

30 November 2012

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

By email: info@alrc.gov.au

Dear Sirs

COPYRIGHT AND THE DIGITAL ECONOMY (IP 42)

This submission is made on behalf of the Copyright Advisory Group – TAFEs (CAG TAFE), the peak body responsible for copyright policy and administration for the Australian TAFE sector (other than in Victoria), including the management of obligations under educational statutory licences. CAG represents the TAFE authorities in all states and territories other than Victoria.

CAG TAFE welcomes the opportunity to participate in this review of copyright exceptions in the digital era. It is CAG TAFE's view that the current copyright framework is not adequate or appropriate for the vocational education and training (VET) sector in the current digital environment.

Endorsement of CAG Schools submission

CAG TAFE has had the opportunity to review the submission made by CAG Schools in relation to the Issues Paper. CAG TAFE agrees with that submission and endorses the recommendations of CAG Schools.

In particular, CAG TAFE agrees with and endorses the following submissions by CAG Schools (together with the more detailed comments made on each point by CAG Schools):

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 Australia's educational exceptions and statutory licences are completely broken and must be repealed.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

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

3. Introducing a flexible exception does not mean that all educational uses of copyright materials would be free. Many uses that are currently paid for under the statutory licences would continue to be paid for under voluntary licensing arrangements (similar to those currently in place with music collecting societies).
4. Replacing the statutory licences and moving to a system of a flexible fair dealing/fair use provision supported by direct and/or collective voluntary licensing is the most appropriate way to ensure the appropriate remuneration for Australian creators, the continued creation of educational content and ensuring public interest uses of copyright materials are adequately recognised.

Additional TAFE issues

CAG Schools identifies a range of problems arising in schools as a consequence of the current education framework of 'statutory licence plus limited exceptions'.

TAFEs operate under the same framework of 'statutory licences plus limited exceptions' identified by CAG Schools. CAG TAFE, like CAG Schools, pays fees under both the Part VA and the Part VB statutory education licences. The flaws in the present system, and consequent copyright issues that arise in schools, apply equivalently to TAFEs.

CAG TAFE also submits that particular circumstances and features of the VET sector exacerbate problems with the current framework experienced by TAFEs beyond even the level identified by CAG Schools. These include:

- **Statutory licences have disproportionately high overheads for the VET sector**

TAFEs make far less use of third-party content under the statutory licences than schools, yet must comply with similarly complex monitoring and compliance requirements if they wish to access the content. This means the inefficiencies inherent in the statutory licence model are particularly stark in the TAFE sector, where fees raised are much lower and the relative portion spent on administering the licences is much higher.

For example, the Part VB licence currently requires CAG TAFE institutes to conduct multiple 10-11 week surveys, in multiple institutions, across a variety of states & territories, every year. These surveys cost several hundred

thousand dollars per year to run,¹ and only 'generate' several million dollars in copyright fees (\$3.4 million in 2012, for CAG TAFE institutes).

In essence, the cost of merely implementing the statutory licence is running at 10% or more of the fees raised. This is not a 'low cost', 'frictionless' or efficient model of providing educational access to content, and TAFEs do not consider it a sustainable model for the future.

- **TAFEs make particularly low usage of statutory licence content**

TAFEs make less use of content under the statutory licences than schools, which makes the disproportionate cost and burden of these licences an even greater issue for TAFEs than schools, and further exacerbates the inefficiencies identified in the submissions of CAG Schools.

The statutory licences compel vast amounts of data to be collected, sifted, and discarded, all to identify a very small number of items to which the statutory licence can be applied. The costs incurred, for the marginal benefit gained, simply do not equate to the economically efficient, streamlined model of access and incentive for which the statutory licences were arguably created.

This can be seen in the operation of both the statutory licences in TAFEs.

Regarding the Part VA licence, the increasing cost and decreasing relevance of the licence has seen many TAFEs simply stop using it in recent years. As of 2013, some 40% of TAFE institutes in the country will have 'opted out' of the Part VA licence due to the costs and complexities involved. This means these TAFEs are no longer able to use recordings of broadcast television and radio content in their institutions. It means the statutory mechanism specifically created to secure access to this content is considered unusable by those it was intended to assist. Government considered there was a sufficiently prevalent public interest here to warrant implementing a legislative solution; CAG TAFE respectfully submits that if some 40% of TAFE institutes have been forced to walk away from the scheme it is clearly not working.

Regarding the Part VB licence, similar issues arise. Only a very small proportion of the print works copied by TAFEs falls within the licence – the

¹ And this is just the direct costs of CAG TAFE engaging an independent survey manager to administer the surveys. It does not capture additional costs incurred including productivity lost within TAFEs implementing the surveys, labour costs within the collecting society in processing the copious data collected, nor management costs in negotiating, drafting and administering the agreements, protocols, forms and training materials required.

vast majority of such copying relates to materials the TAFEs either own, directly licence or do not require permission to use (eg 'open access' materials). However the Part VB licence requires TAFEs to participate in regular and extensive copyright surveys measuring their copying activity, to determine what remuneration might be owed. A vast bulk of copying data is collected, regarding every copying 'job' that passes through the surveyed TAFE's central print room and corridor photocopiers. From that data, every item that in fact the TAFE is already permitted to use must then be excluded. Samples of data available to CAG TAFE suggest more than 90% of all copying data collected is then excluded on this basis.

This means that significant time and cost is spent by survey administrators, TAFE personnel and collecting society staff in collecting data, identifying copy jobs that may need excluding, making enquiries to check the licensing and permissions status of individual works and processing the data to reduce it to the truly 'remunerable' data set. In essence, the statutory licence compels vast amounts of data to be collected, sifted, and discarded, all to identify a very small number of items to which the statutory licence can be applied. The costs incurred, for the marginal benefit gained, simply do not equate to the economically efficient, streamlined model of access and incentive for which the statutory licences were arguably created.

- **TAFEs diverge dramatically from the traditional 'educational institution' expected by the Act**

CAG Schools highlights a number of problems arising from the very specific (and varying) formulations of the Act's education exceptions. We note, for example, the comments at page 41 (Part 2.1.4) of CAG Schools' submission, regarding the varying standards of 'educational institutions', 'course of instruction', 'educational purpose', etc scattered through the Act.

As CAG Schools notes, this creates various problems. It means teachers have to learn and apply different standards to different classroom activities, reduces overall confidence and clarity in the system, and creates significant uncertainty as to whether many newer educational activities fit clearly within the scope of relevant exceptions (eg when will school/TAFE activities no longer have an 'educational purpose'? When will asynchronous digital learning no longer amount to a 'course of instruction'? What exactly is a classroom?).

Problems of this kind are even more significant in the VET sector, which has a greater reliance on non-classroom based teaching. So, for example, TAFE students operate restaurants, hair salons, dental studios and other businesses on campus in the course of their vocational training. They complete industry placements, undertake apprenticeships, or work part- or full-time in their chosen industry while studying. The boundary between "classroom" and "the rest of the world" is even more blurred in the VET sector than in other institutions, yet all of it can form part of the educational experience TAFEs deliver.

The prescriptive scope of current exceptions does not map well onto the far more dynamic and varied nature of education in the VET sector. It requires seemingly arbitrary distinctions to be drawn between what copyright activities are and are not permitted in different parts of the same TAFE course, depending on whether particular activities can be corralled within particular labels, such as a 'course of instruction'.

Consider by way of example the following scenarios:

Scenario 1: A TAFE in Western Australia is teaching classes on mining operations. The TAFE wants to make copies of industry procedures and checklists, drawn from public internet sites, available to students over the TAFE's learning management system. This enables students to both study the materials during class and refer back to them when working remotely in the mining industry during a work placement program.

In this scenario, the TAFE wishes to copy publicly available industry standard information to facilitate access by students both in the classroom and in the workplace. The operation of the statutory licence in Part VB however means that these copying activities will be captured by the survey monitoring processes in place in the TAFEs, ultimately impacting on rate negotiations for the fees to be paid by TAFEs.² The statutory licence is delineated by a bright line – namely, 'educational purpose' – but the contemporary educational experience is far more blurred, particularly in vocational education. In the above scenario for example, at which point is a trainee on a work placement acting as a student, fulfilling an educational purposes, and at which point is s/he an employee, discharging the duties of their employment?

These complexities highlight the arbitrary and at times illogical nature of the highly technical provisions of the Part VB licence, particularly when mapped onto the kinds of educational activities conducted in the VET sector.

² For more detail on this point, CAG TAFEs refers the reader to the submissions of CAG Schools at p53 (Part 2.2.1) and Attachment 2D on the illogical effect of the statutory licence requiring institutions to pay to copy freely available internet materials.

Scenario 2: A TAFE in NSW runs short training courses in conjunction with an industry organisation, which is responsible for generating and contributing all course content. Staff want to make copies of handout materials to be distributed to students attending such courses.

In this scenario, making copies of a seminar handout will most likely lead to copying being recorded in the Part VB monitoring (and therefore attracting a remuneration obligation) in that institute. This is the case even though logic would suggest the TAFE would have an implied or express licence from the industry organisation to copy and distribute its content. The natural operation of the statutory licence inevitably means more material is 'captured' or 'counted' under the licence (and hence remunerated) than ought to be the case under a strictly legal analysis.³

Issues Paper Questions – quick reference

In response to the specific questions asked in the Issues Paper, CAG TAFE's comments above apply particularly to questions 28-31 (educational institutions). CAG TAFE also agrees with and endorses the submissions of CAG Schools as follows:

ISSUES PAPER QUESTION	REFERENCE IN CAG SCHOOLS' SUBMISSION
ALRC INQUIRY	
Question 1	Part 2.1 – Assessing the educational exceptions Part 2.2 – Assessing the educational statutory licenses
CACHING, INDEXING AND OTHER INTERNET FUNCTIONS	
Question 3	Part 2.1 – The statutory licences impede new technologies and educational uses Part 4.6 – Incidental and temporary reproductions and communications in an Internet age
Question 4	Part 3 – Options for reform
CLOUD COMPUTING	
Questions 5-6	Part 4.4 – Cloud computing and education
COPYING FOR PRIVATE USE	
Question 7	Part 4.5 – Private uses of copyright materials

³ This is not to criticise either the TAFE or the collecting society on their practices; it merely reflects an inevitable reality that any statutory licence must implement a wide reaching monitoring process and will almost certainly not be able to achieve 100% accuracy in its measurements. This is an issue for education because errors of this kind almost certainly lead to increased, unnecessary, fees being paid.

ISSUES PAPER QUESTION	REFERENCE IN CAG SCHOOLS' SUBMISSION
Questions 8-9	Part 4.5 – Private uses of copyright materials
Question 10	Part 1.1 – Exceptions
ONLINE USE FOR SOCIAL, PRIVATE OR DOMESTIC PURPOSES	
Questions 11-13	Part 4.5 – Private uses of copyright materials
TRANSFORMATIVE USE	
Questions 14-18	Part 4.5 – Transformative use
LIBRARIES, ARCHIVES AND DIGITISATION	
Questions 19-22	Part 1.1 – Exceptions Part 2.1 – Section 200AB
ORPHAN WORKS	
Questions 23-24	Part 4.3 – Orphan works
EDUCATIONAL INSTITUTIONS	
Questions 28-31	Part 2.1 – Section 200AB Part 2.2 – Assessing the educational and statutory licenses
RETRANSMISSION OF FREE-TO-AIR BROADCASTS	
Questions 35-39	Part 4.2 – Copyright and the convergence review
STATUTORY LICENCES IN THE DIGITAL ENVIRONMENT	
Questions 40-44	Part 3 – Options for reform
FAIR DEALING EXCEPTIONS	
Questions 45-47	Part 3 – Options for reform
OTHER FREE-USE EXCEPTIONS	
Questions 48-51	Part 3 – Options for reform Part 4.1 – Copyright, contract and technological protection measures
FAIR USE	
Questions 52-53	Part 3 – Options for reform Part 3.1 – Introducing new exceptions to enable certain non-remunerable uses of copyright materials
CONTRACTING OUT	
Questions 54-55	Part 4.1 – Copyright, contract and technological protection measures

Further information

If you have any questions or we can provide any additional information in relation to this submission, please do not hesitate to contact me.

Yours sincerely

A handwritten signature in black ink, appearing to read 'Delia Browne', written in a cursive style.

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