

Universities Australia Submission to Productivity Commission Issues Paper: Intellectual Property Arrangements

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Introduction

Universities Australia is pleased to have the opportunity to contribute to the Productivity Commission's Issues Paper on Intellectual Property Arrangements. The paper is part of the Commission's Inquiry into Australia's intellectual property arrangements including their effect on investment, competition, trade, innovation and consumer welfare.

In particular, Universities Australia welcomes the Commission's consideration of the patent system and its role in stimulating innovation in Australia and whether the existing prescriptive copyright system is sufficiently flexible to efficiently cope with rapid technological change.

Universities Australia

Universities Australia is the peak body representing Australia's 39 universities in the public interest both nationally and internationally. The sector employs more than 120,000 people, attracts more than one million students and earns around \$18 billion in export income through international education.

Recommendations

- (i) The introduction of a broadly applicable, flexible copyright exception such as fair use.
- (ii) Streamlining and modernising the copyright educational exceptions and statutory licences.
- (iii) Extending the current ISP safe harbours to other service providers.
- (iv) Amending Australia's anti-circumvention provisions to limit them to technologies that prevent copyright infringement.

Patents

The patent system provides an important mechanism for further leveraging Australia's world class research capabilities for broader benefits, including through the translation and commercialisation of research.

Universities Australia welcomes the Commission's intention of examining the economic value of intellectual property protection. Australia's intellectual property rights are important national assets. A clear understanding of their value is crucial to assessing the benefits and implications of free trade agreements and other international treaties, and ensuring we strike the right balance between strengthening Australia's trade interests and protecting key intellectual property rights. It is critical that any changes made to the intellectual property system take into account the constraints of existing global frameworks and bilateral and regional trade agreements.

Improvements to the intellectual property system will be most effective when they are delivered as part of a larger holistic strategy to increase Australia's innovation capabilities.

Copyright

Universities Australia endorses the Commission's view expressed in its Issues Paper that the intellectual property system should be principles-based and meet four clear broad principles.

The intellectual property system should be: effective, efficient, adaptable and accountable in order to meet its overarching objective of maximising the wellbeing of Australians.

An effective, efficient, adaptable and accountable copyright system should both safeguard the rights of copyright owners as well as provide access for users for the purposes of education and research which benefit the economy and society more broadly.

The existing prescriptive and complex copyright system is not effective, efficient or adaptable – particularly in the digital era – and there is little transparency in how the system has evolved and how it operates in practice.

It imposes significant costs on the higher education sector both in terms of statutory licence fees and heavy administrative compliance costs. It also acts as a roadblock to universities achieving significant national policy objectives outlined by the Federal Government.

The Turnbull Government has identified as an overarching ambition, the important role of innovation, flexibility and adaptability in shaping a nation and an economy that is well suited to a rapidly changing global environment in which changing technology infuses all development.

"The Australia of the future has to be a nation that is agile, that is innovative, that is creative. We can't be defensive, we can't future-proof ourselves. We have to recognise that the disruption that we see driven by technology, the volatility in change is our friend, if we are agile and smart enough to take advantage of it," the Hon Malcolm Turnbull MP said soon after becoming Prime Minister in September 2015.

The Government has highlighted the important role it sees for an innovative higher education sector in bringing about this ongoing transformation.

"Central to securing that agility and those smarts are systems of world class education and training, including an adaptive, innovative and high quality higher education sector", the Minister for Education and Training, Senator the Hon Simon Birmingham said at a conference in October 2015.

However, the existing copyright system is acting as a significant barrier to universities developing as adaptive, innovative, technology-based institutions able to successfully compete with higher education institutions around the world.

The technologies and markets used to create and deliver copyright works have changed significantly, yet Australian copyright law has not moved to accommodate these changes. Instead it frequently prevents Australian universities creating and disseminating knowledge.

The "one size fits all" approach of Australia's copyright system applies a lowest denominator approach to access to all creative works, even where high levels of protection are not intended or appropriate.

This is compounded in the digital environment where almost every use of technology will involve making copies. In this environment, the existing copyright exceptions have proved to be insufficiently flexible to distinguish between those uses that are at the core of copyright and those uses that are not.

As a result, innovative and useful technologies and new ways of using content in socially beneficial ways automatically infringe copyright unless their use falls within one of the existing narrow purpose-based exceptions.

This either impedes or adds significantly to the compliance costs of universities creating and delivering teaching courses to their students, including in competition with universities around the world.

For instance, Australian universities have much less flexibility than their United States counterparts when determining what kinds of content will be included in courses offered via online delivery platforms, including Massive Open Online Courses (MOOCs).

Such courses have also resulted in universities spending considerable resources in seeking copyright permissions for content used.

Universities typically spend between 1250-1740 staff hours for copyright permissions and clearances for use of content for Massive Open Online Courses (MOOCs).

Copyright concerns are also operating as a roadblock in the use of search technologies such as data and text mining in Australian universities.

These technologies are transforming scientific research by enabling automated searches of vast quantities of text and data to look for patterns, trends and other useful information.

The Federal Government has also identified as a major policy priority, lifting the level of engagement between universities and business and industry.

The sector is increasingly global with academic and research engagement with international institutions growing rapidly.

However, academic engagement is being stifled by Australia's copyright regime which limits the use of third party content in academic work.

For instance, this may impact on publishing higher degree theses online – an important aspect of the dissemination of knowledge – and on early stages in research such as conferences, group presentations, peer symposia and other peer testing of research material.

These limitations all put Australian universities at a global disadvantage, especially compared with institutions operating in fair use copyright jurisdictions such as the United States, Israel and South Korea.

For these reasons, a broadly applicable, flexible copyright system such as fair use, should replace the existing prescriptive regime to enable universities to make full use of technology, innovation and new markets to create, use and disseminate knowledge and maximise the drive for an innovative competitive economy.

In its *Copyright and the Digital Economy Report*, tabled in Parliament in 2014, the Australian Law Reform Commission defined fair use as a defence to copyright infringement that essentially asks of any particular use: Is this fair? In deciding whether a use is fair, a number of principles, or 'fairness factors', must be considered. These include the purpose and character of the use and any harm that might be done to a rights holder's interests by the use.

The Law Reform Commission noted that, fair use differs from most current exceptions to copyright in Australia in that it is a broad standard that incorporates principles, rather than detailed prescriptive rules. It stated that this gives it a flexibility and adaptability that prescriptive rules lack.

Fair use can therefore be applied to new technologies and new uses, without having to wait for consideration by the legislature.

A fair use copyright regime would far more consistently meet the principles of effectiveness, efficiency, adaptability and accountability by making it technology-neutral and transparent.

UA includes as attachments two submissions which it prepared for the Australian Law Reform Commission's *Copyright and the Digital Economy* review.