

Productivity Commission
Inquiry into Australia's Intellectual Property Arrangements
Submission by the Council of Australian University Librarians

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Introduction

The Council of Australian University Librarians (CAUL) thanks the Productivity Commission for the opportunity to contribute to its review of Australia's intellectual property arrangements.

CAUL is the peak leadership organisation for university libraries in Australia. Our mission is to influence information policies and practices in Australian higher education, and to support and enhance the value of university libraries.

CAUL submits that the current copyright arrangements within Australia are neither efficient nor effective, and are certainly not adaptable.

Copyright places significant burdens on universities. As one of our members points out, the Copyright Act 1968 (the "Act") contains 90 copyright provisions relating to the operation of the statutory licences, education, research and study, libraries and archives, all of which universities must understand and comply with (see **Attachment A**). This alone should be argument enough for reform - such complexity cannot be warranted. The complexity and inflexibility of these provisions impose significant costs on universities and undermine their ability to engage in the digital economy and utilise new technologies to create and disseminate knowledge.

The technological environment has changed dramatically since the Government last reformed the existing system and considered whether there was a need to provide greater flexibility in copyright law. The Act is technology specific and lacks the flexibility to accommodate technological changes, or continue to strike a balance between the interests of rightsholders and users when innovative new products or platforms are developed.

The statutory licences for educational institutions, set out in Parts VA and VB of the Act, are economically inefficient and create a false market that has imposed unreasonable costs on universities. Inequity within the market means that voluntary licences accessible to universities are overly restrictive, when they are available at all.

The flexible dealing exception in s200AB is uncertain and difficult to apply, and as such, of limited use to universities wanting to use works in ways that would most likely be considered "fair". There is an urgent need for a new exception that can be relied on by educational institutions to provide sufficient flexibility and agility and be subject only to a fairness test.

Scope of this submission

As is discussed above, the current copyright arrangements that universities operate under are extensive and complex. With this in mind, this submission will focus on the primary mechanisms used to regulate copyright use within universities:

- the statutory licences for educational copying set out in Parts VA and VB of the Act;
- the related "flexible dealing" provision for educational institutions provided under s200AB; and
- voluntary licensing.

In the majority of cases, the interpretation and operation of these mechanisms is the responsibility of the university libraries. As such, our members have significant experience, expertise and evidence regarding their application.

With respect to other aspects of the copyright system, and broader issues raised by the Productivity Commission, CAUL supports the submissions of Universities Australia, the Australian Library Copyright Committee and the Australian Digital Alliance.

Principal concerns

In summary, our members find the current copyright arrangements to be extremely difficult and costly to use, confusing for individual librarians and teaching staff in application, and inefficient for the sector as a whole. Our principal concerns are:

- Under the current system, educational institutions often pay multiple times for the use of material.
- In addition to direct licensing costs, the Part VA and VB licences impose unreasonable administration and compliance costs on universities, particularly with respect to the copyright surveys.
- The cost of the software management tools necessary to comply with the statutory requirements is also significant.
- The statutory licences are extremely restrictive in the uses that they allow and are not fit for the digital age. In particular, the hosting rule in Part VB prevents universities from moving easily into the online education space.
- Voluntary licensing is in many cases not a solution, as the voluntary licences are equally restrictive and seek to exclude or limit the exceptions and statutory licences included in the Act.
- Furthermore, voluntary licensing cannot always be obtained - copyright owners may not be identifiable or contactable or simply do not respond.
- s200AB does not provide a remedy for the above limitations as it is extremely difficult to apply. As such, there has been little take up of this exception by the sector.
- When institutions do seek to use s200AB and other exceptions, technological protection measures (TPMs) can present an insurmountable barrier, essentially prohibiting the use.
- There is a clear preference within the sector for a flexible exception based on the US fair use model, which many see as being simpler and more intuitive than the current complex arrangements.

These concerns are drawn from direct feedback from our members in response to a CAUL outreach regarding the Commission's Inquiry.

Supporting evidence provided by our members for each of the concerns, including figures and comments, is provided in **Attachment B**. For reasons of commercial confidentiality, we have anonymised the evidence provided in this public submission. However, upon request, we would be pleased to seek permission from individual CAUL members to provide the Commission with the raw feedback to assist your inquiries.

Recommendations

To ensure an efficient, effective and adaptable copyright system for Australian libraries and educational institutions we recommend:

1. Reform of the statutory licences to reduce their complexity and allow for greater flexibility, particularly with respect to the use of material online, and minimise the administrative and compliance burden they place on the sector.
2. Replacement of s200AB with an open-ended fair use exception based on the US fair use model.
3. Legislative changes to make it clear that contracts cannot overrule copyright exceptions.

The Australian Law Reform Commission (ALRC) recently completed a detailed review of education and library provisions within the Act. Importantly, it recommended that the statutory licences be simplified and streamlined and that a fair use exception be introduced¹.

The ALRC determined that the Act should be amended to ensure that Australian educational institutions are able to rely on unremunerated exceptions where a particular use is deemed “fair”. This would place Australian schools and universities on equal footing with educational institutions in comparable jurisdictions:

“The ALRC considers that it would be unjustified and inequitable if educational institutions... could not rely on unremunerated exceptions such as fair use. Statutory licences should be negotiated in the context of which uses are permitted under unremunerated exceptions, including fair use and the new fair dealing exception. If the parties agree, or a court determines, that a particular use is fair, for example, then educational institutions and Governments should not be required to buy a licence for that particular use².”

CAUL strongly supports these recommendations and appeals to the Productivity Commission to reinforce their importance and priority to Government.

Attachment A: List of provisions relevant to universities in the *Copyright Act 1968*

Below is a table listing 90 copyright provisions⁴ contained in the *Copyright Act 1968* relating to the

¹ ALRC *Copyright and the Digital Economy Report* - www.alrc.gov.au/publications/copyright-ip43

² *Ibid*, para 8.60

operation of a university library. They include several statutory licences and individual exceptions for education, research and study, and libraries and archives. We consider that many of these provisions could be repealed with the introduction of a fair use exception that includes ‘research’ ‘education’, ‘library and archive use’ and ‘assisting people with a disability’ in a non-exhaustive list of illustrative purposes, as recommended by the ALRC in its final report³.

GENERAL	
28	Performance and communication of works or other subject-matter in the course of educational instruction
40	Fair dealing for purpose of research or study
41	Fair dealing for purpose of criticism or review
41 A	Fair dealing for purpose of parody or satire
44	Inclusion of works in collections for use by places of education
49	Reproducing and communicating works by libraries and archives for users
50	Reproducing and communicating works by libraries or archives for other libraries or archives
51	Reproducing and communicating unpublished works in libraries or archives
51A	Reproducing and communicating works for preservation and other purposes
51B	Making preservation copies of significant works in key cultural institutions’ collection
52	Publication of unpublished works kept in libraries or archives
103 A	Fair dealing for purpose of criticism or review
103AA.	Fair dealing for purpose of parody or satire
103C.	Fair dealing for purpose of research or study
110A.	Copying and communicating unpublished sound recordings and cinematograph films in libraries or archives
110B.	Copying and communicating sound recordings and cinematograph films for preservation and other purposes
110BA.	Making preservation copies of significant recordings and films in key cultural institutions' collections
112AA	Making preservation copies of significant published editions in key cultural institutions’ collections
PART VA	
135A	Interpretation
135B	Copies and communications of broadcasts

³ Ibid, Recommendations 4, 5.1, 5.2 and 5.3 - www.alrc.gov.au/publications/copyright-ip42

135C.	Extended operation of this Part
135D.	Operation of collecting society rules
135E.	Copying and communication of broadcasts by educational institutions etc.
135F.	Making and communication of preview copies
135G.	Remuneration notices
135H.	Records notices
135J.	Sampling notices
135JAA.	Determination of questions relating to this Division or the collecting society's rules
135JA.	Agreed notice
135K.	Marking and record keeping requirements
135KA.	Notice requirements in respect of communications
135L.	Inspection of records etc.
135M.	Revocation of remuneration notice
135N.	Request for payment of equitable remuneration
135P.	Declaration of the collecting society
135Q.	Revocation of declaration
135R.	Annual report and accounts
135S.	Amendment of rules
135SA.	Applying to Tribunal for review of distribution arrangement
135T.	Appointment of notice holder
135U.	Copying before declaration of collecting society
135V.	Preview copies
135W.	Notices by administering bodies
135X.	Marking and record keeping requirements
135Y.	Effect of declaration of collecting society
135Z.	Relevant right holder may authorise copying etc.
135ZA.	Copyright not to vest in copier
	PART VB
135ZB.	Interpretation

135ZC.	Eligible items and photographic versions
135ZE.	Part does not apply to computer programs
135ZF.	Operation of collecting society rules
135ZFA.	Licensed communications
135ZGA.	Application of Division
135ZG.	Multiple reproduction of insubstantial parts of works that are in hardcopy form
135ZH.	Copying of printed published editions by educational institutions
135ZJ.	Multiple reproduction of printed periodical articles by educational institutions
135ZK.	Multiple reproduction of works published in printed anthologies
135ZL.	Multiple reproduction of works that are in hardcopy form by educational institutions
135ZM.	Application of Division to certain illustrations that are in hardcopy form
135ZMA.	Application of Division
135ZMB.	Multiple reproduction and communication of insubstantial parts of works that are in electronic form
135ZMC.	Multiple reproduction and communication of periodical articles that are in electronic form by education institutions
135ZMD.	Multiple reproduction and communication of works that are in electronic form by educational institutions
135ZMDA.	Reproduction and communication of works from electronic anthologies by educational institutions
135ZME.	Application of Division to certain illustrations in electronic form
135ZN.	Copying published editions by institutions assisting persons with a print disability
135ZP.	Multiple reproduction and communication of works by institutions assisting persons with a print disability
135ZQ.	Making of relevant reproductions and relevant communications by institutions assisting persons with a print disability
135ZR.	Copying of published editions by institutions assisting persons with an intellectual disability
135ZS.	Copying and communication of eligible items by institutions assisting persons with an intellectual disability
135ZT.	Making of copies etc. for use in making copies or communications for a person with an intellectual disability
135ZU.	Remuneration notices

135ZV.	Records notices
135ZW.	Sampling notices
135ZWAA.	Determination of questions relating to this Part or a collecting society's rules
135ZWA.	Electronic use notices
135ZX.	Records notices and sampling notices: marking and record-keeping requirements
135ZXA.	Electronic use notices: notice requirements etc.
135ZY.	Inspection of records etc.
135ZZ.	Revocation of remuneration notice
135ZZA.	Request for payment of equitable remuneration
135ZZB.	Collecting societies
135ZZC.	Revocation of declaration
135ZZD.	Annual report and accounts
135ZZE.	Amendment of rules
135ZZEA.	Applying to Tribunal for review of distribution arrangement
135ZZF.	Rights of copyright owners
135ZZG.	Copyright not to vest in copier
135ZZH.	Unauthorised use of copies
	FLEXIBLE DEALING
200 AB	Use of works and other subject-matter for certain purposes

Attachment B: Principal Concerns and Supporting Evidence

Boxed text below indicates a direct quote from a member institution

1. Under the current system, educational institutions often pay multiple times for the use of the same material.
 - In 2015, university libraries paid \$50 million to license content collectively through CAUL. This does not include the millions paid by individual libraries under single institution agreements.
 - In addition, universities paid more than \$35 million to collecting societies Copyright Agency and Screenrights, under remuneration agreements for the Part VA and Part VB statutory licences.

Educational institutions (and in some cases, individual academics) often pay multiple times for each scholarly journal article. For example:

- The academic writes the journal in the course of their employment with the university, and submits the article to the journal. The author receives no remuneration for their contribution and in some cases pays an article processing charge. In almost all cases, the publisher takes an assignment of copyright or an exclusive licence.
- The university library pays a direct licence fee to subscribe to a journal on behalf of the university. Licence fees for a subscription products range between approximately AUD \$500.00 (individual journal) to approximately AUD \$2M (for a large subscription database product).
- The university, faculty or individual academic pays an open access article processing charge to make that journal available open access – a key requirement of Australian and international research funders. The average article processing charge has been calculated at USD \$906.00, ranging between USD \$8.00 and USD \$3,900.00. Journals from major international publishers, hybrid journals (mix of paid open access and library subscription) and journals in biomedical fields charge the highest fees overall.
- The journal article may be counted in an annual survey under Part VB of the Act and receives a royalty payment from the Copyright Agency.
- In general, the creator of the scholarly journal article receives no upfront remuneration from the publisher of the scholarly journal and no royalty remuneration from the Copyright Agency.

In addition to paying multiple times for scholarly works as noted above, inefficient methods of sampling mean that the education sector also pays to copy freely available material. In 2013 Universities Australia stated:

“Some of the content that universities currently pay for under the statutory licences, and which is likely to fall within a fair use exception, includes freely available internet content, (including content uploaded onto blogs and freely available wikis that no one ever expected to be paid for) and orphan works. Currently, the money paid by universities for this content is eventually paid to Copyright Agency members who have no connection to the works that were copied. That is because Copyright Agency has no one else to distribute it to. In other words, these members benefit from a windfall payment - at the expense of publicly funded education institutions - due to the inefficiencies of the statutory licence⁴.”

Paying for freely accessible resources, and paying multiple times for licensed resources, is an inappropriate and inefficient use of public funds, and occurs due to inefficiencies and inequities in the administration of the current copyright system.

Another example ... is where the lead academic had to pay US\$2,950 to make available to MOOC (massive open online course) learners a copy of an article that he had authored in 2014 (due to the author assigning his/her rights to the publisher in a contract). A final example is ... where the author had to pay \$AUD 235.33 for a single image (which was a table) that he/she had created themselves in a scholarly article (again because the author assigned his/her rights to the publisher in a contract). Arguably these may have been considered 'fair use' under the US exception and there would not be a need for universities to pay for such usage.

2. The Part VA and VB licences impose unreasonable compliance costs on universities, particularly with respect to the administration of copyright surveys.
 - Individual institutions estimate that they spend “thousands”, usually upwards of \$7,000, to administer and complete mandated copyright surveys.
 - In addition to the significant cost outlay in university staff time and resources, universities may need to engage additional staff to provide extra support to ensure successful completion.
 - One institution, for instance, stated that in 2013/2014 they spent \$30K on survey administration consultants and \$40K in casual staffing support to ensure compliance.
 - Another institution described their experience as follows:

To undertake the 2011 Part VB licence survey (EUS [Electronic Use Survey] & Photocopying) the library paid for a HEW 6 full time staff member for 3 months and at least 3 HEW 3s part time for 4 weeks to assist with the survey. Staff were used to assist in filling out photocopying forms, duplicating copying (so Copyright Agency had copies of what was copied) and visiting/presenting at all the campuses to ensure that staff understood their obligations. The total cost for this additional staffing was approx. \$18k and was in addition to the work that other ongoing staff did - creating information for the survey, supervising the extra staff and dealing with queries and complaints. This was the minimum necessary for successful compliance.

3. In order to ensure survey compliance, universities must manage their course materials throughout the year in accordance with certain administrative practices. This requires the acquisition of specialised software as well as staff resources to implement and manage this process. This in itself creates a significant administrative and cost burden.
 - Our members report that the cost to acquire a reading list management system which can provide effective copyright management and enable compliance with the survey requirements is \$60K in the first year and \$30K/40K as an ongoing subscription.
 - In addition, members report \$15k-40K spent annually on staffing to manage these lists and ensure continual compliance with the survey. (Note: this is an approximate cost. It is difficult to quantify the amount of time spent on list management due to the dispersed nature of the work.)
 - When these costs are added to other copyright management/compliance costs, one institution reported total costs of approximately \$170k per annum.

Currently it takes staff from across various areas a lot of time to educate and promote copyright best practice: i. Information Officer (Copyright) = 0.5 FTE; ii. Various staff (including curriculum developers, resource developers, educational technologies staff) educating academics and developing technologies that incorporate copyright statute provisions, as software does not do this out of the box. During survey periods, further staff from across the university are enlisted to assist with administering the survey/s. i. Can include library staff, administrators, academics; ii. This is in addition to the Information Officer (Copyright).

4. The statutory licences are extremely restrictive in the uses that they allow and are not fit for the digital age.
 - In particular, the hosting rule of Part VB prevents universities from moving easily into the online education space. This rule states that where 10% or one chapter of a work is available on a university content repository, no other part of that work can be made available on the repository at the same time.

Some typical scenarios depicting the inflexibility ... [of the Part VB licence] include:

- Educational institutions are limited to only copying and/or communicating certain amounts of a work upon reliance of the statutory licences being able to only photocopy or scan up to 1 chapter of a book which is divided into chapters or photocopy or scan up to 10% of the number of pages of a book which is or isn't divided into chapters;
- Academic staff wanting to place a chapter or 10% of a work on a library reading list only to be denied as there is already another part of the same work being communicated via the library reading system;
- Academic staff wanting to place 3% of a work on a library reading list only to be denied as there is already 6% of the same work being communicated via the library reading list system. Even though the total % being communicated is less than 10%, this scenario is not permitted as there will be 2 communications from the same work at the same time;
- Academic staff wanting to place chapter 1 of a work on a library reading list and then chapter 2 of the same work 2 weeks later with a requirement that the first chapter is still needed. Under the copying limits chapter 1 must be removed before Chapter 2 can be communicated;
- Academic staff wanting to use a picture, diagram or graph (artistic work) from a hardcopy book, journal or newspaper to give to students via class or a reader pack must spend time determining whether the artistic work has been separately published and if it is available for purchase in the desired format, within a reasonable time and at an ordinary commercial price. If it is, they will need to purchase it. If it isn't, then they may make a copy under Part VB; and
- If an academic wants to use multiple articles from a journal, newspaper or magazine, the articles must be on the same subject matter before they can be copied and/or communicated within the university.

- Academics are choosing to use services other than the statutory licences because of their restrictive nature.

Academics are becoming more reliant on subscription databases and open access and in many cases avoid trying to use Part VB due to its complicated, restrictive and convoluted requirements in the digital environment. It is very difficult for them to understand that their 10% cannot be made available to their select group of students because another unit, sometimes in a different discipline, has already used part of the item.

Examination of the statistical data from the [institution's] library's ereserve in 2012 showed a 4% decrease in materials that are being made available in reliance on Part VB between 2011 and 2012. While this may seem an insubstantial shift, an examination of the data in specific sessions, particularly the last session of 2012, reveals a decrease in the ratio of Part VB materials to open access/subscription database material of as much as 17%.

The library received \$46k (2014) and \$30k (2015) central university funding for MOOCs copyright permissions work undertaken by staff in those years. This has been found to be a 'start up' cost, in that the MOOCs copyright permissions work has been declining as MOOC development staff have become better educated about using freely available and open access materials.

5. Voluntary licensing is in many cases not a solution. They can be equally restrictive and seek to exclude or limit the exceptions and statutory licences included in the Act.

- In many cases publishers are unwilling to enter into negotiations around standard term contracts (which are often not even written for the Australian environment), and Australian institutions do not have sufficient bargaining power to force changes.

Negotiated licences are generally overly restrictive, or not even available to institutions: Our records suggest that we have purchased 2 eBooks (\$135 and US\$225) and one pdf chapter (\$12) ... In two other cases, the eBooks' licences were very restrictive (e.g. one reader at a specified computer) and/or expensive, to the degree that the academics chose not to go ahead with the purchase. And, in a few cases, although eBooks existed, they were not available for institutional purposes.

- It is common for voluntary licences to explicitly exclude or limit exceptions and statutory licences. Even where exceptions aren't explicitly excluded, they are often not acknowledged or permitted under contract terms.

One problem is that despite paying a high price for the Part VB licence and costs for compliance, we can't use a lot of material because it is from separately licensed/subscribed databases where [arguably] the contract terms [may] take precedence over Part VB. Hence, some databases don't allow electronic reserve but linking only (e.g. OVID, EBSCO including Business source complete, Cinahl, Biological abstracts, Ingenta, JSTOR, Medline). In these instances, we are paying for rights we can't use.

As far as document delivery provisions are concerned, these are becoming more difficult as more journals and books move online and many licence agreements do not allow any sharing at all, especially for interlibrary loan. As an approximation, of the resources that have content that would be appropriate for inter-library loan i.e. excluding resources like Scival, Mintglobal, Web of Science, eLearning tools, etc. that don't have inherently lendable content like a PDF, perhaps 50-60% of those resources have clauses that allow for inter-library loan. A lot are silent, so we either negotiate them in if we can, or not.

Fair Dealing for Criticism or Review is being undermined through expectations by publishers and third party owners that permission is required for all uses and republication of third party materials.

The capacity to deliver high quality education in an online environment is frustrated by a combination of the publishers' practices, commercial modelling, licensing and the existing Copyright Act preventing academics from using many core textbooks in their curriculum.

6. Voluntary licensing cannot always be obtained; where copyright owners are not identifiable, not contactable or simply do not respond.

Like most universities, the [institution] has substantial holdings of unpublished materials (and unpublished orphan works) in its rare and special collections, museums and archives. Under the Copyright Act, the copyright in these works will never expire unless the works are published in accordance with the provisions of the Copyright Act. Perpetual copyright means that some of these unpublished works will not be publicly available online unless the copyright owner is located and, where necessary, permission is granted by the owner to allow the university to copy and communicate the work to the public for research and study.

The university's library has an ongoing digitisation program that relies on existing provisions in the Copyright Act to digitise works for archival and administrative purposes. Once digitised, unless the copyright has expired, unless there is a licence from the copyright owner or one of the specific exceptions can be relied on, the digitised version is only available for inspection at the library. Ideally, the university would like to make its special collections available to library users and members of the public for the purposes of research and study.

For example, the [institution] plans to undertake digitisation of the complete collection of ... the free weekly student newspaper published by the Student Representative Council ... [the newspaper] is a significant and popular source of primary information for researchers and members of the public with an interest in Australian political and public figures. During its long history, many notable authors have contributed articles to [the newspaper] while other authors have chosen to remain anonymous...Despite the popularity and significance of the ... collection, the digitisation program was delayed multiple times due to legal uncertainties around providing access to anonymous (orphan) articles and unpublished supplementary material such as notes, manuscripts and sketches.

Staff are not necessarily able to choose the best material for their courses, only that material they can afford to obtain permission for. For example, for the ... MOOC it was theoretically possible to obtain copyright licensing for use of an Andy Warhol image, however we received no response from the official owner of the image (a gallery or the agents) to obtain (purchase) a legitimate authorised copy of the image. So even when willing to pay, we can't necessarily find a solution.

There is no exception in the Australian Copyright Act (Cth) that adequately addresses non-consumptive uses of material such as text, data or content mining.

In many cases, it is possible to obtain upfront permission to conduct data mining activities – for example, when text mining a stand-alone journal database, permission may be covered in the terms and conditions of the university’s subscription to the database. Where large data sets contain distributed or orphan works it is impossible to clear copyright as the rights holder cannot be identified or located. In some countries, in the absence of any express right to reproduce materials obtained through content mining activities, copyright laws have been interpreted in ways that restrict the ability to apply computer or machine reading and analysis to otherwise legally available content.

We advocate for the introduction of a broad fair use exception that is technology agnostic and framed in terms of the end-user outcome and whether or not the use is fair, rather than attempting to define each act. The university considers in such circumstances where individual permission to mine distributed, publicly available data is either difficult or impossible to obtain, data and content mining for non-commercial purposes could be considered a fair use.

In the UK, recent changes to copyright law allows text and data-mining of copyright material for non-commercial research purposes, without having to obtain specific permission from the rights holder. The lack of an appropriate exception to enable data and text mining for non-commercial, research and education purposes places Australian institutions at a competitive disadvantage when compared to researchers and educators in other jurisdictions.

7. The s200AB exception has not provided the intended flexibility for the sector. It is difficult to interpret and to apply, and there is little official guidance on how it can be used. Because of this difficulty in application, the exception is not widely used by the sector.
 - Although CAUL members and other industry copyright advisers may not agree in all cases with the restrictive interpretations of s200AB mentioned below, these statements show the circulation of such interpretations by other parties have a real impact on the risk assessments and decisions of individual institutions.

For libraries, painstaking assessments of individual items as to whether they are in copyright or not are required before they can be digitised or made widely available online. In the US the library might rely on 'fair use' instead. The time and effort required in assessing and seeking permission for digitisation projects means many are never undertaken. At [Institution] library, a recent trial of digitising our collection of 19th & 20th century ... music might appear an obvious choice as the music is rare, fragile and of public interest. However, many composers lived well into the 20th century meaning their music remained in copyright. One cannot assume all the music is in the public domain. So this requires staff time to assess. Once material is determined to still be in copyright, you are in a legal grey area. The relevant exception introduced in 2006 (200AB, the special case exception) which was seen at the time as providing an alternative to fair use, is regarded by commentators (Australian Copyright Council, Copyright Agency for example) as never applying to large scale or mass digitisation projects. Therefore even small scale projects such as making available the flute music collection online are in legal limbo.

Doing a 200AB exemption, even for material that should obviously be accessible, costs again close to \$10k for the time taken to do the research, do the 3 step test and write the risk assessment and get approval. These are real "red tape" costs that prevent us taking the opportunity often to make information accessible that would be of benefit to research and international participation by Australia in research.

A small example – we have ... archives and there are reports on research which can be used by current researchers to make their research more productive and digitisation would make this information widely accessible. We have an example where a researcher was looking at a particular issue and we have evidence in the collection that the proposed study would not reveal a solution that would support the development of a new product. Heavens knows how he came to us but it meant he could move onto other research and we argue contributed to more productive research. Doing a 200AB case or other process to digitise these resources is a total impediment and our limited resources are spent on digitising stuff we can do with a minimum of paperwork so this would not have been digitised and thus the research could easily have been duplicated – stupid system.

The flexible dealing exception in s200AB of the Copyright Act is an example of an exception that is confusing in its application, and is not sufficiently clear to give users certainty about the scope of the provision and whether they are likely to infringe the rights of creators when relying on the provision. The provision is particularly unusual in that it incorporates the three-step test used in international copyright law and, in particular, Article 13 of the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement). This is unusual because the test is normally used by governments to assess proposed copyright exceptions under their domestic copyright laws. However, under the flexible dealing exception, users are required to apply the test to a proposed use under a domestic law exception.

This uncertainty is compounded by the fact that there is little consensus internationally on how to apply the three-step test. As far as the university is aware, there is only one international adjudicative decision concerning the test in the context of the TRIPS Agreement. The university is not aware of any judicial consideration of the test under s200AB.

For the purposes of the flexible dealing exception, the three-step test requires that the use of the copyright material must:

- amount to a special case;
- not conflict with the normal exploitation of the copyright material; and
- not unreasonably prejudice the legitimate interests of the owner of copyright.

In addition to applying the three-step test, a library wanting to rely on the flexible dealing exception must satisfy the following preliminary criteria in relation to the use:

- it must be made for the purpose of maintaining or operating the library (including operating the library to provide services of a kind usually provided by a library);
- must not be made partly for the purpose of obtaining a commercial advantage or profit; and
- there must not be any other exception or a statutory licence in the Copyright Act that provides the use is not an infringement of copyright.

Due to the uncertainty in interpreting these criteria, universities have found it difficult and incredibly time consuming to apply the criteria to a particular proposed use. For example, there are numerous exceptions in the Copyright Act in relation to particular uses of copyright material by a library [and by an educational institution]. To consider whether any of these exceptions or a statutory licence applies to the use before the institution can rely on the s200AB exception is an incredibly time-consuming process and, as a consequence, has a chilling effect on relying on the provision and pursuing the proposed use.

Given the uncertainties in interpreting s200AB, we consider that the provision is unnecessarily complex and has not fulfilled the goals of:

- allowing copyright material to be used for socially beneficial purposes; and
- introducing an exception that would operate like a US style fair use exception that could provide more flexibility than is available under the existing specific exceptions and statutory licences⁵.

8. When institutions do seek to use s200AB¹⁹ and other exceptions, TPMs can present an

⁵ Explanatory Memorandum, *Copyright Amendment Bill 2006*, p 10

insurmountable barrier, essentially prohibiting the use.

Most Australians are not aware that they are breaching copyright every time they copy a legitimate DVD or download material from the iview website, or a freeview website, to make an extract or mashup to include in their lecture. This is not through the act of copying, which may well fall under the s200AB exception, but in circumventing the copy protection on the DVD or on the website (that only allows streaming).

These anti-circumvention laws allow only VHS material [that is not protected by a TPM] to be copied - because almost all DVDs and streaming websites, such as all the legitimate freeview TV sites, have technological protections that prevent copying or downloading. When lecturers ask students to incorporate AV material in their assignments and research, where that material may be ok to copy under fair dealing, the anti-circumvention laws do not allow them to use DVD or freeview material available online. So many staff are trying to incorporate blended learning into their courses when a lot of legitimate material can't be used. It is physically impossible for teachers to use much AV material in a lecture legitimately - you would need about 7 or 8 DVD players or different disk drives queued up to play in class for each extract. This begs the question that if we haven't got exceptions to allow copying of ... DVDs, what is going to happen with all the different formats of the future? Format neutral exceptions appear some way off. In contrast, there is a specific exception in the US to allow university teachers to circumvent copy protection on DVDs for teaching where it is a fair use.

In addition to the lack of a broad fair use provision for education and research, the lack of a broad right for educational institutions to circumvent TPMs to facilitate the use of materials in classroom and online education limits our ability to engage in innovative course design and delivery, placing Australia's education sector at a competitive disadvantage in relation to other jurisdictions... Many teachers have voiced their concern that TPMs negatively impact innovation and educational best practice in the classroom when they prevent the use of audio-visual resources in blended classroom teaching. Other teachers noted that they had no practical way to teach their subjects in a blended classroom environment without including examples of audio-visual works (e.g. film and media studies courses).

A very recent policy decision in the US has introduced a new exemption to the Digital Millennium Copyright Act (DMCA) that allows the copying of "digitally locked" video content in online classroom environments. On 28 October 2015, the exemption was approved by the U.S. Copyright Office. This exemption will have widespread impact across the education sector in the US as the exemption allows open, for-profit online learning platforms to use copyrighted material in video lectures alongside traditional not for profit schools and higher education providers. This provision complements existing provisions within the DMCA which allow professors to use copyright video resources for in-class lectures.

[Institution] Library recently underwent an extensive de-selection process of our video collection. Where items were identified as useful for teaching purposes we are seeking to purchase the titles on DVD. Where they are no longer available for purchase we sought to apply s200AB and format shift them. A number of titles are not able to be format shifted due to TPMs. The university no longer has video players in its teaching spaces and the video players in the library are to be decommissioned at the end of 2012. We will seek permission from the copyright holder to circumvent the TPM so we can make a digital copy. Items that fall into the orphaned work category will be lost to the collection. Some of the items may be historical and culturally valuable e.g. indigenous dance.

A lecturer required digital versions of several videos for a unit that was being taught solely online. She asked that we purchase licensed digital copies of these items so she could use them in the online environment. They were no longer available for purchase and unable to be format shifted due to TPMs on each of them.

9. There is a clear preference within the sector for a flexible exception based on the US fair use model, which many see as much simpler and more intuitive than the current complex arrangements.

Lecturers or students may want to create 'mash-ups' or use 'mash-ups' that would be perfectly legitimate under US broad fair use law but don't fall within the narrow categories of 'parody and satire' 'criticism and review' or 'reporting news' under fair dealing. If the emphasis was rather on whether the use was fair overall, it would allow much more creative freedom in the AV material that can be used. For example the mash-up '[A fair\(y\) use tale](#)' by Prof Eric Fadden, which takes hundreds of extracts of Disney films is very valuable pedagogic material. But it does not fall easily into any of the Australia fair dealing categories - under Australian law it is probably infringing. This narrow categorisation of fair dealing discourages imaginative use of AV material in the Australian classroom.

An alternative in Australia is 200AB. However, the narrow test... is extremely difficult to determine. A simple 'fairness' test, as in fair use, requires much less specialised legal training and allows academic staff to make sensible determinations without having to refer to legal commentaries or seek expert advice.

In research, the requirement for academic staff to get permission for each reproduction of a table, an illustration, an image or a model that they are including in their scholarly articles (where US academics simply rely on fair use) is a great waste of time and energy. We recently spent considerable time in consultation with a professor and the ... Office of the General Counsel seeking advice on whether the reproduction of a single image within a scholarly article being published in an international journal could fall within one of the fair dealing purposes or whether they would have to seek specific permission. Even after extensive consultation and regard to the authorities the law was far from clear. We would have felt much more confident in advising on fair use, for the reason that a fairness assessment is more common sense, more flexible and broad, and there are more legal precedents (with case law in the US) for guidance. This kind of example does not happen in the US as academics are confident in relying on fair use.

If we consider an ideal situation where the onerous tasks in complying with the educational statutory licences are replaced with the flexibility of a 'fair use' copyright system, then the costs mentioned in the tables above and the costs associated with the collecting societies licence fees may be reduced or not even exist. This is not what commercial content creators want to hear, but if these funds were re-injected into the university instead of to copyright compliance tasks and licence fees then content creators within the university could be greatly encouraged to produce more educational content and be funded/supported accordingly.