

Attachment A

THE COPYRIGHT ADVISORY GROUP - SCHOOLS

OF THE

**STANDING COUNCIL ON SCHOOL EDUCATION AND EARLY
CHILDHOOD**

Submission to the Australian Law Reform Commission

PREPARED BY THE NATIONAL COPYRIGHT UNIT

Issues Paper 42: Copyright and the Digital Economy

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EXECUTIVE SUMMARY

The education sector is of critical importance to the success of the digital economy. A strong digital economy requires people to have the best digital education.

The internet has fundamentally changed the nature of teaching and learning in a digital age. Australian teachers have access to a range of digital tools and resources, from online resources to e-learning apps. The new Australian Curriculum is presented solely online.

Students are not passive recipients of knowledge but active participants at the centre of the learning process. In 'flipped' classrooms, rather than the teacher teaching in class and the students doing homework at home, students study a topic at home using online resources and apply their knowledge in the classroom by solving problems and doing practical work.

Educational copyright provisions written in the age of the photocopier don't work in the age of the iPad. Flipped classrooms need fresh thinking.

Educational exceptions

Australia's educational copyright exceptions set different rules for different types of copyright materials and apply differently depending on the technology used. This does not make sense in a digital age. For example:

- Showing an artwork on screen in class is treated differently than showing a poem on the same screen.
- Writing a quote from a book on a blackboard is covered by an exception - but not writing the same quote on an interactive whiteboard.

Section 200AB has not achieved the flexibility it was designed to create and has proved of little practical value for digital materials.

Educational statutory licences

Australia's statutory licences are unsuitable for a digital age and must be repealed.

The statutory licences discourage uses of new technologies

At the same time as governments are encouraging greater use of digital materials in Australian schools, the statutory licences create strong disincentives to do so. For example:

'Old technology' would see a teacher print copies of a scene from a play to hand out in class.

'New technology' might see a teacher save a scene from a play found on a website to their laptop's hard drive, email it to their school email account, upload it to the school's learning management system and display it on an interactive white board in the classroom.

Using old technology would involve one remunerable act under a statutory licence. Using new technology would involve 4 separately recorded remunerable activities.

Australian schools should not be penalised by the Copyright Act for using new technologies for the benefit of Australian students.

Australian schools pay millions of dollars just to use the internet

The application of the statutory licences to all digital materials means that Australian schools pay millions of dollars of public funds to use freely available internet materials (such as online health fact sheets or free tourism maps of Australia).

The same content is available on the internet around the world, every day, for free - but must be paid for in Australian schools.

The statutory licences are very expensive

School copyright costs in Australia are significantly higher than comparable countries:

Country	Schools price per FTE (Part VB or equivalent)	Schools price per FTE (Part VA or equivalent)
Australia	\$16.93	\$5.14
UK	Band 1, age 5-11: £1.90 = AU\$2.95 Band 2, age 11-15: £1.70 = AU\$2.64 Ban 3, age 16-18: £4.43= AU\$6.89	Primary: 32p = AU\$0.50 Secondary: 57p = AU\$0.89
Canada	CAD\$5.16 = AU\$5.04	CA\$1.73 = AU\$1.69
New Zealand	Primary: NZ\$1.50 = AU\$1.19 Secondary: NZ\$3.00 = AU\$2.38	NZ\$4.19 = AU\$3.33

This means Australian schools pay 14 times more per student to use copyright works than schools in New Zealand.

The statutory licences do not reflect the public interest

The Copyright Act fails to provide for virtually any non-remunerable public interest uses in Australian schools. Schools pay for things that individuals can do for free, such as copying short extracts of materials for students' research or study, or copying off air broadcasts to watch later during school hours.

65% of pages copied and paid for in Australian schools in 2010 under the Part VB licence would have been free to use in the United States or Canada.

The statutory licences are economically inefficient

The statutory licences were designed as a solution to market failure in a photocopying age. They are now being used to create 'false markets' in digital works - markets that would not exist 'but for' the statutory licences, and markets that do not exist anywhere else in the world.

They also sit uncomfortably with public sector obligations regarding expenditure of public funds. For example, public monies paid for orphan works under the licence are not returned to education budgets, but result in windfall gains to other copyright owners.

Statutory licences create unacceptably high administrative burdens

'Smart copying' practices implemented by schools to contain copyright costs are increasing the burden of administering the licences. This is bad for schools, collecting societies and rights holders (in the form of reduced amounts available for distribution if administrative costs increase).

One out of every two records collected under the Part VB survey is now excluded from the licence and will not attract a fee, merely impose an administrative cost. This is an unacceptably high burden and contrary to the intentions of the Franki Committee, which recommended setting up Part VB in part to reduce transaction costs.

How to fix the problems

1. Australia's educational exceptions and statutory licences are completely broken and must be repealed.
2. The Copyright Act must be amended to replace the existing educational exceptions and statutory licences with either:
 - A general open-ended provision based on a fairness analysis that could apply to all users of copyright materials
 - A new fair dealing exception for education.

A general open ended provision may better meet the broader policy considerations set out in the ALRC's guiding principles than a fair dealing for education provision.

3. Introducing a flexible exception does not mean that all educational uses of copyright materials would be free. Many uses that are currently paid for under the statutory licences would continue to be paid for under voluntary licensing arrangements (similar to those currently in place with music collecting societies).

4. Replacing the statutory licences and moving to a system of a flexible fair dealing/fair use provision supported by direct and/or collective voluntary licensing is the most appropriate way to ensure the appropriate remuneration for Australian creators, the continued creation of educational content and ensuring public interest uses of copyright materials are adequately recognised.

The Schools are not asking for a free ride – simply a fair ride.

Reform is also required on a range of other issues, including:

- Governance arrangements for collecting societies – ensuring that existing flaws in governance are not replicated in a new framework
- Copyright and contract – rights under existing and new exceptions should not be capable of being excluded by contract
- Technological protection measures – any new exceptions should be accompanied by a recommendation for a corresponding ‘TPM exception’ to the anti-circumvention regime
- Any scheme to solve the problem of orphan works should not be limited to personal uses. Statutory licensing should not be considered as a solution.
- Any ‘transformative use’ provision should not be limited to ‘private’ or ‘non-commercial’ uses but be assessed against principles of fairness.
- Temporary and transitional communications – an exception for ‘temporary communications’ may be needed, analogous to existing ‘temporary reproductions’ provisions.

OVERVIEW OF SUBMISSION

Part 1 of this submission describes the role played by Australian schools in Australia’s copyright system, the changing nature of teaching and learning in an internet age and the pivotal role the education sector will play in Australia’s digital economy (as well as the need for an up to date copyright framework to achieve our digital economy goals).

Part 2 provides a detailed analysis of the many significant problems created by the current educational exceptions and statutory licences.

Part 3 sets out our preferred reform options to solve the problems identified in Part 2.

Part 4 addresses additional issues relevant to the ALRC’s issues paper, including copyright and contract, technological protection measures, the Convergence Review, orphan works, cloud computing, transformative use, the need to consider the issue of ‘temporary communications’ and Australia’s approach to copyright issues in international fora.

QUICK REFERENCE GUIDE

ISSUES PAPER QUESTION	REFERENCE IN SCHOOLS' SUBMISSION
ALRC INQUIRY	
Question 1	Part 2.1 – Assessing the educational exceptions Part 2.2 – Assessing the educational statutory licences
CACHING, INDEXING AND OTHER INTERNET FUNCTIONS	
Question 3	Part 2.1 – The statutory licences impede new technologies and educational uses Part 4.6 – Incidental and temporary reproductions and communications in an Internet age
Question 4	Part 3 – Options for reform
CLOUD COMPUTING	
Questions 5-6	Part 4.4 – Cloud computing and education
COPYING FOR PRIVATE USE	
Question 7	Part 4.5 – Private uses of copyright materials
Questions 8-9	Part 4.5 – Private uses of copyright materials
Question 10	Part 1.1 – Exceptions
ONLINE USE FOR SOCIAL, PRIVATE OR DOMESTIC PURPOSES	
Questions 11-13	Part 4.5 – Private uses of copyright materials
TRANSFORMATIVE USE	
Questions 14-18	Part 4.5 – Transformative use
LIBRARIES, ARCHIVES AND DIGITISATION	
Questions 19-22	Part 1.1 – Exceptions Part 2.1 – Section 200AB
ORPHAN WORKS	
Questions 23-24	Part 4.3 – Orphan works
EDUCATIONAL INSTITUTIONS	
Questions 28-31	Part 2.1 – Section 200AB Part 2.2 – Assessing the educational and statutory licences
RETRANSMISSION OF FREE-TO-AIR BROADCASTS	
Questions 35-39	Part 4.2 – Copyright and the convergence review
STATUTORY LICENCES IN THE DIGITAL ENVIRONMENT	
Questions 40-44	Part 3 – Options for reform
FAIR DEALING EXCEPTIONS	
Questions 45-47	Part 3 – Options for reform

ISSUES PAPER QUESTION	REFERENCE IN SCHOOLS' SUBMISSION
OTHER FREE-USE EXCEPTIONS	
Questions 48-51	Part 3 – Options for reform Part 4.1 – Copyright, contract and technological protection measures
FAIR USE	
Questions 52-53	Part 3 – Options for reform Part 3.1 – Introducing new exceptions to enable certain non-remunerable uses of copyright materials
CONTRACTING OUT	
Questions 54-55	Part 4.1 – Copyright, contract and technological protection measures

PART ONE – OVERVIEW

1.1. Introduction: Copyright Advisory Group

The Copyright Advisory Group – Schools (CAG Schools) represents schools in Australia on copyright matters to the Standing Council on School Education and Early Childhood (SCSEEC – formerly known as MCEECDYA). CAG Schools is assisted by the National Copyright Unit (the NCU), a small secretariat based in Sydney.¹

CAG Schools members include Federal, State and Territory Departments of Education, all Catholic Education Offices and the Independent Schools Council of Australia. On copyright matters, CAG represents the almost 9,500 primary and secondary schools in Australia and their 3.5 million students. In this submission, we refer to the CAG Schools members and their constituents as ‘the Schools.’

The Schools have a significant interest in copyright law and policy. In 2011 Australian schools paid over \$80 million in licensing fees to copyright collecting societies for the use of copyright materials in schools, under statutory and voluntary copyright licences. (This figure does not include additional amounts spent by individual schools to produce or procure educational materials themselves.)

The Schools place a great deal of importance on the appropriate administration of copyright in Australian schools. This includes ensuring system-level and school-level compliance with the educational exceptions and statutory licences. The Schools work with government, content creators, administrators and teachers to ensure that the rights of copyright creators are respected and to ensure the highest possible levels of copyright compliance.

The Schools recognise the importance of providing sufficient incentives to copyright owners to create new works, and the importance of protecting the exclusive rights granted to copyright owners. However, it is also important to ensure an appropriate balance in Australian copyright law, to reflect the great public benefits that flow from appropriate public access to information, particularly for educational and cultural purposes.

This submission has been endorsed by the Australian Education, Early Childhood Development and Youth Affairs Senior Officials Committee (AEEYSOC),² the National Catholic Education Commission and the Independent Schools Council of Australia.

¹ For more details, including points of contact for the NCU, see its website at: www.smartcopying.edu.au.

² AEEYSOC comprises the Director-Generals or CEOs for school education and early childhood education and care from each of the Australian states and territories, as well as representatives of other senior officials committees assisting the Departments of Education and the Health, Community and Disability Services and Aboriginal and Torres Strait Islander Affairs Ministerial Councils

1.2. The broader contribution of schools to copyright in Australia

The Schools invest a significant amount of resources into promoting respect for copyright amongst students and teachers, as well as the broader community. *Smartcopying* (www.smartcopying.edu.au) is an educational resource created by the NCU, as the official guide to copyright for schools and TAFEs. It provides practical advice to teachers on copyright issues to increase understanding of the statutory licences and educational exceptions, and to encourage copyright compliance.

Smartcopying includes a range of information sheets and guides on particular topics, and interactive educational resources on copyright. Recent information sheets have addressed the use of cloud computing, mobile applications, You Tube, iTunes, and digital content repositories. NCU has also created a Creative Commons Information Pack for Educators and Students.

All material on *Smartcopying* is licenced under a Creative Commons 'Attribution-ShareAlike' licence. A link to the site is on the Commonwealth Attorney-General's Department's website and other education and government websites both in Australia and overseas. This resource is well utilised: in August 2012, there were 5,841 visits to the website, averaging 188 visits a day.

Smartcopying also promotes numerous copyright education initiatives:

- 'All Right to Copy?' is one of *Smartcopying*'s initiatives which has been so effective that it is being used by the World Intellectual Property Organisation (WIPO) as an international case study exemplifying a successful IP outreach activity. This educational resource, produced in partnership with the Australian Federation against Copyright Theft, is designed to teach students about copyright and its impact on users and creators and is suitable for students aged 9-15. It can be used across a broad range of subject areas and includes a video dealing with various copyright challenges as well as written copyright information, sample permission letters, useful links and a quiz.
- 'Music for Free?' is a learning and teaching resource which explores the ethics of illegal file sharing. It forms part of the *Values for Australian Schooling* resource series and consists of student activity sheets, guidelines for teachers on providing additional advice, assessment suggestions and a list of resources on teacher references, books and websites.
- 'In Tune' supplements 'Music for Free?' and is a documentary on music piracy for secondary and TAFE Students. It shows Australian musicians talking candidly about creating music in today's digital era, the advantages and disadvantages of the internet, and how the digital revolution and music downloading affects them.
- 'Frank Hardcase' is an animation about music piracy for primary and secondary school students and is part of a Crime Stoppers Australia initiative against music piracy. The campaign involves a school competition based around the animation where students are invited to create an anti-piracy awareness campaign fashioned on the Frank Hardcase animation and characters. The campaign and competition are aimed at students aged 9-15

and are designed to help educate students about copyright and how it might be relevant to their lives.

- ‘Nothing Beats the Real Thing!’ is an educational module on copyright piracy for secondary and TAFE students. This resource includes quizzes, interactive games and activities across all curriculum areas. It focuses on film and TV copyright, and the impact of copyright piracy on creativity and society.

1.3. Setting out the legal framework for educational copyright use

The Copyright Act 1968 (*Copyright Act*) recognises the public interest in educational uses of copyright materials by way of a complex mix of exceptions to the exclusive rights of owners and statutory licences. This part of the submission gives a short overview of the various exceptions and statutory licences most relevant to Australian schools. Part 2.1 of the submission provides an assessment of the adequacy and appropriateness of the educational exceptions in the digital environment. Part 2.2 provides a similar analysis of the statutory licences.

1.3.1. Exceptions

Australian schools are able to rely on a number of exceptions for educational purposes. They are also able to rely on a number of exceptions that apply more generally in the *Copyright Act*. Staff and students may also rely on fair dealing exceptions in certain circumstances.

Educational exceptions

The *Copyright Act* contains a small number of exceptions specific to educational institutions. These are:

- Section 28 - enabling communication and performance of copyright materials in class
- Section 200AAA - permitting educational proxy caching
- Section 200(1)(a) - copying material by hand in the course of educational instruction (eg, writing on a white board)
- Section 200(1)(b) - examination copying
- Section 200(2) - copying a sound broadcast for a course of instruction

There is also a general open-ended exception (s.200AB) for use of works and other subject matter for certain purposes which is applicable to educational institutions as well as libraries and archives and persons with disabilities.

Educational institutions may also rely on more generally applicable exceptions in the *Copyright Act*. For example, exceptions for temporary reproductions and making back up copies of computer software would be applicable to activities conducted in educational institutions.

Fair dealing exceptions

Teachers and students may also rely on fair dealing exceptions (such as for research or study, parody or satire or criticism or review) for individual uses of copyright materials. For example, students can rely on the s.40 exception for research or study to use extracts of copyright works for homework exercises. These exceptions have limited applicability to teachers acting on behalf of educational institutions following the decision in *Copyright Agency Limited v Haines*.³

Library exceptions

Educational institutions are also able to rely on the library and archive exceptions in the *Copyright Act* for copying and communication conducted in school libraries - see for example ss.49 and 50.

1.3.2. Statutory licences

Part VA of the *Copyright Act* is often referred to in schools as the Statutory Broadcast Licence. It permits educational institutions to copy radio and television programs including programs from free-to-air radio and television and satellite and subscription (pay) radio and television. Educational institutions can also copy and communicate podcasts and webcasts which originated as free-to-air television and radio broadcasts and which are available on the broadcaster's website .

Payment is made to Screenrights for the use of radio and television broadcasts under this licence. Screenrights is the declared collecting society that administers the Statutory Broadcast Licence scheme.

Part VB (Division 2 and 2A) of the *Copyright Act* is often referred to in schools as the Statutory Text and Artistic Licence. It allows schools and TAFE institutes to make multiple copies of literary, dramatic, musical and artistic works for educational purposes. Payment is made to the Copyright Agency⁴ which is the collecting society that administers the Part VB licence. The school's governing body, eg the relevant Department of Education, Catholic Diocese or Independent School Association, makes the payment. The Part VB statutory licence covers all government schools and most non-government schools and TAFE institutes.

1.4. The importance of the education sector to the digital economy

The National Digital Economy Strategy sets an important goal that “by 2020, Australia will be among the world's leading digital economies.”⁵ As part of reaching this goal, the Government recently stated in its Cyber White Paper discussion paper that:

³ *Copyright Agency Limited v Haines* [1982] 1 NSWLR 182. See further commentary on this decision below.

⁴ Formerly known as Copyright Agency Limited (CAL).

⁵ Department of Broadband, Education and the Digital Economy, *National Digital Economy Strategy*, p2.

*as the global digital economy continues to expand, Australia’s capacity to emerge as a global leader in digital infrastructure (and) human capital...will be critical to ensuring Australia is positioned as a genuine global leader in the digital age.*⁶

The education sector is of crucial importance in Australia achieving this goal. For our children to effectively contribute to the increasingly global digital world, an education in information and communications technology (ICT) and media literacy skills is paramount. Investing in the education of our young people is a question of making “*a long-term investment in the human capital required to drive the digital economy.*”⁷

The Council of Australian Governments (COAG) has recognised that a digital education in schools will play an important role in maximising young people’s future potential contribution to the nation’s productivity.⁸ Similarly, in its response to the *Book Industry Strategy Group Report*, the Government acknowledged “*digital content is essential to the effectiveness of the Digital Education Revolution and toward this end has committed \$41.2m to the development and delivery of digital teaching and learning resources aligned with the Australian curriculum.*”⁹

The fact that a good digital education is an intrinsic part of the success of our digital future was plainly stated in the *2008-2011 Joint Ministerial Statement on ICT in Australian education and training*. In that statement the Government pledged “*Australia will have technology enriched learning environments that enable students to achieve high quality learning outcomes and productively contribute to our society and economy.*”¹⁰ For this reason, the National Digital Economy Strategy sets a goal to “*extend and develop online educational services, resources and facilities through Australia schools, universities and higher education institutions.*”¹¹

A good digital education is critical for success in a digital economy.

There are two central elements to the role the education sector must play in achieving the Government’s digital economy vision:

- ensuring universal digital literacy; and
- ensuring appropriate widespread access to knowledge online.

⁶ *Connecting with Confidence: Optimising Australia’s Digital Future*, Discussion Paper for a Government Cyber White Paper, p24.

⁷ *Ibid*, p23.

⁸ *Success Through Partnership: Achieving a National Vision for ICT in Schools*, DER Strategic Plan to Guide the Implementation of the Digital Education Revolution Initiative and Related Initiatives, 5 August 2008, p3.

⁹ Department of Industry, Innovation, Science, Research and Tertiary Education, *Book Industry Strategy Group Report - Government Response*, p20.

¹⁰ *Success Through Partnership: Achieving a National Vision for ICT in Schools*, DER Strategic Plan to Guide the Implementation of the Digital Education Revolution Initiative and Related Initiatives, 5 August 2008, p4.

¹¹ *Connecting with Confidence: Optimising Australia’s Digital Future*, Government Cyber White Paper, p8.

1.4.1. Digital literacy

The Government's *Cyber White Paper Discussion Paper*, in a section entitled 'Investing in Australia's Digital Future', stated:

*developing a high level of digital literacy among all Australians would both improve the nation's capacity to take full advantage of the opportunities available in the online environment and heighten awareness of the potential risks associated with operating in cyberspace.*¹²

This is an issue with bi-partisan support: one of the key drivers of the Commonwealth, State and Territory governments' collaboration in the *Digital Education Revolution* (DER) has been to develop the technology skills of young Australians to help "prepare (them) for the future by giving them the skills they will need to participate fully in a knowledge-based economy."¹³

The fact that our future economy, both in Australia and internationally, will be knowledge-based, requiring high degrees of digital literacy, was reiterated in the Prime Minister's opening remarks at the recent Digital Economy Forum at the University of New South Wales (UNSW): "the commodity most precious in the 21st Century ... is knowledge ... [t]he way we create and share knowledge will be a key determinant of our success in the Asian Century."¹⁴

The \$32.6 million allocated in the *Digital Economy Future Directions Final Report* towards access to knowledge online reinforces the importance that the Government has placed on knowledge for our digital future.¹⁵

Beyond the purely economic value of investing in the digital literacy of our population, the social element of the triple bottom line will be boosted by an investment in digital education. Building our human capital, or the know-how of our population, is crucial to Australia's future, and not only for economic reasons. As Nicholas Gruen has observed, gross domestic product cannot be the sole measure of national well-being. Investing in the education of our population and ensuring the free exchange of knowledge and information online has a much bigger picture public interest benefit for society. The HALE index, which values human capital above all other capital, encourages us to consider our society in more than just purely economic terms.¹⁶

¹² *Connecting with Confidence: Optimising Australia's Digital Future*, Discussion Paper for a Government Cyber White Paper, p23.

¹³ *Powering Ideas - Innovation Agenda to 2020*, p40, http://www.innovation.gov.au/innovationreview/documents/poweringideas_fullreport.pdf.

¹⁴ Opening Remarks to the Digital Economy Forum, <http://www.pm.gov.au/press-office/opening-remarks-digital-economy-forum>.

¹⁵ *Digital Economy Future Directions Final Report*, p46, http://www.dbcde.gov.au/digital_economy/future_directions_of_the_digital_economy/australias_digital_economy_future_directions.

¹⁶ Nicholas Gruen, 'GDP's Blind Spots Ignore Full Impact of Education Spending', *The Sydney Morning Herald*, 11 September 2012, <http://www.smh.com.au/opinion/society-and-culture/gdps-blind-spots-ignore-full-impact-of-education-spending-20120910-25oci.html>.

1.4.2. Access to knowledge online

As the United Nations (UN) Special Rapporteur noted in his *Report on the Promotion and Protection of the Right to Freedom of Opinion and Expression*, there are two crucial dimensions to ensuring universal access to knowledge online – first, access to the physical and technical infrastructure required to access the Internet and second, access to content.¹⁷

This second element, access to content, or knowledge, online is a vital component in allowing young Australians to fully participate and develop to their full potential. Commonwealth, State and Territory governments have all made policy commitments to increase access to online content and digital education resources.¹⁸ The Australian Information and Communications Technology in Education Committee's (AICTEC)¹⁹ DER policy document has stated that “*repositories of relevant, suitable, exciting, culturally appropriate, discoverable and affordable materials must be available*” as part of Australia's DER.²⁰

1.5. Teaching and learning in the digital economy

Australian classroom teaching and learning approaches are changing as technological innovations are adopted and digital, internet-connected and networked devices such as laptop computers, tablets and interactive whiteboards become commonplace in classrooms. Increasingly devices used by students and teachers are mobile, supporting learning anywhere and anytime.

Social networking technology is facilitating partnerships and collaboration between students, mentors, classrooms and schools, across suburbs, states and countries.

Print textbooks are no longer the sole resource used to teach the curriculum. Australian teachers have access to an expanding range of digital tools and resources including e-learning applications, the Internet and the digital curriculum content in the National Digital Learning Resources Network (NDLRN).²¹ The new Australian Curriculum is presented solely online and is directly linked to the copyright-cleared digital resources for students and teachers in the NDLRN national repository.

¹⁷ United Nations General Assembly, *Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression*, Frank La Rue, chapters IV and V.

¹⁸ *Success Through Partnership: Achieving a National Vision for ICT in Schools*, DER Strategic Plan to Guide the Implementation of the Digital Education Revolution Initiative and Related Initiatives, 5 August 2008, p5.

¹⁹ AICTEC is a national, cross-sectoral committee responsible for providing advice to all Australian Ministers of Education and Training on the economic and effective utilisation of information and communications technologies in Australian education and training and on implementation of the Digital Education Revolution. For more information, see: <http://aictec.edu.au/>.

²⁰ *AICTEC Digital Education Revolution*, p6, http://www.deewr.gov.au/Schooling/DigitalEducationRevolution/Documents/AICTEC_DER%20ROADMAP%20Advice.pdf.

²¹ The National Digital Learning Resources Network (formerly The Learning Federation (TLF)), funded by the Australian and state and territory governments, contains more than 15,700 digital curriculum resources available free for use in all Australian schools. For more information, see: <http://www.ndlrn.edu.au/default.asp>.

The new Australian Curriculum identifies information and communication technology capability as one of the prerequisite *“set(s) of knowledge, skills, behaviours and dispositions, or general capabilities that apply across the curriculum and help them (students) to become lifelong learners able to live and work successfully in the diverse world of the twenty first century.”*²²

There is a developing distinction between formal and informal learning contexts with delivery by schools and also by new providers such as the Khan Academy, providing online maths, science and other lessons free to students, with 418,000 subscribers and over 202 million video views worldwide.

Students are no longer seen as passive recipients of knowledge but rather active participants at the centre of the learning process, creating rather than merely consuming knowledge. The traditional role of the teacher, transmitting knowledge to the entire class, is changing to that of a coach or facilitator of the learning process. This allows them to provide additional learning-based activities and use a range of digital tools and resources to provide personalized learning experiences to individual students, including those who live in remote areas and those with special needs.

‘Flipped’ classrooms require fresh thinking about educational use in the Copyright Act.

In ‘Flipped’ classrooms,²³ rather than the teacher teaching the topic and the students doing homework exercises, students study the topic themselves at home using online resources and apply the knowledge in the classroom by solving problems and doing practical work. Traditional notions of teaching and

learning are quite literally being turned upside down. Flipped classrooms require fresh thinking about education in a digital age – including how educational use should be dealt with in the *Copyright Act*.

The impact of new technologies is requiring major shifts in policy. Australia has a robust policy framework to guide the development of teaching and learning in the digital economy.

A major aim of the Australian Government’s *Digital Education Revolution* is that *“[s]tudents undertake challenging and stimulating learning activities supported by access to global information resources and powerful tools for information processing, communication and collaboration.”*²⁴

The third *Joint Ministerial Statement on ICT in Australian education and training: 2008-2011* acknowledges that information and communication technologies *“are enabling the transformation of the curriculum and changing the way learners and educators operate, learn and interact.”*²⁵

²² Australian Curriculum, Assessment and Reporting Authority (ACARA), ‘General Capabilities’, available here: http://www.acara.edu.au/curriculum/general_capabilities.html.

²³ See for example The Flipped Classroom Infographic: A new method of teaching is turning the traditional classroom on its head, available here: <http://www.knewton.com/flipped-classroom/>.

²⁴ Ministers’ Media Centre; Education, Employment and Workplace Relations Portfolio, ‘Computers for all Australian Students’, available here: <http://ministers.deewr.gov.au/garrett/computers-all-australian-students-2012>.

²⁵ Ministerial Council on Education, Employment, Training, and Youth Affairs and Ministerial Council for Vocational and Technical Education 2008, *Joint Ministerial Statement on Information and Communications Technologies in Australian Education and Training: 2008-2011*, Australian Information and Communications Technology in Education Committee, Australia, available here: http://www.mceecdya.edu.au/verve/resources/AICTEC_JMS_on_ICT_in_Aust_Ed_and_Training.pdf.

Ministers have agreed that “Australia will have technology enriched learning environments that enable students to achieve high quality learning outcomes and productively contribute to our society and economy.”²⁶

The *National Declaration on Educational Goals for Young Australians* states that:

*[r]apid and continuing advances in information and communication technologies (ICT) are changing the way we share, use, develop and process information and technology, and there has been a massive shift in power – to consumers in general, and to learners specifically.*²⁷

Each Australian state and territory also has its own policies and program frameworks in place to support schools and teachers to respond to the teaching and learning challenges created by the digital economy (See *Attachment 1A*).

Central to these policies, and the Australian Government’s *Digital Education Revolution* policy, is acknowledgement of the critical role that parents play in their child’s education and the need for online access to information about their child’s school, learning program and progress as well as the recognition of the demand, from both students and their parents, for seamless movement between learning at school, home, work and play.

1.6. Copyright laws are impeding these goals

The Schools believe that Australia’s copyright laws are impeding the DER’s aim to support the effective integration of ICT in Australian schools.²⁸

In his recent address at a forum held at the University of Melbourne on high-speed broadband and higher education, Minister for Broadband, Communications and the Digital Economy Stephen Conroy said that universities needed to update their education models and adapt to the challenges and opportunities presented by the widespread roll-out of the National Broadband Network (NBN). As was pointed out by the Vice-Chancellor of the University of New England, Jim Barber, however, “our regulatory environment is obstructing innovation in online delivery and therefore jeopardising the nation’s competitiveness” and is presenting obstacles to online learning which can only be removed by reframing our policy settings in this area.²⁹

Copyright laws are stifling the potential of teaching and learning in the online environment.

²⁶ Ibid.

²⁷ MCEETYA Ministerial Council for Education, Early Childhood Development and Youth Affairs - The National Declaration on Educational Goals for Young Australians 2008, available at: http://www.mceecdya.edu.au/verve/resources/National_Declaration_on_the_Educational_Goals_for_Young_Australians.pdf.

²⁸ *Connecting with Confidence: Optimising Australia’s Digital Future*, Government Cyber White Paper, p8.

²⁹ Charis Palmer, ‘Universities must update education models: Conroy’, *The Conversation*, <http://theconversation.edu.au/universities-must-adapt-education-models-conroy-9848>.

A similar observation could be made about schools, particularly secondary schools, and consideration must be given to the ways in which the current copyright environment is stifling the potential of educational delivery and knowledge sharing in the online environment, thus compromising our competitiveness in the digital future.

In its recent report *Digital Disruption: Short Fuse, Big Bang?*, Deloitte identified education as being an industry which will be significantly disrupted over the next four to ten years by digital-related restructuring.³⁰ This will occur through the increased adoption of new technologies by teachers and students alike. The National Digital Economy Strategy highlights the capacity of broadband technologies to revolutionise the way that teaching occurs in Australian schools.³¹

1.7. Importance of the public interest in copyright policy

Historically, copyright law was devised to balance the interests of the public with the rights of authors. Since Anglo-American copyright protection was first enshrined in the 1710 *Statute of Anne*, the law has served the goal of promoting scientific and artistic progress by stimulating the production and dissemination of works for the public benefit.³²

The importance of appreciating the claims of public interest was a factor in the great copyright cases of the mid-eighteenth century. In *Millar v Taylor*, Yates J (dissenting) recognised the need to balance the claims of authors against those of the public, stating:

*I wish as sincerely as any man, that learned men may have all the encouragements, and all the advantages that are consistent with the general right and good of mankind. But if the monopoly now claimed be contrary to the great laws of property, and totally unknown to the ancient and common law of England: if the establishing of this claim will directly contradict the legislative authority, and introduce a species of property contrary to the end for which the whole system of property was established; if it will tend to embroil the peace of society, with frequent contentions; —(contentions most highly disfiguring the face of literature, and highly disgusting to a liberal mind;) if it will hinder or suppress the advancement of learning and knowledge; and lastly, if it should strip the subject of his natural right; if, these, or any of these mischiefs would follow; I can never concur in establishing such a claim.*³³

In *Donaldson v Becket*, the House of Lords rejected the arguments of the copy-owning booksellers that copyright should be perpetual, with Lord Camden arguing:

³⁰ Deloitte, *Digital Disruption: Short Fuse, Big Bang?*, 2012, pp9-10.

³¹ Department of Broadband, Communications and the Digital Economy, National Digital Economy Strategy: Leveraging the National Broadband Network to Drive Australia's Digital Productivity, 2011, p5.

³² Roya Ghafele and Benjamin Gibert, *The Economic Value of Fair Use in Copyright Law. Counterfactual Impact Analysis of Fair Use Policy on Private Copying Technology and Copyright Markets in Singapore*, Oxfirst Limited, October 2012, p8.

³³ (1769) 4 Burr. 2303, 2394.

[i]f there be any thing in the world common to all mankind, science and learning are in their nature publici juris, and they ought to be as free and general as air or water...Why did we enter into society at all, but to enlighten one another's minds, and improve our faculties, for the common welfare of the species?³⁴

In the eighteenth and early nineteenth centuries, the courts' recognition that there was a public interest in allowing new works to be created using copyright material led to the emergence of the principle that such 'new works' would not amount to infringement.³⁵

International copyright law also recognises the importance of public interest. At the first 1884 Berne Conference, the Chairman of the Conference, Numa Droz, explicitly stated that "*consideration...has to be given to the fact that limitations on absolute protection are dictated, rightly in my opinion, by the public interest.*"³⁶ Over time, legislatures have used copyright exceptions as a way of recognising the public interest in copyright law.

It is important to note that on an international level the public interest is still regarded as an important consideration in modern copyright law. The preamble to the *WIPO Copyright Treaty* (WCT) states that the contracting parties recognise "*the need to maintain a balance between the rights of authors and the larger public interest, particularly education, research and access to information as reflected in the Berne Convention.*"³⁷

This message was reiterated at the 12th Informal Asia Europe Meeting (ASEM)³⁸ on Human Rights in June 2012 where the Working Groups recommended "[g]overnments need to ensure that the public interest balance is maintained and recognized in domestic intellectual property legislation and international treaties and agreements" so that "*fundamental rights and freedoms such as ... right to information ... are positively affirmed.*"³⁹

The ASEM Working Groups also recommended:

[g]overnments should always consider public interest when considering amending or introducing new Intellectual Property laws since they may have chilling effects on the right to access knowledge, culture and education and infringe on other essential human rights. Intellectual

³⁴ Hansard, 1st ser., 17 (1774), 999.

³⁵ I. Alexander, *Copyright and the Public Interest in the Nineteenth Century*, (Hart, 2010), Chapter 6.

³⁶ Ficsor M., *The Law of Copyright and the Internet: The 1996 WIPO Treaties, Their Interpretation and Implementation* (Oxford, New York: Oxford University Press; 2002), chapter 5, 'Digital Agenda – Limitations and Exceptions', p258.

³⁷ *WIPO Copyright Treaty 1996*, http://www.wipo.int/treaties/en/ip/wct/trtdocs_wo033.html.

³⁸ ASEM, the Asia-Europe Meeting, is a forum that promotes various levels of cooperation among Asian and European countries. It represents a process based on dialogue with the objective of strengthening interaction and mutual understanding between the two regions and promoting cooperation that aims at sustainable economic and social development. Member are Austria, Australia, Belgium, Brunei, Bulgaria, Cambodia, China, Cyprus, the Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, India, Indonesia, Ireland, Italy, Japan, Korea, Laos, Latvia, Lithuania, Luxembourg, Malaysia, Malta, Mongolia, Myanmar, Netherlands, New Zealand, Pakistan, Philippines, Poland, Portugal, Romania, Russia, Singapore, Slovakia, Slovenia, Spain, Sweden, Thailand, United Kingdom, Vietnam, the ASEAN Secretariat and the European Commission.

³⁹ Wolfgang Benedek and Madanmohan Rao, *12th Informal ASEM Seminar - Seminar Report*, p30

<http://www.asef.org/index.php/projects/themes/human-rights/2443-12th-human-rights#2691-ict-and-human-rights>.

*Property Rights (IPR) and overly stringent copyright protection, in particular, can threaten the enjoyment of human rights and hamper human creativity online.*⁴⁰

Similar to the ASEM Working Groups' recommendation, the Australian Joint Standing Committee on Treaties report on the Australia-United States Free Trade Agreement recommended "*that the Government enshrine in copyright legislation the rights of universities, libraries, educational and research institutions to readily and cost effectively access material for academic and related purposes.*"⁴¹

1.8. Defining the public interest in the digital environment

The importance of online access to content in the public interest has also been recognised by the United Nation's (UN) Special Rapporteur, Frank La Rue. In his *Report on the Promotion and Protection of the Right to Freedom of Opinion and Expression* he said, "[t]he Internet boosts economic, social and political development, and contributes to the progress of humankind as a whole."⁴² More specifically, he stated "*the educational benefits attained from Internet usage directly contribute to the human capital of the States*"⁴³ and "*by acting as a catalyst for individuals to exercise their right to freedom of opinion and expression, the Internet also facilitates the realization of a range of other human rights*" including "*social and cultural rights...such as the right to education.*"⁴⁴

Similarly, the various Ministers and national representatives at *The Seoul Declaration for the Future of the Internet Economy* declared that "*to contribute to the development of the Internet Economy*" they would "*facilitate the convergence of digital networks, devices, applications and services through policies that...facilitate access to the Internet and the introduction of new and innovative services, while taking into account public interest objectives.*"⁴⁵

The ALRC's terms of reference also recognises "*the general interest of Australians to access, use and interact with content in the advancement of education, research and culture.*"

⁴⁰ Ibid, p33.

⁴⁰ Ibid.

⁴¹ Joint Standing Committee on Treaties report on the Australian-United States Free Trade Agreement, Report 61, Recommendation 16. This report can be accessed here: <http://trove.nla.gov.au/work/9771177>.

⁴² United Nations General Assembly, *Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, Frank La Rue*, p19.

⁴³ Ibid, p17.

⁴⁴ Ibid, p7.

⁴⁵ Organisation for Economic Cooperation and Development (OECD), *The Seoul Declaration for the Future of the Internet Economy*, p6.

1.9. The ALRC review is in good company internationally

Since the Government's 2005 Fair Use Review, where it was decided not to introduce a US-style fair use exception to Australia, there has been mounting concern, both in this country and internationally, about whether purpose-based copyright exceptions are sufficiently flexible to respond to our rapidly changing technological environment.

As was noted in the *Copyright and the Digital Economy* Issues Paper, the importance of flexible copyright exceptions, not only to education, but also to the wider economy and society, is now being recognised around the world. At this moment, comparable jurisdictions internationally are considering introducing new flexible exceptions that would permit free educational copying in circumstances where, in Australia, educational institutions must still pay for the right to copy.

Schools in countries such as the United States (US), Canada, Israel, Singapore, South Korea and The Philippines are permitted to copy on behalf of their students, without payment, within fair use/fair dealing limits. This is in contrast to the situation in Australia, where the existence of the Part VA and VB statutory licences means that, in practice, Australian schools do not receive the benefit of any 'core' of non-remunerable fair dealing uses.

As discussed in more detail in Part 2.2.3 of this submission, our copyright laws are placing Australian schools out of step with emerging international norms. This will have the very real effect of placing Australian students at a disadvantage to students in comparable countries.

The United Kingdom (UK) is currently considering introducing new exceptions for universities and schools that would permit institutions to copy up to five per cent of a work for free, with a licence required only when copying exceeded this limit. The UK is also considering extending the private broadcast time-shifting exception to educational institutions, permitting them to copy and retain broadcasts for up to 30 days without payment. The UK's *Hargreaves Report* also recommended that the UK Government lead a push at the European Union (EU) level for more flexible copyright exceptions and that legislation be drafted that protects copyright exceptions from being overridden by contract.⁴⁶

The Irish Copyright Review Committee is also considering a new fair use exception, as well as an exception permitting educational institutions to use freely available Internet material without payment. Similar deliberations are occurring in the Netherlands, and New Zealand is expected to review its copyright laws in 2013.⁴⁷

⁴⁶ Professor Ian Hargreaves, *Digital Opportunity - A review of Intellectual Property and Growth*, May 2011, p5.

⁴⁷ Fletcher, H 2012, 'Judge tells Kiwis to speak up on copyright', *The New Zealand Herald*, 12 July, available here: http://www.nzherald.co.nz/business/news/article.cfm?c_id=3&objectid=10818963.

1.10. Overview of the Schools' submission

As required by the Terms of Reference, Part 2 of this submission assesses the adequacy and appropriateness of the existing educational statutory licences in the *Copyright Act* in the digital environment. The Schools assert that there are significant problems with the existing educational exceptions in the *Copyright Act* that make them largely unsuited in an Internet age. The Schools also submit that the Part VA and VB statutory licences are completely unworkable in the digital environment and should be repealed.

Part 3 of this submission sets out a number of options for reform that the Schools have considered as an alternative to the existing exceptions and statutory licences.

Part 4 of this submission addresses a number of additional issues raised in the Issues Paper of relevance to the Schools.

Attachment 1A

Government policies/statements on digital education/ICT in education

Commonwealth

Digital Education Revolution (<http://www.deewr.gov.au/Schooling/DigitalEducationRevolution>)

The Digital Education Revolution is a suite of initiatives, including:

- the **National Secondary Schools Computer Fund**, which is helping schools provide new computers and other ICT equipment for students in Years 9 to 12, as well as providing the necessary infrastructure to support the installation and maintenance of the additional ICT. A 1:1 computer to student ratio is being achieved nationally in Australian schools for Years 9 to 12 for the start of the 2012 school year.
- the \$31.4 million **Supporting the Australian Curriculum Online (SACOL)** program that will significantly enhance the pool of national, state and territory digital curriculum resources to support all teachers in implementing the Australian Curriculum. It includes a focus on filling resource gaps identified for English, mathematics, science and history and providing extra resources to help teachers to teach geography, languages and the arts. Funding will also provide support for teachers developing flexible learning approaches and integrating resources into the classroom.
- the \$16.3 million **Information and Communications Technology (ICT) Innovation Fund** which is supporting four projects that together will assist teachers and school leaders to embrace technology and encourage teachers to creatively and effectively integrate the use of ICT into the classroom.
- the **National Schools Interoperability Program** which was established by the Australian Education, Early Childhood and Youth Senior Officials Committee to provide it with technical advice and support for national initiatives.
- the **Australian Curriculum Connect** Project which is supporting implementation of the Australian Curriculum by enabling the use, sharing and discovery of digital resources aligned with the new curriculum.

Other initiatives supporting the use of ICT in Australian education include:

- the more than \$50 million **Online Diagnostic Tools** initiative which will provide resources that help teachers and parents more effectively and efficiently monitor student progress, identify areas of development and support learning using resources tailored to students' individual needs. As part of this initiative, DEEWR is working collaboratively with ACARA to trial online delivery of elements of the National Assessment Program, including examining the feasibility and cost-benefit of moving NAPLAN online.

- the four year \$27.2m **National Broadband Network Enabled Education and Skills Services Program** which will support the development and trialling of online education and skills services that take advantage of the high speed broadband connections being made available through the National Broadband Network. The program will be delivered in, to or between NBN early release sites and be delivered over NBN infrastructure.
- the **ABC/Education Services Australia Portal** project which will provide education resources drawn from the ABC's extensive archive in a digital form that all Australians can access.
- the **Computer Technologies for Schools (CTFS)** project which sources donations of ICT equipment from the public and private sector and arranges for its use in schools throughout Australia according to need.
- the **Framework for Open Learning Program (FOLP)** which supports cross sectoral education projects including the annual iDEA conference which brings together technologists and educators from across Australia and overseas.

Ministerial Council on Education, Employment, Training and Youth Affairs and Ministerial Council for Vocational and Technical Education 2008, *Charter of Principles for Cross-Sectoral Collaboration on Interoperability across the Australian Education and Training Sectors*, MCEETYA / MVTE, Australia

(http://www.mceecdya.edu.au/verve/resources/AICTEC_Standards_-_Charter_of_Principles.pdf)

Preamble: Australia's education and training Ministers recognise the importance of technology in developing the potential of all learners, achieving Australia's education and training goals, and enabling students to achieve high quality learning outcomes and contribute productively to our society and economy.

Ministerial Council for Education, Early Childhood Development and Youth Affairs 2008, *The Melbourne Declaration on Educational Goals for Young Australians*, MCEETYA, 2008

(http://www.mceecdya.edu.au/verve/resources/national_declaration_on_the_educational_goals_for_young_australians.pdf)

p5: Rapid and continuing advances in information and communication technologies (ICT) are changing the way we share, use, develop and process information and technology, and there has been a massive shift in power – to consumers in general, and to learners specifically. In this digital age, young people generally need to be highly literate in ICT and increasingly expect to be able to use such technologies in their learning. While there is some knowledge about how to effectively embed these technologies in learning in schools, we need to make a quantum leap in this effectiveness over the next decade.

Australian Information & Communications Technology in Education Committee 2009, *Digital Education Revolution Implementation Roadmap*, AICTEC, Australia

http://www.deewr.gov.au/Schooling/DigitalEducationRevolution/Documents/AICTEC_DER%20ROADMAP%20Advice.pdf

p3: *Through the Digital Education Revolution (DER), the Australian Government is working with jurisdictions and school sectors to support the development of technology enriched learning environments. The DER forms a key element of the broad education agenda and a wider strategy aimed at improving national productivity and workforce and social participation that is being pursued by the Council of Australian Governments (COAG) through its Productivity Agenda Working Group (PAWG). All state and territory governments have agreed to a national, coordinated and collaborative partnership approach to developing and implementing the DER. COAG1 has charged the Australian Information and Communications Technology in Education Committee (AICTEC) with providing advice on cross sectoral issues so that investments in the DER can benefit education as a whole and on strategies to integrate investments in ICT with wider educational objectives.... Through its DER policy, the Australian Government has already committed more than \$2 billion to stimulate a quantum increase in access to and utilisation of ICT as a tool for improving education outcomes in a digital world and globalised economy.*

p4: *Funding has also been allocated for legitimate additional costs of implementing the National Secondary School Computer Fund. The agreements set out shared national reform directions, specific deliverables and roles and responsibilities.*

p5: *The DER provides an opportunity to build on existing programs and develop approaches that will facilitate sharing and leveraging of expertise, resources and efforts across, and collaboration between, the government and non-government schools, VET and higher education sectors. For the VET sector, particular challenges will include the diversity of delivery locations and the range of providers and participants. Learning anywhere, anytime is already an operational reality for the VET sector to meet the requirements of students in schools, on campus, working from home, in the field or on the job and flexible learning methods and wireless connectivity have significant roles to play. In this context, early attention should be given to mobile infrastructure (like PDAs and smart phones), virtual class room software and a widely accepted e-portfolio tool. Increasing engagement of the VET sector with the DER agenda being developed for the Teaching for the Digital Age will be important.*

p6: *Teachers and educators require the pedagogical knowledge, confidence, skills, resources and support to creatively and effectively use online tools and systems to engage students. Repositories of relevant, suitable, exciting, culturally appropriate, discoverable and affordable materials must be available, especially in key learning areas such as English, mathematics, the sciences, history, languages and geography.*

p6: *National, cross jurisdictional and cross sectoral approaches through the Australian ICT in Education Committee to address the ICT enablers of technology rich learning environments: developing educators' capabilities; access to computers and ICT equipment; secure and robust infrastructure, including broadband; systems and architectures that support access, transfer and*

sharing of information within and between institutions; and affordable access to appropriate online learning resources.

p7: The vision guiding the DER is articulated in the DER Strategic Plan as four statements:

1. Students undertake challenging and stimulating learning activities supported by access to global information resources and powerful tools for information processing, communication and collaboration; ...
4. The Australian, state and territory governments commit to national ICT infrastructure including access to broadband bandwidth, digital learning resources and activities, national curriculum and continuing professional development for teaching staff in best practice utilisation of technologies to improve learning and teaching outcomes.

See also:

Ministerial Council on Education, Employment, Training and Youth Affairs and Ministerial Council for Vocational and Technical Education 2008, *Joint Ministerial Statement on Information and Communications Technologies in Australian Education and Training: 2008-2011*, MCEETYA / MVTE, Australia

(http://www.mceecdya.edu.au/verve/_resources/AICTEC_JMS_on_ICT_in_Aust_Ed_and_Training.pdf)

COAG Productivity Agenda Working Group 2008, *Success through Partnership: Achieving a National Vision for ICT in Schools: Strategic Plan to Guide Implementation of the Digital Education Revolution Initiative and Related Initiatives*, Department of Education, Employment and Workforce Relations, Australia

(<http://www.deewr.gov.au/Schooling/DigitalEducationRevolution/Documents/DERStrategicPlan.pdf>)

Powering Ideas: An innovation agenda for the 21st Century, Australian Government, DIISR, 2009

(<http://www.innovation.gov.au/Innovation/Policy/Documents/PoweringIdeas.pdf>)

New South Wales

NSW Government Department of Education and Training, *DET ICT Strategic Plan 2010-2011*, DET, NSW

(http://www.dec.nsw.gov.au/detresources/DET_ICT_Strat_Plan_2010-2011_GEMrBwiVrX.pdf)

Victoria

Department of Education and Early Childhood Development 2009B, *Digital Learning Statement*, DEECD, Victoria

(<http://www.eduweb.vic.gov.au/edulibrary/public/teachlearn/innovation/digitallearning/dls.pdf>)

Queensland

Education Queensland 2009B, *Smart Classrooms Professional Development Framework*, Department of Education and Training, Queensland

(<http://education.qld.gov.au/smartclassrooms/>)

Queensland Department of Education and Training, *Information and Knowledge Strategic Plan 2010-2014: Powering eBusiness Information*, DET, Queensland

(<http://deta.qld.gov.au/publications/strategic/pdf/iksp-2010-2014.pdf>)

South Australia

Department of Education and Children's Services, *Digital Education Revolution Policies and Good Practices Guidelines*, June 2010

(http://www.decd.sa.gov.au/it/files/links/POLICIES_AND_GOOD_PRACTICE.pdf)

Western Australia

Education and Health Standing Committee, *The role of ICT in Western Australian Education: Living and Working in a Digital World*, Report No.16, September 2012

([http://www.parliament.wa.gov.au/publications/taledpapers.nsf/displaypaper/3815411af526896565b2a95448257a8b0012c522/\\$file/5411.pdf](http://www.parliament.wa.gov.au/publications/taledpapers.nsf/displaypaper/3815411af526896565b2a95448257a8b0012c522/$file/5411.pdf))

Department of Education and Training (WA) 2009, 'ICT in learning'

(www.det.wa.edu.au/education/cmisis/eval/curriculum/ict/index.htm)

ACT

ACT Tertiary Education Taskforce, *Learning Capital: An Integrated Tertiary Education System for the ACT*, 2010

(http://www.det.act.gov.au/_data/assets/pdf_file/0010/308746/Tertiary_Taskforce_Report.pdf)

NT

Department of Education and Training, *Strategic Plan 2011-2014: Delivering a Smart Territory through Quality Education and Training*, Northern Territory

(http://www.det.nt.gov.au/_data/assets/pdf_file/0013/4126/DET_StrategicPlan.pdf)

Tasmania

Department of Education and Training (Tas), *DoE Strategic Plan 2012-2015*, DET, Tasmania

(<https://www.education.tas.gov.au/documentcentre/Documents/DoE-Strategic-Plan-2012-2015.pdf>)

PART TWO - EDUCATIONAL INSTITUTIONS AND THE COPYRIGHT ACT

The *Copyright Act* recognises the public interest in educational uses of copyright materials by way of a complex mix of exceptions to the exclusive rights of owners and statutory licences. This part of the submission gives a short overview of the various exceptions and statutory licences most relevant to Australian schools. Part 2.1 provides an assessment of the adequacy and appropriateness of the educational exceptions in the digital environment. Part 2.2 provides a similar analysis of the statutory licences.

2.1. Assessing the educational exceptions

The Schools submit that there are four main issues with the current educational exceptions that make them problematic in the digital environment:

- 1 Some are technology specific and/or refer to out-dated technologies, which do not reflect the realities of educational practice in an internet age.
- 2 Section 28 may contain a drafting error with significant practical consequences. We highlight below the practical issues created by s.28 as they are an excellent example of the Schools' broader concerns – that the current educational exceptions in the Act are not suited to the realities of the technologies used in modern teaching.
- 3 Section 200AB has been largely ineffective in achieving the flexibility it was intended to create. We think this is due to the particular drafting choices made in implementing the international three-step test in domestic legislation.
- 4 Some exceptions use confusing terminology and are not consistent across the *Copyright Act*. While this may seem an issue of semantics, differences in drafting language across various sections can lead to differential treatment under the Act for different copyright subject matter.

2.1.1. Technological specificity

Some of the educational exceptions in the *Copyright Act* reflect historical teaching practices. Others reference specific technologies which are fast becoming out dated in a digital age. The Schools wish to highlight several examples, which illustrate the broader point of specific, purpose-based exceptions being ill suited to the realities of teaching in a digital age.

**Educational copyright exceptions
are becoming outdated.**

For example:

- Section 200(1)(a) refers to a reproduction other than by use of a machine capable of making multiple copies. Traditionally, this use has been thought to cover uses such as writing up extracts of a work on a blackboard. In a modern classroom however, interactive whiteboards (used for similar purposes) are generally now networked and/or capable of making multiple copies, and are therefore not clearly covered by the exception.
- Section 200(1)(b) covers reproductions or adaptations made as part of the questions to be answered in an examination, or in an answer to such a question. The exception does not cover any communication of the examination 'paper', such as would be required in order to deliver an examination via distance education. Schools are also not permitted to use audio-visual materials in exams. Increasingly, examinations will move online as online learning becomes more widespread, and as digital materials become more prevalent, rendering the section as presently drafted increasingly irrelevant to actual teaching practices. For example, s.200(1)(b) currently permits the inclusion of the score of a musical work in a written exam paper but does not permit an exam where students are required to wear headphones to listen to music being played from an online source.
- Section 200AAA is an effective exception to cover proxy caching technologies used in schools ... but perhaps only the particular technologies used in proxy caching. This exception is particularly well drafted in comparison to s.43A as it covers both the reproduction and communication right, both of which are essential in the operation of a proxy cache. The Schools submit, however, that the same problems that s.200AAA was designed to address will arise in relation to any new technology system used in the future, but will not be covered by the specific requirements of s.200AAA. For example, it is unclear the extent to which the operation of subsection (1) would be affected if any part of the computer system referred to is offered remotely (ie, in 'the cloud'). Section 200AAA is an excellent example of an exception that currently seems to be working well, but is not future-proofed against any technological developments that may take common caching practices outside the particular requirements of a section which was drafted in response to the technical steps involved in operating a proxy cache as was understood in 2006.

Schools submit that the current position is inconsistent with the ALRC's guiding principles 5 and 6.

2.1.2. Section 28

The Schools submit that section 28 is a good example of the difficulties that can arise by including technology and/or purpose specific exceptions into the *Copyright Act*.

Section 28 has traditionally enabled classroom teaching. It was introduced to enable the types of teaching activities that were prevalent at the time of its introduction and has been updated since to take into account new teaching methods.⁴⁸ For example, teachers have always read aloud from copyrighted works in classrooms, and the section has always permitted this activity. In more recent

⁴⁸ See amendments made in 1980, 1994 and 2006.

times, television and video technology enabled teachers to show films and broadcasts and play music in classrooms, and the section was updated accordingly.

Even in the relatively short period of time between the *Digital Agenda Act* amendments in 2000 and the *Copyright Amendment Bill* in 2006, new teaching practices involving distance education were highlighting flaws in a copyright exception that was limited to “in class” uses (see s.28(1)(a)).⁴⁹ Further, new technologies such as electronic reticulation systems meant that ordinary classroom performances such as playing a video to a class of students were involving acts comprised in the communication right as well as the performance right.⁵⁰

As a result of these technological changes, s.28 was amended in 2006 to expand the exception to also apply to the communication right - see ss.28 (5), (6) and (7). The Schools submit, however, that there may be an unintended consequence of the drafting of the amendments to s.28 that still leaves a ‘gap’ in the coverage of s.28. Since the 2006 amendments, further technological developments in centralised learning management systems and interactive whiteboards have made the full coverage of the communication right - and elimination of any ‘gaps’ - in s.28 even more critical.

Section 28 generally applies in the following way:

- a communication of a broadcast is covered by s.28 if *the communication is made merely to facilitate the broadcast being seen or heard in class or otherwise in the presence of an audience* - s.28(6)
- a communication of a sound recording is covered by s.28 if *the communication is made merely to facilitate an act of causing the sound recording to be heard that, because of the operation of s.28, is not an act of causing the sound recording to be heard in public* - s.28(5)(b)
- a communication of a cinematograph film is covered by s.28 if *the communication is made merely to facilitate an act of causing visual images or sounds to be seen/heard that, because of the operation of s.28, is not an act of causing the sound recording to be heard in public* - s.28(5)(c)
- a communication of an artistic work is covered by s.28 if *the communication is made merely to facilitate the work being seen* in class or otherwise in the presence of an audience - s.28(7)
- a communication of a literary, dramatic or musical work is covered by s.28 if *the communication is made merely to facilitate the performance the work that, because of the operation of s.28, is not a performance in public* - s.28(5)(a).

⁴⁹ This is a further example of the limits of technological specificity in drafting – the Digital Agenda Act reforms in 2000 were intended to introduce broad, comprehensive updates to bring the Act into line with digital technologies and practices. However by 2006 technology had already moved on, meaning further reforms were necessary.

⁵⁰ See Part 2.2 of this submission for a particular issue that was raised by Screenrights seeking remuneration under Part VA for communications made when playing copies of broadcasts in class using centralised DVD systems.

It has been suggested that s.28 may only cover communications of certain types of literary, dramatic and musical works, and that other communications of these types of works may still be covered under the Part VB statutory licence as they fall outside the operation of s.28.

(See *Attachment 2A* for a full explanation of this view.)

Consider the practical implications if this interpretation of s.28 is correct:

Teacher A is an English teacher. She recites an extract from a novel to her class.

Teacher B is an art teacher. He brings his laptop to class and plugs it into the classroom's interactive whiteboard to show students some pictures of modern art works.

Teacher C is an economics teacher. She brings her laptop to class and plugs it into the classroom's interactive whiteboard to show students the text of a page from a document stored on her laptop that discusses recently released economic data.

Teacher A's activities would be covered by the exception in s.28(1) and therefore be a non-remunerable use. Teacher B's activities would be covered by the exception in s.28(7) and also be a non-remunerable use. The Copyright Agency claims that, due to the different language used by s.28 in relation to literary, dramatic and musical works, Teacher C's activities are not covered by s.28(5) and are therefore remunerable under the Part VB statutory licence.

Displaying an artwork on a screen is allowed.

Displaying text is not.

If the Copyright Agency's interpretation of s.28 is correct, this would be of significant practical importance to schools for two reasons:

1. Literary, dramatic and musical works make up the vast majority of works used in Australian schools; and
2. The display and projection of copyright material in class makes up the overwhelming majority of electronic uses of copyright materials in the classroom (as measured by the annual electronic use survey (EUS) conducted in Australian schools pursuant to the Part VB statutory licence).

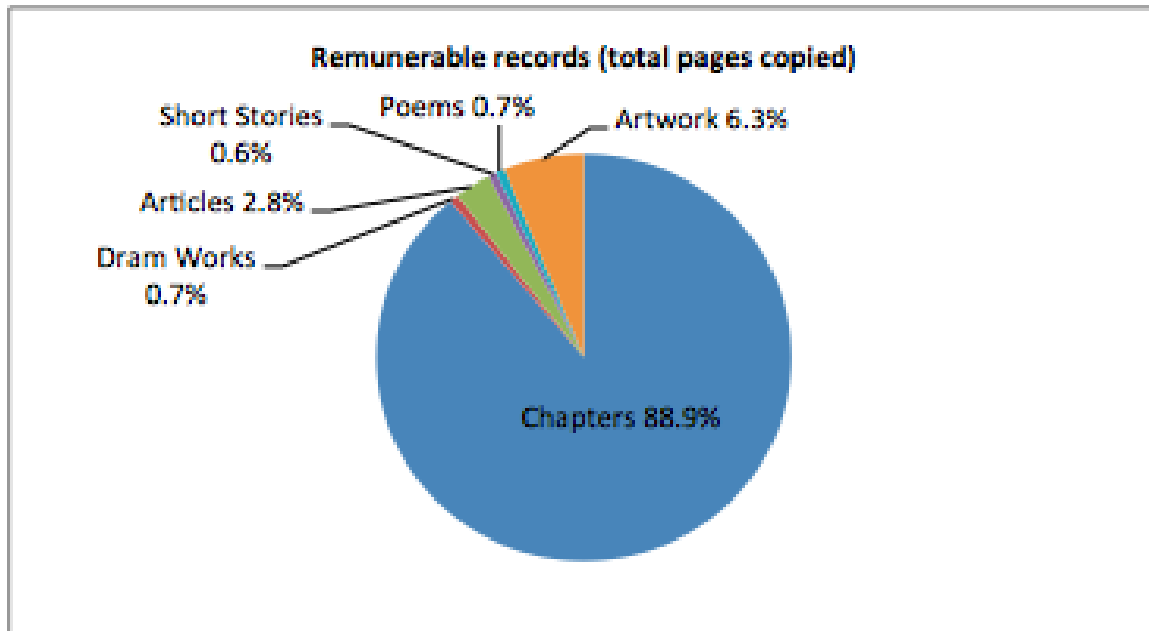
The proportion of literary, dramatic and musical works shown in the EUS data

As Figure 1 below illustrates, the vast majority of electronic materials recorded in the 2010 EUS data set⁵¹ was literary, dramatic or musical works. The category of artistic works (ie, the only category of

⁵¹ The Schools are required to conduct an 'electronic use survey' (EUS) as part of their obligations under the Part VB statutory licence. This is an annual survey conducted across a sample of schools in all states and territories, which measures all electronic use of copyright material by staff during the survey period. It collects data on tens of thousands of individual copying and communicating 'activities', which are processed and made available to the Copyright Agency and the Schools' National Copyright Unit for analysis. The processed 2010 EUS data set was the most recent available at the time of writing. The 2011 EUS data set was released shortly before making this submission, however there has been insufficient

work the Copyright Agency claims can be excluded from remuneration by the operation of s.28) only represented 6.3 per cent of total electronic 'pages' copied in the survey.

Figure 1 - Allocation of remunerable records in 2010 EUS data^{52, 53}



Volume of 'display' use in school copyright surveys

Until recently, schools have been required by the EUS to record all instances when copyright works are displayed or projected on screen in a classroom, even though s.28 might suggest at least an earlier legislative intent that such "in class" display of copyright works ought to be free.⁵⁴

An example of the electronic use survey (EUS) form teachers are required to fill out is included at *Attachment 2B*; the last question on that form refers to recording 'display or project activity and requires staff to record the number of students/staff to whom content was displayed or projected.

In the 2010 EUS data, 84.5% of all remunerable internet copying and 21% of all other remunerable electronic copying was recorded under the category of 'Display and Project'. This is the largest

time to complete analysis of that data. As noted in fn 51 below, the Schools believe the 2011 data will not show a significantly different result.

⁵² The Copyright Agency processing protocols treat internet material as 'chapters', even when sourced from the internet.

⁵³ In these submissions the Schools have presented the most recent data available for any given metric, which is generally drawn from 2010 or 2011 copyright surveys conducted in Australian schools. Unless otherwise noted, we understand all data presented provides a good approximation of the current state of affairs.

⁵⁴ From 2012, teachers participating in the EUS no longer have to record instances of displaying or projection 'live' Internet content in class, but do still have to record every display or projection of 'non website' electronic material in class (ie anything other than 'live' Internet content, eg, a document stored on a laptop or a PowerPoint presentation displayed in class). This reflects changes to the 2012 EUS made as part of ongoing negotiations between the Copyright Agency and CAG over whether 'display' activity (eg showing an internet page on screen to a class) should properly be remunerable under Part VB. The Schools understand that distribution of Part VB licence fees collected from the Schools in previous years, up to and including 2011, will still occur on the basis of all 'display' activity being considered by the Copyright Agency to be remunerable.

category of activity recorded in the survey data, as shown in Figure 2. Figure 2 shows the significant proportion of 'display and project' materials in the two most recent EUS data sets for which analysis was complete at the time of writing.

Figure 2 - Proportion of electronic copying recorded as 'display or project'⁵⁵

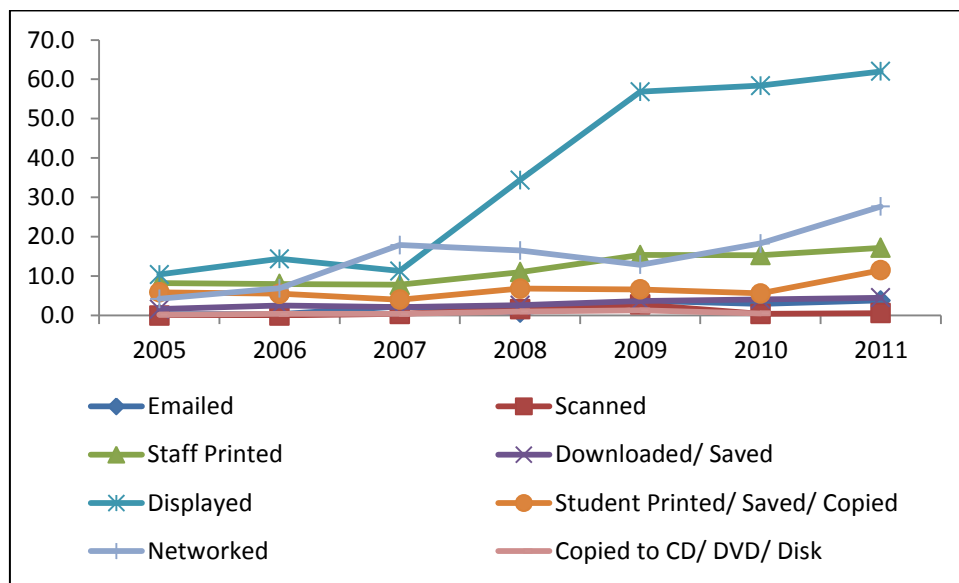
	2009	2010	Average	Average %	
	SPR	SPR	SPR	of total	
AMR Reported TOTAL	103.2	105.6	104.4	100%	
					<i>% of internet</i>
Internet - Display	50.0	44.8	47.4	45%	56%
Internet - all other activities	34.1	39.8	36.9	35%	44%
<i>Internet - total</i>	<i>84.1</i>	<i>84.5</i>	<i>84.3</i>	<i>81%</i>	<i>100%</i>
					<i>% of non-internet</i>
Non Internet - Display	6.9	13.6	10.3	10%	51%
Non Internet - all other activities	12.1	7.4	9.8	9%	49%
<i>Non Internet - total</i>	<i>19.0</i>	<i>21.0</i>	<i>20.0</i>	<i>19%</i>	<i>100%</i>
Grand Total	103.2	105.6	104.4	100%	
Total - Display	56.9	58.4	57.7	55%	
Total - all other activities	46.2	47.2	46.7	45%	
Grand Total	103.2	105.6	104.4	100%	

This means that, in practical terms, schools are required to pay for the vast majority of communications made in Australian classrooms, in circumstances where the Schools believe it is clear that Parliament intended that s.28 should have extended to the communication right for all categories of copyright materials, to enable schools to bring the benefits of new technologies to the classroom.

Figure 3 illustrates how this problem is increasing over time, showing the rapid and continuing increase in 'display' activity over recent years:

⁵⁵ 'SPR' = 'student page rate', a measure of the average number of 'pages' of remunerable copyright content copied/communicated under Part VB per student per year. It is included here to demonstrate the relative proportion of internet vs non-internet material, and display vs non-display activities, used in Australian classrooms in 2009 and 2010.

The SPR data shown here is sourced from annual reports provided to the Schools and Copyright Agency by AMR Interactive (AMR) - the independent survey manager engaged by Copyright Agency to conduct the photocopy and EUS surveys in Australian schools.

Figure 3 - Trend analysis of weighted annual student page rate for valid items by activity type⁵⁶

The issues raised by s.28 highlight how the existing mix of copyright exceptions and statutory licences is completely unsuited to the digital environment and is in fact seriously impeding the use of new technologies in Australian classrooms.⁵⁷ This is in direct contrast to the policy imperatives for digital education discussed in Part 1 of this submission. The Schools submit that this must be remedied as a priority.

2.1.3. Section 200AB

Section 200AB was intended to provide flexibility for public institutions such as libraries, archives, schools and universities to perform socially useful acts.⁵⁸ The ALRC has asked whether the exception should be amended, and if so, how.

Section 200AB has permitted schools to use copyright materials in some new ways which have been a positive advancement on the law prior to 2006. For example, the Schools give the following examples of activities it believes would likely be permitted by s.200AB:

⁵⁶ AMR 2011 Australian Schools EUS DRAFT Annual Review, Figure 6, p 20 (the draft version of this report is cited here as a final version has not yet been released at the time of making this submission).

⁵⁷ The Schools submit that this also highlights another flaw in the way the Australian *Copyright Act* operates in relation to digital technologies. While the *Copyright Act* recognises that there may be a number of 'temporary reproductions' made in the course of reading, browsing and using digital content (see ss.43A and 43B) there is not a similar recognition of the types of temporary and transient "electronic transmissions" made in using digital materials, which may be considered to be exercises of the right of communication to the public. For example, the upload of a work to a learning management system would involve a reproduction of that work, but the display of that in class, connection to a whiteboard or accessing the content by a student or staff may also result in one or more electronic transmissions comprised in the right of communication to the public. Many of these technical 'transmissions' as part of everyday uses are tolerated or not enforced in the general community. However due to the operation of Part VA and VB Australian schools are expected to pay for these transient and necessary digital uses.

⁵⁸ Explanatory Memorandum to the *Copyright Amendment Bill 2006* para 6.53.

- making a captioned version of a film for hearing impaired students when it is not possible to buy a captioned version of the film and you need to show the film in class*⁵⁹
- converting 8-track or VHS tapes to DVD where it is not possible to buy a DVD of that film and the DVD is needed for teaching purposes*
- copying a small extract of audio visual material from a CD-Rom to disc or PowerPoint for classroom display*
- compiling short extracts of audio-visual material for use in class (such as making a DVD of short extracts of several films for an English class) when it is not possible to buy a similar teaching resource*
- copying a French language song that is not available for purchase in digital format to a digital file for inclusion in a podcast for a French language class*
- including short extracts of music in PowerPoint teaching aids*
- translating an extract of an Australian novel into Japanese (where you cannot buy a copy in Japanese) for use in a Japanese language class*
- staging a free practice performance of a play on a drama syllabus for family and friends to allow drama students to practice for a performance assessment*
- preparing an arrangement of a musical work for students to perform in a music class when you cannot buy the arrangement you need*
- copying part of a track from an audio CD for use in an aural exam or assignment.*

Despite these additional incremental uses enabled by s.200AB (which are almost exclusively ‘analog’ examples in practice), the complexity of drafting and the particularly narrow implementation of the international law three-step test (described below) have made it difficult to apply, and increasingly ineffective for digital content in particular. The cumulative effect of the narrow implementation of the three-step test criteria, as well as the limiting language in the Explanatory Memorandum, has led to very limited practical use of s.200AB for new technologies, for which content can almost always be purchased or licensed.

Section 200AB has proved of little value for digital materials.

A high degree of uncertainty as to how the exception would be applied

It is, of course, in the nature of *any* open-ended exception that there will be some degree of uncertainty as to the circumstances in which it will apply, at least until industry or sectoral guidelines or a body of case law provides some guidance as to the kinds of uses that the exception permits. Critics of a fair use exception are often heard to say that the ‘uncertainty’ that would apply under a fair use regime would render such an exception unworkable.

⁵⁹ The asterisk against each example refers to the following text included with these examples when used in the Schools' training materials: “if a work is protected by a copying protection technology, you may not be able to copy material under this exception. You are not allowed to circumvent an access control TPM in the course of making a ‘flexible dealing’. In practice this has made s.200AB of very limited application to cinematograph films.

As discussed in Part 3 of this submission, the Schools generally believe that the benefits of flexibility outweigh any uncertainty created by an open-ended exception. This belief does not apply however, to s.200AB. The Schools submit that the particular way in which the three-step test has been included in s.200AB has created a level of uncertainty that would greatly exceed any initial uncertainty that might be created if Australia were to adopt a fair use exception or a fair dealing exception, such as the Canadian fair dealing provision or that recommended by the Copyright Law Review Committee (CLRC) in 1998.⁶⁰

It is not the three-step test that is the problem.

It's the way the three-step test has been implemented in practice.

The Schools' concerns about s.200AB are not related to the three-step test itself. Rather, it is the particularly narrow and uncertain implementation of the three-step test into the Australian *Copyright Act* that has made s.200AB so uncertain and limiting in practice.

The three-step test is included in both the Berne Convention and the WIPO Copyright Treaty and in Article 13 of the World Trade Organisation (WTO) Agreement on the Trade Related Aspects of International Property (TRIPS). This test was designed to be applied by Parliaments in assessing whether particular exceptions to copyright can be justified in national legislation on an economy-wide basis. This has not translated well into the detailed assessments that individual teachers must make in deciding whether a particular use of copyright material is acceptable under s.200AB. The Schools submit that this approach has led to great difficulties.

The narrowest version of the three-step test

In the Explanatory Memorandum relating to s 200AB,⁶¹ the Government said that the conditions set out in the exception "*incorporate the standard test for copyright exceptions under international copyright treaties to which Australia is a party*". It follows that an Australian court may not start by adopting a dictionary definition of the words contained in s 200AB and look instead, at least at first instance, to the 'standard test' referred to in the explanatory material.

Some commentators have suggested that the three-step test as set out in the WIPO Copyright Treaty may allow for application of more generous limitations than the test as articulated in Article 13 of TRIPS, in light of the preamble to the WIPO treaty that refers expressly to the "*balance between the rights of authors and the larger public interest, particularly education, research and access to information, as reflected in the Berne Convention.*" A similar preamble does not exist in the TRIPS agreement.

Subsection (7) tells us that the words 'conflict with a normal exploitation', 'special case' and 'unreasonably prejudice the legitimate interests' are intended to have the same meaning as in

⁶⁰ CLRC *Simplification of the Copyright Act 1968 Part 1 - Exceptions to the Exclusive Rights of Owners*.

⁶¹ *Copyright Amendment Bill 2006*, Explanatory materials for *Exceptions and other Digital Agenda Review measures* at p3.

Article 13 of TRIPS. That suggests that the starting point for construing s200AB would be to see what jurisprudence exists in relation to the three-step test as set out in Article 13 of TRIPS.

While there has been a great deal of academic commentary on the three step test, there has to date been only one international adjudicative decision on the scope of Article 13 of TRIPS - the WTO Panel decision in the so-called *Homestyle* case.⁶² This defined the three-step test in a narrow and restrictive fashion. Professor Jane Ginsburg has commented that the WTO Panel interpretation of the 'normal exploitation' limb of the test may result in "even traditionally privileged uses such as scholarship...[being] deemed 'normal exploitations, assuming copyright owners could develop a low transactions cost method of charging for them."⁶³

In his detailed analysis of the negotiations that led to the three-step test in the Berne Convention, Dr Martin Senftleben notes that the drafters intentionally agreed on an abstract formula, with a view to reconciling the many different types of exceptions that already existed when it was introduced:

"A comparison of the various observations made by the member countries elicits the specific quality of the abstract formula...: due to its openness, it gains the capacity to encompass a wide range of exceptions and forms a proper basis for the reconciliation of contrary opinions."⁶⁴

Such an interpretation of the three-step test is clearly at odds with the narrow interpretation of the WTO Panel in the *Homestyle* case. An Australian court interpreting s.200AB may, however, consider itself bound to have regard to the approach of the WTO Panel in the *Homestyle* case, given that subsection (7) refers expressly to Article 13 of TRIPS and given that the *Homestyle* case is the only international adjudicative statement on the proper application of the three step test as it appears in TRIPS. This narrower interpretation is potentially problematic given the further narrowing potentially required by subsection 200AB(3).

Drafting choices have turned the three-step test to a six-step test

There are a number of problems with Australia's domestic implementation of the three-step test, which have in practice turned it from a three-step test into a six-step test.⁶⁵

1. Subsection 200AB(6)(b) prevents a teacher from using s.200AB if the use would be covered by another exception or statutory licence. This limits the application of s.200AB to cinematograph films, sound recordings, and any uses of works and broadcasts that

⁶² The Report of the World Trade Organisation Panel on United States - Section 110(5) US Copyright Act (http://www.wto.org/english/tratop_e/dispu_e/1234da.pdf).

⁶³ Ginsburg, Jane C *Towards Supranational Copyright Law? The WTO Panel Decision and the 'Three-Step Test' for Copyright Exceptions* Revue Internationale du Droit d'Auteur January 2001. Available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=253867.

⁶⁴ Senftleben, *Copyright, Limitations, and the Three-Step Test: Analysis of the Three-Step Test in International and EC Copyright Law*, Kluwer Law International, 2004.

⁶⁵ Our analysis focuses on the application of s.200AB as it is used for educational purposes. As we explain in our recent submission to the Attorney-General's Department review of the technological protection exceptions, Australian schools also wish to use s.200AB to assist students with disabilities as permitted by s.200AB(4) ([http://www.ag.gov.au/Consultationsreformsandreviews/Documents/Copyright%20Advisory%20Group%20\(CAG\)%20Submission.PDF](http://www.ag.gov.au/Consultationsreformsandreviews/Documents/Copyright%20Advisory%20Group%20(CAG)%20Submission.PDF)).

would not be covered by Parts VA and VB.

This means it does not provide flexibility for a large range of educational uses of copyright materials.

2. Subsection 200AB(3)(b) limits the use of s.200AB to 'educational instruction', not the more generally applicable 'educational purposes' (the standard used for example in Parts VA and VB). It may mean that s.200AB covers a broader range of uses than just classroom teaching (compare "in the course of giving educational instruction" in s.28) but it is unclear what range of uses may be permitted under s.200AB given the potentially limiting link to 'instruction' that is required.
3. Subsection 200AB(3)(c) states that the use must not be for commercial advantage or profit. This is not a difficult criterion to apply, but it does potentially impact on the more general interpretation of limbs 2 and 3 of the three-step test (in subsections 1(b) and (c)), in that further limitation may be implied beyond that referred to in subsection 3(c).
4. Subsection 200AB(1)(a) – a certain special case.

Given that s.200AB already specifies that copying must be limited to a use that is made by schools for the purpose of giving educational instruction, it is unclear to which further limitations this 'special case' requirement refers. In practice, this has led to schools only using material for which they have an immediate educational need, due to concerns that copying for future uses 'just in case' might be outside of the scope of s.200AB.

5. Subsection 200AB(1)(b) - Not conflict with the normal exploitation of the work.

Reliance on s.200AB has been limited in practice due to commentary in the Explanatory Memorandum that may require schools to also consider "*forms of exploitation which, with a certain degree of likelihood, could acquire significant economic or practical importance*".⁶⁶ The effect of this language has led to concern that any potential conflict with a licence that is offered, or may be offered, by a copyright owner might take the use outside of the scope of s.200AB. This has had a particular impact on digital uses, for which it is increasingly the case that the majority of content can or may soon be able to be licensed or purchased in digital formats.

6. Subsection 200AB(1)(c) - Not unreasonably prejudice the legitimate interests of the rights holder.

The Explanatory Memorandum states that this factor requires an assessment of the "*legitimate economic and non-economic interests of the copyright owner*".⁶⁷ However it is unclear what additional interests are required to be taken into account by this factor in addition to the market considerations described above as well as Australia's existing moral rights provisions.

⁶⁶ Explanatory Memorandum to the Copyright Amendment Bill 2006 para 6.54.

⁶⁷ Ibid.

See *Attachment 2H* for the advice given to Australian teachers about how to implement these steps in practice.

The narrow interpretation that may be required for s.200AB has meant that, in practice, the section may have very limited application to digital materials. It may also decrease the section's already limited usefulness over the longer term, making s.200AB very unsuitable for the digital economy. For example, almost any form of audio-visual and music content is available for purchase via the Apple iTunes store and similar services, perhaps suggesting only a limited range of audio-visual or music content might be useable under s.200AB. This highlights a particularly critical flaw with s.200AB, given the increased consideration of digital exchanges for copyright content, where theoretically all digital works might be licensed in the future.⁶⁸

Figure 4 illustrates the limited practical utility of s.200AB for a range of copyright subject matter:

Figure 4 - Application of s.200AB to copyright subject matter⁶⁹

Subject matter	Comments
Literary, dramatic, musical and artistic works	S.200AB(6) means very limited application, if any, to works
Broadcasts	S.200AB(6) means very limited, if any, application to broadcasts
Sound recordings	Practical effect of s.200AB may be limited for sound recordings in digital forms given the wide availability of online content for purchase/licence (eg iTunes store)
Cinematograph films	Relatively useful for analog films (eg format shifting VHS to learning management systems) Practical effect is limited for films in digital formats due to TPMs (eg for DVD format shifting) and increasing availability of digital content for purchase/licence.

In short, six years after s.200AB was introduced, there remains great uncertainty as to how the exception would be applied by a court and a serious concern on the part of educational bodies that the exception is significantly narrower than comparable provisions overseas. Not surprisingly, this has led to a significant degree of caution on the part of schools in applying the exception.

In explanatory material for the *Copyright Amendment Bill 2006*, the Government stated that s.200AB was introduced in response to its review of whether Australia should have an exception based on the principles of fair use.⁷⁰ It would appear from this that the Government intended that the exception would be relied on by educational institutions to undertake uses that were 'fair'.

⁶⁸ See the recommendation for the creation of a digital copyright exchange in the Hargreaves report pp3-4.

⁶⁹ This table does not consider published edition copyright.

⁷⁰ Copyright Amendment Bill 2006, Explanatory materials for *Exceptions and other Digital Agenda Review measures* p 5.

Australian law already had a doctrine of “fairness” that was well understood by education sector users when s.200AB was introduced. While Australian fair dealing jurisprudence was admittedly fairly sparse, there was also a body of UK law determining what factors are relevant to determining whether a particular use is ‘fair’ for the purposes of a fair dealing exception.⁷¹ The effect of incorporating the unfamiliar language of the three-step test, in a particularly constrained way, into a domestic exception, has been to introduce a degree of complexity and constraint on use that far exceeds that associated with a fairness analysis, or even a more traditional three-step test analysis. In summary, s.200AB has not lived up to its stated goals of introducing a flexible and open-ended exception into the *Copyright Act*. In introducing s.200AB, the then Government indicated that it would monitor the effects of the new exception and any case law with respect to the open-ended exception, and review the new arrangements if necessary.⁷² The Schools believe that such review is now necessary.

When assessed against the ALRC’s guiding principles for this inquiry, the Schools submit that s.200AB fails to meet the policy goals set out in guiding principles 4, 5, 6 7 and 8.

Section 200AB has failed to meet its policy goals and should be replaced with a truly flexible open-ended exception.

The Schools submit that s.200AB has not been a success and should be repealed in favour of a truly open-ended, flexible exception based on the notion of ‘fairness’. The Schools set out their view on preferred reform options in this regard in Part 3 of this submission.

2.1.4. Use of inconsistent terminology

Explaining complex copyright provisions to teachers can be a difficult job. This job is not made easier by the inconsistent use of terminology in the educational exceptions in the *Copyright Act*. For example:

- Section 28 applies when an activity is done ‘in the course of giving educational instruction’
- The Part VA statutory licence applies to copies and communications made ‘solely for the educational purposes’ of an institution (s.135E(b))
- The insubstantial copying provisions of Part VB apply ‘for the purposes of a course of education’ provided by an institution (see s.135ZG)
- The general copying and communication provisions of Part VB apply if the copy/communication is made ‘solely for the educational purposes’ of an institution (see s.135ZJ(b))

⁷¹ See the discussion in Chapter 5 of Part 1 of CLRC Simplification of the *Copyright Act* Report. The CLRC refers to US, UK and Australian cases determining the factors relevant to deciding whether a particular use satisfies the fairness requirement under a US fair use test or a UK or Australian fair dealing test.

⁷² Regulatory Impact Statement contained in the Explanatory Memorandum to the *Copyright Amendment Act 2006*, p13.

- Section 200(1)(a) applies to a reproduction or adaptation made 'in the course of educational instruction' while s.200(2) applies to a 'course of instruction'
- Section 200AB(3) applies to uses that are made 'for the purpose of giving educational instruction'.

At first, it may seem these differences are merely semantic. However, these different terms can and do cause complexity in practice. For example, it is generally accepted that references to a 'course of instruction' might include a narrower set of activities than a reference to an 'educational purpose'. The differences detract from the simplicity and clarity of the *Copyright Act*. They also mean that teachers need to learn different legal tests for different categories of subject matter and different activities. For example, copying and communication of works and broadcasts can be done for 'educational purposes'. In contrast, for films and sound recordings (which in practice are the main subject matter for which teachers can rely on s.200AB, due to the operation of s.200AB(6)) teachers need to understand the potentially narrower terminology "*for the purposes of giving educational instruction*". This situation is in conflict with the ALRC's guiding principles 5 and 7.

This range of references to a variety of educational activities and purposes also highlights a significant difference between the Australian *Copyright Act* and the approach in countries such as the United States and Canada. Teachers in those jurisdictions can simply focus on whether a particular use is fair. In contrast, Australian teachers must understand:

- The different set of rules applicable to various copyright subject matter
- The technical limitations and rules for each subject matter; and
- The limitations as to use (ie, 'educational purpose' versus 'educational instruction' versus 'course of education') imposed by the exceptions and licences.

Applying distinctions between different activities and different copyright subject matter is becoming increasingly difficult in the digital environment. As discussed in Part 1.5 of this submission, modern teaching and learning involves interacting with a wide variety of materials in traditional and non-traditional formats, using a range of devices. Copyright exceptions that apply different rules and standards depending on the type of copyright subject matter make very little sense in this environment. For example, if a lesson utilises iPads and an interactive whiteboard in a classroom to interact with text, audio visual materials and apps, up to four separate exceptions and statutory licences might be involved,⁷³ each of which would have different rules and/or technical limitations depending on the type of teaching activity involved.

The interaction of fair dealing, exceptions and statutory licensing

As discussed in more detail in Part 3 of our submission, schools in countries such as the US, Canada, Israel, Singapore, South Korea and the Philippines are permitted to copy on behalf of their students, without payment, within fair use/fair dealing limits. However, the existence of the statutory licences means that, in practice, Australian schools do not receive the benefit of any non-remunerable fair

⁷³ namely, s.28, s.200AB, Part VA and Part VB.

dealing uses if a statutory licence could cover that use, or if it is outside the technical operation of an existing exception such as s.28. Instead, the majority of copying is automatically treated as remunerable under the statutory licence, even in circumstances where it may otherwise be considered to be fair dealing if done by a student directly.

In the context of Part VB, the existence of the statutory licence has been relied on and continues to be relied on by the Copyright Agency not only to require schools to pay for copying that they do on behalf of students and/or for distribution to students (including orphan works and freely available internet content), but also to argue that fair dealing copying *by students* should be treated as remunerable under the statutory licence and paid for by schools, when it is done at the direction of a teacher.⁷⁴

If a student decides to copy a page for homework, that is a fair dealing. If a teacher asks them to copy the same page, that copy must be paid for under the statutory licence.

This leads to the unusual policy outcome that if a student decides to copy a small extract of a work as part of their studies, that use would be covered by the fair dealing exception for research or study. However, if a teacher asks that student to copy the same material for a classroom or

homework exercise, that copy is treated as remunerable under Part VB.

Contrast this situation to that in Canada, where the Canadian Supreme Court has found that a teacher providing copies of short extracts of works to students was a fair dealing for research or study:

In the case before us, however, there is no such separate purpose on the part of the teacher. Teachers have no ulterior motive when providing copies to students. Nor can teachers be characterized as having the completely separate purpose of “instruction”; they are there to facilitate the students’ research and private study. It seems to me to be axiomatic that most students lack the expertise to find or request the materials required for their own research and private study, and rely on the guidance of their teachers. They study what they are told to study, and the teacher’s purpose in providing copies is to enable the students to have the material they need for the purpose of studying. The teacher/copier therefore shares a symbiotic purpose with the student/user who is engaging in research or private study. Instruction and research/private study are, in the school context, tautological.⁷⁵

⁷⁴ See *Copyright Agency Limited v Haines* [1982] 1 NSWLR 182. Note the Court in the *Haines* case did not go so far as to say that said that there was no potential overlap between the statutory licence and fair dealing: the Full Court expressly noted that it was not necessary to decide this question. Rather, Fox J (with whom the other members of the Full Court agreed) held that the question of what is “fair” for the purposes of the fair dealing exception in s.40 must, following the introduction of the statutory licence, be determined having regard to the “existence and effect” of the statutory licence. His Honour said that it was important to the proper working of the statutory licence that “a distinction be recognised between an institution making copies for teaching purposes and the activities of individuals concerned with research or study”.

⁷⁵ *Alberta (Education) v. Canadian Copyright Licensing Agency (Access Copyright)*, 2012 SCC 37 at [23].

The Schools submit that the current interaction of educational exceptions and statutory licensing in Australia fails to meet the policy goals in ALRC's guiding principle 4 in every respect. Part 2.2 of this submission provides a more detailed explanation of this point in relation to the statutory licences.

2.2. Assessing the educational statutory licences

The Schools submit that the existing statutory licensing schemes are unsuitable for the digital age and should be repealed.⁷⁶

The educational statutory licences don't work in a digital age and must be repealed.

Part 2.2 of this submission first highlights a number of problems that are applicable to the statutory licences in the *Copyright Act*. We then set out some technical issues that are unique to each of the Part VA and Part VB licences. We submit that the statutory licences cannot be supported when assessed against any of the ALRC review's guiding principles.

Statutory licensing for educational institutions was introduced by the *Copyright Amendment Act 1980* following the recommendations of the Franki Report in 1976. The Franki Committee was asked to:

*examine the question of the reprographic reproduction of works protected by copyright in Australia and to recommend any alterations to the Australian copyright law and any other measures it may consider necessary to effect a proper balance of interest between owners of copyright and users of copyright material in respect of reprographic reproduction. The term 'reprographic reproduction' includes any system or technique by which facsimile reproductions are made in any size or form.*⁷⁷

The Franki Report's recommendations led to the introduction of the Part VB licence (for literary, dramatic, musical and artistic works) by the *Copyright Amendment Act 1980*. A second statutory licence, Part VA (for broadcasts) was introduced by the *Copyright Amendment Act 1989*.

John Gilchrist notes⁷⁸ that the Report of the Franki Committee contains a number of themes that still resonate as copyright policy concerns today. One is the Committee's concern for the free flow of information. To quote from Section 1 of the Report:

⁷⁶ Part 3 of this submission sets out the Schools' views about the options available to deal with educational use of copyright in a digital age other than through statutory licensing.

⁷⁷ Report of the Copyright Law Committee on Reprographic Reproduction (October 1976).

⁷⁷ Introduction 1.01.

⁷⁸ Gilchrist, J The Franki Committee (1976 Report) and Statutory Licensing, available at http://ses.library.usyd.edu.au/bitstream/2123/7318/1/Gilchrist_9781920899714_TEXT.pdf.

*Australia is geographically isolated from the major centres of scientific and industrial research and the vast area of the Australian continent raises special problems in relation to the dissemination of information, particularly in the remoter parts.*⁷⁹

There are quite a number of references in the Report to the public interest in ensuring the free flow of information for education and research and for the scientific, technical and social development in Australia.⁸⁰

Second, the Committee was concerned that Australia was (and still is) a substantial importer of copyright material and should be hesitant in adopting a radical solution of a kind that is unlikely to find widespread acceptance amongst member countries of the multi-lateral copyright conventions.⁸¹

Third, the Committee was concerned that its recommendations should be consistent with Australia's international convention obligations and not divorced from what might be called 'world standards' so far as the balance of the rights of the copyright owner and interests of the user were concerned.⁸²

Finally, the Committee was not only concerned with the question of the extent to which copyright owners should benefit from the use of the new technology (reprography) on the grounds of principle, but to what extent it was practical for them to do so.⁸³

The Schools submit that many of these concerns are still valid and have not been addressed by the implementation of the educational statutory licences. Schools submit that, in 2012, the statutory licences are not achieving these same policy goals in the digital environment:

- the statutory licences are not the most efficient way in a digital age to ensure the benefits of digital education are shared by all - particularly those in rural and remote areas;
- the statutory licences (in particular, the Part VB licence) create inefficiencies when seeking to ensure that Australian students are able to fully enjoy the information benefits created by the internet and digital technologies;
- the operation of the educational statutory licences in the digital environment are becoming more and more out of step with global best practice;
- the statutory licences are impeding the development and delivery of educational content to educational institutions, to the detriment of both students and copyright owners.

The Schools submit that, whether assessed by the modern policy goals discussed in Part 1 of this submission, or against the policy goals set out by the Franki Committee, or against the guiding principles set for this review by the ALRC, the conclusion is the same - the Australian educational statutory licences are no longer fit for purpose in a digital age and should be repealed.

⁷⁹ Ibid, 1.37.

⁸⁰ Ibid, 1.02, 1.40, 1.51, 4.06, 6.40, 7.07.

⁸¹ Ibid, 1.35.

⁸² Ibid, 1.27.

⁸³ Ibid, 1.19–20, 1.35–37, 2.53.

The Schools submit that although these statutory licences were designed in response to particular technological developments, they were also designed in a time characterised by two important points:

- they were designed at a time when the nature of copyright content was fundamentally different, as well as the types of use of copyright materials made possible by those technologies;
- they were designed in some degree of a ‘data vacuum’ – in that neither copyright owners, nor schools, had a clear idea of the nature and/or volume of copying actually being conducted in Australian schools.

The Schools believe there are four fundamental problems with statutory licences that make them unsuited for Australia’s digital economy goals:

1. the statutory licences are inherently unsuitable to the digital environment;
2. statutory licences were created in a ‘data vacuum’. Efforts by the education sector to use better data access to better manage copyright expenditures are making the licences less efficient for copyright owners and licensees. These inefficiencies are becoming more pronounced with the increased use of new technologies;
3. statutory licences put Australian schools and students at a comparative disadvantage internationally and do not represent emerging international consensus regarding copyright in the digital environment;
4. statutory licensing is economically inefficient.

2.2.1. The statutory licences are inherently unsuitable to the digital environment

The nature of content and educational use has changed

In 1980, when Part VB was introduced, the dominant technology in contemplation was the photocopier. As discussed above, the licence was introduced as a response to concerns that the existing market for educational content was being put at risk by reprographic technology that allowed

What made sense in the age of the photocopier does not make sense in the age of the iPad.

teachers to make multiple photocopies of *textbooks* in excess of fair dealing limits. It protected an existing market that was threatened by technological change and it addressed concerns that unremunerated copying of this content would reduce the incentive for the creation of further educational content. Potential beneficiaries of the statutory licence were confined largely to traditional publishers and authors. Similarly, the Part VA licence was introduced in response to

technological developments brought about by Betamax and VHS recorders enabling educational institutions to copy broadcast material from television.

The sources of content available for use in schools in 1980 were predominantly professionally produced content such as novels, textbooks, newspapers, and journals. The making of a copy was closely linked to the recipient of that copy (ie, a teacher might make 25 copies of an article, to hand out to the 25 students in her class).

As the Convergence Review recently highlighted, the nature of technology has changed profoundly since the statutory licences were introduced:

[t]oday Australians have access to a greater range of communications and media services than ever before. Developments in technology and increasing broadband speeds have led to the emergence of innovative services not previously imagined. It is now possible to access traditional communications and broadcasting services in new ways, such as radio and television delivered over the internet.

Users are increasingly at the centre of content service delivery. They are creating their own content and uploading to it social media platforms. They are controlling what content they want to view and when they want to view it, for example, through podcasts of popular radio programs and catch-up television programs provided by free-to-air networks.

[Outdated regulatory frameworks] run the risk of inhibiting the evolution of communications and media services.⁸⁴

The Schools submit that similar shifts have affected the range of content available to Australian students and the range of technologies available for the delivery of modern education. At the same time as governments in Australia are encouraging teachers and students to make the most of these technological advancements, the copyright statutory licences impose unjustifiable disincentives to do so without risking a prohibitive impact on education budgets.

Figure 5 illustrates just some of the technological changes that have occurred since the introduction of statutory licensing in Australia. It demonstrates that the pace of change can be so fast that it is not possible to predict the educational practices of the future. For example, the iPod, one of the more profoundly influential technologies of the internet age, was first released by Apple in November 2001,⁸⁵ just 7 months after the commencement of the *Copyright Amendment (Digital Agenda) Act 2000* (Digital Agenda Act) in March 2001, yet arguably was a technology never contemplated in the Digital Agenda reforms.

⁸⁴ Convergence Review Final Report p vii.

⁸⁵ <http://en.wikipedia.org/wiki/iPod>.

Figure 5 - Technological change and educational statutory licensing

Time period	Primary technology	Content source	Nature of 'copying'
1980 Part VB licence	Photocopier	Professionally produced content - primarily books, newspapers and journal articles	Copying was closely linked to a recipient, eg one copy per student or one copy for a relatively defined number of students (eg closed reserve)
1990 Part VA licence	VHS CD	Professionally produced content - broadcast television and radio	Copying closely linked to audience eg one copy per class or school
2000 Digital Agenda Act expansion of statutory licences to electronic works and communication right	Internet/World Wide Web Email Scanner USB device Intranet DVD recorders	Mostly professionally produced content (eg CD ROMs, PDF chapters, online newspapers) Rise of 'self publishing' and 'Web 1.0'	Copying continues as it did in 1980 and 1990 Material could also be uploaded to internet/intranet Temporary copies made as part of consuming content in addition to 'primary' copy/communication (eg copies made by computer in reading an email or webpage)
2012 ALRC review	<ul style="list-style-type: none"> - Internet/World wide web - Mobile and device 'apps' - Distance education - Virtual classrooms - Learning management systems - Interactive white boards - MP3 players - Smart phones - Tablet devices eg iPad - Voice over IP - Internet Protocol TV - Personal hard drive storage devices (eg subscription television, portable storage) - Remote storage devices/services ('cloud' storage) - 3D printers⁸⁶ 	<ul style="list-style-type: none"> - Professionally produced content with commercial aim (eg e-books, subscription-based online learning resources) - Professionally produced content with non-commercial aim (eg fact sheets, promotional materials) - User generated content (eg blogs, social media, photo sharing sites) - YouTube - iTunes - Apps from eg App Store/Play Store 	<p>Copying/communication continues as it did in 1980/1990/2000.</p> <p>Material can be uploaded to cloud drives and accessed from multiple devices (requiring multiple copies to be made as part of viewing 'the original' copy)</p> <p>New services are not clearly 'internet' services (eg mobile apps downloaded to a smartphone). Challenge traditional notions of 'work' and 'subject matter'</p> <p>Interactive whiteboards and in-class computers display content from various sources (world wide web, apps, learning management systems, student devices).</p>
Future ?	?	?	?

These technological changes affect society in general, and are reflected in the expectations of governments, parents and students about the use of technologies in schools. The pace of technological change, and the inability to predict the technological changes that will represent the

⁸⁶ <http://media.smh.com.au/national/selections/could-3d-printing-help-spur-a-digital-revolution-3693139.html>.

next revolution in educational practice, make it imperative that Australia's copyright laws are 'future proofed' to the greatest extent possible.

The Schools submit there are three main ways in which the current educational statutory licences are not suitable to the internet age:

- 1 they rely on out-dated notions of copying and communication that are inconsistent with modern technology and educational practice;
- 2 they rely on out-dated legislative assumptions about content creation, production and distribution;
- 3 they do not appropriately accommodate new technologies and educational uses (ie, they are not 'future proof').

The statutory licences do not reflect modern teaching and learning methods

Under the statutory licences, payment for use of online content by schools is set by attaching a price to the value of an act of communication and multiplying that price by the number of times that a particular piece of online content is communicated⁸⁷ or by the number of students who have access to it. In other words, the statutory licence imposes a 'one-copy-one-view-one payment' model of remuneration. This makes no sense in a digital environment.

Although in recent years commercial deals have been made to fix costs on a 'per student' basis under both the Part VA and VB licences, these rates are still largely derived by reference to current copying volumes and the anticipated amount of future copying and communication. Volume is still a critical element of rate negotiations, as illustrated by the Copyright Agency's description of the current schools' agreement:

*The rate is a commercial one, but negotiated having regard to the likely usage of content in reliance on the statutory licence during the period of the agreement (based on past usage), and the page rates determined by the Copyright Tribunal in 2002.*⁸⁸

While a 'cost per use' model may have made sense in the age of the photocopier and the VHS recorder, it makes much less sense in an internet age. It is a reality of modern technology that many copies and transmissions are made during the use of distributed technologies. Consider the following examples:

⁸⁷ See *Copyright Agency Limited v Department of Education of New South Wales* (1985) 80 FLR 221; *Copyright Agency Limited v University of Adelaide* (1999) 151 FLR 142; *Copyright Agency Limited v Queensland Department of Education* (2002) 54 IPR 19.

⁸⁸ Copyright Agency, *Schools' Use of Internet Content* <http://www.copyright.com.au/get-information/educational-use-of-content/schools-use-of-internet-content>.

Ms Jones teaches year 1. She wants to make a copy of a scene from a play for a classroom exercise. She prints 25 copies of the extract from a website and gives each child a copy.

Mr Smith teaches year 5. He also wants to do a dramatic exercise. He saves a copy of a scene from a play from an e-book to his laptop hard disk. He emails it to his school email account and then uploads it to the school's learning management system (LMS). He then uses the interactive whiteboard in his classroom to display the text to his 25 students.

In each of the above examples, a teacher requires his or her students to read a scene from a play for a classroom exercise. However the treatment of these two examples under the Part VB statutory licence is quite different.

Ms Jones would be required to record printing 25 copies of the scene in the Schools' EUS.

Mr Smith would be required to record one copy made when saving the text to his laptop, one communication made when emailing it to his school account, and a further communication when he uploads it to the LMS. He would also be required to record the display of the scene from the interactive whiteboard to an audience of 25.⁸⁹

See *Attachment 2B* for a copy of the form teachers are required to fill out as part of the EUS.

The simple act of using more modern teaching methods potentially adds up to 4 remunerable activities under the statutory licence in addition to the potential costs incurred by more traditional 'print and distribute' teaching methods. Yet in both cases, 25 students were shown a copy of a scene from a play. While Mr Smith's choice may not have direct financial implications under current negotiated agreements with collecting societies, the additional usage recorded in survey data would feed into data taken into account in future cost negotiations. The need to record every technical step of this single teaching activity in copyright surveys also means the administrative burden on teachers filling out EUS forms is significantly greater when they use newer technologies in their teaching.

The requirements of the statutory licence to record in a survey (and potentially pay for) every technological copy and communication involved in teaching simply do not reflect the realities of modern education in a digital age (see Part 1 of the submission for an overview of digital education policies). At the same time as schools are being encouraged to adopt the benefits of broadband and convergent technologies, the statutory licences provide a direct financial and administrative disincentive to do so.

This is an outcome that the Supreme Court of Canada has recognised as undesirable. In *Entertainment Software Association v. Society of Composers, Authors and Music Publishers of*

⁸⁹ Note: in both cases this activity would be considered to be a free use in countries such as Canada and the United States. See Part 2.2.3 of this submission for further information on how Australia's statutory licences are out of step with international norms.

Canada,⁹⁰ the Court held that a decision by the Copyright Board of Canada to set a separate tariff for the musical works contained in video games downloaded from the internet violated the principle of technological neutrality:

This principle requires that the Act apply equally between traditional and more technologically advanced media forms. There is no practical difference between buying a durable copy of the work in a store, receiving a copy in the mail, or downloading an identical copy using the Internet. ESA has already paid reproduction royalties to the copyright owners for the video games. Absent evidence of Parliamentary intent to the contrary, we interpret the Act in a way that avoids imposing an additional layer of protections and fees based solely on the method of delivery of the work to the end user. To do otherwise would effectively impose a gratuitous cost for the use of more efficient, Internet-based technologies. The Internet should be seen as a technological taxi that delivers a durable copy of the same work to the end user. The traditional balance in copyright between promoting the public interest in the encouragement and dissemination of works and obtaining a just reward for the creators of those works should be preserved in the digital environment.⁹¹

The Schools submit that similar considerations apply to the Australian *Copyright Act*. Today's students and, increasingly, teachers, expect everything to be available online on the web all the time. They access content from a wide array of devices: laptops, tablets, smartphones, etc. Australian schools should not be penalised if they choose to use the most modern teaching methods for the advantage of Australian students.

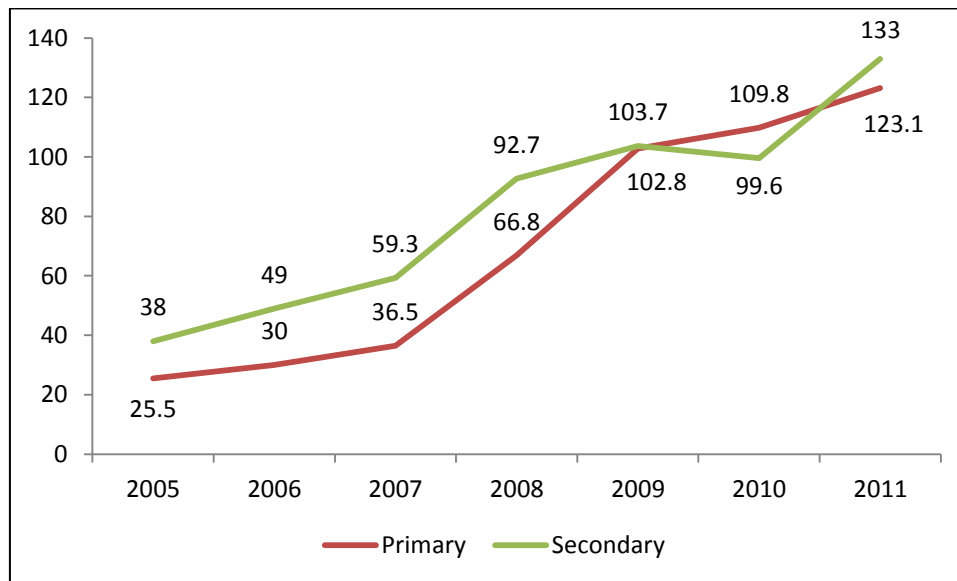
**Schools should not be penalised for using new technologies
for the benefit of Australian students.**

In the digital environment, schools will increasingly be faced with the very difficult choice of taking full advantage of digital technology to improve educational outcomes (knowing that this may over time lead to unsustainable copyright cost pressures) or restricting the amount of content that is made available to a particular class, or the technological methods by which it is made available, due to the operation of the statutory licence.

Electronic use will only increase in Australian schools. Indeed, this is precisely the point of the variety of Commonwealth, State and Territory policies, such as the DER and the NBN discussed in Part 1.5 and Attachment 1A of this submission. For example, electronic use of copyright content in Australian schools increased by 334.5% from 2005 to 2009, as seen in Figure 6 below. This is prior to the rollout of the NBN and the full commencement of the DER program. As such, these trends can be expected to increase dramatically. Figure 6 shows the increased copying rates as measured under the Schools' EUS from 2005 – 2011:

⁹⁰ 2012 SCC 34, McLachlin C.J. and Deschamps, Abella, Moldaver and Karakatsanis JJ

⁹¹ *Ibid* at [5]

Figure 6 – Trend analysis of weighted annual student page rate for valid items by school level⁹²

The Schools submit that a model that links the volume of copies and communications either directly or indirectly to remuneration in *all* circumstances cannot be sustained indefinitely. This is simply not an appropriate approach in an internet age. The Schools submit that it is more appropriate to consider the nature and purpose of the use involved (eg, providing content to students as part of a classroom activity) than the number of technical steps, copies and communications made as part of that use.

Attachment 2C includes additional specific examples of why the statutory licences are not suited to the digital environment.

The statutory licences don't reflect the realities of modern content creation

As discussed above, when the statutory licences were first introduced, content distribution was almost the sole preserve of the professional publisher. Publishers produced novels, academic journals and textbooks; newspapers printed daily newspapers; and free-to-air television was the sole source of broadcast content in Australia. Even in 1998-2000, during the development of the Digital Agenda reforms, consideration was largely confined to online versions of professional publications (such as e-books and PDF journals and chapters sold via websites) as well as the addition of subscription television. Although the notion of 'self publishing' was contemplated, the focus of deliberations was on the (then) emerging commercial markets for online articles and portions of works.⁹³

⁹² AMR 2011 Australian Schools EUS Draft Annual Review, Figure 4, p 18.

⁹³ See for example remarks to the House of Representatives during the Second Reading Debate of the *Copyright Amendment (Digital Agenda) Bill 1999*, Hansard Tuesday 27 June 2000, p16935.

The Schools submit that the explosion of content on the internet, the rise of social media, and the vast range of content distribution methods currently available on the internet simply were not in the contemplation of legislators at the time of the Digital Agenda reforms. One of the most profound shifts between the nature of content considered in 1998-2000 and that available today is the enormous amount of content that is now made freely available online, without any intent to commercialise it. Such content includes:

- public health information;
- pages from corporate websites;
- free tourism maps;
- free calendars (for example, a calendar showing internationally significant days);
- free health fact sheets;
- international material which is not protected by copyright (such as US government produced material eg www.nasa.gov);
- open education resources (such as those funded by the US government's open education initiative⁹⁴);
- public content on social media sites such as Flickr, Instagram, Facebook and Twitter.

However, due to the universal application of statutory licensing, the Part VB licence in particular is responsible for the Schools' being required to pay significant amounts of public funds to use freely available internet content. Much of this material is made available online for promotion or information for which no one ever expected to be paid, and for which there is no commercial market. It cannot be said that any of this content would cease to be created absent a royalty stream from Australian schools.

Schools pay large amount of public funds to use freely available internet materials.

This same content is used throughout Australia and around the world every day without objection from or payment to website owners, but the effect of the statutory licence is that Australian schools are required to pay to use it.

This is not an appropriate outcome from a practical or policy perspective. As Dr Francis Gurry noted in Sydney in 2011:

"The purpose of copyright is not to influence technological possibilities for creative expression or the business models built on those technological possibilities. Nor is its purpose to preserve business models established under obsolete or moribund technologies. Its purpose is, I believe, to work with any and all technologies for the production and distribution of cultural works, and to extract some value from the cultural exchanges made possible by those technologies to

⁹⁴ White House, The Power of Open Education Data <http://www.whitehouse.gov/blog/2012/06/08/power-open-education-data-0>.

return to creators and performers and the business associates engaged by them to facilitate the cultural exchanges through the use of the technologies. Copyright should be about promoting cultural dynamism, not preserving or promoting vested business interests.”⁹⁵

In *Attachment 2D* we provide further information about the significant inequities caused to Australian schools by the imposition of the Part VB licence onto freely available internet materials.

The Schools submit that the situation in relation to freely available internet content is a particularly acute example of how the Australian educational statutory licences are fundamentally broken in an internet age.

The Schools would also draw the ALRC’s attention to a recent finding by the US Copyright Office, which rejected statutory licensing for education as recently as October 2012, saying that educational statutory licences are:

‘mechanisms of last resort that must be narrowly tailored to address a specific failure in a specifically defined market.’⁹⁶

The statutory licences impede new technologies and educational uses

As discussed above, in the digital environment virtually every use of communications technology involves copies and/or communications being made of the content that is being accessed. In many cases, these copies and communications are made as part of the normal functioning of the technology.

The Schools have discussed above how this means the statutory licences are *per se* unsuitable to the digital age. The Schools submit, however, that this general problem is made more severe by the approaches taken by Australian collecting societies in relation to technological advancement. Three examples are illustrative in this regard:

- In its dealings with schools, the Copyright Agency appears to have adopted the view that Part VB requires that each and every copy and communication that occurs in a school automatically confers a right to remuneration under the statutory licence. For example, in Copyright Tribunal proceedings between the Copyright Agency and schools in 2006, the Copyright Agency argued that reading from, and browsing, the internet was remunerable under the statutory licence, and that schools should pay whenever a teacher directed a student to view a website (this became known colloquially as the ‘tell students to view’ case).

The Copyright Agency’s argument was that, when a student clicks on a hypertext link to view a website, the student is communicating the website content to him or herself, and that the

⁹⁵ Dr Francis Gurry, Director General World Intellectual Property Organisation, *Blue Sky Conference: Future Directions in Copyright Law*, 25 February 2011, http://www.wipo.int/about-wipo/en/dgo/speeches/dg_bluesskyconf_11.html.

⁹⁶ Copyright Office, Library of Congress, *Notice of Inquiry – Orphan Works and Mass Digitisation* (22 October 2012) 17 <http://federalregister.gov/a/2012-25932>.

school is authorising this communication. The Copyright Agency felt that it was compelled by the statutory licence to ask the Tribunal to direct schools to include the activity “tell students to view” in the list of activity questions that are used to survey use of copyright content in schools.

This claim was made despite clear statements in the Explanatory Memorandum to the Digital Agenda Act that the exception in s.43A of the present *Copyright Act* was “intended to include the browsing (or simply viewing) of copyright material on communications networks, including the Internet.”⁹⁷

This claim - which if successful would have resulted in Australian schools paying a fee every time a teacher suggested a student look at a website - required legislative intervention to address. At the request of the education sector, the Government amended the Act to make clear that a person who merely clicks on a hyperlink to gain access to a website is not exercising the right of communication.⁹⁸

- The Copyright Agency also claimed that Part VB operates so that caching by educational institutions for efficiency purposes should attract payment under the statutory licence. In a speech to rights holders in May 2006, then Copyright Agency CEO Michael Fraser explained that “*new technology brings new uses ...such as caching*” and that this provided opportunities for rights holders to seek payment.⁹⁹ Again, the education sector was required to request the Government to amend the *Copyright Act*, which resulted in a new exception in s.200AAA for caching by educational institutions, to ensure that they were not required to pay for this activity.¹⁰⁰
- As discussed above, s.28 of the *Copyright Act* contains an exception allowing copyright materials to be used for classroom teaching. For example, playing audio visual content in a class is not an infringement of the copyright owner’s exclusive right to perform a work in public by virtue of the operation of s.28.

After the introduction of the *Digital Agenda Act* in 2000, Screenrights felt that the then-extended operation of Part VA meant that playing a video in a classroom using centralised delivery technologies was a remunerable act under the Part VA statutory licence. This would have meant that if a teacher wheeled a VHS player into a classroom to play a VHS tape copy of last night’s *7.30 Report*, the use would be a free use covered by s.28. If the teacher instead asked the librarian to play this from a centrally located player to a monitor in the classroom using an electronic reticulation system, the classroom use would still be free. Screenrights believed that the inclusion of the communication right into Part VA meant that

⁹⁷ Explanatory Memorandum to the *Copyright Amendment (Digital Agenda) Bill 1999*, p32.

⁹⁸ Now included as s.22 (6A) of the *Copyright Act*.

⁹⁹ Michael Fraser, *Copyright in the Digital Age*, May 2006.

¹⁰⁰ Paragraph 55 of the Issues Paper states “*In relation to s.200AAA, it is unclear why only educational institutions are provided protection for system-level proxy caching.*” The Schools’ request to Government in relation to claims that Part VB required remuneration for system-level caching led to the introduction of s.200AAA. Although the majority of organisations engage in proxy caching, it was the operation of Part VB that meant remuneration could be sought for this activity from the education sector.

the electronic transmission from the library to the classroom was an electronic transmission that was remunerable under Part VA (even though the act of displaying the broadcast program in class was not).

Again, the education sector needed to raise this technical problem with Government, leading to the amendments to s.28 introduced by the *Copyright Amendment Bill 2006*, to enable schools to both perform and communicate copyright materials in class.

Although the problems caused by technologically specific exceptions and licences in the *Copyright Act* are not unique to the education sector, they have a particularly serious impact on educational institutions. These examples show how, due to the application of the statutory licence to all reproductions and communications, no matter how temporary or incidental, it has been necessary for the education sector to request governments to make incremental adjustments to the *Copyright Act* to reflect the realities of new technologies.

In contrast to jurisdictions such as the United States, Canada and Singapore where a core set of free public interest uses are recognised, and collective voluntary licensing negotiations focus on the remainder, the expansive coverage and complexity of the Australian prescribed remunerable uses in Australia can lead to sometimes tortuous negotiations where the default position is that every new use should be remunerable, irrespective of whether it is just a new way of delivering previously recognised uses.

2.2.2. The administrative burden of statutory licensing is bad for schools, copyright owners and licensees

The statutory licences, and particularly Part VB, have led to a significant administrative burden for both the education sector and for the collecting society. Higher costs in administering the licences will have a direct impact on copyright owners, as those costs are deducted from the funds available for distribution to copyright owners. These administrative costs are increasing as Australian schools increasingly look for administrative ways of minimising the financial impact to the sector from the significant flaws identified in Part 2.2.1 of this submission. The Schools submit that this administrative burden will only continue to increase as the statutory licences struggle to address the impacts of new technologies.

An examination of the history of Part VB is instructive in this regard. It shows:

- the steps Schools have needed to take to manage copyright costs under the licence;
- the manner in which Part VB can operate to remove or block the ordinary price signals that would be created by market forces;
- the lack of transparency involved in administration and distribution under the licence;
- how steps taken by the Schools to reduce copying costs can raise the costs of administering the licence to the ultimate detriment of copyright owners.

In summary, the Australian statutory licences start from a position that all uses should be covered by the licence (ie remunerated). This requires significant efforts by the Schools and the collecting societies to manage the increasing set of uses which should properly be excluded from the licence, such as Creative Commons materials, open access or 'free for education' materials owned by government bodies, 'open education' resources and freely available internet materials. This is completely contrary to the intentions of the Franki Committee, which believed that statutory licensing should be a way of minimising the transaction costs of educational licensing.

The history of administering surveys under the Part VB statutory licence

The 1980 amendments to the *Copyright Act* introducing the statutory licence required records of copying to be kept. This proved too burdensome, so schools entered into arrangements with the Copyright Agency to introduce a sampling system, which enabled full records to be kept by a smaller number of schools over set survey periods. This voluntary arrangement was later recognised by the *Copyright Amendment Act 1989*, which changed the Act to allow schools to elect between a records system or a sampling system.

Although the introduction of sampling systems significantly reduced the burden of administering the statutory licence, it still involves a significant cost to both copyright owners (as costs incurred by the Copyright Agency in administering the licence are deducted from the total amounts available for distribution to copyright owners) and to schools.

As an example, in preparation for a copyright survey, each participating school is likely to send two representatives to survey training, and schools must arrange relief teachers to replace those attending the training. The school system must also pay for flights, accommodation and travel costs, as well as the costs of conferencing facilities, equipment hire and catering. To alleviate the impact of the survey during school term, schools are provided with a grant to fund casual teaching and other assistance for the duration of the survey. By way of example, 2011 survey costs were approximately:

- \$96,000 for Western Australia
- \$51,532.10 for Victoria
- \$125,000 for Queensland
- \$120,000 for New South Wales^{101, 102}

Between 1985 and 1996 schools and the Copyright Agency entered into agreements that were based on per capita rates. On 31 December 1996 the Copyright Agency terminated the (then) current agreement and filed an application in the Copyright Tribunal for a determination that a rate should be based on the number of pages copied in schools, rather than a per capita rate. The Copyright

¹⁰¹ These being the four states in which copyright surveys were conducted in 2011 for both the Part VB statutory licence AND either the Part VA statutory licence or the Schools' blanket music photocopying licence with AMCOS (the Australian mechanical copyrights collecting society).

¹⁰² Noting this is just the administrative costs to the school jurisdictions involved; this does not include the costs of the third party survey managers engaged by the Copyright Agency to administer the survey

Tribunal's decision was handed down on 8 February 2002, and set remuneration on a 'page rate' basis that was applicable from 1 January 1997 (and indexed by CPI) as follows:

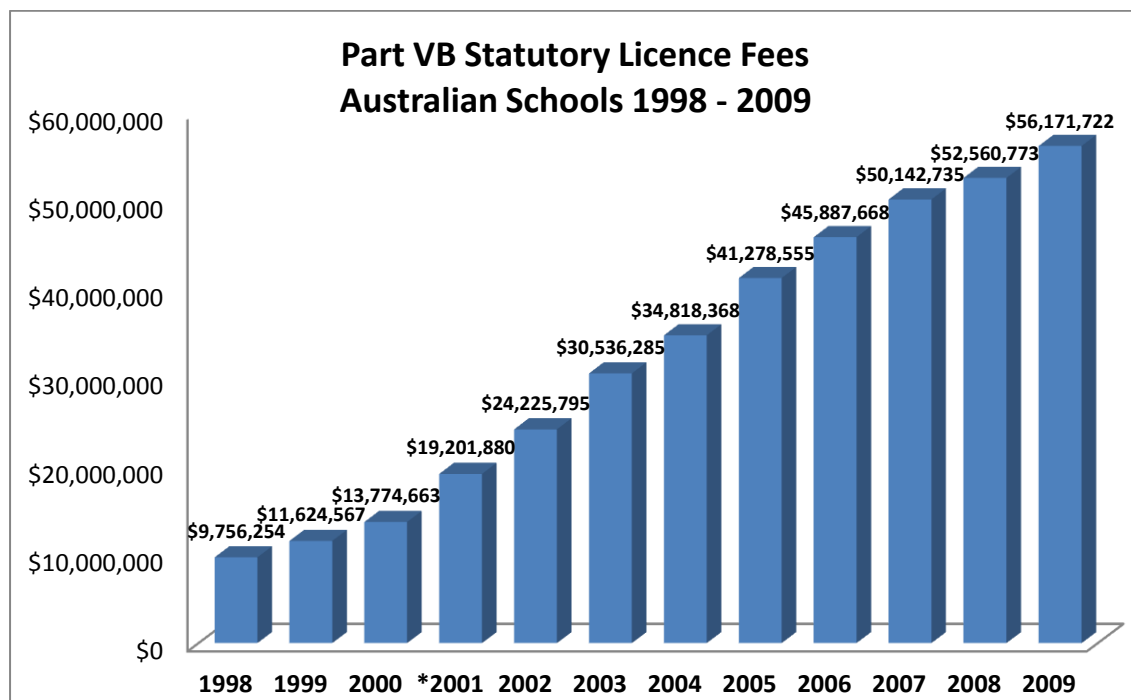
- Basic rate: 4 cents per page
- Artistic works and poetry: 8 cents per page
- Plays, short stories and other 's.135K' works: 6 cents per page
- Overhead transparencies, slides and permanent display copies: 40 cents per page.

Attachment 2E shows a timeline of the history of school agreements and remuneration rates between 1981 and 2002.

The 2002 Tribunal decision had the effect of substantially increasing the total amounts paid by schools under Part VB. The Tribunal also ordered that the rates should apply retrospectively from 1 January 1997 but should be phased in. The Copyright Agency and the Schools agreed on a phase-in of new rates over 5 years as no budgetary provision had been made by the education sector for these significant back payments. These back payments commenced in 2002.

Figures 7 and 8 show the effect of this decision on copyright fees payable by the Schools. Figure 7 shows the trend under the old rate (1998 – 2000) was for there to be a slight increase each year, with the trend after the 2002 decision being for much larger increases every year. Overall licence fees went from \$19 million to \$34.8 million in 3 years. These significant cost increases led to Australian schools exploring methods for reducing the impact on education budgets of the educational statutory licences, particularly Part VB.

Figure 7 –Australian Schools' Part VB Statutory Licence fees¹⁰³



¹⁰³ From 2001 onwards, the Schools Part VB Statutory licence fees represent both digital and hardcopy copying.

Figure 8 shows the detailed financial impact of the decision in schools administered by the Departments of Education in Queensland and New South Wales, including the impact of retrospective payments required by the Tribunal's orders. As this figure shows, the 2002 decision more than doubled the amount paid by Queensland and New South Wales for educational copying in schools.

Figure 8 – Detailed financial impact of 2002 Tribunal decision in NSW and Queensland

State	Year	Payment (\$)	Retro Fee \$ (for years 1998-2001)
QLD	1998	1,157,177.38	109,490.879
	1999	1,169,836.22	344,981.547
	2000	1,174,999.84	619,164.195
	2001	1,193,281.86	1,130,625.637
	2002	3,000,625.46	N/A
	2003	3,886,485.90	N/A
	2004	4,558,574.34	N/A
NSW	1998	2,144,140.16	199,778.793
	1999	2,147,268.00	622,749.987
	2000	2,146,245.48	1,108,732.706
	2001	2,133,716.75	1,988,676.434
	2002	5,265,728.61	N/A
	2003	6,666,115.45	N/A
	2004	7,672,818.00	N/A

The 2002 decision had two main effects on Australian schools:

1. The significant increase in copying costs – including the retrospective application of the decision – led to a sector increasingly anxious about its ability to meet the costs of the Part VB licence as schools increasingly adopted digital technologies in every-day teaching. This effect of increasing anxiety felt across the education sector about copyright licence fees is particularly concerning given the Tribunal's previously stated aim of setting a rate that would be able to be paid by a 'willing but not anxious buyer'¹⁰⁴
2. It led to the rise of so-called 'smart copying' practices in the Australian school sector.

¹⁰⁴ *Copyright Agency Limited v The Department of Education of New South Wales* (1985) 4 IPR 5 at 15-16: "If there is no market, or if the object, perhaps a particular block of land or a particular parcel of shares, is not well sought after so that comparable sales are not easily found, the court will have to construct or endeavour to construct, a notional bargain between a willing but not anxious seller and a willing but not anxious buyer. This becomes a much more theoretical exercise. It involves a degree of subjective judgment and minds will often differ as to what the appropriate outcome is."

The introduction of 'smart copying' practices

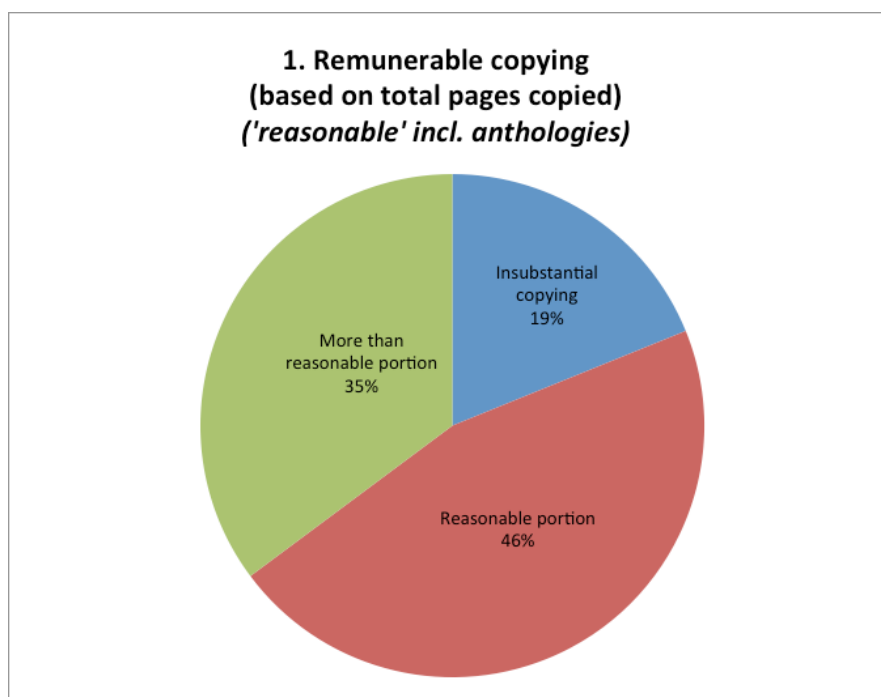
In 2004, Australian schools commissioned a report by Frankauser & Associates, which became known as the 'Smart Copying Report'. It was designed to identify strategies for managing the costs of print and digital copying at school system level. Any such strategy needed to balance cost containment with ensuring that schools still had access to appropriate materials so that educational outcomes were not compromised. The term 'smart copying' describes a philosophy that copying should not be inhibited if it serves a useful purpose, but ways should be devised to determine if all copying in schools was educationally necessary (or identify direct licensing or remuneration-free alternatives), and to consider if 'smarter' use of copyright materials could reduce payments under the statutory licence.

One of the findings of the Smart Copying Report was that schools did not have sufficient access to data conducted under the surveys in order to make assessments about educational copying or to implement smart copying objectives. Data access was sought from the Copyright Agency to enable a range of smart copying activities to be conducted, such as establishing copyright policies in schools, identifying subject areas for possible commissioning of new works for use in schools, identifying popular materials to approach copyright holders to explore direct licensing opportunities and providing assistance and guidance to schools in their use of resources. The Copyright Agency denied the Schools this access to data. Access was finally obtained after Federal Court proceedings.

Once the school systems were able to examine the data collected in the annual copyright surveys (conducted in schools but by third party consultants rather than the schools themselves), it became increasingly clear that the statutory licence was creating inequitable outcomes. Some of these examples have already been discussed under Part 2.2.1 of this submission, such as the payment for freely available internet materials, and the proportion of materials being recorded under 'display and project'. Others are discussed below, including the proportion of blackline masters being paid for in the survey (see page 70). One very clear example is the proportion of short extracts of materials paid for under Part VB which would almost certainly be considered to be a fair use or fair dealing in countries such as Singapore, Canada or the United States.

For example, a review of approximately 7000 records from the 2010 hard copy survey data shows 19% of all remunerable copying was of an 'insubstantial' portion of a work, while a further 46% of remunerable copying was of a 'reasonable portion', as shown in Figure 9.

Figure 9 - Proportion of remunerable copying records, 2010 Hardcopy survey:



Some of the smart copying practices adopted by schools include:

- creating a National Educational Access Licence for Schools (NEALS), enabling schools to cross-licence their materials to each other directly;¹⁰⁵
- writing to commonly used websites that appear in survey results seeking permission to use materials in educational institutions;¹⁰⁶
- encouraging the creation of a register of licences to collate licences to use educational materials in schools to be excluded from data processing by the collecting society;
- encouraging the use of Creative Commons licences for educational resources;
- discussing with the Copyright Agency administrative arrangements to try and exclude as much freely available internet material from remunerable copying data as possible within the confines of the statutory licence.¹⁰⁷

¹⁰⁵ See the Smartcopying website about the NEALS licence at <http://www.smartcopying.edu.au/scw/go/pid/748>.

¹⁰⁶ One of the difficulties experienced in implementing smart copying practices is the impact on collecting society rules on seeking permissions to use works. For example, it is not possible for a copyright owner to direct the Copyright Agency not to collect money on their behalf unless they become a member of the Copyright Agency. If a copyright owner's work is identified in survey data and an owner is notified by the Copyright Agency that they are holding money for that owner, the copyright owner must become a member of the Copyright Agency in order to instruct it that they do not want the money. NCU has been informed by many copyright owners that requests that the money be returned to the schools, or donated to a library or charity, cannot be met. It appears that there are no circumstances in which Part VB enables moneys to be returned to schools once they have been collected – even when so directed by the copyright owner.

¹⁰⁷ Schools do not believe it is possible to solve the problem of school remuneration for freely available internet materials by administrative mechanisms alone, as set out in Part 2.2.1 and *Attachment 2D*.

Complexities of data processing

Increased use of new technologies in Australian schools has led to increased complexity in administering surveys and ensuring the data collected is processed accurately so as to produce a true measure of remunerable copyright activity by schools. The complexity of the current scheme is evident from the issues that have arisen in the course of extensive negotiations between the Schools and the Copyright Agency to determine how particular copied materials should be classified in survey data. Significant negotiations have been required to determine whether, and if so, how particular items should be treated under the Part VB licence, including:

- cross word grids
- multimedia works
- dot to dot drawings
- student completed activity materials placed on classroom walls (such as colouring in sheets)
- screen displays
- interactive works; and
- blackline masters (BLM).¹⁰⁸

The time spent debating these issues, documenting the outcome and applying agreed principles to individual situations has been extensive, and the difficulties increase with the introduction of new technologies into educational practice. The debate about these seemingly small issues is driven by the knowledge of both parties that a copied page recorded in a survey result can translate into thousands of dollars across the school system when statutory licence fees are negotiated. This exemplifies how the current regime is inefficient and unworkable in the digital environment and leads to unacceptably high administration costs.

The Schools do not suggest that the Copyright Agency acts inappropriately in ensuring that all possible remunerable uses are captured and enforced under the Part VB statutory licence. Indeed, it is the role of the declared collecting society to administer the licence on behalf of copyright owners. The Schools simply put forward the highly technical and administratively complex approaches that have been necessary under the statutory licence as further evidence that they are not adequate and appropriate in the digital environment.

Applying smart copying to the internet – the ‘Metcalf categories’

As discussed above, Australian schools have significant concerns about education budgets being directed to pay significant amounts of school funds for freely available internet materials. This concern stemmed from being granted access to data and discovering that Australian schools were

¹⁰⁸ Further details are provided about the problems in relation to BLMs in [Part 2.2.4] of this submission. As an example of the complexity involved, *Attachment 2F* describes the steps taken by data processors working for the Copyright Agency when processing a survey record determine whether or not it should be processed as a BLM, a book or other copied material, or excluded as free for education. Again, the complexities involved far outweigh what any adequate or appropriate system ought to require.

being required to pay under Part VB for freely available websites such as health fact sheets, freely available tourism maps and free online teaching resources.¹⁰⁹

Partly to address these concerns, the Schools and the Copyright Agency agreed to examine the copyright notice on every website identified in the Schools' EUS and classify it according to one of the following classifications (known as the Metcalfe categories¹¹⁰):

1. personal use;
2. non commercial use;
3. use in your organization;
4. free copying;
5. free for education;
6. no terms and conditions, but the website contains a copyright statement;
7. no terms and conditions;
8. copying not permitted;
9. reference to the Australian *Copyright Act* and/or Educational Statutory Licence;
10. password protected.¹¹¹

The Copyright Agency treats websites in certain of these categories as free and websites in others as remunerable, as shown in Figure 10.

¹⁰⁹ See for example http://www.beyondblue.org.au/index.aspx?link_id=7.980, <http://atn.com.au/rdmaps/> and <http://teacherplanet.com/calendar/calendar.php?op=cal&month=3&year=2011>, which have appeared as copying attracting remuneration in previous survey results, as examples of what the Schools consider 'freely available internet materials.

¹¹⁰ Named for a summer clerk at Minter Ellison who had the unenviable task of compiling these categories based on her comprehensive review of websites appearing in school EUS data.

¹¹¹ Further rules exist establishing a hierarchy of categories in circumstances where more than one of these categories appears on a website - see the Copyright Agency *Protocol for the Processing of Website Copyright Notices* available at <http://copyright.com.au/what-we-do/collect-and-distribute-licence-fees/analyse-usage-data/data-processing-protocols>.

Figure 10 - Metcalfe category remuneration allocations

<i>Terms and Conditions</i>	<i>Not Free</i>	<i>Free</i>
Personal Use Personal, non commercial Personal and non commercial	✓	
Non-commercial use Personal or non commercial		✓
Use in your organisation		✓
Free copying		✓
Free for education		✓
© name and/or year and no terms of use	✓	
No copyright © name and/ or year or no terms and conditions	✓	
Copying not permitted	✓	
All Rights Reserved	✓	

Any materials that fall into 'Metcalfe 10' (password protected materials) are quarantined for further examination to determine whether they are free or remunerable under the licence.

This is another example of the highly prescriptive and technical approaches required by the statutory licences, caused in large part by the 'default' position that all uses should be remunerable under Parts VA and VB. Consider the following example:

A teacher in the United States wants to print a copy of a web page for distribution to her students for a classroom exercise. After making an assessment against the fair use factors and guidelines applicable to the education sector, she decides that printing the materials will be considered to be a fair use and therefore free to use for educational purposes.

A teacher in Australia wants to print a copy of a web page for distribution to her students for a classroom exercise. As no exception applies to this activity in Australia, her use would be remunerable under Part VB. As her school is being surveyed this term, she records a copy of the URL for the website in the survey usage record, and selects that she has printed a page from the website and identifies the number of times she prints the page (ie, 30 copies for 30 students).

This URL is later examined in the survey records. A Copyright Agency researcher locates the website to examine the website's terms and conditions. As the website does not have any identifiable terms and conditions, the researcher classifies these 30 pages as 'Metcalfe 7' ('no terms and conditions'). This is a remunerable category and the website would be included in the remunerable data set. If the website included the terms "free for education"

this would be considered to be 'Metcalf 5' which is a non-remunerable category, which would be excluded from the remunerable data set.

Public money would be better spent on Australian education.

Apart from being a highly administratively complex way to deal with the issue of website copying in contrast to a copyright system based on fair use or fair dealing supported by voluntary licensing, the

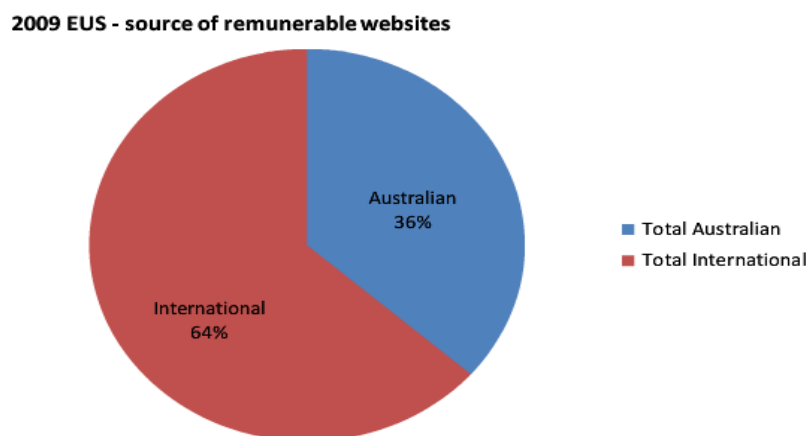
Metcalf categories approach leads to highly inequitable outcomes. For example, many websites are made by web designers who place a copyright notice on the website as part of a template design. This automatically makes any website based on that template remunerable under the Metcalfe categories, without the owner having given any active consideration as to what terms and conditions they wish to adopt.

Furthermore, even if they do consider their terms and conditions, many (if not all) overseas website owners do not contemplate (or indeed know of) the existence of the Australian statutory licences and would not foresee that failure to specify that their website is free for education when designing their website would lead to remuneration under Part VB.

Overseas website owners do not consider Australian statutory licences when designing their website terms and conditions.

This is a particularly significant point given the majority of websites appearing in the Schools' EUS data are international, as shown in Figure 11 below.

Figure 11 – Geographic source of website content copied in Australian schools



The Schools submit that this is further evidence of why the statutory licences are not appropriate for the digital environment and should be repealed.

2.2.3. Australia's educational statutory licences are out of step with international best practice

As discussed above in Part 1.8, governments around the world are considering the best balance of exceptions and licences for the digital environment. The Schools submit that, in undertaking this review, it is essential that the ALRC take into account that the Australian educational copying regime is out of step with the rest of the world. In an increasingly globalised education market, this is putting Australian schools at a comparative disadvantage.

Australian schools pay significantly more per student for copyright fees than overseas schools operating under voluntary licensing schemes. Figure 12 illustrates the comparative costs on a per full time equivalent student (FTE) paid by Australian schools and their international counterparts:

Figure 12 - international comparative licensing data¹¹²

Country	Schools price per FTE (Part VB or equivalent)	Schools price per FTE (Part VA or equivalent)
Australia	\$16.93	\$5.14
UK	Band 1, age 5-11: £1.90 = AU\$2.95 Band 2, age 11-15: £1.70 = AU\$2.64 Ban 3, age 16-18: £4.43= AU\$6.89 ¹¹³	Primary: 32p = AU\$0.50 Secondary: 57p = AU\$0.89 ¹¹⁴
Canada ¹¹⁵	CAD\$5.16 = AU\$5.04 ¹¹⁶	CA\$1.73 = AU\$1.69 ¹¹⁷
New Zealand	Primary: NZ\$1.50 = AU\$1.19 Secondary: NZ\$3.00 = AU\$2.38 ¹¹⁸	NZ\$4.19 = AU\$3.33 ¹¹⁹

¹¹² All figures have been converted into Australian dollars using exchange rates available on 28 September 2012, namely 1 AUD = GBP: 0.643, CAD: 1.023, NZD: 1.259.

¹¹³ The Copyright Licensing Agency, information available at http://www.cla.co.uk/licences/licences_available/fe and <http://schools.cla.co.uk/your-cla-schools-licence/what-is-the-cla-schools-licence-and-why-do-you-need-it/>.

¹¹⁴ Educational Recording Agency (ERA), information available at http://www.era.org.uk/tariff_rates.html. The ERA negotiates discounted licence fees with umbrella organisations representing large numbers of educational establishments. The UK Schools ERA licence is reported as a lump sum, which leads to the assumption that UK Schools are on a discounted licence fee. As such it is likely that the actual rate may be lower than the amount reported above. If any schools have the 'ERA plus' licence, the above fees would be increased by 16p for primary students and 29p for secondary students. 'ERA plus' information is available at http://www.era.org.uk/era_plus.html.

¹¹⁵ We understand that the Canadian tariffs are currently under review.

¹¹⁶ See generally the Access Copyright website at <http://www.accesscopyright.ca>; and more specifically: <http://www.accesscopyright.ca/educators/invoice-faq-for-k-12/>; and <http://www.accesscopyright.ca/educators/copying-guidelines-for-elementary-and-secondary-schools-2010-2012/>. See also Copyright Board of Canada's decision in *Access Copyright v. The Ministries of Education: Statement of Royalties to be Collected by Access Copyright for the Reprographic Reproduction, in Canada, of Works in its Repertoire*, July 17 2009; as well as the recent Canadian Supreme Court decision in *Alberta (Education) v. Canadian Copyright Licensing Agency (Access Copyright)*, 2012 SCC 37.

¹¹⁷ See generally Educational Rights Collective of Canada's website at <http://www.erc.ca>; and specifically: http://www.erc.ca/ed_insts_faq_part2.html under the FAQ "What is the Educational Rights Tariff"; "How much are the royalties under the comprehensive tariff".

¹¹⁸ See generally Copyright Licensing New Zealand's website, <http://www.copyright.co.nz/>, and more specifically: <http://www.copyright.co.nz/html/blob.php/Schools%20T&C%202012.pdf?attach=false&documentCode=2327>. These rates are not inclusive of GST.

¹¹⁹ Note: Screenrights operates a statutory licence for schools in Australia and a voluntary licence for schools in New Zealand. See generally: <http://www.screenrights.org/content-users/new-zealand-services/educational-licence>; and see specifically: http://www.screenrights.org/sites/default/files/uploads/NZTTVR0411_2012.pdf.

This figure starkly shows the impact of the Australian statutory licence scheme. It shows that Australian schools pay per full time equivalent student:

- up to 14.2 times more for works and 1.5 times more for broadcasts than schools in New Zealand;
- 3.4 times more for works and 3 times more for broadcasts than schools in Canada; and
- up to 6.4 times more for works and up to 10.3 times more for broadcasts than schools in the United Kingdom.

Put another way, New Zealand schools only pay approximately 7% of the copyright fees paid for works by Australian schools.

Australian schools pay approximately 14 times more per student for educational use of copyright works than schools in New Zealand.

Australian educational institutions also pay for many uses that are free for education in comparable jurisdictions. Figure 13 illustrates the difference between the Australian situation and the circumstances of schools in other similar countries. In particular, it shows how the Australian *Copyright Act* fails to provide for almost any non-remunerable public interest access to copyright materials in Australian schools.

The Australian *Copyright Act* fails to provide for almost any non-remunerable public interest access to copyright materials in Australian schools.

Figure 13 - international comparisons of non-remunerable educational use

US	Canada	UK	Singapore	Australia
Schools can rely on fair use - the fair use exception expressly refers to multiple copying for education	New fair dealing exception will permit schools to make multiple copies for education	The Government is currently considering introducing new fair dealing exceptions that would permit schools to make multiple copies of up to five per cent (or more) of a work per quarter	Schools can rely on educational copying exception to make multiple copies of up to 5 pages of a work, or not more than 5% of a work if there are more than 500 pages	Schools cannot rely on fair dealing for any copying ie, almost all educational copying is default remunerable
Schools only need to pay for classroom copying that exceeds fair use limits	Only need to pay for classroom copying that exceeds fair dealing limits. Fair dealing case law suggests up to 10 per cent will be fair Canada has a new exception for free use of freely available internet content	Schools would only need to pay for classroom copying that exceeded fair dealing limits	Schools only need to pay for classroom copying in excess of this amount	There is a free exception for 1 to 2 page copying, but it does not allow for non-consecutive passages to be copied from a work in digital format

As the table shows, in the US, Canada and Singapore there is *statutory recognition* that schools should be permitted to copy works for distribution to their students, without payment, provided that the amount of copying is “fair”. In effect, schools in these jurisdictions have similar fair dealing rights to those enjoyed by students undertaking their own research or study. This can be contrasted with Australia, where virtually all classroom copying is paid for, and where there is no scope to apply a fairness analysis in order to determine whether educational copying should be paid for or not.

Schools pay for the right to do things that individuals can legally do for free.

The UK Intellectual Property Office (IPO), as part of its ongoing Copyright Consultation following the Hargreaves Review, has noted that UK schools “currently pay for the right to do things that individuals are permitted to do freely by law”, such as time-shift broadcasts (in reliance on the personal

time-shifting exception) and copy works for study within fair dealing limits (in reliance on the fair dealing exception). This observation was made in the context of a consultation seeking comment on various educational copyright reform proposals, including an exception that would permit schools to copy, within fair dealing limits, for distribution to students, and an exception that would permit schools to copy broadcasts for educational purposes.¹²⁰ The IPO noted that even if schools were permitted to do some copying for free under fair dealing, many of them would still continue to take out a licence with the Copyright Licensing Agency to allow them to copy in excess of fair dealing limits. However, the IPO noted that as the value of these licences would be expected to go down (due to them covering fewer uses) so too would the cost of the licences to schools be expected to decrease due either to market forces or to legal challenges by schools.¹²¹

The Schools acknowledge that there is a 'trade off' involved here. Where Australian schools have no, or limited 'free uses' of copyright materials for educational use, they may also have a more defined and extensive set of permitted (albeit remunerable) uses.¹²² The Schools want to stress that their recommendation that the Australian statutory licences should be repealed is made in the clear recognition of that trade off.

The benefits of repealing the statutory licence would outweigh any potential costs.

The Schools strongly believe that the benefits that would flow to the Australian educational sector from repeal of the statutory licences would greatly outweigh any perceived disadvantage from a less comprehensive set of exceptions supported by voluntary licensing.

The Schools illustrate this with the following examples:

Example 1 - 'reasonable portion' copying

Sample data from the 2010 Hardcopy Survey suggests that 46% of total remunerable hard copy copying pages in 2010 were of a reasonable portion or less of a work (ie, in simple terms, up to 10% or one chapter of a work). This 'reasonable portion' category does not include copies of works that are considered to be 'insubstantial'. Insubstantial copying represented an additional 19% of remunerable pages.

This means that 65% of pages copied in Australian schools in 2010 for which a fee was payable under the statutory licence would have likely been copied for free as fair educational use in the United States, Canada and Israel. In addition, a significant proportion of this copying would be non-remunerable in Singapore and potentially the United Kingdom (if the UK IPO proposal is adopted).

¹²⁰ United Kingdom Intellectual Property Office, *Extending Copyright Exceptions for Educational Use: Impact Assessment*, November 2011, p10. <http://www.ipo.gov.uk/consult-ia-bis0317.pdf>.

¹²¹ *Ibid*, p 19.

¹²² Although, as noted above, the Schools' experience is that, even with a relatively defined set of permitted uses, there can be considerable uncertainty about the application of defined provisions to new technologies.

Example 2 - Blackline masters

In the 2010 Hardcopy Survey, 20% of all remunerable hard copy pages were 'blackline masters' (educational resource books which have pages specifically designed for photocopying for classroom use and are priced for sale accordingly¹²³). Copies made from blackline masters in Australia are treated as remunerable copies under the Part VB statutory licence. CAG understands that these copies are recognised as a fair use in the United States, and specifically excluded from remuneration as a fair dealing in Canada.¹²⁴

Example 3 - Off air copying of free-to-air broadcasts

Copying a free-to-air broadcast for replaying at a more convenient time is a recognised free personal use in Australian copyright law (s.111). So if a student sets a personal recording device to tape an episode of *Lateline* to watch at a more appropriate time for a homework exercise, that copy will be a free use. However if a teacher copies the same episode of *Lateline* to show the next day in class, that use is remunerable under the Part VA statutory licence.

This situation is particularly significant for subscription television broadcasts. Many schools pay broadcasters such as Foxtel or Austar to access a subscription television service under an educational licence. This service generally includes an intelligent set top box (such as Foxtel IQ or Austar MyStar) which enables schools to record programs, including using facilities such as 'series link' by which, for example, the set top box can be set to record an entire series of a particular show. This recording is clearly contemplated by – and facilitated by – the provision of the set top box. However schools must then pay for this copying under the Part VA licence, in circumstances where the exact same recording would be free if made in any household in Australia.

In contrast, this educational use would be a fair use, and non-remunerable, in the United States.¹²⁵ In Canada, licence fees are only required to be paid for broadcasts that are not 'news or news commentary'.¹²⁶ In Singapore schools can rely on a specific exception that permits copying of broadcasts for educational purposes.¹²⁷ In each case, the exception also applies to any underlying works comprised in the broadcast. As noted above, the United Kingdom is currently considering introducing an exception to enable educational institutions to copy broadcasts for educational purposes.

¹²³ See for example *What is a Blackline Master?* <http://www.articlesbase.com/k-12-education-articles/what-is-a-blackline-master-1380248.html>.

¹²⁴ <http://www.accesscopyright.ca/educators/copying-guidelines-for-elementary-and-secondary-schools-2010-2012/>.

¹²⁵ Copyright and Fair Use. Information on copyright law and fair use in an academic setting <http://poly.libguides.com/content.php?pid=59733&sid=442218>.

¹²⁶ See Educational Rights Collective of Canada http://www.ercc.ca/ed_insts_faq_part2.html. It is unclear what the impact of the Copyright Modernization Act extending fair dealing to education will be on this licence.

¹²⁷ Singapore *Copyright Act* s 115.

2.2.4. Statutory licensing is economically inefficient

As with any monopoly, the statutory licences, administered by monopoly collecting societies declared under the Act, can only be justified to the extent that the inherent restraint on competition is justified by the benefits that the statutory licences deliver to society at large. In a critique of what he described as ‘copyright overreach’, the late Mr Justice Hugh Laddie said in 1996:

We should not be handing out monopolies like confetti while muttering ‘this won’t hurt’. I suggest we should approach monopolies from the other direction. We should say, as our predecessors did, that the basic rule is that no monopoly should exist unless it is shown to be objectively justified.¹²⁸

This principle also underpins the National Competition Policy, which provides that legislation should not restrict competition unless the benefits of the restriction to the community as a whole outweigh the costs and that the objectives of the legislation cannot be achieved by any other means.¹²⁹

The Schools submit that there is significant evidence of monopoly and market failure, as described as a result of Australia’s educational statutory licences. As a result, the statutory licences can no longer be objectively justified: the costs in terms of economic inefficiency outweigh any benefits that the licences may deliver to rights holders or education sector licensees.

False market for works

The Part VB statutory licence was intended to operate as a solution to market failure caused by high transaction costs,¹³⁰ but is now being used to create a false market in works. The Schools provide six examples of this behaviour:

- Payment for use of freely available internet materials

Part 2.2.1 and *Attachment 2D* set out in detail the way in which, as a direct result of the statutory licence, Australian schools are required to pay to use freely available internet content that was never intended to be paid for. There is no “market” for this content as it is not for sale. It is made freely available online. The only remuneration for this type of content is that created by the operation of the statutory licence itself. The Part VB statutory licence is being used to create a market where none existed. Millions of dollars of public funds are being spent on content that is not being commercialised in any true sense, and in circumstances where Australian educational bodies are the only organisations in the world legislatively required to pay for its use. In many (if

Millions of dollars of public funds are being spent on copying freely available internet materials

¹²⁸ Mr Justice Laddie, *Copyright: Over-strength, Over-regulated, Over-rated?*, [1996] 5 EIPR 253 at 260.

¹²⁹ National Competition Principles Agreement clause 5(1), available at http://www.pc.gov.au/data/assets/pdf_file/0007/18277/ncp_agreement.pdf.

¹³⁰ See *Report of the Copyright Committee on Reprographic Reproduction* 1976, AGPS Canberra, para 1.21.

not most) cases, the money collected for this copying is never distributed to the relevant rights holders, as they cannot be identified and/or located. As we discuss below,¹³¹ this money ends up providing a windfall gain to rights holders who have no connection with the content that was copied. It amounts to a tax on the use of freely available internet materials.

- Encouraging website owners to seek payments from Australian schools for content that they do not require anyone else to pay for

The Schools have complained to the Copyright Agency and to Government about the operation of Part VB in respect of freely available internet materials. In response to these complaints, the Copyright Agency now offers the following advice to website owners who have made their content freely available on the internet:

In 2008 Australian schools used, on average, 75 pages per student of digital content, most of which was from the internet.

So what are some practical tips for members who want to make sure their intention to receive CAL payments for use of their web content is clear?

Libby says taking the following practical steps will help to make it clear to people who have access to content from your website, and to CAL, that you want to receive CAL payments for educational and government use of the content:

- *providing an obvious link to your terms of use on each page of your website;*
- *having a separate webpage for your terms of use;*
- *making your terms of use clear and consistent for each piece of content on your site;*
- *avoiding phrases that might exclude your content from payment such as 'non commercial'; and*
- *making sure there is a link to your terms of use for downloadable documents.*

And if you use the word "free", make sure you are clear about what uses of the content are free, and for who they are free,' she says.

'For example, you may wish to invite teachers to download sample pages from a resource to encourage them to purchase the resource, but you need to make it clear that use of the sample pages in class is covered by the statutory licence.'¹³²

¹³¹ Eg at p82.

¹³² Copyright Agency information sheet *On Just Terms*, available here: <http://www.copyright.com.au/get-information/about-publishing/publishing-news/on-just-terms>.

Part VB allows website owners to seek payments from Australian schools – and only Australian schools – for otherwise freely available internet materials

The Schools freely acknowledge that it is the role of a statutory collecting society to liaise with its members regarding their entitlement to be paid for copying done in reliance on the licence. That said, despite the efforts by the Copyright Agency, the provisions of Part VB have the effect of encouraging website owners who had intended to make their content available for free to seek payment from Australian schools - and only Australian schools - for no other reason than that the statutory licence allows them to do so.

- Creating markets that would not exist 'but for' the statutory licences

Another example of the false market created by the statutory licence is the way in which some rights holders are taking advantage of the licence to deal directly with the education sector for some uses and to rely on the statutory licence for others. For example, the publisher of a popular online educational resource currently licences its product directly to schools in Australia and other jurisdictions. Only in Australia, however, does the publisher seek to be paid again when students use the content in the classroom. This is achieved through the imposition of 'Australia-only' terms and conditions that directly reference the Part VB statutory licence. The licence terms do not appear in terms and conditions for the publisher's international markets.

In other words, in Australia – and Australia only – this publisher has two bites at the remuneration 'cherry': once through the licence payment received directly from schools and a second time through money received from the Copyright Agency when the resource is used in the classroom by Australian school students. The terms and conditions offered to schools in other jurisdictions are quite different. Schools overseas pay once only for the right to use the resource.

- Overly strict processing protocols also result in 'double dipping'

Australian schools pay to use 'blackline masters' (BLM) in circumstances where this is a non-remunerable use in comparable countries. As mentioned above (see page 70), BLMs made up 20% of all hard copy pages recorded in the survey in 2010.

The term 'blackline master' is a term used throughout the publishing industry to connote a work that is subject to an express licence to make copies for distribution to students. The pricing of BLMs generally reflects the included licence to make multiple copies. It is common educational practice for a school to buy a BLM book (at a commercial price which reflects the intended use of the work) and then make multiple copies of these BLM pages for distribution in class.

However, the treatment of BLMs under Part VB is one of the worst examples of data processing practices under the statutory licences leading to 'double dipping' by publishers. If a copyright owner is registered as a 'BLM Publisher' in the Copyright Agency's database, the Copyright Agency will process any pages copied from the BLM as remunerable and payment will be made to the rights holder when the verso (or equivalent) page on the BLM states:

- that schools or teachers *may photocopy pages of the work for classroom use or instruction*;
- that the copied page are marked as '*Fully reproducible, 'May be photocopied'* or similar wording;
- where the material is copied from a source that is partially a BLM, and the copied page itself contains a statement that the page is marked as '*Fully reproducible, 'May be photocopied'* or similar wording.

The Copyright Agency will only consider a BLM to be free for educational use where the copyright holder is not registered as a BLM Publisher in the Copyright Agency database and the verso page and/or copied page contains a statement that the BLM and/or page is marked as '*Fully reproducible, 'May be photocopied'* or similar wording. (See *Attachment 2F* for the BLM decision tree adopted as part of the Copyright Agency's processing protocols.)

The complexity of this approach can make officers of NCU dealing with these processes feel like they are living in a Kafka-esque world based on administrative and technical distinctions which are completely divorced from the real world, where it is widely accepted industry practice that BLMs are purchased to enable copying of individual pages for classroom use. The effect of this processing is particularly problematic for works published overseas, where it would not be within the publisher's contemplation to address the specific requirements of the Australian statutory licences in its copyright notices.

The practical effect of the BLM processing protocols on the Schools is that:

- certain publishers are effectively 'double remunerated' for uses which are clearly within contemplated uses for the sale of BLMs;
 - copying volumes are artificially inflated, which has an impact on future negotiations; and
 - this practice actively harms other copyright owners, as the 'double' remuneration of BLM publishers reduces the size of the distribution pool for other categories of works which are legitimately included as remunerable records.
- Statutory licensing allows 'double dipping' between direct and statutory licences

The Schools discussed in the previous point how processing protocols can result in 'double payments'

**Statutory licensing
allows for double dipping
by rights holders**

to copyright owners due to processing protocols. These type of 'double payments' can also result from educational use of materials for which schools have already paid an access fee or obtained a direct licence.

We have discussed above how a well-known educational publisher charges a licence fee for students to access an educational resource. The publisher also reserves its rights to collect remuneration under the Part VB licence for any materials that are printed from the resource in schools. Schools pay directly to access the resource and then again indirectly when it is used for the purposes for which it was purchased.

- Statutory licensing means public funds are spent on accessing publicly funded content

The ABC was allocated \$990.7 million in the May 2011 Federal Budget and \$11.2 million in the 2011-2012 Additional Estimates process, totalling \$1 billion for the 2011-2012 year. The 2011-2012 ABC Annual Report clearly states that over 70% of the ABC's expenditure is on making and distributing content, of which 31.7% is for the production of TV programs and 1.2% is for innovation (eg online content).¹³³

Although this is publicly funded content, schools pay \$18 million per year (and growing) in licence fees to Screenrights for television and radio content copied under the Part VA licence, approximately 80% of which is copied from the ABC and SBS. This means public funds are being used twice to use this same content in Australian schools – once to commission its creation from the ABC, and once again via the more circuitous and less efficient route of education funding being diverted into copyright licence fees and remitted to the ABC by the statutory collecting society. The Schools submit that it is economically inefficient for the taxpayer to be paying at least a portion of the \$1 billion allocated to the ABC for the creation of local content and then to pay Screenrights some millions of dollars more per year in Part VA licence fees to secure access to that content for educational purposes.

- Statutory licensing reduces incentives for publishers to innovate

The Schools submit that the "one-copy-one-view-one payment" model of remuneration on which the statutory licences are based can act as a disincentive for publishers to adopt innovative distribution models for Australian schools.

Under the statutory licence, publishers have limited incentive to offer innovative distribution and pricing models to schools. For example, the Commonwealth *Department of Industry, Innovation, Science and Research* has suggested that publishers of e-books should allow Australian students three purchasing options:

- hard copy (automatic electronic copy included which dynamically updates)
- electronic copy which dynamically updates; and

¹³³ *Australian Broadcasting Corporation Annual Report 2011-2012*, pp150-151.

- electronic copy with optional part or whole print option (the student pays for printing if and when they decide to print).¹³⁴

However, as the Schools have shown above, these options are not easily accommodated within the terms of the statutory licences. Publishers can rely on the statutory licence instead of innovating in content creation and delivery. In contrast, a voluntary licensing system supporting flexible educational exceptions would enable schools and copyright owners (directly or through a collecting society) to negotiate for the range of content, formats and uses that best suit educational needs. Further, publishers in Australia would be free to compete on product, service delivery and price for how best to serve the education market.

The effect of the statutory licence in cases such as those identified in these practical examples is not to address market failure, but rather to provide a means for some rights holders to get more money than they could if forced to rely on the market alone. This statute-enabled 'double dipping' would not be possible but for the default operation of the statutory licences.

Statutory licensing may lead to inefficiencies for rights holders

As discussed above, one of the primary reasons that statutory licensing was introduced after the Franki Report was the recognition that the transaction costs of seeking permission for widespread educational use of reprographic technologies were too high. The Schools submit that the current approach to the statutory licence by both collecting societies and educational licensees is leading to precisely the types of transactional problems that the Franki Committee were aiming to avoid.

Unfortunately, however, legitimate attempts by Australian schools to contain their own costs¹³⁵ have the effect of increasing the costs involved in administering the licence - raising the transactional costs incurred in seeking permissions and clarifications from copyright holders in precisely the manner the Franki Committee believed should be avoided. Any

inefficiencies in the licence also do not just affect educational bodies - in terms of survey burden, cost and time - they also directly harm copyright owners. Higher costs incurred by collecting societies in administering the statutory licences impact directly on copyright owners in reduced amounts of money available for distribution.

The more schools try to contain their own costs, the more it costs to administer the statutory licences

The 'smart copying' practices implemented by the education sector have had the practical result of increasing the administration costs of the licence. For the education sector, this represents a significant amount of staff time. It is estimated that approximately 70% of the time of the National Copyright Unit (set up to advise on copyright issues and administer the statutory and voluntary

¹³⁴ Commonwealth Department of Industry, Innovation, Science and Research submission to the Book Industry Strategy Group.

¹³⁵ See Part 2.2.2 of this submission for a detailed explanation of 'smart copying practices'.

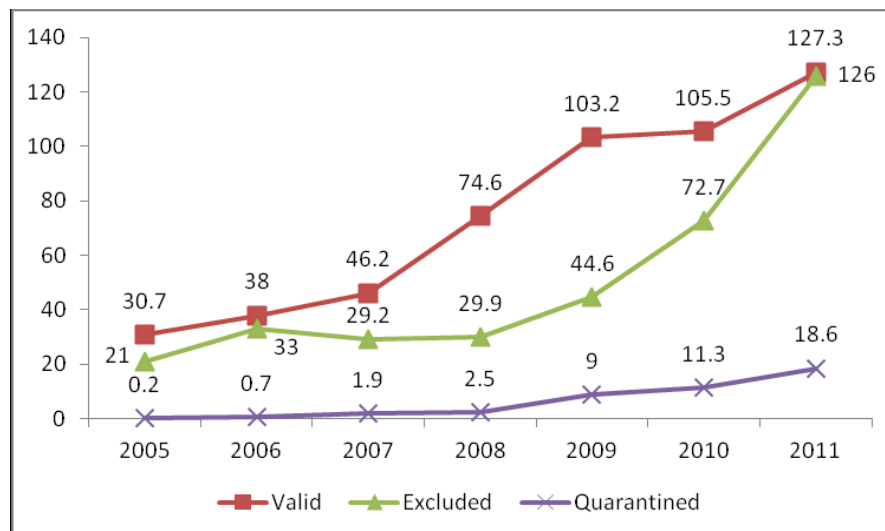
licences on behalf of the national school and TAFE sectors) is spent on administering the statutory licences and implementing smart copying practices.

One out of every two records collected under the Part VB licence is not relevant to the licence – an unacceptable administrative burden.

Also, as schools implement more and more smart copying initiatives, the amount of records that are required to be excluded from the statutory licence's pool of remunerable pages is steadily increasing. As Figure 14 shows, in the 2011 EUS for example, the amount of page records excluded due to the implementation of smart copying practices is almost the same as the total amount of remunerable records collected under the licence. A further

significant proportion of the records are 'quarantined' for further examination as to whether or not they are appropriately remunerable under the survey. In other words, one out of every two records collected is not relevant to the licence and will not attract a fee, merely impose an administrative cost. There is a significant cost attached for both the Schools and the collecting society (and ultimately rights holders) in working to get this material excluded from the pool of remunerable works.

Figure 14 – Trend analysis of weighted average page rates for all items - EUS¹³⁶



Smart copying practices may also have significant serious consequences for copyright owners over time. The collecting society's administration costs of collecting and processing data and distributing funds to copyright owners based on survey results are paid from funds collected on behalf of copyright owners. In other words, the higher the costs of administering the licence, the smaller the pool of distributable funds available for copyright owners.

¹³⁶ AMR 2011 Australian Schools EUS DRAFT Annual Review, Figure 2, p. 17.

The operation of Part VB is therefore highly inefficient – and becoming increasingly so - as schools attempt to minimise the negative impacts of the statutory licences in the digital environment. The Schools have been required to work hard over several years to ensure that only legitimate materials are paid for under the statutory licence. However the Schools are also conscious that the harder the sector works to ensure that only appropriate copyright uses are paid for under the licence, the higher the costs of administering the licence will become for the collecting society, and, consequently, copyright owners.

The Schools believe that a voluntary licensing system would enable greater efficiencies in licence administration for both copyright owners and educational licensees.

Statutory licensing imposes costs that are not necessary to ensure the continued creation of educational resources

As discussed in Part 1.5 of this submission, Australian schools use an increasingly diverse range of materials in teaching. Schools use traditional materials such as textbooks and periodicals but increasingly are relying on web-based materials and newer technologies such as mobile ‘apps’. Content creation is booming in both traditional and non-traditional forms – and this is occurring internationally in countries where the publishing sector does not rely on statutory licensing for revenue.

Explosion in the growth of apps

Teachers and students are ordinary Australians – and the popularity of smartphones, tablets and mobile apps in Australia is reflected in the use of these technologies in schools.

Australians are embracing mobile internet devices - there are now over 16 million smartphone subscribers connected to the Internet in Australia.¹³⁷ Tablet devices are becoming increasingly commonplace, with 15% of Australian homes owning a tablet device in 2012’s first quarter. This figure is predicted to increase to 39% this year.¹³⁸

This is leading to an explosion of innovation in mobile apps, sold through online stores such as the Apple App Store or Google Play. As an example of this growth, the Android app market surpassed the 400,000 app mark in December 2011, doubling the market total in just 8 months.¹³⁹

Schools are taking advantage of these new devices and apps to explore innovative ways to deliver educational outcomes for students. The Western Australia Department of Education’s *iPads for Education Early Childhood iPad Initiative*, for example, states: “It is anticipated that the use of iPads

¹³⁷ ABS Mobile Handset Subscribers, 30 June 2012, available at <http://www.abs.gov.au/ausstats/abs@.nsf/Lookup/8153.0Chapter9Jun%202012>.

¹³⁸ OzTam Australian Multi Screen Report, trends in video viewership beyond conventional television sets, May 2012, available at http://www.oztam.com.au/documents/other/australian%20multi%20screen%20report%20q1%202012_final.pdf.

¹³⁹ iThink InfoTech Smartphones and Business Application Growth Statistics and Facts: Infographics February 7th, 2012, available at <http://www.ithinkinfotech.com/blog/development/smartphones-infographics.html>.

as a learning tool will continue to drive school improvement in the National Assessment Program – Literacy and Numeracy (NAPLAN).¹⁴⁰

The increased use of mobile devices and apps in Australian schools means a significant shift in educational content creation and publishing, with app developers creating innovative new education apps which are available for purchase directly from devices via 'app stores'. This all occurs outside of the traditional realm of educational publishers and the statutory licences.

Growth in traditional publishing industries in markets without statutory licences

Recent research has shown that the global publishing industry is continuing to grow, even in the middle of a global economic downturn. According to several PricewaterhouseCoopers reports, both the North American and global publishing industry grew in the period 2004 - 2010, experiencing revenue growth of approximately 13% (North America) and 9% (globally).¹⁴¹ The educational publishing sector in Australia also continues to grow. The value of primary, secondary and tertiary book sales in Australia grew from an estimated \$450 million in 2001 to \$620 million in 2010.¹⁴² This growth is at a rate of 9% above inflation – a quite impressive growth rate in the recent global economic climate.¹⁴³

Further, the number of books produced is continuing to rise. Figure 15 shows the growth in the number of books produced in both traditional and non-traditional publishing sectors in the United States from 2002 - 2010.

Figure 15 - Growth in United States publishing market 2002 - 2010¹⁴⁴

Year	Number of traditional titles	Number of non-traditional titles ¹⁴⁵	Total titles
2002	215,138	32,639	247,777
2003	240,098	26,224	266,322
2004	275,793	19,730	295,523
2005	251,903	30,597	282,500
2006	274,416	21,936	296,352
2007	284,370	123,276	407,646
2008	289,729	271,851	561,580
2009	302,410	1,033,065	1,335,475
2010	316,480	2,776,260	3,092,740

¹⁴⁰ See <http://det.wa.edu.au/ipadsforeducation/detcms/navigation/ipad-initiative/?page=1>.

¹⁴¹ Cited in Masnick M and Ho M, *The Sky is Rising. A Detailed Look at the Global Entertainment Industry* January 2012 pp16-17 <http://www.techdirt.com/articles/20120129/17272817580/sky-is-rising-entertainment-industry-is-large-growing-not-shrinking.shtml>.

¹⁴² Cover to Cover: A market analysis of the Australian book industry, Commissioned by the Department of Innovation, Industry, Science and Research, May 2011, at 16, figure 9. Note: these figures represent book sales that are separate to any payments under a statutory licence.

¹⁴³ The actual increase was 37%. The CPI increase over the same period was 28%.

¹⁴⁴ Ibid, Masnick M and Ho M, at p18.

¹⁴⁵ Such as print-on-demand, self-published works and micro-niche publications.

Textbook publishing is expected to make up the largest share of the book publishing industry revenue in 2012, totalling US\$7.1 billion. While the trade book market, which includes fiction and nonfiction books, has slumped, textbooks are in high demand. During 2006-2011, the textbook market has increased by 5%. Publishers are investing in internet and other media outlets to interact with consumers directly and focus on rapidly increasing e-book sales. E-books are estimated to generate over 15% of industry revenue in 2012, and are projected to grow to 23% of revenue by 2017.¹⁴⁶

This growth has occurred without the existence of a statutory licence for education. As discussed above, the United States and Singapore have for many years permitted schools to make multiple copies of works within fair use/fair dealing limits for classroom use. Canada has recently introduced such an exception and the UK Government is considering doing the same. Schools are not aware of any credible evidence to the effect that permitting educational copying within fair limits has resulted or will result in a reduced incentive for authors to create the kind of content that is used in schools.

This issue is particularly significant in considering freely available internet material and free-to-air television broadcasts. As we've noted above, a large amount of copying that Australian schools pay for under the statutory licence is freely available internet content and orphan works. It cannot be said that the payment of a copyright royalty is necessary to ensure the continued creation of such works. In our view, the existence of statutory licences for education has little or no effect on the decision to create, communicate and broadcast this content to the public.

From an economic point of view, the payment extracted from Australian schools for use of this content, and the administrative costs associated with collecting the money, renders the system inefficient. Schools would benefit from not having to pay for the content, and it will continue to be created regardless of whether schools pay to use it or are permitted to use it for free.

Administration of statutory licences sits uncomfortably with public sector obligations

Public funds – general accountability standards

The lack of transparency in the revenue distributions under the Part VB statutory licence in particular sits uncomfortably with Education Department obligations in relation to expenditure of public funds, and best-practice administration for non-government school authorities. The current lack of visibility in terms of the distribution by collection agencies of funds paid out of public education budgets does not meet the best practice standards required by public sector organisations, which are required to ensure value for money and accountability of public funds.

The obligation to spend public money responsibly is entrenched in law and policy. All governments in Australia, both Commonwealth and State, have procurement policies which require organisations to ensure 'value for money' and appropriate expenditure of public funds. See *Attachment 2G* for an

¹⁴⁶ New Zealand Trade and Enterprise Exporter Guide *Book publishing – focus on education: Overview of key markets* Market Profile May 2012, pp6-7 <http://www.nzte.govt.nz/explore-export-markets/market-research-by-industry/Documents/Education-publishing-May-2012.pdf>.

The lack of transparency in distributions sits uncomfortably with obligations to obtain value for money for expenditure of public funds.

overview of these policies. Similarly, in the Federal Government's response to the Book Industry Strategy Group Report, Recommendation 17 stated that its policy for the Digital Education Revolution was to ensure that funding decisions in educational administration were based on policies that provide the best educational outcome for Australian students in the most cost-effective manner.¹⁴⁷

The importance of ensuring value for money and accountability in the expenditure of education budgets was also highlighted in a recent comprehensive review of educational funding for schools. David Gonski's *Review of Funding for Schooling Report*, released in December 2011, also recommends accountability for expenditure of educational funds. In particular, Recommendation 4.1 states that "[p]ublic funding should provide demonstrable value for money and recipients should be accountable for the proper use of public funds."¹⁴⁸

In relation to value for money and accountability the report says:

*Schooling represents a huge public and private investment in Australia's children and young people. This report calls for further significant investment. The effectiveness and efficiency with which these resources are deployed are vital to making the case for that investment. Therefore, funding arrangements must ensure proper use of and accountability for public funds. Moreover, funding arrangements need to be developed and implemented in a way that ensures limited public funds are directed where they are needed and that effectiveness of this investment can be demonstrated by credible and robust evidence. The obligations on recipients of public funding should be clear and effective.*¹⁴⁹

The Schools submit that the inefficiencies and lack of transparency inherent in the statutory licence schemes do not best meet these policy goals regarding use of education funding.

Public funds - paying for orphan works

The Issues Paper identifies the problem of orphan works, ie, where the owner of a copyright work cannot be identified and located by someone who wishes to make use of the orphan work.

This problem is particularly acute with respect to educational use of literary, dramatic, musical and artistic works, as all educational use of these kinds of orphan works must be paid for under the Part VB statutory licence.¹⁵⁰ In other words, the default position under the statutory licence is that all

¹⁴⁷ Department of Industry, Innovation, Science, Research and Tertiary Education, Book Industry Strategy Group Report - Government Response, June 2012, p20.

¹⁴⁸ <http://www.deewr.gov.au/Schooling/ReviewofFunding/Documents/Review-of-Funding-for-Schooling-Final-Report-Dec-2011.pdf>, p149.

¹⁴⁹ <http://www.deewr.gov.au/Schooling/ReviewofFunding/Documents/Review-of-Funding-for-Schooling-Final-Report-Dec-2011.pdf>, p149.

¹⁵⁰ Except in the case of insubstantial copying.

works must be paid for - even in circumstances where neither schools nor the Copyright Agency can identify the copyright owner.

Under the Copyright Agency's distribution rules, any remuneration collected for the use of orphaned works is not returned to the education sector. Rather, the statutory licence results in windfall gains to rights holders who have no connection with the content that was copied. When the Copyright

Money collected for orphan works is not returned to schools but results in windfall gains for other copyright owners

Agency is unable to identify the rights holder for a particular work it retains the money in a trust account for up to four years. If the rights holder has still not been identified after four years, the money goes into a 'roll over' which is distributed that year as a windfall to rights holders who have no connection to the works that were copied. Rights holders who have no connection with the works that are copied receive, and come to rely on, an income stream generated as a result of Australian schools paying to copy works that no-one ever expected to be paid for.

Another concerning aspect of using public funds to pay for use of orphan works is that these payments have no impact on the incentive to create the works used. As noted above, monopolies are only justified to the extent that the inherent restraint on competition is justified by the benefits delivered to society at large. One of the most cited benefits of copyright law is the incentive to create, yet in the case of orphan works, this incentive is absent given that the correct creator is not able to be identified and rewarded. In this regard, diverting funds to pay for the use of orphan works serves no meaningful purpose and essentially amounts to a squandering of public monies.

The Schools submit that not only is this payment model highly inefficient, it fails to meet the standards of accountability required of education departments administering public funds.

2.3. Conclusion of Part 2

The Schools submit that the educational exceptions and statutory licences in the Australian *Copyright Act* are not adequate and appropriate in the digital environment and should be repealed.

The educational exceptions:

- are technology specific and do not reflect the realities of teaching and learning in a digital age;
- are overly complex and inconsistent in their application for various types of copyright materials;
- provide limited, if any, flexibility for future technological development;
- in the case of s.200AB, are drafted with a degree of complexity that makes the operation of the section highly uncertain and potentially of little use in the digital environment.

The statutory licences:

- are inherently unsuited to the digital environment;
- create significant administrative burdens (increasing with the use of internet materials in schools) which affect schools, collecting societies and rights holders;
- operate in a manner that is highly inconsistent with the original policy intentions behind their creation;
- are significantly more expensive than licences in comparable countries;
- are economically inefficient and lead to inequitable outcomes.

The combination of Australia's educational exceptions and licences mean that Australian schools pay significant amounts of public funds for uses that are free for education in the majority of comparable countries (or for free uses that are under consideration by governments in the case of the United Kingdom and Ireland).

The Schools recommended reforms are set out in Part 3 of this submission.

Attachment 2A

[Extract from letter dated 9 May 2008 from the Copyright Agency's representatives, setting out the Copyright Agency's view of s.28]

"CAL¹⁵¹ AND THE SCHOOLS

CAL has referred to us the correspondence between our respective clients regarding the provisions of section 28 of the *Copyright Act 1968*.

We have reviewed the relevant provisions in detail.

In summary, it is CAL's view that 'display or project' should continue to be included in the EUS, as the majority of relevant communications will be remunerable even if there is no associated reproduction, for the reasons set out below.

1. As you are aware, section 28(1) provides that, where a literary, dramatic or musical work is "performed in class or otherwise in the presence of an audience" and the performance is given by a teacher in the course of giving educational instruction, not being instruction given for profit, or by a student in the course of receiving such instruction, this does not constitute a performance in public so long as the audience is limited to persons who are taking part in the instruction or are otherwise directly connected with the place where the instruction is given. This exemption extends also to causing sound recordings and films to be heard and viewed in classroom situations (section 28(4)).
2. We do not intend to examine in detail the conditions set out in section 28(1), except to note that the section appears to apply to a narrower range of premises and situations that might be covered under the statutory licence in Part VB of the Act.
3. The exception in section 28(1) applies only to "performances"
4. Section 27 of the Act sets out matters relating to "performance", which is stated to include (a) a reference to "any mode of visual or aural presentation, whether the presentation is by the use of reception equipment, by the exhibition of a cinematograph film, by the use of a record or by any other means"; and (b) in relation to a lecture, address, speech or sermon - including a reference to "delivery". The reference to "any mode of visual or aural presentation" clearly includes what we would commonly regard as 'performance' of a work, for example, where a person recites a literary work, such as a poem or short story, acts out a dramatic work such as a play, or sings or plays an instrument in the case of a musical work. The specific reference to "delivery" in the case of lectures, sermons, addresses, speeches or sermons - all instances of literary works - confirms that "performance" includes this "traditional" mode of aural presentation in the case of such works.
5. Accordingly, for the purposes of section 28(1), it will be clear that any of the above modes of aural or visual presentation will be relevant where a work is "performed" in the course of classroom educational instruction, but the question will remain whether there has actually

¹⁵¹ as the Copyright Agency was formerly known.

been a "performance". In the case of a musical work that is communicated to reception equipment over the internet or is contained in a film or record that is exhibited or played, this seems clear enough: there will have been an aural or visual presentation of the work through one or other of these various means in substitution for a live performance in the classroom (at least in theory, if the performers had been present there and had played the work). The same would be true of a recitation or reading of a literary or dramatic work that is transmitted to reception equipment and which is then displayed to, or listened to by, students in a classroom or which is exhibited as part of film or heard through the use of a sound recording. In each of these instances, there will have been a "performance" of the work or the causing of sounds or images to be heard or seen (in the case of a film or sound recording).

6. However, CAL does not consider that a performance (or aural or visual presentation) takes place where a work is simply displayed on a screen in a static fashion, for example, where a poem or piece of text is projected (perhaps to be followed by others). A static display of a work is not the same as an aural or visual presentation by performers or, in the case of a lecture, address, speech or sermon, the delivery of the same. In the case of a classroom display, therefore, where parts of a work are projected onto a screen from a website, this is not a "performance" of the work if all that occurs is a static display of the work or a part of that work.
7. We further note that section 27(3) ascribes responsibility for a performance where this occurs through the use of reception equipment to the person operating that equipment, and section 27(4) provides that where a work is performed by the operation of reception equipment or record-playing equipment being equipment provided by or with the consent of the occupier of the premises where the equipment is situated, the occupier... shall be deemed to be the person giving the performance... whether he or she is the person operating the equipment or not". Section 28(l) refers only to performances made by a teacher or a student. The subsection will not apply where a teacher shows or plays communications or recordings of works in class through the use of reception equipment such as a computer linked to the internet (or free to air radio or television receiver etc), and this equipment has been provided by the place where instruction is given - in other words, by the "occupier of the premises where the equipment is situated".
8. Accordingly, in the case of a literary, dramatic or musical work communicated to reception equipment located in a classroom, the exception under section 28(1) will not apply in the following circumstances:
 - (i) where the work or part thereof is displayed in a "static" way, ie where there is no aural or presentation of the work in the way required for a performance within the meaning of section 27(L): in this situation, there will be no "performance", and, by definition, no "performance in public" to which the exception under section 28(1) can apply.
 - (ii) where the display occurs on classroom reception equipment provided by the place of instruction, while this might otherwise be a "performance" and a "performance in public" (in front of the class), the exception under section 28(1) will not be applicable on the basis that the performance will be deemed by section 27(4) to have been carried out by the occupier of the premises (which would usually be the school or "place of instruction") and not the teacher or student actually operating the reception equipment.

9. If no exempted performance in public occurs by virtue of section 28(1) in one or either (or both) of the circumstances referred to in paragraph 8 above, section 28(5) will not apply to exempt the communications to the reception equipment that have "facilitated" the occurrence of these performances. The only situation where section 28(5) will have this effect will be where the operator of the reception equipment is that of the teacher him - or herself. However, even in that case CAL believes that the reception equipment will still fall within section 27(4), as it could only be operated by the teacher "with the consent of the occupier of the premises", ie the school.
10. Accordingly, quite apart from the reproductions that may occur when a "Display/Project" activity occur, there will also be relevant acts of communication where there is the use of reception equipment by a teacher or student to display or project works in a classroom setting, with there being little likelihood that anything other than a small proportion of these will fall within the exclusion now provided by section 28(5).
11. Section 28(5) will only exempt a small number of communications that facilitate performances of literary, dramatic and musical works in the course of educational instruction under section 28(1); this is primarily because such performances will be deemed to have been made by the school or place of instruction, rather than by the teacher or student, but also will not be applicable where the displays are static and do not constitute performances in the first place. It is therefore likely that the vast bulk of communications to reception equipment that are made in these circumstances will fall within the scope of remunerable activities for the purpose of the EUS and should continue to be captured. This, of course, is a separate question from the number of reproductions that occur as a consequence of such communications, which CAL believes may occur in the case of up to half of the communications.
12. CAL accepts that section 28(7) appears to have a contrary outcome so far as the communication of artistic works is concerned, and that with some minor limitations, this provision appears to exempt the bulk of such communications, taking them outside the scope of remunerable acts for the purposes of the EUS. CAL regards this as highly damaging to and inexplicably discriminatory against owners of the copyright in artistic works, and reserves its right to make appropriate submissions to the government in this regard.
13. CAL maintains its view that where there is an associated prior act of reproduction for the purpose of display or projection to a class, that act may attract remuneration at a higher rate.

Accordingly, CAL is of the strong view that display/project should remain in the EUS, and that a percentage of all communications should be remunerated. The precise percentage is perhaps a further matter for analysis of data."

Attachment 2B

Electronic Use Survey usage record form

Submit Usage Record

1. Enter details of a copyright item, 2. Click SUBMIT, 3. Enter usage details, 4. Click FINISH

COPYRIGHT ITEM

Sourced from :	<input type="text" value="Please select one"/>	Page(s):	<input type="text"/>
Item type :	<input type="radio"/> Text Only <input type="radio"/> Image Only <input type="radio"/> Music Only <input type="radio"/> Combination (Text/Image/Music)	<input type="button" value="?"/> <input type="button" value="?"/>	
		<input type="button" value="SUBMIT"/> <input type="button" value="CANCEL ITEM"/>	

USAGE

Scan or digitally photograph	<input type="checkbox"/>	<input type="button" value="?"/>	No. of copies	<input type="text"/>
Print	<input type="checkbox"/>	<input type="button" value="?"/>	No. of copies	<input type="text"/>
Download / Save / Copy to computer or storage device	<input type="checkbox"/>	<input type="button" value="?"/>	No. of copies	<input type="text"/>
Make available on or from network / online	<input type="checkbox"/>	<input type="button" value="?"/>	Intended no. of students/staff	<input type="text"/>
Email	<input type="checkbox"/>	<input type="button" value="?"/>	Intended no. of students/staff	<input type="text"/>
Tell student to Print / Copy / Save	<input type="checkbox"/>	<input type="button" value="?"/>	Intended no. of students	<input type="text"/>
Display or Project (excluding material displayed directly from the internet)	<input type="checkbox"/>	<input type="button" value="?"/>	Intended no. of students/staff	<input type="text"/>
		<input type="button" value="FINISH"/> <input type="button" value="CANCEL RECORD"/>		

Attachment 2C

Specific examples of why the statutory licences are not suited to the digital environment

As discussed in Part 2.2 of this submission, the statutory licences comprise complex rules that are inappropriate in a digital environment. These rules are ill suited to making content available to students in a digital environment and prevent schools in Australia taking full advantage of the educational opportunities afforded by the internet.

The intention in extending the licences to the digital environment was to enable the Schools to take account of new technologies:

*The new statutory scheme for the electronic use of copyright material [in electronic form] has been drafted in broad terms to enable it to adapt to future technological developments. The key to the new scheme is flexibility, based on agreement between educational institutions ... and the relevant collecting societies.*¹⁵²

While the amendments may have achieved their goal in terms of the flexibility permitted in negotiating the matters and processes that constitute an electronic use system, the substantive provisions of the licences themselves have proved to be less than flexible, and far from future proof.

This should not perhaps be surprising. The United States Copyright Office, for example, has recently rejected statutory licences as a useful model for educational copying, describing them to be “mechanisms of last resort that must be narrowly tailored to address a specific failure in a specifically defined market.”¹⁵³

This Attachment sets out a number of specific problems with the statutory licences. While these issues may not by themselves amount to a significant problem, they show how the licences' detailed technical requirements are easily inadvertently breached, and encourage the imposition of artificial constraints on the use of digital technologies in schools. In some cases, the provisions set rules with which it is not technically possible to comply. Taken together, they show why the Schools believe that the educational statutory licences are not adequate and appropriate in the digital environment and should be repealed.

Online communication of works - s.135ZMD(3)

The statutory licence contains different rules regarding how much of a work can be made available to students, depending upon whether this is done by making the content available on the school

¹⁵² Second Reading Speech to the *Copyright Amendment (Digital Agenda) Bill 1999*, House of Representatives, Hansard 2 September 1999, p9749.

¹⁵³ Copyright Office, Library of Congress, Notice of Inquiry – Orphan Works and Mass Digitisation (22 October 2012) 17 <http://federalregister.gov/a/2012-25932>.

intranet, learning management system¹⁵⁴ etc or by handing out copies to each student. To illustrate, consider the following scenarios:

When making a photocopy, Teacher A can copy a reasonable portion of a science textbook for distribution to her class. Teacher B can also copy a reasonable portion of the same book for distribution to his class. In most cases, this will be up to 10 per cent of the pages or one chapter of the work. It does not matter that these two teachers have copied different parts of the same book, provided that each of them has copied no more than 10 per cent or one chapter.

If the work is copied electronically and communicated to students via the school intranet or learning management system, the rules are quite different.

Teacher A can still copy up to 10 per cent of a work (although now calculated according to words rather than pages), but no other teacher can communicate any other part of the same work to his or her students via the intranet until the part made available by Teacher A is taken down. This restriction operates regardless of whether teacher A has communicated less than 10 per cent of the work. For example, if Teacher A has only communicated 7 per cent of a work via the school intranet and Teacher B asks the school librarian if he can communicate 3 per cent of the same work to his students via the intranet, The librarian would be required to tell Teacher B that s.135ZMD(3) of the Act operates to prevent the school from doing this.

The effect of s.135ZMD(3) would be the same if Teacher A had only communicated 3 per cent of the work to her students. Nor does it make any difference that the only students who can access Teacher A's 3 per cent were students in her class. No other teacher in that school can communicate any other part of the same work via the intranet unless and until Teacher A's material is taken down.

The legislative intention appears to have been to prevent schools from simultaneously making available online more than one portion of the same work¹⁵⁵ - even where access is limited to students in a particular class. In an age of learning management systems, centralised content delivery systems and networked interactive whiteboards in classrooms, provisions such as s.135ZMD(3) make compliance with the statutory licence using modern education tools increasingly difficult.

The hardcopy provisions in Division 2 of Part VB take account of the reality that different teachers will use different parts of the same work in different ways for different groups of students. This reality is not reflected in the electronic provisions in Division 2A. Not only

Part VB is out of date and does not recognise the realities of teaching in Australian schools.

¹⁵⁴ See the definition of a learning management system available at http://en.wikipedia.org/wiki/Learning_management_system.

¹⁵⁵ See the Explanatory Memorandum to the *Copyright Amendment (Digital Agenda) Bill 1999*, p80.

does this impose an added level of administrative difficulty for schools, it restricts the ways in which teachers can deliver content to their students.

A school that decides that the most efficient way of delivering content to its students is via the school intranet or learning management system is effectively penalised for that choice. This is completely contrary to Government policy of encouraging schools to fully embrace digital technology to improve efficiency and educational outcomes. Schools can and do develop workarounds to these conditions (for example, requiring teachers to archive items to personal hard drives at the end of a class instead of deleting content from a LMS), however these administrative requirements are administratively complex and completely unsuited to the realities of teaching in a modern school.

Copying from different parts of the same work - s.135ZMB(5)

Another example is the different legal treatment of insubstantial copying depending on whether the copies made are in hardcopy form or electronic form.

It is a fundamental principle of Australian copyright law that a copy of a work that is not a 'substantial part' of a work cannot be a copyright infringement. In the educational context, this principle is reflected in the statutory licences, so that educational institutions do not have to pay remuneration for 'insubstantial copying'.

Under the hardcopy provisions, a teacher can copy up to 2 pages of a work in hardcopy form.¹⁵⁶ A copy made from a work is considered to be insubstantial irrespective of whether the 2 pages are consecutive or taken from separate locations in a work. However, when the statutory licence was extended to digital copying and communication, this principle was not carried across to s.135ZMB. Under the electronic use provisions, teachers may copy up to 1% of the pages of an electronic work or 2 pages (whichever is greater) if the work is paginated, or 1% of the words in the work if the electronic work is not paginated. When the work copied is in a digital format, however, an insubstantial amount cannot be comprised of different parts of the work: the 2 pages (or 1 per cent of words if the work is not paginated) copied must be consecutive. If the 2 pages are not consecutive, the second page will be considered a separate copy and must be paid for.

Consider the following examples of this distinction:

Teacher A copies paragraph 1 and paragraph 2 from a webpage to use for a lesson. The sum total of what is copied is less than 1% of the words on the web page. The two paragraphs are consecutive on the web page. As a result, the copying is deemed to be insubstantial. Therefore, no payment is required under the educational statutory licence.

Teacher B wants to copy from the same website, but she decides to copy paragraphs 1 and 3. The total amount copied still comprises less than 1% of the total words on the web page, but, unlike Teacher A, she has not copied 'continuous passages'.

¹⁵⁶ See s.135ZG.

Teacher A's copying would be deemed to be insubstantial (and free). As for Teacher B's copying, the first paragraph would be deemed insubstantial (and therefore free), but Teacher B's copying would need to be paid for under the statutory licence. The only difference between the two examples is that the passages copied are not continuous.

The result of this seemingly arbitrary distinction is that Teacher B's copying is required to be paid for out of education budgets in a situation where the general law of copyright would most likely view the copying of such a small amount as insubstantial and therefore non-infringing.

This example would be the same if a teacher copied two sentences from a PDF file or other online work, if the two sentences were taken from different pages of the document.

This is an issue with real consequences in practice, as insubstantial copying is not excluded from the remunerable data set measured by the statutory licence copyright surveys, despite the clear intention of Part VB that such copying should not be remunerable. The technical impact of the 'non cumulative copying' requirement may be less significant given it is unclear how well these technical requirements are captured in the survey data. Nevertheless, these records are included in the data set and remunerated.

The Schools believe that these provisions make Part VB overly technically complex. They simply do not reflect the 'real world' way in which teachers use technologies in schools.

The requirement to provide copyright notices – s.135KA and s.135ZA

Both educational statutory licences require a school to give a prescribed notice 'in relation to each communication made by it' containing statements that the communication has been made under the relevant statutory licence and that the works or other subject matter contained in the communication might be protected by copyright.

The Schools have found that it is not technically possible to comply with this requirement in all circumstances (eg, communications made to interactive whiteboards, multiple communications made from content repositories such as LMS, etc). As such, schools have had to come up with 'work around' solutions, such as inserting a link to the notice in the labelling information or displaying the notice on the computer screen as the user logs into the repository. Although the Schools have not encountered significant opposition to their working solutions to this issue, it further illustrates how the technical requirements of the statutory licence are not suited to the modern teaching and learning environment.

Attachment 2D

Statutory licensing and freely available internet materials

All governments in Australia are committed to maximising the benefits of the internet in Australian schools. The Commonwealth Government's investment in the National Broadband Network and the Digital Education Revolution recognises the importance of ubiquitous broadband access and the critical importance of broadband infrastructure to educational outcomes. Educational payments for freely available internet materials threaten the Government's digital economy goals.

The National Digital Economy Strategy sets the following goal:

By 2020, Australian schools, TAFEs, universities and higher education institutions will have the connectivity to develop and collaborate on innovative and flexible educational services and resources to extend online learning resources to the home and workplace; and the facilities to offer students and learners, who cannot access courses via traditional means, the opportunity for online virtual learning.

And yet, Australia is the only place in the world where schools are legislatively required to pay for printing a page from a website. The Schools submit that this situation must be urgently changed if the Government is to meet its Digital Economy Strategy goals and realise the educational benefits from its investment in the NBN.

Consider the following example:

Jane is researching on the web for a homework assignment. She visits a newspaper website and clicks on the print icon next to the article and prints a copy of an article to take to school the next day.

Peter is a consultant preparing for a meeting. He remembers that a politician recently gave a speech on an issue likely to be discussed in the meeting. He goes to the web, finds the speech, clicks the 'printer friendly' icon and prints the relevant paragraphs of the speech to take to the meeting.

Joseph is a teacher. As part of preparing a lesson he visits a newspaper website, clicks on the print icon next to an article and prints a copy of an article to take to class.

All three people are engaged in activities that occur across Australia - and around the world - every day. Jane and Peter's copy is likely to be permitted for free either by the 'fair dealing for research or study' exception or by an implied licence created by the web publisher placing a 'print' icon next to the work. Joseph, however, has engaged in a remunerable act under the educational statutory licence, which must be paid for out of education budgets.

The Schools submit that they are required to pay for educational uses of freely available websites, even in circumstances where there was clearly no commercial intention in making the content available online. Some of the 'real life' examples taken from electronic copying surveys include online TV guides, health fact sheets, the 'About Us' page on corporate websites, online printable teaching resources and even material like free tourism maps of Australia.

This problem potentially adds millions of dollars to education budgets each year

The Schools estimate that between 64 and 82% of remunerable website use in schools falls into the category of 'freely available internet material'. The current situation means that schools are expected to pay for all internet use – even the vast majority of online material where it is clear that the copyright owner never expected payment from Australian schools, such as tourism maps made available for download on tourism websites.

The Schools currently have a fixed-cost agreement with the Copyright Agency under the Part VB statutory licence where they pay around \$55.7 million per year for print and electronic use of copyright works. We estimate between \$8.34 and \$10.79 million of this cost each year relates to freely available internet material.¹⁵⁷

The level of internet usage in schools is increasing over time, both as a result of general changes in the digital environment and as a direct result of targeted government policy actions. For example, the Digital Education Revolution program commenced in 2008, and electronic use in schools rose by 40% in that year alone.

This situation threatens the success of the Government's investments in digital education

The Government hopes to improve educational outcomes by increasing use of online learning. The National Digital Economy Strategy points to an EU study that found that broadband access in classrooms results in significant improvement in pupils' performance.¹⁵⁸

The NBN and implementation of the Digital Economy Strategy will result in even greater use by schools of the wide array of freely available internet material that is directed at teachers and students, further increasing the cost to schools.

Continuing to require payment for freely available internet materials and other forms of uses where there is no separate market for those uses (such as in the case of technical copying and

¹⁵⁷ Due to the fixed and agreed nature of the agreement between the Copyright Agency and the Schools it is not possible to estimate with precision the amount of educational use that can be attributed to use of freely available internet materials. The Schools also don't have any access to data regarding how distributions (eg to website owners) occur in practice. This estimate was derived by assessing the total copying amounts for hardcopy and electronic use, and working out the proportion of website use as against this total use. We then used a variety of proxies to attempt to credibly estimate the proportion of website use that could be considered to be 'freely available' internet materials. One proxy was based on existing processing categories (the Metcalfe categories described in Part 2.2.2 above), another was based on the number of website entries listed in survey results as having an 'unknown' author. These figures should not be considered to be actual cost estimates - rather they reflect the proportion of the total statutory licence expenditure which might reasonably be allocated to freely available internet materials, based on actual usage data.

¹⁵⁸ *The National Digital Economy Strategy*, Department of Broadband, Communications and the Digital Economy, p 36.

communications that are required as part of the use of new technology use discussed in Part 2 of this submission) will make the statutory licences more and more unsuitable to the digital age.

This issue has historically caused most concern to schools in the context of the Part VB statutory licence, but with the innovation occurring in the delivery of broadcast material to the public (such as IPTV services and the proliferation of catch up TV services such as ABC's iView) this problem may also become a significant issue under the Part VA licence in the near future.

How to solve the problem of remuneration of freely available internet materials

The Schools submit that the only way to solve the problem of a default obligation to pay for freely available internet materials is to amend the *Copyright Act*.

The Schools illustrate in this submission that statutory licensing is past its 'use-by date' in a digital age, and that the Part VA and VB licences in the *Copyright Act* should be repealed. Part 3 of this submission sets out the Schools' view as to the optimal model for incentivising creation and appropriate educational public interest use in the digital age.

To their credit, the Copyright Agency has taken steps to try and implement administrative measures to remove some freely available internet materials from remunerable copying under Part VB. While these steps may go some way to alleviating the worst impacts of this problem, an administrative solution cannot resolve these issues for a number of reasons:

- *to do so is inefficient*

The Copyright Agency's administrative solution would involve it contacting website owners individually to clarify their intention in relation to works placed on the internet. The size and complexity of this task cannot ever be a comprehensive solution, is contrary to the policy rationale for introducing a statutory licence in the first place, and is bad for copyright owners as it raises the costs of administering the licence.

- *The Copyright Agency may have no authority to agree a comprehensive administrative solution*

Part VB requires a body administering an educational institution (an 'Administering Body') to issue a remuneration notice to a declared collecting society undertaking to pay "equitable remuneration" for copying and communication of works for educational purposes.

There is provision under the Act for the Administering Body and the Copyright Agency to reach agreement as to "the amount of equitable remuneration" to be paid for copies and communications of works that are in electronic form: s 135ZWA.

However, it is possible that the Copyright Agency has no authority to reach such an agreement. Firstly, the Copyright Agency is the declared collecting society for the purposes of the Part VB statutory licence with respect to "all relevant copyright owners": s 135ZZB. It may follow from this that the Copyright Agency cannot reach an agreement that would

result in one class of copyright owners not being paid for copying and communication of their works. Secondly, when the Administering Body issues a remuneration notice to the Copyright Agency, it undertakes to pay “equitable remuneration to [the Copyright Agency] for licensed copies and licensed communications made by it”: s 135ZWU. It may follow from this that the Copyright Agency cannot reach an agreement with an Administering Body that would result in no payment being made for a particular class of copies or communications.

- *An administrative solution is bad for copyright owners and the public*

Finally, the Schools submit that the question of whether educational institutions should have the benefit of a new exception is a matter of *public policy*. It is not a matter that ought to be determined by administrative means at great public expense by the Copyright Tribunal.

The obligation to pay for freely available internet material only arises because of the way that the Part VB licence operates. This is a legislative problem that requires a legislative solution.

Attachment 2E

Outline of history of the School's rates under the Part VB statutory licence

1 August 1981: Statutory licence for educational institutions introduced by section 14 of the *Copyright Amendment Act 1980* (Cth) (s 14 commenced on 1 August 1981).

20 March 1985: Copyright Tribunal decision in *Copyright Agency Ltd v Department of Education of New South Wales and others* (1985) 59 ALR 172.

(a) Rate: 2 cents per page.

1 December 1986: the Copyright Agency entered into agreement with the Association of Independent Schools NSW (AISNSW).

(b) Discount on Copyright Tribunal rate: 25% in respect of records provided in computer readable form and 12.5% in respect of records provided in writing.

(c) The discount was to be reduced for records sent to the Copyright Agency after 12 December 1986 to 20% and 10% respectively.

1 January 1988: the Copyright Agency entered new agreement with the Schools.

(d) Schools charged at a 'per capita' rate.

(e) 12 cents (primary students) and 60 cents (secondary students).

(f) These fees were calculated on the assumption that copy pages for each primary student would be 8 pages and each secondary student would be 40 pages, and multiplying these by 1.5 cents.

27 October 1989: Variation of 1988 agreement between the Schools and the Copyright Agency.

(g) The new rates were:

(i) 1989: 61.5 cents (primary) and 77.5 cents (secondary).

(ii) 1990: 93 cents (primary) and \$1.05 (secondary).

(iii) 1991: \$1.36 (primary) and \$1.86 (secondary).

(h) These fees reflect the midpoint between the fees in the preceding year and the fee that would have been payable if those fees had simply been increased by CPI.

21 April 1992: New agreement between the Schools and the Copyright Agency.

(i) 1992: \$1.50 (primary) and \$2.052 (secondary).

(j) 1993 and 1994: 1992 rate increased by CPI plus 10%.

31 December 1996: the Copyright Agency terminated 1992 agreement (notice of termination sent 22 December 1995) and filed application in the Copyright Tribunal for rate to be based on pages copied, rather than a per capita rate.

8 February 2002: Copyright Tribunal decision in *Copyright Agency Ltd v Queensland Department of Education and Others* (2002) 54 IPR 19 (Finkelstein DP).

- (k) Basic rate: 4 cents per page in 1997 (indexed by CPI).
- (l) Artistic works and poetry: 8 cents per page (indexed by CPI).
- (m) Plays, short stories and other 's 135ZK works': 6 cents per page (indexed by CPI).
- (n) Overhead transparencies, slides and permanent display copies: 40 cents per page (indexed by CPI).
- (o) The basic rate set came into operation from 1 January 1997.
- (p) The new rates were to be phased in over a period of 3 or 4 years.

In 2004 the Schools agreed with the Copyright Agency that The Schools would pay \$9 million in respect of the copying of digital works for the years 2001 to 2004.

In August 2005 the Copyright Agency commenced proceedings in the Copyright Tribunal seeking determination of a rate for electronic use.

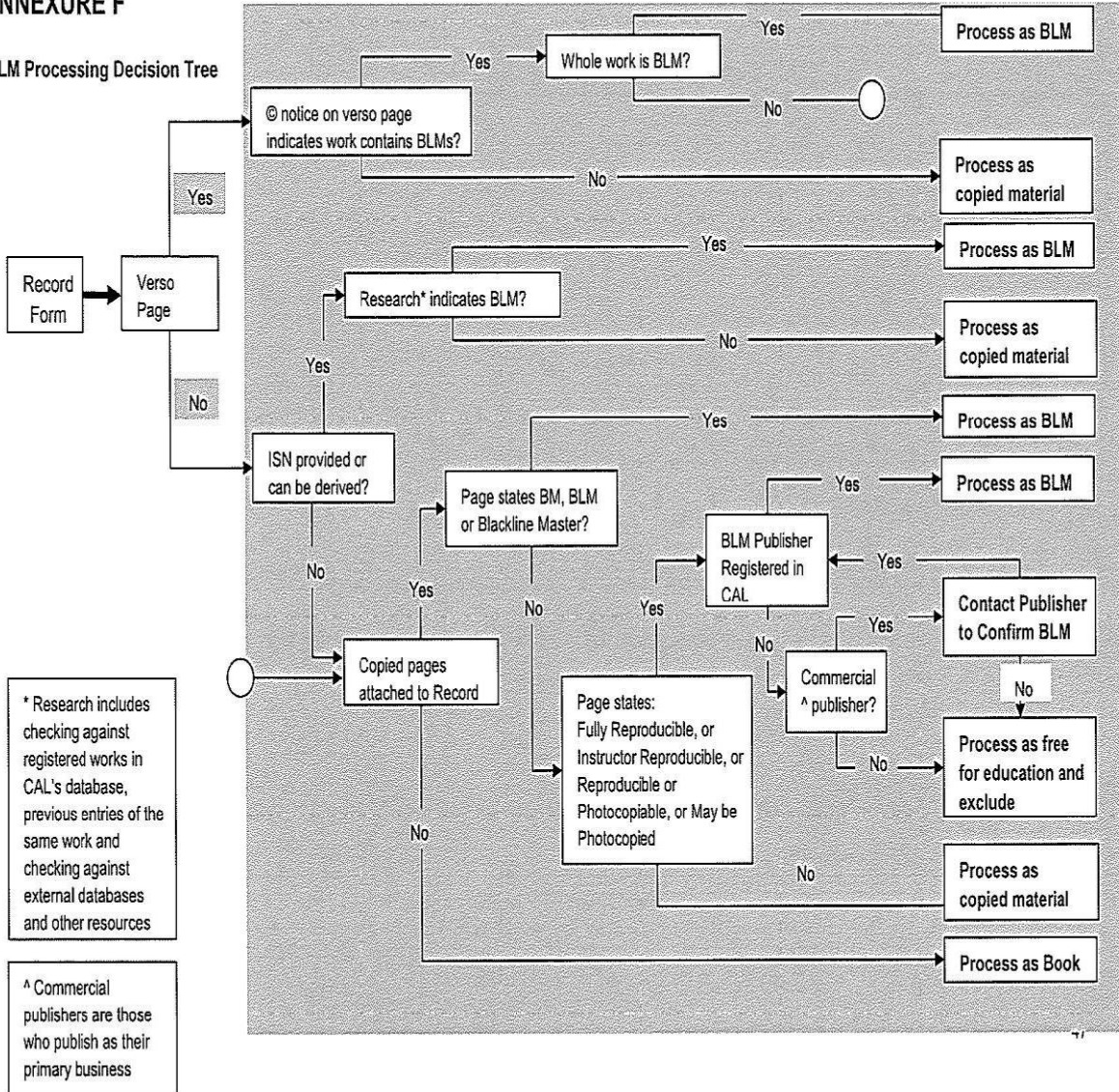
In 2009 the Copyright Agency and the Schools agreed that the Schools would pay an amount of \$16.00 for each Full Time Equivalent Student in 2010, in respect of copying and communication of hardcopy and digital works, with this amount to be increased by the increase in the CPI in each of 2011 and 2012.

Attachment 2F

Black Line Master Processing Decision Tree

ANNEXURE F

BLM Processing Decision Tree



Attachment 2G

Public sector procurement obligations

NSW

In NSW, the *Public Finance and Audit Act 1983* (NSW) regulates government expenditure. Section 11 of that act concerns internal control and audit and section 12 concerns the commitment of expenditure and states. Specifically, s.12(2) deems that "An officer of an authority who commits or incurs expenditure shall be responsible for the exercise of due economy."¹⁵⁹ At a higher level, the *Fiscal Responsibility Act 2012* (NSW) addresses the Government's budget decisions and overall management of the State accounts. Section 7 in particular outlines the 'Principles of Sound Financial Management'.¹⁶⁰

From a financial management policy perspective, the NSW Financial Management Framework for the General Government Sector is most relevant to administration. It's an umbrella for a range of policies concerning accountability, management and accounting requirements for financial and asset management by the NSW public sector.¹⁶¹

Victoria

In Victoria, the Victorian Government Purchasing Board (VGPB), established under the *Financial Management Act 1994*, regulates the purchase, rental or lease of goods and services (other than construction and related matters), and the management and disposal of goods by all Government departments, Victoria Police and twelve administrative offices identified in the *Public Administration Act 2004*.¹⁶²

The Victorian *Audit Act 1994* authorises the Auditor-General to conduct annual financial statement audits of public sector agencies, undertake performance audits within the public sector which encompass assessments of the economy, efficiency and effectiveness of the management of public resources by the government or individual government agencies and examine the use of public grants received by both private and public sector organisations.¹⁶³

South Australia

In South Australia, section 12 of the *State Procurement Act 2004* (the Act) requires the State Procurement Board to "develop, issue and keep under review policies, principles and guidelines relating to the procurement operations of public authorities".

Queensland

In Queensland, procurement obligations are set by s.19 of the *Financial and Performance Management Standard 2009*, made under the *Financial Accountability Act 2009*.¹⁶⁴ The *State Procurement Policy (2010)* provides the framework for all Queensland Government procurement

¹⁵⁹ <http://www.legislation.nsw.gov.au/viewtop/inforce/act+152+1983+cd+0+N/>.

¹⁶⁰ <http://www.legislation.nsw.gov.au/maintop/view/inforce/act+58+2012+cd+0+N/>.

¹⁶¹ http://www.treasury.nsw.gov.au/_data/assets/pdf_file/0003/3774/tpp00-4.pdf.

¹⁶² <http://www.procurement.vic.gov.au/CA2575BA0001417C/pages/procurement-practitioners-general-procurement-requirements-application-of-vgpb-policy>.

¹⁶³ http://www.audit.vic.gov.au/about_us/audit_legislation.aspx.

¹⁶⁴ <http://www.legislation.qld.gov.au/LEGISLTN/CURRENT/F/FinAccPManSt09.pdf>.

and is administered by the Department of Housing and Public Works. The Policy's key objectives are to advance the priorities of government, seek value for money and ensure purchases are made with probity and accountability. All government departments, agencies, statutory bodies and government-owned corporations must comply with it.¹⁶⁵

WA

In Western Australia, procurement policies regulate the way in which the Western Australian Government purchases from suppliers in the private and not-for-profit sectors. The State Supply Commission (SSC) procurement policies regulate WA public authorities to, among other things, ensure that their procurement of goods and services achieve the best value for money outcome and that their procurement activities are conducted with high standards of probity and accountability.¹⁶⁶

ACT

The ACT's *Government Procurement Act 2001*, supported by the *Government Procurement Regulation 2007*, regulates government procurement for the territory. Section 22A sets out the procurement principle of 'value for money' and imposes an obligation on the territory to pursue value for money in undertaking any procurement activity.¹⁶⁷

NT

In the Northern Territory, *The Procurement Act 1995* provides for the procurement of supplies for the purposes of the territory and government agencies taking into account value for money.¹⁶⁸

Tasmania

In Tasmania, government buyers must behave ethically and comply with the Procurement Code of Conduct and the Government Purchasing Principles, embodied in Treasurer's Instructions 1101 and 1201, which encourage fair and open competition between suppliers, with the objective of achieving best value for money.¹⁶⁹

¹⁶⁵ <http://www.hpw.qld.gov.au/supplydisposal/GovernmentProcurement/ProcurementPolicyGuidance/Pages/default.aspx>.

¹⁶⁶ <http://www.finance.wa.gov.au/cms/content.aspx?id=12662>.

¹⁶⁷ <http://www.legislation.act.gov.au/a/2001-28/default.asp>.

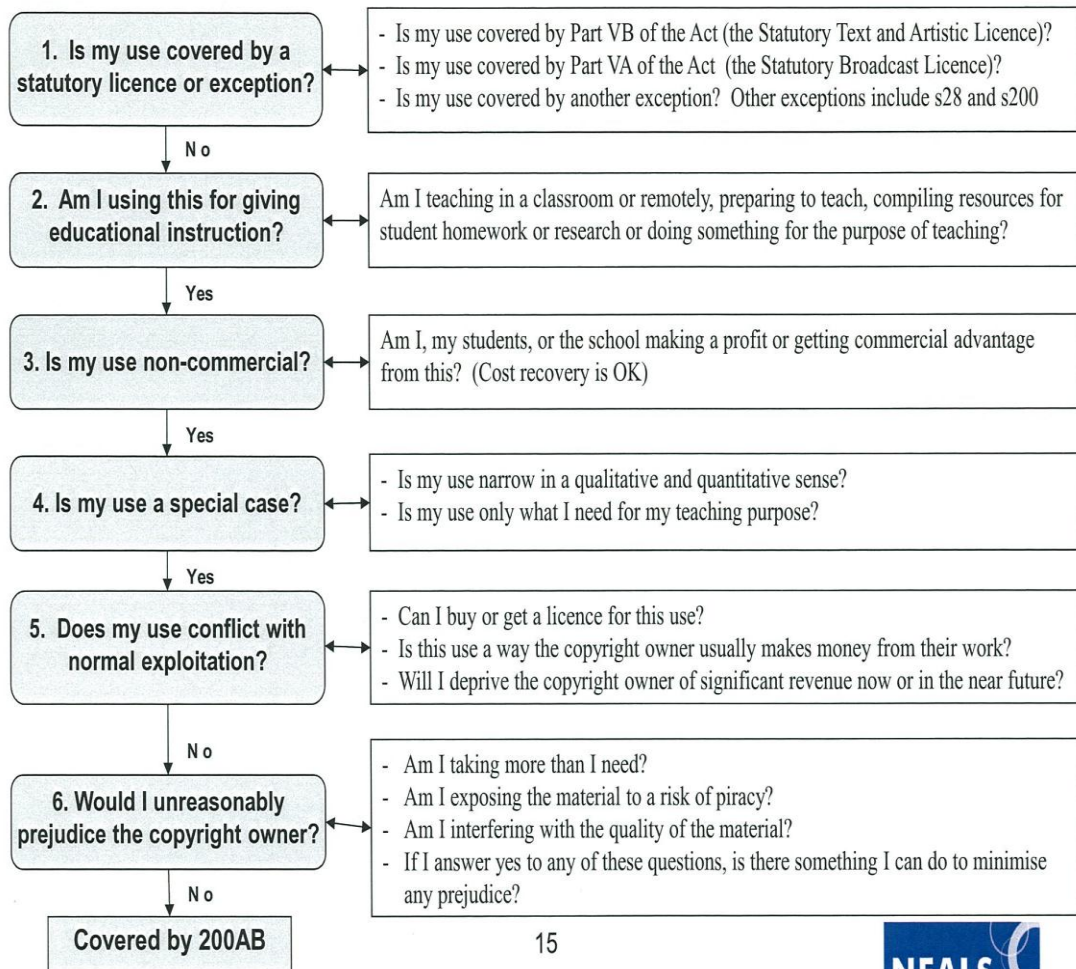
¹⁶⁸ Northern Territory Government, *Procurement Direction F1 Legislative Structure*, p2.

¹⁶⁹ <http://www.purchasing.tas.gov.au/buyingforgovernment/getpage.jsp?uid=F5E74B20DEF74E68CA256C750016BC87>.

Attachment 2H

Section 200AB Flow chart

Free Use Exceptions: s. 200AB



PART THREE - OPTIONS FOR REFORM

Statutory licences are not adequate and appropriate for the digital environment and should be repealed.

For the reasons detailed in Part 2 of this submission, the Schools submit that Australia's education statutory licences are not 'adequate and appropriate' in the digital environment. As such, the ALRC should not consider *any* reform option that would contemplate the continued existence of a statutory licensing regime in Australia. Instead, the Schools submit that a new approach should be taken to balance the interests of copyright creators with the public interest in ensuring both the creation of new works and appropriate public interest access to content for the purposes of education, research and study in the digital era.

The Schools have given detailed consideration to what mix of exceptions and licences would best serve the interests of copyright creators, the education sector and the broader digital economy. In doing so, the Schools have spent many months looking closely at educational copying regimes in comparable jurisdictions in order to understand what models work most appropriately for education sector users and rights holders in a digital environment. In making their assessments, the Schools have kept in mind the policy balance specified in the Terms of Reference to this review, the Guiding Principles set out in the ALRC's Issues Paper and Australia's international obligations to ensure that all exceptions comply with the three-step test.

The Schools urge the ALRC to recommend the following reform to the *Copyright Act*:

1. Amend the existing educational exceptions to better recognise the public interest in a core set of non-remunerable educational uses of copyright materials; and
2. Repeal the existing educational statutory licences to enable direct voluntary licensing between the education sector and copyright owners (either directly or collectively via a collecting society ie, a 'blanket' licence¹⁷⁰).

¹⁷⁰ Technically voluntary licences would be administered by a licensing society rather than a collecting society, although we use the term 'collecting society' throughout for convenience. For example, APRA and AMCOS are copyright licensing societies because they grant licences. Copyright Agency and Screenrights on the other hand are copyright collecting societies, at least in so far as their dealings with schools are concerned, as they merely administer the licence granted by statute. Under the Schools' proposal, Screenrights and Copyright Agency would still have key roles to play in the administration of voluntary licences, however they would more properly be considered to be licensing societies. For the purposes of simplicity we use the general term 'collecting society' in this submission throughout.

3.1. Introducing new exceptions to enable certain non-remunerable uses of copyright materials

As discussed in Part 2 of this submission, use of copyright materials in Australian schools is governed by a number of specific and highly technical and/or prescriptive exceptions. The Schools have spent considerable time exploring four potential scenarios for reforming the *Copyright Act*:

Scenario 1 - Introducing new purpose-based 'closed' exceptions

Scenario 2 - Amending s. 200AB to include additional purposes or uses

Scenario 3 - Introducing a new open-ended, flexible exception that could be relied on by anyone (including education) for uses that are 'fair'

Scenario 4 - Introducing a new 'fair dealing for education' exception.

We set out below the School's thinking as to whether the potential reform models identified by Schools would be 'adequate and appropriate in the digital environment'. The Schools hope that framing our consideration of these models against the test required by the Terms of Reference in relation to the existing licences and exceptions will be of assistance to the Commission.

Summary of Part 3.1 of this submission

In summary, the Schools believe that only scenarios 3 and 4 above are worth detailed consideration by the ALRC as serious reform options for the *Copyright Act*. Open-ended, flexible exceptions have the best potential to incentivise content

Open-ended flexible exceptions are the best way to future-proof the Australian *Copyright Act* to work for the technologies of tomorrow as well as of today.

creation, reflect the public interest in appropriate non-remunerable access to content for the purposes of education and future-proof the *Copyright Act* in the interests of the Australian digital economy. The use of closed exceptions presents significant risks in terms of developing a robust legislative framework with the potential to maintain its relevance, coverage and technological neutrality over the course of several decades. The detailed discussion in Part 2 of the Schools' experience regarding, for example, s.28 and the Part VB statutory licence, provides extensive historical evidence in this regard (see Part 2.1.2 above).

After detailed consideration, the Schools believe that broader public policy considerations might lead to the ALRC expressing a preference for scenario 3 over scenario 4:

- The issues raised by Schools in relation to the problems experienced under technology-specific exceptions also apply to other stakeholders such as consumers, libraries, archives, museums and galleries, internet service providers, remote storage and 'cloud' service providers and almost any person or organisation who wishes to apply copyright exceptions

to new technologies

- In the Schools' view, an open-ended exception, applicable to all so long as a use is 'fair', is the option most likely to deliver the flexibility required to encourage innovative new uses for copyright materials. This is consistent with governmental innovation and digital economy goals, and also offers the environment that will best enable the education sector to comply with the policy goals of ensuring that Australian teachers and students are able to experience the educational benefits made possible by universal broadband and new technologies.
- As stated in Part 1.5, Australian classroom teaching and learning approaches are changing as technological innovations are adopted. These changes are illustrated in the Government's *Digital Education Revolution* and the new Australian National Curriculum, both of which encourage schools to engage in new, digital manners, not only with students but also with parents, families, and others, outside of the traditional school environment. These activities, while required by national digital education policies, may not be considered to be *directly* for the purposes of education, even though they may well be considered to be fair.

Scenarios 1 and 2 may still represent a degree of improvement on the status quo, in conjunction with the repeal of the statutory licences. However the Schools strongly believe that these scenarios would not best address the policy balance expressed in the terms of reference, ensure adequate and appropriate access to content for educational purposes, nor best position Australia as one of the world's leading digital economies, as envisaged by the National Digital Economy Strategy. We set out our thinking in relation to scenarios 1 and 2 in *Attachment 3A* of this submission.

3.1.1. Scenarios 3 and 4 – introducing an exception based on 'fairness'

Both scenarios 3 and 4 would deliver greater flexibility than currently exists in the Australian *Copyright Act*. They both would rely on a user undertaking an assessment of what is 'fair'.¹⁷¹ This assessment could be done by reference to a set of prescribed factors (such as in s.107 of the United States Copyright Law or s.40(2) of the Australian *Copyright Act*), or could be undefined and left to judicial determination (such as in fair dealing for parody or satire in Australia or s.29 of the Canadian *Copyright Act*).

The main differences between scenarios 3 and 4 are:

- Scenario 3 – economy-wide application (ie, anyone could rely on the exception) as long as the use is 'fair', with a prescribed, non-exhaustive list of fairness factors
- Scenario 4 – specific to the education sector (whether alone or in conjunction with other listed public interest purposes) with no defined fairness factors.

¹⁷¹ Question 52 in the Issues Paper asks whether an exception should be framed by reference to 'fairness', 'reasonableness' or 'something else'. The Schools believe that a provision based on 'fairness' would be the most consistent with Australia's own copyright system and international norms.

In what follows we set out the matters that the Schools have considered when weighing up the pros and cons of each of these reform options.

Defined fairness factors

Australia could draw on a number of models in introducing a fair dealing or fair use provision that included a non-exhaustive list of fairness factors.

The Copyright Law Review Committee (CLRC)

In its 1998 report *Simplification of the Copyright Act*, the CLRC proposed an open-ended exception that specifically referred to, but was not limited to the (then) existing fair dealing exceptions. The model proposed by the CLRC would address concerns expressed by some that replacing the existing fair dealing exceptions with a US-style fair use exception would lead to uncertainty. The CLRC described this model as “*akin to but more precise than the US fair use exception*”¹⁷² and said that it had the benefit of being “*sufficiently flexible to accommodate new uses that may emerge with future technological developments, but also provides enough detail to provide valuable guidance to both copyright owners and users.*”¹⁷³

While the model proposed by the CLRC was in some ways ‘akin’ to the US fair use exception, it was in one important respect narrower than the US exception in that it did not expressly refer to copying by educational institutions. This is not surprising: at the time that the CLRC was conducting its review, the Part VB statutory licence was, for the most part, working reasonably well. While it is true that Australian schools were at that time paying under the Part VB licence for uses that could be made without payment by US schools in reliance on fair use, the Schools submit that, as discussed in Part 2.2 of this submission, it was the extension of the Part VB licence to the digital environment, combined with the availability of access to data by the Schools that led to the majority of the problems raised in this submission.

If the CLRC model - or something like it - were adopted, it would be imperative to ensure that the words expressed a very clear legislative intention to the effect that the exception was intended to apply to copying by educational institutions (and not just their students).

The CLRC suggested the factors that are currently set out in s.40 of the *Copyright Act* should apply to the open-ended exception set out in its report.

¹⁷² CLRC Simplification Report para 6.10.

¹⁷³ Ibid, para 6.08.

These factors are:

- the purpose and character of the dealing;
- the nature of the work or adaptation;
- the possibility of obtaining the work or adaptation within a reasonable time at an ordinary commercial price;
- the effect of the dealing upon the potential market for, or value of, the work or adaptation;
- in a case where only part of the work or adaptation is [reproduced] the amount and; substantiality of the part copied taken in relation to the whole work or adaptation.¹⁷⁴

The United States

In the United States, the fair use exception (17 USC 107) is open-ended, but refers expressly to ‘teaching (including multiple copies for classroom use)’ as well as ‘scholarship or research.’ Schools and other educational institutions rely on this exception to copy for educational purposes. This includes copying of print and graphic works, broadcasts and other audio-visual works for classroom teaching and distance learning. As we discuss below in Part 3.1.1, in the context of copying for inclusion in an e-reserve, a US court has recently held that, as a general rule, copying of up to 10% of a work will satisfy the ‘amount and substantiality’ limb of the fairness test.

The US fair use provision requires the assessment of four factors:

- the purpose and character of the use, including whether such use is of a commercial nature or is for non-profit educational use
- the nature of the copyrighted work
- the amount and substantiality of the portion used in relation to the copyrighted work as a whole
- the effect of the use upon the potential market for, or value of, the copyrighted work.

The flexibility of the fair use exception in the US has in effect operated as innovation policy within the copyright system because it creates incentives to build innovative products, which yield complementary technologies that enhance the value of copyright works.¹⁷⁵ It has also enabled a more flexible recognition of the public interest in appropriate free access to information in the US education system.

Israel

In Israel, the fair use exception in s.19 of the *Copyright Act 2007* is open-ended but also refers expressly to “*instruction and examination by an educational institution.*” Schools and other educational institutions rely on this exception to copy for educational purposes. Guidelines

¹⁷⁴ The ALRC notes at paragraph 245 of the Issues Paper that the fairness factors set out in s.40 of the Act are based to a large extent from the principles derived from common law fair dealing cases.

¹⁷⁵ Fred von Lohmann, ‘Fair Use as Innovation Policy’, *Berkeley Technology Law Journal*, vol 23.1, 2008, cited in *Excepting the Future*, p40.

prepared by the higher education sector for the purpose of distributing works to students suggest that as a general rule, copying 'roughly one fifth' of a work, or one article in a periodical publication, will be 'fair.'¹⁷⁶

Section 19 of the Israeli *Copyright Act* requires an assessment to be made of:

- the purpose and character of the use;
- the character of the work used;
- the scope of the use, quantitatively and qualitatively, in relation to the work as a whole;
- the impact of the use on the value of the work and its potential market.

The Israeli *Copyright Act* also authorizes the Government to "make regulations prescribing conditions under which a use shall be deemed a fair use."¹⁷⁷ This is an interesting model which could be explored as a way of balancing the interests of flexibility and certainty often raised by commentators as the policy trade off to be made between a 'fair use' and 'fair dealing' system. For example, a model such as the Israeli implementation of fair use would enable the introduction of general fair use factors, but would still allow the Government to ensure certainty for certain public interest uses such as classroom performance and communication, format shifting, certain types of system-level technical copies and other uses which are considered to have a social benefit in deeming in advance to be fair.

The Philippines

In the Philippines, the fair use exception in s.185 of the *Intellectual Property Code* is open-ended but also refers expressly to "teaching including multiple copies for classroom use" as well as scholarship and research. Schools and other educational institutions rely on this exception to copy for educational purposes.¹⁷⁸ The Philippines and United States fair use factors are otherwise identical.

Singapore

A new flexible fair use provision (*clause III.35. Fair dealing in relation to works*), which was recently adopted in Singapore strongly echoes the fair use provisions of US copyright law. It is instructive to note that a recent economic study has found that the introduction of a fair use style provision has not had any detrimental economic effect in Singapore.¹⁷⁹ In fact, "a recent counterfactual impact analysis of the fair use policy in Singapore is correlated with higher growth rates in private copying technology industries while having a very limited impact on copyright industries."¹⁸⁰ This supports

¹⁷⁶ Niva Elkin-Koren et al, *Fair Use Best Practices for Higher Education Institutions: The Israeli Experience*, Journal of the Copyright Society of U.S.A., Forthcoming. This article can be found here:

http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1648408.

¹⁷⁷ s.19 of the *Copyright Act* 2007.

¹⁷⁸ s.185 of the *Intellectual Property Code* of the Philippines.

¹⁷⁹ Roya Ghafele and Benjamin Gibert, *The Economic Value of Fair Use in Copyright Law. Counterfactual Impact Analysis of Fair Use Policy on Private Copying Technology and Copyright Markets in Singapore*, Oxfirst Limited, October 2012, p3.

¹⁸⁰ *Ibid*, Abstract.

the Schools' contention that a more flexible fair use exception would benefit the Australian education sector without damaging creative industries.

South Korea

South Korea has also recently adopted a 'fair use'-style provision. Article 35-2 states "*...it shall be permissible to use works for purposes such as news reporting, criticism, education, or research which do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interest of the right holder*".¹⁸¹ Korea's fair use factors are identical to those of the US.¹⁸²

Ireland

In March 2012 the Irish Copyright Review Committee stated "*[i]t is clear...that there is nothing intrinsically or exclusively American about the fair use doctrine. It has found homes in other common law countries, and the UK would be among them if EU law permitted.*" The Schools submit that this observation is equally relevant to the ALRC's current examination of Australia's exceptions and statutory licences.

Comparing prescribed fairness factors

In determining which of the three sets of fairness factors set out above is most appropriate, at least the following matters are relevant:

Firstly, the US, Filipino and South Korean factors arguably privilege non-commercial and educational uses.

Secondly, unlike the US and Israeli factors, the CLRC's fairness factors require a court to have regard to the *possibility of obtaining the work or adaptation within a reasonable time at an ordinary commercial price*. On one view, this factor is merely a subset of the 'effect of the dealing on the market' factor that appears in the US and Israeli factors. However, treating it as a separate factor *may* lead a court to read this as a legislative direction to adopt a 'market failure' approach to determining fairness.

The Schools submit that a 'market failure' approach to the determination of what is a fair use/dealing with a work is not supported by policy principle, nor international jurisprudence. As such, care should be taken in considering whether to adopt the CLRC model in favour of a more general formulation of fairness as the basis for an open-ended exception.

In its submission to the CLRC Simplification review, Copyright Agency proposed that a remuneration scheme, akin to the Part VB statutory licence, should apply to *all digital copying* undertaken for the purpose of research or study. Copyright Agency submitted that the only rationale for the research and study fair dealing exception was that of market failure (ie, that it would be impractical to

¹⁸¹ Article 35-3 of the *Copyright Act* of Korea.

¹⁸² *Ibid.*

monitor and collect remuneration for this copying). It was argued that as digital technology now facilitated licensing, there was no longer a need for, or a rationale for, a free exception.

The CLRC did not agree with Copyright Agency's characterisation of a 'market failure' rationale for fair dealing. The CLRC referred to the Franki Committee's earlier rejection of the Copyright Agency proposal, and relied on the Franki Committee's statement that it was satisfied that "*as a matter of principle a measure of photocopying should be permitted without remuneration...to an extent which at least falls within the present limits of fair dealing.*"¹⁸³ The CLRC also referred to the preamble to the 1996 WIPO Copyright Treaty which it said:

*set out the international community's recognition of the need to '... maintain a balance between the rights of authors and the larger public interest, particularly education, research and access to information, as reflected in the Berne Convention...'*¹⁸⁴

The CLRC's analysis, based on the comments of the Franki Committee, suggest that the Franki Committee was *not* intending to introduce a 'market failure' test for determining fairness, when it recommended the inclusion of the s.40 fairness factors. On the contrary, the Franki Committee suggested that a certain amount of free copying for the purpose of research or study, within the limits of fairness, should be permitted 'as a matter of principle'.

It is significant that in two decisions this year considering the appropriate limits of unremunerated copying for educational purposes - one in Canada and one in the US - the courts have expressly rejected a market failure approach to determining whether copying by educational institutions is fair:

- In *Council of Ministers for Education v Access Copyright*,¹⁸⁵ the Canadian Supreme Court was considering the extent to which it was permissible for schools to copy works for distribution to students in reliance on the students' own fair dealing exception. The court was hearing an appeal against a decision of the Canadian Copyright Board in which the Copyright Board had determined that buying books for each student was a realistic alternative to teachers copying within fair dealing limits to supplement textbooks. The Supreme Court held that it was unrealistic to expect a school to buy sufficient copies for every student of every text, magazine and newspaper from which an excerpt was to be taken. Implicit in the court's reasoning in this case is that fair dealing is not just about market failure: ie, notwithstanding that Access Copyright was willing to grant a licence covering the uses in question, the court nevertheless determined that it was fair for schools to copy within certain limits without having to pay.
- In *Cambridge University Press v Georgia State University*,¹⁸⁶ the US District Court for the Northern District of Georgia was required to determine whether Georgia State University

¹⁸³ Ibid para 6.24. Emphasis added.

¹⁸⁴ Ibid para 6.27.

¹⁸⁵ *Alberta (Education) v Canadian Copyright Licensing Agency (Access Copyright)*, 2012 SCC 37.

¹⁸⁶ *Cambridge University Press et al v Georgia State University*, the decision can be found here: <http://www.tc.umn.edu/~nasims/GSU-opinion.pdf>.

could rely on the fair use exception for excerpts of works that had been uploaded onto a password protected e-reserve system to be accessed (viewed, downloaded, copied, etc) by students. The publishers in this case asked the court to find that where a commercial licence was available – even for a single page or paragraph of a work – unpaid uses could never be ‘fair’. GSU argued that fair use would become a meaningless exception if publishers could seek to override it by developing a licensing scheme that can charge users for a single page, paragraph etc. The court said that in cases where fair use factors one to three were in favour of an educational institution but factor four was against it (ie because a licence was available) it was necessary to consider (a) whether the failure of the educational institution to pay a licence fee for excerpts of this kind would create a disincentive for authors to create works and (b) whether it would lead to less works being made available. Having regard to these factors, the court decided that Georgia State University’s copying was fair, despite the publishers leading evidence to the effect they were willing to grant licences to cover the uses. Again, it is clear from this reasoning that the court rejected a pure market failure approach to determining whether a use was fair.

It also may be relevant that Australia has very little jurisprudence about the s.40(2) fair dealing factors, whereas there is an emerging body of jurisprudence interpreting the US fair use provision. There are also relevant guidelines created by educational institutions and sectors of the economy that provide significant additional guidance in terms of the industry practice that has developed in relation to assessing the fair use factors. On balance, this might suggest that, if the ALRC is considering an open ended provision that includes a list of fairness factors, it may be preferable for Australia to adopt factors similar to the United States fair use factors. This may provide a larger range of sources of guidance to Australians about the likely operation of any new open-ended provision.

3.1.2. Undefined fairness factors

An alternative model is to leave it completely to the courts to determine what factors are relevant to determining fairness in any particular case. This has been the an approach adopted in Australia (for example, the existing fair dealing exceptions for criticism or review, parody or satire or reporting the news in the Australian *Copyright Act*¹⁸⁷) and has recently been adopted in Canada. For example, the ALRC could recommend the introduction of an additional exception that applied to fair dealing for the purposes of education.¹⁸⁸

Canada

In a recent case, the Canadian Supreme Court held that schools can rely on the research and study fair dealing exception when a teacher copies works, within fair dealing limits, for distribution to students.¹⁸⁹

¹⁸⁷ See ss. 41, 41A, 42, 103A, 103AA and 103B of the *Copyright Act*.

¹⁸⁸ The Schools believe that if this option is to be preferred, there would be merit in condensing the existing set of fair dealing provisions so that one set of fair dealing provisions would apply to both works and subject matter other than works.

¹⁸⁹ *Alberta (Education) v Canadian Copyright Licensing Agency (Access Copyright)*, 2012 SCC 37.

The Canadian fair dealing provision was also recently amended to add new permitted purposes, including education, to the existing fair dealing purposes. Thus the provision now reads:

*29. Fair dealing for the purpose of research, private study, education, parody or satire does not infringe copyright.*¹⁹⁰

It is not yet clear the extent to which the addition of 'education' as a new permitted purpose in s.29 of the Canadian *Copyright Act* will permit educational uses in addition to those already permitted by the existing research and study exception. The new amendments seem to imply that there may be new, additional fair dealing 'educational' purposes permitted in addition to those covered by the existing 'research and study' purpose. As noted above, the Canadian *Copyright Act* does not contain any express guidance as to what factors are relevant to determining whether a particular use is 'fair': this is left to the courts. In a seminal decision in 2004 - *CCH Canadian Ltd. v. Law Society of Upper Canada*,¹⁹¹ the Canadian Supreme Court provided detailed guidance in this regard, which has continued to be relied on, most recently in the *Access Copyright* case.

Firstly, the court set out a non-exclusive six-factor analysis for determining whether a particular use was fair:

- the purpose of the dealing;
- the character of the dealing;
- the amount of the dealing;
- the nature of the work;
- available alternatives to the dealing;
- the effect of the dealing on the work.

Secondly, the court explained the nature of exceptions and their role in determining the proper balance between the rights of rights holders and users, stating that the fair dealing exception:

is perhaps more properly understood as an integral part of the Copyright Act than simply a defence. ...[t]he fair dealing exception, like other exceptions in the Copyright Act, is a user's right. In order to maintain the proper balance between the rights of a copyright owner and users' interests, it must not be interpreted restrictively.

More recently, in a series of cases handed down in 2012, the Supreme Court has re-affirmed that fair dealing is a 'user's right'.

For example, in the *Society of Composers, Authors, and Music Publishers of Canada (SOCAN) v Bell Canada*¹⁹² the court was required to consider whether a royalty was payable to SOCAN when an

¹⁹⁰ Amended by the Copyright Modernization Act 2012 (C-11).

¹⁹¹ *CCH Canadian Ltd. v. Law Society of Upper Canada* [2004] 1 S.C.R. 339, available here: <http://www.canlii.org/en/ca/scc/doc/2004/2004scc13/2004scc13.html>.

¹⁹² *Society of Composers, Authors and Music Publishers of Canada v. Bell Canada*, [2012] SCC 36. Available here: <http://scc.lexum.org/decisia-scc-csc/scc-csc/scc-csc/en/item/9996/index.do>.

online music store allowed a customer to download a 30-90 second audio preview of a song before deciding whether to buy. The court held that the use amounted to a fair dealing for the purpose of research. In determining fairness, the 'amount of the dealing' factor should be assessed based on the individual use, not the amount of the dealing in the aggregate. This was because fair dealing is a 'user's right'.

Similarly in the *Access Copyright* case, it was the amount copied for each user - ie each student - that was relevant when determining fairness, not the amount copied in the aggregate.

Following the introduction of the new fair dealing for education exception and the decision in the *Access Copyright* case, administrative bodies of educational institutions (including the Ontario Public School Board Association and the Association of Canadian Community Colleges) have issued model fair dealing policies¹⁹³ that provide guidance on the amount of works that schools and other educational institutions can use when relying on fair dealing. These guidelines are set out in *Attachment 3B*.

Singapore

By way of background, the Singapore *Copyright Act* includes:

- an open-ended fair dealing exception,¹⁹⁴
- an education specific exception that permits unremunerated educational copying of works within specified limits,¹⁹⁵ as well as an exception that permits unremunerated educational copying of broadcasts;¹⁹⁶
- an educational statutory licence that permits remunerated copying of works for educational purposes within specified limits.¹⁹⁷

The 'fair dealing' for education exception is contained in s.51 of the Singapore *Copyright Act*. It permits multiple copying and communication of an 'insubstantial part' of a work on an educational institution's premises for the purpose of a course of instruction provided by the institution. An 'insubstantial part' is defined as not more than 5 pages of a work, or not more than 5% of a work if there are more than 500 pages in the work. For digital works, the limits are expressed as 5% of the total number of bytes or 5% of the number of words.

Schools in Singapore can also copy broadcasts for educational purposes without remuneration. The educational broadcast copying exception in s.115 of the Singapore *Copyright Act* applies not only to the broadcasts, but also to underlying works etc. comprised in the broadcast.

¹⁹³ [Association of Canadian Community Colleges Fair Dealing Guidelines, Ontario Public School Board Association Fair Dealing Guidelines.](#)

¹⁹⁴ Section 35 Singapore Copyright Act.

¹⁹⁵ Section 51 Singapore Copyright Act.

¹⁹⁶ Section 115 Singapore Copyright Act.

¹⁹⁷ Section 52 Singapore Copyright Act.

United Kingdom Intellectual Property Office Consultation (IPO)

In its recent consultation on copyright, the UK IPO put forward for public consideration a proposal for a new educational copying regime whereby:

- schools would be permitted to rely on a fair dealing exception to make multiple copies of works for educational purposes; and
- copying of up to 5% of a work would be deemed to be fair.

3.1.3. Fair dealing provisions and deeming

The Schools do not believe that a quantitative based deeming provision should be included in an open-ended fairness provision for several reasons:

- quantitative provisions are difficult to use in practice in the digital environment. For example, calculating the number of bytes or words in a work can be difficult in practice, particularly where the content in question is being accessed via a mobile device or tablet, or where the content itself involves multimedia elements. It can also be difficult to calculate a portion of a work without making a copy of the entire work, which is both technically and theoretically problematic.
- quantitative provisions may work reasonably well for some literary, dramatic works and musical works, but are very difficult to apply for other categories of copyright subject matter. In an internet age, it is increasingly difficult to determine what is a work, let alone calculate a subset of that work with any precision.
- specified deeming provisions can in practice operate more as a 'ceiling' than a 'floor'. In other words, if a provision specifies that copying or communicating x% of a work is fair, even in circumstances where a fairness analysis is still technically possible for using a percentage of the work that is greater than x, in practice this can lead to confusion and a tendency to minimise the flexibility of an open-ended provision.

3.1.4. Assessing scenarios 3 and 4 – an open-ended provision or fair dealing for education?

As discussed above, both scenarios 3 and 4 would both achieve the result of ensuring that:

- Australian copyright laws would recognise that there is a strong public interest in permitting a limited set of core non-remunerable educational uses of copyright materials;
- educational copyright exceptions are not locked into specific educational practices or specific technologies, and can adapt to meet the challenges of new teaching methods enabled by technological advancement;
- The *Copyright Act* is more consistent with emerging international best practice, which will provide significant benefits for Australia's digital economy.

Schools believe that either of these scenarios, in conjunction with the repeal of the statutory licences and reliance on voluntary licensing arrangements, would solve the great majority – and perhaps all – of the issues identified in this submission. After some consideration however, from the perspective of broader public policy considerations, the Schools are inclined to recommend scenario 3 to the ALRC as our preferred option for reform.

The concerns identified by the Schools in this submission in relation to purpose-based exceptions and licences and the need for copyright laws to be responsive to developments in technology apply generally to all stakeholders and not just to the education sector. For example, exceptions that apply differently depending on the type of technology being used impede the use of digital technologies in schools, but also in libraries, homes and universities, and by digital content creators and entrepreneurs looking to start innovative businesses in Australia. This might suggest the generality of scenario 3 offers a better solution than the education-specific scenario 4.

Also, moving towards a principle based exception (eg scenario 3) rather than a specific purpose-based exception (eg scenario 4) would be consistent with the approach recommended by the Convergence Review, which recommended:

*a shift towards principles based legislation to ensure the policy framework can respond to the future challenges of convergence ... [a] principles based approach would provide increased transparency for industry and users [and] moves away from detailed 'black-letter law' regulation, which can quickly become obsolete in a fast-changing converged environment and is open to unforeseen interpretations.*¹⁹⁸

In the education context, the main difference between scenarios 3 and 4 seems to be that scenario 3 requires a 'one step' analysis and scenario 4 requires a 'two step' analysis. Consider the following example:

A school wants to assess whether a particular use is permitted under an open ended fair dealing provision.

Under scenario 3 – the school would need to assess whether the intended use was fair, by reference to the statutory factors and any relevant case law and industry guidelines.

Under scenario 4 – the school would need to assess whether the intended use was fair, by reference to case law and any industry guidelines and that the use had the required educational purpose.

In practice, for the majority of educational uses, there may be little difference between the analysis required by scenarios 3 and 4. However as discussed in Part 1.5 of this submission, schools are increasingly being required by national digital education policies to provide services (for example, to

¹⁹⁸ Convergence Review, Executive Summary at pxii. A move from a fair dealing exception to an open ended US-style provision was also recommended by the Joint Standing Committee on Treaties in its consideration of the Australia-United States Free Trade Agreement. See Joint Standing Committee on Treaties report on the Australia - United States Free Trade Agreement - Report 61, Recommendation 17. Available here: <http://trove.nla.gov.au/work/9771177>.

the community and students' extended families) that may go beyond traditional notions of education and/or educational purposes. This may present difficulties in the future if an exception is too narrowly linked to a particular educational purpose (see the discussion about this in Part 2.1 above).

The Schools submit that a use should be permitted if, when assessed against factors that balance the interests of rights holders and the intended use, it is fair.

The Schools believe that the ALRC's guiding principles 5, 6, 7 and 8 lead to the conclusion that scenario 3 (one, generally applicable, flexible fair dealing/use provision) would lead to better outcomes for all Australians than an exception that is limited to educational and other specified purposes. This appears to be the option that would best meet the ALRC's goal of reducing the complexity of copyright law, while ensuring that Australia's *Copyright Act* can respond to technological change and new uses of copyright materials by teachers, students, and more generally.

A generally applicable, open-ended exception would lead to more balanced copyright laws in the interests of all Australians

3.1.5. Moving to an open-ended exception - compliance with the three-step test

The ALRC has sought comment as to whether proposed reforms would comply with Australia's international law obligations, including the so-called 'three-step test' on limitations and exceptions in Article 9(2) of the Berne Convention. The Schools provide these comments to assess their preferred model of an open ended, flexible exception based on fairness.

The Schools submit that there is no requirement or limitation in Article 9(2) of the Berne Convention that would prevent Australia from adopting an open-ended exception based on fairness, whether this be a fair use style provision with a set of factors prescribed for judicial consideration, or a more general fair dealing provision that allows for the courts to determine their own fairness criteria based on case law.

Dr Martin Senftleben provides support for this view in his comprehensive study of the three-step test.¹⁹⁹ In an account of the negotiations that led to the three-step test, Dr Senftleben has shown that the three-step test was intended to reconcile the many different types of exceptions that already existed when it was introduced, and to be an abstract, open formula that could accommodate a 'wide range of exceptions'. Dr Senftleben says:

[a] comparison of the various observations made by the members countries elicits the specific quality of the abstract formula...due to its openness, it gains the capacity to encompass a wide range of exceptions and forms a proper basis for the reconciliation of contrary opinions.²⁰⁰

¹⁹⁹ Senftleben, *Copyright, Limitations, and the Three-Step Test: Analysis of the Three-Step Test in International and EC Copyright Law*, Kluwer Law International, 2004.

²⁰⁰ *Ibid.*

The Schools submit that it is also significant that in the many hearings leading up to the United States becoming a signatory to the Berne Convention, no concerns regarding fair use were raised by any of the WIPO and European copyright experts who took part. The then WIPO Director-General, Arpad Bogsch, said that the only aspect of the United States copyright law that made it incompatible with the Berne Convention was the notice and registration requirements that existed at that time.

²⁰¹ Fair use was not raised as a concern in this regard.

Finally, we note again that the preamble to the WIPO Copyright Treaty emphasises “*the need to maintain a balance between the rights of authors and the larger public interest, particularly education, research and access to information.*”

3.1.6. Moving to an open-ended exception – balancing flexibility and certainty

Much of the debate around whether an open-ended provision such as fair use is preferable to a set of more specific, purpose-based exceptions has revolved around the need to balance flexibility with certainty.

It seems to the Schools that the ‘flexibility v certainty’ debate in Australia has been based on some assumptions that Schools believe are not now correct, even if they may have been in the past, ie, that a set of purpose based exceptions and statutory licences create an environment of greater certainty than an environment characterised by an open-ended flexible exception. In the Schools view this traditional view is not correct.

In the Schools’ experience, the existing *Copyright Act* arrangements are *highly* uncertain. The recent *Optus TV Now* litigation is an excellent example of the uncertainty that can arise from a stand-alone purpose based exception. In an educational context, almost 7 years after the 2006 amendments, the Schools and Copyright Agency are still disagreeing over the interpretation of s.28. It took a Copyright Tribunal case and legislative reform to clarify whether the Part VB licence applied to a student reading from the internet. Other aspects of the Part VB licence remain unclear even 12 years after the Digital Agenda reforms, such as the meaning of ‘separately published’ in the digital environment. Indeed, it can even be unclear what should be considered a ‘work’ in an internet age. For example, the Schools and Copyright Agency spent long periods debating whether use of an interactive website where primary school students moved a snail into the correct location for a full stop in a sentence should be remunerable under Part VB.²⁰²

Attachment 3C shows a graphic representation of the practical differences between the copyright laws that apply to schools in Australia, the United States and Canada. It highlights the way in which the majority of core teaching activities are automatically remunerable in Australia, while these same uses may amount to fair dealing/fair use in Canada and the US. The Schools believe that this places Australian schools and students at a disadvantage internationally, and suggests that the

²⁰¹ William Patry, The Party Copyright Blog, ‘Fair Use, the Three-Step Test, and the Counter-Reformation’, available here: <http://williampatry.blogspot.com.au/2008/04/fair-use-three-step-test-and-european.html>.

²⁰² Roy: tale of a Singing Zebra, The Full Stop Game, available here: <http://www.roythezebra.com/reading-games/full-stop-beginner-1.html>.

balance struck in the Australian *Copyright Act* does not adequately recognise the public interest in allowing limited free uses of copyright materials for educational purposes.

Schools submit there can also be a trade off between certainty and flexibility. Certainty is of very little use to the education sector where the only certainty available is that teachers *cannot* use new technologies because purpose based exceptions do not apply to it, or that it is certain that any new use must be remunerable under the statutory licence,

Uncertainty about whether teachers can use a new technology is better than certainty that they can't.

irrespective of whether that use would otherwise be considered 'fair' to copyright owners. The Schools submit that the government's broader digital economy and digital education goals would be better served if there were some core educational uses of copyright materials that were considered to be free in the public interest, even if it is initially unclear where the boundaries of those uses lie, rather than the current default situation: namely, that the majority of educational uses must be paid for, no matter how technical or incidental, and irrespective of whether the copyright owner expects remuneration from any other type of user.

The Schools are aware that the recommendations in this paper represent significant changes to the status quo. It is also clear that there would be initial uncertainty caused by *any* significant change to the *Copyright Act*. The Schools have considered these issues at a system-wide level over almost a 12-month period and do not make these recommendations lightly. We believe that a cost-benefit analysis of this issue leads to a clear result – the longer-term benefits of an open-ended flexible exception would clearly outweigh the costs incurred by any initial uncertainty caused by this change.

3.2. Voluntary licensing

As discussed in the introduction to Part 3, the Schools do not suggest that all copying that is currently paid for in Australian schools would – or should - be free. Many uses of copyright materials would continue to be paid for. It is envisaged that Copyright Agency and Screenrights would still exist to

Schools are not arguing that all uses of copyright materials in Australian schools should be free. Voluntary licences (either direct or collectively administered) are a more efficient way of ensuring that creators will still be paid for appropriate educational uses of their materials

facilitate voluntary licences and that the Schools would continue to operate to negotiate blanket voluntary licences on behalf of Australian schools. The Schools are simply arguing that it is more efficient for the education sector and copyright owners alike to have all uses of copyright materials that are not covered by an open-ended exception to be paid for under voluntary licensing arrangements than the current system of statutory licensing.²⁰³

For the reasons that we have set out in Parts 2.2 and 3.1 of this submission, the Schools strongly believes that an educational copying regime based on a set of core, non-remunerable public interest uses supported by voluntary licences would be considerably more suitable, efficient and fair than the current regime for the digital environment.

It is certain that under whatever model replaces the existing statutory licences, Australian schools will continue to deal directly with rights holders (either directly or through collecting societies), for all uses that are not covered by and/or exceed the limits of any new flexible exception. This may include situations where schools wish to copy in excess of amounts that would be considered 'fair' under an exception, or for purposes that would not themselves be considered 'fair'.

Australian schools currently enter into voluntary licences for school use of some sound recordings, musical works and cinematograph films. In our experience, in comparison to the statutory licences, these voluntary licence negotiations with music collecting societies and film copyright owners such as Roadshow Public Performance Licensing are more efficient and simpler to negotiate in the absence of the overly prescriptive and technical requirements of the statutory licence. In large part, the Schools submit this is due to schools' ability to seek a commercial rate for the educational uses they view as necessary or desirable, without the presumption that a licensing arrangement must proceed, pursuant to a statutory requirement that all uses in schools must be separately accounted for and remunerated. For example, in the Schools' agreement with music collecting societies, it was possible to negotiate a commercial rate for a licence that allows schools to store musical works and sound recordings on a school intranet server,²⁰⁴ without entering into technical discussions and

²⁰³ The education sector would in this way be similar to other volume users of copyright materials who negotiate voluntary licences, such as pubs and clubs, radio and television broadcasters and the fitness industry.

²⁰⁴ As long as certain conditions are met.

survey/record keeping requirements about the number of copies and communications that might entail on a practical basis when a variety of technologies are used to access that stored music by teachers and students. This is in stark contrast to the highly complex and burdensome administrative and technical issues required to be taken into account in similar negotiations under statutory licences.

Australian schools don't want a free ride – we simply want a fair ride.

Negotiating on a voluntary basis for uses not covered by exceptions is the norm in jurisdictions comparable to Australia, including the United States, the United Kingdom, New Zealand and Canada. In this regard, it may be instructive to note financial data comparisons between Australia and jurisdictions that combine a fairness exception with a residual voluntary licensing scheme, such as those referred to in Part 2.2.3 above.

The matters that led the Franki Committee to recommend the Part VB statutory licence no longer apply. In the era of photocopying, the statutory licence may have provided an efficient model to ensure that rights holders were compensated for lost sales arising from copying of their works. That model is no longer fit for purpose in the digital environment. It has led to Australian schools being completely out of step with schools in comparable jurisdictions and paying to use content for educational purposes that no one else in the world is paying to use.

3.3. Conclusion of Part 3

The issues raised in this submission have been carefully considered by the Schools since Government first signalled an ALRC copyright reference almost 12 months ago. The Schools acknowledge that these are significant recommendations for reform, and they are not made lightly.

This submission should be read as a strong statement on behalf of every Government school in Australia, and the vast majority of non-Government schools, that the current system for educational copyright use in Australia, based on statutory licensing, is broken beyond repair and must be replaced with a more modern and fair system.

The current system, based on statutory licences, is broken beyond repair. Australia must move to a fairer and more modern system that is suitable for the digital age

The Schools' position can be summarised as follows:

1. Statutory licensing is completely broken and Parts VA and VB of the *Copyright Act* should be repealed.
2. The *Copyright Act* should be amended to repeal the existing educational exceptions and replace them with either:
 - a general open-ended provision based on a fairness analysis, that could apply to all users of copyright materials (scenario 3 described above);
 - or
 - a new fair dealing exception for education (scenario 4 described above) - this could either be a standalone exception such as a new 'fair dealing for education' added to Australia's existing fair dealing exceptions, or added in conjunction with other designated fair dealing purposes (similar to the new Canadian fair dealing exception).
3. On balance, the Schools believe that a general open-ended provision would better meet the policy considerations set out in the ALRC's guiding principles than a 'fair dealing for education' provision.
4. A flexible exception applicable to educational uses of copyright material would:
 - recognise the core public interest in ensuring some appropriate non-remunerable educational uses of copyright materials for the benefit of Australian students;
 - remedy the problems identified in Part 2.2 of this submission regarding the illogical outcomes that result from technologically-specific statutory licences and exceptions which can operate as a disincentive or penalty on the use of the best practice educational methods permitted by new technologies (and indeed encouraged and/or required by government policy);
 - future-proof the *Copyright Act* for the digital economy, to ensure that Australian teachers can continue to deliver the educational benefits made possible by the digital economy to Australian students;
 - make Australia's copyright balance in relation to public interest educational uses of copyright materials consistent with emerging international philosophies regarding the benefits of flexible exceptions to the digital economy;
 - ensure that Australian schools are no longer disadvantaged when electing to use new technologies in teaching, and are no longer paying for uses of copyright materials that comparable countries recognise should be permitted in the public interest.
5. Introducing a new flexible exception does not mean that all educational uses of copyright materials would be free. Many uses that are currently paid for under statutory licence would continue to be paid for under voluntary licensing arrangements (either directly with copyright owners or collectively through blanket licence arrangements).

6. Replacing statutory licensing with voluntary licensing will bring significant efficiency gains, from the perspective of copyright creators, the education sector and the economy as a whole.
7. Repealing the statutory licences and moving to a system of a flexible fair dealing/fair use exception supported by direct and collective voluntary licensing is the best way to incentivise continued innovation in the creation of educational content and its use in the Australian school system.
8. Reform is required to the governance arrangements for Australian collecting societies to ensure that the existing flaws in governance are not replicated in the new framework.

Attachment 3A

Scenarios 1 and 2 – purpose based exceptions and expanding s.200AB

This attachment sets out the Schools analysis as to why these scenarios should be rejected by the ALRC as reform options.

Scenario 1 – additional purpose based exceptions only

After detailed consideration, the Schools have determined that scenario 1 is not an appropriate option for reform of the educational copying regime in the digital environment.

Open-ended exceptions are more flexible than purpose-based exceptions

The unsuitability of a set of closed exceptions (in the absence of any open-ended, or flexible exception) is currently the subject of widespread discussion in jurisdictions such as the UK that are bound by the EU Copyright Directive. In his review of UK copyright law, Professor Ian Hargreaves expressed regret that EU law did not, according to advice that he had received, permit the UK to introduce open-ended exceptions. Professor Hargreaves said that under the European approach to exceptions - which confines exceptions to a closed list of categories - “*new kinds of copying which have become possible due to advancing technology are automatically unlawful.*”²⁰⁵

While Professor Hargreaves did recommend the introduction of a number of new purpose-based exceptions to copyright, he clearly saw this as a ‘second best’ option, and one that he only recommended due to concerns that EU law did not permit the introduction of open-ended exceptions. Professor Hargreaves urged the UK Government to

*explore with our EU partners a new mechanism in copyright law to create built-in adaptability to future technologies which, by definition, cannot be foreseen in precise detail by today’s policy makers.*²⁰⁶

Similar considerations are ongoing in Ireland and the Netherlands.²⁰⁷

As we set out above, Australia is not faced with the obstacle that faces policy makers in jurisdictions bound by the EU Copyright Directive. Nor, in the school’s view, does the three-step test stand in the way of Australia adopting open-ended exceptions.

The Schools submit that narrow, purpose-based exceptions can create as many problems as they solve. Any change in technology, or in teaching practice, has the potential to result in uses that ‘creep’ beyond the boundaries of existing exceptions. As a result, schools (and other users) would be required to engage in further rounds of advocacy and law reform. Around the world, there is

²⁰⁵ Digital Opportunity: A Review of Intellectual Property and Growth (the Hargreaves Review) p43.

²⁰⁶ Ibid p47.

²⁰⁷ <http://www.rnw.nl/english/article/loosen-copyright-law-says-dutch-government>.

overwhelming recognition of the shortcomings of specific purpose-based exceptions in a rapidly developing technological environment.

Combining purpose-based exceptions with open-ended exceptions?

The Schools understand that some stakeholders may still see the need for some purpose-based exceptions in the *Copyright Act* as a means of achieving some degree of certainty.

The Schools believe that if any purpose-based exceptions are retained, it will be critical that they be accompanied by a more open-ended or flexible exception. It will also be essential to ensure that any purpose-based exceptions should be considered to be 'minimum permitted uses', and that the existence of a specific exception (for example, for playing a sound recording to students in a classroom or via distance education) would not prevent reliance on an open-ended exception in the case of a different use of the same type of copyright subject-matter permitted by the closed exception (for example, it should be possible to format shift a sound recording in appropriate and fair circumstances even when another exception exists which would permit playing a sound recording in class).

An example of such a model is the purpose-based library and educational copying exceptions contained in ss. 108 and 110 of the United States Copyright Law, which operate as 'safe harbours', or prescribed minimum standards of acceptable use, for libraries and educational institutions but do not preclude new or additional uses being considered to be 'fair' under s.107 (the fair use provision).

Scenario 2 – amending s.200AB to include additional purposes or uses

As we discuss in Part 2.1 of this submission, s.200AB has failed to live up to the cautiously optimistic expectations that the education sector had for this exception when it was introduced in 2006. The exception has been of limited use to schools. Reasons for this include:

- More than six years after the exception was introduced, there remains a very high degree of uncertainty as to how it would be applied
- The specific implementation of the three-step test adopted in s.200AB has added an unreasonable degree of complexity for schools wishing to rely on the exception
- The exception appears not to permit schools to use works in ways that would most likely be considered 'fair' if analysed according to a United States fair use analysis or a fair dealing analysis such as in Canada or more generally in Australia.

The Schools do not consider that s 200AB is capable of addressing the needs of education sector users in the digital environment. For the reasons set out in Part 2.1 of this submission, the Schools urge the ALRC to reject any suggestion that s.200AB should be used as a model for any flexible or open-ended exception in the Australian *Copyright Act*.

Attachment 3B

Canadian Fair Dealing Guidelines for Education

Guidelines have recently been released by the Association of Canadian Community Colleges and the Ontario Public School Board Association.

Those guidelines state:

- 1 *Teachers, instructors, professors and staff members in non-profit educational institutions may communicate and reproduce, in paper or electronic form, short excerpts from a copyright-protected work for the purposes of research, private study, criticism, review, news reporting, education, satire and parody.*
- 2 *Copying or communicating short excerpts from a copyright-protected work under these Fair Dealing Guidelines for the purpose of news reporting, criticism or review should mention the source and, if given in the source, the name of the author or creator of the work.*
- 3 *A single copy of a short excerpt from a copyright-protected work may be provided or communicated to each student enrolled in a class or course:*
 - a. *as a class handout*
 - b. *as a posting to a learning or course management system that is password protected or otherwise restricted to students of a school or postsecondary educational institution*
 - c. *as part of a course pack*
- 4 *A short excerpt means:*
 - a. *up to 10% of a copyright-protected work (including a literary work, musical score, sound recording, and an audio-visual work)*
 - b. *one chapter from a book*
 - c. *a single article from a periodical*
 - d. *an entire artistic work (including a painting, print, photograph, diagram, drawing, map, chart, and plan) from a copyright-protected work containing other artistic works*
 - e. *an entire newspaper article or page*
 - f. *an entire single poem or musical score from a copyright-protected work containing other poems or musical scores*
 - g. *an entire entry from an encyclopedia, annotated bibliography, dictionary or similar reference work*
- 5 *Copying or communicating multiple short excerpts from the same copyright-protected work, with the intention of copying or communicating substantially the entire work, is prohibited.*
- 6 *Copying or communicating that exceeds the limits in this Fair Dealing Guidelines may be referred to a supervisor or other person designated by the educational institution for*

evaluation. An evaluation of whether the proposed copying or communication is permitted under fair dealing will be made based on all relevant circumstances.

- 7 Any fee charged by the educational institution for communicating or copying a short excerpt from a copyright-protected work must be intended to cover only the costs of the institution, including overhead costs.*

These guidelines reflect the reasoning of the Supreme Court in the CCH and Access Copyright cases. The Schools submit that such considerations may also be relevant to a consideration of 'fairness' if the ALRC was minded to recommend a general exception of fair dealing for education.

Attachment 3C

Certainty versus Flexibility

Practical differences between copyright laws in Australia, Canada and USA

This table uses a ‘traffic light’ analysis to compare the situation in Australia (where most uses are automatically remunerable) with the situation in Canada and the US, where these same uses will often amount to fair dealing/fair use.

In preparing this table, we have had regard to Canadian²⁰⁸ and US²⁰⁹ case law on fair dealing/fair use. We have also had regard to guidelines that have been prepared to assist US and Canadian teachers to determine whether a particular use is fair.²¹⁰ We acknowledge that the fair dealing/fair use analysis involves weighing up certain factors, including the amount copied and the nature of the work. The point of this table is not to suggest that uses that are remunerable in Australia would automatically be treated as ‘fair’ in Canada or the US. Rather, the point of the table is to illustrate the way in which uses that are automatically remunerable in Australia may amount to fair dealing/fair use in these comparable jurisdictions.

Red = Remunerable, Orange = May be fair dealing/fair use and Green = Probably fair dealing/fair use

Scenario	Australia	Canada	USA
Teacher wants to copy 1 chapter of a book for inclusion in a set of class materials (30 copies).	Red	Green	Green
Teacher wants to scan 1 chapter of a book and place it on a password protected content repository and limit access to a specific classroom.	Red	Green	Green
Teacher wants to copy an entire poem or short story (from a work containing other poems or short stories) for in-class handout (30 copies).	Red	Green	Green
Teacher wants to copy an extract of text as well as images from a freely available website and email to students to read in preparation for class.	Red	Green	Green
Teacher wants to copy an extract of text as well as images from a freely available website to display on the class’ interactive whiteboard as well as hand out in class (30 copies) to use in the lesson.	Red	Green	Green

²⁰⁸ Alberta (Education) v. Canadian Copyright Licensing Agency (Access Copyright), 2012 SCC 37

²⁰⁹ Cambridge University Press et al. v. Patton et al., 1:2008cv01425

²¹⁰ http://copyright.cornell.edu/policies/docs/Fair_Use_Checklist.pdf,
http://www.opsba.org/index.php?q=federal_issues/changes_to_copyright_law_have_financial_and_policy_implications_for_member_boards; http://www.michaelgeist.ca/component/option,com_docman/task,doc_download/gid,116/

Teacher wants to make multiple copies of an out of print book for students. The book was written in 1972, and the author died in 1995. The teacher is unable to locate current contact information for the publisher, but can find cheap second-hand copies.			
School wants to copy a book in its entirety to add to its library. The book is out of print in hardcopy. It is commercially available as an eBook but sales are restricted to individuals, not companies or institutions.			
School has purchased a book which comes with a CD audio recording of the book. School wants to format shift the recording to MP3, to enable students to access the recording from school laptops that don't have CD-ROM drives. An MP3 version is not commercially available.			
Teacher wants to scan pages from textbooks to use in their lessons via an interactive whiteboard.			
School library wants to copy thumbnail images of books from the internet for use in online library catalogue.			
School wants to scan a full copy of an English text onto a password protected school intranet and make it accessible to all teachers teaching that text. Teachers would grant students access to extracts of that text as required for their particular class. Once a class finishes the lesson involving the text, the material would no longer be accessible by students.			
School wants to hold 'talent quest', where students recite or perform poems, musical numbers, and excerpts of plays and stories, for parents/community, in a non-profit school concert.			
Teacher wants to copy short extracts of music from a CD that the teacher personally owns to include in a PowerPoint teaching resource.			
As part of a homework assignment, a teacher wants to place an electronic presentation that has copyrighted background music included in it onto a password protected intranet with access limited to students in the class.			
Teacher wants to make a recording of a student performance of a musical or literary work, for evaluation or rehearsal purposes			

School wants to copy parts from an old original score borrowed from another school that cannot be obtained commercially.			
Teacher wants to record a specific TV or radio news program for use in class.			
Teacher wants to copy a recorded TV/radio program (30 times), for distribution to students as part of an in-class assignment.			
Teacher wants to make one copy of a quiz from a student textbook to place on the school's password protected intranet for students to access as an assignment to be completed and turned in online.			
School wants to format shift a collection of recorded TV broadcasts, for uploading to a school's content management system. Students will only have access to a broadcast when a specific broadcast is needed for a particular lesson. Once the lesson is completed, access will be removed.			
Teacher wants to make a compilation of short television clips (clips from tv broadcasts, programs, news programs, etc.) to show to her class as part of a course of instruction.			
Teacher wants to post the full text of a newspaper article on to the classroom's password protected wiki for students to download, read and complete an assignment regarding. The article will only be accessible to the students in the course			
Teacher wants to copy one article from a periodical to hand out in class (30 copies).			
Teacher wants to play an entire song as part of a course of instruction. The song is an educational song that the teacher purchased online.			
Teacher borrows an audio CD from a friend in order to make a copy of a track just in case the track may be helpful during the school year for the purpose of constructing aural exercises or examinations.			
Teacher wants to re-arrange a purchased score, to edit or simplify the work appropriately for students to perform.			

PART FOUR - OTHER ISSUES OF CONCERN TO AUSTRALIAN SCHOOLS

In this Part the Schools address seven additional issues:

1. The interaction of copyright exceptions, contract and technological protection measures
2. The copyright implications of the Convergence Review
3. Some specific issues for schools in relation to orphan works
4. The emerging importance of cloud computing to the education sector
5. Considering a transformative use provision, and assessing whether it should be confined to non-commercial uses
6. Considering the impact of 'temporary communications' in a digital age
7. Some thoughts on the approach Australia should be taking to copyright issues in international fora.

4.1. Copyright, Contract and Technological Protection Measures

In the digital era, where every use of a copyright work is likely to involve an exercise of at least one of the exclusive rights of a copyright owner, uses that previously involved no act of copyright (such as reading) are now able to be controlled by the rights holder, not only through copyright laws but also through the use of contract and technological protection measures (TPMs). Both can be used to restrict the public's access to and use of works.

Copyright exceptions are essential to the public interest and should not be able to be excluded by operation of contract or TPM

As the Schools have submitted above, copyright exceptions are fundamental to maintaining the copyright balance by ensuring that the public interest is served and that Australian students have access to the educational materials they need to learn. However, as copyright law currently stands, copyright owners are able to use both contracts and TPMs to attempt to override copyright exceptions.

The Schools submit that there is very little point in a digital age in ensuring copyright exceptions allow free use of copyright materials if contracts and TPMs are capable of overriding those exceptions, making them impossible to use. Any limitation on copyright exceptions, either by means of contract or TPMs, interferes with the public interest balance that copyright exceptions are supposed to protect.

The House of Representatives Standing Committee on Legal and Constitutional Affairs (LACA) stated this point clearly in 2006:

*[t]he widespread use of exclusionary or limiting agreements, particularly when presented to copyright users as a virtual fait accompli in the form of end user licence agreements, could easily render the very concept of permitted exceptions meaningless.*²¹¹

4.1.1. Copyright and Contract

The Schools submit that it is imperative that the *Copyright Act* be amended to ensure that exceptions - including any new exceptions introduced as a result of this review - be protected from being overridden by contract. The exceptions are fundamental to defining the boundaries of the grant of copyright. They provide certain *public* benefits, determined by democratic means. It should not be open to rights holders to rely on private contracts to override those public benefits and to rewrite the copyright balance that Parliament has deemed appropriate.

In 2002 the CLRC concluded that on the basis of academic commentary, evidence provided by submitters and its own investigations, that agreements were being used to exclude or modify copyright exceptions. The CLRC found that, should those agreements be enforceable, *“there would be a displacement of the copyright balance in important respects.”*²¹²

The CLRC felt that the question of whether agreements that purport to exclude or modify copyright exceptions are enforceable was not settled in domestic law. However due to the displacement of the copyright balance that could occur if such agreements were enforceable, the CLRC recommended that the law be clarified to ensure that provisions in contracts cannot be used to override the copyright exceptions granted to users by the *Copyright Act*.²¹³

The issue of ‘copyright and contract’ was also recently considered in the United Kingdom. The Hargreaves report recommended that the UK government should also legislate to ensure that copyright exceptions are protected from override by contract.²¹⁴

The Schools submit that there is even more evidence that contractual terms are intentionally being used to modify and exclude exceptions and statutory licences in 2012 than there was in 2002. The issue of copyright and contract remains a critical issue in 2012 and will continue to increase in importance as the volume of content made available in digital form continues to grow. The Schools urge the ALRC to recommend that the *Copyright Act* be amended to ensure that existing exceptions and any new exceptions that may be implemented as a result of this review be given their full operation by ensuring that any provisions in agreements have no effect to the extent they purport to limit or exclude copyright exceptions.

²¹¹ House of Representatives Standing Committee on Legal and Constitutional Affairs *Review of technological protection measure exceptions* February 2006, p135. The Committee recommended (in the context of exceptions to the TPM provisions) that copyright laws nullify any agreements purporting to exclude or limit the application of permitted exceptions under the liability scheme (Recommendation 33).

²¹² Copyright Law Review Committee, *Copyright and Contract* (2002), p142.

²¹³ *Ibid*, p10. Recommendation 7.49 listed a number of exceptions the CLRC identified as critical to the copyright balance and should not be excluded by contract. The Schools submit that in a digital age it is essential that all exceptions in the *Copyright Act* be able to operate free from attempts to limit or exclude their operation by contractual means.

²¹⁴ *Ibid*, p8.

4.1.2. 'Copyright and contract' in practice

The ALRC's issues paper requests information about current practices in the marketplace concerning contracts and licensing, in particular issues arising in relation to online mass-market contracts that appear unfair or invalid because the drafting party imposes the terms – including in relation to the operation of copyright exceptions.

The Schools would like to provide two examples of where contracts or terms and conditions have an impact on the operation of educational exceptions or statutory licences:

- agreements or conditions that purport to impede or exclude the operation of exceptions or statutory licences; and
- terms and conditions which purport to claim remuneration under statutory licences in circumstances where the material would otherwise be free to use.

Agreements that impede or exclude exceptions or statutory licences

Many common sources of digital materials include terms and conditions that make it unclear whether teachers are permitted to rely on the educational exceptions in the *Copyright Act*. For example, the Kindle Store Terms of Use states that access to Kindle content is “solely for your personal, non-commercial use.”²¹⁵ It is unclear whether this licence would extend to a teacher displaying content from an e-Book purchased through the Kindle Store on an interactive whiteboard via a Kindle reading app installed on a laptop.

Similar considerations apply to content purchased from the iTunes store. The NCU's Smartcopying website provides this advice to teachers and schools wanting to know whether they can use content purchased from iTunes in Australian schools:

*[w]hen buying digital content from online stores, such as the iTunes store, you must agree to the store's Terms of Use. For example, the iTunes Terms of Use state that products purchased from the store can only be used for 'personal, non commercial use'. This expression may not include 'educational use'. As a result, it is unclear whether the store's contract itself prohibits the educational use of content purchased from the iTunes Store.*²¹⁶

It is unclear whether the iTunes terms of use would prevent a school from relying on s. 200AB, which is the flexible dealing exception, to use music purchased from iTunes on content repositories. There is a risk that a school might be said to be in breach of contract if it copies music downloaded from an online store such as iTunes. However, a school would not infringe copyright if the s. 200AB exception set out in the *Copyright Act* applied.²¹⁷

²¹⁵ Amazon Kindle Store Terms of Use, September 6 2012, available at:

http://www.amazon.com/gp/help/customer/display.html/ref=hp_200699130_storeTOU1?nodeId=201014950.

²¹⁶ Smartcopying fact sheet *Digital Sound Recordings (iTunes and other digital music stores)*, available at:

<http://www.smartcopying.edu.au/scw/go/pid/1037>.

²¹⁷ Ibid; see also Smartcopying information sheet on “Using iTunes in Schools”, available here:

http://www.smartcopying.edu.au/scw/go/cache/offonce/pid/1049/ctnscroll_guidelinesContainer/1_1.

Due to the legal uncertainties caused by the iTunes terms of service, the NCU advises schools to consider relying on free iTunes content instead of materials purchased via the iTunes store, as no contract is required to access this content. See the following extract from the Smartcopying fact sheet *Using Free iTunes Content*:²¹⁸

*The iTunes store contains a variety of **free** content. This includes music, TV shows, films, podcasts and applications. This content can be streamed direct from the iTunes store or downloaded into your iTunes player without payment and used for educational purposes. A user is not required to accept the iTunes Terms of Use when downloading free content. As a result, it is unlikely that the iTunes Terms of Use will be claimed to affect how the content can be used. Teachers should try to use free iTunes content instead of purchased iTunes content wherever possible to minimise the risk that they are breaching the conditions of use.*²¹⁹

Resolving the 'copyright and contract' issue to ensure exceptions can continue to operate as intended in the digital environment is therefore in the interests of copyright owners as well as the Schools, as in order to ensure legal certainty it is safer from a legal risk perspective for teachers to access free iTunes content rather than purchase material through the store.

Terms and conditions used to assert reliance on statutory licences when materials are clearly intended to be free

Contracts or website terms and conditions can also be used to undermine open access initiatives and even prevent schools from taking advantage of free for education initiatives.

For example, in December 2011, the Minister for Broadband, Communications and the Digital Economy and the Minister for School Education, Early Childhood and Youth announced \$19.4 million funding for a new online education portal ('ABC Splash') to be developed by the ABC and Education Services Australia (ESA).²²⁰ The media release announcing the project states that the resource is a "free, public, online portal that provides students, families and teachers with access to an extensive library of educational content and services for use in classrooms and homes across Australia".²²¹

However the terms of the use of the site (the "House Rules") provide that:

The vast majority of content on this site is provided free for educational use however it is important for you to know that some video and audio which can be downloaded attracts Screenrights' fees. This will be covered by schools' existing Screenrights agreements and will not apply to home use. All other content, including streamed video and audio, images, text documents do not attract Screenrights and CAL (Copyright Agency Limited) fees.

²¹⁸ Ibid.

²¹⁹ We note the iTunes store now also includes books and other text works also

²²⁰ The portal is now publicly available at <http://splash.abc.net.au/>.

²²¹ http://www.minister.dbcde.gov.au/media/media_releases/2011/299. See more information on the ABC/Education Services Australia Educational Portal Project at <http://splash.abc.net.au>.

*ABC Splash is exempt from some Australian statutory licences - ABC grants permission for free educational use of all content in ABC Splash where such uses might otherwise attract fees under the Copyright Act Part VB (CAL) statutory licences.*²²²

This means that in practice the resource will not be completely free for education when used in Australian schools, despite the clear intentions of the Government in announcing this project (and contributing over \$19 million in public funds). Although the ABC has made some content free under the Part VB licence, it reserves rights to remuneration for some video and audio content under the Part VA licence. This means that increased usage by teachers of this supposedly 'free for education' resource may over time lead to significantly increased remuneration under the Part VA licence. It is also not clear from the ABC Splash website how to assess which video and audio content will be considered remunerable under Part VA in order for the Schools to implement smart copying strategies to reduce these costs.

4.1.3. Copyright and Technological Protection Measures (TPMs)

The concerns we have outlined above in relation to contracts apply equally to the use of TPMs to prevent users from exercising rights granted by an exception in the *Copyright Act*.

In its review of the anti-circumvention regime in Article 17.4.7 of the Australia - United States Free Trade Agreement, the LACA Committee recognised the importance of both ensuring adequate exceptions to the TPM provisions in the *Copyright Act* and ensuring that such exceptions could not be excluded by contract.²²³ We note that in its response to the LACA Report, the Government indicated in principle support for these recommendations, and specifically recommendation 33 in relation to agreements that purport to exclude or limit the application of permitted exceptions under the liability scheme:

*[t]he Government accepts this recommendation in principle. The Committee's discussion of this issue will also be of assistance when the Government responds to the Copyright Law Review Committee's report on Copyright and Contract.*²²⁴

While we note that the question of further exceptions to the anti-circumvention regime is outside the scope of the ALRC terms of reference, the Schools are greatly concerned by the extent to which the use of TPMs has adversely impacted the ability of users to exercise their rights. Specifically in the context of education, TPMs prevent the Schools from using the s.200AB flexible dealing exception to format shift materials for educational purposes.

The Schools have raised with the Government over many years the impact of the TPM provisions on the ability of Australian schools to rely on exceptions granted by the *Copyright Act*. This issue has been particularly acute in relation to the ability to format shift legitimately acquired DVDs to enable

²²² <http://splash.abc.net.au/house-rules>.

²²³ LACA Committee, Recommendation 33.

²²⁴ Government response to the House of Representatives Standing Committee on Legal and Constitutional Affairs Report "Review of Technological Protection Measures Exceptions" in response to recommendation 33 (unpaginated).

educational uses of films (for example to make available to students in classrooms via a centralised content repository or LMS, or for teachers to copy short extracts of films to compile a lesson using software such as PowerPoint or Prezi).

In announcing the Government's intention to review whether additional exceptions should be introduced to the TPM scheme, former Attorney-General The Hon Robert McLelland MP made the following reference to the Schools' request:

*[t]he Copyright Advisory Group has approached me for an additional exception to allow circumvention of technological protection measures for certain education purposes. In particular they have sought an exception that would allow schools to change the format of films from DVD to MP4 for teaching purposes. This review will assist me in deciding whether or not to amend the Copyright Regulations.*²²⁵

The Schools recently provided evidence of the adverse impact caused by TPMs on the ability of teachers and students to use certain exceptions and the Part VA statutory licence in Australian schools and called for exceptions to be introduced to the TPM provisions in relation to Part VA, s.200AB and for student use of the fair dealing provisions.²²⁶

The Schools urge the ALRC to recommend that the Government explore every opportunity to reform the anti-circumvention regime with a view to ensuring that the balance determined by parliament cannot be overridden through the use of TPMs.

At a minimum, the Schools urge the ALRC to recommend to the government that any new exceptions that are introduced into the *Copyright Act* as a result of this enquiry be accompanied by the introduction of a corresponding exception to enable users of the exception(s) to be able to circumvent an access control TPM to make use of the new exception. Any other result would make the reforms envisaged by the ALRC's review of minimal effect in practice.

In order for users, including the education sector, to be able to have full use of content as copyright exceptions intend, the law must ensure that both TPMs and contract are not capable of overriding those exceptions. Accordingly, the Schools submit that the ALRC recommend that the government should introduce regulations to ensure that copyright exceptions are maintained.

²²⁵ Address to the Blue Sky Conference *Future Directions in Copyright Law* 25 February 2011 available at <http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22media%2Fpressrel%2F589537%22>.

²²⁶ See Copyright Advisory Group submission to the Attorney-General's Department Review of Technological Protection Measures. Available here: <http://www.ag.gov.au/Consultationsreformsandreviews/Pages/SubmissionsfortheReviewofTechnologicalProtectionMeasures.aspx>.

4.2. Copyright and the convergence review

The ALRC has asked for feedback on the implications for copyright law reform of the recommendations of the Convergence Review.²²⁷ The Schools submit that these implications are potentially profound given the close linkages between the *Copyright Act* and the *Broadcasting Services Act 1992* (BSA).

The *Copyright Act* uses the word ‘broadcast’ as a noun and a verb, ie as a form of copyright protected subject matter and as a type of activity included within the copyright owner’s exclusive rights. For example, s.10(1) of the *Copyright Act* defines a broadcast (noun) to mean: “a communication to the public delivered by a broadcasting service within the meaning of the *Broadcasting Services Act 1992*.” The *Copyright Act* also contains a number of references to ‘broadcasting’ (verb).²²⁸

In the context of education, the noun ‘broadcast’ underpins the entire operation of the Part VA statutory licence. Part VA grants the right, in exchange for equitable remuneration, to educational institutions to copy and communicate ‘broadcasts’ for educational purposes. Section 135C also provides that the Part VA licence also applies to a communication of the content of a free to air broadcast, by the broadcaster making the content of the broadcast available online at or after the time of the broadcast, in the same way as it applies in relation to the broadcast.

A key finding of the Convergence Review was that rules based on the concept of a ‘broadcasting service’ are increasingly ineffective, and a new approach is required.²²⁹ As a result, the central recommendation of the Convergence Review was that regulations should apply to significant media enterprises called ‘content service enterprises’ (CSE).²³⁰ The Convergence Review final report envisages a shift away from ‘black letter law regulation’ and the introduction of a principles-based policy framework.²³¹

The Convergence Review found that laws based on concepts such as broadcasting are outdated and should be repealed.

The Final Report recommends the staged implementation of its recommendations, with phase 2 being the replacement of the BSA with new media-neutral content services legislation regulating CSEs and introducing self-regulatory and co-regulatory arrangements for other types of content service providers.²³²

²²⁷ Australian Government, Convergence Review Final Report, available at:

http://www.dbcde.gov.au/data/assets/pdf_file/0007/147733/Convergence_Review_Final_Report.pdf.

²²⁸ See for example s.25.

²²⁹ Convergence Review Final Report, p7.

²³⁰ Ibid, at p ix.

²³¹ Ibid, at p xii.

²³² Ibid, p106.

As such, it is likely that if the Convergence Review's recommendations are accepted, the existing definition of 'broadcasting service' in the BSA will be repealed. This clearly has profound implications for the *Copyright Act*.

The Convergence Review's recommendations have the potential impact of:

- changing the scope of broadcasting copyright, ie, the nature of the broadcast (noun) that is protected in the *Copyright Act*. This is potentially critical due to the more limited rights granted to broadcast copyright in the *Copyright Act* (for example, the more limited term of protection given to broadcasts as compared to other forms of copyright)²³³
- changing the nature and potential application of exceptions for the purposes of broadcasting²³⁴
- changing the range of entities who may enjoy formal rights under new communications legislation (for example, if only significant media enterprises will be designated as CSEs²³⁵ under a new content services regulatory regime, how will this impact on the range of entities that currently own 'broadcasts' as defined by reference to the BSA?)
- changing the scope and application of the Part VA statutory licence.

Potential impact of the Convergence Review on the Part VA statutory licence

The Part VA licence applies to a broad range of broadcasts, such as news programs, documentaries and drama broadcasts on free-to-air or subscription television as well as certain free-to-air broadcasts made available online. Under the current *Copyright Act* definition of 'broadcast', many types of content such as communications delivered via internet protocol television (IPTV), the majority of online content such as 'made for internet' content, YouTube videos etc are currently excluded from the Part VA licence.

There seem to be at least 3 potential implications of the Convergence Review recommendations for the Part VA licence, all of which are profound:

- 1 an enormous expansion of the scope of the Part VA licence (potentially extending it to all forms of audiovisual content irrespective of the mode or delivery or original point of distribution);
- 2 extinguishing the Part VA licence completely;
- 3 creating the need for a complete re-examination of the need for, and appropriate scope of, the Part VA licence in a converged media environment.

²³³ The term of protection for broadcasts is 50 years (s.95), compared to 70 years for sound recordings and films (ss.93 and 94).

²³⁴ See for example ss.47 and 107.

²³⁵ See Convergence Review Final Report, p ix.

The Schools contended in Parts 2 and 3 above that the educational statutory licences are not appropriate for the digital environment and should be repealed. The Schools submit that the Convergence Review's recommendations provide further evidence for the fact that the educational statutory licences are based on outdated technological constructs and should be repealed.

4.3. Orphan Works

Orphan works are widely recognised as a problem in Australia and internationally. For example, the United Kingdom is in the process of introducing an orphan works scheme;²³⁶ the question of how to solve the problem of orphan works has been recently addressed by the Australian Attorney-General's Department;²³⁷ and a review of this issue is underway in the United States.²³⁸

The inability of the legal system to resolve the appropriate legal treatment of these works is currently stifling the use, access to and dissemination of orphaned copyright works. The current regime in general acts to 'lock up' these works so that they are unavailable to potential users - including libraries, students and researchers - as users are unable to obtain permission to revive those works. As discussed in Part 2.2.4 of this submission, the orphan works problem is particularly acute for Australian schools as the operation of the Part VB statutory licence means that these works are treated as remunerable under the statutory licence – even for orphan works where the collecting society is unable to identify the copyright owner.

How to solve the orphan works problem?

It is not good public policy to collect money by default for a category of works where, by definition, it is difficult or impossible to find the right person to pay.

From a public interest point of view, the Schools believe that the rationale behind any orphan works scheme should be to facilitate the widest possible use of orphan works, as long as there are appropriate safe guards if the owner of a work is eventually

identified. Further, it is imperative that statutory licences do not operate to collect money by default for a category of works when, by definition, it is difficult or impossible to identify the proper recipient of those funds.

The Issues Paper refers to a model for dealing with orphan works proposed by Australian copyright academics Professor David Brennan and Professor Michael Fraser. Brennan and Fraser have proposed a 'non-commercial use exception for natural persons using unpublished subject matter derived from lawfully obtained material' that would apply where the relevant copyright owner is not

²³⁶ Department of Business Innovation and Skills, Enterprise and Regulatory Reform: 30 July- UK copyright: Accessing Orphan Works, available here: <http://discuss.bis.gov.uk/enterprise-bill/2012/07/30/30-july-uk-copyright-accessing-orphan-works/>.

²³⁷ Australian Government, Attorney-General's Department, Orphan Works Internal Review, available here: <http://www.ag.gov.au/Consultationsreformsandreviews/Pages/Orphanworks.aspx>.

²³⁸ US Copyright Office, Orphan Works Review, available here: <http://www.copyright.gov/orphan/>.

able to be located after a 'diligent search'.²³⁹ The Copyright Council Expert's Group has proposed a similar exception.²⁴⁰

The Schools submit that there is no policy justification for limiting the operation of any orphan works scheme to personal use or to natural persons. Organisations such as schools and libraries have a critical role to play to ensure that the public and students are able to access a potential wealth of information contained in orphan works. The proposal may also be extremely difficult to enforce in practice. It may be impossible to identify whether many orphan works have ever been published. For example, a local newspaper may donate its collection of old photographs to a school or public library. It is often impossible when presented with a box of old photographs to identify which have appeared in a newspaper and which are unpublished.

Brennan and Fraser also propose a broader exception for published material where there are missing owners. This exception involves three stages culminating in payment via a compulsory licence administered by the collecting society where a copyright owner cannot be identified within three years. They submit that this proposed exception "*seeks to balance user accountability, predictive certainty for users and fairness to rights holders.*"²⁴¹

This proposed model reinforces the existing system of statutory licensing administered by a copyright collecting society. The Schools believe that their experiences with statutory licensing, as set out in detail in Part 2 of this submission, should be considered as significant evidence weighing against any consideration of a statutory licence as a method for solving the problem of orphan works. The Schools believe that a statutory licence would be the most economically inefficient way to deal with this issue, leading to a situation where significant administrative costs would be incurred in order to collect remuneration for copyright owners who, by definition, are extremely difficult to find. On this basis, the Schools submit that the ALRC should reject any model that relies on a statutory licence to solve the problem of orphan works.

4.4. Cloud computing and education

Part 1 of this submission describes the importance of education to the digital economy and the increasing use of new technologies in education. As discussed, governments in Australia and internationally recognise the importance of the education system in equipping students with first-class ICT and media literacy skills in order to fully participate in a digital world. As the nature of teaching and learning has changed, content and school ICT systems are not just required in 'school hours' and on school premises: governments, students, teachers and the community increasingly expect educational resources to be available 24/7 and be accessible remotely.

²³⁹ David Brennan and Michael Fraser, *The Use of Subject Matter with Missing Owners - Australian Copyright Policy Options* (2012), p7.

²⁴⁰ Copyright Council Expert Group, *Directions in Copyright Reform in Australia* (2011), pp8–9.

²⁴¹ David Brennan and Michael Fraser, *The Use of Subject Matter with Missing Owners - Australian Copyright Policy Options* (2012), pp9-12.

In this environment, Australian schools are increasingly looking at cloud-based solutions to both improve internal efficiencies (freeing up much-needed educational budgets) and for delivering cutting edge education to students.

Cloud computing - delivering cost efficiencies

Educational institutions are joining corporations and governments around the world in exploring cloud computing solutions for enterprise computing needs.

The economies of scale and other features of cloud computing are likely to mean an increasing shift away from institutionally hosted services. These services are increasingly provided using Internet technologies to staff and students and accessed from web browsers. The services are offered cheaply or freely to education, often with much higher availability than can be provided by the educational institution.²⁴²

However, Australia's copyright law means that our education sector is limited in its ability to capitalise on the potential cost efficiencies that cloud computing offers. A recent KPMG report, *Modelling the Economic Impact of Cloud Computing*, found that although Australia's education and training sector has been an early adopter of cloud technologies, its ability to fully realise the potential of this technology is compromised by perceived barriers due to governance.²⁴³ The KPMG report stated that:

should Australian organisations adopt cloud platforms as expected across their ICT requirements - as more mature markets such as the US suggest is likely - then the benefits at both the enterprise and aggregate economy level could be substantial.²⁴⁴

KPMG predicts that the associated cost reductions in operating and capital expenditures provided by cloud technologies will result in an increase in long-run GDP of \$3.32 billion per annum after a 10 year period of adjustment.²⁴⁵ As the education and training sector contributes 4.1% to Australia's overall GDP,²⁴⁶ it appears that a reframing of the current policy settings which constrain online sharing and delivery of information via the cloud would prove profitable to the economy overall.

The Department of Education and Training in NSW, for example, has used cloud computing technology to provide a more reliable and available email system for students. This is estimated to have reduced costs by 66% and provided a more effective tool for students to collaborate and learn.²⁴⁷

²⁴² *Cloud Computing in Education*, UNESCO Institute for Information Technologies in Education Policy Brief September 2010, p1, available at: <http://iite.unesco.org/pics/publications/en/files/3214674.pdf>.

²⁴³ KPMG, *Modelling the Economic Impact of Cloud Computing*, 2012, p24.

²⁴⁴ KPMG, *Modelling the Economic Impact of Cloud Computing*, 2012, p7.

²⁴⁵ KPMG, *Modelling the Economic Impact of Cloud Computing*, 2012, p7.

²⁴⁶ KPMG, *Modelling the Economic Impact of Cloud Computing*, 2012, p24.

²⁴⁷ Google Apps for Education Case Study, available here:

http://static.googleusercontent.com/external_content/untrusted_dlcp/www.google.com/en//apps/intl/en/business/case_studies/nsw_det.pdf.

Cloud computing - facilitating contemporary education

As discussed previously in this submission, educational institutions are moving away from traditional models of classroom delivery. Blackboards have been replaced with interactive whiteboards, schools are increasingly fully networked, students are as comfortable with tablets as they are with PCs or paper, and the iPod is as much a teaching resource as the television. Cloud computing enables 'anytime, anywhere, any device' access to learning resources, and students increasingly use cloud computing to collaborate and work on documents in real time from multiple locations.

Education doesn't have to take place with the teacher front and center and students sitting in rows. It can take place outside, under a tree branch, on a boat or plane, in a grocery store or while hiking, if you have an Internet connection ... [c]loud computing is changing the ways people do personal learning, interactive learning and many-to-many learning, in the primary, secondary and higher education spheres. And un-tethering students and teachers from desktops is only part of it. It also gives greater longevity to information by storing it in the cloud (imagine if Sir Isaac Newton had posted YouTube videos about his breakthroughs); and it allows students to interact and collaborate with an ever-expanding circle of their peers, regardless of geographical location.²⁴⁸

An NBN-enabled tele-education project is provided as a case study in the National Digital Economy Strategy:

This NBN-enabled tele-education project in Armidale will commence in late 2011 and deliver state-of-the-art virtual interactive training rooms, laboratories and community learning capability. The partnership between the TAFE NSW – New England Institute and University of New England will deliver:

High-definition, internet-protocol-delivered television, video on demand and three-dimensional trade skilling packages open access courseware combining University and TAFE content that will be available free to the user from any NBN footprint high-quality open learning and support services for teaching professionals cloud technology enabling software licensing to the server to ensure individuals do not pay licence fees enhanced community access services for 30 regional community technology centres in NSW.

The project will take advantage of the NBN's ubiquitous and reliable high-speed broadband to assist in the development and delivery of new models of education services and resources to students and learners Australia wide. The project will be funded through a National Partnership Agreement under the Digital Regions Initiative. The TAFE NSW – New England Institute in partnership with the University of New England and Community Technology Centres Associations, will deliver it.²⁴⁹

²⁴⁸ *How Cloud Computing is Revolutionizing Education* Laurence Cruz, The Network, CISCO, August 2011, available here: <http://newsroom.cisco.com/feature-content?articleId=460910>.

²⁴⁹ National Digital Economy Strategy, p38.

The Copyright Act is ill equipped to deal with the challenges of cloud computing.

The ALRC has asked for comments as to whether the Australian *Copyright Act* is impeding the development or delivery of cloud computing services and whether amendments to the *Copyright Act* are required for cloud computing. While the Schools cannot comment on the impact of Australia's laws on the development

on cloud computing services, in the Schools' opinion, the answer to the ALRC's questions of whether amendments to the *Copyright Act* are required to facilitate the use of cloud computing services in Australia is clearly "yes".

The Schools submit that the Australian *Copyright Act* makes the adoption of cloud computing services difficult or impracticable in a number of ways:

- 1 Australia's technology specific and purpose based exceptions create a high risk of copyright liability for cloud computing services;
- 2 private copying exceptions and research and study exceptions apply to students but not to institutions, leaving institutions exposed to a great degree of legal uncertainty in the adoption of cloud computing technologies;
- 3 The *Optus TV Now* decision, which found that Optus was *itself* the maker of a copy stored on its remote servers, makes introducing a cloud computing solution on a network-wide basis for the use of staff and students a very challenging exercise from the perspective of legal risk. While the Court in the *Optus* case stressed that its decision should not be taken to mean that *any* cloud service would infringe copyright, it provided little guidance as to what factors would result in the cloud service provider, rather than the user, being found to have made the copy. In the school context, content uploaded by students relying on a fair dealing purpose may need to be copied again by the cloud provider as part of offering the service, and would almost certainly also be communicated when the student accesses the stored content. If the cloud provider is found to have made the copy, it is unlikely to be in a position to rely on the student's fair dealing exception. In certain situations any copies and communications made by the cloud provider may be considered to copies and communications "by or on behalf of" the school for educational purposes, and thus covered by the statutory licence, but as discussed in Part 2.1.4 above, the various educational exceptions and statutory licences apply differently to different types of educational activities and copyright subject-matter. These distinctions would be extremely difficult if not impossible to assess in practice. In the event that the cloud provider is found to have infringed copyright, then the school may be exposed to liability based on an argument that it has authorised that infringement.
- 4 Australia's statutory licences are completely ill equipped to deal with cloud computing. The 'per page/per copy' remuneration model described in Part 2.2 above makes any potential cloud computing solution in an educational institution potentially prohibitively expensive, even if the other conditions of the statutory licences could be met. The existing problems identified in relation to the application of the statutory licences to new technologies used in

the delivery of education would be exacerbated a thousand-fold if remuneration was payable under a statutory licence every time content was transferred from, for example, a device to an LMS to the cloud.

4.5. Transformative use

As recognised in the Issues Paper, new technologies are leading to increased creative uses of copyright materials to create sampling, remixes, mashups and other transformative new uses of copyright materials.

These practices are also occurring in education. A good example of how students are encouraged to create mashups as part of their studies is the Victorian Department of Education and Early Childhood Development's *Phat Poetry* website, which encourages students to learn about poetry through mashups:

*The site allows students to research a range of poetic styles and techniques and explore poems chosen from a selection of classic and contemporary poets. Students are encouraged to either write a poem or choose one from the examples on the site and then combine it with photos, animation, video, sound effects and music to create a digital mashup. Phat Poetry is a creative and innovative way of enhancing literacy learning in the classroom and exciting students about poetry through technology.*²⁵⁰

The Institute for the Future of the Book's *Horizon Report* provides some other examples of the types of educational mashup resources that can be used in modern education.²⁵¹ For example, students and teachers can use data sets to mashup new maps layers on Google maps, to create a digital field trip:

*Web-based tools for manipulating data are easy to use, usually free, and widely available. Research can be displayed on interactive graphs, charts, or maps that make the concepts clear. Mashups of geotagged data have obvious applications for education; researchers can use public, tagged media to create mashup maps with embedded annotations. These "hyperlocal" annotations—minute details about a specific location in the form of everyday photographs, blog entries, and video clips—offer opportunities for research that were previously only available by actually living in the location in question. Digital photographs taken with GPS-enabled cameras automatically capture precise geographic/locative information; when uploaded to services like Flickr, the photos 'know' where they were taken, making them readily available for geo-based mashups.*²⁵²

²⁵⁰ Victorian Department of Education and Early Childhood Development, *Phat Poetry*, available at: <https://fuse.education.vic.gov.au/pages/View.aspx?id=9d5dc4ba-8e2a-49b5-987e-762c106bb4e6&Source=%252fpages%252fResults.aspx%253fs%253dPoets>.

²⁵¹ Institute for the Future of the Book, 2008 Horizons Report, available at: <http://wp.nmc.org/horizon2008/chapters/data-mashups/>.

²⁵² *Ibid*, at 7.

The Schools note that Canada has recently introduced a new exception for non-commercial transformative use. In addition, the Australian Copyright Council's Expert Group (CCEG) has proposed the introduction of an exception into the Australian *Copyright Act* for "private, non-commercial transformative uses."²⁵³ As recognised by the Issues Paper at page 38, it is likely that these types of transformative uses in an educational context would be covered by the open-ended exception advocated by the Schools in Part 3 of this submission.

These proposals suggest three critical policy questions for the ALRC's consideration:

1. Is it appropriate to limit exceptions to private uses?
2. Is it appropriate to limit exceptions to non-commercial uses?
3. Is it appropriate for the nature of the use (ie, private or in an organisation, commercial or non-commercial) to be considered as part of a broader assessment of whether a use should be considered to be fair?

Private uses of copyright materials

The Schools note that the CCEG proposal would limit the application of a transformative use exception to private uses. This would be consistent with existing exceptions in the *Copyright Act* enabling format shifting and time shifting of certain types of copyright materials for private uses.

The Schools have shown in Part 2 of this submission the inequitable result of time shifting being a freely permitted act when undertaken by a student at home but being a remunerable act under Part VA when done by a school on the student's behalf. These distinctions also don't recognise the increasing blurring of the boundaries between 'home' and 'school', such as in the 'flipped' classrooms discussed in Part 1.5 above.

The Schools submit that similar considerations apply in relation to transformative uses of copyright materials. The Schools submit that there is no valid policy reason for confining any transformative use exception to private uses of material. As discussed, modern teaching and learning practices require students to remix, mashup and engage with copyright materials as part of their studies in the same way as they may do at home, for example on a social media site. As a result, the Schools strongly oppose any proposal that would limit permitted transformative uses of copyright materials to private purposes only.

Limiting exceptions to non-commercial uses

Although the Canadian approach to transformative uses would lead to a better result for Australia than the CCEG proposal, the Schools submit that exceptions that limit the application of the provision to non-commercial purposes can lead to implementation problems in practice for several reasons:

²⁵³ Copyright Council Expert Group, *Directions in Copyright Reform in Australia*, 2011, p2. Emphasis added.

- Determining what uses are commercial and non-commercial can be very difficult in an internet age.

As the Issues Paper acknowledges at page 39, defining non-commercial use in a digital environment that monetises social relations, friendships and social interactions may be problematic. The Convergence Review also recognised the increasingly merged nature of professional and user-generated content, in considering how to assess which entities should be considered to be ‘content service enterprises’ under the Committee’s recommended new regulatory scheme.²⁵⁴

For example, if a student uploads a video they have made as part of a homework exercise onto YouTube and selects an option which enables advertising to be shown in conjunction with the video (enabling the student to receive a share of any revenue received from ‘clicks’ on the advertisement), would this take the student’s use outside the scope of an exception limited to non-commercial purposes?

- The question of what is a ‘non-commercial’ use can be difficult to assess in practice.

For example, there has been some difficulty in assessing whether standard non-commercial licences such as Creative Commons licences cover non-government schools. Although the Schools take the view that educational uses in non-government schools are clearly non-commercial, copyright owners have raised this issue from time to time.

- Limiting exceptions to non-commercial uses only is inconsistent with Australia’s fair dealing history.

Australia’s fair dealing exceptions are not confined to non-commercial uses.²⁵⁵ For example, commercial media outlets are able to rely on the fair dealing exceptions for reporting the news and for criticism or review. Similarly, researchers who may eventually have a commercial purpose in monetising part or all of their research can rely on the fair dealing exceptions for research and study. In the United States, companies such as Google are able to rely on the fair use exception for new uses of copyright material that are assessed to be fair and in the public interest, such as the provision of a search engine.²⁵⁶ The Schools believe that it would be inconsistent and inappropriate to limit uses that would otherwise be in the public interest *per se*, simply because the organisation seeking to make the use had a commercial purpose. The Schools submit that the relevance (or otherwise) of a commercial purpose would be better assessed as part of a general analysis of whether such a use is fair, as discussed below.

²⁵⁴ See Convergence Review Final Report p11.

²⁵⁵ See for example the use of small excerpts of television broadcasts by a commercial television broadcaster being considered to be a fair dealing for criticism, review or reporting the news despite its commercial nature in *‘The Panel’ case v TCN Channel Nine v Network Ten Pty Ltd* [2001] FCAFC 146 22 May 2002 [104]. Although this is not always true for educational institutions due to the existence of the statutory licences, as we discuss in Part 2 of this submission.

²⁵⁶ See *Perfect 10 v Google* 416 F. Supp. 2d 828 (C.D. Cal. 2006), *aff’d in part and rev’d in part*, *Perfect 10, Inc. v. Amazon.com, Inc.*, 487 F.3d 701 (9th Cir. 2007), *Field v. Google Inc.*, 412 F. Supp. 2d 1106, 1123 (D. Nev.2006).

Questions of purpose should be considered as part of a fairness analysis

The Schools acknowledge that determining whether the purpose of an intended use is private or public, commercial or non-commercial, is clearly a relevant consideration in assessing whether a use should be considered to be in the public interest and permissible under copyright laws. However, the Schools submit that the public interest is best served by including considerations of purpose in a broader analysis of what should be considered to be fair or reasonable use of copyright materials.

For example, the fact that a particular use is being done by a commercial organisation may well be a factor weighing against a determination that a particular use of a copyright work can be fair. Then again, there may be other situations where it may not – such as the existing situation where the use of copyright materials in news reporting can be considered to be fair, even where the media outlet is a commercial enterprise. The Schools submit that the public interest would be better served by enabling Courts to take factors such as the commerciality or non-private nature of a use into account in weighing the public policy balance of whether a use should be fair, than by creating legislative exceptions which automatically preclude all commercial or non-private uses from being considered to be permissible (ie fair).

The Schools believe the question of whether a use is for a private, educational or even commercial purpose should be addressed as part of an assessment as to whether that use is fair. It may be that the fact a particular use of a work is for private or educational purposes leads more readily to a conclusion that a use is fair than if the user had a commercial purpose. In other circumstances, it may be the commerciality of the use is outweighed by the wider public interest in permitting a new use of copyright materials, as the United States Courts determined under s.107 of the US *Copyright Act* in relation to the public benefits afforded by search engine technology.

The Schools advocate in Part 3 of this submission for an open-ended exception enabling new uses of copyright materials to be permitted if they can be assessed as fair by reference to a non-exhaustive list of prescribed factors. The Schools submit that this would be the best model for ensuring appropriate transformative uses of copyright materials are permissible in Australia, rather than the overly narrow model advocated by the CCEG or an exception which arbitrarily excludes all commercial transformative uses of copyright materials from being considered to be fair.

4.6. Incidental and temporary communications in an internet age

The Schools have discussed in detail in Part 2 of this submission how the educational statutory licences are not suited to meet the realities of teaching and learning in the digital environment. We have explained how the default position in the statutory licences is that all copies and communications, no matter how incidental or necessary to the use of technology by teachers and students, are required to be recorded in surveys and treated as remunerable under the statutory licences.

The Schools submit that this highlights another flaw in the way the Australian *Copyright Act* operates in relation to digital technologies. While the *Copyright Act* recognises that there may be a number of ‘temporary reproductions’ made in the course of reading, browsing and using digital content as part of the ordinary use works and other subject matter (see ss.43A and 43B; ss.111A and 111B), there is no similar recognition of the types of temporary and transient ‘electronic transmissions’ made in using digital materials, which may be considered to be exercises of the right of communication to the public.

For example, the upload of a work to a learning management system would involve a reproduction of that work, but the display of that work in class (via connection to a laptop and/or interactive whiteboard) or accessing the content by a student or staff from the cloud or a centralised content repository, may also result in one or more electronic transmissions comprised in the right of communication to the public when the content is transmitted from the LMS to a laptop, monitor or electronic whiteboard.

Any incidental reproductions of the work that occur as part of the technical process of using the (non-infringing) work in a classroom via the learning management system would likely be considered temporary copies under ss.43A or 43B. However there is not an equivalent section for any incidental electronic transmissions that occur at the same time. In the context of educational institutions, each of these ‘incidental or temporary’ communications is considered to be remunerable under a statutory licence.

There is merit in considering whether exceptions for ‘temporary communications’ are required in the same way as we have exceptions for ‘temporary reproductions’.

Many such technical ‘transmissions’ are part of everyday uses, and - although potentially an exercise of the copyright owner’s right of communication to the public - are tolerated or not prosecuted in the general community. However due to the operation of Parts VA and VB, Australian schools are expected to pay for these transient and necessary digital uses.

The Schools submit it is worth considering the public benefit in exploring whether equivalent exceptions to ss.43A, 43B, 111A or 111B are required for the right of communication to the public (or whether ss.43A, 43B, 111A and 111B should be amended to include the right of communication to the public).

4.7. Australia’s approach to international agreements about copyright

The Issues Paper notes at page 15 that one of the possibilities for this inquiry is to consider what flexibility can be found within international constraints and what advice can be provided for future negotiations on international treaties and trade agreements.

The Schools submit that the guiding principles identified by the ALRC for this inquiry should be presented as guiding principles to future Australian Governments in determining Australia's negotiating position for international treaties and trade agreements. The Schools believe that these guiding principles reflect the need to protect the rights of copyright owners and incentivise the creation of new works, as well as to ensure the recognition of the public interest in appropriate access to knowledge. The principles also reflect the importance of ensuring copyright legislation has sufficient flexibility to recognise the need to adapt copyright laws for future technological developments.

One of the unfortunate side effects of Australia's free trade agreement with the United States ('AUSFTA') is the ceding of much of Australia's ability to make copyright laws that are in the best interests of Australians. For example, Australia is not empowered to answer a simple policy question: What are the appropriate exceptions that should be introduced to the TPM provisions in the *Copyright Act*?

Instead, policy debates must start with the question 'What does the AUSFTA permit us to do?' This policy disempowerment – and the inability to make domestic copyright policy that suits Australia's own domestic agenda – should be avoided at all costs in negotiating future international treaties and trade agreements.

The Schools also note that the recent ASEM Seminar on Human Rights recommended that governments should consider including provisions in multilateral and bilateral trade treaties and agreements which include a requirement for open-ended exceptions in copyright.²⁵⁷

The Schools welcome the recent recommendation of the Joint Standing Committee on Treaties (JSCOT) that Australia should not ratify the Anti-Counterfeiting Trade Agreement (ACTA) until the ALRC has reported on the current inquiry on copyright and the digital economy.²⁵⁸ Similarly, the Schools suggest that the guiding principles of this review (and subsequent recommendations) be considered in the negotiations for the Trans Pacific Partnership Agreement (TPPA). Specifically, the Schools submit that Australia should not ratify agreements such as ACTA and the TPPA unless they comply with the policy criteria set out in the Terms of Reference to this inquiry and the guiding principles set out by the ALRC.

The Schools note in this context the recent announcement by Prime Minister Gillard that TPP negotiations are currently scheduled to conclude in October 2013,²⁵⁹ one month prior to the ALRC's reporting deadline for this review. The Schools would be supportive of the ALRC making preliminary recommendations in this regard that could be considered by TPP negotiators.

²⁵⁷ Wolfgang Benedek and Madanmohan Rao, *12th Informal ASEM Seminar - Seminar Report*, p27.

²⁵⁸ The Parliament of the Commonwealth of Australia Joint Standing Committee on Treaties Report 126, Treaty tabled on 21 November 2011, Anti-Counterfeiting Trade Agreement (Tokyo on 1 October 2011) June 2012, Canberra, Recommendation 8 at p61.

²⁵⁹ <http://news.smh.com.au/breaking-news-world/two-trade-deals-good-for-jobs-gillard-20121120-29mx9.html>.

Revisiting the question of 'formalities'

Over the longer term, the Schools believe there may be merit in discussions in international fora about whether the prohibition of 'formalities' in the Berne Convention should be revisited. In a digital age, where more and more content is being created by non-traditional publishers and individuals (such as user-generated content), it may make sense for the international copyright system to require rights holders to take one or more steps in order to assert their rights in a commercial sense.

Many of the issues raised by the Schools in Part 2 of this submission in relation to the educational exceptions and copyright licences would be ameliorated by a system whereby rights holders who wished to exploit their content commercially were required or encouraged to take steps to make that intention clear. For example, the economic and administrative problems caused by the statutory licences requiring payment for freely available internet materials and orphan works would be significantly reduced if the licences only applied to copyright materials where the rights holder had indicated that they wished their work to be commercialised. In effect, it would confine the commercial aspects of the copyright system to copyright owners who wished to seek a commercial return for their work.

The Schools recognise that removing the prohibition on formalities in the Berne Convention is, at the very least, a long-term goal, and may in fact be impossible given the entrenchment of this position in international copyright law. However, there may still be some significant benefits in exploring whether incentives could be created to encourage rights holders to register the copyright materials from which they expect to receive commercial gain.

This issue has been recognised by the Director-General of WIPO, Francis Gurry:

[t]he international legal system for copyright, the Berne convention, is built upon the basis of no formalities for copyright protection. You get copyright protection automatically. I think that while it is unlikely that we can revisit that principle, since it's embedded in an international convention that is adhered to by over 170 countries – it's unlikely we can do that – but what we can have is voluntary registrations systems, and we can encourage the use of voluntary registration systems. I think that this is an element of infrastructure that is absolutely indispensable for building the global digital marketplace ... to be able to find out easily who owns the rights and who controls the rights in relation to different pieces of creative content.²⁶⁰

As the Schools have addressed in detail in Part 2 of this submission, we believe that the statutory licences and educational exceptions in the *Copyright Act* are inappropriate and inadequate for the digital environment and should be repealed. While a system requiring copyright owners to register their works or otherwise take formal steps to indicate a commercial intention in relation to their works may assist in addressing some of the Schools' concerns, it would not be a true panacea. Nevertheless, there may be significant merit in the longer term in moving towards a system where

²⁶⁰ Francis Gurry, Closing Keynote Global INET, April 24, 2012, Geneva, Switzerland, available at: http://www.elon.edu/docs/e-web/predictions/isoc_20th_2012/Francis%20Gurry%20INET%202012%20Keynote.pdf.

copyright owners who wished to receive the full protections afforded by the copyright system were required to 'opt in' (similar to the patent and trademark systems) to receive those protections, rather than concentrating policy discussion and the efforts of the Courts on the appropriate public interest uses which should be considered to be appropriately 'opted out' of the system by the operation of statutory exceptions and licences.

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THE COPYRIGHT ADVISORY GROUP - SCHOOLS

OF THE

**STANDING COUNCIL ON SCHOOL EDUCATION AND EARLY
CHILDHOOD**

**SUPPLEMENTARY SUBMISSION TO THE AUSTRALIAN LAW
REFORM COMMISSION INQUIRY INTO COPYRIGHT AND THE
DIGITAL ECONOMY**

PREPARED BY THE NATIONAL COPYRIGHT UNIT

APRIL 2013

The Copyright Advisory Group - Schools (**the Schools**) appreciates this opportunity to provide the Australian Law Reform Commission (**ALRC**) with a brief supplementary submission dealing with some of the issues raised by submissions to the Issues Paper. We may provide a more detailed response in due course in our submission in response to the Discussion Paper.

In this supplementary submission, we address three matters:

- Confusion that appears to have arisen regarding the basis for the Schools' decision to seek repeal of the statutory licences
- The inefficiencies that flow from monitoring and measuring uses that do not or should not attract remuneration
- The suggestion by Copyright Agency that any new exception should not apply to uses that are permitted under a licence.

Why the Schools seek repeal of the statutory licences

Some rights holder interests - including Copyright Agency - have suggested that the Schools' decision to seek repeal of the educational statutory licences is motivated solely by a desire to avoid paying for copying and communication that is currently covered by those licences. We wish to correct this misconception.

While the Schools' preferred position is that the statutory licences be repealed and a new flexible exception be introduced, our request for the repeal of the statutory licences is not contingent upon the introduction of a new exception. The Schools fully acknowledge that if the licences are repealed, regardless of whether or not a new exception is introduced, there will be a continuing need for collective licensing for educational use of content. Contrary to the suggestion by Copyright Agency in its supplementary submission dated April 2013, the Schools' do not suggest that a new exception would apply to all uses that are currently covered by the statutory licences.¹ We are not saying all copying and communication by schools should be free.

This position was made clear in the Schools' submission to the ALRC's Issues Paper:

Introducing a flexible exception does not mean that all educational uses of copyright materials would be free. Many uses that are currently paid for under the statutory licence would continue to be paid for under voluntary licensing arrangements (similar to those currently in place with music collecting societies).²

¹ Copyright Agency says in its supplementary submission that it has sought but not yet received an indication from the education sector about likely reduction in licensing fees from the proposal to repeal the statutory licences. No such request has been made by Copyright Agency to the Schools.

² See p6 of the Schools' main submission.

The reforms that the Schools seek with respect to licensing of content are policy-based, not cost-based. They are intended to ensure that future dealings between schools and collecting societies can occur in a fair and efficient manner. This will not be possible unless the statutory licences are repealed. We have set out detailed reasons why the statutory licences should be repealed. These include that they are inherently unsuitable to the digital environment (see Submission pages 46 to 56) and that, they are economically inefficient, creating a false market for works (see Submission pages 71 to 76).

The repeal of the statutory licences may result in some reduction in the amount currently paid by schools for copying and communication. This would be a natural consequence of correcting the current effects of Australia's out-dated statutory licences, which require remuneration for uses that would elsewhere in the world be considered to be 'fair'. The main benefit flowing from this reform however would be to replace an inefficient and out-dated licensing regime with a regime that is better suited to a digital environment and more in step with the educational copying regimes operating in comparable jurisdictions. In the Schools' submission, this benefit will flow whether or not the repeal of the statutory licences is accompanied by the introduction of a new flexible exception.

Finally, we note that Copyright Agency appears to suggest that it should be a goal of the statutory licence to prop up a local educational publishing industry.³ The Schools strongly disagree with this. While it is clearly a goal of copyright to incentivise the continued creation of content, the Schools submit that there is absolutely no policy justification for continuing with a highly inefficient licensing regime - that imposes significant unnecessary costs on the education sector - merely because there is perceived to be some advantage to local educational publishers. A far more efficient means of supporting local publishers – in the event that the government does consider this to be warranted - would be by means of direct government support or establishing a voluntary licensing system which can more flexibly respond to the needs of both publishers and schools in the digital environment.

Copyright Agency's "zero rate" submission: an illustration of the inefficiencies of statutory licensing

In its supplementary submission, Copyright Agency suggests that the statutory licences do not require payment for each and every licensed copy and communication, and that even if they were to do so, it is open to the Copyright Tribunal to determine that equitable remuneration for a particular use is zero.

This position is at odds with the position previously adopted by Copyright Agency, which has previously sought to have each and every act of copying and communication - including caching - measured for the purpose of having this activity included when determining equitable remuneration to be paid by schools.⁴

³ See page 11 of Copyright Agency's supplementary submission where it suggests that one reason why schools in some countries pay less than Australian schools for educational copying is that these countries have "alternative means of supporting a local educational publishing industry".

⁴ See pp 54-55 of the Schools' main submission.

More importantly, however, the “zero rate” position outlined in Copyright Agency’s supplementary submission is a clear example of the inefficiencies of the statutory licence that have led to the Schools seeking its repeal. Under a voluntary licence regime, the parties to the licence reach agreement as to what uses are covered by the licence and therefore remunerable. There is no need for either party to direct resources to monitoring and measuring uses that do not attract remuneration.

Compare this with the statutory licences. By Copyright Agency’s own admission, each and every copy and communication made in sampled schools is required to be reported regardless of whether or not Copyright Agency intends to seek remuneration.⁵ Even if Copyright Agency were in the future to adopt a position whereby some copies and communications attracted a zero rate, it makes absolutely no sense from an efficiency point of view to impose substantial compliance costs on schools (and Copyright Agency itself) for the purpose of collecting data on copying and communication that Copyright Agency now says is not necessarily even remunerable.

Copyright Agency appears to suggest that this “record everything whether it is remunerable or not” approach to licensing is a virtue of the statutory licence, based on the fact that it is convenient for schools to be relieved of any responsibility for deciding whether a use falls within the scope of the licence. The Schools strongly reject this argument. The unnecessary costs associated with collecting and processing data on uses that either fall outside of the scope of the licence, or for which Copyright Agency does not otherwise intend to seek remuneration, represents a significant waste of public resources. The National Copyright Unit (formed in 2005 partly in response to the Schools’ concerns that the costs associated with the statutory licences were increasing exponentially) directs a very large proportion of its resources to developing and implementing the smart copying practices that are only necessary due to the inefficient operation of the statutory licence.

Copyright Agency itself also engages in unnecessary expenditure as a result of the inefficient operation of the statutory licence. This includes the cost of processing data relating to copying of freely available internet content, *even where Copyright Agency accepts that no remuneration is payable due to the copying falling outside of the scope of the statutory licence*. See, for example, Copyright Agency’s supplementary submission, where it states that schools are required to report copying and communication from all websites notwithstanding that Copyright Agency excludes from remuneration more than 50 per cent of uses of content sourced from the internet. The costs incurred by all parties would be significantly reduced if this copying and communication were not required to be reported in the first place. A voluntary licensing arrangement would free both parties from the statutory constraints and inefficiencies created by the statutory licences.

Copyright Agency’s “fairness” submission

In its supplementary submission, Copyright Agency says that any new exception should not apply if the use is allowed under a licence that is available on reasonable terms.

⁵ In the print survey, teachers are not in fact required to record unpublished materials (eg administrative or school owned materials).

The Schools submit that such a "market failure" approach to determining the scope of exceptions is to misunderstand the nature of exceptions as a central aspect of copyright law, and has been rejected by local law reform bodies as well as by courts in the US and Canada. It has also been implicitly rejected by the UK Government.

The Schools refer the ALRC to the following:

- In Australia, the Copyright Law Committee on Reprographic Reproduction (**Franki Committee**) considered and rejected an argument by the Australian Copyright Council that rights holder willingness to licence library copying by university students should defeat any claim that such copying could be done in reliance on fair dealing. The Franki Committee found that as a *matter of principle* a measure of photocopying should be permitted without remuneration in reliance on the research and study fair dealing exception.⁶ In other words, the Committee's understanding of exceptions such as fair dealing was that they were a carve out of the grant of copyright that operated as a matter of principle, and were not subject to elimination merely because the rights holder was willing to grant a licence.
- In 2004, the Canadian Supreme Court considered this question. In *CCH Canadian Limited v. Law Society of Upper Canada*,⁷ the Court said:

Before reviewing the scope of the fair dealing exception under the Copyright Act, it is important to clarify some general considerations about exceptions to copyright infringement. Procedurally, a defendant is required to prove that his or her dealing with a work has been fair; however, the fair dealing exception is perhaps more properly understood as an integral part of the Copyright Act than simply a defence. ...In order to maintain the proper balance between the rights of a copyright owner and users' interests, it must not be interpreted restrictively.

This led the Court to find that the availability of a licence was not itself determinative of whether or not a use was fair:

The availability of a licence is not relevant to deciding whether a dealing has been fair. As discussed, fair dealing is an integral part of the scheme of copyright law in Canada. Any act falling within the fair dealing exception will not infringe copyright. If a copyright owner were allowed to license people to use its work and then point to a person's decision not to obtain a licence as proof that his or her dealings were not fair, this would extend the scope of the owner's monopoly over the use of his or her work in a manner

⁶ Copyright Law Committee on Reprographic Reproduction, October 1976 (Franki Report) para 6.24
<http://www.ag.gov.au/Copyright/CopyrightLawReviewCommittee/Reports/Pages/CopyrightLawCommitteeonReprographicReduction.aspx>

⁷ *CCH Canadian Limited v. Law Society of Upper Canada* 2004 SCC 13

that would not be consistent with the Copyright Act's balance between owner's rights and user's interests.

- In a series of decisions earlier this year, the Canadian Supreme Court reaffirmed this principle. In *Council of Ministers for Education v Access Copyright*,⁸ the Court held that schools could rely on fair dealing despite the fact that the collecting society, Access Copyright, was prepared to grant a licence for the relevant uses. And in *Society of Composers, Authors and Music Publishers of Canada v. Bell Canada*, the Court held that an online music publisher could rely on the research and study exception to allow potential purchasers to stream short, low quality previews of musical works for free notwithstanding that the rights holders were prepared to grant a licence for this use.
- US courts have also rejected a pure market-failure approach to fair use. In *Cambridge University Press v Georgia State University*,⁹ the US District Court for the Northern District of Georgia was required to determine whether Georgia State University could rely on the fair use exception for excerpts of works that had been uploaded onto a password protected e-reserve system. The publishers asserted that where a commercial licence was available, unpaid uses could never be fair. GSU argued that fair use would become a meaningless exception if publishers could seek to override it by developing a licensing scheme that can charge users for a single page, paragraph etc. The Court agreed, finding that it would involve "circular reasoning" to determine the fair use question merely on the basis of whether a licence was or was not available for the use in question.
- See also *Bill Graham Archives v. Dorling Kindersley Ltd.*¹⁰ In this case, which involved a dispute over whether the publisher of a history of the Grateful Dead could rely on fair use to reprint thumbnail-size reproductions of copyrighted concert posters despite the fact that the publisher was willing to grant a licence for this use, the US Court of Appeals for the Second Circuit said:

[A] copyright holder cannot prevent others from entering fair use markets merely by developing or licensing a market for parody, news reporting, educational or other transformative uses of its own creative work.

- In the UK, the Intellectual Property Office is considering whether to recommend new copyright exceptions, including new education exceptions. Two such exceptions being considered are an expanded exception permitting educational institutions to copy and communicate print and graphic works and an exception permitting educational institutions to time shift broadcasts.¹¹ This is notwithstanding that these uses are currently subject to licence. The IPO Consultation on Copyright document that canvasses these proposals makes no reference to any principle to the

⁸ *Alberta (Education) v. Canadian Copyright Licensing Agency (Access Copyright)* 2012 SCC 37

⁹ *Cambridge University Press v Georgia State University* Civ. Action No 1:08-CV-1425-ODE

¹⁰ *Bill Graham Archives v. Dorling Kindersley Ltd* 448 F 3d 605 (2d Cir 2006)

¹¹ See Consultation on Copyright, December 2011, UK IPO

effect that educational (or other) exceptions should not be available for any use that a rights holder is prepared to licence. On the contrary, the IPO clearly contemplates that new exceptions could be introduced for uses that are currently the subject of a licence.

Copyright Agency also considers that the availability of a Creative Commons licence should also exclude the operation of an exception. With respect, this position is contrary to the intention and terms of the Creative Commons licences. See for example a ‘frequently asked question’ on the Creative Commons website:

[Do Creative Commons licenses affect exceptions and limitations to copyright, such as fair dealing and fair use?](#)

No. All of CC's licenses include language that accounts for exceptions and limitations, similar to the following: "Nothing in this license is intended to reduce, limit, or restrict any rights arising from fair use, first sale or other limitations on the exclusive rights of the copyright owner under copyright law or other applicable laws."

The laws of all jurisdictions allow at least some uses of copyrighted material without permission of the creator, and may include uses such as quotation, current-affairs reporting, or parody in some jurisdictions. These exceptions vary depending on the jurisdiction. [Fair use](#) and [fair dealing](#) are two exceptions to copyright that may be relevant to your use of a CC licensed work depending on your jurisdiction.¹²

The Schools accept that the availability of a licence on reasonable terms may be relevant to an assessment of whether a particular use may be considered ‘fair’. However it cannot be the case that the ‘mere availability’ of a licence operates to prevent the reliance on an exception in a copyright statute in all cases. The Schools submit that Copyright Agency’s position is wholly inconsistent with recognised principles of law and policy – in Australia and internationally.

We would be pleased to discuss any of the issues raised in this supplementary submission with the ALRC if this would be of assistance.

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¹² http://wiki.creativecommons.org/Frequently_Asked_Questions#Do_Creative_Commons_licenses_affect_exceptions_and_limitations_to_copyright.2C_such_as_fair_dealing_and_fair_use.3F