



THE UNIVERSITY OF
SYDNEY

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24 February 2022

The Hon Paul Fletcher MP
Minister for Communications, Urban Infrastructure, Cities and the Arts
c/- Department of Infrastructure, Transport, Regional Development and Communications
Canberra ACT 2600

By email: copyright.consultation@communications.gov.au

Dear Minister,

Exposure Draft of the Copyright Amendment (Access Reform) Bill 2021 & Review of Technological Protection Measures Exceptions

The University of Sydney welcomes the opportunity to provide the **attached** submission in response to the Australian Government's [Discussion Paper: Exposure Draft Copyright Amendment \(Access Reform\) Bill 2021 & Review of Technological Protection Measures Exceptions](#), released 21 December 2021.

The University strongly supports the Government's proposed reforms as an initial step towards simplifying Australia's copyright framework and ensuring it remains fit for purpose in a rapidly changing, globally connected and competitive research and education environment.

However, in our assessment, the proposed changes risk falling short of taking full advantage of the rare opportunity this Bill presents to simplify Australia's overly complex copyright system. Complex, narrow, purpose-based exceptions to infringement are difficult for institutions and individuals to apply in practice. This serves to unnecessarily stifle innovation and puts Australian research, education and creative individuals and industries at a competitive disadvantage.

The University has, for at least a decade, advocated for fair and flexible copyright exceptions, which apply to all users and types of copyright material. For instance, we refer the Department to our previous submissions on the [Australian Law Reform Commission \(ALRC\) Copyright and the Digital Economy Inquiry 2012-13](#), and the [Productivity Commission's Public Inquiry into Intellectual Property Arrangements 2015-16](#).

In addition, the University is a member of Universities Australia (UA) and the Council of Australian University Librarians (CAUL). We commend both organisations' submissions to these consultations and support their continued advocacy for a fair, flexible and future-ready copyright system. In making this submission, we have chosen to emphasise specific areas of consideration for the University and submit a range of practical changes and clarifications that we believe will ensure the proposed new provisions operate as intended, now and into the future.

We trust this feedback on the Government's proposed copyright reforms is helpful and would be pleased to provide further information as required.

Should you require further information about any aspect of the University's submission, in the first instance, please contact Ms Kate Stanton, Senior Manager, Copyright and Information Policy, Access Services, The University of Sydney:
kate.stanton@sydney.edu.au, 0452 191 484.

Yours sincerely,

(signature removed)

Mark Scott

Attachment The University of Sydney submission in response to the Australian Government's *Exposure Draft Copyright Amendment (Access Reform) Bill 2021 & Review of Technological Protection Measures Exceptions*, released December 2021

The University of Sydney submission in response to the Australian Government’s [Exposure Draft Copyright Amendment \(Access Reform\) Bill 2021 & Review of Technological Protection Measures Exceptions](#), released December 2021

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1. Executive summary and recommendations

The University of Sydney welcomes the opportunity to make a submission in response to the Australian Government’s Discussion Paper on the Exposure Draft of the Copyright Amendment (Access Reform) Bill 2021 & Review of Technological Protection Measures Exceptions. Universities play a diverse role in the creation, development, management, reuse and preservation of copyright materials. We strongly support the proposed reforms set out in the Discussion Paper and Exposure Draft as an initial step in simplifying existing provisions and providing greater clarity.

Nevertheless, after carefully considering the Government’s proposed changes, we are concerned that they would fall short of taking advantage of the rare opportunity this Bill offers for Australia to significantly reduce the complexity of its copyright system. Moreover, in our assessment, the proposals would not serve to achieve an appropriate balance between the exclusive economic rights of copyright owners and the wider public interest for the advancement of education, research, creativity and culture. The burden of complexity and imbalance becomes especially apparent during times of rapid technological change, educational innovation, or society-wide crisis, such as the unforeseen changes resulting from the COVID-19 pandemic.

To “future-proof” Australians from other unanticipated developments, the University strongly supports the introduction of flexible copyright exceptions such as a general “fair use” exception that applies to all users and types of copyright material. In addition to this submission, we wish to draw the Department’s attention to the following University submissions to the Australian Law Reform Commission and Productivity Commission:

- Copyright and the Digital Economy Discussion Paper ([August 2013](#)),
- Public Inquiry into Intellectual Property Arrangements ([December 2015](#); [June 2016](#)).

Complex, narrow, purpose-based exceptions are difficult to apply in practice. They stifle innovation and put our research, education and creative sectors at a competitive disadvantage when compared to other jurisdictions. In our experience, there is significant confusion and uncertainty about the way each of the various fair dealing and other exceptions currently operate in Australia.

The University is a member of Universities Australia (UA) and the Council of Australian University Librarians (CAUL). We commend their submissions and support their continued advocacy for a fair, flexible and future-ready copyright system.

1.1 Recommendations

With these recommendations, we have chosen to focus on the types of legislative changes that we believe would address key areas of concern that have arisen for the University. We are a large-scale education and research institution, library service provider and producer and consumer of copyright materials; with many years of practical experience dealing with copyright matters in accordance with Australia's existing law. We recommend the following changes and clarifications to ensure that the proposed new provisions operate as intended, now and into the future:

- 1. New section 113FA Fair dealing for quotation.** The proposed new quotation fair dealing exception in section 113FA should extend to the quotation of unpublished material. Further, to require users or organisations to determine whether something has been "*made public*" before the exception can be relied on places an unnecessary administrative burden on them and is likely to have a chilling effect on reliance on the provision. Section 113FA(1)(c) should therefore be removed.
- 2. New section 113KK Application of this Subdivision to illustrations accompanying articles and other works.** The drafting in this section refers to "*illustrative artistic work*". This section should be amended to cover all "explanatory or illustrative copyright material" in all forms and formats (see our comments below in the "Libraries and archives: Illustrations" section).
- 3. New section 113MA Use of copyright material in the course of educational instruction.** The meaning of "temporarily available" (section 113MA(2)(c)) should extend to future use of the recording if it is used by the same educational institution for the same unit of study, lesson, or tutorial, albeit for a new cohort of students. This clarification could be noted in the Explanatory Memorandum.
- 4. New section 113KH Use of unpublished theses or similar literary works.** The expression "*thesis or similar literary work*" used in the proposed provision suggests a thesis is only comprised of a literary work created by the thesis author. This is not always the case in practice. A contemporary thesis may, for example, include non-traditional research outputs or multimedia. Section 113KH should therefore be amended as set out in **Schedule 1**.
- 5. Access control technological protection measures (TPM) restrict student learning.** Students enrolled in Australian educational institutions currently do not have the ability to fully engage in certain learning activities because of the Copyright Act's prohibition on circumventing an access control TPM for students' fair dealings with copyright material for research or study purposes (or one of the other fair dealings). Such an exemption should be introduced in the interests of the students' learning.

2. Orphan works: Application to Copyright Tribunal to fix reasonable terms

Question: Part 11, Division 3 of the Copyright Regulations 2017 sets out the matters to be included, in particular kinds of applications and references to the Copyright Tribunal. What matters do you consider should be included in an application to the Tribunal to fix reasonable terms for ongoing use of a former orphan work?

An application to the Copyright Tribunal that involves ongoing use of an orphan work by educational and cultural institutions, libraries and archives may include the following:

- The nature of the proposed ongoing use (is the use commercial or non-commercial, are the works being made available for download and reuse or viewing only?).
- Is the proposed use permitted under a fair dealing, another exception or covered by a statutory licence?
- The type of work. For example, is it a work, or subject matter other than works? Is it stand-alone material, or part of a compilation?
- An assessment of the market rate for the similar use of a similar non-orphan work, assessed at the time the ownership of the orphan work is claimed.
- The duration of copyright in the former orphan work (does the copyright owner have a short or long period of time in which to exploit the work?).

2.1 Additional issues

Following the establishment of the University in 1850, the University Library has accepted for inclusion in its collection, the personal papers (such as letters) and other items of significance to Australian history and culture (examples of such donations are set out on the University Library's [Rare Books and Special Collections website](#)).

While much of this material is of scholarly and historical interest and unique and specific to Australia, it includes orphan works. Universities and libraries are generally risk-averse public institutions. As a result, it has been difficult for librarians to provide reasonable online access to orphan works for interested scholars, and to reuse orphan works in scholarly communications and publishing.

The University supports the proposed limitation of remedies for use of orphan works to protect those who make such works available. The University also supports the clarification that the educational statutory licence does not apply to the use of copyright material covered by the orphan works scheme (the new sections 113P(7), 116AJA(4) and 116AJB(2)). For example, when an academic wishes to use in an educational context Orphan Works freely available on the internet or embodied in physical objects (e.g., a model of a building) in accordance with the proposed provisions, that use should not be remunerable under the educational statutory licence. Such a use of an orphan work does not prejudice the copyright of a known rightsholder, and any remuneration cannot, by definition, be paid to the copyright owner.

The following issues, if not properly addressed, may impact on the University's ability to use and/or make orphan works available:

1. Orphan Works - secondary use

- a. Single search rule: upon completion of a 'reasonably diligent search,' many orphan works will be made available for secondary use in a range of formats, including electronic copies. Users may include individuals, cultural and educational organisations, or commercial entities. Each of these users should

be entitled to rely on the prior search and not be required to undertake a new search.

- b. The single search rule should not be time restricted. The original search may be relied upon for the duration of copyright in the orphan work, including when any relevant industry code of practice has been updated.
- c. Libraries and archives that make orphan works available to users should not be required to keep records of those users or be under any obligation to provide such records to a copyright owner of a former orphan work, unless required to do so by court order.

2. Orphan Works – a ‘reasonably diligent search’:

- a. should be simple, cost effective and not administratively burdensome
- b. should have special provisions for mass digitisation projects with a reasonable set of search requirements; and
- c. must not require searches of databases or registries that require the payment of fees for access.

3. Fair dealing for quotation

Question 2.1: Should the proposed new quotation fair dealing exception in section 113FA extend to the quotation of unpublished material or categories of unpublished material?

The proposed new quotation fair dealing exception in section 113FA should extend to the quotation of all unpublished copyright material, provided the copyright work has been attributed and the title is identified where it is practical to do so.

3.1 Additional issues

Unpublished material

The proposed exception should apply to all copyright material, simplifying the practical application of the exception and ensuring it operates as intended. To require users or organisations to determine whether something has been “*made public*” before the exception can be relied on, places an unnecessary administrative burden on them and is likely to have a chilling effect on reliance on the provision. For example, University staff would have to consider and apply the factors set out in sections 29A (Making public), 29 (Publication) and 27 (Performance) of the *Copyright Act* and make enquiries to ascertain whether (or not) the material has been made public. This additional consideration is unnecessary, as no harm will be caused to the rightsholders from the use.

Commercial purpose quotation – “Immaterial to the commercial value of the product or service in which it is used” (new section 113FA(1)(b)(ii))

The determination of what is “*immaterial*” may be difficult to achieve in practice, particularly when this criterion is in addition to the application of the four standard fairness factors (which are already well known to be complex to apply in practice). To ensure the new fair dealing exception can be used as intended, any commercial use should be based on an assessment of whether the use of the quotation would conflict or be in competition with exploitation of the work by the copyright owner.

4. Libraries and archives: Online access - 'reasonable steps'

Question 3.1: For the purposes of new paragraph 113KC(1)(b), what measures do you consider should be undertaken by a library or an archive to seek to limit wider access to copyright material when made available online?

In most circumstances, it should be sufficient for an appropriate rights statement or warning notice to be applied to the work. Where an existing system is in place, user authentication (or identification) combined with an appropriate rights statement or other warning notice are reasonable controls. Additional measures would prove burdensome for clients, libraries and educational institutions and are unlikely to provide additional protection.

The University supports the inclusion of a commercial availability test within this provision. University Library staff are experienced in applying such a test in the routine delivery of library services.

5. Libraries and archives: Illustrations

Question 3.2: Does proposed new section 113KK, which replaces and simplifies current section 53 but is not intended to make any substantive changes to that section, adequately cover all of the matters set out in current section 53 or are there some potential gaps in coverage?

The University acknowledges the new provision (section 113KK) is not intended to make any substantive changes to the current section 53. However, for this new provision to operate effectively now and in the future, it should not be limited to "illustrative artistic works". Rather, the new section 113KK should be amended to cover all "explanatory or illustrative copyright material" in all forms and formats, not just artistic works. This change would better reflect the multidisciplinary nature of scholarly and creative practice (see our comments below in relation to the proposed new section 113KH for theses).

6. Education: Online access - 'reasonable steps'

Question 4.1: For the purposes of new paragraph 113MA(2)(d), what measures do you consider should be undertaken by an educational institution to seek to limit access to copyright material, when made available online in the course of a lesson, to persons taking part in giving or receiving of the lesson, and ensure it is used only for the purposes of the lesson?

The University considers that the following measures would be reasonable in limiting access to copyright material under the proposed new provision:

- authentication to secure enterprise systems and content platforms used to communicate the material
- warning notices when communicating content to students.

Additional steps to limit access would prove burdensome for students, teachers and educational institutions and are unlikely to provide any additional protection.

6.1 Additional issues

The proposed classroom teaching exception requirement that the recording of the material is made available on a “*temporary basis to persons taking part in the giving or receiving of the educational instruction*” (section 113MA(c)) is understood to mean the University can make a recording of a lesson and make that recording available to a teacher or student enrolled in that unit of study, course, or tutorial for the whole of the teaching period and any associated assessment period, but not for saving as a permanent teaching resource for routine use by teachers and students.

However, the University recommends the meaning of “temporarily available” extends to future use of the recording if it is used by the same educational institution for the same unit of study, lesson, or tutorial, albeit for a new cohort of students. This would enable universities to use recordings that:

- capture bespoke events (e.g., special guest speakers, industry practitioners)
- are time sensitive (e.g., commentary on current events) where the work or broadcast material is not archived by the owner for future use
- supplement a class where a teacher is unavailable to deliver a lesson during the following teaching period (e.g., a teacher is unavailable at short notice).

7. Theses exception: new section 113KH

The expression “*thesis or similar literary work*” used in the proposed provision suggests a thesis is only comprised of a literary work created by the thesis author. This is not always the case as a thesis may, for example, include non-traditional research outputs or multimedia. Additionally, a thesis can include third-party copyright material or other copyright material created by the thesis author but the copyright in which may or may not be owned by that author. Examples of other copyright material may include published journal articles used as thesis chapters, musical works, films, recordings of theatrical performances or musical works, and, of course, artistic works (such as illustrations and photographs).

While the proposed section 113KK covers the inclusion of accompanying explanatory or illustrative artistic works it does not cover other copyright material. Therefore, the University submits that section 113KH should be amended as set out in **Schedule 1**. Alternatively, the proposed section 113KK could be amended by expanding it to cover all explanatory or illustrative copyright material, not just explanatory or illustrative artistic works, and other material that forms part of the thesis.

While the proposed fair dealing for quotation may apply to much of the third-party material included in a thesis, we do not see what additional public benefit is achieved by a university library making a fair dealing assessment before supplying a copy of a thesis under the new section 113KH. Instead, we submit the amendments mentioned above are made to the proposed provision as they will not cause harm to rightsholders.

8. Technological protection measures (TPMs)

Circumvention of an Access Control TPM to enable a fair dealing:

Students enrolled in Australian educational institutions currently do not have the ability to fully engage in certain learning activities because of the Copyright Act’s prohibition on circumventing an access control TPM for students’ fair dealings with copyright material for research or study

purposes (or one of the other fair dealings). For example, a student may want to use a film for an assignment (e.g., a video essay) but if that film is protected by an access control TPM they will not be able to do so, and instead will have to spend time finding a film that does not have an access control. This may not provide an equivalent substitute, with the unfortunate consequence that the student's time could have been better spent engaging with the learning activity.

The University recommends that the Copyright Regulations are amended to include an exemption for all fair dealings by students or teachers that relate to a course of instruction, including students undertaking higher degrees by research (Masters by Research and PhDs).

Schedule 1: Suggested drafting changes to proposed section 113KH

To ensure the provision operates as intended, and incorporates multidisciplinary, multimedia theses, and thesis components, the University recommends the following changes to the proposed section 113KH:

113KH Use of unpublished theses or similar ~~material literary works~~

- (1) An authorised officer of a library or archives does not infringe copyright in copyright material by a use of the material if:
 - (a) the material forms part of the collection comprising:
 - (i) the library of a university or similar institution; or
 - (ii) an archives; and
 - (b) the material is **or forms part of**:
 - (i) the manuscript of an unpublished thesis or similar ~~material literary works~~; or
 - (ii) a copy of an unpublished thesis or similar ~~material literary works~~; and
 - (c) a request has been made by, or on behalf of, a person to be supplied with a copy of the material; and
 - (d) the use of the material is for the purpose of:
 - (i) making, or causing another person to make, the copy; or
 - (ii) supplying the copy to the person; and
 - (e) the authorised officer is satisfied that the person:
 - (i) requires the copy for the purposes of research or study or for the purposes of the person's private and domestic use; and
 - (ii) will not use it for any other purpose; and
 - (f) the authorised officer is satisfied that it is reasonable to supply the copy to the person.

Supply

- (2) For the purposes of this section, **supply** includes supply by way of a communication.