would allow greater flexibility to make use of material that a person reasonably believes to be orphaned, whilst affording the same level of protection to rightsholders. It would be consistent with the Government’s proposed approach of requiring varying levels of effort dependent upon the nature of the copyright material, and the purpose and character of the use.

Interaction between limited liability scheme and s113P statutory licence

The wording of s116AJB(2) as currently drafted – dealing with circumstances involving ‘former’ orphaned works – would appear to prevent a university from relying on the statutory licence for such works. The effect of this drafting would be to require a

² Copyright Agency diverts funds meant for authors to \$15m fighting fund (smh.com.au) <https://www.smh.com.au/politics/federal/copyright-agency-diverts-funds-meant-for-authors-to-15m-fighting-fund-20170420-gvo10w.html>.

³ See <https://www.nsla.org.au/sites/default/files/documents/nsla.copyright-search-orphan-works-feb19.pdf>.

⁴ See <https://www.nsla.org.au/resources/procedural-guidelines-reasonable-search-orphan-works>.

university to engage in licence negotiations with an individual rightsholder for a use that would otherwise be remunerable under one of the statutory or voluntary licences held by the universities. UA submits that where a rightsholder comes forward to claim ownership of an orphaned work, continued use of that material should be covered under existing statutory and voluntary licensing arrangements which universities have in place.

Question 1.1: Orphan works: Application to Copyright Tribunal to fix reasonable terms

UA submits that the matters to be included in an application to the Copyright Tribunal to fix reasonable terms for ongoing use of a former orphan work should include at least the following:

- identify the copyright material relevant to the application
- state whether the applicant is the owner or exclusive licensee of the copyright material
- set out the circumstances or events giving rise to the application, including any steps taken to reach agreement with the respondent to the application
- set out the orders being sought.

UA further submits that the Regulations should set out [non-exhaustive] matters that the Copyright Tribunal must have regard to when making an order fixing reasonable terms, including at least the following:

- the nature of the copyright material, including whether it was created for personal consumption or without expectation of commercial return
- the purpose and character of the use/proposed use which is the subject of the application, including whether the use is commercial

FAIR DEALING FOR QUOTATION

An example of the problem

“The majority of copyright queries received at our university are around use of material in theses: it surpasses all the teaching and research queries combined. Approx. 200 hours a year are spent on checking the contents of student theses (to make sure there is no unauthorised third-party material) before they go online. By way of example, we had a student studying theology. They had included passages from a sermon written by a deceased priest in their dissertation but had to remove these when their thesis was made public. There was nowhere online for readers to locate that same material.”

UA strongly endorses the proposed fair dealing exception for non-commercial quotation. This exception will have enormous benefits for both students and staff, allowing more research to be quoted and disseminated to the public whilst at the same time reducing the current burdens placed on library staff.

As we have noted in previous submissions⁵, the current fair dealing exceptions for research or study, and criticism or review, are not sufficiently flexible to accommodate

⁵ See <https://www.universitiesaustralia.edu.au/policy-submissions/copyright/>.

the many ways in which students and academics want to use copyright content in publicly beneficial ways that cause no harm to rightsholders.

For example, students may currently rely on the fair dealing exception for research or study to include small amounts of third-party content in their theses, but that exception does not apply when the university makes the thesis publicly accessible on a digital repository. That means that the university is required to remove this content before uploading it to the repository – or risk being sued for copyright infringement – unless the student has been able to obtain permission from the rightsholder. When this happens, the integrity of the thesis is compromised, as is the ability for people to access publicly funded research.

Similarly, university researchers and academics are currently prohibited from using small amounts of third-party content in their conference papers and presentations. Unless the use can absolutely be deemed as ‘criticism and review’ – which in many cases it cannot – no exception applies and they cannot use the content unless they have been able to obtain a licence.

These limitations put Australia out of step with comparable jurisdictions. Most Australians would not understand that using text or images sourced from the internet for the purpose of illustration in a presentation is currently unlawful. The proposed quotation exception would go a long way to ensuring that Australian researchers are able to use copyright material for publicly beneficial uses in the same ways as their international peers.

UA strongly supports the clarification that universities would not be required to rely on the statutory licence for uses that fell within the proposed quotation exception. The 2020 Copyright Tribunal proceedings between Copyright Agency and the universities highlighted the fact that universities are currently required to pay under the statutory licence for uses such as the inclusion in teaching PowerPoint slides of:

- a drawing downloaded from the Cancer Council of NSW website;
- movie screenshots downloaded from the internet; and
- a photograph of an out of copyright drawing by Jean Honore Fragonard (who died in 1806) which is freely available on the Metropolitan Museum of Arts website.

These incidental uses of copyright material cause no harm to rightsholders. In each case, the content – which was being used by a lecturer to illustrate a point – had been made freely available on the internet with no expectation of payment. Notwithstanding this, Copyright Agency submitted before the Copyright Tribunal that such uses were remunerable under the s113P statutory licence.

UA supports the scope of uses and materials that the quotation exception is intended to cover and agrees with the Government that there is no policy reason to limit a quotation exception to certain kinds of copyright material only (such as text material **only**). The proposed quotation exception is already narrow in scope when viewed in the context of comparable jurisdictions, and UA submits that to limit the exception any further would be to put Australia out of step with our international peers. UA also notes that Article 10(1) of the *Berne Convention* imposes an obligation for an exception for fair quotation.⁶ The proposed fair dealing for quotation exception would mean that Australia would at last meet that requirement.

⁶ S Ricketson and J Ginsburg, *International Copyright and Neighbouring Rights: The Berne Convention and Beyond* (2nd ed, 2006) Vol I, 783.

UA makes the following specific comments about aspects of the drafting.

Users for which quotation is permissible – new s113FA(1)

First, this section introduces an exhaustive list of uses for which it will be permissible to rely on the fair dealing exception, including ‘a person or organisation for the purpose of research’. UA supports the range of users that the quotation exception will extend to, noting that the Discussion Paper includes references to educational institutions and libraries as well as individuals such as academics, teachers, students and library staff. We are also pleased to see that the Discussion Paper notes research organisations – such as scientific, medical or industrial research organisations – would also be able to rely upon the exception. For the avoidance of doubt, UA recommends that these users are included as examples in the bill’s Explanatory Memorandum. Similarly, UA also recommends that the table of non-exhaustive examples set out on page 16 of the Discussion Paper be incorporated into the Explanatory Memorandum. These examples will ensure that university staff and students are provided with sufficient guidance to be comfortable using the exception in their research and presentations.

Secondly, as to s113FA(1)(a)(vii), UA submits that it would be preferable for the stated purpose to be ‘research or study’, rather than research only. While these two words have slightly different dictionary definitions, in practice, universities, academics and students are familiar with the language of ‘research or study’ when relying on the existing research or study fair dealing exceptions, and do not stop to parse the language when determining if their proposed activity can be characterised as only ‘research’ or ‘study’. We are concerned that the proposed drafting may cause confusion and has the potential to be construed by a court as applying to a more limited range of activities than are covered by the research or study fair dealing exception.

Thirdly, the Discussion Paper notes that dealing with copyright material ‘for the purpose of research’ extends to making the research public, including by making the research findings online. For the avoidance of doubt, UA recommends that this clarification be included in the bill’s Explanatory Memorandum.

Relevant matters under the fairness factors – new ss113FA(2) and (3)

UA welcomes the inclusion of fairness factors that are consistent with the factors set out in section 113E relating to disability copying. Specifically, we welcome the Government’s inclusion of four fairness factors rather than five.

UA recommends that the relevant matters set out in Table 4 of the Discussion Paper be included in the bill’s Explanatory Memorandum (as they are with s113E), including that the mere availability of a licence will not be determinative of whether a use is ‘fair’. We consider that the wording in the Explanatory Memorandum for the *Copyright Amendment (Disability Access and Other Measures Bill) 2017* with respect to the third factor in s 113E(2) is appropriate. That is:

this factor requires an analysis of whether the proposed use of copyright material is reasonably fair with regards to the interest of the copyright holder. If material is commercially available, factors one, two and four become more important, noting that a use may still be considered fair even if the material is commercially

*available. Only substantial market harm from the individual use should be considered unfair.*⁷

This will provide important guidance to users and the courts.

Copyright material that has been ‘made public’ – new s113FA(1)(c)

UA submits that there is no policy reason to limit the exception to material that has been made public before it may be relied upon.

As the Discussion Paper notes, this limitation would prohibit quotation from materials such as unpublished letters or images (for example, material bequeathed to universities). The Discussion Paper notes that this limitation could make the quotation exception less effective and more difficult to administer, and it is UA's view that this assertion is correct. UA recommends that the proposed exception should apply to unpublished material in the same manner as it is expected to apply to published materials. This approach is supported by the ALRC. When considering Article 10(1) of the *Berne Convention* (that is, the provision that mandates a fair quotation exception), the ALRC noted that:

*The first requirement [of the Berne Convention], that the work be ‘lawfully available to the public’, is not a requirement of existing fair dealing exceptions under the Copyright Act... In any case, there seems to be no need to limit a fair dealing for quotation exception to material lawfully available to the public, as the requirement under the Berne Convention should be seen as providing the minimum scope of a quotation exception. There is nothing to prevent a broader exception, within the confines of the three-step test.*⁸

There is a large volume of material held by university libraries that is unpublished and limiting the exception to published material would create unnecessary uncertainty. The effect may be to reduce reliance upon the exception, as universities err on the side of caution. As the quotation exception is currently limited in terms of the scope of users, and purposes for which it may be relied upon, there is no real risk that extending the exception to unpublished materials would cause harm to rights owners.

LIBRARY AND ARCHIVE PROVISIONS

Examples of the problem

“We had a woman request a copy of her father’s thesis. She wanted to surprise him with a copy as a gift because he had lost his when he returned to his home country decades ago. Her use did not fall under current Document Delivery provisions because it was not for “research or study”, and she was not the copyright owner herself. In the end, we had to deny her request.”

“Our university is at the forefront of an Australian effort to ensure that digital content is not lost to the research community as a result of having been created using computer file

⁷ Copyright Amendment (Disability Access and Other Measures Bill) 2017, Explanatory Memorandum, page 15: https://parlinfo.aph.gov.au/parlInfo/download/legislation/ems/r5832_ems_6286f247-9092-48bd-aac1-d771a2c7ee30/upload_pdf/625196.pdf;fileType=application%2Fpdf

⁸ Australian Law Reform Commission, *Copyright and the Digital Economy*, Final Report (2013) par 9.62-9.64 https://www.alrc.gov.au/wp-content/uploads/2019/08/final_report_alrc_122_2nd_december_2013_.pdf

formats that have become obsolete. The project involves what is known as 'Emulation-as-a-Service' (EaaS).

Collecting institutions including university libraries have vast holdings of digital content that were created using file formats that have become obsolete. The software programs that are needed to read them are no longer available. The result is that this content is at risk of falling into a black hole.

Emulation involves the development of software that mimics the behaviour of a legacy software environment. Through EaaS, US university libraries, and the German National Library are providing the research community with access to emulated environments that enable them to access digital content that would otherwise be inaccessible.

While the library and archives preservation and research exceptions can be relied on to make preservation and research copies of obsolete software, and to provide users with access to these copies for research purposes, the exceptions are currently restricted to providing on-site access via dumb terminals.

The proposed amendments which would enable libraries and archives to provide remote access to preservation and research copies made in reliance on those exceptions is critical to achieving this."

UA strongly supports the proposed changes to the library and archive provisions. The Access Reforms will significantly reduce the administrative burden associated with document supply. They will also enable university libraries to make more of their collections available to remote users, without creating harm to rightsholders.

Currently, if a copy request is made and fulfilled, the library must not only keep a full record of the request, but also immediately delete the copy made. If the same material is requested a week later by a different user, the university must repeat the entire process. There is no scope to avoid this replication by reusing previously copied material. This is particularly frustrating in a university environment where libraries will often be responding to requests from multiple researchers working on similar topics and requesting copies of the same material. The proposed changes will remove unnecessary red tape such as this without impacting on any legitimate commercial market.

UA makes the following specific comments about aspects of the drafting.

Making material available online – new s113KC

UA welcomes the introduction of new s113KC which will allow university libraries to make more of their collections available to staff and students remotely. We note that the Discussion Paper makes it clear that these provisions will not allow libraries or archives to become quasi-e-book or streaming services, or to displace the acquisition of commercial products where these are available. As UA has repeatedly asserted, our members have no intention of engaging in the sorts of activities that seek to compete with the commercial markets of rights owners.

We support the inclusion of a commercial availability test within this provision. The university sector, and libraries in particular, have much experience applying the principles of commercial availability.

UA notes the concerns held by some rights owners that s113KC(1) does not require a commercial availability test to be conducted where copyright material acquired in electronic form is made available online. However, online access to library collections is inherently limited to users who would have access to the library's physical collection. Online materials are not made available to the general public. This provision will simply allow libraries to provide their user community with reasonable and equitable access to library collections. By way of example, libraries would be in a position to respond to situations such as forced campus closures as a result of COVID-19, or natural disasters like floods and bushfires. Providing remote access is essentially the extension of a core function of the university library in response to the growing reliance on online access that university staff and students have come to reasonably expect.

We believe that the inherent limitations within the proposed new provision (including the requirement for the library to take reasonable steps to ensure that users accessing material online do not infringe copyright in the material) are more than adequate to protect the legitimate interests of rightsholders. UA submits that concerns expressed by some rightsholders that these provisions will lead to widespread copyright infringements are vastly exaggerated and unsubstantiated.

Document delivery and inter-library loans

UA is supportive of the extension of the document supply provisions to cover 'private and domestic use'. This amendment will help to clarify the circumstances where it is permissible to supply material to certain users. Similarly, UA welcomes the extension of these provisions to cover any copyright material, including audio-visual material. University library collections are made up of an increasing volume of this type of material, and the impact of library closures during the COVID-19 pandemic has particularly impacted the supply of these resources to students, staff and other libraries.

UA is pleased that the new provisions will continue to allow requests to be made orally in appropriate circumstances, and for declarations to be signed electronically. We also support allowing another person to make a request on behalf of a user. These provisions ensure that libraries can respond flexibly to the individual circumstances of students and staff and are crucial for the efficient operation of the document supply system.

Question 3.1: Reasonable steps to ensure that copyright is not infringed

University libraries are responsible, risk-averse custodians of copyright material. They have a well-established track record of protecting the rights of copyright owners and ensuring that copyright is not infringed by themselves or their users. UA supports the steps set out in the Discussion Paper, including limiting access to registered library users with password protection the inclusion of a copyright notice. UA would welcome the inclusion of these steps within the Explanatory Memorandum, provided that enough flexibility is retained for universities to adapt to changing uses, technologies and circumstances.

EDUCATION EXCEPTIONS

UA welcomes the changes to the education exceptions in ss28 and 10 of the Act to render each of these exceptions material and technology neutral. As the Discussion Paper notes, these amendments will ensure that Australia's education copying

exceptions better support contemporary teaching methods. As UA has stated in previous submissions⁹, a modern education system requires flexible, technologically neutral copyright exceptions that allow pedagogical evolution. The university sector's experience throughout the COVID-19 pandemic in particular has shown that Australia's educational copying provisions are out of step with global best-practice and the ways in which students and teachers expect to be able to engage with educational content.

UA welcomes the removal of uncertainty around the operation of the classroom teaching exception currently contained in s28 (new s113MA). Universities are well placed to protect the rights of copyright owners when relying on this exception, including by restricting access to students through the use of usernames and passwords. These are measures that universities already take to protect the rights of copyright owners when making material available to students online, and universities will continue to implement these practices.

UA looks forward to engaging further with the Government in substantive discussions regarding much-needed reform to s200AB of the Act.

CONCLUSION

UA is pleased to be a part of this consultation on behalf of our 39 member universities, some of which have made individual submissions.

For many years UA has consistently recommended that the Government update the Act to bring it in line with the ways that Australian education institutions, research organisations and the wider community access and share content. The COVID-19 pandemic only served to highlight the limitations of the existing copyright framework, with institutions forced to close campuses and students required to quickly adapt to online learning. Unfortunately, Australia's inflexible copyright laws were unable to adapt to meet the changing circumstances in work and learning that were faced across all sectors during the pandemic.

The Government's proposed reforms will go a long way to addressing many of limitations that are holding Australian universities and researchers back. The current reality is that Australia's prescriptive, purpose-based copyright exceptions put our universities and our innovative industries at a competitive disadvantage. Universities and research institutions are the backbone of Australia's innovation output. Without these amendments, Australia will not be able to meet its goal of becoming a leading innovative nation by 2030.

These reforms are a vital first step to ensuring that Australia is able to achieve this goal. UA strongly supports the Government's proposal and looks forward to working with the Department further in relation to amendments to s200AB of the Act.

⁹ See <https://www.universitiesaustralia.edu.au/policy-submissions/submissions/#area=copyright>.