

14. Education

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Summary

14.1 Copyright law must continue to ensure writers, publishers, film makers, and other rights holders have an incentive to create the educational resources that students and educational institutions rely on.

14.2 However, 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.

14.3 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.

14.4 The ALRC has concluded that fair use is a suitable exception to apply when determining whether an educational use infringes copyright. Further, the fact that a particular use is for education should favour a finding of fair use. ‘Education’ should be included as an illustrative purpose in the fair use exception.

14.5 If fair use is not enacted, then ‘education’ should be included in the list of prescribed purposes in the new fair dealing exception recommended in Chapter 6.

Applying this exception would also require consideration of what is fair, having regard to the same fairness factors in the fair use exception.

14.6 The fair use and new fair dealing exceptions are not unqualified or blanket exceptions for education. Educational uses are not even presumptively fair; other factors must be considered, including any potential harm to the rights holder's market. A non-transformative use that merely repackages and substitutes for a copyright work will not be fair use, under the exceptions recommended in this Report.

14.7 This chapter is about unremunerated exceptions for education. Remunerated exceptions for education—the statutory licences—are discussed in Chapter 8.

Education and exceptions

14.8 Education has been called 'one of the clearest examples of a strong public interest in limiting copyright protection'.¹

14.9 The preamble to the *World Intellectual Property Organization Copyright Treaty* (WCT) refers to '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*'.²

14.10 The fair use of copyright material for teaching has long been recognised as a legitimate type of exception in international law. Article 10(2) of the *Berne Convention* provides:

It shall be a matter for legislation in the countries of the Union, and for special agreements existing or to be concluded between them, to permit the utilization, to the extent justified by the purpose, of literary or artistic works by way of illustration in publications, broadcasts or sound or visual recordings for teaching, provided such utilization is compatible with fair practice.³

14.11 The references to 'purpose' and 'fair practice', Professors Sam Ricketson and Jane Ginsburg state,

make the provision more open-ended, implying no necessary quantitative limitations. The words 'by way of illustration' impose some limitation, but would not exclude the use of the whole of a work in appropriate circumstances.⁴

14.12 However, Ricketson and Ginsburg express some doubt about whether anthologies or course packs consisting of chapters taken from various books would fall within the scope of art 10(2) of the *Berne Convention*. It would be 'a distortion of language', they state, to describe such uses as 'by way of illustration ... for teaching'.⁵ They also note that such usages are 'well-developed forms of exploitation in many

1 K Garnett, G Davies and G Harbottle, *Copinger and Skone James on Copyright* (16th ed, 2011), [9–96].

2 *World Intellectual Property Organization Copyright Treaty*, opened for signature 20 December 1996, ATS 26 (entered into force on 6 March 2002), preamble.

3 *Berne Convention for the Protection of Literary and Artistic Works (Paris Act)*, opened for signature 24 July 1971, [1978] ATS 5 (entered into force on 15 December 1972).

4 S Ricketson and J Ginsburg, *International Copyright and Neighbouring Rights: The Berne Convention and Beyond* (2nd ed, 2006) Vol I, 791.

5 *Ibid.*, 794.

countries, subject to voluntary licensing arrangements or even compulsory licensing schemes'.⁶

Current exceptions

14.13 The *Copyright Act* contains a number of unremunerated exceptions for educational institutions. There are exceptions for:

- s 28—performing material, including playing music and films, in class;
- s 44—including short extracts from material in a collection;
- ss 135ZG, 135ZMB—copying insubstantial portions;
- s 200—use of works and broadcasts for educational purposes (copying works by hand in class, for example, on a blackboard; examination copying; copying a sound broadcast); and
- s 200AAA—proxy web caching by educational institutions.⁷

14.14 There is also a broad exception in s 200AB of the *Copyright Act* for, among others, bodies administering an educational institution. The exception covers a use that is for the purpose of giving educational instruction and not for a profit.⁸ The use must amount to a special case, must not conflict with a normal exploitation of the material and must not unreasonably prejudice the legitimate interests of the owner of the copyright.⁹

14.15 The *Copyright Act* also provides exceptions for fair dealing for the purpose of research or study, in ss 40 and 103C.¹⁰ However, these exceptions have been held not to extend to uses by educational institutions, but only to private research and study by individuals.¹¹

Criticisms

14.16 Copyright Advisory Group—Schools (CAG Schools) submitted that the current education exceptions are inflexible and feature a number of practical problems. For example, writing a quote from a book on an interactive whiteboard is not technically covered by an exception.¹² CAG Schools also submitted that ‘showing an artwork on screen in class is treated differently than showing a poem on the same screen’¹³ and

6 Ibid, 794.

7 See Ch 11.

8 *Copyright Act 1968* (Cth) s 200AB.

9 Ibid s 200AB.

10 Ibid ss 40, 103C, 248(1)(aa). See also Ch 7.

11 *De Garis v Neville Jeffress Pidler Pty Ltd* (1990) 37 FCR 99; *Haines v Copyright Agency Ltd* (1982) 64 FLR 185.

12 Copyright Advisory Group—Schools, *Submission 707*. Copyright Agency submitted that it had never sought payment for this use, even if the use could be measured: Copyright Agency, *Submission 727*.

13 Copyright Advisory Group—Schools, *Submission 231*.

that ‘Australian schools pay to hand out small extracts of books to students in classrooms’.¹⁴ CAG Schools said that there are:

different rules regarding how much of a work can be made available to students, depending upon whether this is done by making the content available on the school intranet, learning management system etc or by handing out copies to each student. ...

In an age of learning management systems, centralised content delivery systems and networked interactive whiteboards in classrooms, provisions such as s 135ZMD(3) make compliance with the statutory licence using modern education tools increasingly difficult. ...

A school that decides that the most efficient way of delivering content to its students is via the school intranet or learning management system is effectively penalised for that choice. This is completely contrary to Government policy of encouraging schools to fully embrace digital technology to improve efficiency and educational outcomes.¹⁵

14.17 The exception for short extracts in s 44 of the *Copyright Act*, others submitted, is ‘tightly circumscribed’, ‘employs vague terminology’, appears to be an ‘historical anachronism’, and is ‘another provision that makes a mockery of claims that the existing approach delivers certainty for users’.¹⁶

14.18 Australian copyright law is also limiting the way in which Australian universities can deliver course content via massive open online courses, or MOOCs, Universities Australia submitted. This is putting Australian universities at a competitive disadvantage to universities in fair use jurisdictions like the United States. The existing exceptions are ‘insufficiently flexible to allow this kind of use’.¹⁷ However, Universities Australia stressed that:

fair use is not a ‘free for all’ for US universities operating MOOCs, and nor would it be if this exception were enacted in Australia. Some US copyright experts have suggested that the open nature of MOOCs will mean that fair use will operate in a more limited way than it does with password protected university e-reserves.¹⁸

14.19 Copyright content made available through an open online course may indeed have a greater potential to harm a rights holder’s market than the same content distributed to a confined group of students. Universities should obtain a licence to use much of this material for online courses.

14.20 Universities Australia said the existing pt VB statutory licence does not apply to ‘content that is publicly accessible, regardless of whether it has been made available for educational purposes’.¹⁹ Copyright Agency however submitted that ‘dissemination of content via MOOCs is covered by the statutory licence, and much more comprehensively than arrangements in any other country’.²⁰

14 Copyright Advisory Group—Schools, *Submission 707*.

15 Ibid.

16 R Burrell, M Handler, E Hudson, and K Weatherall, *Submission 716*.

17 Universities Australia, *Submission 754*.

18 Ibid.

19 Ibid.

20 Copyright Agency, *Submission 866*.

Fair use and education

14.21 The ALRC recommends the introduction of fair use.²¹ That some educational uses may be fair is clear from the US fair use provision. The US fair use exception twice refers explicitly to education. The preamble includes, as an illustrative purpose, ‘teaching (including multiple copies for classroom use), scholarship, or research’. Furthermore, the first of the four fairness factors in the US provision is the ‘purpose and character of the use, including whether such use is of commercial nature or is for *nonprofit educational purposes*’.²² Some US copyright academics submitted:

We have seen that in the United States, the importance of education as a purpose deserving of recognition in fair use analysis is well established, and that this fact has enabled a wide range of time-honored educational practices to flourish, and facilitated others to emerge. That said, it is important to emphasize that educational fair use has not eclipsed or displaced the sale and licensing of educational materials in the United States. Textbook publishing, in both hard-copy and digital formats, continues to thrive.

And schools at all levels continue to license other content for class use and teaching support, as well as to purchase monographs and periodicals for digital libraries. This is true, in part, because even decisions like the recent *Cambridge University Press v Becker* allow a relatively narrow scope for unlicensed illustrative quotation in teaching materials; in other words, educational fair use in the United States provides some room for innovation in teaching but none for wholesale appropriation of copyrighted content.²³

14.22 The United Kingdom Government is introducing a ‘fair dealing provision for the purpose of instruction, enabling teachers to make reasonable use of copyright materials without infringing copyright, as long as such use is minimal, non-commercial, and fair to copyright owners’.²⁴ This is more confined than fair use—non-commerciality, for example, is a condition, rather than a consideration. However, in the ALRC’s view, the proposed UK provision is likely to permit similar unlicensed uses that would be permitted under fair use. Importantly, neither exception is overly prescriptive, and both require a consideration of fairness.

14.23 The ALRC recommends that ‘education’ be one of the illustrative purposes listed in the fair use provision. Including an illustrative purpose for education in Australia’s fair use exception will signal that an educational use is more likely to be fair than a non-educational use. In other words, an educational purpose will weigh in favour of fair use.

14.24 However, the fairness factors must be considered. The fact that a particular use is educational does not necessarily mean the use is fair. In fact, it does not even create a presumption that the use is fair. In particular, the unlicensed use of material specifically

21 See Ch 4.

22 *Copyright Act 1976* (US) s 107 (emphasis added).

23 G Hinze, P Jaszi and M Sag, *Submission 483*.

24 Intellectual Property Office (UK), *Technical Review of Draft Legislation on Copyright Exceptions—Education* (2013).

produced for educational purposes would usually harm the market for that material. Such unlicensed uses, even though for education, will often not be fair use.

14.25 Stakeholders who supported fair use generally said educational use should be considered under the exception, and education should be an illustrative purpose.²⁵

14.26 However, many stakeholders opposed the introduction of fair use, including the proposal to consider educational uses under a fair use exception. The most common argument against fair use was that the exception would harm rights holders' markets, and particularly markets for books and other material specifically made for education.

Market harm

14.27 Many vital educational resources might not be created without the protection of copyright laws. The incentive to write or publish a textbook, for example, might be undermined if the authors and publishers were not paid for the use of their books by students and educators. The public interest in education could be undermined by 'weak' copyright laws that undermine the incentive to create. Fair use accounts for this by requiring consideration of harm to rights holders' markets.

14.28 Many publishers of Australian educational material expressed concern about potential harm to their markets, should new exceptions be introduced or the statutory licences for education be repealed.²⁶ Oxford University Press, for example, wrote of authors and publishers 'who have invested their expertise, research, time, effort and money in producing educational materials specifically designed to support learners of all ages and bespoke Australian curricula'.²⁷

14.29 Expanding exceptions for educational institutions will discourage investment in and the development of educational content, including investment in 'new resources and platforms' which are important for the digital economy.²⁸ John Wiley and Sons submitted that 'quality education materials, especially those tailored for a specific Australian curriculum, take significant time, resources and skill to develop and the efforts and rights of the creators and copyright holders should be recognised'.²⁹ This publisher also stated:

the primary market of many texts and resources are for their express use in schools and educational institutions, so to allow any extended right of free use (particularly in the digital arena) would significantly reduce the ability of, and incentives for, publishers to produce the kinds of innovative and educational materials which are relied on by teachers, lecturers and educators.³⁰

25 See, eg, CSIRO, *Submission 774*; Universities Australia, *Submission 754*; Copyright Advisory Group—TAFE, *Submission 708*; Copyright Advisory Group—Schools, *Submission 707*; Education Services Australia, *Submission 661*; National Archives of Australia, *Submission 595*.

26 For example, Penguin Australia, *Submission 669*; Allen & Unwin, *Submission 582*; International Association of Scientific Technical and Medical Publishers, *Submission 560*; RIC Publications Pty Ltd, *Submission 456*; OfficeLink Learning, *Submission 379*.

27 Oxford University Press Australia, *Submission 333*.

28 Australian Publishers Association, *Submission 225*.

29 John Wiley & Sons, *Submission 239*.

30 *Ibid.*

14.30 Another publisher of educational material for Australian schools submitted that it relies heavily on funds it receives through the statutory licence:

Remove that compensation and you remove that capacity to create. Remove new creative product and publishers would have to dilute the quality of resource available to educators. A diluted resource pool means a diluted quality of education.³¹

14.31 The International Association of Scientific, Technical and Medical Publishers stated that ‘the public interest of education is best served by encouraging the creation of new publications and information services targeted at this sector’. Offering journal subscriptions and other information services to non-commercial communities was said to be ‘the very essence of “normal exploitation” which must be left free of exceptions that prejudice the legitimate interests of rights holders unreasonably’.³²

14.32 It was submitted that course pack licensing schemes are ‘ensuring a healthy, vibrant and viable market for creators’ and producing material specifically for educational institutions. This income stream was said to be ‘particularly important for individual and small creators’.³³

There is likely to be little argument that for illustration purposes, teachers may make copies of works for use on teaching tools, such as interactive whiteboards. ... However, permitting teachers to make copies of copyright works (small or substantial portions thereof) and distribute them to students appears to strongly conflict with normal exploitation of works.³⁴

14.33 Stakeholders stressed that new exceptions would be particularly damaging in an environment in which creators and rights holders are already struggling to fight piracy and maintain successful business models in a new digital age, with new digital formats and distribution channels.³⁵

14.34 For example, music publishing was said to have been ‘severely affected by the distribution of unauthorised copies on the internet’, and any ‘further undercutting of the financial viability of these specialist publishers by the broadening of statutory licences or unremunerated exceptions may see the unintended consequence of closing this market down entirely’.³⁶

14.35 Another publisher warned that allowing more unpaid uses for education ‘would result in drying up of income streams for writers’.³⁷ A reasonably secure source of income was considered particularly important for creators in an industry ‘where sales and therefore royalties tend to decline after a year or so’.³⁸ Secondary licence fees can ‘give much-needed stability to a creator’.³⁹

31 RIC Publications Pty Ltd, *Submission 456*.

32 International Association of Scientific Technical and Medical Publishers, *Submission 560*.

33 ALPSP, *Submission 562*.

34 Ibid.

35 For example, Allen & Unwin, *Submission 582*.

36 AMPAL, *Submission 189*.

37 Spinifex Press, *Submission 125*.

38 Walker Books Australia, *Submission 144*.

39 Ibid.

14.36 The Australian Publishers Association (APA) submitted that:

except in relation to the existing free *de minimus* uses such as copying material onto whiteboards and so on (section 200) or uses that fall within section 200AB, there are *no* compelling grounds on which educational sectors should be entitled to use copyright material without payment.⁴⁰

14.37 The APA also considered that it is only fair that publishers share in the value that educational institutions have in accessing copyright material, rather than have to subsidise educational institutions. Different uses have different value, but the APA submitted that this can be considered when determining the equitable remuneration the education sector should pay—it should not simply be made free.⁴¹

14.38 In the ALRC’s view, 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.⁴²

14.39 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.

Availability of a licence

14.40 As discussed in Chapter 5, if a licence can be obtained for a particular use of copyright material, then the unlicensed use of that material will often not be fair. The availability of a licence is an important consideration in determining whether a use is fair, and will weigh against a finding of fair use.

14.41 However, the availability of a licence does not settle the question of fairness. Market harm needs to be weighed along with the other fairness factors. Some damage to a rights holder’s market may be justified, for a use that is transformative or has an important social value, particularly if the damage is minor or remote.

14.42 Market harm does not mean *any* loss of licence fees. This may be particularly important to recognise where there is a broad statutory licence in place. Those who now rely on the statutory licences for education have strongly objected to having to account and pay for uses that are not traditionally licensed, such as so-called technical copies and certain material freely available on the internet. When considering market harm under a fair use or fair dealing exception, the relevant market should be ‘traditional, reasonable, or likely to be developed markets’.⁴³ Statutory licences will not always be a good guide to this market, because they provide broad protection from infringement, and therefore licence both inside and outside traditional markets. Rather

40 Australian Publishers Association, *Submission 225*.

41 *Ibid.*

42 See Ch 2, framing principles 1 and 2.

43 See Ch 5.

than consider statutory licences under the fourth fair use factor, courts might instead consider whether the particular use is being licensed voluntarily, either directly or collectively, in Australia and overseas.

14.43 The fair use exception may act as an incentive for rights holders and collecting societies to offer reasonable and convenient licences for the use of their material. Where such licences are not offered, it will be easier to establish that an unpaid use did not harm a rights holder's market.

Transformative use

14.44 An educational use is more likely to be fair, and less likely to harm a market that a rights holder alone should be entitled to exploit, when the use is transformative.⁴⁴

14.45 Many of the uses about which publishers of educational materials are concerned, appear to be non-transformative uses, such as photocopies or digital reproductions of educational resources that would be used as a substitute for buying or licensing the original material. Such uses are unlikely to be fair, under the fair use or new fair dealing exceptions recommended in this Report.

14.46 However, the use for educational purposes of copyright material that was *not* in fact created for educational purposes is more likely to be transformative, and is much less likely to interfere with the market for the original material.

14.47 For example, the market for a film made for educational purposes may be harmed if the film is shown without a licence to students in schools and universities. People may have invested in the making of the film, expecting some return from sales to schools and universities. Copying this film for educational purposes may therefore not be transformative or fair.

14.48 However, the nightly news is not made for educational purposes. Television networks do not invest in news programs hoping for a return from licensing fees from schools who might record and show the program in class the next day. They might not return fees collected from schools by collecting societies for this use, but the news program would have been made whether or not schools paid to copy the program. The educational use of this news program is therefore more likely to be transformative and fair.

'Freely available' material

14.49 Some have submitted that schools and universities should be able to use, without payment, some material that is otherwise 'free'—uses such as copying freely available web pages and content broadcast on free-to-air television. In the ALRCs view, whether such uses infringe copyright should be determined by applying a fairness exception. The difficulty of distinguishing between freely available material that should be paid for, and freely available material that need not, highlights the benefits of flexible principles-based copyright exceptions.

44 See Ch 5.

14.50 The Australian education sector has favoured the introduction of a new exception allowing educational institutions to copy and communicate free and publicly available material on the internet for non-commercial educational purposes.⁴⁵

14.51 This option was put to the ALRC in support of calls to repeal the statutory licences for educational uses. Statutory licences may provide a mechanism for such uses to be monitored and monetised. In the ALRC's view, it may be more straightforward to consider whether these uses should be permitted under an unremunerated exception.

14.52 CAG Schools submitted that paying for content that is freely available online undermined the Government's digital economy goals, including 'the success of the Government's investments in digital education'. It 'potentially adds millions of dollars to education budgets each year' and, furthermore, 'Australia is the only place in the world where schools are legislatively required to pay for printing a page from a website'.⁴⁶

14.53 Examples of uses that CAG Schools said were treated as remunerable under the statutory licence in the 2011 survey of electronic copying in schools included:

- reproducing thumbnail images of books on a school intranet as a way of showing teachers and students what books are in the school library;
- saving and displaying a Google map on an interactive whiteboard in the classroom;
- telling a student to print, copy or save a page from Facebook;
- printing a page of a Government Department's contact information from the White Pages;
- printing a freely available webpage such as the home page from the McDonald's website; and
- printing a freely available webpage such as an information page from the University of Newcastle's website.⁴⁷

14.54 Universities Australia submitted that freely available internet material, including blogs and wikis, is copied in homes and businesses throughout Australia, and in universities in other countries, and 'no one is seeking to be paid for it'.⁴⁸

We are particularly concerned that at the very time that a wide range of high quality audio-visual resources are being made freely available—such as content on YouTube EDU and the Open University on iTunesU—Screenrights is proposing to seek extension of the Part VA licence that may result in content of this kind becoming remunerable in Australia.⁴⁹

45 D Browne, 'Educational Use and the Internet—Does Australian Copyright Law Work in the Web Environment?' (2009) 6(2) *SCRIPT-ed* 450, 461.

46 Copyright Advisory Group—Schools, *Submission 231*.

47 Copyright Advisory Group—Schools, *Submission 707*.

48 Universities Australia, *Submission 754*.

49 Universities Australia, *Submission 246*. See also Society of University Lawyers, *Submission 158*.

14.55 Universities Australia submitted that no one but the education sector is paying to time shift free-to-air broadcasts, and the payments extracted from the education sector ‘cannot in any way be said to be necessary to provide an incentive for the continued creation of the content’.⁵⁰

14.56 Universities Australia submitted that often the fees collected do not even benefit the publishers, authors and other creators of that material. Instead, ‘the millions of dollars collected each year from educational institutions for copying of freely available internet content and orphan works is likely to be paid to Copyright Agency members who have no connection to the works that were copied’.⁵¹ These members were said to be benefiting at the expense of publicly funded educational institutions, and the ‘loss of this windfall income could not in way be said to cause them unreasonable prejudice’.⁵²

14.57 Universities Australia wrote of a ‘global move towards making high quality educational content freely available’ and submitted that ‘open access publishing has dramatically changed the scholarly communications landscape’.⁵³

14.58 Many of the claims of the education sector were strongly opposed by publishers and collecting societies. For example, Copyright Agency said that uses such as reading a poem out loud to distance education students and reciting a poem to a virtual class using Skype or a Google hangout are allowed by ss 28 or 200AB.

14.59 Copyright Agency submitted that other uses are excluded from ‘volume estimates’ if the terms of use allow free use by schools, and where the terms of use do not allow such free use, the collecting society can nevertheless be instructed not to allocate payment.⁵⁴ For some other uses of copyright material, Copyright Agency submitted that they are permitted under the statutory licence, but are ‘not recorded in surveys and Copyright Agency seeks no payment’.⁵⁵

14.60 The collecting society Screenrights submitted that the call by the education sector wrongly assumes that ‘free’ material on the internet is not valued by the copyright owner.

Copyright owners like Screenrights’ professional filmmaker members make material available online for very clear commercial reasons. They may choose to make it available for a fee, such as with commercial video on demand services or they may choose to license a website to stream the content for a period of time without charging the consumer directly (such as ABC iView). In the latter case, the consumer still pays for the content, either by watching associated advertising, or through brand attachment to the website and there are clear cross promotional benefits to other platforms where the content is available for a fee, such as via DVD or Blu-ray discs.⁵⁶

50 Universities Australia, *Submission 246*.

51 Universities Australia, *Submission 754*.

52 Ibid.

53 Ibid.

54 Copyright Agency, *Submission 866*.

55 Ibid.

56 Screenrights, *Submission 215*.

14.61 Material ‘freely’ available on the internet, Screenrights submitted, is very much like material broadcast ‘freely’ on television, and copyright owners should be compensated for the use of either type of material. Screenrights said that there may be ‘debate about the value of the content and the price of the compensation, but the principle is the same’.⁵⁷

14.62 In the ALRC’s view, it is important to distinguish between different types of material which may be accessed without paying a fee. Some of this content may be provided without any expectation that rights holders will collect fees from educational institutions and governments for the use of the material. At other times, rights holders may only wish to provide their content under limited circumstances.

14.63 Of course, a film shown with advertisements on free-to-air television is not really ‘free’. Advertising is also not the only way of selling content without explicitly charging for its use: giving a customer access to a free book, for example, so that the customer enters a content ‘ecosystem’ in which he or she is more likely to buy other books, or films, television shows and other material, is not necessarily the same as giving the book away for free.

14.64 The fair use and new fair dealing exceptions recommended in this Report may capture some uses of this content by educational institutions. As discussed below, these exceptions require consideration of the likely harm a particular unpaid use might have on a market. The exceptions are flexible and require certain principles to be considered, and are therefore better equipped to distinguish between types of ‘freely available’ material than more prescriptive exceptions.

Small portions

14.65 Some publishers called for the removal of the ‘small portions’ exceptions in ss 135ZG and 135ZMB of the *Copyright Act*, so that educational institutions pay for the use of this material.

14.66 Walker Books Australia said that the ‘small portions’ exceptions are ‘perhaps not really fair in relation to works such as picture books, or poems, where a small portion might represent a significant part of a work’.⁵⁸ Cengage Learning Australia submitted that

two pages is often the exact extent (often one page is) of a relevant classroom exercise or lesson plan that we create and seek to sell in a ‘bundle’ of classroom and homework exercises, tests and lesson plans. A two-page portion from our work can represent 100% of value of that portion downloaded.⁵⁹

14.67 Extending the licence to cover these uses ‘would provide a fairer system for all interested parties’, RIC Publications said, and ‘allow greater clarity for the Copyright Agency in its administration process, again for the benefit of all parties’.⁶⁰

57 Ibid.

58 Walker Books Australia, *Submission 144*.

59 Cengage Learning Australia Pty Ltd, *Submission 68*.

60 RIC Publications Pty Ltd, *Submission 147*.

14.68 Universities Australia, however, submitted that current copyright laws are ‘stifling academic engagement’. For example, it was argued that universities risk infringing copyright simply by making available on an online repository a student thesis featuring short excerpts or images from other copyright material.

To avoid this risk, they generally require their students to obtain permission for use of third party content (which can be highly costly, and in many cases impossible) or, alternatively, to remove this content from their thesis.⁶¹

14.69 Many of these factors are relevant in any consideration of the fair use exception. For example, the third fairness factor is ‘the amount and substantiality of the part used’. This factor in the US fair use provision was considered in 2012 by a US District Court in *Cambridge University Press v Becker (Georgia State University)*. The Court stated that the word ‘substantiality’ as used in the US fair use provision means ‘value’.⁶² It also stated:

In determining what percentage of a book may be copied, the Court looks first to the relationship between the length of the excerpt and the length of the book as a whole. Then, the relationship between the value of the excerpt in relation to the value of the book is examined. The Court also considers the value of a chapter in itself (rather than just a few paragraphs).⁶³

14.70 The Court also considered the other fairness factors. In relation to the fourth factor, which concerns market harm and is discussed further below, the Court stated:

Unpaid use of a decidedly small excerpt (as defined under factor three) in itself will not cause harm to the potential market for the copyrighted book. That is because a decidedly small excerpt does not substitute for the book. However, where permissions are readily available from CCC [Copyright Clearance Center] or the publisher for a copy of a small excerpt of a copyrighted book, at a reasonable price, and in a convenient format (in this case, permissions for digital excerpts), and permissions are not paid, factor four weighs heavily in Plaintiffs’ favor. Factor four weighs in Defendants’ favor when such permissions are not readily available.⁶⁴

14.71 Finally, the Court considered whether the use would ‘disserve the purposes of the copyright laws’, and concluded that ‘the unpaid use of small excerpts will not discourage academic authors from creating new works, will have no appreciable effect on Plaintiffs’ ability to publish scholarly works, and will promote the spread of knowledge’.⁶⁵

14.72 Similar analyses may be made when the fair use or new fair dealing exceptions recommended in this Report are applied to the use of small portions of copyright material for education. However, much may turn on the nature of the copyright

61 Universities Australia, *Submission 246*.

62 *Cambridge University Press v Becker (Georgia State University)* (District Court for North District of Georgia, 11 May 2012), 67. It has been reported that this case will be appealed.

63 *Cambridge University Press v Becker (Georgia State University)*, Civ Action No 1:08-CV-1425-ODE (District Court for North District of Georgia, 11 May 2012), 87.

64 *Ibid*, 89.

65 *Ibid*, 89.

material that is used. The works discussed in this US case may be distinguished from other educational material, such as resources created specifically for classroom use.

Commercial use and third parties

14.73 Under fair use, a use is less likely to be fair if it is commercial. The fact that the material will ultimately be used for educational purposes does not necessarily mean the use will be fair, particularly if the use was made by a commercial entity.

14.74 Two US cases illustrate this point. In *Basic Books v Kinko's Graphics Corp*,⁶⁶ the copying of copyright material to form course packs was found by a US District Court not to be fair use. The use was found to have undermined the market for the full texts from which excerpts had been taken. The Court placed particular weight on the profit-making motive of the defendant, a commercial photocopying business.⁶⁷

14.75 There was a similar outcome in *Princeton University Press v Michigan Document Services Inc*.⁶⁸ Michigan Document Services was a commercial copy shop that, without a licence, reproduced substantial segments of copyrighted works and bound and sold them as course packs to students. Professors Ginsburg and Gorman explain that the majority of the Court held, among other things, that there was not a blanket exemption in s 107 for 'multiple copies for classroom use'; that the 'verbatim duplication of whole chapters and other large portions of the plaintiff-publishers' books weighed heavily against fair use'; and that 'the photocopying adversely affected not only the publishers' book sales but also the photocopying royalties that they would otherwise be paid by a by-then thriving licensing and collecting agency'.⁶⁹

14.76 These cases concerned commercial copying. Copying and other uses by a nonprofit educational institution are more likely to be fair, though the fairness factors would need to be considered. In 2012, a US District Court, in a case involving making copies of excerpts of copyrighted works for teaching and scholarship, distinguished commercial copying held not to be fair from the 'purely nonprofit, educational purposes' of a university.⁷⁰

14.77 Not all commercial uses will be unfair under fair use. Many companies rely on the fair dealing exceptions for news reporting and other exceptions, and should be able to rely on fair use in appropriate circumstances. Some commercial uses that are ultimately for education may also prove to be fair use. Third party digital applications, for example, may in some cases be fair use, despite being commercial. Such services may be found to be fair in part because the use merely facilitates another use that would be fair, or perhaps because the use is 'purely technical'.⁷¹

66 *Basic Books v. Kinko's Graphics Corp* 758 F Supp 1522 (SNDY, 1991).

67 J Ginsburg and R Gorman, *Copyright Law* (2012), 194.

68 *Princeton University Press v Michigan Document Services, Inc*, 99 F 3d 1381 (6th Cir, 1996).

69 J Ginsburg and R Gorman, *Copyright Law* (2012), 194.

70 *Cambridge University Press v Becker (Georgia State University)* (District Court for North District of Georgia, 11 May 2012), 49.

71 See Chs 7 and 11.

Technical copying

14.78 The education sector expressed particular concern about having to license so-called ‘technical copies’ that are made when using digital technologies in the classroom.⁷² CAG Schools, for example, submitted that

The simple act of using more modern teaching methods potentially adds up to 4 remunerable activities under the statutory licence in addition to the potential costs incurred by more traditional ‘print and distribute’ teaching methods.⁷³

14.79 The statutory licences may provide a mechanism for these technical uses to be accounted and paid for by governments and educational institutions. The ALRC suspects most other organisations happily ignore the fact that caching a website on a local server, for example, may infringe copyright.

14.80 Submissions from the education sector highlighted the inefficiencies and inequity of having to account for technical copies. But the fact that unlicensed technical copying by an educational institution will be for the ultimate purpose of education may only slightly favour a finding of fair use. The stronger arguments for permitting this type of use are set out in Chapter 11, and may be relied on by many organisations, not just educational institutions. The ALRC considers that merely technical or incidental uses will often be fair use, and should not need to be licensed.

Fair dealing and education

14.81 If Australia does not adopt a fair use exception, then the *Copyright Act* should be amended to include a new fair dealing exception with a prescribed purpose for education.⁷⁴

14.82 Like fair use, the exception would be flexible and able to adapt to new technologies and teaching practices. Like fair use, it would only cover uses which are fair, having regard to the fairness factors. This is a second best option, but it is more likely to enable educational institutions to make use of new digital technologies and opportunities than the existing or amended specific exceptions.

14.83 Some have argued that the existing exceptions for fair dealing for research or study⁷⁵ should be interpreted to extend to copying by educational institutions. As discussed in Chapter 8, these exceptions have been interpreted not to extend to uses by educational institutions, but only to private research and study by individuals.⁷⁶ The Supreme Court of Canada has taken a broader interpretation to Canada’s fair dealing

⁷² Some of these uses are discussed in Ch 8.

⁷³ Copyright Advisory Group—Schools, *Submission 231*.

⁷⁴ See Ch 6.

⁷⁵ *Copyright Act 1968* (Cth) ss 40, 103C, 248(1)(aa).

⁷⁶ See *Haines v Copyright Agency Ltd* (1982) 64 FLR 185, 191; *De Garis v Neville Jeffress Pidler Pty Ltd* (1990) 37 FCR 99, 105–6.

for research provision, finding that the ‘teacher/copier ... shares a symbiotic purpose with the student/user who is engaging in research or private study’.⁷⁷

14.84 This problem does not arise with fair use, in which the listed purposes are illustrative, and do not confine the exception. It is preferable to consider whether any given use is fair, rather than automatically prohibit the use. In any event, Canada has since introduced an exception for fair dealing for the purpose of education,⁷⁸ and the ALRC recommends the introduction of a fair dealing for education exception.

Guidelines

14.85 One objection to fairness exceptions for education is that teachers may not have the time or expertise to determine whether particular uses are fair. The Australian Education Union submitted:

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.⁷⁹

14.86 The publisher Allen & Unwin submitted that teachers may mistakenly believe that using copyright material for education should be free because education has a public value and is often not-for-profit. They also doubted whether teachers would be ‘in a position to reliably assess the market impact of their copying as fair use requires’.⁸⁰

14.87 In the ALRC’s view, guidelines should play an important part in providing this necessary help and certainty for teachers.⁸¹ The education sector has said that teachers and other educators are already given copyright guidelines, and that new guidelines for fair use would be produced if fair use were enacted. The ALRC considers that teachers will find it easier to apply fair use than Australia’s current complex range of specific exceptions.

Repeal of existing exceptions

14.88 If either fair use or a fair dealing for education exception is enacted, then the existing specific exceptions in the *Copyright Act* for educational institutions should be repealed—ss 28, 44, 200, 200AAA and 200AB.⁸²

14.89 The ALRC would expect that many uses within the scope of these exceptions are likely to be fair under the fair use exception, although this would depend on the application of the fairness factors in the particular circumstances. Some may not be

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

78 ‘Fair dealing for the purpose of research, private study, education, parody or satire does not infringe copyright’: *Copyright Modernization Act, C-11 2012* (Canada), s 29.

79 Australian Education Union, *Submission 722*.

80 Allen & Unwin, *Submission 582*.

81 Fair use guidelines are discussed more generally in Ch 5.

82 The repeal of s 200AB is also recommended in Ch 12. Section 200AB also covers certain uses for people with disability.

fair, perhaps where rights holders now offer licences they were once thought unlikely to offer.

14.90 In any event, the ALRC considers that to increase innovation and efficiency in a digital age, copyright exceptions should be flexible and refer to principles. Confined and specific exceptions should therefore generally only be necessary to remove doubt with respect to uses that have a particularly important public interest.

Recommendation 14-1 The exceptions for educational use in ss 28, 44, 200, 200AAA and 200AB of the *Copyright Act* should be repealed. The fair use or new fair dealing exception should be applied when determining whether an educational use infringes copyright.

