



# Copyright Modernisation Consultation Response

Submitted July 2018

## Contact information

PO Box 8169  
Australian National University  
ACT 0200

[cpo@caul.edu.au](mailto:cpo@caul.edu.au)

[www.caul.edu.au](http://www.caul.edu.au)

Phone +61 2 6125 2990

## Introduction

The Council of Australian University Librarians (CAUL) appreciates the opportunity to respond to the Department of Communication and the Arts' *Copyright modernisation consultation paper* regarding options for important reforms to the *Copyright Act 1968 (Cth)*. CAUL is the peak leadership organisation for university libraries in Australia.

University libraries are deeply engaged in shaping the scholarly information environment at their respective institutions. Since scholarly information, in all its forms, underpins university research, teaching and engagement, the remit of the library is necessarily broad, encompassing information support for cutting edge research, teaching and, often, extensive responsibility for cultural collections. Responsibility for managing copyright and compliance at most universities is also organisationally located within the library.

This submission is the product of the direct and practical experience that academic libraries have gained through assisting the university community to manage their copyright rights and obligations across the broad spectrum of university activities. Clearly, CAUL has a particular interest in the libraries and archives provisions of the *Copyright Act*, but our interest is not limited to this sphere. Commensurate with the broad brief of the university library, this response reflects many of the points where copyright intersects with research, teaching and collections in the university context.

As the Department recognises, the digital landscape is shifting at unimaginable speed, opening up research possibilities, teaching technologies and whole fields of study that were unforeseen even a decade ago. There has been a paradigm shift in the use of technology and the availability of information that shows no sign of abating. Despite many amendments, copyright law has not kept pace with this rate of change. This cycle is set to continue as new technologies and unforeseen uses emerge.

Every day, university libraries and their copyright officers work to reconcile the current copyright framework with academic endeavour. It is a challenging and often thankless task as copyright is often perceived as placing barriers in the way of innovation, preventing researchers and teachers from fully realising the benefits of new technologies. Without a significant change in the approach to copyright, the ability of universities to innovate will be compromised, especially when compared to universities in comparable jurisdictions.

CAUL stands in agreement with Universities Australia (UA) and the Australian Libraries Copyright Committee (ALCC) that reform of Australia's copyright system must be evidence based, and must allow copyright material to be used in ways that are fundamentally fair, facilitating advancements in research, education, science and innovation that are beneficial for Australian culture and society.

To achieve these aspirations, CAUL actively seeks solutions that offer flexibility for both rights holders and users. A system that embraces flexibility is the only way in which we can build the agility needed to respond to a rapidly changing world. For this reason, CAUL supports the introduction of an open-ended 'fair use' style copyright exception as the only option that will guarantee Australia's copyright system is genuinely adaptable, effective, and future-proof.

The introduction of flexible arrangements where use is determined according to a ‘fairness test’ will ensure that Australian copyright law has the capacity to respond to an environment of relentless change. This will act as a major step towards achievement of the Department’s aspiration to create a system that is truly modern and fair for all stakeholders.

This consultation offers the opportunity to address many of the concerns that university libraries experience at their respective institutions. There is an opportunity to redress the balance between protecting the rights of copyright owners and meeting the public need to access copyright information. It is an opportunity to remove legal impediments to new research and teaching technologies that do not threaten primary markets; to remove the laborious and absurd administrative processes that accompany orphan works; and to ensure that exceptions made in the public interest cannot be contracted out.

**To address these challenges CAUL recommends that:**

1. An open-ended ‘fair use’ style copyright exception is adopted in order to guarantee Australia’s copyright system is genuinely adaptable, effective, and future-proof
2. The four fairness factors from s 113E are adopted as they represent an international standard for ‘fairness’
3. A principles-based ‘fair use’ exception be accompanied by illustrative purposes that are neither exclusive nor prescriptive, and that do not limit the uses that might be considered ‘fair’. The existing six fair dealing exceptions as well as the seven new purposes nominated in the Department’s consultation paper should be included as illustrative purposes
4. As a second preference, fair dealing exceptions be extended with seven new prescribed purposes in addition to the six existing purposes. This alternative will be supported only if a principles-based ‘fair use’ style exception is not adopted
5. s200AB is repealed in favour of a ‘fair use’ style exception
6. The existing libraries and archives exceptions, namely ss49, 50 and 110A, are modernised in line with the recent amendments to the preservation, administration and research exceptions
7. A ‘fair use’ style illustrative purpose for libraries and archives is adopted to allow flexibility and innovation in the use of collections based upon an established test for fairness
  - 7.1. In addition, CAUL supports the introduction of a specific standalone statutory exception to cover operational and non-commercial uses of copyright material by libraries and archives for core services
8. All exceptions in the Copyright Act are protected from contractual override
9. A ‘fair use’ style illustrative purpose for orphan works is adopted to allow flexibility in the use of orphan works based upon an established test for fairness
  - 9.1. In addition, CAUL supports the introduction of a specific standalone statutory exception to cover non-commercial uses of orphan works by educational institutions, libraries and archives, and key cultural institutions so that they are able to fulfil their public mission to make works accessible

## Background to the response

Question 1 Flexible Exceptions .....	1
CAUL supports a ‘fair use’ style exception.....	1
Appropriate ‘fairness factors’ .....	2
Are additional fair dealing exceptions a long-term solution? .....	2
Illustrative purposes.....	3
Incidental or technical use .....	4
Text and data mining .....	4
Library and Archives.....	5
Certain educational uses.....	6
Question 2 Changes to Other Copyright Exceptions.....	9
Section 200AB should be repealed in favour of a fairness-based exception.....	9
Sections 51 - 52.....	9
Questions 3 & 4 Contracting Out of Copyright Exceptions.....	10
Question 5 Orphan Works .....	12
Conclusion.....	15
Abbreviations.....	15

### Question 1 Flexible Exceptions

#### CAUL supports a ‘fair use’ style exception

Australian university libraries actively seek solutions that offer flexibility for both rights holders and users. A system that embraces flexibility is the only way in which we can build the agility needed to respond to a rapidly changing world. For this reason, CAUL supports the introduction of an open-ended ‘fair use’ style copyright exception as the only option that will guarantee Australia’s copyright system is genuinely adaptable, effective, and future-proof. Further, a fair use style exception embodies the flexibility to support innovation.

### Appropriate ‘fairness factors’

Any statutory fairness test must be perceived as ‘fair’ by both rights holders and users. This will be critical to the success of a fairness-based exception – it protects the rights of all stakeholders.

CAUL submits that the fairness factors from s 113E (*Fair dealing for purpose of access by persons with a disability*) will fulfil this function for both rights holders and consumers. These four fairness factors, used in the US and other jurisdictions, represent an international standard for ‘fairness’ and more closely align with the recommendations of the ALRC and PC reports to introduce ‘fair use’ in Australia<sup>1</sup>. They can be used by risk-averse library and educational institutions to reduce risks encountered in undertaking their core functions. The fairness factors would ensure that large-scale commercial uses would not be eligible for protection under this exception, requiring appropriate permissions and licences to be sought.

In considering any potential fairness factors within the Act, our view is that the following clause (currently found in the fairness test for s 40(2)(c) (*Fair dealing for purpose of research or study*)) should **not** be used:

‘the possibility of obtaining the work or adaptation within a reasonable time at an ordinary commercial price;’

This test is not relevant to many digital activities, and its market-related function can be achieved through a fairness test such as s 40(2)(d) or s 113E(2)(c) that considers the ‘effect of the dealing upon the potential market for, or value of, the material’.

### Are additional fair dealing exceptions a long-term solution?

CAUL reiterates support for the introduction of an open-ended ‘fair use’ style copyright exception as the only option that will support innovation and guarantee that Australia’s copyright system is genuinely adaptable, effective, and future-proof. However, the Department’s consultation paper invites consideration of ‘additional fair dealing exceptions for new specific purposes’ as an alternative.

CAUL agrees that this option may resolve some of the current problems encountered by universities but is doubtful it will prove to be an effective long-term solution. The fact that *seven* potential new prescribed purposes have been put forward as part of this consultation indicates the scale of the problem. How many more exceptions will be needed in coming years to manage unforeseen uses and social needs?

Given the rate of ‘exponential change’ in society, there will be new uses and new challenges on the horizon, rendering the new exceptions obsolete, and creating the need for new ones. There will inevitably be delays while the legislation catches up again. This cycle will repeat itself, accompanied by attendant frustrations for users who are trying to work within the legal framework. As the

---

<sup>1</sup> ALRC *Copyright and the Digital Economy* final report, para 5.1 (<https://www.alrc.gov.au/publications/5-fair-use-exception/summary>); PC *Intellectual property arrangements -final report* - recommendation 6.1, p. 193 (<https://www.pc.gov.au/inquiries/completed/intellectual-property/report/intellectual-property.pdf>)

consultation paper observes, the ‘evolution of the fair dealing regime may not be keeping pace with the exponential rate of change in contemporary society.’<sup>2</sup>

The addition of seven new purposes for fair dealing will make the Act even more complex for non-expert users to navigate.

Nevertheless, if this alternative is adopted, CAUL recommends that the existing six prescribed purposes for fair dealing must be retained, and we also endorse all seven of the new prescribed purposes.

### Illustrative purposes

A principles-based fair use exception should be accompanied by illustrative purposes that are neither exclusive nor prescriptive, and that do not limit the uses that might be considered ‘fair’.

CAUL supports the retention of the existing six fair dealing purposes as illustrative purposes, as well as the addition of the seven new purposes nominated in the Department’s consultation paper as these address immediate concerns of our communities.

CAUL offers comment on the following illustrative purposes:

#### Quotation

‘It shall be permissible to make quotations from a work which has already been lawfully made available to the public, provided that their making is compatible with fair practice, and their extent does not exceed that justified by the purpose, including quotations from newspaper articles and periodicals in the form of press summaries.’ (*Berne Convention*, Article 10.1)

Quotation from works of all kinds is a cornerstone of academic practice, used as evidence for argument and importantly, as examples. The right to make quotations of a general nature without asking for permission from the copyright owner is permitted by the Berne Convention and is allowed in comparable jurisdictions such as the UK and the US, provided the use is ‘fair’ and the author is acknowledged. Yet, in Australia, academics are restricted to using quotations that fall within limited specific fair dealing purposes, most commonly for research or study, or criticism and review.

In practice, these purposes are highly restrictive, as many quotations do not fit into a neat category. The ALRC observed ‘in many cases quotations will not be directly for ‘criticism or review’ or ‘research or study’, but for other purposes, such as academic publication, that serve important public interests.’<sup>3</sup> For example, a quote or image that only serves as an example does not meet the purpose requirements for ‘criticism and review’, so it cannot be used in a conference presentation or in a public lecture. This curtails sharing knowledge with the public and with colleagues.

A particularly anomalous situation applies to the treatment of theses. A PhD student can make use of third party works in his/her thesis under fair dealing for research or study. However, for the same

---

<sup>2</sup> Australian Government, Department of Communication and the Arts, *Copyright modernisation consultation paper*, p.

9. <https://www.communications.gov.au/have-your-say/copyright-modernisation-consultation>

<sup>3</sup> ALRC, *Copyright and the Digital Economy* <https://www.alrc.gov.au/publications/9-quotation/fair-use-and-quotation>

thesis to be made available online through an institutional repository, copyright permissions for all third party content - including graphs, figures and images - must be obtained. This process is burdensome and often simply not possible. In some instances, the rights holder cannot be located; in other instances, when the rights holder can be located, they may not respond to the request at all, or they may demand an exorbitant licence fee for the use.

It is also noteworthy that the 'research or study' fair dealing exception does not apply to collaborations with industry that are encouraged both by universities and governments, but may be construed as commercial activities.

Not only must quotation fall within a specific fair dealing purpose, it must also meet a complex substantiality test requiring judgements about quality and quantity. This adds a perplexing layer for academics who often have no idea that their right to quotation is limited in this way. Academics commonly assume they are entitled to quote in support of their position. The right of quotation is an area where current copyright law is out of step with expectations and understanding in the community.

Allowing extracts of copyright material, including visual and audio-visual works, to be used in an illustrative manner in theses, publications and conference presentations - subject to a fairness test - will increase the discoverability, accessibility and reusability of Australian research outputs, as well as increase the speed within which research is made available. Our clients will also be able to fairly and appropriately utilise library and archival collections in ways that are currently not permitted by copyright legislation.

### **Incidental or technical use**

CAUL welcomes a broad copyright exception that allows for incidental and technical use, permitting researchers to fully engage with innovative digital research practices and participate in international research projects on an equal footing. This particularly applies to research in 'big data', artificial intelligence, text and data mining, digital humanities and cloud computing, all of which rely upon making digital copies as part of the process. Australian researchers are constrained by a copyright regime that generally precludes these activities even though they are often non-consumptive. These new uses would be better served by a broadly based fairness test that is technology-neutral and extends to all formats.

### **Text and data mining**

The absence of an appropriate exception to enable data and text mining places Australian universities and their communities at a competitive disadvantage compared to researchers and educators in other jurisdictions. It is a barrier that is preventing research projects from proceeding.

At one university, a research student proposed a project to text mine a corpus of materials available on the open web to identify health-related messages that may change over time. This is socially useful, non-commercial research, but it has been impeded by copyright because the technical process involves making a copy of the corpus of works so that an automated web crawler can 'mine' the data. It is hard to see how this use would damage the market for, or value of, the underlying works that are otherwise available on the web. In other jurisdictions, this may well be considered a 'fair' use.

It is noteworthy that the same student employed a second strategy in an effort to complete her research project. In this instance, she sought permission to use a body of material that was available through a licensed library database, but the vendor requested an impossible sum to process the body of material, so the research could not proceed. Universities should not be expected to pay additional licence fees for technical and incidental copying, and for text and data mining where the use is non-consumptive.

In line with our preference for a 'fair use' style exception, CAUL would prefer to see an illustrative purpose established for both 'incidental or technical use' and for text and data mining. This would remove some of the barriers to innovative research, making transformative uses possible subject to an established fairness test. For the reasons outlined earlier in this paper, CAUL supports a fairness test based upon the four fairness factors from s 113E, rather than the five factors proposed in ss 40, 103C.

If a 'fair use' style framework is not introduced, CAUL would support the introduction of separate fair dealing exceptions for this purpose.

If a broadly based exception for 'incidental and technical use' comes into force, CAUL would support the repeal of existing measures within the Act, especially if the nature of the use was explained in the EM.

*Non-commercial use.* CAUL submits that any new fairness-based exception that permits 'incidental or technical use' and text and data mining, should **not** be limited to non-commercial uses. This will have a damaging effect on building collaborations with industry and potential commercialisation. Further, the UK restriction to 'non-commercial' purposes has proved to be difficult to interpret and problematic. A robust fairness test should manage any negative effects for rights owners.

## Libraries and Archives

CAUL supports the introduction of a specific illustrative purpose for libraries and archives to assist with interpretation of the fairness factors in a 'fair use' style framework. However, as a secondary option, we would support the creation of a prescribed fair dealing purpose. CAUL welcomes the prospect of an exception that would cover all forms of copyright material.

Greater flexibility is required for libraries and archives to undertake activities that fulfil their mission to make cultural collections accessible to greater audiences and to enrich and preserve cultural heritage. Libraries and archives, and their clients and researchers would be encouraged to use collections in new and innovative ways subject to the fairness test. It opens up possibilities for collections. Such activities might include:

- Digitisation programs for selected collections
- Digital archiving
- Providing access beyond that permitted by 'research or study'
- Including collection material in exhibitions with entry fees that are semi-commercial
- Including selected collection material in specialist publications or in public lectures and presentations
- Enabling use of orphan works

- Collaborating with industry partners in key exhibitions and projects

These activities are not necessarily strictly non-commercial. CAUL would prefer to see limited commercial applications for libraries and archives such as using collection materials in publications and catalogues and charging for exhibitions. In this model, the interests of rights holders would be protected by the fairness test to ensure that the use remained 'fair'. For reasons noted elsewhere in this response, CAUL supports a fairness test based on the four fairness factors from s 113E, rather than the five factors proposed in ss 40, 103C.

In addition, CAUL supports the retention of a specific standalone exception for libraries and archives to support non-controversial operational activities such as interlibrary loan and preservation. This should not limit the fair use/fair dealing exception. This could possibly be limited to non-commercial use and to use 'by or on behalf of' a library or archive.

*Modernising existing exceptions.* CAUL supports the Department's proposal to modernise a number of existing library and archives exceptions, namely ss 49, 50 and 110A, in line with the recent amendments to the preservation, administration and research exceptions. CAUL agrees that the modernised library and archive exceptions should be expanded to include all copyright materials (audio-visual items as well as works), and should apply equally to published and unpublished copyright materials, both new and old.

### Certain educational uses

CAUL supports the creation of a fair use style exception with a specific illustrative purpose for educational uses. This will allow universities the flexibility to take advantage of new and innovative educational technologies and media in ways that do not cause harm to rights holders. The latter would be determined by a fairness-based test based on established principles. As a second preference, CAUL supports an additional fair dealing exception that is sufficiently open-ended to allow flexibility.

Like UA, CAUL submits that a statutory licence will be in place to allow educational uses of copyright material that are not permitted by any other exception or licence. The statutory licence provides a process for remuneration of copyright owners without requiring universities to ask for permission. Through payment of licence fees to Copyright Agency over many years, universities have proved they are willing to pay for legitimate educational uses. Nevertheless, CAUL argues that universities **should not** be required to pay for uses that are inconsistent with the fundamental principles of copyright and should be non-remunerable.

The Department's roundtable *Quotation and educational use: models for further consultation* paper states that an additional fair dealing exception for educational use would clarify 'in statute that statutory licences do not apply to a use of copyright material which, because of another provision of the Act, would not infringe copyright.'<sup>4</sup> This appears to perhaps clarify s 113Q(2) in the new streamlined statutory licence where it states that copying will be licensed under the statutory

---

<sup>4</sup> Australian Government, Department of Communication and the Arts, *Quotation and educational use: models for further consultation*.

licence when the copying does not infringe copyright ‘*only* because of section 113P’. In other words, reliance upon the statutory licence only comes into effect when no other exceptions are available.

To be workable, s 113Q(2) needs to be supported by appropriate exceptions, such as an open-ended fair use exception or, at least, additional fair dealing provisions. Without appropriate exceptions within the Act, it will be of limited value.

In practice, the net of the statutory licence has been cast too wide and CAUL contends this needs to be wound back. At present, universities find they must remunerate authors for the use of works even when they were created for public good, where there is no market harm and remuneration was not the intention. Educational use of materials made available on the internet is a good starting point. The following two examples may help to illustrate the extent of this problem.

Annual reports are created by government departments and companies as part of their reporting or regulatory requirements, and they are often available in full text on the internet. In some cases, reports are marked with a Creative Commons licence which allows re-use. But where this has not happened, it is difficult to see how the reproduction of a portion for teaching purposes could lead to market harm or loss of remuneration. Nevertheless, if a business school wishes to copy a portion of an annual report for teaching purposes, it must rely on the statutory licence, remunerating for that use. A fair use style or fair dealing exception for educational uses would enable universities to apply a fairness test for this use.

Another example reported by a university occurred when copying extracts of State legislation for teaching purposes. The legislation was available on the web but terms of use were unclear, and obtaining advice from the State proved difficult and protracted. The selected portions required for teaching were then copied in reliance on the statutory licence, amounting to a remunerable use for material that was not created with any expectations of payment. This use is another example of the need for a fairness-based test that would test the boundaries and scope of the statutory licence.

Using orphan works is another example where the statutory licences affects our ability to teach. Even though the copyright owner cannot be identified or found, universities are still expected to report and remunerate CA for copying part of the work under the statutory licence. This leads to an absurd scenario where CA cannot locate the copyright owner, holds the fees in trust for four years and then re-distributes these monies to rights holders who are not the creators of the copied work.<sup>5</sup> A fairness-based exception or a specific exception for the use of orphan works would help to re-establish balance in the remuneration that universities are expected to pay under the statutory licence.

The Department’s *Quotation and educational use: models for further consultation* paper suggests that the EM should clarify that the exception for educational uses is ‘not intended to prevent or

---

<sup>5</sup> UA ^*Review of the code of conduct for copyright collecting societies* p. 6-7. UA reports that the monies held in trust have also been diverted to build a fund to advocate against fair use <https://www.universitiesaustralia.edu.au/Media-and-Events/submissions-and-reports/Review-of-the-Code-of-Conduct-for-Copyright-Collecting-Societies>

significantly reduce licensing of education use of copyright material.’<sup>6</sup>Nevertheless, as the examples above illustrate, there are some situations where it would be both fair and reasonable for some transactions under the statutory licence to be reduced through the application of a fairness-based test. It would be unfortunate if the drafting of the EM militated against these reasonable reforms.

The university sector pays the collecting societies over \$35 million in fees each year for use of the statutory licences. The overall cost to the universities is probably inflated by the fact that the reach of the statutory licence extends further than is warranted. CAUL supports UA’s submission that Australian universities are currently paying far more than their international counterparts for a broadly equivalent licence, due to the overly comprehensive and restrictive nature of the educational statutory licence.

The sheer complexity of the educational provisions of the Copyright Act is another reason driving CAUL’s support for a fair use style exception. Universities operate complex IT systems to manage the day to day administration as it is too difficult for academic teachers to interpret how they are able to incorporate third party materials into their teaching. For example, film and video are important resources in current teaching practice. However, they are also very complex to actually use. As one copyright officer reported:

*Audio-visual material is treated differently under the Copyright Act depending on whether it is a commercial DVD, a digital file or a copy of a broadcast. This creates confusion and frustration.... S28 of the Copyright Act allows a lecturer to show a film from a commercial DVD in class. However, if the lecturer wishes to record the lecture to make it available to students via the LMS as a study aid or as part of the flipped classroom, the film cannot be included in the recording as s28 only allows copyright material to be performed in class, and it does not cover reproducing material.*

The source of the video and its format is treated as more important than the content under the educational provisions, whereas for teaching, it is the content that is important. Furthermore, the same university reported that it is particularly difficult to gain permission to use film. These are barriers to the use of film for non-commercial educational purposes, and they are out of step with community expectations. The introduction of a fair use style exception would, at least in some circumstances, allow academics to apply a more streamlined test based upon fairness.

---

<sup>6</sup> Australian Government, Department of Communication and the Arts, *Quotation and educational use: models for further consultation*.

## Question 2 Changes to Other Copyright Exceptions

### Section 200AB should be repealed in favour of a fairness-based exception

As noted in the roundtable summary, the current s 200AB provision is inflexible and inefficient due to an overly complex test that is difficult not only to interpret and but to apply in practice. As a result, most CAUL libraries have not made optimal use of this provision as intended by the government. Section 200AB should be repealed and replaced by a more flexible fairness-based exception.

### Sections 51 - 52

If a fairness-based exception is introduced, it may be possible to also repeal sections 51 and 52 in the libraries and archives provisions. The case for this repeal is strengthened by the recent statutory changes related to unpublished works, and potentially a new approach to the management of orphan works.

### **CAUL supports standalone exceptions for certain uses by libraries and archives, persons with a disability and orphan works to supplement illustrative purposes or fair dealings.**

The *Copyright modernisation consultation paper* affirms that in other jurisdictions, such as the US, 'fair use operates within a broader copyright exceptions framework. Importantly, the existence of fair use does not negate the operation of other definite copyright exceptions.'<sup>7</sup> CAUL endorses this view and submits that it is appropriate to apply this principle to certain non-controversial or operational uses made in the public interest.

CAUL recommends that a standalone exception of this nature would be beneficial for the efficient operation of libraries and archives, providing access to persons with a disability and managing orphan works. Increased efficiency and certainty can be expected to yield equivalent benefits for users of these services.

Libraries and archives provides a good example. As raised during the roundtable on libraries and archives, a specific exception is still required for 'everyday' activities such as document supply, interlibrary loan, and preservation and administration of the collections. CAUL requests that these provisions are retained in addition to the illustrative purpose for libraries and archives to give library staff operational certainty in some core activities where fairness is clear and does not need to be constantly tested.

In the education sphere, the statutory licence will be in place for copying and communicating third party works that are not available through another exception without seeking permission.

The retention of standalone exceptions for specific activities should not be seen as limiting the operation of a fairness-based exception. This will allow much-needed flexibility for the exercise of

---

<sup>7</sup> *Copyright modernisation consultation paper*, p 11. <https://www.communications.gov.au/have-your-say/copyright-modernisation-consultation>

judgement where the situation is ambiguous or new, based on fairness factors that are designed to protect the interests of all stakeholders.

### Questions 3 & 4 Contracting Out of Copyright Exceptions

CAUL strongly supports Option 2 in the Department's *Copyright modernisation consultation paper*, that is, making unenforceable contracting out of all copyright exceptions. Copyright exceptions are intended to serve important policy purposes, and ensuring they are protected ensures that the copyright system remains fair to both users and content creators. CAUL emphasises that it is particularly important to protect existing library, archive, education and disability exceptions from contractual override, plus any new fair use/extended fair dealing exceptions enacted as a result of this consultation.

The issue of contracting out is particularly important for universities as they increasingly acquire most of their access to scholarly information through contracting directly with rights holders. Contract terms therefore govern the uses of materials, and sometimes this is to the detriment of exceptions allowed under the Act. Given the magnitude of direct licencing, contractual override has significant public policy implications.

Universities, through their libraries, pay handsomely for access to scholarly information and for the right to use this information for legitimate academic purposes. They should not be restricted from exercising rights that are deemed to be non-infringing under the Act. In 2016, a staggering total of over A\$342million was spent on library materials by Australian university libraries. Journal subscriptions, acquired almost entirely through licensed databases, have increased by 40% since 2009.<sup>8</sup> Clearly, the primary market for academic publications is still strong and rights holders derive substantial benefit from the university sector.

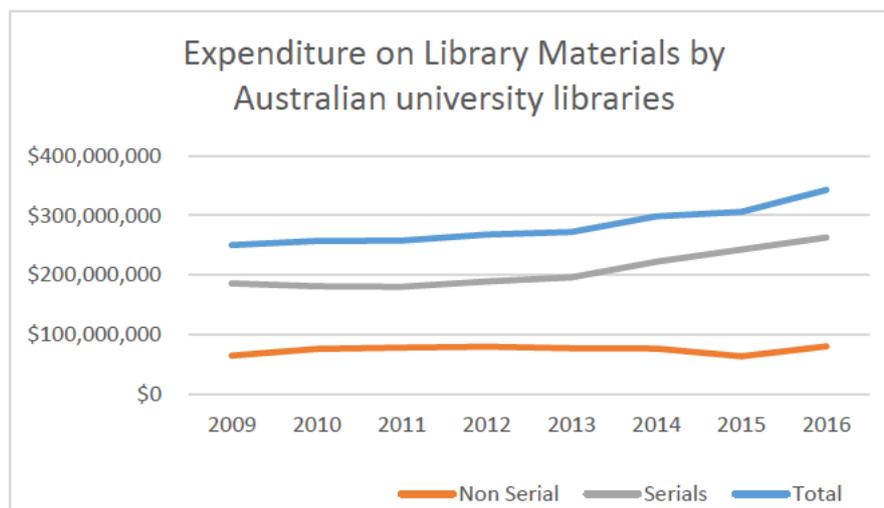


Figure 1: Expenditure on Library materials<sup>9</sup>

<sup>8</sup> Statistics provided by the Council of Australian University Librarians

<sup>9</sup> Statistics provided by the Council of Australian University Librarians

Payment is in kind, as well as in cash. As creators, academics write scholarly works for publication, peer review the works of others and sit on editorial boards. The publishing industry depends upon these contributions for credibility and authoritativeness, yet academics, paid by their universities, usually give their time and expertise to the publishers free of charge.

Universities also continue to pay high statutory licence fees to collecting societies to remunerate rights holders for educational use of third party works, even though dependence on these materials has reduced relative to the use of directly licensed database and ebook resources.

Despite the amount that the university sector contributes to the publishing industry, the issue of contracting out of copyright exceptions remains a particular concern. Libraries have reported the following examples:

- Prohibiting use of materials for course packs and eReserve systems
- Blanket restrictions on forwarding materials, or portions of materials
- Restricting supply of interlibrary loan articles to hard copy only
- Limiting articles available for interlibrary loan to a subset of database titles.

The same situation occurs with regard to text and data mining. While some licence conditions prohibit text and data mining altogether, others seek to control it through processes and sometimes through additional fees. Universities should not have to pay again for these technical and non-consumptive uses that are legitimate research activities.

Libraries have negotiated long and hard regarding the terms of database licences, sometimes with success. They have involved procurement experts and asserted market power through consortia, but the nature of the market makes it difficult to negotiate more favourable terms with publishers for the following reasons:

- Scholarly resources are often only available from a single supplier. There is little incentive for publishers to negotiate with universities for improved contract terms.
- Demand for scholarly information from academic users is strong. Vendors are aware that universities *must* acquire access to certain materials to support research and teaching. In the absence of competition and alternatives, libraries have little choice but to accept the terms offered.
- Australia is not a critical market for many vendors, making it even harder to negotiate contract terms that reflect Australian copyright law.

Hence universities are often over a barrel. They are in a structurally weak negotiating position compared to providers of scholarly information. They are often not able to prevent contracting out of exceptions. For this reason, exceptions need to be protected against contracting out at statutory level if they are to fulfil their public purpose.

Contracting out of exceptions to infringement is also extremely disruptive at an operational level. Libraries spend significant sums in setting up and maintaining systems to manage their copyright obligations regarding interlibrary loan and eReserve. When contracts diverge from statutory requirements, these systems are disrupted, resulting in manual interventions and inefficiencies.

Globalisation has led to more and more international contracts between libraries and publishing companies. However, it is commonplace for large international publisher licence agreements to not recognise Australian law, as per the below example taken from a licence agreement:

*Fair Use/Fair Dealing. Customer and its Authorized Users may use the materials contained within the Service consistent with the doctrines of “fair use” or “fair dealing” as defined under the laws of the United States or England, respectively.*

It is imperative that Australian libraries are able to confidently exercise Australian copyright exceptions, without the fear of breaching agreements with large international publishers who do not vary their standard contracts for Australian consumers.

## Question 5 Orphan Works

University special and archival collections contain important (but orphaned) cultural works relevant to teaching, research and cultural heritage. These works are locked away from broad public access due to the inability to locate the copyright owner. The scale of this problem is large at some universities. For example, the Australian National University (ANU) Archives hold 21kms of material that dates back to the 1820s, much of which is unable to be digitised or made broadly available in the public interest because it is orphaned.

CAUL welcomes the amendments concerning unpublished and orphan works that will come into force with the *Copyright Amendment (Disability Access and Other Measures) Act 2017* on 1 January 2019, but they will not resolve all of the problems related to managing these collections and making them broadly available to the public. The duration of copyright in these works means that a vast amount of orphaned material will remain in limbo for 70 years after the date it is made or made public.

Orphan works on the internet are also becoming a greater problem due to the volatility and ephemeral nature of the internet. Information is uploaded and then it is removed, or perhaps copied many times until the original copyright owner is impossible to find. Links are not permanent – they are subject to ‘link rot’ where links no longer point to the resources that were once available. Students or researchers may conscientiously reference their sources, but the link becomes a dead link over time. All of this orphaned material falls within the copyright duration period of year made public plus 70 years.

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 the Copyright Agency:

*... 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.*

CAUL does not have an informed view about all of the issues raised in the *Copyright Modernisation consultation* related to orphan works and we offer the following thoughts based upon our working experience with these collections. Broadly speaking, our experience suggests that a model based

upon 'Option 1 – Statutory exception' would be appropriate for resolving some of the tensions raised in managing orphan works.

The cultural collections within academic libraries are often historically important, and libraries have a mission to expose these collections to enrich cultural heritage and to facilitate research. On the other hand, as managers of cultural collections, academic libraries are often also engaged in some commercial activities, albeit usually on a very small scale. They might court commercial partners for exhibitions, engage in publication, make images and footage available for films and documentaries, charge an entry fee for an exhibition, create memorabilia such as cards and gifts for sale. These activities are actually driven by the mission to make collections available to the public as the proceeds supplement public funding and are applied to producing expensive exhibitions and publications, etc. In this sense, library activities span both the non-commercial and quasi-commercial spheres. A good solution covering the use of orphan works within collections needs to take these dual purposes into consideration.

Similarly, CAUL has an ambivalent approach to beneficiaries of the exception. There is no doubt that libraries and archives and their governing institutions need to be able to fulfil their public purpose, including engaging in non-commercial digitisation of collections, including orphan works. These institutions also need special statutory help to deal with a problem of this scale. An exception that allows for use of orphan works 'by and on behalf of by or on behalf of educational institutions, libraries and archives and key cultural institutions' is welcome if it streamlines the processes required for using orphan works and remove barriers to exposing collections.

On the other hand, it does not make sense to make cultural collections available and not allow others to use them to the full. CAUL is doubtful that any exception should be limited to only educational institutions, libraries and archives and cultural institutions. On the contrary, we argue that an orphan works exception needs to apply to researchers and external clients who also need to use these works for a variety of purposes, and particularly for scholarly publication. Failure to allow utilisation of orphan works by a range of users defeats the purpose of making them available.

With this in mind, it is unlikely that there is one neat system to meet these differing needs. To resolve some of the tensions noted above, CAUL supports the creation of a dual system of exceptions to manage orphan works, similar to our recommended approach to exceptions for disabilities, libraries and archives and also to a lesser extent, education. This approach allows institutions to get on with their core business, providing public benefit and cultural depth. But, importantly, it also allows the flexibility for fair uses by other parties as well as the institutions.

For these reasons, CAUL supports the introduction of a 'fair use' style illustrative purpose for orphan works to allow flexibility in the use of orphan works based upon an established test for fairness. The test includes elements that consider market implications and this could be used to manage commercial activity. If a fair use exception is not introduced, CAUL favours the creation of an additional exception for fair dealing.

In addition, CAUL supports the introduction of a specific standalone statutory exception to cover non-commercial uses of orphan works by educational institutions, libraries and archives, and key cultural institutions so that they are able to fulfil their public mission to make works accessible. This

will remove the barriers posed by managing orphan works and streamline projects and day-to-day activities for these institutions, leading to efficiencies and improved results.

CAUL welcomes the inclusion of all types of copyright works within the scope of this proposal. Locating copyright owners for arthouse, niche and non-English language films can be particularly difficult. Similarly, CAUL also endorses the broad scope of permitted uses contained in these proposals

Before orphan works can be used by institutions or their clients, a “diligent search” should be undertaken, by the individual or institution wishing to use the work, to ensure the rights holder cannot be identified or located. CAUL supports the Department’s proposal to leave “diligent search” undefined, and to refer to best practice industry guidelines to guide the assessment of whether a diligent search has been undertaken. As proposed by the Department, all users of orphan works must comply with the moral right of attribution, unless it is reasonable not to do so.

If an owner comes forward, then it is no longer an orphan work and it is clear that neither exception applies. In this circumstance, the user must negotiate a licence with the rights holder for continued use of the material.

At present, universities are able to use orphan works in teaching under the statutory licence for educational use. However, universities effectively pay for this use, through remunerating CA, that as noted earlier, eventually redistributes the unclaimed sum to a general pool of copyright owners who have no connection with the orphan work<sup>10</sup>. This redistribution to a third party makes no sense at all, and as the ALRC observes with regard to extended collective licensing schemes, it is ‘inconsistent with the incentive rationale to copyright, to give authors incentive to create new works.’<sup>11</sup>

Universities and other institutions should no longer be required to pay for use of orphan works, especially when the use is for socially beneficial, non-commercial purposes.

Enabling fair uses of orphan works would place Australian researchers on equal footing with their international counterparts, thus furthering the advancement of research, education and innovation in Australia.

---

<sup>10</sup> UA ^ *Review of the code of conduct for copyright collecting societies* p. 6-7 <https://www.universitiesaustralia.edu.au/Media-and-Events/submissions-and-reports/Review-of-the-Code-of-Conduct-for-Copyright-Collecting-Societies>

<sup>11</sup> ALRC *Copyright and the Digital Economy* as quoted in *Copyright modernisation consultation paper* p 25 <https://www.communications.gov.au/have-your-say/copyright-modernisation-consultation>

## Conclusion

The Government requires universities to be efficient, agile and world-leading in research in a tighter budgetary environment. As a result, universities must be innovative so that they can creatively compete in global education and research markets. Universities also wish to support Australian culture and identity, and to do that they need to be able to access and use Australian resources. To achieve these ends, Australian universities need legislation that supports their activities, not legislation that constrains them.

This consultation offers the opportunity to address many of the concerns that university libraries experience at their respective institutions. It is an opportunity to redress the balance between protecting the rights of copyright owners and meeting the public need to access copyright information by removing legal impediments to new research and teaching technologies that do not threaten primary markets; by removing laborious and absurd administrative processes that accompany orphan works; and by ensuring that exceptions made in the public interest cannot be contracted out. It offers an opportunity to support innovation and the proliferation of new and transformative research in the national interest.

## Abbreviations

<b>ALCC</b>	Australian Libraries Copyright Committee
<b>ALRC</b>	Australian Law Reform Commission
<b>CA</b>	Copyright Agency Ltd
<b>CAUL</b>	Council of Australian University Librarians
<b>PC</b>	Australian Government Productivity Commission
<b>UA</b>	Universities Australia