



Australian Education Union

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2 August 2013

The Executive Director
Australian Law Reform Commission
GPO Box 3708
Sydney NSW 2001

Email: copyright@alrc.gov.au

Dear Sir or Madam,

**Re: AEU Submission to the Australian Law Reform Commission Inquiry
into Copyright and the Digital Economy**

Please find attached a submission from the AEU to the Australian Law Reform Commission Inquiry into Copyright and the Digital Economy.

Please contact me if you have any questions in relation to this submission.

Yours sincerely,

A handwritten signature in blue ink that reads 'S Hopgood'.

Susan Hopgood
Federal Secretary



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Submission to the Australian Law Reform Commission Inquiry into Copyright and the Digital Economy

The Australian Education Union (AEU) represents more than 192,000 teachers and other education workers in public education in all States and Territories. Our members are employed in government schools and public early childhood work locations, in public institutions of vocational and/or technical and further education and training, in Adult Multicultural or Migrant Education Service centres and in Disability Services centres as teachers, school leaders and education assistance or support work classifications.

Introduction

That education is a matter of significant public interest could not be questioned. Quality education is an integral part of the national interest, and the reforms proposed in the discussion paper have potentially far reaching consequences for the administration of education in this country.

Given this fact, and the potential for a substantial proportion of cases testing the ‘fair use exception’ to come from educational settings, the AEU is concerned about the lack of involvement of teachers and teacher organisations in the inquiry process to date. There is not one Advisory Committee member from an educational organisation, much less one representing the public education sector, in which the majority of Australian students are educated. The education sector is also grossly underrepresented in the submissions in response to the Issues Paper.

The AEU believes that given the importance of this matter for education in Australia, that it and other relevant teacher organisations should be invited to participate in the process and that adequate time be allowed to consider the implications more thoroughly. It is in this context that the following brief response is provided to the discussion paper.

The Australian Education Union’s Position

The AEU is broadly supportive of the framing principles for reform of copyright law in Australia provided in the Discussion Paper. It is in the best interests of students and teachers that teachers have access to a range of quality resources to support teaching and learning in all educational contexts, and the principles are consistent with this.

The AEU does not dispute the need for review, where changing circumstances have significantly impacted on the way that people access copyrighted material. However, law reform should not be the automatic response to any issues that arise in a review, particularly without thorough consultation with all stakeholders (as identified above). Doing so would risk consequences that are contradictory to the principles.

Looking at the detail of the Australian Law Reform Commission's (ALRC) proposals, the AEU believes that there are some significant considerations arising from their potential impact in the context of education which have been neglected in the process thus far. These concern both the creators of educational resource materials and the users of the material in schools and other educational contexts.

If the framing principles are to be adhered to, the AEU argues that any reform must give serious consideration to the following:

- the potential for a reduction in the content that is currently available to educators;
- that already busy teachers and educational administrators are not burdened with additional compliance requirements and an unmanageable workload associated with copyright (for which they are not qualified) in order to continue to provide quality learning opportunities for students; and
- that creators of material used in the classroom continue to have adequate motivation to produce materials as well as appropriate remuneration for creation of said resources.

Repeal of Statutory Licences and Introduction of Voluntary Licences

How voluntary licences would be negotiated and administered under the proposed reforms is a question that at this stage remains unanswered. This process would, however, have a substantial impact on how effective they would be in educational contexts. The current arrangements provide certainty and clarity for teachers, so that they can go about their core duty – teaching – without being hampered by the need to understand the complexities of copyright legislation.

It is unclear whether the introduction of voluntary licences would automatically change this, but there is a very real likelihood that it will make working with copyrighted material more complex for teachers. At the very least, there are likely to be a number of different copyright licences relating to material a teacher would use. Each licence may well have different conditions attached. For example, some resources could only be used in the classroom and not at home, some could be modified, others not, and so on. The list of possible conditions is potentially endless. It is simply not reasonable for teachers to be expected to know and understand so many different conditions of use on a daily basis.

As individual educational institutions, schools are simply not equipped to negotiate copyright licensing agreements. Teachers have neither the qualifications nor the resources to handle this additional workload. They cannot be expected to understand copyright law, nor have an understanding of what might constitute fair remuneration in a (nation-wide) market of educational resources.

Presumably it would also affect the workload of copyright holders, should they have to negotiate separate educational licences with each of the nearly ten thousand schools in Australia, as well as TAFE campuses, and other educational providers. There are also concerns about equity: where, for example, students attending those schools without the resources to negotiate such licences will have limited access to the resources necessary for their learning in the classroom, as well as for the rights holders, some of whom are far better able to negotiate licences than others.

The AEU asserts strongly that any negotiation of licences for copyright material must not be devolved to the school level.

The concern raised by Universities Australia in its submission, that the education sector is the only one making payment, via current licencing arrangements, for a range of material that is otherwise ‘freely available’ is acknowledged, though not necessarily supported. The AEU does not believe that education budgets should shoulder an unfair proportion of the remuneration burden under copyright law. However, if this is true, this does not necessarily mean that the solution is to abolish statutory licences. Tight (state) education budgets cannot be the sole consideration in establishing the perspective of the education sector on any possible law reform. It is in the public interest that the quality of education of Australian students be paramount.

While the current administration of statutory licences creates a significant workload for some schools some of the time, this may be dealt with in other ways. And, in fact, there is a very real concern that the reforms will significantly increase transaction costs, as identified in 4.75 of the discussion paper. 6.7 of the same paper notes that:

The most common policy justification for imposing a statutory licence seems to be market failure due to prohibitively high transaction costs—that is, where ‘the costs of identifying and negotiating with copyright owners outweigh the value of the resulting licence.’

This would certainly be the case for education.

The ‘Fair Use Exception’

On first impressions, the ALRC’s arguments as to why the enactment of a fair use exception should be implemented in Australia seem appropriate to the circumstances of education. The AEU certainly recognises the need for the law to be able to reflect current circumstances. Flexibility, coherence and predictability sound desirable. However the AEU is not convinced by the ALRC’s argument that the fair use exception will necessarily provide these.

The fact that the ALRC’s proposal argues that, “Fair use should be considered on a case by case basis” (13.16) is particularly problematic in the context of schools, not least because of the lack of clarity about what would constitute a ‘case’. Is the user an individual teacher? A school? An educational jurisdiction? Or, for example, is the ‘case’ a single reproduction of material for one class or the use by an institution of all materials from a particular publisher? The answer to these questions will have a significant impact on the position the AEU would take on any reform of copyright law.

It is inappropriate for teachers to be burdened with any additional responsibilities for which they are not qualified and would add to their workload. Judgements about what constitutes ‘fair use’ must not be the responsibility of individual teachers or schools who do not have the appropriate qualifications, resources or support to navigate the complex world of copyright law.

The sense of how large a task this may turn out to be is reflected in the discussion paper’s proposed ‘fair use exception’, with at least four nebulous factors to consider in each instance.

4.151 The list of [four] fairness factors is non-exhaustive. Other factors may be considered. For example, principles of justice, equity and perhaps even acknowledgment of moral rights may also be relevant in determining the fairness of a use.

The ALRC states that because the exceptions are flexible and principle-based, they are more appropriate for use in a changing environment. This may well be true and an important consideration in a world where prescriptive exceptions may quickly become obsolete. However, teachers use copyrighted material on a very frequent basis without access to legal expertise. That teachers could make a judgment about these matters – which they could confidently assume would stand up to a test in a court of law – every time they use copyrighted material, is an unreasonable demand. Teachers simply cannot be expected to navigate such a ‘flexible’ and complex legal area. The flexibility and complexity may simply serve to increase doubt and angst for teachers about the use of copyright material.

The Compounding Impact of Both Proposed Changes on the Workload of Teachers

In a world where it is unclear whether a particular use of copyrighted materials would constitute a ‘fair use exception’ or should be licensed under a voluntary arrangement, educational users of material would need to make a judgment about what ways in which to use this material. Aside from workload and qualification issues already raised, this also raises a number of ethical considerations in the world of education.

Given the fact that many educational resources used in classes are written by teachers currently employed by schools or Departments of Education, the negotiation of voluntary licences at the level of school or even Department, raises the risk of conflicts of interest in managing public resources, given the likelihood of the involvement of creators of content in both sides of the negotiation process.

There is a real concern that the proposed changes together pose the risk that important resource material currently being used in teaching and learning would be withdrawn from permissible use altogether, and further, that resource use would be hampered by doubt and financial considerations.

The Importance of a Diversity of Resource Material in Teaching and Learning

It is extremely important that authors continue to have the motivation to produce quality resource material and that they are adequately remunerated. The quality of education for students around Australia is dependent on access to a range of appropriate resource material.

In the field of education, it is particularly important to consider the following factors. Firstly, some of the best resources are those that are tailored specifically to state-based, or increasingly, Australian curricula. As ‘education’ is listed explicitly in the ALRC’s proposed illustrative purposes, these resources will potentially be used almost exclusively within what falls into the classification of a ‘fair use exception’. This runs the risk of a significant reduction in remuneration for the creators and publishers of such content. This problem is more significant for the producers of educational resources than for some other authors and creators. With limited or no income to be gained from doing so, many authors and publishers will likely choose to cease the production of such material. As a result, teachers and students in classrooms may have access to fewer resources tailored to specific curriculum needs written by educational experts.

Emerging technologies certainly have the capacity to transform, and are already transforming, education in Australia and around the world. Teachers want to be able to use new technologies as they emerge in innovative ways. It is appropriate that their work is not hamstrung by copyright legislation that is inappropriate for the technologies available and the times in which they are working. However, given the insufficient participation by educators in the consultation process to date, the argument that current arrangements are doing that has not been convincingly put. In any case, having copyright legislation that allows for flexible classroom use of resources is worthless if quality content is no longer available.

In an environment of uncertainty, there is a real risk that teachers, fearful of inadvertently infringing copyright, would begin to severely limit the material that they provide for students. This will have a negative impact on the education of students around the country, which is expressly contradictory to Principle 3 of the Inquiry itself. In attempting to reduce the administrative burden of negotiating and administering copyright licences, educational institutions may be forced to limit the diversity of resource material used in teaching and learning. However, an important part of developing critical literacy in students is that they are able to evaluate a range of perspectives on issues, requiring a diversity of source material.

Conclusion

At this stage the AEU does not believe that the concerns outlined have been addressed by the ALRC's proposals. In fact the proposals acknowledge that the process will need to be tested in courts. This is problematic for teachers to say the least, who require certainty about resource material in order to plan for effective teaching.

The AEU strongly asserts that any changes to copyright law must not add to the compliance requirements and workload of teachers and schools. It must also be ensured that quality educational resources can continue to be developed, readily available to all students, and that their authors are appropriately remunerated.