

# Productivity Commission SUBMISSION COVER SHEET (not for publication)



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## Executive summary

This submission is made on behalf of the Australian government and non-government schools sector. The sector has a significant interest in copyright law and policy, spending upwards of \$665 per annum on purchasing educational content, and more than \$90 million per annum on collective licences to use educational resources in schools.

The internet has fundamentally changed the nature of teaching and learning in a digital age. Yet Australia's copyright laws are stuck in the age of the photocopier.

The Government has recognised the critical importance of students acquiring the digital skills to equip them for the 21st century workforce. Yet copyright still acts as a significant roadblock to the use of digital technology in Australian schools.

Australia's copyright system is in urgent need of reform. Our educational copyright provisions are:

- **not effective**
  - what worked in the age of the photocopier is not working well in the age of the iPad
  - differential copyright treatments for different types of educational uses lead to ludicrous outcomes in practice
  - digital locks have made some exceptions largely inoperable in practice
- **not efficient**
  - personal use exceptions do not apply for the benefit of Australian students
  - Australian schools pay millions of dollars each year to make non-harmful educational uses of materials no one ever expected to be paid for. This includes freely available internet materials such as online TV guides, health fact sheets, free tourism maps, and social media posts
  - statutory licences structurally disincentivise digital uses
- **not adaptable**
  - the educational copyright provisions are not future proof, and are not meeting the challenges posed by modern teaching methods
- **not accountable**
  - problems with the governance arrangements for the educational statutory licences have been a known policy problem since at least 2000.

The Australian Law Reform Commission (ALRC) recently undertook a detailed assessment of Australia's educational copying provisions, and recommended three changes to ensure that the Australian education sector was best placed to meet the challenges of the digital environment:

1. The introduction of a fair use exception;
2. The simplification and streamlining of the statutory licences; and
3. Ensuring teachers can rely on General Exceptions where appropriate to do so.

CAG urges the Productivity Commission to endorse the ALRC's recommendations and to recommend that the Government implement them as a priority part of Australia's innovation agenda.

The policy rationale for adopting the ALRC's rationale is strong:

- **fair use allows the right questions to be asked.**  
Currently, if a particular educational use is not covered by an existing exception, the use is either automatically prohibited, or required to be paid for under statutory licences, regardless of how 'fair' the use might be. Fair use shifts the focus from whether a particular educational activity falls within the confines of a technology-specific provision, and instead asks whether the use is 'fair'.
- **fair use ensures licensing arrangements are fair.**  
Moving to a fair use environment would not remove the need for licensing of educational uses for which copyright owners should properly be remunerated. However it would remove the current inefficiencies of requiring payment for uses even in circumstances where the material is made freely available online, or falls outside the technical confines of a technology-specific exception.
- **fair use would help drive industry collaboration.**  
The education sector is forging closer collaborations with industry to drive research and innovation. However the educational copying provisions generally apply only when a use is being conducted solely by a teacher or student for the educational purposes of the school. There is no such automatic limitation with fair use. The fact that there may be a commercial element to a particular use is relevant to determining whether the use is fair, but there would be no automatic prohibition on schools undertaking research collaboration with industry partners. This flexibility is much more suited to the realities of the expectations on a modern education system.
- **fair use protects rights holders as well as users.**  
At the heart of a fair use assessment is an assessment of a particular use on copyright owners' markets. Content production and innovation flourish in fair use environments. The introduction of a fair use provision would not in any way impact on the amount of money Australian schools spend on purchasing educational resources. Collective licences would continue to exist - but in a more flexible way that is more suited to a

digital learning environment. Some activities that are identified as fair uses would no longer be remunerable (such as the educational use of freely available internet materials). This may have some impact on licence fees. Alternatively, the licences could be re-negotiated to allow a greater range of teaching activities with appropriate remuneration for creators.

- **fair use is not a novel concept.**

Australian policy makers have been considering the merits of introducing a flexible exception like fair use for almost twenty years. The time is now ripe for this reform in Australia.

In advocating for reform of the educational copyright provisions, Australian schools are not asking for a free ride - simply a fair ride. And a ride that does not involve significant speed bumps on the road for digital uses.

CAG welcomes an evidence based assessment of the benefits of injecting greater flexibility into Australian copyright law. Unfortunately, debates about the introduction of fair use in Australia have been coloured by a great deal of misleading rhetoric, which we address in this submission.

While education and innovation policy is focused on increasing Australia's digital and STEM capabilities, copyright is operating as a roadblock. This review is an important opportunity to get the regulatory settings right to achieving these goals.

CAG urges the Productivity Commission to recommend that the ALRC's copyright recommendations be implemented as a priority.

CAG also encourages the Productivity Commission to highlight the importance of government support for open educational resources (OER) policies to ensure that publicly funded resources can be widely used and re-purposed in order to achieve the maximum productivity benefits from the expenditure of public funds.

## 1. Introduction

### 1.1 An introduction to CAG

This submission is made by the Copyright Advisory Group (Schools) to the Council of Australian Governments' Education Council (CAG). CAG is assisted by the National Copyright Unit (NCU), a small secretariat based in Sydney.

CAG members include Commonwealth, State and Territory Departments of Education, all Catholic Education Offices and the Independent Schools Council of Australia. On copyright matters, CAG represents the almost 9500 primary and secondary schools in Australia and their 3.5 million students.

CAG welcomes the opportunity to contribute to this important review of Australia's IP system. This submission will focus on the urgent need for copyright law reform.

CAG has a significant interest in copyright law and policy. In 2012 the Australian school sector spent over \$665 million in purchasing educational content<sup>1</sup>. In addition to this expenditure on **acquisition** of content, the sector also spends significant resources on licence fees for educational **use** of content. In 2015 Australian schools paid over \$90 million in licensing fees to copyright collecting societies for the use of copyright materials in schools under collective licensing arrangements. This is made up of:

- Approximately \$62 million for the use of literary, dramatic, artistic and musical works under statutory licence;
- Approximately \$22 million for the use of broadcasts under statutory licence; and
- Approximately \$7.5 million for the use of music under voluntary licensing arrangements.

CAG places 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 licences. CAG works with Government, content creators, administrators and teachers to ensure that the rights of copyright owners are respected, and to ensure the highest possible levels of copyright compliance.

CAG recognises the importance of ensuring 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 that the copyright system reflects the great public benefits that flow from appropriate public access to information, particularly for educational and cultural purposes.

## 1.2 Education in a digital age

The internet has fundamentally changed the nature of teaching and learning in a digital age. Today's classrooms bear little if any resemblance to the classrooms of even just 10 years ago. Blackboards have long been replaced by interactive whiteboards and touch sensitive screens, and students engage with teachers and their peers via digital devices.

The classroom of the near future will bear even *less* resemblance to the "chalk and talk" classroom. A recent Sydney Morning Herald report provided a snapshot of what lies just around the corner for today's school children:<sup>2</sup>

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<sup>1</sup> This estimation is based on a survey of 379 schools conducted in late 2012 and early 2013. The 379 schools provided a random stratified representation of schools by State, Sector (Government, Catholic and Independent) and Level (Primary, Secondary, Combined) to allow statistically reliable estimations to be done of school spending on a national basis.

<sup>2</sup> <http://www.smh.com.au/national/education/the-classroom-of-the-future-comes-alive-20151106-gksgt3.html#ixzz3qwi8ydFI>

*Interactive floorboards, colour sensitive robots and Lego furniture: welcome to the classroom of the future. ...*

*Mobile touch sensitive screens, cloud computing across all devices, walls and desks upon which students can write, and Lego-style furniture that allows students to sit, stand, crouch or lay their way around a classroom will become standard.*

The newspaper was reporting on the NSW Government's initiative to roll out new technology across 1600 classrooms, although similar initiatives are happening across the country. Announcing the \$1 billion investment, NSW Education Minister, Adrian Piccoli said:

*We've got to change with the times. The right classrooms with right technology, that's when you really start to see the magic happen...*

*More traditionalist folk who went to school 10 to 50 years ago would have experienced teaching in classrooms sitting behind desks. There is a role for that, but there is a greater role now for having more flexible learning spaces.*

This review by the Productivity Commission is of enormous significance for Australia's future competitiveness in the digital economy. Government and industry<sup>3</sup> are agreed that education - and in particular science, technology, engineering and maths (STEM) education - is crucial to the future economic and social well being of Australia. A new Australian curriculum for Digital Technologies<sup>4</sup> introduces computational thinking, logic and problem- solving capability into school curriculums, with simple visual programming taught in primary school and a general purpose programming language taught in high school. This curriculum has been designed to prepare today's schools children to become the creators and innovators of the future.

In a submission to the Senate Standing Committee on Economics review into Australia's innovation system,<sup>5</sup> the Chief Scientist listed some of the characteristics of nations which capitalise most effectively on innovation. These included "a reliable pipeline of STEM graduates, maintained through collaboration between Government and industry" and "a STEM-literate population that seeks out new technologies and employs them creatively". But there is another very important feature that innovation-led economies have in common: flexible, adaptive copyright law. Countries such as Israel, South Korea, Singapore and the United States all have flexible copyright law that facilitates, rather than hinders, the innovative teaching practices and classroom technologies that provide the reliable pipeline of STEM graduates.<sup>6</sup>

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<sup>3</sup> See for example recent comments by the Business Council of Australia  
[http://www.zdnet.com/article/business-council-calls-for-coding-to-begin-with-toddlers/?tag=nl.e551&s\\_cid=e551&ttag=e551&ftag=TRE7ed2633](http://www.zdnet.com/article/business-council-calls-for-coding-to-begin-with-toddlers/?tag=nl.e551&s_cid=e551&ttag=e551&ftag=TRE7ed2633)

<sup>4</sup> <http://www.australiancurriculum.edu.au/technologies/digital-technologies/curriculum/f-10?layout=1>

<sup>5</sup> <http://www.aph.gov.au/DocumentStore.ashx?id=e5a89526-fab9-4f9c-b182-fcc34e48c824&subId=298379>

<sup>6</sup> See section 6.4 below for further discussion

The following statements was a key element of the Commonwealth Government's recently released Innovation statement:

*Ensuring the next generation of students have the skills needed for the workforce of the future is critical to ensuring Australia's future prosperity and competitiveness on the international stage.<sup>7</sup>*

These are exciting times for education, but the benefits of this classroom revolution will not be fully realised without significant reform of the educational copying regime. Flexible classrooms require flexible and adaptive copyright law.

Our existing copyright regime was designed in the age of the blackboard and the photocopier, and a time when students were the passive recipients of knowledge rather than active participants at the centre of the learning process. It is not flexible, or adaptive, and is certainly not fit for purpose in a digital environment.

The Australian Law Reform Commission (**ALRC**) has made a strong case for urgent reform of copyright to facilitate education in Australia. In its *Copyright and the Digital Economy* report<sup>8</sup>, the ALRC said:

*New exceptions are needed to ensure educational institutions can take full advantage of the wealth of material and new technologies and services now available in the digital age. Education should not be hampered or stifled by overly prescriptive and confined exceptions. Licences should not be required for fair uses of copyright material that do not harm rights holders and do not reduce the incentive to produce educational material.<sup>9</sup>*

The ALRC recommended replacing the existing prescriptive, educational copyright exceptions with an open ended, flexible exception (of the kind that applies in innovative economies such as Israel, South Korea, Singapore and the United States). It also recommended streamlining the educational statutory licences to remove inefficiencies in the licences that add unnecessary burdens on teachers and collecting societies, and that cost millions of dollars of public money each year with no corresponding benefit. CAG strongly endorses these recommendations. The reforms proposed by the ALRC would greatly improve the efficiency of the educational copying regime, as well as ensuring that it is well placed to adapt to changes in teaching practices and technology.

As we outline in more detail in this submission, the existing educational copying regime is stifling the potential of educational delivery and knowledge sharing in the online environment. Far from facilitating education, it is imposing unnecessary transaction costs on teachers and has in-built structural disincentives against the uptake of digital technologies in Australian schools. . There is an urgent need for copyright to be updated for the digital age.

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<sup>7</sup> <http://www.innovation.gov.au/page/embracing-digital-age>

<sup>8</sup> <http://www.alrc.gov.au/publications/copyright-report-122>

<sup>9</sup> <http://www.alrc.gov.au/publications/copyright-report-122> para 14.2

This submission is organised as follows:

- Part 2 contains an overview of the exceptions and statutory licences that comprise the Educational Copyright Provisions in the *Copyright Act 1968 (the Act)*.
- In Part 3, we set out our assessment of the Educational Copyright Provisions against the criteria set out by the Productivity Commission in the Issues Paper.
- In part 4, we outline the findings of the ALRC in its *Copyright and the Digital Economy* review, and set out the three main recommendations that the ALRC made for addressing the serious shortcomings that it identified with the Educational Copyright Provisions.
- In part 5, we set out the case for flexible copyright law.
- In part 6, we debunk some of the myths that have been relied on by opponents of fair use.
- In part 7, we address rights holder arguments that licensing is a complete solution to the problems that we have outlined in this submission.
- In part 8, we outline the ways in which educational publishing is thriving in a fair use environment.
- In part 9, we discuss the importance of strong OER policies.

## 2. Overview of the Educational Copyright Provisions

The *Copyright Act 1968 (the Act)* recognises the public interest in educational uses of copyright materials. These uses are governed by a complex mix of statutory licences and exceptions to the exclusive rights of owners (**Educational Copyright Provisions**). This part of the submission gives a short overview of those provisions.

### 2.1 *Exceptions*

The Act contains a small number of exceptions that are 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 an interactive whiteboard)
- Section 200(1)(b) - examination copying
- Section 200(2) - copying a sound broadcast for a course of instruction
- Section 200AB(3) - so-called “flexible dealing” exception for the purpose of giving educational instruction



## **2.2 Statutory licences**

The Act contains two educational statutory licences in Parts VA and VB. These licences allow for certain educational uses of copyright material without the permission of the rights holder, subject to the payment of equitable remuneration.

The Part VA statutory licence permits educational institutions to copy and communicate radio and television programs for educational purposes. 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 - the collecting society that administers the Part VA licence - for copies and communications made under this licence.

The Part VB statutory licence permits educational institutions to copy and communicate literary, dramatic, musical and artistic works for educational purposes. Payment is made to the Copyright Agency, which is the declared collecting society that administers the Part VB licence.

## **3. Assessing the Educational Copyright Provisions**

CAG submits that when assessed against the Productivity Commission's Terms of Reference and the assessment criteria set out in Figure 2 of the Issues Paper, the Commission will find that the Educational Copyright Provisions are not as effective, efficient, adaptable or accountable as they need to be to ensure Australian schools are best equipped to deliver the graduates needed in the 21st century.

This part of the submission will summarise the main reasons that the Educational Copyright Provisions do not meet the tests set out in the Productivity Commission's assessment framework. For a more detailed overview of the Educational Copyright Provisions please see CAG's submissions to the ALRC Copyright in the Digital Economy Issues Paper (**Attachment A**) and Discussion Paper (**Attachment B**).

### **3.1 The Educational Copyright Provisions are not *effective***

The Educational Copyright Provisions are not effective in a digital environment. They operate as a significant roadblock to Australian schools making full use of digital technology for the benefit of Australian students. They are not fit for purpose in today's educational environment - let alone for tomorrow's digital classroom - for at least the following reasons:

#### **3.1.1 Provisions designed for the age of the photocopier are not working well in the age of the iPad**

The educational exceptions are technologically specific, and were designed to address teaching practices and technologies that are no longer relevant in the digital classroom. They are stuck in a place and time that bears little if any resemblance to today's digital classroom. As technology

and teaching practices continue to develop, this will only become more of an issue. For example:

#### *The “blackboard” exception*

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 have replaced blackboards. While they are used for the same purpose as a blackboard, they are generally now networked, and/or capable of making multiple copies, and are therefore not clearly covered by the exception.

#### *Exam copying 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. Currently, this exception permits teachers to use small amounts of a copyright work in an exam paper, but it does not allow the exam to be emailed to students or put online. Similarly, a school can rely on s 200(1)(b) to include the score of a musical work in a written exam paper, but the exception does not apply if students are required to wear headphones to listen to music being played from an online source. 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.<sup>10</sup>

#### *Caching exception*

The caching exception in s 200AAA was enacted in 2006 in response to concerns that schools may be liable for copyright infringement simply for using proxy caches for educational purposes. Again, however, the exception is drafted in highly technologically specific language that was relevant to operating a proxy cache as the technology was understood to operate in 2006, but which is coming under increasing strain in 2015. For example, it is unclear the extent to which the exception applies if a school uses a cloud-based service to carry out caching on its behalf.

#### *Classroom performance exception*

The classroom performance exception in s 28 has traditionally enabled classroom teaching. It permits schools to communicate<sup>11</sup> and perform copyright material in class, and is relied on by schools to communicate broadcasts, sound recordings and films in class, and to display art works (including on interactive whiteboards). Copyright Agency takes the view, however, that s 28 cannot be relied on by schools to display some types of *text* in the classroom (eg on

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<sup>10</sup> Copyright Agency recently joined CAG and Universities Australia in seeking an amendment to extend the exam copying provision to include exams undertaken online.

<sup>11</sup> The communication right covers the electronic transmission of copyright material (eg email or internet transmission) and making it available online (eg uploading to a website or learning management system)

whiteboards etc), even where what is displayed is freely available internet material.

**Attachment C** is the Schools Electronic Use System (EUS) training program presented by AMR Interactive to teachers responsible for running the EUS survey in their schools. Slides 55 - 64 of the training materials set out the steps a teacher would need to take to fill in the EUS survey in relation to saving a copy of an internet worksheet to a USB for later display in a classroom.

This means in practice, the display of 'static' text (eg, a teacher displaying a PDF from a USB drive on a screen in class) is not covered by s28 and is remunerable under the statutory licence, but that display of 'non-static' text (eg, display of a web page on a screen in class) is covered by s28 and therefore a free use.

The real world implications of this legal anomaly are ludicrous:

Teacher A is an English teacher. She reads an extract from a novel out loud 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 a music teacher. She plays a MP3 file from her iPod via bluetooth speakers to her class.

Teacher D is a drama teacher. He plays a DVD of a scene from a film to his students in class.

Teacher E 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 freely available website that discusses recently released economics data.

Teacher F is a history teacher. He found a copy of historical document on a website. He saves a PDF copy of the text to his USB drive then plugs that into an interactive whiteboard to show his class on screen.

All of these teachers are going about their daily activities of teaching Australian students. Yet these activities are treated differently under copyright law:

Teacher A	Covered by s28 - free use
Teacher B	Covered by s28 - free use
Teacher C	Covered by s28 - free use
Teacher D	Covered by s28 - free use
Teacher E	Covered by s28 - free use
Teacher F	<b>Not covered by s28 - remunerable under the statutory licence</b>

This has potentially significant cost consequences for schools given that text works make up the vast majority of works used in Australian schools, and the display and projection of this content in class makes up about half of all electronic uses of copyright materials in the classroom. This also has a significant impact on teacher time, as teachers are required to record instances of 'display' as part of their survey obligations.

In the 2014 electronic use survey (EUS) under the Part VB licence, 51.1% of the pages recorded in the survey were from the 'display/project' activity classification. Teachers are taught in EUS training materials that they are to record under this 'display/project' activity saving images to a computer and then displaying them on an interactive whiteboard.

The EUS makes up 11.31% of remunerable data sets collected under the Part VB statutory licence for both hard copy and electronic uses. (ie the 'print survey' makes up the other 88.69% of teaching activities recorded under the surveys). CAG estimates that approximately \$3.47 million in 2014 in licence fees could be attributed to displaying text-based content on screens in classrooms.

Total expenditure on Part VB licence 2014:	Approximately \$60 million
EUS component of total remunerable data sets in 2014 - 11.31%	Approximately \$6.79 million
'Display/project' activity - 51.1% of pages	Approximately \$3.47 million

CAG has had an opportunity to review the submission by Macmillan Science and Education Australia to this review, in which the publisher says that "Copyright Agency has never sought payment for this, even if there were a way to measure it."<sup>12</sup> This is not correct.

In fact, Copyright Agency **has** insisted on this use being reported when a school is being surveyed, and **has** indicated that it considers the use to be remunerable. In a letter dated 9

<sup>12</sup> [http://www.pc.gov.au/data/assets/pdf\\_file/0003/194439/sub016-intellectual-property.pdf](http://www.pc.gov.au/data/assets/pdf_file/0003/194439/sub016-intellectual-property.pdf) p 4

May 2008<sup>13</sup>, Copyright Agency's solicitors, Banki Haddock Fiora, confirmed that Copyright Agency was "of the strong view" that this use should be recorded by schools during the period of a survey and paid for. Copyright Agency's solicitors added that their clients considered it to be "highly damaging" that displaying art works on a whiteboard - ie the activity engaged in by Teacher B above - was not remunerable, and that Copyright Agency reserved its rights to advocate for this activity to also be remunerable. A copy of this correspondence is available at page 84 of the CAG submission to the ALRC's *Copyright and the Digital Economy* Issues Paper at **Attachment A**.

### **3.1.2 Digital locks have made some exceptions inoperable**

The Educational Copyright Provisions include a more recent exception in s 200AB(3). This exception was intended to provide flexibility for educational institutions to make small uses of copyright material for educational instruction.<sup>14</sup>

The kinds of activities that it was anticipated this exception would apply to include:

- 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 a teacher needed to show the film in class
- 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

A major shortcoming of this exception, however, is that it does not apply if the copyright material that a school wants to use is subject to an access control technological protection measure (TPM); ie a digital lock that prevents a work from being accessed without a password or technological key.

By way of explanation, as part of the Australia – United States Free Trade Agreement (AUSFTA), Australia introduced provisions into the Act that prohibit the circumvention of TPMs unless there is an express exception that permits this. Currently, there is no exception that permits educational institutions to circumvent a TPM in order to use copyright material in reliance on s 200AB(3). The AUSFTA does permit the Government to enact such an exception.

Schools increasingly rely on the use of digital resources to deliver the highest standard of education. The proliferation of TPMs applied to such content – and the absence of

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<sup>13</sup> Note: this correspondence was prior to Copyright Agency agreeing that Teacher E's activities could be covered by s28.

<sup>14</sup> Explanatory Memorandum to the *Copyright Amendment Bill* 2006 para 6.53

corresponding TPM exceptions – means that while the need to use such content has steadily grown, the opportunity to access it under existing exceptions has steadily shrunk. Most commercially purchased DVDs, for example, are subject to TPMs.

The absence of a TPM exception prevents schools from relying on s 200AB to assist students with disabilities by creating captioned versions of DVDs for students with hearing disabilities, or using electronic copies with ‘read aloud’ functions for visually impaired students. As a result, schools are placed in the unenviable position of choosing whether to be in breach of their obligations to students with disabilities under the *Disability Discrimination Act 1992*, or to comply with copyright law. This has real world consequences: a direction from the *Human Rights and Equal Opportunity Commission* requires schools to ensure that all videos shown in a mainstream class that includes deaf and hearing impaired students are captioned. This is just the kind of use that s 200AB was intended to allow, but there is no corresponding TPM exception to allow this use.

This also has an impact on everyday educational activities. In the lead up to Anzac day this year, the National Copyright Unit was inundated with requests from schools wanting to know if they could use small excerpts from the iconic Australian film *Gallipoli* for inclusion in PowerPoint presentations etc to be used in the classroom to bring Anzac day to life for students.

Unfortunately, NCU was forced to advise schools that when the school’s copy of the film was on a DVD that was protected by a TPM they could not rely on s 200AB to create what would have been an engaging teaching resource. Again, this is the kind of use that s 200AB was intended to allow. Using short extracts of films from already purchased DVDs would not have caused any harm to the copyright owners.

In the digital era, where every use of a copyright work will involve an exercise of at least one of the rights of copyright, uses that previously involved no act of copyright (such as reading a book) are now able to be controlled by the rights holder, not only through copyright but also through the use of TPMs. These digital locks are being used by rights holders to re-write the copyright balance by making exceptions such as 200AB, which are intended to permit non-harmful public interest uses, obsolete.

### **3.2 The Educational Copyright Provisions are not *efficient***

CAG wishes to highlight 4 ways in which the Educational Copyright Provisions do not function as efficiently as they should:

1. The Educational Copyright Provisions allow no scope for educational institutions to rely on General Exceptions
2. The terms of the statutory licences have led to false markets in works and broadcasts, leading to windfall payments to rights holders who in some cases have no connection with the works that were used.
3. The statutory licences structurally disincentivise digital uses.

4. Section 200AB contains a carve-out that prevents it being relied on for many non-harmful uses

We discuss each of these problems in more detail below.

### **3.2.1 The Educational Copyright Provisions allow no scope to rely on General Exceptions**

The Act contains a number of fair dealing<sup>15</sup> and private use<sup>16</sup> exceptions (**General Exceptions**). While these exceptions have some limited application to students (who can rely on the “research or study”, “criticism or review”, and “parody or satire” exceptions to use extracts of copyright works for homework exercises), teachers are precluded from relying on any of the General Exceptions.

There are two reasons for this:

#### **1. Teachers cannot make fair dealing copies for students**

A decision by the Federal Court in 1982 - *Copyright Agency v Haines* -<sup>17</sup> has been construed as having the effect that the existence of the educational statutory licences automatically rules out any scope for schools and universities to rely on fair dealing when copying for teaching purposes. Haines’ case has been relied on, and continues to be relied on, by 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 themselves should be treated as remunerable under the statutory licence and paid for by schools, when it is done at the direction of a teacher.

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, but if a teacher asks the student to copy the same material for a classroom or homework exercise, that copy is treated as remunerable under the statutory licence. This puts Australian schools and universities in a very different position to educational institutions in comparable jurisdictions with more flexible copyright exceptions. In Canada, the US, Singapore, South Korea, Israel and the Philippines, teachers can rely on flexible copyright exceptions such as fair use to undertake fair uses, for educational purposes, without payment.

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<sup>15</sup> Ss 40-43 and ss 103A to 104

<sup>16</sup> ref for private use exceptions

<sup>17</sup> *Copyright Agency Limited v Haines* [1982] 1 NSWLR 182.

### Example - student research for an assignment

Student A is completing an assignment on Romeo & Juliet. The teacher has handed out a list of suggested readings, but Student A decides to undertake her own research. She finds an article that looks like it will be relevant and she makes a copy.

Student B is completing the same assignment on Romeo & Juliet, but he decides to stick with what's on the reading list. He chooses one of the articles on the list and makes a copy.

Student A and Student B are both copying for the purpose of completing their school assignment, but Student A's copy is treated as having been made **by her** under a **General Exception** and Student B's copy is treated as having been made **by the school** under the **Educational Copyright Provisions** (which means that the school pays for the copying).

The only difference is that Student B has copied material that was suggested by the teacher and Student A has made her own decision about what to copy.

In the 2014 electronic use survey (EUS) conducted under the Part VB statutory licence, 8.9% of the pages recorded were from the 'tell students to print/save' activity classification (ie, Student B in the above example). See Example 4 (slides 71-72) of the EUS training materials provided at **Attachment C** for the steps teachers are required to take under the EUS when asking students to print or save from a web page. CAG estimates that approximately \$604,000 of educational funds may have spent on this activity in 2014.

## 2. *Personal use exceptions do not apply for the benefit of students*

The personal use exceptions such as time shifting of broadcasts do not apply when the use is undertaken by a teacher for educational purposes.

### Example - teacher making a copy of a broadcast

Teacher A makes a copy of tonight's ABC News to watch at home tomorrow.

Teacher B makes a copy of the same edition of the ABC News to watch in class tomorrow with her students.

Teacher A and Teacher B are both "time shifting" the ABC News; ie making a copy to watch at a more convenient time, but Teacher A's copy is treated as having been made **by her** under a **General Exception**, while Teacher B's copy is treated as having been made **by the school** under the **Educational Copyright Provisions** (which means that the school pays for the copying).

The only difference is that the copy made by Teacher B will be used for educational purposes rather than private purposes.



### **3.2.2 The terms of the statutory licences have given rise to false markets in works and broadcasts and windfall gains to rights holders**

#### **Example 1: Australian schools paying millions of dollars for non-harmful educational uses that no one ever expected to be paid for**

The statutory licences apply to all copyright materials, even in circumstances where the rights holder cannot be located, or where material is made freely available to use on the internet. For example, US websites that offer free educational resources are still covered by the Part VB statutory licence if the website contains a generic copyright notice eg “Copyright, Website Owner 2015”.

This means that the Australian schools sector pays to use:

- orphan works (works where the rights holder cannot be found or identified) in 2014 nearly 20% of all pages in the Part VB survey represented orphan works<sup>18</sup>. CAG estimates that payments for ‘unknown’ works may represent approximately \$9.16 million of total licence payments in 2014; and
- 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. Much freely available internet material is from overseas based websites, where it is unlikely the copyright owner ever thought to specifically exclude the application of Part VB of the Australian Copyright Act.

#### **A case study freely available internet materials**

The freely available internet content that schools have paid to use includes 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.

In the latest survey of school copying, this included a series of posts for the “Top Coke Tweets” Twitter account,<sup>19</sup> and the “Humans of Western Australia” Facebook page.<sup>20</sup>

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

Australian schools are paying millions of dollars for uses that neither pose any threat to the commercial interests of rights owners, nor undermine the creativity that copyright law seeks to foster and encourage.

<sup>18</sup> This figures includes records from both the EUS and hard copy surveys. The ‘unknown’ author proxy in the survey data is used for all records that do not include any title or URL information.

<sup>19</sup> [https://twitter.com/coca\\_col](https://twitter.com/coca_col)

<sup>20</sup>

<https://www.facebook.com/humansofwesternaustalia>

CAG estimates that between 9.29% - 11.46% of pages in the 2014 Part VB surveys could be attributed to the use of freely available internet materials.<sup>21</sup> CAG estimates that this means that between \$5.58 million and \$6.88 million dollars of the total payments to Copyright Agency in 2014 can be linked to this freely available content.

This is a significant flaw in the Educational Copyright Provisions. It has resulted in Australian schools paying millions of dollars of public funds each year to use content where the original rights holder is not identifiable, or for uses which the rights holder never expected to be paid. The Educational Copyright Provisions are being used to create a market where none would exist but for the existence of the statutory licences.

It goes without saying that allowing schools to rely on a General Exception to copy freely available internet material that no one ever expected to be paid for would not harm rights holders, nor reduce the incentive to produce educational material. The millions of dollars extracted from the Australian education sector for these uses cannot in any way be said to be necessary to provide an incentive for the continued creation of the content. The money that is paid by schools (and universities) for this content amounts to a highly inefficient tax on the use of freely available internet materials.

This aspect of the Educational Copyright Provisions attracted a great deal of criticism by the the ALRC in its *Copyright and the Digital Economy* report:

*The statutory licences may therefore provide a mechanism for educational institutions and Governments to **pay for uses that no one else pays for**. So called ‘technical copies’ and freely available content on the internet are perhaps the two most commonly cited examples of content that gets counted under the statutory licences, but is ignored in most other organisations.*<sup>22</sup> (Our emphasis)

The ALRC said that educational institutions should **not** be required to rely on a licence “for fair uses of copyright material that do not harm rights holders and do not reduce the incentive to produce educational material”<sup>23</sup>, which is certainly the case for orphan works and freely available educational materials.

This problem is exacerbated by practices adopted by collecting societies, encouraging the creation of false markets that do not exist elsewhere in the world, and would not exist in Australia but for the existence of the statutory licences.

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<sup>21</sup> These estimates are based on NCU data analysis of pages recorded in the Part VB surveys using two alternative proxies to reasonably estimate the number of pages that could be attributable to freely available internet materials. Proxy 1 involves using certain agreed processing protocol categories as a proxy, and results in an estimate of \$5.58 million in 2014. Proxy 2 involves using electronic materials with ‘unknown’ owners (ie, where no author can be credited or identified), and results in an estimate of \$6.88 million in 2014.

<sup>22</sup> Ibid para 8.103

<sup>23</sup> <http://www.alrc.gov.au/publications/copyright-report-122> para 14.2

In a recent update to its website,<sup>24</sup> Copyright Agency provides tips for authors who make their content freely accessible on a website, but who want to be paid when that content is used in an Australian classroom:

*Don't -*

- *use any of the following phrases without qualification: 'non commercial use', 'use in your organisation', 'all rights reserved', 'free copying', 'free for education'*
- *simply prohibit commercial use (this will be treated as allowing any non commercial use, such as educational and Government use)*
- *have more than one terms of use on your site, unless it is completely clear which terms of use apply to each piece of content on the site*
- *use the word "free" without being clear about:*
  - *what is "free": for example, viewing, downloading one copy for personal use, downloading one copy to use in connection with teaching, and*
  - *for whom the use is free: for example, teachers who subscribe to your loyalty program or alert service*

The universal coverage of the statutory licences, combined with the inability of schools to rely on General Exceptions puts Australian schools in a very different position to educational institutions in comparable jurisdictions with more flexible copyright exceptions. In Canada, the US, Singapore, South Korea, Israel and the Philippines, schools can rely on flexible copyright exceptions such as fair use to undertake *fair* uses, for educational purposes, without payment.

### **Example 2: the distortion of price signals for broadcasts**

Digital technology has led to new and efficient ways for teachers to access broadcast content. Instead of having to physically make a copy, they can now take advantage of Resource Centres: entities licensed by Screenrights under the statutory licence to copy broadcasts on behalf of schools. The first Resource Centre - Enhance TV - was actually set up by Screenrights.

While it is certainly true that Resource Centres have provided an easy way for teachers to obtain copies of broadcasts for classroom use, they have - in conjunction with technical provisions in the Part VA statutory licence - in practice imposed a highly inefficient cost burden on schools through the creation of a false market in broadcasts. By way of example:

- In the days before Resource Centres, a teacher would decide to copy a particular program for her class. Given that she actually had to go to the trouble of making the copy, she was unlikely to have copied broadcasts "just in case" she might want to show them to her students at some point in time.

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<sup>24</sup> <http://copyright.com.au/about-copyright/website-terms/>

- Today, teachers receive daily updates from Enhance TV and other Resource Centres alerting them to programs that may be of interest to their students. There is no effort at all involved in clicking a link and asking for a copy “just in case” it may be useful, and many do.

This situation is exacerbated by another aspect of the statutory licences: under each of these licences, surveyed schools are required to report so-called “anniversary” copies and communications. These are copies and communications of works and broadcasts that are *deemed* to have occurred because a school has made a copy (eg of a book chapter, or a broadcast), uploaded it onto a learning management system (LMS), and kept the copy on the LMS for a period of more than 12 months. Anniversary copies are treated as being remunerable even if no student ever actually used the work in the time that it remained on the LMS.

This effectively operates as a penalty for using digital technology to store content. By way of example:

- In the days of VHS, a teacher would copy a broadcast, and this copy would be treated as remunerable. The copy could be stored indefinitely, and shown to any number of students, without any further remuneration being attracted.
- In the digital environment, a teacher copies a broadcast, or requests a copy from a Resource Centre, and this copy is treated as remunerable. The teacher can show the broadcast in class without any further remuneration being attracted<sup>25</sup>, but if the copy is stored and networked on the school’s LMS, a fresh copy and communication is deemed to have been made each year that the broadcast remains available on the LMS. It is no longer possible to purchase VHS or DVD copies from Resource Centres. Copy programs are provided as “digital files” only. This means, entire school collections will be treated as anniversary copies if these remain available online.

Unfortunately it is not apparent from the survey data schools receive from Screenrights what is an anniversary copy, and what is a copy or communication made during that particular school year. However, CAG believes that the cost implications are significant. NCU analysis of ten schools reports collected under the Part VA licence in financial year 2013-14 shows that 80% or more of the records of storage on a school LMS may be anniversary copies. Furthermore, the vast majority of these “anniversary copies” are dormant and have not been accessed or viewed by teachers and students. In practice, this means that schools effectively pay a “digital stocktake fee” for unused copies

From our review of the survey data, it is apparent that a great deal of broadcast content copied via Resource Centres has been requested “just in case” it might one day be useful for a particular class. For example, in the 2013-14 financial year, school-based survey data showed a percentage increase in copying records of over 100% in that year. CAG submits that this type of increase either shows a systemic change in how schools are using broadcast content, or a survey system that is not properly recording the actual usage of broadcast content in schools.

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<sup>25</sup> Relying on the exception in s 28

In a commercial environment, the significant cost consequences of requesting copies of content that schools might never actually use would operate as a “price signal” to make rational and efficient purchasing choices. There is no such price signal currently in schools: teachers have no incentive to restrict their “purchasing” to content that have actually decided to use in class. Payments are made by the bodies administering schools, which in the case of state schools is the relevant State or Territory Department of Education. The “push” model of Resource Centres, and the absence of any effective price signal directly linking consumption to use, has significant cost consequences: Screenrights has recently sought substantial price increases for copying of broadcasts based largely on the data relating to use of Resource Centres by schools.

### **3.2.3 *The statutory licences structurally disincentivise digital uses***

Under the statutory licences, payment for use of online content by schools is formally set by attaching a price to the value of an act of communication and multiplying that price by the number of times that particular piece of online content is communicated<sup>26</sup> or by the number of students who have access to it. In other words, the strict terms of the statutory licence for works imposes a ‘one-copy-one-view-one payment’ model of remuneration.

In recent years, schools and collecting societies have agreed to move away from this strict formal approach, and agreed on commercial rates for all uses, but records of volume and usage are still used to inform rate negotiations. Teachers are still required to record all forms of digital uses as if they were operating under a more formal ‘one-copy-one-view-one payment’ model. As such, the statutory licences still impose price signals and transaction costs which discourage digital uses.

While a ‘cost per use’ model may have made sense in the age of the photocopier and the VHS recorder (the prevalent technology at the time that the statutory licences were enacted), it makes absolutely no sense in a digital environment. It is a reality of modern technology that many copies and transmissions are made during the use of distributed technologies. Consider the following examples:

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 classroom 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.

<sup>26</sup> 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.

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 - and the survey methodology that is used to measure the amount of copying and communication that has occurred - is quite different:

- If her school was being surveyed, Ms Jones would be required to record printing 25 copies of the scene.
- If his school was being surveyed, 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.

See the training materials at **Attachment C** (and slide 12 as a summary) of the activities required to be recorded under the EUS for electronic uses.

The simple act of using more modern teaching methods potentially adds up to 4 recordable and potentially remunerable activities under the statutory licence on top of those costs that would be 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 as part of their education.

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. 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.

Unless the Educational Copyright Provisions are brought into line with the realities of 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.

This reality was acknowledged by the ALRC:

*The statutory licences may therefore provide a mechanism for educational institutions and Governments to pay for uses that no one else pays for. ...*

*Digital technologies allow for new, innovative, and efficient uses of copyright material. Many of these uses rely on multiple acts of copying and communication— with copies being stored and effortlessly moved between multiple computers and devices, some*

*local, some stored remotely in the cloud. To the extent that the Copyright Act requires these acts of copying and communication to be strictly accounted for and paid for, then it may prevent licensees from taking full advantage of the efficiencies of new digital technologies.*<sup>27</sup>

### **3.2.4 Section 200AB contains a carve out that greatly limits its scope**

In explanatory material for the *Copyright Amendment Bill 2006*, the Government stated that s 200AB(3) was introduced in response to its review of whether Australia should have an exception based on the principles of fair use.<sup>28</sup> 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'. However, s 200AB(3) contains a carve out: it does not apply to any use that "because of another provision of this Act ... would not be an infringement of copyright assuming the conditions or requirement of that other use were met".

This rather inelegantly expressed provision has the effect that schools cannot rely on the exception for uses that in many cases would amount to a fair use in comparable jurisdictions, such as use of freely available internet material, or orphan works. Given that these uses potentially fall within the scope of the statutory licence, s 200AB(3) is automatically ruled out.

We have a ludicrous situation where the Copyright Act contains an exception that was intended to allow schools to undertake fair uses that would not cause unreasonable prejudice to rights holders, but they cannot take advantage of this exception to engage in uses that would cause **no prejudice** to rights holders.

### **3.3 The Educational Copyright Provisions are not *adaptable***

The Educational Copyright Provisions have no inbuilt capacity to adapt to technological change and changes in teaching practices. They are not at all adaptable, and this makes them completely unsuited to a rapidly changing digital environment.

#### **3.3.1 The statutory licences are not 'future proof'**

An educational copyright regime that was fit for purpose in a digital environment would be sufficiently flexible and adaptable to take account of changes in technology without giving rise to a situation where rights holders could seek to be remunerated for every new use irrespective of whether it is just a new way of delivering previously recognised uses.

That has not, however, been the case under the Educational Copyright Provisions. The 'one-copy-one-view-one payment' model of remuneration that operates under the statutory licences - which we have outlined in section 3.2.3 above - has in the past led to protracted negotiations between CAG and the copyright collecting societies. Historically, Copyright Agency's default

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<sup>27</sup> ALRC, *Ibid* para 8.103 to 8.104

<sup>28</sup> Copyright Amendment Bill 2006, Explanatory materials for *Exceptions and other Digital Agenda Review measures* p 5.

position has been that that every new use should be remunerable, and this has made it necessary for the education sector to request Governments to make incremental adjustments to the Act to reflect the realities of new technologies. By way of 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 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 - 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.<sup>29</sup>
- The Copyright Agency also claimed that caching by educational institutions for efficiency purposes should attract payment under the statutory licence. In a speech to rights holders in May 2006, the 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.<sup>30</sup> Although the majority of organisations engage in proxy caching, it was the operation of the statutory licence that meant remuneration could be sought for this activity from the education sector (and only the education sector). Again, the education sector was required to request the Government to amend the 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.
- As discussed above, s.28 of the 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 considered 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.

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<sup>29</sup> Now included as s.22 (6A) of the *Copyright Act*.

<sup>30</sup> Michael Fraser, *Copyright in the Digital Age*, May 2006.



*This would have meant that if a teacher wheeled a VHS player into a classroom to lay 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 took the view that the inclusion of the communication right into Part VA meant that 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.

#### **A case study - section 28**

Section 28 was updated in 2000 to include digital teaching methods covered by the communication right<sup>31</sup>.

The development of electronic reticulation systems put pressure on s 28, and it was updated again in 2006.

The subject-matter specific nature of the 2006 update has led to absurd situations where some digital uses of texts are covered by the section and some are not.

Section 28 is again showing its age in 2015. The exception is confined to educational uses that occur "in class, or otherwise in a presence of an audience". However modern teaching does not always occur "in class", with the adoption of flipped classrooms and technology-driven student centred learning.

It simply does not make sense to continue to retrofit the Act each time that there is an advance in technology. Retrofitting also usually involves significant delay between the problem being identified and it being fixed, due to the realities of Parliamentary processes.

We need an adaptive copyright system that can allow for future non-harmful public benefits uses where appropriate to do so. It would be far better to ask if particular educational uses were "fair".

#### **3.3.2 Section 200AB has failed to provide flexibility that was intended by its drafters**

Nine years after it was introduced, there is a widespread view in the education, library and cultural sectors that s 200AB - which was intended to operate somewhat like a fair use

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<sup>31</sup> *Copyright Amendment (Digital Agenda) Act 2000*

exception - has not lived up the expressed legislative intention of bringing these sectors more in line with their counterparts in the US.<sup>32</sup> It has been of limited use to schools wanting to use works in ways that would most likely be considered fair if analysed according to a fairness test, and has proven to be nowhere near as flexible and adaptive as a fair use exception.

We have already discussed above the “carve-out” that results in s 200AB(3) not being available for any uses that would cause no prejudice whatsoever to rights holders, such as use of freely available internet material and use of orphan works, given that these uses fall within the scope of the statutory licence. Another significant shortcoming, however, is overly complex and ambiguous drafting. A report by Policy Australia Pty Ltd commissioned by the Australian Digital Alliance and the Australian Libraries’ Copyright Committee in 2012 found that the drafting of s 200AB - particularly the inclusion of the so-called “three step test”<sup>33</sup> - has led to a much greater degree of confusion and uncertainty than could have been expected had the legislature opted for a fair use exception.<sup>34</sup> Policy Australia reported:

*...most of the institutions we spoke to had in place well developed “fairness” assessments that they applied when determining what uses they could make of copyright works. As is clear from the stakeholder comments set out above, the language of fairness is one that these institutions are already very familiar with. It is central to their every-day risk assessment framework, and despite their risk-averse nature, they feel able to apply a fairness framework in a way that allows them to engage in the public purposes for which they were set up. In contrast, s 200AB does not lend itself to that kind of analysis. As we’ve discussed above, the way in which the three step test has been incorporated into s 200AB is extremely complex and uncertain. Most of the institutions that are intended to benefit from the exception do not have in-house legal counsel, nor a budget that extends to consulting external lawyers on a regular basis. While some groups have prepared guidelines to assist in interpreting s 200AB, the complexity of the drafting is such that many are reluctant to use it in any but the most straightforward cases.*<sup>35</sup>

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<sup>32</sup> See, for example, a report commissioned by the Australian Digital Alliance: *Flexible exceptions for the education, library and cultural sectors: Why has s 200AB failed to deliver and would these sectors fare better under fair use?* [http://digital.org.au/sites/digital.org.au/files/documents/Appendix%201%20-%20ADA%20s200AB%20report%2015%20Nov%202012%20\(1\).pdf](http://digital.org.au/sites/digital.org.au/files/documents/Appendix%201%20-%20ADA%20s200AB%20report%2015%20Nov%202012%20(1).pdf)

<sup>33</sup> 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 Agreement). It is a test that is intended to be applied by signatories of the Berne and TRIPS treaties when determining whether a copyright exception that they wish to enact would comply with their obligations under these treaties.

<sup>34</sup> Ibid

<sup>35</sup> *Flexible exceptions for the education, library and cultural sectors: Why has s 200AB failed to deliver and would these sectors fare better under fair use?* [http://digital.org.au/sites/digital.org.au/files/documents/Appendix%201%20-%20ADA%20s200AB%20report%2015%20Nov%202012%20\(1\).pdf](http://digital.org.au/sites/digital.org.au/files/documents/Appendix%201%20-%20ADA%20s200AB%20report%2015%20Nov%202012%20(1).pdf)

Policy Australia found that there had been a great deal of reluctance to rely on the exception, and that this could not be fully explained by a general culture of risk aversion amongst the institutions that were intended to benefit from it:

*While [risk aversion] is clearly part of the story, the most common reasons expressed for the sectors' lack of use of s 200AB related to the section itself, and specifically the particular complexities created by the drafting choices in implementing the three step test in s 200AB.<sup>36</sup>*

The Policy Australia report concluded that any exception that was intended to be relied on by public institutions will not be fit for purpose unless it has regard to the institutional and cultural realities of public institutions, including the fact that many operate on limited budgets and do not have regular recourse to legal advice. It said:

*It does appear from the evidence provided in consultations that despite their generally risk averse nature, educational institutions, libraries and cultural bodies would be more likely to use an exception that required them to engage in a fairness risk assessment. This, in our view, is significant. There would be little point seeking to replace s 200AB with a provision such as fair use if the institutions intended to benefit from such an exception were no more likely to use it than they have been to use s 200AB. Our consultations suggest that this would not be the case.<sup>37</sup>*

In the Explanatory Memorandum to the Copyright Amendment Bill 2006 introducing 2006, the Government stated that would monitor the effects of the introduction of s200AB and review the new arrangements if necessary.<sup>38</sup> CAG submits that s 200AB has not achieved the intended flexibility in the Act, and technology has increasingly put other areas of the Act under great stress. A flexible exception such as fair use would not be subject to such limitations.

### **3.4 Educational Copyright Provisions are not as accountable as they should be**

CAG submits that some aspects of the Educational Copyright Provisions are not as accountable as they could be.

The Act creates a monopoly for authors and other creators in respect of the works and other subject matter they produce. The rights provided under the Act may be exercised individually or, in many cases, collectively through collecting societies authorised by statute such as Copyright Agency Limited and Screenrights, or licensing organisations such as the Australasian Performing Rights Association (APRA) and Phonographic Performance Company of Australia.

There are a number advantages with collective licensing. In particular, it reduces transaction costs, so users do not have to seek and negotiate numerous licence from a very large number

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<sup>36</sup> Ibid

<sup>37</sup> Ibid

<sup>38</sup> Explanatory Memorandum *Copyright Amendment Bill 2006* p13

of copyright owners. However, collective administration of copyright also results in far greater monopoly power for owners than would be available to them acting individually.

The Act has recognised this, and disputes over remuneration and licensing terms can be referred to the Copyright Tribunal. The collecting societies and licensing bodies themselves also have given some recognition to the fact that they should act responsibly by creating a Code of Conduct, and individual dispute resolution schemes.

While on its face the Copyright Tribunal makes the collecting societies accountable, in practice the restraints placed on collecting societies are limited because of the high cost of recourse to the Tribunal, where costs will often run to millions of dollars, and the delay involved in obtaining a hearing and then a judgement.

CAG submits that there are three ways in which the current statutory licence governance arrangements are not as accountable as they should be:

**1. *The powers granted to the relevant Minister are limited***

A collecting society formed to administer the statutory licenses under the Act must be 'declared' by the Minister for that purpose. The Act also provides that such declaration can be revoked by the Minister in certain limited circumstances (section 135ZZU), but the result of revocation would have such a devastating effect on copyright owners and licensees it is extremely unlikely this power would be exercised by a Minister other than in the most extreme circumstances.

The Act does not give the Minister any power to direct collecting societies to act in any particular way in relation to licensing or distribution of royalties, or in their general obligations to members or licensees.

The Ergas Competition Review examined these powers and recommended:

*The grounds for ministerial revocation ... should be broadened to cover all collecting society arrangements, both input and output, including the disclosure of information to members and the public. Relevant ministers should issue guidelines to each collecting society, in the spirit of a contract between the society and the community, that specify the government's expectations regarding the society's conduct, including the terms of the information required to be disclosed and the process for disclosure".<sup>39</sup>*

**2. *The role of the Code of Conduct***

The Voluntary Code of Conduct<sup>40</sup> suffers from the deficiency that it is created and administered by the collecting societies and licensing bodies themselves. While it is true the Code of

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<sup>39</sup> Intellectual Property and Competition Review Committee, *Review of intellectual property legislation under the Competition Principles Agreement*, 2000, p127.

<sup>40</sup> <http://copyright.com.au/wp-content/uploads/2015/04/CopyrightAgency-CodeofConduct.pdf>

Conduct provides for the appointment and independent Code Reviewer (who is currently a retired Federal Court judge) to oversee application of the Code, the Reviewer's powers are limited. Recently the Code Reviewer, when dealing with a complaint from licensees, said that a dispute about the practice of some collecting societies would be best resolved by the Copyright Tribunal rather than by the Code Reviewer himself. The cost of such a referral would be prohibitive, particularly after the costs incurred in first going through the Code Review process..

### **3. Limited oversight from the ACCC**

The only collecting society or licensing organisation to have obtained an authorisation from the ACCC, is APRA. Therefore, there is no oversight of the activities of the other organisations from a competition viewpoint. In practice, the day-to-day controls on the power of the collecting societies are so limited they can operate largely without meaningful practical constraints on their conduct.

CAG Submits that the Act should be amended to provide a cheaper form of dispute resolution between users and collecting societies, perhaps along the lines introduced by APRA, on a voluntary basis. CAG also recommends the creation of a supervisory position, such as "Inspector of Copyright Collecting and Licensing Organisations", who had power to investigate their practices and require changes if it was thought appropriate in the public interest.

While the Copyright Tribunal is currently reviewing its own procedures in an attempt to make proceedings more efficient and affordable, we also submit that this should be backed by legislative amendments to ensure that streamlined procedures can be adopted without fear by the Tribunal that a party will claim it has been denied natural justice, because of the streamlined procedures adopted in the hearing.

## **4. ALRC assessment of the Educational Copyright Provisions**

The ALRC undertook a detailed examination of the educational copyright scheme and found the existing "overly prescriptive and confined exceptions"<sup>41</sup> and statutory licences to be totally unsuited to a digital environment. The ALRC said that the educational copyright scheme was in urgent need of reform to enable educational institutions to take full advantage of the wealth of material and new technologies and services now available in a digital age.<sup>42</sup> The ALRC made the following recommendations regarding the educational copyright scheme:

1. Replacing the educational exceptions with a flexible fair use exception
2. Simplifying and streamlining the statutory licences
3. Clarifying the Copyright Act to ensure that the existence of the statutory licences does not prevent educational institutions from relying on General Exceptions

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<sup>41</sup> ALRC *Copyright and the Digital Economy* report, para 14.3

<sup>42</sup> ALRC *Copyright and the Digital Economy* report paras 14.2, 8.4

CAG strongly strongly supports each of these recommendations, which we discuss in more detail below.

#### **4.1 ALRC recommendation: replace existing educational exceptions with fair use**

The ALRC recommended repealing each of the educational exceptions and replacing them with a flexible fair use exception. The ALRC said:

*...the existing exceptions for educational use of copyright material are due for reform. New exceptions are needed to ensure educational institutions can take full advantage of the wealth of material and new technologies and services now available in a digital age.*<sup>43</sup>

*...The ALRC has concluded that fair use is a suitable exception to apply when determining whether an educational use infringes copyright.*<sup>44</sup>

Most importantly, the ALRC said the Copyright Act should be amended to ensure that Australian educational institutions are put in the same position as schools and universities in comparable jurisdictions who are not required to pay for uses that were “fair”:

*<sup>45</sup>The ALRC considers that it would be unjustified and inequitable if educational institutions... could not rely on unremunerated exceptions such as fair use. Statutory licences should be negotiated in the context of which uses are permitted under unremunerated exceptions, including fair use and the new fair dealing exception. If the parties agree, or a court determines, that a particular use is fair, for example, then educational institutions and Governments should not be required to buy a licence for that particular use.*

This is a critical recommendation, which CAG submits must be implemented as a priority.

The ALRC addressed rights holder concerns that allowing schools and universities to rely on fair use would mean that all uses currently paid for under the statutory licences would become free:

*There are many uses of copyright material under the statutory licences that would clearly not be fair use or permitted under other exceptions, and for which users will need to continue to obtain a licence.*<sup>46</sup>

*It should also be noted that although it is not necessary to obtain a licence for uses that do not infringe copyright, this does not necessarily mean that parties to a licence must*

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<sup>43</sup> Ibid para 14.2

<sup>44</sup> Ibid para para 14.4

<sup>45</sup> Ibid para 8.60

<sup>46</sup> Ibid para 8.61

*agree on the scope of fair use and other copyright exceptions. As Professor Daniel Gervais has written, in a collective licence, ‘rights holders and users could agree to disagree on the exact scope of fair use, yet include some of the marginal uses in the scope of the license and reflect that fact in the price’.*<sup>47</sup>

The ALRC also addressed rights holder concerns that a fair use exception - or what rights holders described as “weak” copyright laws - risked undermining the incentive to write or publish textbooks, thus negatively impacting not just on rights holders but also on the schools and students who depend on these works being created. The ALRC said that fair use accounts for this by requiring consideration of harm to rights holders’ markets:<sup>48</sup>

*...the importance of education does not mean creators should subsidise education in Australia. Although this Inquiry is about exceptions to copyright, the ALRC appreciates the need for copyright laws to help ensure authors, publishers, film makers and other creators have an incentive to create.*

*However, the fairness exceptions recommended in this Report explicitly require that harm to rights holders’ interests be considered when determining whether a particular use—including a use for education—is fair. The stronger the arguments are that unpaid uses will harm creators and publishers, the stronger the case will be that a particular educational use is not fair.*<sup>49</sup>

In its submissions to the ALRC review, CAG clearly stated that introducing a flexible exception such as fair use would **not** mean that all educational uses of copyright materials would be free, and that many uses of educational materials would continue to be paid for under the statutory licences and under voluntary licences. This statement was endorsed by State, Territory and Commonwealth Education Ministers, as well as the Independent Schools Council of Australia and the National Catholic Education Office.

In advocating for reform of the educational copyright scheme, Australian schools are not asking for a free ride; they are simply asking for a fair ride.

Schools also need a ride where there are not significant speed bumps on the road for digital uses.

#### **4.2 ALRC recommendation: streamline and simplify the statutory licences**

The ALRC identified two problems with the statutory licences:

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<sup>47</sup> Ibid para 8.62

<sup>48</sup> Ibid para 14.27

<sup>49</sup> Ibid 14.38 - 14.39

- they have resulted in educational institutions paying for uses that should be covered by unremunerated exceptions; and
- they are inflexible and overly prescriptive.

In turn, the ALRC recommended to reforms to address these concerns:

1. the Copyright Act be should be clarified to ensure the existence of the statutory licences does not imply that educational institutions cannot rely on General Exceptions; and
2. that the statutory licences by streamlined to make them less prescriptive and considerably more flexible.

CAG strongly supports these recommendations and submits they should also be implemented as a priority.

### ***Allowing educational institutions to rely on General Exceptions where appropriate***

The ALRC was highly critical of the way in which the statutory licences had resulted in schools and other educational institutions being prevented from relying on General Exceptions for uses that were “fair”:

*One of the main advantages of a statutory licence, namely that it allows licensees considerable freedom to use a large range of copyright material without permission, in practice may also mean that far more of what a licensee does will be counted and paid for.*

*The statutory licences may therefore provide a mechanism for educational institutions and Governments to pay for uses that no one else pays for. So called ‘technical copies’ and freely available content on the internet are perhaps the two most commonly cited examples of content that gets counted under the statutory licences, but is ignored in most other organisations.<sup>50</sup>*

While the ALRC recommended retention of statutory licensing (albeit with a streamlined statutory licence), it said the Copyright Act be should be clarified to ensure the existence of the statutory licences does not imply that educational institutions cannot rely on General Exceptions.<sup>51</sup> The ALRC also said that if fair use is not enacted “then the case for repealing the statutory licences becomes considerably stronger.”<sup>52</sup>

### ***Streamlining and simplifying the statutory licences***

The ALRC recommended that the current detailed provisions concerning the setting of equitable remuneration, remuneration notices, records notices, sampling notices, and record keeping should be removed and replaced with a statutory licence that provides simply that the amount of

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<sup>50</sup> Ibid paras 8.102-103

<sup>51</sup> Ibid para 8.5

<sup>52</sup> Ibid para 8.4



equitable remuneration and other terms of the licences should be agreed between the relevant parties, or failing agreement, determined by the Copyright Tribunal.<sup>53</sup>

CAG is pleased to acknowledge that the education sector has recently worked constructively with Copyright Agency Ltd, Screenrights and Universities Australia to design a simplified and streamlined statutory licence which is based on in line with the ALRC's recommendation.<sup>54</sup> This consensus solution - which would replace the existing statutory licences - has been presented to Government.

However, it is critical to note that this reform would only solve **one** of the problems that the ALRC identified with the educational copyright scheme; ie the fact that the statutory licence is prescriptive and inflexible. It would **not solve** the two other significant problem identified by the ALRC: firstly, that the statutory licences have resulted in educational institutions being unable to rely on General Exceptions; and secondly, that the existing educational exceptions are entirely unsuited to a digital environment and should be replaced with a fair use provision. Each of these remain as pressing concerns.

## 5. The case for fair use

A flexible exception like fair use would remove the roadblocks that are impeding the use of digital technology in schools. It would be much better placed to meet the challenges of new teaching methods enabled by technological advancement. It would allow Australian schools to take full advantage of international best practice teaching methods, and to engage with students and their families in ways encouraged by the Australian Curriculum.

### 5.1 Fair use would allow for the question of fairness to be asked

Currently, if a particular use does not come within one of existing prescriptive exceptions, the use is either automatically prohibited, or required to be paid for under the statutory licences, regardless of how "fair" the use would be. Fair use would shift the focus from whether a particular educational use falls within the confines of a prescriptive technology-specific exception or licence, to whether the use in question is 'fair'.

#### **An example of how fair use might work**

The exam copying provision in s 200(1)(b) does not apply to the communication right, which means that the exception does not apply to exams delivered online.

CAG submits that a better approach is to ask whether using a small extract

<sup>53</sup> ALRC *Copyright and Digital Economy* report, recommendation 8-4

<sup>54</sup> Copyright Agency has also supported an amendment that extend the exam copying provision (discussed in section xx] above) to exams undertaken online.

of a work in an examination is a fair use – not to set different rules for different copyright materials and different teaching methods.

## 5.2 Allowing schools to rely on fair use would prevent rent seeking

Enacting a fair use exception would go a long way towards addressing the problems that we have highlighted in this submission, but it would also be imperative to ensure that it was made clear in the Copyright Act that schools and universities were entitled to take advantage of this exception; ie that they should no longer be required to rely on the statutory licences for uses that are fair.

It is this combination of no flexible fair use exception, and the requirement to rely on the statutory licence for non-harmful activities such as using freely available internet material and orphan works, that has resulted in Australian schools being forced to pay millions of dollars a year for minor, non-harmful, public interest uses of copyright materials that are recognised around the world as being free and fair uses. As we have noted above in part 3.2.2, a great deal of the money that schools pay for this copying either goes to rights holders who never had any intention of seeking payment for use of the content, or ends up with rights holders who had no connection whatsoever with the content copied. It is an incredibly inefficient use of public funds at a time when education budgets are coming under increasing pressure, and could be better spent on educating Australian students.

Moving to a fair use environment would not remove the need for licensing of educational uses that should properly be remunerated, but it would remove some of the current unfairness and inefficiencies caused by existing copyright law.

## 5.3 Fair use would help drive industry/education collaboration

The education sector, in line with the Government's innovation agenda, is forging closer relationships with industry to drive research and innovation. A recent example of school/industry collaboration is the Pathway in Technology Early College High School (P-TECH) pilot:<sup>55</sup>

*The Australian Government has provided \$500,000 funding to support the establishment of a STEM focused P-TECH pilot to test and adapt this innovative US model of education-industry collaboration in the Australian context.*

*The P-TECH model is based on a partnership between education and industry that is focused on supporting young people to make a successful transition from school to further education, training and work.*

<sup>55</sup> <https://www.studentsfirst.gov.au/restoring-focus-stem-schools-initiative>

*The P-TECH pilot will utilise existing Australian qualifications and actively engage industry in the learning and development of young people. Industry involvement, collaboration and mentoring will create direct links between what students are learning in school and the requirements of the modern workplace.*

*The pilot will provide secondary students with an industry supported pathway to a STEM related diploma, advanced diploma or associate degree. Students will then have the option to continue their study at the tertiary level or pursue employment in a STEM related field, including job opportunities with industry partners.<sup>56</sup>*

P-TECH is just one example of a much wider trend towards collaboration between industry and education.

There is, however, a significant roadblock to schools and universities relying on existing educational exceptions and statutory licences when engaging in this kind of collaboration: the exceptions and limitations generally apply only when the use is being undertaken solely by a teacher or student for the educational purposes of the school, university etc. The benefit of the exception or statutory licence is generally lost if a third party is provided with access to copies. There is an automatic “no” to this kind of use, regardless of whether it would be socially useful and regardless of whether or not it would unreasonably prejudice rights holders.

There is no such limitation with fair use. The fact that there is a commercial element to a particular use would be one element in determining whether the use was fair, but there would be no automatic prohibition on schools relying on fair use when undertaking collaboration with third parties. If the use was “fair”, it would be allowed. This flexibility is much better suited to an educational institutions are increasingly expected to engage with industry and the wider community.

#### **5.4 Fair use would make copyright more adaptable**

The pace of technological change, and the inability to predict the technological changes that will represent the next revolution in educational practice, make it imperative that Australia’s copyright laws are ‘future proofed’ to the greatest extent possible. Purpose-based, prescriptive exceptions and limitations are simply not capable of adapting in an environment where technology and teaching practices are rapidly evolving.

Consider, for example, the s 200(1)(b) exam copying exception discussed in part 3.1.1] above. It was created with a particular teaching model - paper based exams - in mind. As a matter of principle, there is no reason why the exam copying provision ought not to apply when an exam is being done online (eg by a distance education student) as opposed to in the classroom, but the prescriptive nature of the exception provides no scope for this.

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<sup>56</sup> <https://www.studentsfirst.gov.au/restoring-focus-stem-schools-initiative>

Another example is the caching exception in s 200AAA. As we have discussed above, the prescriptive wording of that section has given rise to concerns that it may not apply when a school uses a cloud-based service to carry out caching on its behalf.

Responding to changed technology and practices with piecemeal adjustments to exceptions is no longer a viable approach: inevitably, there is a long delay between the emergence of a new use and the legislature's consideration of the need for a specific exception. The educational copying regime now lags many years (and in some cases decades) behind the current state of technology and teaching practice.

A technology-neutral, open standard such as fair use would have the agility to respond to changes that have not yet even been anticipated, and without the need for legislative intervention. It would future proof copyright law.

### **5.5 Fair use would protect rights holders as well as users**

We aware that some rights holder groups have argued that the viability of the educational publishing sector would be affected if schools and universities could rely on a fair use exception.

CAG submits that these fears are unfounded: at the essence of a fairness-based analysis is the guiding principle that the use must be fair both to the copyright user and to the copyright owner. A fair use exception would apply only to uses that were "fair" when assessed against the relevant fairness criteria, including the effect of the use upon the potential market for, or value of, the copyright material. This requirement to consider market harm as part of a fairness assessment is a significant protection to ensure that copyright owner markets are clearly and properly preserved when determining the limits of fair use.

While we do not resile from the fact that some uses of copyright materials that currently attract remuneration would be considered to be a 'fair' use if this exception were enacted, the vast majority of uses that schools currently pay for would continue to be paid for.

#### **Schools would continue to pay for educational materials**

The Australian education sector currently spends upwards of \$665 million dollars per annum on purchasing educational resources for Australian schools. This expenditure is in addition to the over \$90 million dollars spent each year on copyright licensing fees paid to copyright collecting societies.

Enacting the ALRC's recommendations would not in any way impact the amount the Australian school sector spends on buying educational resources. Collective licences with Copyright Agency and Screenrights would continue to exist - but in a more flexible way that is more suitable to the digital learning environment.

Some activities that are identified as fair uses would no longer be remunerable - such as the educational use of freely available internet materials - which may have some impact on licence fees. Alternatively, the licences could be negotiated to allow a greater range of teaching activities with appropriate remuneration for creators.

## 5.7 Australian policy makers have been thinking about fair use for a long time

As can be seen from the timeline set out below, the relative merits of introducing an open-ended flexible copyright exception like fair use into Australian copyright law have been considered in Australia for almost twenty years, with two separate recommendations for fair use being made in 2013 alone. Some reviews set out below have assessed that the benefits of fair use did not outweigh the costs at the time, while others have firmly recommended an open-ended flexible exception such as fair use.

1998 In 1996, the Copyright Law Review Committee (CLRC) was asked to examine the simplification of the various provisions and schemes that provide exceptions to the exclusive rights of copyright owners. In 1998 the CLRC recommended the adoption of an open-ended flexible exception, similar to the ALRC's fair use proposal:

*The Committee recommends the expansion of fair dealing to an open-ended model that specifically refers to the current set of purposes, but is not confined to those purposes.*<sup>57</sup>

The Committee stated that the result of its recommendations would be to "introduce a provision akin to but more precise than the open-ended US fair use provision".<sup>58</sup> The strength of this approach is that:

*it is technology neutral and avoids the use of specific provisions to deal with specific cases. This should lead to legislation that is simpler and less likely to need constant revision to keep pace with technological developments".*<sup>59</sup>

2000 In the context of reviewing copyright in terms of competition policy, the Ergas Committee considered that, at that time, the transaction costs of changing the Copyright Act to introduce a flexible exception would outweigh the benefits.<sup>60</sup> The Committee also noted:

*... the current 'balance' in the Copyright Act between copyright owners*

<sup>57</sup> CLRC, Simplification Report [2.03], available here: <http://www.ema.gov.au/agd/www/Clrhome.nsf/Page/4DDD04A11F548554CA256D270020AEE9?OpenDocument>.

<sup>58</sup> Ibid at [6.10]

<sup>59</sup> Ibid at [6.06]

<sup>60</sup> Intellectual Property and Competition Review Committee, *Review of Intellectual Property Legislation under the Competition Principles Agreement* (2000), 129.

*and users has been worked out in the context of the present rules on fair dealing. If this concept changes with the development of the market for copyright material along different lines, imposing greater restrictions on the availability of material for fair dealing purposes, there may be serious competition implications.*<sup>61</sup>

June 2004 The Joint Standing Committee on Treaties (JSCOT) considering the *Australia – United States Free Trade Agreement* (AUSFTA) recommended that “the Copyright Act 1968 replace the Australian doctrine of fair dealing for a doctrine that resembles the United States’ open-ended doctrine defence of fair use.”<sup>62</sup> JSOT noted that the extension of the term of copyright contained in AUSFTA, and said that:

*... in order to ensure that the balance of interests between users and owners is maintained (as the evidence suggests that it will be altered under the AUSFTA) the Committee is putting forth three recommendations that it believes will not only assist educational, libraries, research and other similar institutions to discharge their function of providing community access to knowledge that will enhance the intellectual commons but also resolve a long standing legal anomaly in Australian copyright law:*

**Recommendation 16**

*The Committee recommends 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.*

**Recommendation 17**

*The Committee recommends [the Copyright Act] replace the Australian doctrine of fair dealing for a doctrine that resembles the United States open-ended defence of fair use, to counter the effects of the extension of term extension and to correct the legal anomaly of time shifting and space shifting that is currently absent.*

**Recommendation 18**

*The Committee recommends [a review of the] standard of originality applied to copyrighted material with a view to adopting a higher standard such as that in the United States.*<sup>63</sup>

August 2004 Another Senate Committee considering AUSFTA noted the difference between the US doctrine of fair use and the Australian doctrine of fair dealing:

*“simply put, in the United States courts have the power to find new, or unforeseen but economically insignificant uses ‘fair’. Australian courts*

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<sup>61</sup> Ibid

<sup>62</sup> The Joint Standing Committee on Treaties—Parliament of Australia, Report 61: The Australia-United States Free Trade Agreement (2004), Rec 17.

<sup>63</sup> Ibid at pp 237-238

*do not have that power.”*<sup>64</sup>

The Committee also noted that a result of AUSFTA, Australian users of information will have more restricted access to copyright information than users in the United States due to the higher standards of copyright protection in Australia overall and the lesser usage rights available.<sup>65</sup>

Referring to the failure to implement the CLRC's recommendation for an open-ended exception, the Committee found:

*As a result, under the AUSFTA, Australian users of information will have more restricted access to copyright material than users in the United States due to the higher standards of copyright protection overall and the lesser usage rights available. Nothing in the AUSFTA would prevent Australia from implementing legislation to ... introduce a 'fair use' defence to copyright infringement*<sup>66</sup>

The Committee also noted the advice from the Department of Foreign Affairs and Trade that there was nothing in AUSFTA that would prevent Australia from introducing a fair use defence to copyright infringement.<sup>67</sup>

Government Senators adopted the conclusions expressed by JSCOT. Labor Senators separately recommended that the Senate establish a Select Committee on intellectual property to investigate options for possible amendments to the Copyright Act to expand the fair dealing exceptions to more closely reflect the fair use doctrine in the United States.<sup>68</sup>

- 2004 Both major political parties announced that Australia would consider the introduction of fair use as part of official party policies for the 2004 election campaign.<sup>69</sup>
- 2005 The Attorney-General's Department conducted a review considering the introduction of fair use in Australia (AGD Review).<sup>70</sup> A formal response to this review was not issued.
- 2006 Following the conclusion of the AGD Review, the Government introduced new exceptions for time and format shifting, and a new 'flexible fair dealing'

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<sup>64</sup> Senate Committee considering the Australia –United States Free Trade Agreement in Chapter 3 – Intellectual Property at [3.103], available here: [http://www.aph.gov.au/Parliamentary\\_Business/Committees/Senate\\_Committees?url=freetrade\\_ctte/report/final/ch03.htm](http://www.aph.gov.au/Parliamentary_Business/Committees/Senate_Committees?url=freetrade_ctte/report/final/ch03.htm).

<sup>65</sup> Ibid at [3.104]

<sup>66</sup> Ibid, [3.104 – 3.105].

<sup>67</sup> Ibid at [3.05]

<sup>68</sup> Parliament of Australia, Senate Select Committee on the Free Trade Agreement between Australia and the United States, Final Report, August 2004. See in particular Labor Senators recommendation 8.

<sup>69</sup> Cited at footnote 5 in Weatherall, K, *Of copyright bureaucracies and incoherence: Stepping back from Australia's recent copyright reforms*, Melbourne University Law Review, Vol 312007, p976. See also Regulatory Impact Statement to *Copyright Amendment Bill 2006*, p6.

<sup>70</sup> Attorney-General's Department *Fair Use and Other Copyright Exceptions. An examination of fair use, fair dealing and other exceptions in the Digital Age*, Issues Paper, May 2005.

provision – s.200AB.

It was expressly acknowledged that s.200AB was designed to provide some flexibility to use copyright material for certain socially useful purposes, which will “provide some of the benefits that the fair use doctrine provides in the United States.”<sup>71</sup>

The Senate Committee considering this provision stated that s.200AB is “based on the principle of ‘fairness’, that is, a court would be required to assess whether a use is ‘fair’ by testing it against new conditions set out in the legislation.”<sup>72</sup>

In the context of a decision to implement time and format shifting exceptions and the ‘semi-open’ flexible fair dealing provision of s.200AB, instead of fair use, the Howard Government stated:

*The Government will monitor the effects of legalising time-shifting and format-shifting and the development of case law with respect to an open-ended exception [s.200AB]. It will review the new arrangements if necessary.*<sup>73</sup>

July 2013      The House of Representatives Standing Committee on Infrastructure and Communications recommended the “clarification of ‘fair use’ rights for consumers, businesses, and educational institutions, including restrictions on vendors’ ability to ‘lock’ digital content into a particular ecosystem.”<sup>74</sup>

November 2013      The ALRC’s central recommendation was that the Act should provide an exception for fair use, replacing the majority of existing prescriptive exceptions with the fair use exception.<sup>75</sup>

Some submissions to the Productivity Commission have claimed that the ALRC was equivocal in its recommendations.<sup>76</sup> This could not be further from the truth. The ALRC clearly stated:

*Despite the many benefits common to both fair use and fair dealing, a confined fair dealing exception will be less flexible and less suited to the digital age than an open-ended fair use exception. Importantly, with a confined fair dealing exception, many uses that may well be fair will continue to infringe copyright, because the use does not fall into one of the listed categories of use. For such uses, the question of*

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<sup>71</sup> The Hon Phillip Ruddock MP, Second Reading Speech to the *Copyright Amendment Bill 2006*.

<sup>72</sup> Parliament of Australia, Standing Committee on Legal and Constitutional Affairs Report *Copyright Amendment Bill 2006 [Provisions]*, November 2006, p4.

<sup>73</sup> Regulatory Impact Statement to *Copyright Amendment Bill 2006*, p13.

<sup>74</sup> House of Representatives Standing Committee on Infrastructure and Communications, *At What Cost? IT Pricing and the Australia tax* (Canberra, July 2013) at xiii.

<sup>75</sup> ALRC *Copyright and the Digital Economy*, Report 122, November 2013

<sup>76</sup> Australian Film/TV Bodies submission, para 64



*fairness is never asked.*

Referring to criticisms that fair dealing is “very much a second-best option”, the ALRC stated:

*The ALRC agrees with some of these criticisms of confined exceptions, and prefers the open-ended exception. However, in response to stakeholder feedback, the ALRC is recommending an alternative in the event that fair use is not enacted. This alternative builds upon the existing fair dealing regime and may even prepare the way for fair use at a later time.*<sup>77</sup>

In summary, CAG submits that fair use is not foreign to Australia’s policy deliberations, and the ALRC’s recommendation for fair use was just the latest in a series of considered, evidence-based and well thought-out recommendations about the desirability of flexible copyright exceptions in Australia.

CAG submits that the time is ripe for the introduction of fair use into the Australian Copyright Act.

## 6. Debunking fair use myths

CAG welcomes an evidence-based assessment of the benefits of injecting greater flexibility into Australian copyright law. Unfortunately, debates about the merits of purpose-based versus flexible exceptions have often been coloured by a great deal of misleading rhetoric. In this section we will debunk some of the myths that have been perpetrated by opponents of flexibility:

1. the myth that flexible exceptions would destroy the educational publishing industry
  - enactment of a flexible exception in Canada did not decimate the Canadian educational publishing industry;
  - introducing fair use in Australia would not harm the publishing industry.
2. the myth that flexible exceptions such as fair use are inherently uncertain;
3. the myth that flexible exceptions such as fair use do not comply with the “three step test”; and
4. the myth that fair use is an intrinsically US doctrine.

### 6.1 The myth that flexible exceptions would destroy the educational publishing industry

In section 8 below we outline the way in which the educational publishing industry is thriving in the US under fair use. In this section, and in **Attachment D**, we address the claims made in

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<sup>77</sup> ALRC *Copyright and the Digital Economy*, Report 122, November 2013, para [6.19] - [6.23]

publisher submissions that “fair use” has decimated the Canadian educational publishing industry, and that it would do the same in Australia if the ALRC recommendations were adopted.

### **6.1.1 The myth that fair use has decimated the Canadian educational publishing industry**

We have had an opportunity to review submissions by some publishers that assert - without providing any evidence - that Canadian educational publishers have been “decimated” as a direct result of a recently enacted fair dealing for education exceptions that permits Canadian schools and universities to use small amounts of works for educational purposes without payment.

As we set out in **Attachment D** to this submission, this claim does not withstand scrutiny. It is true that some Canadian educational publishers have reported declines in the K-2 text book market, but there are many reasons for this that are completely unrelated to the 2012 copyright reforms highlighted by publishers. For example:

- Oxford University Press (OUP) has told the Productivity Commission that the most significant reason that it ceased publishing in its schools divisions in Canada was “the loss of licensing income” from Access Copyright. And yet, in its 2013/2014 Annual Report, it says nothing about copyright reform, and instead says that the decision to wind back its schools division in Canada followed “*a decade-long decline in the Canadian market for educational resources during which purchases of materials have fallen by nearly 50 per cent.*” OUP added that the decision to wind back in the schools market does not affect the company’s other activities in Canada “*including our market-leading Higher Education and ELT programmes.*”
- OUP also asserts that the 2012 copyright reforms were the reason that Canadian educational publisher Nelson Education Ltd failed. And yet, an affidavit filed by Nelson’s CEO in what were effectively bankruptcy proceedings, the company lists reduced spending on new curriculum by Canadian schools, increasing use of open education resources, the use of used textbooks, and the transition from traditional print books to digital products (which is said to be “having a transformative effect on the business”) as matters that negatively impacted on the company’s ability to remain profitable.
- A recent “open letter” from the Higher Education Committee of the Association of Canadian Publishers (ACP)<sup>78</sup> complained about university bookshops selling second-hand books. The ACP said that while they understood that bookshops were under pressure to offer only the lowest priced options, there were important reasons to stop selling second hand books, including that “students deserve the choice of purchasing new books”:

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<sup>78</sup> <http://publishers.ca/images/downloads/ACP-HigherEdCttee-OpenLetter-NewTexts.pdf>

*“We know that some students actually prefer to purchase new—a copy with no dog ears, no yellow highlighting, no scribbled notes, no pages about to fall out.”<sup>79</sup>*

- The ACP has also lamented the increasing popularity of open access publishing,<sup>80</sup> saying that it *“views with concern the trend to equate public funding for research with the right to public access to published versions of the research to which value has been added.”*
- A report by PriceWaterhouseCoopers that was commissioned by the ACP<sup>81</sup> listed publicly funded, open access educational content as “threat” to the Canadian publishing industry:

*Open Educational Resources are a threat to traditional publishers as they provide textbooks and course materials for free. Some schools boards have access to digital content developed by the Ministry and/or teachers free of charge.*

- The PWC report also noted that “media players such as Apple and Google” were emerging as a new source of disruption for Canadian educational publishers by “seeking to introduce new business models and alternative content distribution channels.”<sup>82</sup>

The publishers are asking the Productivity Commission to ignore the disruptions that we’ve set out above - ie open access publishing, student preferences for second-hand books, reduced spending on new curriculum, new media players such as Google and Apple - and simply take it on faith that any financial difficulties that Canadian publishers claim to be experiencing can be sheeted home to the 2012 copyright reforms.

### **6.1.2 The myth that introducing fair use in Australia would harm Australian publishers and authors**

A May 2015 study of book publishing in Australia paints a rosy picture for educational publishing in Australia. Despite the publishing industry as a whole facing challenges from foreign online book retailers, the report by IBISWorld says that demand from education and training is expected to rise:

*Steady demand for educational books from schools and universities is expected to benefit industry operators active in these markets over the next five years, contributing to forecast revenue growth of 1.9% in 2015-16.*<sup>83</sup>

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<sup>79</sup> Ibid

<sup>80</sup> <http://publishers.ca/images/downloads/ACP-HigherEd-Statement-OpenAccess-August2014.pdf>

<sup>81</sup> [http://www.accesscopyright.ca/media/94983/access\\_copyright\\_report.pdf](http://www.accesscopyright.ca/media/94983/access_copyright_report.pdf) p 51

<sup>82</sup> Ibid p 51

*Book publishers active in the educational book segment are expected to have steadier revenue streams than other industry operators.*<sup>84</sup>

*...In addition, the industry also has a dependable revenue stream from the educational books segment, as students are generally required to purchase prescribed textbooks for most schools and universities, which reduces large year-to-year changes in revenue.*<sup>85</sup>

The outlook for educational publishers would not be any less rosy if fair use were enacted.

Students and schools would still be required to purchase prescribed textbooks as they currently do. As such, CAG can see very little - if any - impact on the over \$665 million spent annually by the school sector on purchasing educational resources.

It is true that some rights holders who currently receive windfall payments for copying of orphan works, and freely available internet material, would no longer receive that money if schools could rely on fair use for this copying rather than having to pay under the statutory licence. But that would have no impact whatsoever on the profitability of Australian publishers and authors, as this type of windfall gain should not be built into revenue expectations. As suggested above in section 3.2.2, CAG estimates that the amount of existing licensing revenue that could be attributed to works that cannot be identified in survey data was approximately \$9 million in 2014.

The claim that the sky will fall on Australian educational publishing if fair use is enacted is as much a myth as the claim that fair dealing for education decimated the Canadian educational publishing industry. The publishers who have made this claim in submissions to the Productivity Commission have provided absolutely no evidence to support the assertion that their current profitability is dependent on continuing to receive payments from Copyright Agency for public interest, non-harmful uses of copyright materials in Australian schools.

Finally, it is worth noting that the IBISWorld report does sound *one* note of caution for Australian educational publishers:

*...the rising use of internet-based teaching resources may limit revenue from this segment.*<sup>86</sup>

That's what's known as disruption. Keeping copyright law as it is will do nothing to protect Australian educational publishers from having to address this challenge, and nor should it.

## **6.2 The myth that flexible exceptions such as fair use are inherently uncertain**

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<sup>83</sup> IBISWorld Industry Report J5413 Book Publishing in Australia May 2015 p 4

<sup>84</sup> Ibid p 7

<sup>85</sup> Ibid p 26

<sup>86</sup> Ibid p 7

Opponents of fair use claim that it is inherently uncertain and unpredictable as compared with Australia's existing copyright exceptions. Again, this myth does not withstand scrutiny.

Firstly, existing Australian fair dealing jurisprudence is anything but certain. Copyright academics Michael Handler and David Rolph drew attention to this when writing about 'The Panel' case<sup>87</sup>. This was a case where the Federal Court considered the application of the fair dealing exceptions to a news review program. The judge at first instance, and three appeal court judges, reached different views as to whether particular excerpts from television programs could be said to come within the purpose of either "reporting news" or "criticism or review". Handler and Rolph were critical of the Court's failure to take the opportunity to develop a clear jurisprudence as to the factors that would be relevant when determining when the fair dealing exceptions for reporting news, and criticism or review, applied:

*"...[the judges] did not adequately consider: the proper standard by which the fairness of the dealing ought to be assessed; how crucial terms, such as 'criticism', 'review' and 'reporting of news', should be defined and applied; or how the substantial body of UK case law on fair dealing should be interpreted."*<sup>88</sup>

As the ALRC noted, it was the closed-ended nature of the fair dealing exceptions that created the uncertainty for the parties in The Panel case, **not** the question of whether or not the uses were fair:

*...A number of stakeholders pointed out that TCN Channel Nine v Network Ten Ltd ('the Panel case') focused on the question of whether the use of clips in an entertainment show was for the purpose of reporting news or the purpose of criticism and review. Fair use would avoid this problem, by not confining the exception to a set of prescribed purposes.*<sup>89</sup>

Secondly, in the US, the development of codes of practice and guidelines by user groups (including libraries and educators) have injected a great deal of predictive certainty as to kinds of uses that are likely to be "fair". A good example is the *Documentary Filmmakers' Statement of Best Practices in Fair Use*.<sup>90</sup> This document, which was developed in 2005 by documentary filmmakers with the assistance of legal advisors, contains a clearly understandable set of guidelines that are easy for filmmakers to apply. Prior to the development of the Statement of Best Practice, filmmakers who included third party content in their films in reliance on fair use often found it difficult and expensive to obtain "errors and omissions" insurance. Insurers now recognise this document as an effective guide to fair use principles, and offer errors and

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<sup>87</sup> TCN Channel Nine v Network Ten Pty Ltd [2001] FCAFC 146 22 May 2002

<sup>88</sup> Michael Handler and David Rolph, 'A Real Pea Souper: The Panel Case and the Development of the Fair Dealing Defences to Copyright Infringement in Australia', 27 Melbourne University Law Review, 381 at 383

<sup>89</sup> ALRC *Copyright and the Digital Economy* report, para 4.130

<sup>90</sup> <http://www.centerforsocialmedia.org/fair-use/best-practices/documentary/documentary-filmmakers-statement-best-practices-fair-use>

omissions insurance to filmmakers who comply with it when using unlicensed copyright content in films.<sup>91</sup>

### Fair use would be less uncertain than s 200AB

The ALRC noted that fair use would provide more, not less, certainty for education and library sector users than s200AB. Responding to suggestions from right holder groups that the reason that users had failed to take advantage of s 200AB was uncertainty caused by the flexibility of that exception, the ALRC said that 200AB had failed as an exception *not* because it was flexible, but because it was overly complex and ambiguous.<sup>92</sup> The ALRC rejected the suggestion that the problems associated with s 200AB would also arise under fair use, and noted that the US experience with fair use guidelines suggested that there would be a greater potential for effective guidelines around the concept of fairness “because the starting point is less uncertain”.<sup>93</sup>

A report commissioned by the Australian Digital Alliance for the purpose of the ALRC Copyright and the Digital Economy review supports this<sup>94</sup>. It found that those responsible for copyright in schools, universities, libraries and cultural institutions viewed s 200AB as a failure because of its complexity, and that these users were more familiar with the type of fairness analysis required by provisions such as fair use and fair dealing.

Finally, recent US scholarship has shown that fair use is nowhere near as uncertain as many of its critics suggest. See in particular:

- a study by Professor Pamela Samuelson that showed that fair use cases tended to fall into common patterns, which gives rise to more coherence and more predictability than its opponents suggest;<sup>95</sup> and
- an empirical analysis of fair use cases by Professor Matthew Sag that demonstrated that there are consistent patterns that can provide guidance to those seeking to rely on fair use.<sup>96</sup>

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<sup>91</sup> *Flexible Exceptions for the Education, Library and Cultural Sectors: Why Has s 200AB Failed to Deliver and Would These Sectors Fare Better Under Fair Use?* (2012), report prepared for Australian Digital Alliance/Australian Libraries Copyright Committee by Policy Australia Pty Ltd <http://nofilmschool.com/2013/03/fair-use-fbi-our-nixon-white-house-super-8-movies>

<sup>92</sup> ALRC *Copyright and the Digital Economy* report, para 12.21

<sup>93</sup> *Ibid* para 12.25

<sup>94</sup> [http://digital.org.au/sites/digital.org.au/files/documents/Appendix%201%20-%20ADA%20s200AB%20report%2015%20Nov%202012%20\(1\).pdf](http://digital.org.au/sites/digital.org.au/files/documents/Appendix%201%20-%20ADA%20s200AB%20report%2015%20Nov%202012%20(1).pdf)

<sup>95</sup> P Samuelson, ‘Unbundling Fair Uses’ (2009) 77 *Fordham Law Review* 2537.

<sup>96</sup> M Sag, ‘Predicting Fair Use’ (2012) 73 *Ohio State Law Journal* 47, 51.

### 6.3 The myth that flexible exceptions such as fair use do not comply with the “three step test”

There is a large body of opinion from highly respected intellectual property academics to the effect that there is nothing in the the so-called ‘three-step test’ on limitations and exceptions in Article 9(2) of the Berne Convention that would prevent a signatory state from adopting an open-ended exception such as fair use.

This includes:

- The *Declaration for a Balanced Interpretation of the Three Step Test in Copyright Law*<sup>97</sup>. The Declaration was released in 2008 by the International Association for the advancement of Teaching and Research in Intellectual Property, under the auspices of the Max Planck Institute. It is critical of what it says have been overly restrictive and narrow interpretations of the test, and states that the Three Step Test does not prevent legislatures from introducing open-ended limitations and exceptions “so long as the scope of such limitations and exceptions is reasonably foreseeable”.
- Dutch scholars, Professor Bernt Hugenholtz and Professor Martin Sentfleben, have considered<sup>98</sup> the scope for flexible exceptions under the EU Copyright Directive (which sets out a list of permitted purpose-based exceptions) and found that there is nothing to prevent member states from introducing flexible fair use style exceptions.
- See also Professor Senftleben’s account of the international negotiations that led to the three step test.<sup>99</sup> He 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.*

- In February 2012, the Dutch Government announced that it was considering introducing an open ended fair use exception and that it would seek to persuade other EU member states to adopt more flexible exceptions.
- In a 2013, the Irish Copyright Review Committee said there was nothing in the three step

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<sup>97</sup> [http://www.ip.mpg.de/shared/data/pdf/declaration\\_three\\_steps.pdf](http://www.ip.mpg.de/shared/data/pdf/declaration_three_steps.pdf)

<sup>98</sup> *Fair Use in Europe: In Search of Flexibilities*

[http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2013239](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2013239)

<sup>99</sup> Senftleben, *Copyright, Limitations, and the Three-Step Test: Analysis of the Three-Step Test in International and EC Copyright Law*, Kluwer Law International, 2004.

test that would prevent Ireland or the UK from enacting a fair use exception.<sup>100</sup> The Committee noted that the US Government had taken the view in submissions to the World Trade Organisation that the fair use doctrine is *equivalent* to the three step test.<sup>101</sup>

CAG submits 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.<sup>102</sup> 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.”

#### **6.4 The myth that fair use is an intrinsically American doctrine**

Some opponents of fair use suggest that a fair use exception of the kind recommended by the ALRC would be US-centric, and thus give rise to uncertainty for owners and users who are not familiar with US fair use jurisprudence. This view is based on several misunderstandings:

##### **6.4.1 The very real similarities between fair use and fair dealing**

The only substantive difference between fair use and fair dealing is that fair use is ‘open-ended’ in relation to the types of purposes that *may* be considered to be fair, and fair dealing is not. Apart from that, the non-exclusive list of factors that are relied on to determine whether a use is “fair” in the US are essentially the same factors that have always been relied on to determine whether a dealing is “fair” in Australia. Australian courts are entirely familiar with these factors. So are users - including academics and students - who have relied on the fair dealing exceptions to undertake their own research and study.

<b>US fairness factors</b>	<b>Australian fairness factors</b>	<b>ALRC suggested fairness factors</b>
The purpose and character of the use, including whether such use is of a commercial nature or is for non profit	The purpose and character of the dealing	The purpose and character of the use

<sup>100</sup> Modernising Copyright, Report of the Copyright Review Committee, Dublin, 2013 p 91

<sup>101</sup> Ibid

<sup>102</sup> 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>.



educational purposes		
The nature of the copyright work	The nature of the work or adaptation	The nature of the copyright material
The amount and substantiality of the portion used in relation to the copyright work as a whole	The possibility of obtaining the work or adaptation within a reasonable time at an ordinary commercial price	The amount and substantiality of the part used
The effect of the use upon the potential market for, or value of, the copyrighted work	The effect of the dealing upon the potential market for, or value of, the work or adaptation	The effect of the use upon the potential market for, or value of, the copyright material
	In a case where only part of the work or adaptation is copied, the amount and substantiality of the part copied taken in relation to the whole work or adaptation	

The Australian fairness factors were inserted into s 40(2) of the Act (the research and study fair dealing exception) as a result of a recommendation by the Copyright Law Committee on Reprographic Reproduction (the Franki Committee),<sup>103</sup> and were based on the same English common law cases that the US factors are based on.

The absence of an express reference to these factors in the sections of the Act that address fair dealings for other purposes (for example criticism and review) has never meant that those same factors do not also apply when determining whether dealings for these other purposes are fair. Copyright expert Professor Sam Ricketson has noted that “by and large, [the factors in s 40(2)] are similar to the types of factors taken into account in the case law dealing with fair dealing prior to this amendment”.<sup>104</sup> See also the Copyright Law Review Committee’s 1998 Simplification Report. The CLRC considered the fairness factors set out in s 40(2) of the Act and said that these factors apply - as a matter of common law - to all fair dealings, not just dealings for the purpose of research and study.<sup>105</sup>

#### **6.4.2 The US is not an outlier when it comes to fair use**

<sup>103</sup> The Franki Committee said while it would be “quite impracticable” to attempt to seek to precisely define fair dealing, it would be “useful” to set out a list of factors that could provide assistance to users when determining whether a reproduction for the purpose of research or study was fair.

<sup>104</sup> S Ricketson, *The Law of Intellectual Property: Copyright, Designs and Confidential Information*, Lawbook Co para 11.35

<sup>105</sup> CLRC Simplification Report para 6.36

The benefits of flexible copyright exceptions have been recognised internationally, including in jurisdictions such as the US, Israel, Singapore and South Korea, that have strong track records as innovation hubs.

- In the United States, the fair use exception is open-ended, but refers expressly to “teaching (including multiple copies for classroom use)” as well as “scholarship or research.”<sup>106</sup>
- In Israel, the fair use exception is open-ended but also refers expressly to “instruction and examination by an educational institution.”<sup>107</sup>
- In the Philippines, the fair use exception is open-ended but also refers expressly to “teaching including multiple copies for classroom use” as well as “scholarship and research.”<sup>108</sup>
- In Singapore, a new flexible fair use provision which was recently adopted echoes the fair use provisions of US copyright law.<sup>109</sup>
- In South Korea, a recently implemented fair use provision 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 unreasonable prejudice the legitimate interest of the right holder.”<sup>110</sup>
- In Canada, the *Copyright Modernisation Act* was recently introduced which includes a flexible exception that states “fair dealing for the purpose of research, private study, education, parody or satire does not infringe copyright.”<sup>111</sup>

See also the Irish Copyright Review Committee - which recommended the adoption of a fair use exception - in its 2013 report on Modernising Copyright:

*[Fair use] is not unique to the US; many other jurisdictions have adopted versions of it, most recently South Korea; and other jurisdictions, including Australia, are actively considering whether to do so.*<sup>112</sup>

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<sup>106</sup> 17 USC 107.

<sup>107</sup> Section 19 of the *Copyright Act* 2007.

<sup>108</sup> Section 185 of the *Intellectual Property Code*.

<sup>109</sup> Clause III.35 *Fair dealing in relation to works*.

<sup>110</sup> Article 35-2 of the *Copyright Act* of Korea.

<sup>111</sup> Copyright Modernization Act, C-11 2012 (Canada), s 29.

It is clear from this that a fair use exception of the kind recommended by the ALRC would be consistent with the principles-based approach to copyright in many comparable jurisdictions.

Recent research undertaken by the Brussels-based Lisbon Council that sought to measure the economic impact of copyright exceptions of the kind set out above.<sup>113</sup> Of particular interest for the purposes of this submission, the report noted that “greater scope and flexibility of exceptions to copyright have valuable positive externalities, specifically in the promotion of education [and] independent research.”

## 7. Licensing is not a complete solution

CAG submits that it is imperative to keep in mind that copyright exceptions, including fair dealing and fair use, are an intrinsic part of the copyright balance. As was noted by the Ergas Committee:

*The principle that society reaps benefits from knowledge and learning which in many cases outweigh limitations on the rights of owners to earn income from educational uses has long been recognised in copyright law. It is reflected in the special status given to education in the Berne Treaty.*<sup>114</sup>

The special status given to educational and other public interest uses is also recognised in the Preamble to the WIPO Copyright Treaty, which includes the following:

*Recognizing 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*

It is clear from these international instruments that contrary to the suggestion made by some rights holder groups, market failure has never been the only justification for unremunerated exceptions. This has particular significance when the relationship between the educational statutory licences and the educational and general exceptions is being reviewed. In the context of educational uses of copyright works, the ALRC commented:

*It is sometimes argued that where a licence is available, unremunerated exceptions should not apply. If market failure were the only proper justification for unremunerated exceptions, then the availability of a collective licence might suggest that unremunerated*

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<sup>112</sup> Modernising Copyright, Report of the Copyright Review Committee, Dublin, 2013 p 89

<sup>113</sup> [The 2015 Intellectual Property and Economic Growth Index: Measuring the Impact of Exceptions and Limitations in Copyright on Growth, Jobs and Prosperity.](http://www.lisboncouncil.net/publication/publication/122-the-2015-intellectual-property-and-economic-growth-index.html)  
(<http://www.lisboncouncil.net/publication/publication/122-the-2015-intellectual-property-and-economic-growth-index.html>)

<sup>114</sup> Ergas Committee Report, September 2000

*exceptions should necessarily not be available. In the ALRC's view, **the availability of a licence is an important consideration, both in crafting exceptions and in the application of fair use—but it is not determinative.** Other matters, including questions of the public interest, are also relevant.*<sup>115</sup> (Our emphasis)

## 8. Educational publishing is thriving in a fair use environment

A major theme of educational publisher submissions to this review is that fair use and a thriving educational publishing industry are incompatible. This is demonstrably not true.

In the US, schools and universities have for many decades been able to rely on the fair use exception to make “fair” uses of copyright content for educational purposes in the same way that Canadian schools have been able to since 2012.

If fair use really was an impediment to a thriving educational publishing sector, you would expect to see that reflected in the profitability of US educational publishers. And yet, a recent Wired review of the educational publishing business reported that these companies are bigger and more profitable than major media corporations:

*Education publishers dwarf trade presses. Only the top trade press, Random House, is bigger than Cengage, the little-known education publishing division that Thomson spun off in 2008 before merging with Reuters. Education publishers are also much bigger than other media companies that attract much more attention. Pearson is far bigger than AOL or the New York Times Company (and much more profitable). In order to find publishers with greater revenue or profits, you have to go up the ladder to companies like News Corp that include global television markets, or retail entities like Amazon.*

*One after one, Apple, Inkling, Barnes & Noble and other digital publishers have given up trying to outflank academic publishers.*<sup>116</sup>

These publishers are thriving because they are adapting to meet the challenges of disruptive technology. They are offering innovative solutions - such a digital textbook rental service that can save students 60 per cent of the cost of a regular textbook<sup>117</sup> - that respond to the changing demands of teachers and students in the digital age.

In its 2015-2019 Global Media and Entertainment Outlook,<sup>118</sup> PWC predicts that growth in the global educational publishing sector will outpace consumer and professional books revenue:

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<sup>115</sup> ALRC Copyright and the Digital Economy report, para 5.59

<sup>116</sup> Why Education Publishing Is Big Business <http://www.wired.com/2012/01/why-education-publishing-is-big-business/>

<sup>117</sup> See <http://www.coursesmart.com/media>

<sup>118</sup> <https://www.pwc.com/gx/en/industries/entertainment-media/outlook/segment-insights/book-publishing.html>

*Between 2014 and 2019, global total educational books revenue will grow at a CAGR of 2.0%, exceeding the CAGRs of 0.8% for consumer books revenue and 1.6% for professional books revenue.*

*Educational books will benefit from strong growth in digital and only a marginal shrinkage in print, with print books still being easier to share around a classroom and pass on to new students.<sup>119</sup>*

The future looks bright for those educational publishers who embrace the central role for digital education in Government STEM and innovation initiatives, as well as the challenges and opportunities arising from digital disruption.

## 9 Australia needs strong OER policies

As discussed above, education and innovation policy is focused on increasing Australia's STEM capability, but copyright is operating as a roadblock. OER policy must be a key component of Australia's innovation policy.

Open Educational Resources (OER) are openly licensed educational resources (eg textbooks, software, online learning modules, data sets or reports) which are free for anyone to use and can be freely adapted, remixed, shared, translated and improved. An example of OER is material released under an open licence like Creative Commons.

OER is critical because it facilitates educational uses that can otherwise be impossible – or overly costly - because of copyright restrictions. For example:

- publicly funded resources continue to be created and licensed in a manner that doesn't enable them to be extensively used by schools, teachers and parents or openly licensed in the future. This means:
  - of the \$90 million per annum the school sector pays to licence copyright materials for use in schools, a significant proportion of this is still spent on schools paying to use Government funded resources. In 2014, 1.54% of total remunerable pages included in the Part VB surveys were resources owned by Government Departments or the Board of Studies. CAG estimates that approximately \$925,000 of the approximately \$60 million paid under the Part VB licence in 2014 was paid out for materials that should have fallen under the AusGOAL framework;

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<sup>119</sup> Ibid

- taxpayers are essentially paying for these materials twice: once when Government funded resources are created and then again when they are used in schools;
- as discussed above, restrictions in the Copyright Act limit what teachers can do with copyright-protected content (for example, a teacher can usually only copy 10% of a text-based work under the Part VB statutory licence). In contrast, OER resources enable teachers to assist students to develop skills for the 21<sup>st</sup> century workplace, by using resources for remixes, code clubs, research and data mining, to collaborate with students in other schools or the wider community - the only limit is the students' imagination!

Australia was initially a world leader in the adoption of OER policy, but is now falling behind due to a lack of practical enforcement of existing OER policies. For example:

- Australia is a signatory to the 2012 Paris OER Declaration, which calls on Governments to openly licence publicly funded educational materials<sup>120</sup>. However this has not been implemented.
- The Australian Government's Open Access and Licensing Framework (AusGOAL) is the world's best practice in open licensing for publicly funded information<sup>121</sup>. This requires Commonwealth Departments and agency materials to be licensed under a Creative Commons CC BY licence. However AusGOAL implementation has stalled.
- Other countries are moving ahead, while Australia is failing behind (see the recently announced [#GoOpen](#) campaign<sup>122</sup> and the EU's Opening Up Education initiative<sup>123</sup>).
- Lack of Australian produced OER means teachers are forced to use OER predominantly from the US rather than Australian funded resources.

CAG submits that in order to achieve the maximum productivity benefit from the expenditure of public funds, the Commonwealth Government needs to ensure greater accountability in relation to existing OER policies, by openly supporting and encouraging the implementation of AusGOAL in Commonwealth Departments, and ensuring that any appropriate publicly funded initiative/project/resource to openly licence the resources in accordance with the AusGOAL framework, making them widely and freely available.

There would also be great benefit from the Commonwealth openly supporting and encouraging the use of OER (for example, developing an Australian version of #GoOpen).

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<sup>120</sup> [http://www.unesco.org/new/en/communication-and-information/resources/news-and-in-focus-articles/all-news/news/unesco\\_world\\_oer\\_congress\\_releases\\_2012\\_paris\\_oer\\_declaration/](http://www.unesco.org/new/en/communication-and-information/resources/news-and-in-focus-articles/all-news/news/unesco_world_oer_congress_releases_2012_paris_oer_declaration/)

<sup>121</sup> <http://www.ausgoal.gov.au/>

<sup>122</sup> <http://www.ed.gov/news/press-releases/us-department-education-launches-campaign-encourage-schools-goopen-educational-resources>

<sup>123</sup> <http://www.openeducationeuropa.eu/en/initiative>

OER policies do not replace the need for copyright reform. However, they are a keen part of the puzzle in encouraging public access to publicly funded resources in a digital age.

As Creative Commons itself has recognised:

*Our experience has reinforced our belief that to ensure the maximum benefits to both culture and the economy in this digital age, the scope and shape of copyright law need to be reviewed. However well-crafted a public licensing model may be, it can never fully achieve what a change in the law would do, which means that law reform remains a pressing topic. The public would benefit from more extensive rights to use the full body of human culture and knowledge for the public benefit. CC licenses are not a substitute for users' rights, and CC supports ongoing efforts to reform copyright law to strengthen users' rights and expand the public domain.*<sup>124</sup>

## Conclusion

CAG submits that the issues and challenges raised in this submission were fully canvassed in the ALRC's Copyright Review. The ALRC undertook a detailed and comprehensive analysis of the Educational Copyright Provisions and recommended three changes to ensure that the Australian education sector was well placed to meet the challenges of the digital environment:

4. The introduction of a fair use exception;
5. The simplification and streamlining of the statutory licences; and
6. Ensuring teachers can rely on General Exceptions where appropriate to do so.

Advances in digital education and increased business and government focus on the importance of equipping Australian students for the challenges of the 21st century workforce have made the need for copyright reform more acute.

CAG urges the Productivity Commission to endorse the ALRC's recommendations and to recommend that the Government implement them as a priority part of Australia's innovation agenda.

## Attachment A

See CAG Schools submission to ALRC Copyright and the Digital Economy Issues Paper Available at [http://www.alrc.gov.au/sites/default/files/subs/cag\\_schools\\_submission\\_-\\_ip\\_42\\_-\\_corrected.pdf](http://www.alrc.gov.au/sites/default/files/subs/cag_schools_submission_-_ip_42_-_corrected.pdf)

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<sup>124</sup> <https://creativecommons.org/about/reform>

## Attachment B

See CAG Schools submission to ALRC Copyright and the Digital Economy Discussion Paper  
Available at

[http://www.alrc.gov.au/sites/default/files/subs/707\\_org\\_cag\\_schools\\_submission\\_-\\_dp79\\_-\\_final\\_version.pdf](http://www.alrc.gov.au/sites/default/files/subs/707_org_cag_schools_submission_-_dp79_-_final_version.pdf)

## Attachment C

Schools EUS Electronic Use System training materials  
Presented by AMR Interactive

Available at <https://www.hightail.com/download/ZWJXQ3QrK3hmVFkxWjhUQw>



## Attachment D

### Dispelling the myth that fair dealing for education has led to the ‘decimation’ of the Canadian educational publishing sector

As is clear from the table below, this assertion, which has been made by several publishers in submissions to the Productivity Commission, is demonstrably false.

Submitter	Claims made	Facts
<p>Oxford University Press</p>	<p><i>“In 2014, Oxford University Press ceased publishing in its schools divisions for a number of reasons, including declining provincial budgets and weaker post-recession economy, but <b>most significantly because of the loss of licensing income distributed on behalf of Access Copyright.</b> “</i></p>	<p>From the OUP 2013/2014 Annual Report:</p> <p><i>“We also encountered difficulty in Canada, where we took the hard decision during the year to wind down our development of local educational content for the schools market. <b>This followed a decade-long decline in the Canadian market for educational resources</b> during which purchases of materials have fallen by nearly 50 per cent. This decision does not affect our other activities in Canada, however, including our <b>market-leading Higher Education and ELT programmes.</b> “</i></p> <p>And from the OUP 2012/2013 Annual Report:</p> <p><i>“Growth also took place in neighbouring <b>Canada, where OUP is one of the largest publishers in the humanities and social sciences. A string of new titles helped to buoy sales, while digital revenue increased tenfold on the previous year.</b> .. Canada secured significant sales increases in a declining market, buoyed by a major high school geography adoption. “</i></p> <p>In other words, the schools market</p>

		has been declining for 10 years prior to OPU's decision to exit Canada (ie long before the 2012 changes to Canadian copyright law that OUP complains about), and the higher education market is thriving despite the fact that universities can claim the benefit of the new fair dealing for education exception.
Oxford University Press	<i>"The impact that the changes had on Oxford University Press is just one example of the significant harm that has been caused to educational publishing in Canada. <b>Emond, a locally owned publisher, has also ceased publishing...</b>"</i>	From the Emond Publishing Website <sup>125</sup>  <i>"Today, <b>Emond Publishing has expanded to serve the college, university, and professional market with resources that students and professionals can rely on from backpack to briefcase. In 2015, Emond published the first book in the Emond Professional Series, a new collection of practical handbooks for professionals embarking upon careers as lawyers, paralegals, and law clerks.</b>"</i>
Oxford University Press	<i>"Nelson, the largest educational publisher, tried to sell its business, and when this failed, declared a form of bankruptcy."</i>	The suggestion was that it was fair dealing for education that led the demise of this publishing company.  The facts, however, are set out in an affidavit from the company's CEO <sup>126</sup> : it is clear that the company's failure was largely a result of: <ul style="list-style-type: none"> <li>● declines in educational funding</li> <li>● slower course curriculum refresh</li> <li>● greater uptake of open access educational resources, and</li> <li>● the transition to digital.</li> </ul>

<sup>125</sup> <http://www.emond.ca/about-emond.html>

<sup>126</sup> [http://cfcanada.fticonsulting.com/NelsonEducationLtd/docs/Application%20Record%20\(%20Returnable%20May%2012%202015%20\)%20part%201%20of%203.pdf](http://cfcanada.fticonsulting.com/NelsonEducationLtd/docs/Application%20Record%20(%20Returnable%20May%2012%202015%20)%20part%201%20of%203.pdf)

<p>McGraw Hill Education</p>	<p><i>“Taking the Canadian experience from 2012, <b>revisions to fair dealing directly contributed to an unprecedented decline in Access Copyright revenue for McGraw Hill Education in Canada...</b> There has been a subsequent loss of jobs and a shift to a US structure, damaging not only the local industry but by extension the publication of Canada-specific cultural and curricula content.”</i></p>	<p>From the McGraw Hill Ryerson 2012/2013 Annual Report: <sup>127</sup></p> <p><i>“The Higher Education Division reported consistent sales with a slight increase of 0.4% in a market that was lower year-over-year. <b>This Division continues to invest in the development of digital and customized learning solutions, areas that have grown over the past two years and that we believe are the key to our long-term growth and profitability in Higher Education. The School Division reported a sales decrease of 23.1% while industry-wide results declined 12.0%. This under performance relative to the industry is a result of non-recurring sole source contracts. Spending in all regions decreased this year as curricular implementation reached cyclical lows.</b> We continue to develop products to serve areas that show promise for growth, including continued improvements to our digital products.”</i></p> <p>In other words, the higher education market is thriving <i>despite</i> universities now being able to take advantage of fair dealing for education, and the schools market declined for reasons quite unrelated to copyright.</p>
<p>Macmillan Education</p>	<p><i>“We support the view of the Oxford University Press Australia and NZ Submission that highlights the severe impact seen on businesses in Canada due to the change to a ‘fair use’ approach to copyright. We believe the same result would occur in Australia if</i></p>	<p>The suggestion appears to be that “fair use” and a thriving educational publishing market are not compatible, but the evidence is very much to the contrary. In the US - which has had fair use for much longer than Canada has had a fair dealing for education</p>

<sup>127</sup> [http://arielkatz.org/wp-content/uploads/2014/06/2013\\_annual\\_report.pdf](http://arielkatz.org/wp-content/uploads/2014/06/2013_annual_report.pdf)

	<p><i>‘fair use’ was to go ahead. ‘Fair use’ does not provide protection for a sustainable local publishing industry.”</i></p>	<p>exception - the educational publishing market is actually thriving. See, for example, a recent media report on “Why Educational Publishing is Big Business”: <sup>128</sup></p> <p><i>“Education publishers are much bigger than other media companies that attract much more attention. Pearson is far bigger than AOL or The New York Times Company (and much more profitable). In order to find publishers with greater profits, you have to go up the ladder to companies like News Corp that include global television markets, or retail entities, like Amazon. This makes companies like Pearson hard to ignore...”</i></p> <p style="text-align: center;"><i>and</i></p> <p><i>“...We talk a lot about the transformation to an information economy, but companies like Pearson, Elsevier, Thomson Reuters and McGraw-Hill epitomise it. Textbooks and institutional publishing services lie at the exact juncture of knowledge and money”.</i></p> <p>Contrary to what Macmillan Education suggests, fair use clearly <b>does</b> provide protection for a sustainable publishing industry.</p>
<p>Australian Publishers Association</p>	<p><i>“The impact of the changes on educational publishers is irrefutable and negative. A recent report from PWC is pretty clear and damning.”</i></p>	<p>The PWC report states that schools are making greater use of publicly funded open sourced educational materials. PWC says that this is a threat to Canadian publishers as it provides textbooks and course materials for free.</p>

<sup>128</sup> <http://www.wired.com/2012/01/why-education-publishing-is-big-business/>