

Copyright and COVID-19

Summary of results of a survey of members of the Council of Australian University Librarians (CAUL)

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Executive Summary

2020 required universities to radically change the delivery of education across the globe. The move to remote learning and interrupted access to campuses meant changes in the means and extent of access to resources to support education. Library responses highlighted the challenges both in adapting services to focus on digital collections and providing access to print through innovative means. Publishers also offered positive reactions with many making COVID-19 related research outputs freely accessible, at least for a limited period. Some leading publishers, such as Cambridge University Press, recognised the additional problems of students unable to be in the country of their chosen university, making accessible a wide range of resources across all subject areas.



Figure 1: Magnifying displaying copyright,
<https://www.pxfuel.com/en/free-photo-jkfold>

The Council of Australian University Librarians (CAUL) is the peak leadership organisation for university libraries in Australia. Its members are the 39 Australian universities with representation on Universities Australia and 8 members of the Council of New Zealand University Librarians (CONZUL).

A survey was undertaken of Australian CAUL members to understand the extent of use of provisions of the Copyright Act 1968 to support students and academics during the pandemic.

The key findings are:

- The extent of digital collections available in universities (current CAUL members spend is 98.4% of journal budget on digital materials and 85% of the spend on books is on electronic books) meant that copyright provisions were used primarily for material not available digitally
- Section 200AB confusing and was not broadly used as there were concerns that the wording was not easy to apply effectively in a time of pressure on resources
- Audio visual material was in demand but there was hesitancy to make digital copies because of a lack of clarity and guidance
- While US based digital archives offered controlled digital lending, Australian universities accessed only the openly accessible material as they could not register for lending under the current provisions of the Copyright Act
- The substantive reforms proposed to the Copyright Act are timely and important to support universities.

Introduction

COVID-19 has created a new environment where Australian university libraries have largely been unable to offer direct access to their physical collections to the university community. Access to online resources, access by remote users (that is those physically unable to use the collections) and resources (digital copies) for new forms of learning have been the characteristics of library interaction for educators and students during the year. Copyright legislation has been an enabler for the making of digital copies and remote delivery. While those creating the legislation did not envisage that physical access would be restricted so extensively by disasters such as pandemics and bushfires and other natural disasters, collecting evidence on how the provisions have been used shows a practical application in different circumstances. A survey was undertaken to collect information from Australian universities libraries.

Survey results

All 39 members of the Council of Australian University Librarians, the peak body for university libraries, were invited to participate in the survey. 25 completed surveys were received, a response rate of 64%. Respondents included regional and metropolitan libraries, Group of Eight (research) and predominantly teaching universities.

Survey results indicate that there were some small changes in the making and communication of copies through the period of COVID-19 remote learning, and that the provisions regularly used to support education were highly relevant. There was however a gap between educational needs and activities possible under current copyright provisions, particularly compared to international practice.

Fair dealing for the purpose of research or study.

Sections of the Act provides for fair dealings that are not infringements of copyright in literary, artistic, musical and dramatic works, for example, fair dealing for the purpose of research or study (section 40), for criticism or review (section 41), or the reporting of news (section 42). Within the scope of this are the making of a copy of a reasonable proportion for an individual, note that making of copies under the statutory licence is a separate provision.

The majority of libraries found there was no change in the activity taken under this section during COVID-

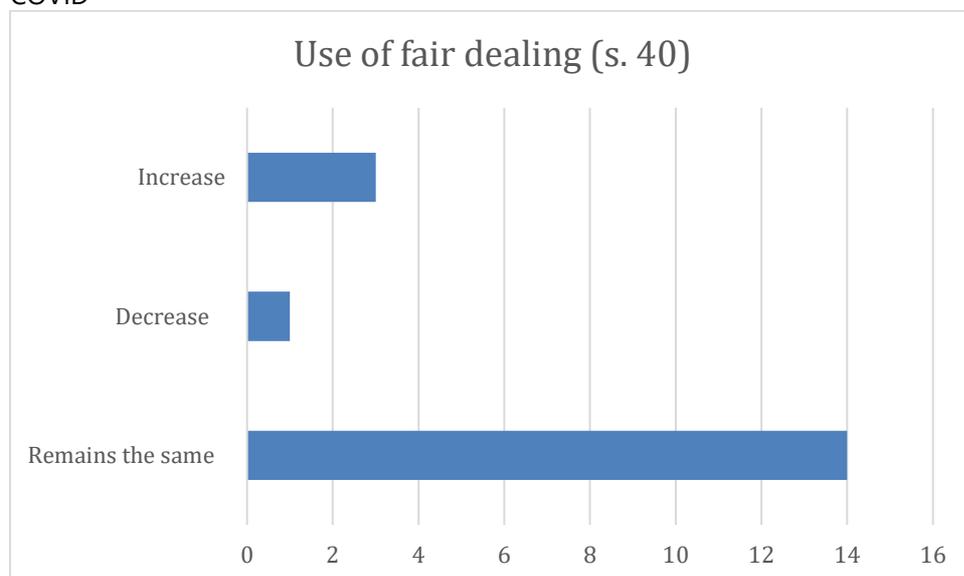


Chart 1. Survey results – Use of fair dealing (s. 40)

Reproducing and communicating works by libraries and archives for users (Remote user access).

The closure of physical campuses mean that the traditional concept of remote users who were unable to attend campuses and access collections needed to be rethought. Even students who were physically living in student residences on campus were unable to access library facilities for at least some of semester 1, meaning that their engagement with the library fell within the remit of remote service delivery. The need for this was moderated to a degree by the contribution of publishers in opening up access to digital resources for universities to some material often without charge. This was particularly important for students unable to be in country, for example in China.

Considerable support was provided to library staff on this aspect of the legislation because it was highly relevant to delivering collection access. The Australian Libraries Copyright Committee provided a paper and ran a series of webinars on this topic (Australian Libraries Copyright Committee, 2020).

Responses to this question indicated that there was not a single trend. Libraries were fairly even spread between increasing, decreasing and steady state use of this provision.

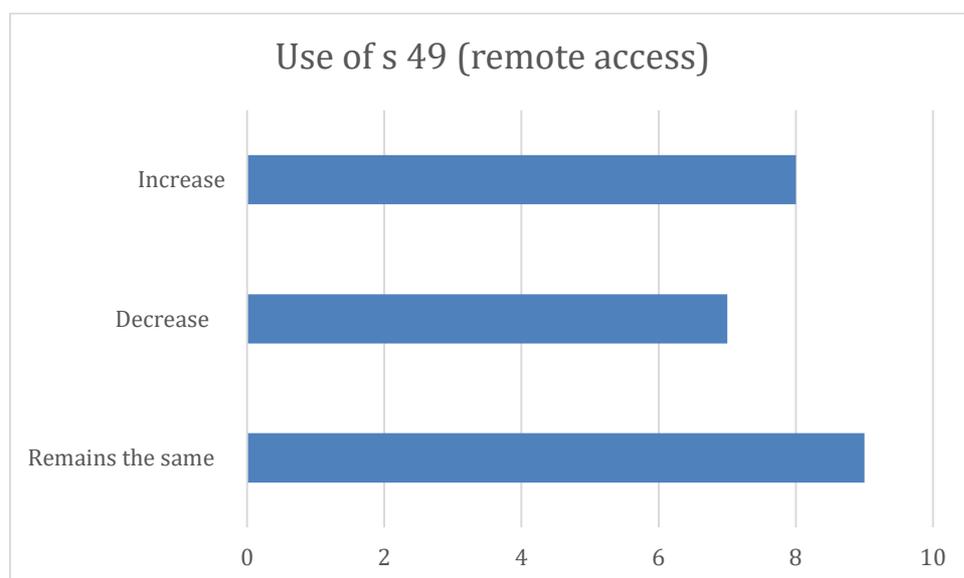


Chart 2. Survey results – Use of s. 49 (remote access)

Use of works and other subject-matter for certain purposes (Digitisation).

Section 200AB is an important provision for the galleries, libraries, archives and museums sector in Australia. It enables digitisation under certain conditions:

The copyright in a work or other subject-matter is not infringed by a use of the work or other subject-matter if all the following conditions exist:

- (a) the circumstances of the use (including those described in paragraphs (b), (c) and (d)) amount to a special case;
- (b) the use is covered by subsection (2) or (3);
- (c) the use does not conflict with a normal exploitation of the work or other subject-matter;
- (d) the use does not unreasonably prejudice the legitimate interests of the owner of the copyright.

The three step test has been applied by libraries, often together with a risk analysis, to digitise and provide access to special materials or special collections. During the period of library closure Universities Australia provided valuable advice on this matter. In order to use the provision libraries undertook the three step test, documented the case and recorded appropriate approval, make resources available within the requirements of the legislation.

Comments identified that copying was undertaken for AV material including YouTube videos (8), Textbooks with no commercial availability where students were not expected to acquire their own copy. In the case of YouTube although a library considered they copied under 200AB given the conditions of the release of videos on YouTube copying was possible without using this section.

Ric Butt (Strine Designs) provided permission for Saints Peter & Paul's former cathedral & bishop's house Goulburn : conservation report to be digitised and made openly accessible. He was enthusiastic about the opportunity to make his work accessible to the world for education and research to communicate his findings more broadly than possible with only 2 physical copies in existence.

It is important to note that some libraries investigated the use of section 200AB and did not use it because they were able to obtain permission from copyright owners to make digital copies and communicate them. Ric Butt (Strine Designs) provided permission for *Saints Peter & Paul's former cathedral & bishop's house Goulburn : conservation report* to be digitised and made openly accessible. As there are only two copies of this report in the world digitisation provided for access and preservation as well as fulfilling the needs of the students undertaking the course in which it was a key resource.

In summary, some libraries advised they were copying and communicating under section 200AB however the material that they made available did not require use of that provision – thus this is an overestimate of use. Libraries used this section consistent with use in previous years.

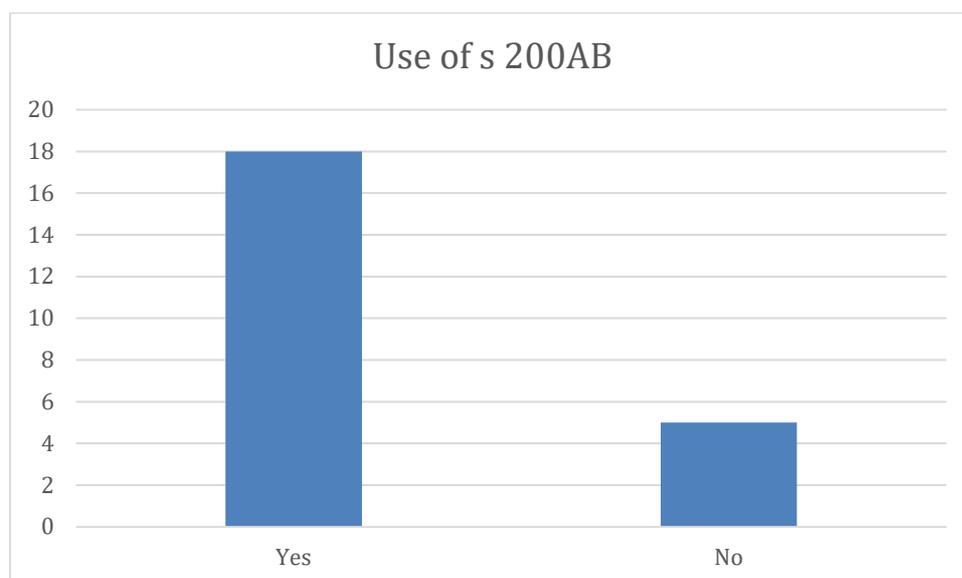


Chart 3 Survey results – Use of s. 200AB.

Use of other sources of resources

In response to the question *Did you use or refer your users to material made available through HathiTrust, ResearchGate, Internet Archive or Academia.au* 40% of the respondents indicated that they had referred users to these sources.

Given the extensive publicity about HathiTrust including the Emergency Temporary Access Service and the Internet Archive National Emergency Library this was a relatively low level of referrals. A likely factor was that Australian copyright legislation prevents university students and staff accessing any material beyond that which was made fully open access.

Australian libraries were only able to use material that was either out of copyright or made available under creative commons licences. There were not able to access material made available under controlled digital lending.

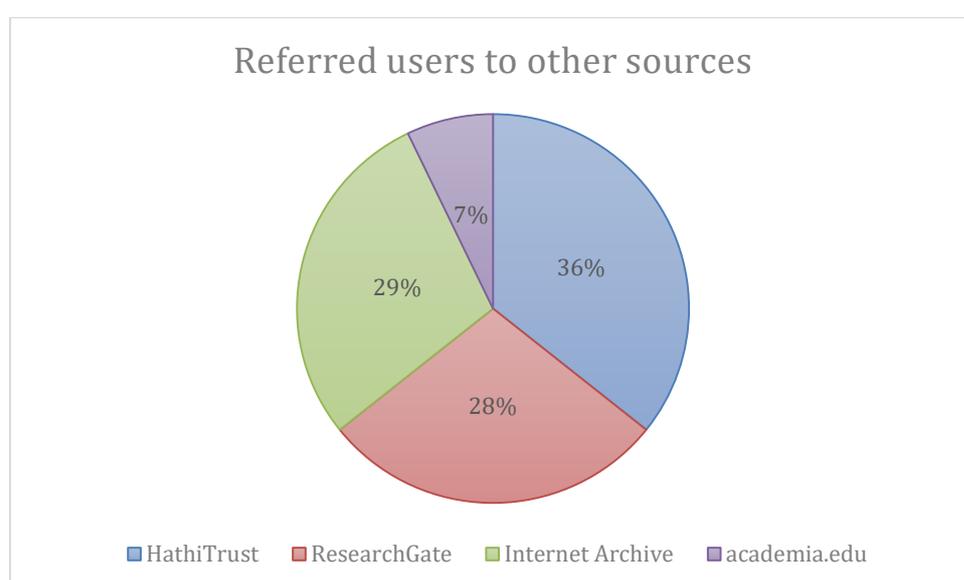


Chart 4 Survey results – Referred to other sources.

Support resources.

A wide range of high quality information resources were made available by organisations and libraries to assist librarians and library users. Respondents were asked to rank the resources from most useful (1) to least useful (8). The Universities Australia advice, provided fairly early in the period, were the most useful.

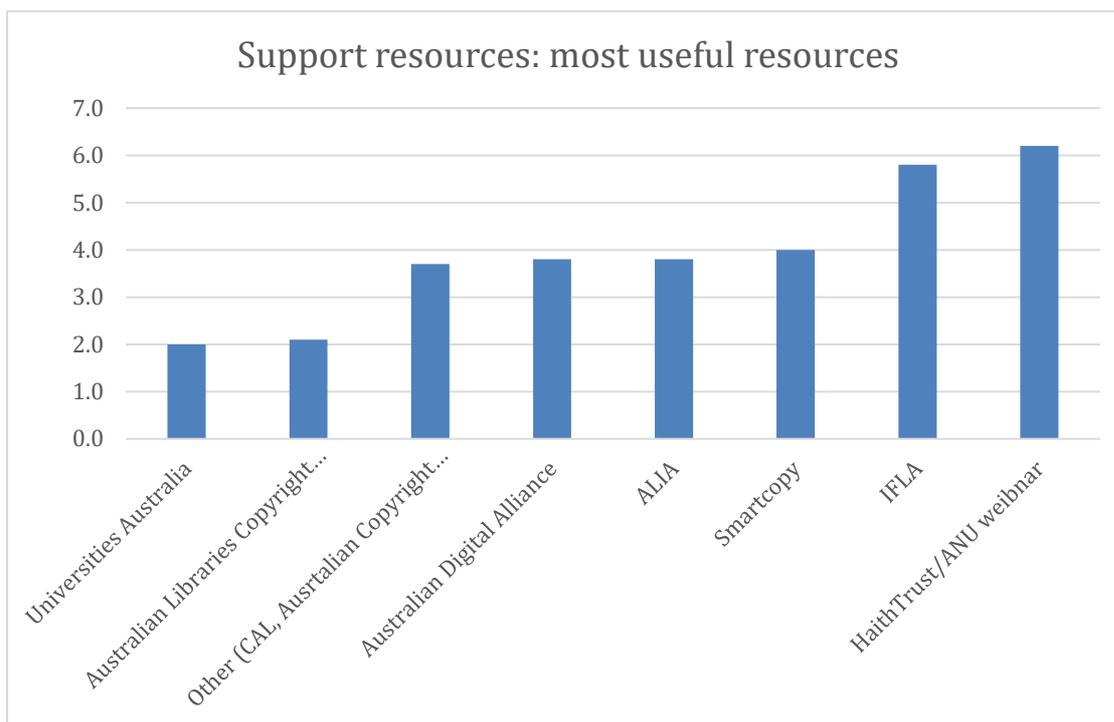


Chart 5. Survey results: Support resources: most useful resources

Open Educational Resources

Many universities libraries have developed knowledge of and guidance on open educational resources in recent years. The discussions held with academics and digital education staff demonstrated the value of this knowledge and the need to continue to work together to develop a better set of tools around open educational resources.

Respondents indicated a significant increase in this service.

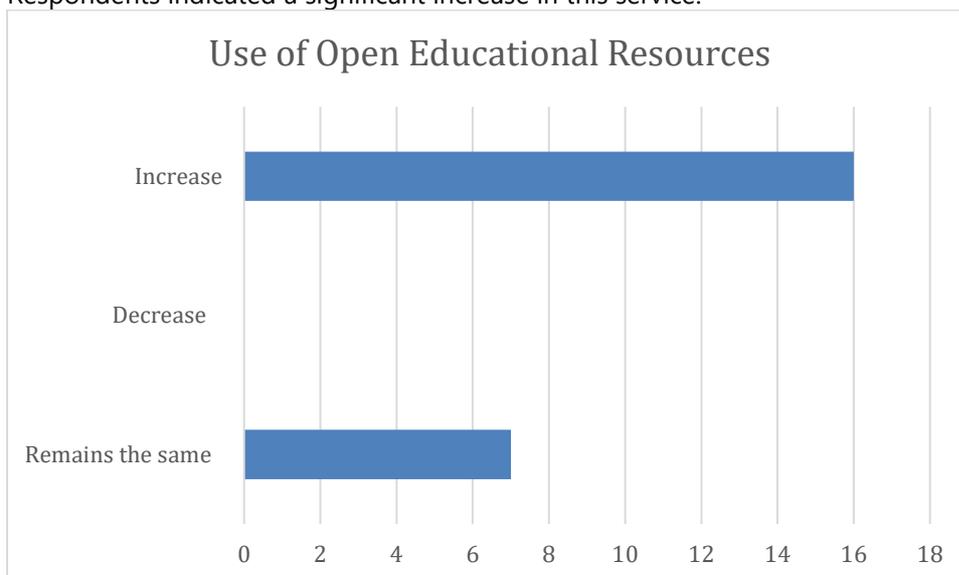


Chart 6. Survey results: Use of Open Educational Resources

Comments.

Areas of comment included:

Staff obtained permission from various rights holders to use materials in different ways (e.g. digitise, stream, etc.)

A trial of ten works from University's Press have been made available as read-only access via the LMS to the university community and public, with a non-exclusive, revocable perpetual licence to use the work in this way granted by the publisher and authors.

Copyright changes.

Respondents were asked: Are there copyright changes that you think could have made access to material in collections better for our universities in the pandemic?

In summary, the pandemic revealed issues from publisher contracts and knowledge of the copyright legislation. The confusion from the legislation and guidance material raises concerns that the current reasonable portion is unreasonably restrictive.

Responses included:

I believe the copyright framework is there, it's just about not being afraid to use it to its fullest extent.

Would have benefited from greater capacity to stream videos.

Not copyright specifically, but allowing copyright to override the licence requirements for ebooks would have been very useful. We were unable to provide chapter scanning for reading lists for some resources due to no access to print collections. Therefore the only option was to purchase an expensive ebook for only a chapter or to not provide any access to the work.

200AB flexible dealing could not be used for all resources due to the fairness factor. – where the rights holder indicated digitising material would impact their ability to commercially exploit content. This impacted us in not being able to apply 200AB where rights holders do sell ebooks to individuals but did not have a model to offer libraries.

Changes to publisher licence restrictions around the supply of online material via ILL would also be beneficial. This isn't necessarily a copyright change unless you count potential changes to prohibit the contracting out of exceptions.

Would be great if there was an exception in the Act that could be relied on during times of crisis (such as COVID) that there is a way of reducing the risk of copyright infringement.

Ability to override some e-resource contracts to allow for ILL especially when access to physical collection is limited.

Clear guidance on increased amounts that could be considered fair to copy and communicate would have been useful for print material.

Less restrictive licensing, especially textbooks.

Yes a broader fair use provision would alleviate issue of determination of what is reasonable to copy under pandemic situations.

Negotiated agreement with publishers, similar to the online storytime agreement, to allow universities with in-person only classes changed to online-only delivery, to provide electronic versions of larger than standard "reasonable portions" of works that could not be commercially-sourced by libraries during semester one...

A specific, temporary agreement allowing universities to provide text online until the end of semester, then destroy all copies and access, where assessment and course outline was already set, would have helped students considerably.

Yes - a Fair Use rule would have made all things easier for us. Under the current Australian law there is a lot of confusion and complexity that is hard to convey to teachers and they tend to avoid anything that becomes difficult (i.e. getting permission) or is not readily accessible; especially when under pressure such as the rush to go online during the pandemic.

Better guidance

As noted guidance was seen as an area that required improvement. When asked: *Are there tools or support that could have enabled your library to more effectively use the provisions of the Copyright Act to make material available to your community?* Respondents commented:

Some sort of decision-tree model / guided model that would allow staff to step through a range of questions and arrive at the allowable actions / choices.

- 1) Some guidance issued was quite vague and difficult to apply (it would have been more useful to have specific case studies or scenarios).
- 2) It would have been good to have libraries share their experience of applying copyright exceptions as a training tool.

A pandemic hotline would be great - where we could get an answer about a particular use through an email or phone call. The lists of publisher resources freely available during the pandemic were helpful but it became a struggle to find information about a specific resource when one had to trawl through various long lists only to find that the particular work was not available. It would be helpful to have a list of what can be done under pandemic conditions and what cannot be done e.g. use more than 10% of a chapter without special permission. It was also tricky making resources available to students based overseas so some relaxation of rules in that area would help - although the difficulty was often from the other country's tight internet laws.

Creation of guidance materials

Many libraries created guides for their communities. Examples include:

<https://www.utas.edu.au/copyright/copyright-for-teaching/covid-19-and-copyright-guide>

https://www.mq.edu.au/_data/assets/pdf_file/0008/966023/COVID-19-Lib-Info-Sheet-for-Online-Teaching.pdf

<https://www.uwa.edu.au/library/help-and-support/copyright-and-digital-resources-during-covid-19>

<https://www.uwa.edu.au/library/help-and-support/copyright-and-digital-resources-during-covid-19/publishers-offering-free-access-during-covid-19>

<https://www.uwa.edu.au/library/help-and-support/copyright-and-teaching>

<https://anulib.anu.edu.au/news-events/news/copyright-helping-providing-access-resources-during-covid-19>

<https://anulib.anu.edu.au/news-events/news/publishers-offering-free-access-scholarly-materials-response-covid-19>

Concluding comments

The final collection provided valuable contextual comments under the following major themes, examples of comments only have been included

Limited effect due to the extent of digital collections

Our long-standing collections policy of prioritizing electronic over print purchasing where possible lessened the disruption for us. Most content was e-available and therefore we did not have to rely too heavily on digitising.

As far as copyright concerns, we were not affected by the pandemic situation. We continued to operate as usual within the copyright limits. The only negative aspect was a difficulty in the actual scanning from the physical items in closed collections.

Complexities of legislation

The COVID-19 pandemic has highlighted how difficult it is to navigate the permissions and exceptions included in the Copyright Act. It highlights the need to improve our capacity to work with the legislation in the Australian higher education environment. Greater clarity and less reliance or capacity for varied interpretation of the Act will allow us to meet compliance obligations, ensure rights holders receive equitable remuneration, and benefit the recipients of tertiary education.

Need for guidance material including free resources

The ANU resource on sharing works produced very early on was much appreciated. I think that much effort was then duplicated by each university producing and updating essentially identical pages with the same information, rather like the days when we all originally catalogued the same works rather than sharing records. It would be useful to have a more coordinated effort to producing guide materials for our communities that could distribute effort (For example, all copyright officers producing a joint podcast where one pair created a 10 minute podcast on one aspect of copyright relevant to all universities, with another pair working on a different topic...)

Timely need for copyright reform

If the pandemic continues over the next two years there is a need for the Government to create special regulations or for the Department of Infrastructure, Transport, Regional Development and Communications to provide clearer guidance on copyright usage.

Conclusion

2020 has been an extraordinary year with closures of university libraries due to bushfires, smoke, hail and the COVID-19 pandemic.

University libraries are developing collections in primarily digital form in the 2019 CAUL statistics show that 98.4% of the spend on journals is on digital material and 85% of the spend on books is on electronic books. Much of the collection that has been collected over the decades is, however, in print form and some works are not available in print or not affordable electronically in terms of licence costs.

The survey results suggest that there is considerable confusion about some applications of the Copyright Act and that in some cases the legislation itself is not as clear as it should be. The Government commitment to copyright modernisation will assist in clarifying a number of provisions.