

Copyright and compliance when the law can't keep up: A risk management strategy for innovation in online classrooms

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Innovative methods for creating and sharing information on the internet pop up constantly, but when it comes to using those new materials and methods, copyright law is a stumbling block in some cases and an insurmountable roadblock in others. Copyright law in Australia lacks the flexibility to keep up with educators' desire to create original, ultramodern digital classrooms. Having black and white laws and myriad grey uses creates confusion and apprehension, stifles creativity, and also creates compliance risks. Some educators refrain from experimenting with new uses because of the uncertainty, but some educators proceed without regard for copyright, opening up their universities and themselves to possible reputational and financial risk. The optimal approach is somewhere in the middle, and this balance can be achieved with a firm understanding both of copyright law and of one's university's risk culture. It is rare that uses are both super-innovative and definitively compliant, but risk can be managed, and calculated decisions can be made. This paper discusses historical and current issues surrounding copyright and innovation, as well as risk assessment methodologies and compliance strategies, so instructors can optimise what the internet can offer, while still having confidence in their legal footing.

Copyright as an inherent barrier to innovation and success in digital classrooms

Current copyright law in Australia is problematic for innovation and success in digital classrooms in the higher education sector. The problems are of both historical and contemporary origin. The *Copyright Act of 1968* (the *Act*), the document that guides the use of copyrighted materials in Australia, was not designed for the kinds of uses now available to the sector; it was written for the kind of uses available at the time of drafting. Drafting has been ongoing arguably from 1709 to present, but still the *Act* lacks a forward-facing perspective; it has only a backward-facing one. The Australian copyright system descended from the British system, typically traced back to the late seventeenth century when a guild of printers, binders, and booksellers lost the statutory monopoly it had previously held on the printing of books in England (Davison, Monotti & Wiseman, 2012). After a successful lobbying campaign, the first copyright statute was passed—the 1709 *Statute of Anne*—allowing authors to hold exclusive rights in their works for fourteen and sometimes twenty-eight years (Davison, Monotti & Wiseman, 2012). This initial statute was designed exclusively to protect against the copying or reprinting of books by unauthorised parties (Bently, 2010).

Certainly the drafters of the 1709 *Statute of Anne*, often referred to as the first copyright act, were not considering the possibility of future technological advances in the ability to reproduce works of literary and artistic value, and they definitely were not considering that educators might someday want to embed video viewers in the platforms of their digital classrooms. It is unlikely that the drafters of the current Australian *Act* were considering that possibility, either. Many copyright statutes were passed between the *Statute of Anne* and the *Copyright Act of 1968*, and multiple amendments have been made since the *Act* went into effect on 1 May 1969. Even after the most recent amendments went into effect in 2010, establishing the resale royalty scheme for works of art, it is still clear that the *Act* seeks to establish protections and exceptions only for media and uses that existed at the time of drafting.

The statutory licence for education, Parts VA and VB of the *Act*, belies this point. Parts VA and VB seek to extend a statutory licence to educational institutions to use copyrighted materials in the course of providing educational instruction. The first statutory licence was added to the *Act* in 1980 as a result of the Franki Committee and in response to the ruling in *University of New South Wales v. Moorhouse* (Copyright Law Committee, 1976). The Part VA licence is based on amendments made to the *Act* in 1989 and contained in Part VA, further expanded in 2000 (Gerdson, 2003). Both licences were broadened under the *Copyright Amendment (Digital Agenda) Act 2000* to include more internet-born work types and uses, but both licences have since remained largely untouched for the better part of a decade. Because the

licences have remained untouched, the media available for use under the licences is the media that was able to be copied in 2006, and the uses available are uses available in 2006. Some sections contain prescriptive, narrow definitions that appeared satisfactory in 2006 but are already outdated. The definition of *broadcast* in Part VA excludes many types of newer broadcast media that higher education institutions rely on heavily, such as internet protocol television (IPTV) and the majority of “made for internet” content, like YouTube videos and iTunes U podcasts (Copyright Advisory Group - Schools, 2012). Because the *Act* is generally written prescriptively—in reaction to contemporary pressures at the time of drafting—its design is not compatible with the kind of innovative uses that could make digital classrooms in higher education extraordinary.

Current copyright law in Australia is also problematic for innovation in higher education because it is inconsistent in its specificity and narrowness, preventing users from understanding which uses are protected and which are fair game. Some definitions in the *Act*, such as that of an adaptation of a literary work, are unnecessarily specific, closing out any potential new methods of adaptation. For a non-dramatic literary work, the only uses considered as adaptations are arranging the work into a dramatic form, translating the work, and creating a version of the work in which the story is told through pictures (*Act*). This specificity eliminates the possibility of other uses being considered adaptations, such as the creation of derivative works, without parliamentary action to amend the definition. When some definitions are as specific as this one, it then causes confusion and uncertainty when other terms are left undefined. Notably, there is no definition of an adaptation of an artistic work in the *Act*. While the language in section 21(3) of the *Act* sounds like the definition of an adaptation of an artistic work—it states that the conversion of a two-dimensional artistic work to a three-dimensional work and the conversion of a three-dimensional to a two-dimensional work are both considered reproductions—the word *adaptation* is never used. The combination of specificity and silence makes the *Act* unnecessarily complex and difficult for users to understand and use.

An additional complicating factor for innovation in higher education is the speed at which changes are currently made to the *Act*. That speed is slow and inadequate. Additional exceptions to the exclusive rights of copyright owners have to be added to the *Act* by amendment, and that process has proven itself unable to keep up with pace of technology. The most glaring example of this issue is domestic time-shifting. Australians did not have the legitimate ability to record television broadcasts and watch them at a more convenient time until 2006, approximately 27 years after it became legal in the United States. While the United States Supreme Court decision in *Sony Corp. of America v. Universal City Studios, Inc.* (frequently called the Betamax case,) which deemed time-shifting to be fair use in the United States, was initially met with distress from television broadcasters (Lupovitz, 1992), the distress gave way to great strides in television business models, alternate forms of advertising, and a shifting ecosystem between creator and consumer. By the mid-1980s, broadcasters were showing feature films in the dead of night, knowing that subscribers could set the timers on their VCRs and watch those films at a later time (De Atley, 1985). The decision allowed broadcasters and entrepreneurs to begin working immediately on new methods of satisfying the changing desires of television consumers. Before Australians could record broadcasts on VHS tapes, Americans could record broadcasts on TiVo. Four months after Australians could record broadcasts on VHS tapes, Americans could access many broadcasts at any time on Hulu.com, which was fully licensed by the broadcasters. The slow process required for amendments to the *Act* in Australia stifles the kind of innovation that was able to flourish in the United States. Without the addition of a broad exception that allows for new uses without amendment, the *Act* cannot adequately respond to changes in technology and user demands (Australian Law Reform Commission, 2013).

In the higher education sector, the risk of maintaining the status quo is that Australia could get left behind when it comes to providing students with top-notch educational experiences. Innovation in the broadest sense means more products, more jobs, more creativity, and more opportunities, but it also means an equal footing to compete globally in the fast-paced digital arena (Gardner, Stringer and Riordan, 2015). By adhering strictly to the current copyright system, Australia is creating a hostile regulatory environment for technology innovators, and Australian educational institutions are disadvantaging their students. Not only are educational institutions not able to use the best and newest methods of instruction, but they are also preventing students from using their full creative potential. Many innovative education products developed overseas are not permitted to be used in Australia on grounds of copyright infringement. As Trish Hepworth notes in “Mythbusting Fair Use for Education,” “[A] teacher is currently allowed to write a poem on a blackboard for free. If she writes the same poem on a digital whiteboard instead, this activity

must be paid for under a statutory licence. Imposing fees on basic educational uses of small amounts of digital materials creates disincentives for schools to use the most modern teaching methods for the benefit of Australian students” (2013).

Need for change in approach

Copyright reform is possibly imminent, following the publication of the ALRC report in November 2013 calling for radical change and a broad fair use exception (Australian Law Reform Commission, 2013), but it is prudent to proceed assuming that there will be no action on the reforms called for in the report. Unfortunately, we have been here before. Fair use in various forms and iterations has been proposed and discussed many times in Australia. It has been proposed by the Franki Committee in 1975, by the Australian Council of Libraries and Information Services in 1992, by the Copyright Law Review Committee (CLRC) in 1995, by the CLRC again in 1998, and by the Intellectual Property and Competition Review Committee in 2000 (Wyburn, 2006). Fair use was discussed in detail around the *Australia-United States Free Trade Agreement* in 2004, and the Joint Standing Committee on Treaties (JSCOT) recommended the replacement of fair dealing with an open-ended fair use provision. Numerous reports from other stakeholders argued for fair use at this time as well. In 2005, the Federal Attorney General Philip Ruddock announced a review on whether a fair use provision should be adopted (Wyburn, 2006). In 2013, the Australian Law Reform Commission issued its report *Copyright and the Digital Economy*, which is being discussed in Australia presently, but it should not be taken as given that the report will affect the kind of sweeping change it advocates.

With or without copyright reforms on the horizon, the negative impacts of the status quo are real and present now. Because the *Act* is out-dated and largely unworkable in its present form, two strategies for dealing with it tend to present themselves from users in higher education institutions: Fearful hyper-compliance and total disregard. Neither is ideal. Fearful hyper-compliance, where the user makes fewer uses than are available due to fear of infringement, results in zero innovation and little creativity. Total disregard, where the user ignores copyright law and proceeds without concern, opens up the user and the user’s institution to financial and reputational risk. Anecdotal evidence indicates that instructors prioritise compliance with the specifics of copyright law quite low, and the finer technical points are rarely voiced to instructors for fear of making the rules too complicated to follow. In the absence of instruction, instructors employ their own heuristics to handle copyright concerns, which yields undesirable, inconsistent results.

The danger of fearful hyper-compliance has been discussed above. Lack of innovation and creativity hinders full use of the educational tools available and short-changes students seeking top-notch educational experiences. The danger of the latter approach is the focus of most university risk management offices. The financial and reputational risk from wide-scale copyright infringement can be enormous. Georgia State University in Atlanta, Georgia, in the United States is currently bogged down in copyright litigation due to alleged copyright infringement in their digital repository. The initial litigation took five years, millions of dollars, and yielded a 350-page written decision, and the case is now back in district court where the publishers have filed a motion to reopen the trial record and present new evidence, possibly extending the length of the litigation by years (Albanese, 2015). The litigation surrounding Google Books, HathiTrust, and many United States universities was also long and expensive, lasting nine years from initial filing to the decision in the Second Court of Appeals. While there has not been a massive copyright infringement case concerning universities in Australia since *University of New South Wales v. Moorhouse* in 1975, the memory of the financial and reputational harm from that case will not be soon forgotten.

The optimal end result for copyright compliance is not hyper-compliance or total disregard—it is somewhere in the middle. Ideally, the copyright compliance atmosphere at higher education institutions should foster innovation while attracting minimal financial and reputational risk. Achieving this middle ground necessarily involves some education about copyright law basics, but more importantly it involves education about risk management for copyright uses. A risk management approach allows for innovation, improving the educational experience of students, and it also minimises the risk of financial or reputational risk as a primary concern, allowing the institution to feel comfortable in its legal footing.

Advocating a risk management approach is also preferable to advocating strict compliance to the *Act*. While it may seem as if the best practice would be to recommend following the letter of the law, in actuality a strict compliance approach can often lead to uncertain or inefficient guidance from compliance officers and to varying levels of compliance from users. Uncertain guidance is often the result of scenarios that the *Act* is ill-equipped or unequipped to handle. These scenarios are currently prolific, and the number of scenarios that the *Act* cannot handle is only going to grow as technology advances. Advances in technology and the internet generally are forcing courts to reconsider the definitions of the most basic copyright terms, such as *copy*, *communicate*, and *publish*. In September 2014, Getty Images sued Microsoft for creating a website widget that displayed images supplied by Microsoft's Bing search engine. Getty Images is asserting that this widget infringes on Getty Images' exclusive rights as copyright holder in some of the images displayed and that damages are incalculable. (Getty Images, 2014). The court is first going to have to unpack whether displaying an image from a search engine via a widget constitutes a reproduction of the image. That is not a question that can be answered if one is only following the letter of the law. Similarly, there was a court case in Israel dealing with RSS feeds as reproductions (Bob, 2013), as well as a case in Sweden dealing with hyperlinking as communication (Essers, 2014). As technology advances, the *Act* cannot definitively answer even the most basic questions, causing copyright compliance officers tasked with following only the letter of the law to give uncertain and perhaps unfounded guidance.

Following the letter of the law is also less desirable than a risk management approach because definitive answers often require time and expertise to find. The *Act* is a complex document that is often difficult to decipher, a fact to which many copyright experts can attest, evidenced via multiple submissions to the ALRC *Copyright and the Digital Economy* report of 2013. Legal professionals often argue about the meaning and intent of sections of the *Act*, and there are many unsettled aspects, including many that pertain to higher education. Section 200AB is an excellent example, as it has been explored and challenged very little since its inception in 2006. Because of its complexity, finding definitive answers in the *Act* can be time-intensive, and it can also be impossible. At most higher education institutions, there are not enough feet on the ground to provide the copyright guidance necessary for a strict interpretation of the *Act* in every situation.

Lastly, a risk management approach is optimal because if it is time-intensive and complex to find answers, then people are not going to look for them. Lecturers, instructors, course designers, and other users of copyrighted materials who are employed by institutions of higher education are busy people. From anecdotal experience, the more complex the issue, the less likely users are to pursue the answer or to follow guidance when it is given. Users then apply varying heuristic techniques to resolve the question of copyright, but unless those of us responsible for copyright compliance are teaching those heuristic techniques, the resulting outcomes are inconsistent and feature prominently the two outcomes discussed above: Hyper-correction and total disregard. An intuitive, functional, user-friendly approach is needed to ensure that compliance is more uniform and risk is better managed.

Strategies that work

Taking copyright out of the picture

At the University of New South Wales (UNSW), our first line of defence with copyright issues is to take them outside of copyright law to avoid the confusion and complexity of the *Act*, as well as to promote innovation and encourage the sharing of information and knowledge. Primarily, if third-party materials are required in an online classroom environment, we recommend using materials licensed under Creative Commons or a similar open-access licensing scheme. A Creative Commons licence functions as permission from the creator to the user. It operates like a contract, meaning any uses made of the Creative Commons-licensed materials will be governed by the terms of the licence, not the *Act*. This is beneficial for users because Creative Commons was built to be user-friendly (Creative Commons, 2015). The terms of Creative Commons licences and similar licences are clear, concise, and easy to understand. Additionally, there are helpful resources available free-of-charge from Creative Commons that can assist users with interpreting the licences, should users have any questions. The allowable uses for Creative Commons and similar open access licences are generally numerous and broadly construed, and the volume of Creative Commons and open access materials available currently is extensive. At UNSW, we recommend replacing traditionally copyrighted materials with Creative Commons materials often when

we are assisting with MOOCs and publicly-accessible digital classroom platforms, and we rarely encounter scenarios where we are unable to locate a Creative Commons-licensed or open-access resource to meet a specific need.

Beyond ease of use, another reason to advocate for the use of Creative Commons-licensed and open access materials in digital classrooms is the advancement of the idea that information is meant to be shared. The underlying purpose of open access licences and the open access movement generally is to remove barriers to usage and to facilitate sharing of copyrighted materials. The open access movement was born in response to a legal framework that was too restrictive, and it functions as an alternative to the complex, unworkable nature of copyright domestically and internationally (Bissell, 2009). Supporting the open access movement also supports the idea that alternatives to traditional copyright are needed.

A second strategy we employ at UNSW to take copyright and its restrictions out of the picture is to encourage instructors to create their own materials. Especially when instructors are teaching in publicly-accessible digital classrooms, we suggest that they consider *creating* instead of *curating* the materials in their courses. This requires a shift in perspective on the part of the instructor, but it gives them a helpful framework from which to start the course design process. Many instructors do not realise until late in the design process that third-party copyrighted materials without licences in place are going to be expensive or impossible to use on publicly-accessible digital platforms. Materials created by instructors are likely to be owned by the instructor's institution, depending on the institution's intellectual property policy, but most institutions allow for broad use of instructor-created course materials. Encouraging the creation of original materials such as images, charts, graphs, videos, hypothetical scenarios, photographs, and other materials not only allows the works to be used freely in most cases, but it also encourages the creativity and innovation that gives value to educational experiences.

Risk management

A risk management approach is the most ideal way for users to handle copyright questions in the absence of professional guidance, and it is the safest way for professionals to handle copyright questions in the absence of answers. As discussed above, there are increasingly scenarios where the *Act* is inadequate to provide definitive answers, and in many higher education institutions there is an inadequate availability of guidance. Knowing how to evaluate risk in these situations is critical. However, risk management only works if everyone is on board. Users of copyrighted materials should work with their risk management office and legal office before adopting a risk management strategy. Everyone involved in the process should be comfortable proceeding with the strategy before it is adopted. Situations that one institution might consider low-risk may be high-risk for other institutions, and the opposite may be true as well. Individuals involved in copyright clearance and advice should talk to someone at their universities who can help them unpack their institutions' risk strategies.

The copyright risk management strategy employed at UNSW is a modification of a standard risk management framework, the same framework used for workplace health and safety. We determine the severity of the likely consequences for each use and the likelihood that those consequences will occur, and we use both values to determine whether a use is low-risk, medium-risk, high-risk, or very high-risk.

This can be illustrated by assigning values to each factor on a scale of 1 to 5. For the severity of likely consequences, a value of 1 will indicate that the consequences are mild or negligible in value; a value of 5 will indicate that the consequences are very severe. For the likelihood that those consequences will occur, a value of 1 will indicate that the likelihood is very low; a value of 5 will indicate that the likelihood is very high.

The associated risk analysis can be visualised as is shown below (Table 1).

Table 1.
Risk analysis framework

Risk analysis		Likelihood of consequences				
		1	2	3	4	5
Severity of consequences	1	Low	Low	Medium	Medium	Medium
	2	Low	Low	Medium	Medium	High
	3	Low	Medium	High	High	Very High
	4	Medium	Medium	High	High	Very High
	5	Medium	High	High	Very High	Very High

When determining the severity of consequences possible for a use of copyrighted material, we generally consider the following factors: (a) The nature of work being used; (b) the value of the work being used; (c) the damage your use will do to that value; (d) the scope of the use; and (e) the nature of the likely consequences. This list is not exhaustive, but it covers our main areas of concern.

These factors require only reasonable analysis, and many users will be able to undertake the analysis unassisted. Regarding the nature of the work being used, we consider the media of the work and the effort that was involved with the creation of work. For a variety of reasons, some media are protected more than others. For example, music and film recordings are protected much more heavily than their written equivalents—lyrics and scripts. The reproduction and communication of scholarly articles in massive open online classrooms (MOOCs) is heavily policed, but the use of cat gifs is not. The analysis is not exact, but it is an important factor to evaluate. Additionally, works that required considerable amounts of effort to produce are generally protected and defended more heavily than works that were created with less effort. Reproduction and communication of oil paintings is more heavily monitored than the use of Microsoft Paint drawings.

Also important is the value of the work being used and any damage to that value that the proposed use might cause. If the work contains or is based on proprietary information of great value to the rightsholder, any action on the part of the rightsholder will be more severe. Also to be considered regarding the value of a work is whether the use concerns the “heart” of the work, the most important and valuable pieces. For example, reproducing and communicating the chorus of a song will exact a more severe response from the rightsholder than using a little-known verse. A companion factor to consider is whether the proposed use will damage the value of the original work in any way. Uses that create a substitute market for a work or that disparage the work in any way will generate much more severe consequences than uses that do neither.

Regarding the scope of the use, it is important to consider how many people will be the final recipients of the use. In the case of MOOCs, this factor can be dispositive. MOOCs operate with the intention of reaching thousands and thousands of eyes across the world in many circumstances. That makes the scope of the use much broader than in the case of a flipped classroom on a publicly-accessible platform, where the total audience may number in the hundreds, even though it is technically available to millions. Where use is confined to a password-protected platform only accessible to a few hundred students at most, the severity of consequences will almost always be low. Rightsholders often determine the value of their licences and the damages of any infringements on a per-person basis, so the larger the scope of use, the more severe the consequence may be.

Lastly, it is important to consider the nature of the likely consequences. Legal consequences for online infringement are generally going to fall somewhere on the spectrum between take-down notice and lawsuit. When deciding where a use might lie on the spectrum, we tend to consider the rightsholder involved, any previous actions the rightsholder has been involved in, the industry of the rightsholder, and the outcome of any other comparable situations. For example, if the rightsholder is an educational institution, a non-profit association, or a professional organisation, it is more likely that a take-down

notice will be issued instead of a lawsuit, though it is not always that simple. Many scholarly publishers have been litigious recently, as have pharmaceutical organisations, especially when the work used involves proprietary information about patented drugs, so decisions should include all information available the rightsholders. In addition to legal consequences, reputational consequences should be considered as well. UNSW considers all reputation harm to be a severe consequence, and it is likely that most higher education institutions will take a similar stance.

When determining the likelihood of consequences for a use of copyrighted material, we generally consider the following factors: (a) The identity of the rightsholder; (b) the nature of the use; (c) the scope of the use; (d) the likelihood that the use will interfere with the rightsholder's ability to profit from the work; and (e) whether any steps are being taken to mitigate possible consequences.

When considering the identity of the rightsholder, it is helpful to use many of the factors discussed above in relation to rightsholders, as well as the likelihood of the rightsholder taking any action at all. Whether the rightsholder is actively defending its rights in any of its intellectual property is a critical factor to evaluate. Especially when it comes to works available online, many rightsholders choose not to exercise their rights. If the image is appearing on multiple thousands of sites, it is generally safe to assume that the rightsholder is not defending the copyright. However, some rightsholders only defend their rights when uses are commercial or derogatory in nature. It is important to evaluate how your use compares to other uses when determining how this factor affects your rating for likelihood of consequences.

The nature of the use should also be a factor. Most importantly, we consider whether the use is detrimental or beneficial to the rightsholder. The likelihood of consequences is substantially higher when a use is decreasing the market for a work or detrimental to the reputation of a work. If a use is derogatory in any way, if it involves a remix of the work that the rightsholder may not fully endorse, if it creates undesirable associations between the work and other works, then action on the part of the rightsholder is more likely. Positive associations will drive up the market for the work, benefitting the rightsholder, but negative associations will drive down the market, hurting the rightsholder's bottom line.

The scope of the use affects the likelihood of consequences similarly to the way it affects the severity of consequences. Rightsholders typically police the most wide-scale uses of their works more heavily than the smaller-scale uses. The greater the audience to which you are communicating, the greater the likelihood is that the rightsholder will try to stop the communication.

Probably the most important factor we consider is whether our use is interfering with the rightsholder's ability to profit from the work. We evaluate carefully whether we are creating a substitute market for the work and driving sales away from the rightsholder's legitimate means of profiting from the work. The analysis we perform here is similar to the analysis we perform before relying on section 200AB of the *Act*, which contains similar language. We look to whether a licence is available for the kind of use we want to make and whether our use will compete with a legitimate business model of the rightsholder. If a substitute market is being created, the likelihood of consequences is greatly increased.

The last factor we take into account is whether any steps are being taken to mitigate the likelihood of consequences. The mitigation steps we recommend use the acronym *SCAN*: Secure the work, clip it, attribute it, and put users on notice. It is always best to secure the work being used so as few users access it as possible. Securing a work can be done by employing a password barrier, an unsearchable link, an encryption method that prevents copying, or other similar measures. It is not always practicable to secure content, but it is always a good idea. Clipping the work—only using as much as you need—is also a crucial risk mitigation strategy. Rightsholders may make decisions based on how much of a work is used or which part of a work is used; it is best to only use what is needed. Additionally, it is best practice to attribute any third-party copyrighted works used and point users back to the source when possible. There is no risk management strategy for dealing with moral rights—works should always be cited and attributed to the creators. Lastly, it is a good practice to put users on notice when using third-party copyrighted works. Informing students that a work included in the digital classroom is copyrighted by someone else and should only be used pursuant to the *Act* helps to prevent any infringement on the part of the students and indicates to the rightsholder that you respect the copyright and are treating it responsibly.

When all factors have been considered, we use the risk analysis framework in Figure 1 to determine if the risk is low, medium, high, or very high. When the risk is low, we recommend employing the mitigating steps discussed above, if they have not already been employed, and proceeding with the use. When the risk is medium, we recommend employing the mitigating steps above, proceeding with use, and taking steps to facilitate less severe consequences. These steps include providing ready access to an administrative email address and a take-down notice procedure or online form. When the risk is high, we do not recommend proceeding; we advise users to consider other courses of action. When the risk is very high, we do not recommend proceeding; we advise considering other courses of action, and we notify the legal office if necessary.

Conclusion

While our risk-management approach to unresolvable copyright questions is not perfect, it serves our needs at UNSW and gives users the freedom to push the envelope in digital classrooms. Our approach allows users to proceed with uses that would otherwise be unallowable due to the failure of the *Act* to discuss the topics. It allows for innovation and creativity to flourish without significantly harming the rights of creators, and it allows individuals other than legal experts to participate in the conversation about copyright and what the range of acceptable uses should be. While a well-crafted risk-management approach will never replace legal reform as a means of righting the balance between users and rightsholders, it is an important step that higher education institutions can take to better serve their students and their students' educations.

References

- Albanese, A. (2015, March 6). Publishers' move could mean 'whole new trial' in GSU copyright case. *Publishers Weekly*. Retrieved from <http://www.publishersweekly.com/pw/by-topic/digital/copyright/article/65786-publishers-move-could-mean-whole-new-trial-in-gsu-copyright-case.html>.
- Australian Law Reform Commission. (2013). *Copyright and the Digital Economy*. Commonwealth of Australia.
- Bently, L., Suthersanen, U., & Torremans, P. (Eds.). (2010). *Global copyright: Three hundred years since the Statute of Anne, from 1709 to cyberspace*. Northampton, MA: Edward Elgar Publishing.
- Bissell, A. N. (2009). Permission granted: open licensing for educational resources. *Open Learning*, 24(1), 97-106.
- Bob, Y., (2013, February 21). In precedent, court rules News1's posting items from RSS feed not copyright infringement. *The Jerusalem Post*. Retrieved from <http://www.jpost.com/National-News/Posting-RSS-feed-items-not-copyright-infringement>.
- Copyright Act 1968 (Cth)*. Retrieved from http://www.austlii.edu.au/au/legis/cth/consol_act/ca1968133/index.html.
- Copyright Advisory Group - Schools. (2012). Submission to the Australian Law Reform Commission.
- Copyright Law Committee. (1976). *Report of the Copyright Law Committee on Reprographic Reproduction*. Canberra: Australian Government Publishing Service.
- Creative Commons (n.d.). About. Retrieved March 9, 2015. Retrieved from <http://creativecommons.org/about>.
- Davison, M. J., Monotti, A. L., & Wiseman, L. (2011). *Australian intellectual property law* (2nd ed.). Port Melbourne, Victoria: Cambridge University Press.
- De Atley, R. (1985, September 7). VCRs put entertainment industry into fast-forward frenzy. *The Free Lance-Star*, pp. 12.

- Essers, L. (2014, February 13). Linking to a website doesn't infringe copyright, Europe's Court of Justice says. *PCWorld*. Retrieved from <http://www.pcworld.com/article/2097660/no-authorisation-required-for-hyperlinks-to-copyright-works-cjeu-says.html>.
- Gardner, M., Stringer, J., & Riordan, C. (2015, March 9, 2015). Commercialisation 'a difficult conversation'. *The Australian*. Retrieved from <http://www.theaustralian.com.au/higher-education/commercialisation-a-difficult-conversation/story-e6frgcjx-1227251781928>.
- Gerdson, T. (2003). In Baker T. (Ed.), *Copyright: A user's guide* (2nd edition ed.). Melbourne: RMIT University Press.
- Getty Images Inc. v. Microsoft Corp., U.S. District Court for the Southern District of New York, No. 14-7114 (2014).
- Hepworth, T. (2013, August 9). Mythbusting fair use for education. Retrieved from <http://digital.org.au/content/mythbusting-fair-use-education>.
- Lupovitz, J. (1992). Beyond betamax and broadcast: Home recording from pay television and the fair use doctrine. *Entertainment, Media and Intellectual Property Law Forum*, 2, pp. 69.
- Sony Corp. of America v. Universal City Studios, Inc.*, 464 U.S. 417 (1984).
- University of New South Wales v. Moorhouse*, 133 CLR 1 (1975).
- Wyburn, M. (2006). Higher education and fair use: A wider copyright defence in the face of the Australia-United States Free Trade Agreement changes. *Australian Intellectual Property Journal*, 17(3), 181.

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