



24 February 2022

## **CAUL Response to the Exposure Draft of the Copyright Amendment (Access Reform) Bill**

### Introduction

The Council of Australian University Librarians (CAUL) is the peak leadership organisation for university libraries in Australia. CAUL has advocated for copyright reform to recognise the changes in scholarly publishing and the commercial market. CAUL members make a significant contribution to the publishing industry, spending over \$384 million on purchasing material in 2020<sup>1</sup>.

CAUL welcomes and strongly supports the proposed Copyright Access Reforms in the exposure draft as a commitment by the government to an approach to copyright that recognises the modern digital environment and equitably supports the rights of authors, publishers, libraries and readers.

The *Copyright Amendment (Access Reform) Bill 2021 and Review of Technical Protection Measures Exceptions* (the Access Reforms) take Australia forward significantly in meeting the issues identified in the Productivity Commission and Australian Law Reform Commission reports. They recognise that change is required to support Australian industry, research and education. This submission from CAUL offers information on scholarly publishing, University Library purchasing and recommends further developments to support industry development including Data and Text Mining, access to archives and moves towards fair use to support Australian universities to fulfil their roles in providing quality learning and teaching and delivering world class research.

### Trends in scholarly publishing and rights

There are important differences between trade and scholarly publishing that are highly relevant to the reforms. Trade publishing covers works for the general public, such as fiction and works on recreation (e.g. cooking, travel). Scholarly publishing is research and material for higher education. University libraries have significantly changed their approach to acquisition due to the immense changes in scholarly publishing in recent years.

The most recent figures available (2020 data) show the extent of change to digital:

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<sup>1</sup> Data available from CAUL on request

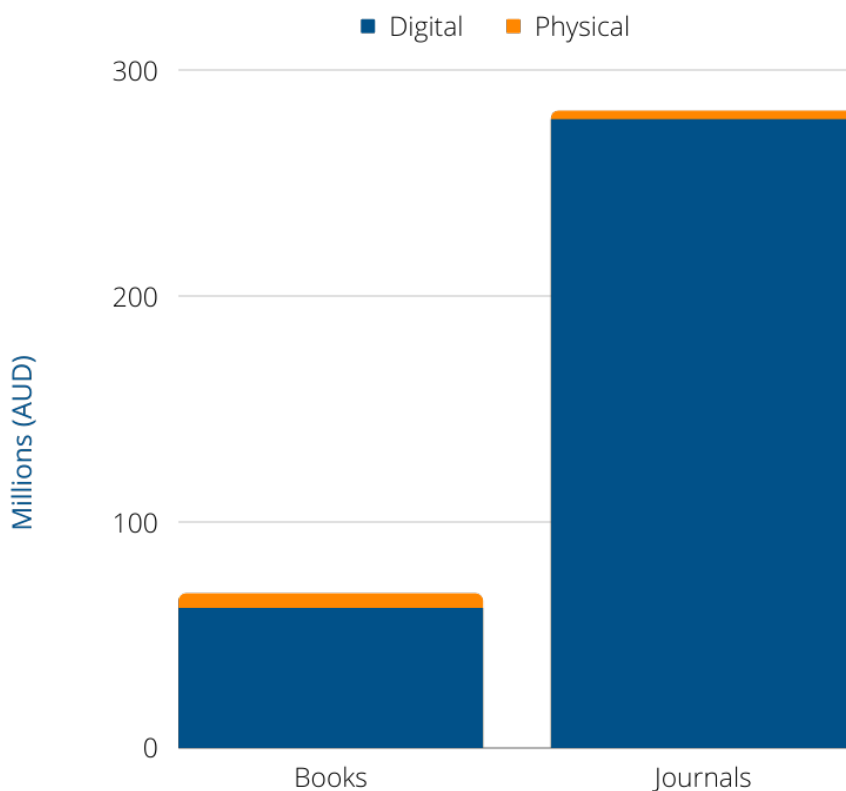


Figure 1. Australian University Library expenditure on content, 2020 (CAUL)

In 2020, 97% of the \$384,036,703 expended on library collection materials was expended on digital materials. 99% percent of the total expenditure on journals was allocated to digital journals and 91% of total expenditure on books was allocated to digital books. Digital collection materials have licence arrangements that provide for use of the materials by the university community. The proposed Copyright Access Reforms will not harm these commercial arrangements in any way, rather they will complement and enhance them. Specifically, the orphan work amendment clarifies the process to enable effective implementation; it does not change the relationship of orphan works to the statutory licence. The quotation amendment provides for clarity and consistency with publisher processes and compliance with licences.

Another major trend in publishing is open access (OA). In research publishing, authors may pay to publish through article processing charges (APCs) or book processing charges (BPCs) for open access publishing, rather than *being* paid to publish as in trade publishing. APCs are generally in the vicinity of \$US2,000 to \$US3,000<sup>2</sup>, while for books, BPCs are around \$US15,000. In the scholarly world the benefit to authors is recognition through impact and engagement, rather than financial payment. Major funders such as the Australian Research Council require works resulting from research they fund to be made open access. The 2018 data in the Excellence in Research Australia report showed that around 32% of journal articles by Australian researchers and 33% of research reports were published open access<sup>3</sup>.

<sup>2</sup> <https://www.openaccess.cam.ac.uk/publishing-open-access/how-much-do-publishers-charge-open-access#:~:text=Generally%20the%20range%20is%20between,Service%20pays%20is%20%C2%A32147.>

<sup>3</sup> <https://dataportal.arc.gov.au/era/nationalreport/2018/pages/section1/open-access/#:~:text=Note%3A%20The%20ARC%20Open%20Access,from%20the%20date%20of%20publication.>

In addition, international publishers are adopting new library subscription models that cover both read access to material and the cost of publishing articles. These Read and Publish agreement models,<sup>4</sup> which CAUL has been negotiating on behalf of the Australian university library sector, are supporting development of different commercial models. Authors publishing under these agreements make their work open access to all, regardless of whether they have access to scholarly databases. CAUL has RAP agreements with 15 publishers including CSIRO, Cambridge University Press, Springer Nature, Wiley and Oxford University Press.

For Australian researchers and publishers, participation in this new market is important as it both increases the dissemination of research (and thus researcher impact) and contributes to nationally significant research outcomes through optimising research translation. The major publishers are based overseas, many in countries that have a more balanced copyright regime such as the United States. The proposed changes to the Copyright Act, particularly in relation to quotations and orphan works, take a significant step towards supporting participation in the international environment. For Australian publishers to grow into this market long term, consideration of fair use is important for future steps in copyright reform.

This is relevant to the review of the Copyright legislation as the nature of the commercial arrangements in the university sector have changed significantly in the digital environment. In the predigital environment libraries purchased print material that sat on a shelf and with rights processes for further use. The legislation therefore needed to be explicit about use for educational purposes with administratively cumbersome systems. In the digital environment, over 90% of works are acquired by university libraries with rights to use for all university purposes. Rather than receive remuneration, authors must pay to publish (particularly APCs) and thus the publishers receive remuneration from libraries, users and authors. The Act needs to take into consideration what administrative processes and restrictions are relevant to the scholarly publishing ecosystem and there should be nothing in the act to prevent the uses that are commercially acquired. The current provisions are administratively burdensome and limit the sector's ability to effectively use the licenced works. The legislation must not impact adversely on these arrangements or reduce the ability of publishers, authors and libraries to use rights consistent with the rights regime for access, use and open access.

## Response to Exposure Draft

### Schedule 1—Limitation on remedies for use of orphan works

CAUL strongly supports the Government's proposal in relation to orphan works.

CAUL strongly supports the Government's proposal in relation to orphan works. The proposal strikes an appropriate balance between the interests of rights holders and users. It represents a very clear and effective approach to enabling publications to be used to further research and education.

Australian University Libraries contain works published over the centuries that are important for use in the sector to benefit Australian research and education, as well as to public benefit. Allowing universities to rely on the orphan works limited liability scheme will reduce red tape and enhance the use of important content for purposes that benefit the public good.

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<sup>4</sup> <https://caul.libguides.com/read-and-publish#:~:text=The%20CAUL%20Consortium%20works%20continuously,of%20any%20transactional%20Article%20Processing>

### Example of challenges

Prof Marian Sawer, first author of *Working from inside: twenty years of the Office of the Status of Women* wished to use this work in a course in semester 2, 2021. The work had been out of print since 1995 after publication in 1994 and there was no commercial impact of making a copy available to students in the course. There was no record found of an agreement with the Office of the Status of Women regarding rights. The published work recorded © Commonwealth of Australia on the verso of the title page and was published by the Australian Government Publishing Service. Correspondence occurred in May, June and July with the Office of Women, the successor agency, and Department of Infrastructure, Transport, Regional Development and Communication. After four months of enquiries and numerous emails the course commenced in July without permission for a digital copy to be made of the work. Nine months later, permission has still not been received, the course is now over and the process of obtaining permissions proved to be an exercise in red tape which had no commercial implications. This is an example of the need for reform.

### New section 116AJA

CAUL supports this new section and recommends the following:

- the wording be clear that the diligent search is undertaken within a reasonable period; and
- that the provision should not conflict with use under s113P.

The development of codes of practice with industry partners to support the proposed orphan works regime will enable clarity of use and building best practice.

In relation to the reasonably diligent search, CAUL notes that the scholarly publishing industry has a standard that has been well used by the publishing industry in relation to the use of citations that addresses the characteristic of use, the conduct of the search and the nature of the particular item. Having an established set of principles that has been used by the publishing industry that is consistent with those proposed confirms that this is an area where industry practice is well developed. Creation of updated guidance to implement the reforms will be able to build on these existing standards.

CAUL supports the assertion made by Universities Australia that a diligent search should be able to be undertaken either before use of the work or “as soon as reasonably practicable”. This is important for many reasons, not least of which is to address the need for research that is required to have public benefit, such as COVID-19 research and theses which are time defined.

CAUL also recommends that whenever the s113P statutory licence could be used, that should be possible and suggests that the drafting be reviewed to ensure this is clear.

### Schedule 2— New fair dealing exception for non-commercial quotation

CAUL strongly supports the new fair dealing exception for non-commercial quotation. The provisions are well worded, and CAUL particularly endorses its explicit coverage of research use. CAUL Notes that this exception is not in conflict with S113P. CAUL suggests the amendment of s113FA(1)(a)(vii) to extend the term to “research and study” consistent with good industry practice and with the language used elsewhere in the act and guidance material from the Copyright Council.

The use of quotations is vital to the work of the university sector, in particular higher degree by research students and researchers. There are a significant number of students graduating each year that have completed theses as part of their study:

- 2017: 10,891
- 2018: 10,408
- 2019: 11,165<sup>5</sup>

Theses range in the extent of use of quotations within the work (including use of images) from 800 quotations in an art history thesis to 100 quotations in a computer science thesis, based on a review of recent theses. If each quotation takes an hour to conduct a diligent search, follow up and recoding of permissions then more than 1 million hours per year are spent by students in university on the red tape around permissions for quotations. This is a huge loss in productivity for the education sector with no commercial impact on authors.

CAUL strongly endorses the proposed fair dealing exception as it will remove this unnecessary administrative burden, reduce the incentive to avoid quotation of third party material and contribute to greater productivity and output in research.

It is the view of CAUL that the proposed fair dealing is consistent with the article 10 of the Berne Convention for the Protection of Literary and Artistic Works which is quoted below:

**1. Quotations; 2. Illustrations for teaching; 3. Indication of source and author**

(1) It shall be permissible to make quotations from a work which has already been lawfully made available to the public, provided that their making is compatible with fair practice, and their extent does not exceed that justified by the purpose, including quotations from newspaper articles and periodicals in the form of press summaries.

(2) It shall be a matter for legislation in the countries of the Union, and for special agreements existing or to be concluded between them, to permit the utilization, to the extent justified by the purpose, of literary or artistic works by way of illustration in publications, broadcasts or sound or visual recordings for teaching, provided such utilization is compatible with fair practice.

(3) Where use is made of works in accordance with the preceding paragraphs of this Article, mention shall be made of the source, and of the name of the author if it appears thereon.<sup>6</sup>

Ephemeral material is used in lectures where there is both no commercial implication for rights holders and material is produced with the intention of wide distribution. For example, advertising catalogues from companies such as Bunnings and the Good Guys are used in courses on marketing within Business degrees.

The increased use of quotations will decrease barriers to the use of material in study and research and increase the impact of Australian authors. These proposed changes will not have a commercial impact on authors or publishers and will assist students to have access to current materials for their study.

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<sup>5</sup> Australia. Department of Education, Skills and Employment, [uCube](#)

<sup>6</sup> WIPA Berne Convention for the Protection of Literary and Artistic Works. <https://wipolex.wipo.int/en/text/283698>

CAUL supports the amendment of s113FA(1)(a)(vii) to extend the term to “research and study” consistent with good industry practice and with the language used elsewhere in the act and guidance material from the Copyright Council.

In respect to the fairness factors the proposed four factors provide clarity and are in the view of CAUL more appropriate than applying five factors. The proposed wording on the third factor in s 113E(2) will assist the implementation and ensure no harm results from the change.

Copyright material has been ‘made public’ (Schedule 2, item 4, new section 113FA(1)(c))

CAUL recommends that the new fair dealing exception for non-commercial quotation include unpublished material.

Many libraries and archives in the university sector hold important collections for which the ability to provide access through quotations would both remove administrative burden and support research and study.

CAUL submits that a letter or archive is not substantially different to a pamphlet or material printed with limited circulation and should be included in the scope of the fair dealing exception. Quoting material in a thesis, for example, is not making the material available by publication. A thesis is not a published work and the proposed restriction is inconsistent with the nature of theses and indeed research.

Letters and archives are often written with the expectation that they will be shared more broadly, not restricted in their availability. In relation to research, scholars communicate findings and discuss ideas as they develop through letter writing to colleagues, and indeed letters have been the basis of works that are then published. In addition those seeking a public voice, such as advocates and politicians often write letters with the intention that they will be available to a wider audience. The Act should not prevent that nor create an administrative barrier to achieving that.

#### **Example of letters/archives**

The Germaine Greer Archive at the University of Melbourne comprises documents, photographs, books, magazines and born-digital audio, video and text media that document the life and career of Germaine Greer, a major figure in academic and popular culture in Australia and internationally.

The archive currently fills 487 archive boxes (occupying 82 metres of shelf space) mainly documenting the period 1959-2010 and was acquired by the University from Germaine Greer in March 2017. The University of Melbourne purchased the archive and is progressively making it available to support research. The management of the collection reflects the principles of digitisation of works and preparation of finding aids with access to the physical collection and material not yet digitised through [access conditions](#) clearly articulated to users.

The legislation should allow for the digitisation of the collection and access conditions consistent with the agreement between the donor and the University.

Any restriction based on confidentiality such as commercial in confidence should be dealt with by the access control of the hosting institution for the material, not through a restriction on quotations.

CAUL submits that the restriction on access is the appropriate control mechanism on sensitive material and that the exception should be applied to all materials. The drafting confuses the two concepts of access control of material in collections and rights for reuse and thus should be revised.

### Schedule 3— Update and clarify library and archives exceptions

CAUL strongly supports the proposed amendments to the library and archive provisions.

CAUL strongly supports the proposed amendments to the library and archive provisions. The proposed reforms will enable collections to be made available to remote users and reduce administrative burdens that bring no benefit to authors, publishers or libraries. The removal of the requirement to delete copies made of material does not make that material openly accessible or reduce the rights of any copyright owners. Rather it increases the ability for the system of inter-library loans and document supply to occur effectively and increases the benefit to authors with their work being more widely read and likely cited. This increases the impact of authors and contributes to future career benefits.

The proposed changes will remove red tape without reducing the benefits of rights holders.

Remote users – s113KC

CAUL strongly supports the proposed amendment.

COVID-19 has reinforced the importance of ensuring that the legislation and university systems do not penalise students who are studying remotely. The propulsion will not result in libraries supplanting suppliers by becoming streaming services, rather it will enable legitimate access to material that has been purchased for students who cannot physically be on campus but are served by the Library. During the pandemic, libraries discovered that many services previously supplied to students could not be made available in some countries because of government controls on Internet access. For equity reasons this proposed change is important to support the education sector. Noting the sector is one of Australia's most significant industries, there is a national benefit from this reform.

Many universities have special collections and archives that cannot be lent physically as material is fragile and rare. The new exceptions would permit libraries to provide materials to researchers online remotely rather than on premises.

The proposed provision has an important benefit to the nation and would not have a material commercial impact. It will enable a more effective and productive sector.

Interlibrary loan and Document delivery

CAUL strongly supports the proposed amendment.

CAUL supports the proposed changes and the extension to cover private and domestic use. The amendment adds greater clarity and will allow for support of community activity such as family history research.

The move to allow for oral requests is consistent with the Government's support for provisions that assist those with a disability to have equity in access to services. It will also support efficiencies in processes in libraries.

## Schedule 4: Update and restore education exceptions

CAUL strongly supports the proposed amendment.

CAUL strongly supports the proposed changes as they provide better support for contemporary teaching methods and greater ability to respond effectively to changing education needs. The removal of uncertainty in relation to the operation of classroom teaching in what is now an online world will assist the quality and successful completion of education, providing a better educated workforce for Australia.

CAUL notes that the well established mechanisms in university libraries ensure only legitimate access by students enrolled in courses at universities. There is extensive access control including identity systems such as Shibboleth protecting access to university systems and meeting cybersecurity requirements in every Australian university.

### Matters not covered in the proposed changes

While welcoming the proposed reforms, CAUL draws the Government's attention to the need for clearer regulation to support a modern system of education, research and innovation that university libraries help to drive. Outstanding issues include Data and Text Mining from library and archive collections, the need to progress steadily towards greater fair use provisions in order for Australia to be internationally competitive and the opportunities to release more Government content through a more progressive approach to opening up access to the material.

In science and the humanities, innovative research increasingly requires access to collections as data sources to build new capabilities and industries. The Copyright Act needs to evolve to meet these national requirements. Data and Text Mining is one example of technology that is essential for industry and is currently unclear in terms of rights, particularly for digitised works. CAUL welcomes the initiatives in the proposed reforms as an important step towards removing barriers to using technology.

Australian research and education institutions compete in a global environment. The fair use provisions seen in the US and many other countries allow for the creation of great services that benefit study and research. It would improve the effectiveness and productivity of the sector if fair use was enacted in Australia. Under the current system, a large volume of Australian research and publications are not digitised and therefore are not available to benefit industry or increase the impact of Australian research. The changes proposed will be an important step towards removing these barriers.

Finally, many Australian government publications are available internationally but are locked away from Australians. This restricts access to information that has been collected by government and core information critical to effective democratic participation. Many thousands of ABS and CSIRO publications<sup>7</sup> are locked away from Australians limiting access to this information for community, education or industry benefit.

Overall, it is important to note that CAUL welcomes the developments as very positive steps that balance the rights and interests of authors, publishers, libraries and users.

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<sup>7</sup> List of publications provided to ANU University Librarian 2021, copy of list is available on request



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### **About the Council of Australian University Librarians**

The [Council of Australian University Librarians](#) is the peak leadership organisation for university libraries in Australia. CAUL members are the University Librarians or equivalent of the 39 institutions that have representation on Universities Australia and the eight members of the Council of New Zealand University Librarians (CONZUL). CAUL makes a significant contribution to higher education strategy, policy and outcomes through a commitment to a shared purpose: To transform how people experience knowledge – how it can be discovered, used and shared. CAUL’s vision is that society is transformed through the power of research, teaching and learning. University libraries are essential knowledge and information infrastructures that enable student achievement and research excellence.

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