



The Executive Director
Australian Law Reform Commission
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Dear Sir / Madam

Copyright and the Digital Economy

The Society of University Lawyers (SOUL) is a not-for-profit association whose membership is primarily comprised of in-house practising lawyers who are employed by Australian universities and their related organisations. SOUL's members provide legal services to their respective institutions on the full breadth of legal issues affecting the higher education sector. SOUL's mandate is to promote the exchange of information on legal matters affecting universities and the higher education sector generally.

SOUL welcomes the opportunity to make a submission on this important inquiry as Copyright legislation has a major impact on University activities.

Universities are unique institutions whose fundamental purposes are to conduct teaching and research and to promote public debate and the dissemination of knowledge in society. Universities are constantly striving to improve their delivery of teaching in order to attract and retain students and provide an education that is relevant and up to date. Universities are also often at the forefront of innovation in research.

This submission will address selected questions from the Issues Paper that relate to the educational and research activities of a University and its staff.

1. Educational activities

Questions 28 and 29

SOUL submits that the Part VA and Part VB statutory licensing schemes for educational institutions are not adequate or appropriate in the digital environment for the following reasons:

Limited scope

The Part VA licence only permits copying and communication of broadcasts. This excludes internet transmissions or internet-only content uploaded by television or radio broadcasters. Such internet content is becoming more prevalent especially as tablets become more popular than television.

The statutory licensing schemes do not adequately cover works that have been made freely available on the internet without reservation of rights. Universities are paying under the Part VB licence to copy such works, even though rightsholders have made the material available without expectation of payment. The statutory licence schemes do not extend to audio-visual internet content (e.g. YouTube), nor is such content dealt with under any exception available to educational institutions.

Changing learning and teaching landscape

The statutory licence schemes impose a requirement on institutions such as a University to take all reasonable steps to ensure that copies made under the statutory licence are only communicated to persons entitled to receive or access it. "Reasonable steps" has been generally interpreted to mean a password-protected learning management system. However, continuing advances in technology (e.g. cloud computing) and changes in the way students communicate and expect Universities to communicate with them (e.g. social media) mean that a central learning management system may not always be the most suitable e-learning medium. In this digital age students generally conduct their key aspects of their lives through Facebook, Twitter and other online services; similarly, they expect to be able to conduct their education utilising current, up-to-date technology.

New and emerging teaching practices are stifled under the statutory licence schemes. For example, rather than traditional use of material for teaching and reading, digital humanists analyse texts, photographs and other materials using new digital ways. This sort of re-use is not well supported by the statutory licensing schemes, given the limitations as to the amount that can be reproduced and the manner in which it can be communicated under those schemes.

Further, Universities increasingly perform a broader community role in making knowledge and education accessible to all (e.g. by public lectures, massive open online courses). The statutory licences do not appear to extend to these activities.

Universities require flexibility in order to ensure that their methods of teaching remain relevant and that they can fulfil their broad educational role in the digital age.

Imbalance between protection of rightsholders and promotion of fair access

The statutory licence schemes were established to ensure that rightsholders receive equitable remuneration for use of their works. However, many rightsholders now choose to make material freely available online. Some fees paid by educational institutions for the statutory licences are being distributed to rightsholders who do not expect to be remunerated. For example, some Universities themselves receive distributions from CAL on account of schools making reproductions of University websites. This means that schools are paying (under their Part VB remuneration notice) for materials that Universities are happy for schools to use freely. This is an example of how the statutory licensing scheme has evolved into a misguided, costly and unnecessary exercise in revenue

raising from one part of the educational sector to remunerate another part that does not seek such remuneration. It would be interesting to calculate the compliance and administrative costs involved in this pointless exercise.

In our experience, a significant proportion of the works copied by Universities under the Part VB licence are scholarly journal articles or extracts from academic texts. The authors of these works usually work within the tertiary sector. Unless the authors have registered with CAL themselves, they are unlikely to receive a share of CAL distributions via their publisher, as academic publishing contracts rarely provide for a distribution of royalties to the author. In any event, remuneration is not a motivation for academics to publish.

Lastly, we find it paradoxical that individual students are able to copy works for free under the fair dealing exception for research or study, and yet a University has to pay if it undertakes the copying for students, even though the University does not profit from this service.

Question 30

We believe that the limitations submitted in response to Questions 28 and 29 would be overcome by the abolition of the statutory licence schemes and the introduction of a broad free-use exception for educational institutions. We note that such an exception is available in the US and Canada, allowing educational institutions open-ended 'use' for educational purposes. We acknowledge that s200AB was introduced in Australia to provide some of the benefits that the fair use doctrine provides in US law but this section has been of limited utility to the Australian University sector due to its application being restricted to 'special case' circumstances.

If a broad free-use exception for educational purposes is introduced, we suggest that it incorporates a deeming provision on the minimum amount to be regarded as 'fair' – say 10%. We are also supportive of the inclusion of specific exceptions to further enable reasonable free use for educational purposes (e.g. copying freely available internet material unless expressly prohibited by the website).

We do not support the extension of the existing statutory licensing schemes as that will not provide 'future-proofing' and would result in an increase of licence fees (currently already totalling approximately \$30 million across the University sector) as well as the already significant administrative costs of compliance with the licence limits, recordkeeping and sampling requirements.

Question 45 and 46

In *CAL v Haines (1982)*, it was held that educational institutions would rarely be able to rely on the fair dealing exceptions due to the existence of the statutory licence schemes. This is unduly restrictive and results in anomalous situations where an individual student or researcher has been able to rely on the fair dealing for research or study exception to reproduce third party material in their work or for their study activities, but the University is unable to similarly rely on that exception even if the University's activity is an extension of that individual's study or research, e.g.

- a. Make the full text of a student's PhD thesis freely available online – many Universities do so under the Australasian Digital Thesis Program¹
- b. Communicate a student's assignment to other students as a "good example" or as part of a collaborative learning exercise
- c. Copy and distribute reference articles obtained by one researcher for the rest of the research team

We also refer to the recently published NHMRC and ARC policies requiring Universities to establish repositories to disseminate publications from publicly funded research.

The existing approach to fair dealing (with a defined set of "fair" categories of use) imposes narrow limitations on Universities and their constituents and do not allow for new technologies and uses.

These problems can be overcome by the introduction of a fair use exception for educational institutions (as submitted in response to Question 30), or at the very least, extension of the fair dealing exceptions for 'research or study' and 'criticism or review' so that they apply to Universities.

Question 54

Universities' reliance on hardcopy source materials for educational purposes is decreasing. Instead, universities are increasingly subscribing to online electronic resources (ebooks, e-journals). In many cases, the terms of the subscriptions are more generous than the Part VB licence but in some cases they are more restrictive. Additionally, where universities do purchase textbooks, these often come with an accompanying CD containing (or an online login to) an electronic version of the book and/or additional teaching resources. These CDs or restricted websites typically contain terms and conditions that restrict normal use and distribution of the book by the University library, and uses permitted under the Part VB licence or fair dealing provisions.

We are aware that teaching material is often sourced from the internet, however website terms vary greatly between sites and are often inconsistent with the statutory licences and exceptions under Australian Copyright law. This makes it difficult to monitor, manage and educate staff on the differences in copying rights and obligations under law and contract.

We submit that agreements which purport to exclude or limit copyright exceptions or licences available for educational or research purposes should be unenforceable.

2. Research activities

Question 25 and 26

'Big data' is generating increasing interest amongst researchers. Universities are moving towards collaboration in storage, access, categorisation and analysis of large data sets, metadata and associated material. The Research Data Storage Infrastructure project² (which has received \$50 million of funding under the Commonwealth's Education Investment Fund) is one example and it involves:

¹ <http://www.caul.edu.au/caul-programs/australasian-digital-theses>

² <http://rdsi.uq.edu.au/>

- Collection of data from data custodians
- Creation / modification of metadata that may reproduce parts of that data
- Storage on that data on infrastructure across participating institutions (“nodes”) or cloud service providers
- Replication of that data across nodes
- Provision of the data to university researchers when requested
- Analysis of the data by researchers

Any one of the above steps may involve an exercise of the copyright that subsists in the data, however the current copyright legislation is unclear on the permissibility of these steps. It is possible that researchers may be able to rely on the fair dealing for research or study exception in undertaking the final step, but that exception is unlikely to be available to research institutions and service providers involved in the preceding steps. Nor will it enable outcomes of the research to be communicated without the permission of rightsholders. In most instances, it would be impossible to obtain clearances from all individual rightsholders.

We advocate for the introduction of a broad data mining and data use exception that is technology agnostic and framed in terms of the end-user outcome rather than attempting to define each act.

Question 5 and 6

Casual “Dropbox” style cloud storage services are increasingly available on economical, scalable and stable basis. These offer researchers practical online alternatives to infrastructure controlled by their research institution in a more traditional manner. These services are also often seamlessly integrated with the users’ desktop computer and use of these services could involve an incidental reproduction or communication of the work, without the individual researcher being aware.

There is no certainty provided for this activity under the fair dealing for research or study exception. We ask that this be taken into account in the ALRC’s consideration of what, if any, amendments are required to take into account cloud computing.

Summary

In this digital age, Copyright legislation should seek to facilitate access to knowledge whilst balancing this against rightsholders’ economic rights. Universities play a pivotal role in the community, enabling the creation and dissemination of education and knowledge. In order for universities to remain innovative and beacons of education, they should be afforded more flexibility than is contained in the current statutory licences and exceptions available to educational institutions.

Yours faithfully

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