Draft Copyright Reform Legislation: submission from Open Access Australasia

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About Open Access Australasia

Open Access Australasia is a membership organisation of 20 Australian university libraries, all eight New Zealand university libraries through the Council of New Zealand University Librarians (CONZUL), the Creative Commons Australia chapter, Tohatoha Aotearoa Commons, the Australian Library and Information Association (ALIA), the Australian Digital Alliance (ADA) and Wikimedia Australia. Its mission is to attain open access to research in Australia and New Zealand through advocacy, collaboration, awareness, and capacity building across the Australian and New Zealand research sectors.

Our interest in these proposed amendments is in relation to how they would support the increased use and reuse of academic research at the same time as appropriately protecting the rights of copyright holders. We have commented below on the questions that directly relate to open access for research.

We are generally supportive of the proposed amendments and the aim to better support the needs of Australians accessing content in the digital environment. In addition to the specific points below we would make the following general comments.

• Simplification of key provisions of the Act are an important reform that will make copyright easier for the general public to understand and for users, such as academics, to comply with. We also believe that the amendments will improve the ability for Australians to access content online through cultural institutions and governments in appropriate circumstances.

The release of research material under a Creative Commons (CC) licence is fundamental to how open access works. Broadly, we discourage any changes introduced by this Bill that would threaten the enforceability of the CC licences, or any other ‘open’ licence mechanism.

Question 1.1: Orphan works: Application to Copyright Tribunal to fix reasonable terms.

Open Access Australasia is supportive of the provision’s intention to make more of Australia’s orphaned materials in cultural collections accessible. We acknowledge and respect the need to balance that with protections for creators. We welcome the ability for the parties to negotiate terms if a copyright owner comes forward. And that either party can apply to the Copyright Tribunal if terms cannot be mutually agreed.

Question 1.1 asks what matters “should be included in an application to the Tribunal to fix reasonable terms for ongoing use of a former orphan work”. In the case of digitised research theses, the works would be made available open access in the institution’s repository for download and use under specific licensing. In this situation the work is not being offered for financial benefit to the institution, rather it is simply part of a wider collection. If a copyright owner were identified and they objected to their thesis being made available, the policy of the university library currently would be to withdraw it from open access, and only offer the work for research purposes by request. It is unlikely an application to the Tribunal would be necessary in this circumstance.

As the discussion paper identifies, cultural institutions are discouraged from releasing orphaned works as they could be financially liable if the copyright owner later comes forward and claims compensation for use of the material, or objects to its use altogether.

The examples of orphan works identified in the discussion paper do not include the large number of older research theses held in all university libraries in Australia which represent a significant original contribution to the research landscape and many are currently only accessible on request – assuming the seeker is aware the relevant thesis exists and is able to find it. Theses are not created with “an expectation of commercial return”. Even subsequently published monographs are rarely profitable.
Most collections of research theses held in Australian university libraries are the result of “mass digitisation of collection items”, so Open Access Australasia welcomes the suggestion that: “In some cases, it may be reasonable to narrow searches to a shorter investigation based on the outcome of a representative sample of the works”. Given the almost universal nature of this work across Australian university libraries, these libraries represent an excellent example of an ‘industry’ that could develop ‘industry codes of practice’ to cover written guidelines, protocols or other industry guidance material on conducting diligent searches. University libraries have been making research theses openly available with different approaches to the contacting of authors. The instances of a copyright owner subsequently responding to the university with a request for the work to be removed from open access is very rare.

Question 2.1: Quotation: Unpublished material

Open Access Australasia strongly supports the introduction of a new fair dealing exception for quotation. In response to question 2.1, OA Australasia supports the inclusion of unpublished material in the fair dealing exception for quotation. Libraries and archives have extensive collections of unpublished material which play a pivotal role in research and subsequent research outputs. We agree that the fairness factors laid out in Table 4 will ensure that unpublished material is not used when it would be inappropriate to do so, such as in the cases of confidentiality, potential market value, cultural sensitivities or reputational risk.

We are particularly pleased to see that the exception extends beyond non-commercial purposes to include research purposes where the quotation is immaterial to the commercial value of the product/service. In the overview, the discussion paper refers to individuals using quotations for research purposes. However, later examples refer also to “an academic work published in a book or journal” (Table 3) and “scholarly works that are published commercially”. It is unclear whether research purposes would include textbooks under this new fair dealing exception and clarification on this would be recommended.

We note that one of the key case studies in the discussion paper focuses on ensuring Masters and PhD Students are not unfairly burdened by rights clearance when wanting to disseminate their thesis. We note that this is a hugely positive step and will reduce the necessity to issue a redacted version of a thesis due to uncleared third-party copyright. However, it is worth noting that third-party copyright for thesis by publication (composed of student’s already-published journal articles and book chapters, and occasional not yet published manuscripts) will remain an obstacle to making theses publicly available as copyright for individual papers is often transferred to publishers. We encourage the government to consider further exceptions that would permit students to include the published versions of their articles which form part of the thesis in their final publicly available thesis.

Question 5.1: Government: Use of incoming material

Open Access Australasia supports a more flexible statutory licence for government that would allow communication of material, for example, material used in government decision-making. For example, scientific research publications are provided to government for various purposes including to inform policy making. In combination with efforts outside of the copyright reform process such as those at institutions and the Chief Scientist’s work to increase open access to research publications, this would greatly simplify government’s access to and use of incoming material through access to the data and research underpinning policy decisions.

Additional comment:

Contracting out (Schedule 3, items 12 and 13)

“This amendment is a technical clarification that section 47H does not imply that agreements can exclude or limit the operation of other provisions in the Act.”

Open Access Australasia would welcome a clarification that section 47H does not imply that contracts can exclude or limit the operation of other provisions.