



1 June 2018

Submission by the University of Adelaide Library

in response to the

Department of Communications and Arts - Copyright modernisation consultation paper (March 2018)

The University of Adelaide welcomes the opportunity to provide comments on the copyright modernisation consultation paper. The Library is responsible for managing copyright compliance, the statutory licences and educating staff on their copyright obligations.

The University is committed to generating world class research, providing a quality learning and teaching experience for future leaders and engaging meaningfully with the community. As a significant creator and user of copyright material we have a strong interest in ensuring that Australia's copyright system is fit for purpose now and into the future.

Summary

The University of Adelaide supports the following reform options:

- Introduction of a fair use exception
- Protection from contracting out for all exceptions
- A direct exception for orphan works

Flexible exceptions

The University supports the introduction of a 'fair use' exception as the best way to insert flexibility into the copyright system. We believe a principles based approach to copyright exceptions would be beneficial to both users and creators of copyright material and would ensure that the system remains adaptable to change. A fair use exception would help facilitate the shift towards a principles based system.

We view this shift as necessary not only to allow the University to achieve our research, teaching and engagement objectives but in order to provide a consistent framework for our staff and students as they navigate the world at large. The current system has led to a disconnect between the prescribed exceptions and how copyright material is used in practice with many common uses potentially infringing even when they are unlikely to cause harm to the copyright owner. The ability to measure proposed uses against defined fair use principles,

be it in an educational, industry or personal context, has the potential to undo much of the confusion caused by the large number of current exceptions.

The three examples below illustrate situations encountered at the University which are not adequately accommodated within the current system of prescribed exceptions.

The University mandates that a digital version of all research theses awarded a higher degree be made freely available online through our institutional repository. This ensures wide dissemination and is in keeping with current expectations that publicly funded research is made available on open access. However the common inclusion of third party copyright material, such as text quotations and images, often cause problems. While this material may be necessary to the understanding of the thesis it does not necessarily fall within the narrow definition of criticism or review. This puts students in a difficult dilemma, they can self-censor and exclude material from the start which may affect the quality of the thesis and their examination outcome or they can strip this material out from the open access version which may cause them reputational harm as readers are presented with a diminished version. Neither of these options are ideal for students, for the University or for research and knowledge building more generally.

The University significantly invests in staff to create new copyright materials for learning and teaching. We also acknowledge that by its nature education draws heavily on pre-existing knowledge and ideas and that the incorporation of third party copyright material in teaching is often necessary. We make substantial financial investments to provide legitimate access to copyright material through library purchases and subscriptions, as well as licence payments to collecting societies. However, the current system of fair dealing exceptions and the conditions around the educational statutory licence has resulted in some proposed uses of material for learning and teaching being unworkable. A recent example involved a teacher wanting to upload an article abstract with redacted words to our learning management system for use in an exercise, a link to the complete article which had been made freely available online by the copyright owner would have been supplied at the end of the exercise. It is hard to see how this use would have caused harm to the copyright owner but it was not accommodated by the current fair dealing exceptions and the administrative burden of relying on the educational statutory licence for what was freely available material seemed excessive. While in this case permission was sought and freely given by the copyright owner it took a number of weeks to gain and was an unnecessary diversion of resources.

AdelaideX harnesses the expertise of the University's academic and professional staff to produce Massive Open Online Courses (MOOCs) which anyone around the world can participate in for free. Since its inception in 2014 it has created 17 courses which have attracted over 550,000 learners in over 190 countries. MOOCs are a key way for the University to engage with the community and achieve our objective of making the transformative effect of university education available to more people. AdelaideX has created a large amount of original content and third party material is only included if it has been released under a Creative Commons licence or permission has been granted. While this approach works in most cases there have been occasions where material has not been able to be used. One example involved a photograph of an embryo with a rare congenital defect which was necessary to illustrate the topic being discussed. It was clearly not possible to recreate the photograph and the term of the permission was so short it could not be relied on. The only solution was for a staff member to dedicate time creating a graphic representation of the image which served the purpose but was a poor substitute to the actual photograph.

While we acknowledge that using copyright material in the above situations would not always be considered fair the opportunity to assess this based on defined principles would be welcome. The University supports all of the uses listed in the consultation paper (p. 11) as illustrative purposes for a fair use exception. We view the inclusion of the existing fair dealing uses as necessary for continuity and the addition of new illustrative uses as required to provide confidence when making initial assessments after the introduction of a fair use exception. In particular we would find the new illustrative purposes of quotation, certain educational uses, library and archive use, and text and data mining to be beneficial.

If a fair use exception is not enacted, then we would support the introduction of additional fair dealing exceptions. This would include all of the additional uses suggested as illustrative purposes for the fair use exceptions. There is a need for these uses to be covered. The above examples may have been accommodated if there were fair dealing exceptions for quotation and certain educational uses. However, we believe that adding specific prescribed exceptions is not sustainable in the long term as it increases the complexity of exceptions which users have to navigate and leads to a copyright system which is continuously playing catch-up to accommodate previously unforeseen needs. This particularly frustrates our efforts to educate the University community around what is acceptable use of copyright material.

We agree with the suggestion that a fair use exception would adopt the fairness factors as used in the current research and study exception. We understand the need to comply with obligations under international agreements and feel that since these factors are already in use they would offer continuity and allow fair use to be interpreted with relative confidence.

Contracting out

The University supports all copyright exceptions being protected against contracting out. As the discussion paper acknowledges this is the only relevant option in the event of a fair use exception being introduced. This is also consistent with our view that there is a need for the copyright exception system to be more flexible while still being able to be applied with confidence. If only specific exceptions are protected against contracting out then this will add to complications and perpetuate the current risk adverse approach adopted by many organisations. It would also be difficult to justify excluding certain exceptions since by their nature they are all in the public interest.

The need for exceptions to be protected against contracting out has become more important with the increasing shift towards online availability of material. If the copyright system is to be technologically neutral then it should be clear that the automatic attachment of terms and conditions to all electronic material does not override copyright exceptions, just as the standard disclaimer publishers add to the beginning of a physical book prohibiting all copying and communication does not prevent portions being copied in reliance of the educational statutory licence, the fair dealing for study or research, for supply to other libraries and so on.

Within the University this issue is likely to only get worse with more material required for research and teaching purposes only being made available to staff and students online, either through Library purchases and subscriptions or other freely available resources. The ambiguity over contracts versus copyright exceptions has already caused issues with material required for learning and teaching not being made available to students.

In one instance this was a single book chapter which was a required reading for a course with 200 students. The Library had purchased access to the eBook however this was only available to one user at a given time, its high price point meant it was not feasible to purchase additional access and a physical version was not available. Previously we would have dealt with this situation by relying on the statutory licence but in this case the contract prevented it which resulted in students missing out with no additional benefit to the copyright owner, it only served to diminish the reach and impact of the author's work.

Audio-visual material which is only accessible via online services available for individual subscription are increasing being requested for use in teaching. At the moment this material is unable to be used as it is not covered under the educational statutory licence and conditions routinely specify that material is only for private use which limits the possibility of even playing the material in class. In one case a teacher wanted to play a radio drama in class which was available via a popular streaming music service however given that it could only be accessed after agreeing to terms and conditions which prohibited public performance a cautious approach was taken. In the end the teacher directed students to listen to the play independently. Requiring students to sign up to commercial services to access materials is not ideal but without it being made explicit that contracts cannot override exceptions material will either not be used or similarly clunky solutions will be employed.

Orphan works

We support the introduction of a direct exception for orphan works. The University Library is the custodian of large amounts of orphaned copyright material, this not only includes unique material held in the Archives, Rare Books and Special Collections but also older out of print material which forms a part of the general collection. An exception which would facilitate greater use of this material and allow digitisation projects to be undertaken with confidence is key to the Library's mission to provide access to information and meet users increasing expectation of online availability.

We do not have a specific preference of the form which an orphan works exception takes as long as it does not contain onerous requirements which will prevent it from being used. For example the designation of what constitutes an orphan work should comply with industry standards rather than determined by overly prescriptive diligent search requirements. It is imperative that any exception avoids the complex and unintuitive nature which has rendered s200AB to be rarely used throughout the library or education sector. We also believe that any exception should not be limited to cultural and collecting institutions. Limiting the exception in this way will cause frustration for users and more importantly result in missed opportunities regarding the creation of new material.