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Government of **Western Australia**
School Curriculum and Standards Authority



Our ref: IM0037-02 (2012/39272)

Professor Jill McKeough
Australian Law Reform Commission
GPO Box 3708
SYDNEY NSW 2001

Dear Professor McKeough

SUBMISSION TO INQUIRY INTO COPYRIGHT LAW

The School Curriculum Standards Authority is a Western Australian government authority with legislated functions relating to the development and accreditation of courses for Western Australian school students, and to the standards, assessment and certification of the achievement of those students.

In carrying out its assessment and certification function, the Authority is responsible for the development and conduct of the public Western Australian Certificate of Education (WACE) examinations for senior secondary school students. It is in the context of the Authority's use of third party copyright material in the WACE examinations that we present this submission in response to Question 50: Should any other specific exceptions be introduced to the *Copyright Act 1968 (Cth)*?

Submission

S200(1)(b) of the *Copyright Act* provides that 'The copyright in a literary, dramatic, musical or artistic work is not infringed by reason only that the work is reproduced...as part of the questions to be answered in an examination...'. It does not provide for the reproduction of sound recordings or films. The Authority relies on s200 for the reproduction of third-party copyright literary, dramatic, musical and artistic works for inclusion in WACE examination papers.

However, the nature of student assessment and the content of examinations have evolved since the proclamation of the *Copyright Act* at a time when examinations were characteristically conducted solely in 'pen and paper' format i.e. students providing written responses to written questions. In the past, any third-party copyright material contained within the questions would have been likely to consist of a literary, dramatic, musical or artistic work, and the reproduction of such a work would therefore be covered by s200(1)(b).

Music is an example of a subject area which has seen change in examination practice. In addition to the requirement to complete a practical music performance examination, the written WACE music examination requires students to listen to recordings of musical excerpts and then to answer questions relating to the excerpts. The preparation of the material for such questions may involve the reproduction of (typically short) excerpts from commercial sound recordings.

Since s200 does not provide for the reproduction of sound recordings, the Authority must therefore rely on s183—'Use of copyright material for the services of the Crown'. Since there is no declared collecting society for the use of sound recordings for government purposes, the Authority is required to notify copyright owners (typically recording companies) and agree terms for the reproduction (and public performance) of sound recordings used in WACE examinations. This is done after the examinations have been sat each year, because to notify copyright owners beforehand would compromise the security and confidentiality of the content of the examinations, and by extension their effectiveness as reliable assessment tools.

Negotiation of terms of use can be problematic in this scenario, because recording companies can find it difficult to understand this use of their material and accommodate it within their licensing structure, and they can sometimes raise objections to being notified of the use after the event. The net effect is that the Authority has less room in which to negotiate terms, which can in turn result in increased costs for government. These difficulties would be alleviated by the expansion of s200 to include the reproduction and public performance of sound recordings so that they can be used on the same basis as literary, dramatic, musical and artistic works.

Recording companies may take the view that they and the recording artists they represent would be deprived of royalties for the use of their work, but an alternate view is that the Authority's use of small excerpts from a small number of sound recordings once a year is not likely to represent a large loss of royalties. The owners of the rights to literary, dramatic, musical and artistic works have not received royalties for the reproduction of their work under s200 since the inception of the provision, and it seems reasonable to propose that sound recordings and films be brought within the ambit of the provision in the same spirit in which works have been included.

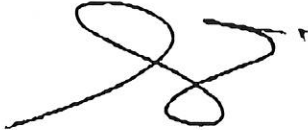
Film extracts can also be an examination component in a number of courses (for example, languages other than English); candidates view a piece of film footage, and are then required to answer questions relating to the footage. Again, since s200 does not provide for the reproduction of films, the Authority must rely on s183 and, with no declared collecting society for the use of films for government purposes, is required to notify copyright owners and agree terms for the reproduction (and public performance) in WACE examinations. And again, there are inherent difficulties in notifying after the examinations have been sat—copyright owners may object to the making of the copies, and may see fit to charge considerable fees, regarding which the Authority has a very limited basis for negotiation.

A further significant issue arises from the fact that s200 does not provide for the communication to the public of any copyright material; this will become increasingly problematic for the Authority in the context of the current move towards online delivery of examinations. In the scenario of the online delivery of—to take an earlier example—an examination in a language other than English containing copyright material including audiovisual material, the Authority would be obliged to notify copyright owners and agree terms retrospectively for the reproduction of the audiovisual material and its communication to the public.

Recommendation

That s200 be amended to include the reproduction and public performance of sound recordings and cinematograph films, and the communication to the public of literary, dramatic, musical and artistic works, and sound recordings and cinematograph films.

Yours sincerely

A handwritten signature in black ink, consisting of a large, stylized loop followed by a horizontal line and a small upward tick at the end.

**ALLAN BLAGAICH
CHIEF EXECUTIVE OFFICER**

14 December 2012