



Dr Michael Spence
Vice-Chancellor and Principal

07 July 2018

The Director, Copyright Law Section
Department of Communications and the Arts
GPO Box 2154
Canberra ACT 2601

Submitted via: copyright.consultation@communications.gov.au

Dear Director,

Copyright Modernisation consultation paper March 2018

The University of Sydney welcomes this opportunity to comment on this discussion paper. The University is one of Australia's largest tertiary education institutions with a comprehensive education and research profile.

The University is a member of Universities Australia. In making this submission we wish to provide our support for the detailed responses made by Universities Australia and emphasise some key areas of concern to the University. We wish also to draw the Department's attention to the submissions we have made to other substantive recent reviews of copyright laws including the Australian Law Reform Commission – Copyright and the Digital Economy (August 2013) and the Productivity Commission – Public Inquiry into Intellectual Property Arrangements (December 2015 and December 2016). Our submissions to these and other policy processes are available on our website: http://sydney.edu.au/about/government/submissions_2018.shtml.

Background

Universities play a diverse role in knowledge development, exchange and preservation. We are at once creators, consumers, and custodians of copyright materials. In this context, we have formed the view that the current Copyright Act 1968 (the **Act**) is not flexible enough to promote innovation in the tertiary education sector and provide a cost-effective framework for management of copyrights in the modern learning spaces consisting of learning studios, web conferencing, social technologies, class rooms, overseas excursions and other formal and virtual learning environments.

The special role of education is made clear in the way that policy and law makers around the world are taking steps to ensure that copyright laws do not impede education. Today the challenges for educational institutions competing in a global market include the need to use digital technologies to innovate in response to the changing educational environment and to meet student expectations. Massive Open Online Courses (MOOCs), learning hubs, and open forums for discussion such as "Sydney Ideas" are examples where the statutory licences and "fair dealing" provisions in the Act do not appear to support the use of copyright protected material for such diverse educational purposes.

This situation arises from two important limitations. First, the limitations imposed by the statutory licences that require the University to take steps to ensure that material copied and communicated is only made available to persons entitled under the licence. Second, the limitations imposed by the “fair dealing” exemptions in the Act that do not allow copying and communication of material by other persons for educational purposes or for research and study. In most instances, to copy and communicate copyright protected material permission must be sought from each copyright owner and/or appropriate replacement material found that is available for use through Creative Commons licences or similar. Frequently, we have found that rights holders cannot be identified or found or, if found, are asking a price for the use of the material that is unaffordable.

Question 1 – Flexible Dealing and Fair Use

The University supports Option 2 – a fair use copyright exception

Fair Use remains our preferred option as the best way to ensure flexibility now and in the future for uses that are not yet contemplated. Each of the fair dealing exceptions proposed under Option 1 would be dealt with under Fair Use and provide universities and other persons collaborating with universities, with the clarity required to enable important educational and research innovation to occur.

If enacted, we support the introduction of the four fairness factors that are currently in use in the United States (US factors).

If Option 2 is not enacted then Option 1 is a viable alternative

The existing fair dealing model with its closed list of specific exemptions to infringement of copyrights does not, in our view, provide sufficient flexibility to support innovation in education and the industries and communities that education seeks to engage with and support. Each new situation that is not within the scope of a specific exemption (or other exemption) requires legislative intervention. To strike the right balance between the rights of owners and the “rights of users” and to foster innovation, we support the introduction of a more open-ended model featuring a flexible exemption.

We support the introduction of the following fair dealing exceptions:

- education, provided the exception is broad enough to apply to all persons not just educational institutions;
- quotation, provided the meaning of quotation remains undefined and the exception is not limited to certain contexts;
- incidental or technical use;
- text and data mining; and
- library and archive use.

Again, we support enactment of the four fairness factors (US factors) for each of the above exceptions. For certainty, our preference is that the exceptions are added to the Copyright Act, not amended from time-to-time by the Minister (after consultation).

Contracting Out

For universities to obtain full benefit of any new exceptions it is imperative the Copyright Act be amended to make unenforceable contracting out or use of TPMs so as to limit access to all copyright exceptions.

Access to Orphan Works

We support a statutory exception with a limitation of remedies. It is preferable for this exception to remain broad and available to all persons. Since 1879, the University of Sydney Library has under law been a collecting institution for the NSW legal deposit scheme. Consequently, it collects and holds substantial material that may not identify the author. The University and the community would benefit from a direct exception to legalise non-commercial use of orphaned works by the University and persons accessing its collections.

In addition, our Library holds a substantial amount of Orphan Works in its rare-books, special and general collections. These works are generally only available to visitors to the library and not made accessible through electronic means due to the uncertainty associated with copyright ownership and rights of use. We therefore support legislative reform that provides for the grant of a statutory licence to custodians of orphan works to enable access without infringement.

We would be pleased to assist the Department in this consultation further as required.

Contact:

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Yours sincerely,

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