

The Executive Director
Australian Law Reform Commission
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Dear Sir

This submission has been prepared by The University of Queensland Library in response to a number of proposals raised by the Australian Law Reform Commission in its discussion paper, *Copyright and the Digital Economy*.

1. Overview

- a) The University of Queensland Library supports the separate submissions made to the Commission by Universities Australia;
- b) The Library supports the teaching, learning, research and publication goals of more than 45,000 staff and students at any one time – it does so by providing access to print and electronic collections across the entire spectrum of scholarly endeavour;
- c) The Library is also the repository of large hardcopy collections of rare and no-longer-published works, and large collections of unpublished papers, manuscripts and University theses;
- d) As direct witness to the transformative impact of new technologies on teaching, learning, research and publication over the last thirty years, the Library supports amendments which will restore much needed balance and flexibility to the working of Australian copyright law.

2. Copyright 'Sclerosis'

As noted by the commission, and numerous commentators and scholars, copyright law is no longer able to operate in an efficient and balanced manner in the digital age.

Changes to the underlying architecture of copyright law in Australia must achieve the following:

- a. A recognition that copyright should provide no more protection to copyright holders than is required to achieve economic and incentive fairness;
- b. 'Use it or lose it' is an axiomatic feature of the law in other areas of intellectual property – it is one of the great challenges of copyright law reform to incorporate the discipline of 'use it or lose it' into a system of protection that requires no formality, no active usage or making available of protected works, and allies this with the longest periods of protection in IP law;
- c. In framing its reform proposals – whichever approach is taken – the commission must provide a system of increasing user rights in direct correlation to the owner's efforts to make the work available to the public, whether in a commercial manner or otherwise;
- d. A failure to use and make available negates any counter-argument of detrimental economic harm – copyright should not remain – as it has become – a system of maximum protection with no concomitant public policy requirements of usage and availability.

3. Statutory Licences Repeal

The statutory licences have, within the restrictive confines of Australian fair dealing, served a useful purpose over a couple of decades, but changes in technology and the urgent need to review the permissible limits of fair dealing, suggest that their utility is mostly past.

The Library supports proposals contained in the Paper to:

- a. Repeal and replace the current fair dealing provisions with a new fair use provision that allows, inter alia, multiple copying by educational institutions for and on behalf of their students;
- b. In the alternative, should a root and branch overhaul of fair dealing ultimately not be achievable, the Library would strongly endorse the approach recently adopted by the Canadian legislature to introduce a fair dealing for "educational purposes", as part of an expanded, fair and more technologically relevant rework of the current fair dealing provisions;

- c. The combination of educational copying under fair use or an educational fair dealing would allow for educational institutions to negotiate 'free market' licences with CAL on an 'as needed' basis;

4. Fair Dealing/Fair use Overhaul

The current fair dealing provisions are anachronistic in the digital age and reflect the earlier analogue era when copyright owner and production was centralised and industrialised. The Library supports the Commission's proposal for the possible introduction of a U.S.-style fair use, noting that:

- a. Greater flexibility in acceptable uses is vital in providing a built-in mechanism for adaptable use of copyright materials;
- b. The amendments would provide a mechanism for flexible adjudication by the Courts which, consistent with the adaptability of U.S. fair use, would allow interpretation and practice to more closely align the rights of owners and users;
- c. The Library is aware that the Commission faces significant opposition to the possible introduction of fair use proposals, and therefore strongly supports – in the failure of a fair use re-write to go forward – the 2012 Canadian reforms to their 'traditional' fair dealing provisions. Significantly, this would include a new fair dealing for educational purposes;
- d. As noted above, amendment to permit fair use copying by educational institutions is strongly supported by the Library.

5. Digitisation Rights/Orphaned Works

Libraries are an important repository of copyright works that, under the current copyright system, are no longer made available by copyright owners, but which nevertheless are still in copyright and subject to severe reproduction limitations under current law.


The Library would encourage the Commission to make the failure of a copyright owner to 'use and/or make available' a copyright work a relevant ground to be considered in determining the fairness or otherwise of a use, including that of a Library digitising and making available to the public such works in their collection.

Proposals by publishing and copyright owner interest groups focus on placing an unwieldy system of pre-digitisation steps and approvals in the path of institutions seeking to make available 'orphaned works', but in the Library's view the very fact that a published work –

for a period and in circumstances to be determined by legislation – has not been made available to the public by a copyright owner, should crystallise an institution's right to make a 'public copy' available from its collection.

I hope these comments assist the Commission in its deliberations.

Yours sincerely,


for Robert Gerrity
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