

**THE COPYRIGHT ADVISORY GROUP – SCHOOLS
OF THE
STANDING COUNCIL ON SCHOOL EDUCATION AND EARLY
CHILDHOOD**

**Submission to the Australian Law Reform Commission
PREPARED BY THE NATIONAL COPYRIGHT UNIT**

Discussion Paper 79 (DP 79): Copyright and the Digital Economy

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EXECUTIVE SUMMARY

The Australian school sector strongly supports the ALRC's proposals for the introduction of a fair use provision and the repeal of the educational statutory licences. They are important reforms that will ensure that Australia's copyright laws are updated for the digital economy.

Fair use is critically important to modern education

Fair use will remove the roadblocks currently impeding the use of digital technologies in Australian schools.

For example, a teacher is currently allowed to write a poem on a blackboard for free. If she writes the same poem on a digital whiteboard instead, this activity must be paid for under a statutory licence. Imposing fees on basic educational uses of digital materials creates disincentives for teachers to use the most modern teaching methods for the benefit of Australian students.

Fair use will make life easier for teachers

Teachers currently need to learn different copyright rules for different types of copyright content, and different technologies. For example, different rules apply to novels v short story collections, artworks v illustrations, CDs and MP3s, books and newspapers. They also apply differently depending on whether the teacher uses a photocopier or a learning management system.

Fair use would allow clear and simple guidelines to be created that could apply irrespective of the content or teaching method being used. The flexibility of fair use will allow guidance to be provided about how teachers should be allowed to use emerging technologies in classrooms.

Fair use would not mean all educational use of copyright content would be free

A series of misleading claims have recently been made by the Australian Society of Authors (ASA) and Copyright Agency suggesting that the ALRC's proposals would take fair remuneration away from Australia's authors and seriously challenge the rights and income of Australian authors and publishers.

These claims are not supported by fact.

The Australian school sector clearly stated in submissions to the ALRC that introducing a flexible exception 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 collective voluntary licensing arrangements (similar to those currently in place with music collecting societies).

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.

Collective licensing arrangements will continue to operate under the ALRC's proposals. Copyright owners will not be required to negotiate individually with schools, nor will each school need to obtain a separate licence for its copyright use.

Fair use will not impact on educational publishing markets

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 \$80 million dollars spent each year on copyright licensing fees paid to copyright collecting societies.

There is no suggestion the ALRC's proposals would impact in any way the amount the Australian school sector spends on buying educational resources. Collective licences with Copyright Agency and Screenrights will 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, 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.

Making the copyright system fairer

The ALRC's proposals would mean that Australian schools were no longer required to spend public funds on activities that do not affect copyright owner markets, such as:

- printing out a fact sheet on head lice from the Department of Health and Ageing's website to hand out to students
- printing copies of a free tourism map from a website for students to use in class
- asking a student to print a map from Google maps for a homework exercise
- reproducing thumbnail images of book covers on a school intranet to show students what books are available in the school library.

It is astonishing that the ASA and Copyright Agency seem happy for money to be collected for these types of activities, instead of ensuring that educational licences fees are directed towards authors who are writing to earn a living.

The ALRC's proposals protect copyright owners

The ALRC has proposed a fair use assessment which specifically requires consideration of the impact of any educational use on copyright markets and the value of copyright works. If a use unreasonably harms copyright owners, it wouldn't be considered fair, and licence fees would still be required.

Dispelling the myths about fair use

Much of the debate around the ALRC's proposals seems to misunderstand what is being proposed. We want to dispel some of the myths about fair use.

1. Fair use is not a foreign concept

Australia's current fair dealing provisions and fair use share a common legal history.

2. The ALRC's proposals are not radical

A flexible copyright exception very similar to the ALRC's proposal was first recommended for introduction in Australia in 1998. The introduction of fair use was also recommended by Parliamentary Committees in 2004, and just this week the House of Representatives Inquiry into IT Pricing recommended the consideration of fair use for consumers, businesses and educational institutions.

3. Fair use is not uncertain

Fair use jurisprudence in the United States is reasonably coherent and predictable. Guidelines and best practice statements have developed to provide additional certainty of how fair use works in various sectors. Insurance companies are happy to offer insurance policies relying on some fair use guidelines.

4. Fair use may be more certain than Australia's current laws.

Australian courts currently have to focus on technical considerations concerning who made the copy (in the case of a remote television recording service) or defining the purpose of the use (in the case of a satirical television show), rather than asking whether the use is fair. These technical approaches can be highly unpredictable in practice. A fair use assessment based on the clear fairness criteria proposed by the ALRC may in fact be much more predictable than the current law.

5. Australia needs fair use

Many educational and other uses that are recognised as being fair overseas are not permitted in Australia. In 2013, Australia's copyright laws still do not permit basic internet functions such as search and indexing, or modern education methods such as MOOCs. Fair use will enable Australia's copyright system to better embrace the opportunities presented by the digital economy.

Other issues

Contractual override

We strongly support the ALRC's policy position that contracts should not be able to be used to limit or exclude public interest uses of copyright materials. However we are concerned about the creation of a 'hierarchy' of illustrative purposes within fair use. For example:

- the importance of education to the public interest is not recognised, and the public interest in education is artificially separated from the public interest in research or study;
- statutory interpretation issues in relation to the operation of the fair use exception could be created in relation to the illustrative purposes that are not protected from contractual override;
- the approach prioritises 'legacy' uses over newer uses, such as those covered by the illustrative purpose for non-consumptive use.

Broadcasting

Australian schools strongly support the ALRC's recommendation to repeal the educational statutory licences. We are very opposed however to the ALRC's alternative recommendation that, in the event the licences are not repealed, the Part VA licence be extended to all forms of online transmission of television and radio programs over the internet. The practical effect of this recommendation would be to remove some types of content from an existing free exception (s.200AB) and shift it into a remunerable statutory licence (Part VA). Given trends in convergence, this could potentially capture a much broader range of content than the ALRC appears to intend.

Non-consumptive uses

Australian schools strongly support the ALRC's proposal to include non-consumptive uses as an illustrative purpose in the proposed fair use provision. Digital teaching and learning rely on many non-consumptive uses of copyright materials (such as system level caching, some types of cloud storage and anti-plagiarism tools). These uses do not ordinarily harm the market for copyright works, but enable new and beneficial teaching and learning experiences via the use of digital technologies.

Orphan works and mass digitisation

The school sector supports the ALRC's approach to orphan works. We see no policy justification however, in preventing educational institutions or other commercial organisations from using a voluntary licence for mass digitisation projects where appropriate remuneration is paid to rights holders.

OVERVIEW OF SUBMISSION

Introduction: Copyright Advisory Group

The Copyright Advisory Group – Schools (CAG Schools) represents schools in Australia on copyright matters to the Standing Council on School Education and Early Childhood (SCSEEC – formerly known as MCEECDYA). CAG Schools is assisted by the National Copyright Unit (NCU), a small secretariat based in Sydney.¹

CAG Schools members include Federal, State and Territory Departments of Education, all Catholic Education Offices and the Independent Schools Council of Australia. On copyright matters, CAG represents the almost 9,500 primary and secondary schools in Australia and their 3.5 million students. In this submission, we refer to the CAG Schools members and their constituents as ‘CAG.’

CAG has a significant interest in copyright law and policy. In 2012 the Australian school sector spent over \$660 million in purchasing educational content. In addition, in 2012 Australian schools paid over \$80 million in licensing fees to copyright collecting societies for the use of copyright materials in schools, under statutory and voluntary copyright licences.

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

CAG recognises the importance of providing 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 an appropriate balance in Australian copyright law, to reflect the great public benefits that flow from appropriate public access to information, particularly for educational and cultural purposes.

This submission has been endorsed by the National Catholic Education Commission, the Independent Schools Council of Australia, and is supported by the Australian Education, Early Childhood Development and Youth Affairs Senior Officials Committee (AEEYSOC).²

¹ For more details, including points of contact for the NCU, see its website at: www.smartcopying.edu.au.

² AEEYSOC comprises the Director-Generals or CEOs for school education and early childhood education and care from each of the Australian states and territories, as well as representatives of other senior officials committees assisting the Departments of Education and the Health, Community and Disability Services and Aboriginal and Torres Strait Islander Affairs Ministerial Councils.

This submission addresses 7 sets of proposals raised in the Discussion Paper:

1. fair use (Proposals 4-1 – 4-4; Proposals 13-1 – 13-3);
2. fair dealing (Proposal 13-2);
3. statutory licences (Proposals 6-1 and Question 6-1);
4. contracting out (Proposal 17-1);
5. broadcasting (Proposal 16-1);
6. non-consumptive use (Proposals 8-1 – 8-3); and
7. orphan works and mass digitisation (Proposals 12-1 – 12-3 and Question 11-1).

PART 1. CAG SUPPORTS FAIR USE

CAG strongly supports the proposal to enact a new fair use exception. CAG agrees with the ALRC that fair use would be much better placed than the existing set of purpose-based fair dealing exceptions to adapt to a rapidly changing technological environment.

CAG agrees with the ALRC's analysis as set out in the Discussion Paper about the importance of introducing a flexible open-ended exception into the *Copyright Act*. In this submission we highlight 7 reasons for this view:

- fair use would provide the flexibility needed in the digital environment;
- fair use would be simpler for teachers;
- fair use does not mean that all educational uses of copyright materials would be free;
- fair use would bring fairness back into Australian copyright law;
- fair use is consistent with Australian law
- the benefits of flexible exceptions are being recognised internationally; and
- fair use is not a foreign concept to Australian copyright policy. Australian policy makers have been thinking about fair use for a long time.

We also provide some more detailed commentary on the issue of 'flexibility v certainty' that is often presented as a choice in relation to the introduction of a fair use exception into Australian copyright law. CAG believes that the arguments often made about an alleged lack of certainty in relation to fair use are significantly overstated.

1.1 Arguments in support of fair use

1.1.1 Fair use provides the flexibility needed in the digital environment

In its submission to the issues paper, CAG explained how modern teaching philosophies no longer treat students as passive recipients of knowledge, but active participants at the centre of the learning process. For example, in 'flipped' classrooms, students study content at home using online resources, and apply knowledge in the classroom, using a wide range of online resources, social media platforms and collaboration tools.³

Flipped classrooms require fresh thinking. A modern approach to fairness is required.

³ See CAG submission in response to the ALRC's Copyright and the Digital Economy Issues paper (IP 42), part 1.5.

The Australian Curriculum encourages schools to use digital technology to engage not only with students, but also with parents, families, and others, outside of the traditional school environment. These activities, while required by national education policies, may not be considered to be directly for the purposes of education under the terms of existing copyright exceptions. Under the current regime of closed, technology-specific education exceptions, Australian schools are increasingly limited in the ways in which they can meet these curriculum goals.

In CAG's Issues Paper submission, we highlighted a range of practical problems arising from the inflexibility of the current educational exceptions. For example:

- s.200(1)(a) permits a teacher to write an extract by hand on a blackboard, but not on an interactive whiteboard;
- the caching exception in s.200AAA is not future-proofed against any technological developments that may take common caching practices outside the particular requirements of the section, which was drafted in response to the technical steps involved in operating a proxy cache as the technology was understood to operate in 2006;⁴
- there may be unintended gaps in the coverage of s.28, which have led to Australian schools being required to pay for 'technical' communications made in Australian classrooms in relation to some works and not others (for example, the display of text on an interactive whiteboard may not be covered, despite what CAG submits is a clear Parliamentary intention that s.28 should have been extended to this activity⁵). This is despite s.28 having been amended just six years after its introduction in 2000 to take account of new teaching practices involving distributed teaching technologies, centralised learning management technologies and distance education;⁶
- s.200AB, which was intended to provide flexibility for public institutions such as libraries, archives, schools and universities to perform socially useful acts, has in practice been of very limited use when it comes to digital content and new technologies, due to the way it was drafted and its particularly narrow implementation of the international law three-step test.⁷

These and other exceptions that impose different rules for different technologies, led CAG to submit the view that the existing educational exceptions are ill-suited to a digital environment in which technological innovations are constantly changing Australian classroom teaching and learning approaches.

⁴ See CAG submission in response to the ALRC's Copyright and the Digital Economy Issues paper (IP 42), p 30.

⁵ See Supplementary Explanatory Memorandum to the *Copyright Amendment Bill 2006*, para 199.

⁶ It has been suggested by Copyright Agency that s.28 may only cover communications of certain types of literary, dramatic and musical works, and that other communications of these types of works may still be covered under the Part VB statutory licence as they fall outside the operation of s.28 (see Attachment 2A to CAG's submission in response to the ALRC's Copyright and the Digital Economy Issues paper (IP 42) for a full explanation of this view).

⁷ See CAG submission in response to the ALRC's Copyright and the Digital Economy Issues paper (IP 42), p 36.

Fair use would remove the roadblocks that are impeding the use of digital technologies in Australian schools.

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.

As the ALRC recognises in the Discussion Paper, the *Copyright Act* has always acknowledged a strong public interest in permitting a limited set of non-remunerable educational uses of copyright. The public interest in education is also expressly acknowledged in the Terms of Reference for this *Copyright and the Digital Economy* review, which refer to “the general interest of Australians to access, use and interact with content in the advancement of education, research and culture.” It is also reflected in international treaties, including the WIPO Copyright Treaty and the Berne Convention,⁸ and is acknowledged in the educational exceptions that we have referred to above.

The difference that the proposed fair use exception would make is to 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’.

It is better to ask whether a use is fair than whether it ticked the right technical boxes.

CAG agrees with the ALRC that:

It seems preferable at least to consider whether any given use is fair, rather than automatically prohibit the use. Copyright law that is conducive to new and innovative services and technologies should at least allow for the question of fairness to be asked.⁹

An example of how fair use might work

Currently, section 200(1)(b) allows the reproduction of a musical work to include as part of an exam question, but not playing a sound recording of the musical work as part of the exam. The exception does not apply to the communication right, which means that the exception does not apply to exams delivered via distance education.

CAG submits that a better approach is to ask whether using a small extract of a work in an examination is a fair use – not to set different rules for different copyright materials and different teaching methods.

⁸ For further detail see Section 4 below on contracting out.

⁹ ALRC Copyright and the Digital Economy Discussion Paper (DP 79) at paragraph [13.67].

1.1.2 Fair use would be simpler for teachers

Teachers, parents and schools all expect to be able to use the most modern and effective teaching methods for the benefit of Australian students. However, as CAG's issues paper submission showed, Australia's current educational exceptions and statutory licences are stuck in the age of the photocopier.

Photocopier age laws don't suit digital age education. Reform will benefit teachers and students.

Australian teachers currently face a complex copyright environment, which sets different rules for different types and different uses of copyright materials. These rules apply differently to different technologies and formats. This just does not make sense in a digital age.¹⁰

CAG is aware that the ASA has written to schools in Australia claiming that the ALRC's proposals will make things worse for Australian teachers. See *Attachment B* for this correspondence and *Attachment C* for CAG's response. As stated in CAG's response, CAG does not share ASA's views. CAG believes that the ASA's correspondence misunderstands the current law, misrepresents the impact of the ALRC's proposals, and misunderstands the impact of reform on teachers.¹¹

CAG would never support a law reform proposal that would make things worse for teachers.

The ALRC notes in its Discussion Paper that fair use will lead to greater certainty by assisting in "mitigating statutory interpretation problems."¹² CAG strongly supports this view.

Teachers in Australia currently need to understand:

- The different set of rules applicable to various copyright subject matter (for example, there are different rules in Part VB depending on whether a teacher is copying a text book, an anthology, an article in a journal or a poem);¹³
- The technical limitations and rules for each subject matter (for example, copying a free to air broadcast that is subsequently made available online is covered by Part VA, copying any other kind of online video is covered by s.200AB);¹⁴
- Limitations as to the purpose of the use (eg, 'educational purpose' versus 'educational instruction' versus 'course of education').

¹⁰ See *Attachment A* for some of the many guidelines provided by the NCU to assist teachers to navigate these rules.

¹¹ CAG's information sheet for teachers in relation to the ASA's claims is available at *Attachment C* as well as: <http://www.smartcopying.edu.au/scw/go/pid/1077>.

¹² ALRC Copyright and the Digital Economy Discussion Paper (DP 79) at paragraph [4.170].

¹³ See, for example, Part VB of the Copyright Act, Division 2, sections 135ZJ, 135ZK, 135ZL, 135ZM.

¹⁴ See Part VA of the Copyright Act, Division 1, section 135C and Part X of the Copyright Act, s.200AB subsection 3.

As noted in CAG's submissions in response to the Issues Paper, significant interpretive difficulties arise from the inconsistent use of terminology in the existing educational exceptions, for example:

- Section 28 applies when an activity is done 'in the course of giving educational instruction'
- The Part VA statutory licence applies to copies and communications made 'solely for the educational purposes' of an institution (s.135E(b))
- The insubstantial copying provisions of Part VB apply 'for the purposes of a course of education' provided by an institution (see s.135ZG)
- The general copying and communication provisions of Part VB apply if the copy/communication is made 'solely for the educational purposes' of an institution (see s.135ZJ(b))
- Section 200(1)(a) applies to a reproduction or adaptation made 'in the course of educational instruction' while s.200(2) applies to a 'course of instruction'
- Section 200AB(3) applies to uses that are made 'for the purpose of giving educational instruction'

Fair use will make things easier for teachers.

These different terms give rise to uncertainty and cause complexity in practice.

In contrast, teachers in the US and Canada need only consider whether a particular use is 'fair', by reference to clear guidelines established by school systems.¹⁵ CAG fully anticipates that the NCU would provide similar plain language guidelines about day to day teaching practices under a fair use provision as is currently provided in relation to the existing exceptions and statutory licences.¹⁶

These unnecessary complexities in drafting and interpretation would be addressed by a principles-based approach that required only consideration of whether a particular use is or is not 'fair'.

The ALRC's proposals will not create any additional burden for teachers. Teachers will not become the 'copyright police.' Nor will they be required to make copyright decisions each time they want to use materials in class. As is currently the case, uses will either be clearly understood to be covered by the exception (as set out in guidance to teachers), or they will be permitted under the terms of a voluntary collective licence that will set out the rules for teachers.

CAG anticipates that the combination of fair use plus voluntary licensing arrangements will in fact make teachers lives easier in practice – as school system wide guidance could be provided in relation to the

¹⁵ See for example the guidance provided to Canadian schools in the Ontario Ministry of Education Memorandum *Use of Copyright Protected Works for Education*, Policy/Program Memorandum No. 157, June 21 2013.

¹⁶ See *Attachment A* for some examples of information and fact sheets currently provided to teachers by the NCU.

use of new technologies or teaching tools, and licences could be re-negotiated and updated to take into account these developments.

1.1.3 Fair use does not mean that all educational uses of copyright materials would be free

CAG is aware of claims by some rights holders that the ALRC's proposals would mean substantially fewer copyright payments by schools to copyright owners.¹⁷

Schools are not asking for a free ride – just a fair ride.

These claims simply cannot be supported.

CAG has made it clear from the start of the ALRC's enquiry that the Australian school sector does not anticipate that moving to a fair use environment would mean that all educational uses in Australian schools would be free. As CAG acknowledged in its Issues Paper submission:

*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 licence would continue to be paid for under voluntary licensing arrangements (similar to those in place with music collecting societies) ... The Schools are not asking for a free ride – simply a fair ride.*¹⁸

It is important in this context to re-state the membership of CAG: all State and Territory government education departments; the Independent Schools Council of Australia; the National Catholic Education Commission; and the Department of Education, Employment and Workplace Relations (DEEWR). The Australian Education, Early Childhood Development and Youth Affairs Senior Officials Committee (AEEYSOC) also endorsed CAG's issues paper submission.

In addition, a letter of support for the CAG issues paper submission was sent to the ALRC from the Standing Council on School Education and Early Childhood (SCSEEC) stating:

*The CAG proposal was recently considered and endorsed by SCSEEC Education Ministers, with the Minister responsible for school education in each State and Territory and the Australian Government expressing support for the submission and its recommendations.*¹⁹

CAG's statements in relation to the impact of the introduction of fair use and the repeal of the statutory licences have been endorsed by Education Ministers of all levels of Australian government. It is astonishing that the ASA and Copyright Agency do not seem to have accepted these assurances.

¹⁷ See, eg, the following submissions to the ALRC Copyright and the Digital Economy Issues Paper (IP 42): CAL, *Submission 249*; Screenrights, *Submission 289*; APA, *Submission 225*; Pascal Press, *Submission 84*; ASA, *Submission 169*; APRA|AMCOS, *Submission 247*.

¹⁸ See CAG submission in response to the ALRC's Copyright and the Digital Economy Issues paper (IP 42), in the executive summary, pp6-7.

¹⁹ Submission 292 to the ALRC Copyright and the Digital Economy Issues Paper (IP 42).

In this context, CAG wishes to address three issues in relation to the claims by certain copyright owner representatives that the ALRC's proposals will significantly reduce income to rights holders:²⁰

- a) The Australian school sector has a long track record of entering into successful voluntary collective licensing arrangements;
- b) Copyright owner claims regarding the costs of current educational copyright arrangements do not present the whole story;
- c) The approach set out by the ALRC is designed to protect copyright owner markets.

CAG also notes that the claims by Copyright Agency and the ASA are not supported by experience in the United States. In their response to the Kernochan report commissioned by Screenrights for the ALRC review,²¹ Hinze, Jaszi and Sag state:

*...it is important to emphasise that educational fair use has not eclipsed or displaced the sale or 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.*²²

a) Educational voluntary licences in Australia – an impressive track record

Some rights holders have suggested that if fair use is enacted, the Schools would seek to have *all* educational copying included under the fair use exception, and therefore to avoid remunerating content owners altogether. This is unfounded, and unfair to the schools sector, which has a long history of entering into voluntary arrangements with copyright owners to pay for content *even over and above* the content covered by the statutory licences.

Schools have a long history of entering into voluntary licences.

Case study one – Schools Voluntary Music Licences with with APRA|AMCOS|ARIA²³

CAG and APRA|AMCOS started working together 25 years ago to establish a voluntary music licence that enables the schools to copy print music beyond what was allowed under Part VB. Part VB limits the use of a musical work in most cases to use of 10% of the musical work, and Part VB does not apply to sound recordings.

²⁰ See, eg, the following submissions to the Issues Paper: CAL, *Submission 249*; Screenrights, *Submission 289*; APA, *Submission 225*; Pascal Press, *Submission 84*; ASA, *Submission 169*; APRA|AMCOS, *Submission 247*.

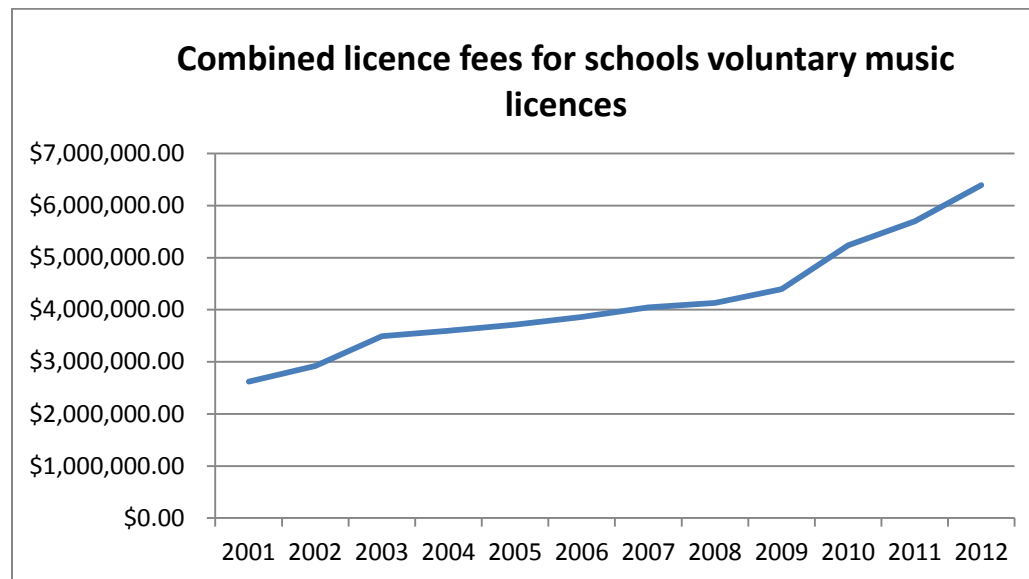
²¹ Submission 291 to the ALRC Copyright and the Digital Economy Issues Paper (IP 42).

²² Gwen Hinze, Peter Jaszi, and Matthew Sag *The Fair Use Doctrine in the United States – A Response to the Kernochan Report*, Submission 483 to the ALRC Copyright and the Digital Economy Discussion Paper (DP 79).

²³ See the [Smartcopying website](http://www.smartcopying.edu.au/scw/go/pid/652) for information sheets covering the voluntary music licences: <http://www.smartcopying.edu.au/scw/go/pid/652>.

This relationship has developed into three separate voluntary music licences for uses not covered by exceptions or a statutory licence. These licences have been renegotiated multiple times, none of which demanded a determination by the Copyright Tribunal. Every renegotiation has addressed the specific needs of schools and rights holders, and the licences have been ‘updated’ accordingly to accommodate the developments in teaching practices at the time.

As seen in Figure 1, revenue paid under the licences has increased over time, in accordance with the greater range of uses permitted under the licence and the use of music in schools:²⁴



Case study two - Schools' Voluntary Licence with Roadshow Public Performance Licensing²⁵

Section 28 of the *Copyright Act* allows educational institutions to use film in a classroom for educational purposes. This exception does not extend to entertainment or non-educational purposes, such as might apply for rained out sports days, teacher absences, after-school care, etc. Uses for these types of activities must be licensed by the copyright owner.

Clearing rights and obtaining permission to play a film outside of s.28 can be costly and time consuming at the individual school level, which led numerous schools to voice a need for a licence that went beyond s.28. As such the NCU, on behalf of Australian Schools, negotiated a voluntary collective licence

²⁴ This graph includes the licensing fees (GST inclusive) for all three voluntary music licences. These three licences are the: APRA licence, AMCOS licence, and the APRA|ARIA|AMCOS licence. For more information on these licences, please see the [Smartcopying website](http://www.smartcopying.edu.au/scw/go/pid/1019).

²⁵ See the [Smartcopying](http://www.smartcopying.edu.au/scw/go/pid/1019) information sheet covering the Roadshow licence here: <http://www.smartcopying.edu.au/scw/go/pid/1019>; as well as the Roadshow Public Performance Licensing website here: <http://roadshowppl.com.au/wpMyBusiness/MBASchools.aspx>.

with Roadshow Public Performance Licensing specifically for the non-educational use of films in Australian schools. This licence has no reporting requirements and was negotiated to cover specific activities schools indicated were important to their usual activities, such as being able to play films on bus trips, at school camps and excursions, and at after-school and holiday programs conducted at and by the school.

CAG's track record of entering into successful collective voluntary licensing arrangements for music and films shows that mechanisms exist and operate well to ensure that Australian broadcasters and creators of works used in Australian schools will continue to receive appropriate remuneration for that use.

b) The schools' sector expenditure on content

Claims made by Copyright Agency and the ASA suggest that schools only pay \$17 per student per year for the use of educational content in Australian schools.²⁶ This figure significantly under states the significant contribution of the education sector to Australian creators.

In 2012, the Australian school sector spent over \$665 million buying educational resources.

A recent survey indicates Australian schools spent approximately \$400 million on purchasing content in 2012.²⁷ This equates to an expenditure of \$122.22 per full time equivalent student on content in 2012.²⁸ 'Content' includes both hardcopy²⁹ and electronic³⁰ resources with hardcopy content representing 70% of school spend, and electronic content representing 30% of school spend.³¹ As such, a significant proportion of this expenditure is directed directly to Australian authors and publishers.

In addition to the spending done by Australian Schools in 2012, the survey also indicates that 'others' spent approximately \$265 million on purchasing content in 2012.³² Expenditure by 'others' includes content purchased for students by persons other than the school, which may include students, parents, parent organisations, family members, legal guardians, sponsorships, scholarships, etc. This equates to \$74.53 per full time equivalent student.³³

²⁶ For examples of these claims see *Attachment D* and also *Attachment B*.

²⁷ The data and estimation is based on a survey of 379 schools conducted in late 2012 and early 2013. The 379 schools provide 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.

²⁸ Ibid. Note full time enrolments (FTEs) were calculated using data provided by DEEWR for Australian schools in 2012.

²⁹ Hardcopy content surveyed included books, audiobooks (cassette and CD), periodicals, video/films, music (CDs, etc), sheet music, reference/library material as well as an open-ended 'other' category.

³⁰ Electronic content surveyed included subscription based resources, web-based music, electronic video/films, ebooks, audiobooks (MP3s), applications for electronic devices, and an open-ended 'other' category.

³¹ See above, FN 27.

³² Ibid. 'Others' may include students, parents, parent organisations, family members, legal guardians, sponsorships, scholarships, etc. It is common for parents and community groups to fundraise and contribute to the purchase of educational resources to be used in schools.

³³ Ibid.

The survey indicates that together, schools and others contributed over \$665 million dollars to the educational content sector and Australian creators in 2012.³⁴ This was in addition to the over \$80 million dollars in licensing fees to copyright collecting societies for additional uses of resources in Australian schools.

To put this in context, the amount spent by schools and others on purchasing educational content is more than seven times the amount Screen Australia received from the government in 2012³⁵ and more than three times the amount the Australia Council for the Arts received from the government in 2012.³⁶ To put this into further context, according to the 2010-11 *Cultural Funding by Government* survey the estimate of Federal Government funded expenditure on literature and print media was \$31.5m, while the estimate of State and Territory Government funded expenditure was \$12.1m.³⁷ As such, the NCU's recent survey indicates that in 2012, the school sector contributed more than 20 times that of the Federal Government to literature and print media and more than 50 times that of the State and Territory Governments.

The school sector contributes hugely to the creative industry in Australia. This contribution is more than:

- **3x the amount the government funded the Australia Council for the Arts**
- **7x the amount the government funded Screen Australia**
- **20x the amount the federal government funded the literature & print media**
- **50x the amount the state and territory governments funded the literature & print media**

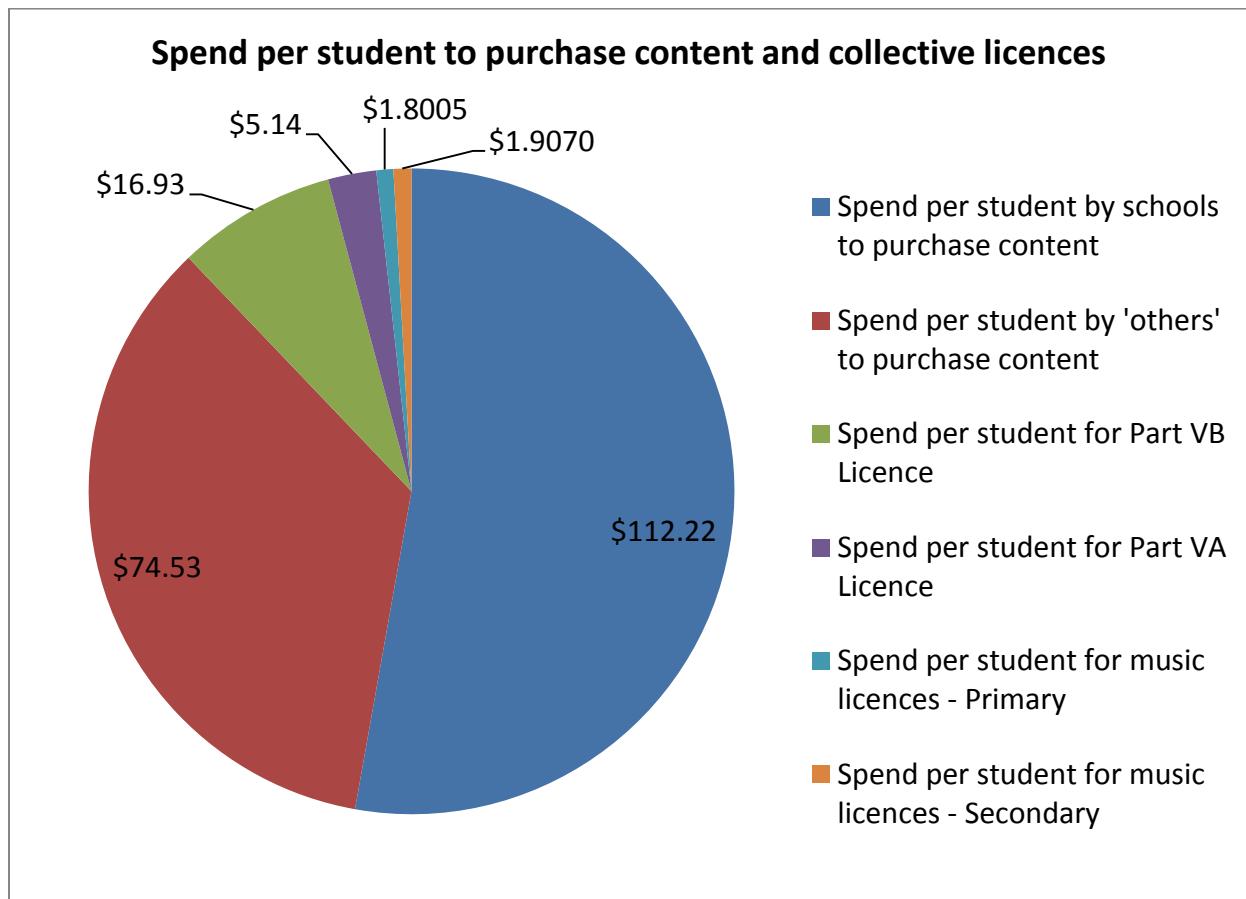
³⁴ Ibid.

³⁵ https://www.screenaustralia.gov.au/documents/SA_publications/AnnualReports/AR_1112.pdf

³⁶ http://www.australiacouncil.gov.au/_data/assets/pdf_file/0016/142351/Australia-Council-Annual-Report-201112.pdf

³⁷ See the Australian Bureau of Statistics – Arts and Culture in Australia: A Statistical Overview, 2012, Literature and Print Media, which can be found here: <http://www.abs.gov.au/ausstats/abs@.nsf/Lookup/4172.0main+features142012>

A breakdown of the content expenditure per student across purchased and licensed content in Australian schools is provided at Figure 2:³⁸



There is no suggestion that anything in the ALRC's proposals would have any impact whatsoever on the over \$665 million dollars spent by the Australian school sector in purchasing educational content for Australian school students. This revenue will still continue to flow to Australian authors and creators.

Australian schools will continue to spend significant money to purchase educational resources even after the proposed introduction of a fair use provision.

Any revenue impact in relation to statutory licence fees would be limited to the uses currently remunerated under the statutory licence that should be considered to be fair for the purposes of education. As we discuss below, uses that significantly impact on copyright owner markets or licence revenue would be unlikely to be considered to be fair and would still need to be licensed.

³⁸ This figure represents school expenditure from 2012. Note Part VA fees are based on the financial year, and the \$5.14 rate is for the FY 2011/12. The music licences fees represent all three music licences as listed above in FN 24 (GST inclusive).

c) The ALRC's approach protects copyright owner markets

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. Accordingly, a fairness assessment based on the ALRC's proposed factors would require a balancing of the interests of these two groups. The ALRC's proposed fourth fairness factor in particular protects the interests of copyright owners, by requiring consideration of *"the effect of the use upon the potential market for, or value of, the copyright work."*

In the context of private copying, the ALRC explains how a fairness assessment would adequately protect copyright owner markets. CAG submits that these comments would also apply to educational uses.

In the ALRC's view, the proposed fair use exception is better suited to account for the effect of a given use on the market for copyright material than specific, closed exceptions. Fair use is a flexible exception that, unlike [existing Australian exceptions] requires consideration of 'the effect of the use upon the potential market for, or value of, the copyright material.' Where the market offers properly licenced copies, then it may be less likely that [a use is fair].³⁹

CAG submits that the ALRC's approach gets the policy balance right. It will mean that if an educational use is fair – when assessed against all the fairness criteria - it would be permitted in a school. If it is not, schools would need to remunerate copyright owners for this use under a voluntary licence.

The 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. As discussed further in Section 3 below, voluntary licences will be an easy and efficient method to ensure that educational uses are remunerated when they would not properly be regarded as fair.

CAG submits that at this early stage of the policy process it is not possible to provide comprehensive guidance of exactly what uses would be considered to be fair uses, and which uses would be required to be covered by collective voluntary licences. This may depend on factors such as whether the Government implemented a fair use provision, or a purpose based provision such as fair dealing for education. This may also depend on additional factors such as policy statements and/or examples provided by Parliament if these reforms are introduced. Final guidance would also need to be developed in consultation with copyright owners about their views regarding the market impacts relevant to a fair use assessment.

However, even at this early stage of considering the implementation of a fair use exception, it is possible to identify a range of uses which CAG submits could be considered to be 'clearly fair.'

³⁹ ALRC Copyright and the Digital Economy Discussion Paper (DP 79) at paragraph [9.59].

CAG submits that the following examples would likely be considered a fair use under the proposed reforms:

- A teacher printing an information sheet on head lice from the Department of Health and Ageing's website to hand out to students.
- A teacher printing out a copy of a map of Australia from Google Maps to use in a geography lesson.
- A teacher reading a poem out loud to a distance education class.
- A teacher displaying the text of a book on an interactive whiteboard for a student to read out loud in class.
- A teacher streaming an episode of a television show from ABC iView to students in a classroom.
- A teacher adapting a piece of music to incorporate other instruments as part of a classroom exercise when the adaptation needed is not available to purchase commercially.

This list is not intended to suggest in any way that CAG has formed a view about whether uses not included in this list would or would not be covered by a fair use provision. CAG simply wishes to provide some examples of the types of uses that it considers may be covered by a fair use provision to minimise concerns about the impact of any reforms on existing licence revenues. Other educational uses may be considered to be fair, and many other educational uses would need to be properly licensed. These would be assessed against the fairness criteria identified by the ALRC.

1.1.4 The ALRC's approach would bring fairness back to Australian copyright law

CAG has set out above how a significant proportion of uses that are currently paid for under the statutory licences will continue to be paid for in the proposed new system under voluntary licensing arrangements (similar to those currently in place with music collecting societies). The system proposed by the ALRC will continue to support the production of educational content in Australia – and ensure that creators will continue to receive fair remuneration for their efforts.

CAG does not resile from the fact however that some uses of copyright materials that currently attract remuneration would be considered to be a 'fair' use under the exception proposed by the ALRC. Under the ALRC's proposed model, Australian schools would no longer be prevented or discouraged from using modern teaching methods to teach Australian students. Schools would also no longer be required to pay for minor, non-harmful uses of copyright materials that are recognised around the world as being free and fair uses of copyright materials.

The ALRC's proposals would remove current inequitable effects

CAG submits that moving to a fair use environment would not remove the need for licensing of educational uses that should properly be remunerated – it would simply remove some of the current *unfairness* caused to schools by existing copyright law.⁴⁰

As set out in detail in CAG's Issues Paper submission,⁴¹ there are many circumstances where Australian educational institutions are currently either:

- prevented from making non-harmful public interest uses of materials that would properly be regarded as 'fair'; or
- allowed to make such uses, but only for a fee under the statutory licences, in circumstances where:
 - the copyright owner never expected payment (for example, in the case of freely and publicly available information such as free tourist maps, public health information, free calendars, etc.);⁴²
 - the copyright owner is never able to be identified or paid by the collecting society, and the payment is distributed to completely unrelated members of the relevant collecting society (in the case of orphan works); or
 - it is not appropriate to remunerate the copyright owner for the type of material or the type of use in question (for example, in the case of printing the 'About Us' page from corporate websites, emailing a tweet, or downloading a free tourism map for a classroom geography project).

Consider some of the uses that were treated as remunerable under the statutory licence in the 2011 survey of electronic copying in schools:⁴³

- reproducing thumbnail images of books on a school intranet as a way of showing teachers and students what books are in the school library;⁴⁴
- saving and displaying a Google map on an interactive whiteboard in the classroom;⁴⁵
- telling a student to print, copy or save a page from Facebook;⁴⁶
- printing a page of a Government Department's contact information from the White Pages;⁴⁷

⁴⁰ For some examples of this unfairness caused by the current copyright law, see *Attachment E*.

⁴¹ See *Attachment G* for additional information on why the statutory licences are not suited to the digital environment.

⁴² For additional examples see *Attachment F*.

⁴³ The listed examples are all from the 2011 Schools EUS Remunerable Data Set. For additional examples of remunerable websites from the 2011 EUS survey, see *Attachment F*.

⁴⁴ <http://www.fantasticfiction.co.uk/search/?searchfor=book&keywords=maze+runner>

⁴⁵ <http://maps.google.com.au>

⁴⁶ <http://www.facebook.com/rugbyworldcup>

⁴⁷ <http://www.whitepages.com.au>

- printing a freely available webpage such as the home page from the McDonald's website;⁴⁸
- printing a freely available webpage such as an information page from the University of Newcastle's website.⁴⁹

Shifting the focus to fairness strikes the right policy balance

As discussed above, the fairness factors proposed by the ALRC require any fairness assessment to take into account the impact on any proposed use on a copyright owner's market. Critically however, the ALRC makes it clear that all factors are to be considered, with no one factor being more relevant than another.⁵⁰ CAG submits that this is essential in order to ensure that public interest uses are preserved in the digital environment.

Advances in digital technology increasingly facilitate the licensing of low-value uses that previously would have been economically unviable. This has led to claims by collecting societies that a fair use exception "*conflicts with a normal exploitation of the work*" and "*unreasonably prejudices the legitimate interests of the rights holder*."⁵¹ If these claims are accepted, fair use would have little if any role to play in a digital environment where a licence can be sought and granted with relative ease. Taken to its logical conclusion, this is an entirely circular argument: any use which a rights holder is prepared to licence would be *per se* 'unfair' if done without permission.

As the ALRC notes, international copyright agreements 'do not mandate' an approach to copyright policy that results in free use exceptions only being available when there is market failure.⁵² Nor have courts overseas adopted this approach.

In the US, courts are required to weigh up four factors: the purpose and character of the use (including whether the use is of a commercial character or for non-profit educational purposes); the nature of the copyright work; the amount and proportion of the work used; and the effect of the use on the potential market for or value of the work. In *Campbell v Acuff-Rose Music Inc* 510 US 569 (1994), the US Supreme Court held that there is no presumption that one factor weighs more heavily than the others: each of the four fairness factors is to be considered. Similarly, in *Bill Graham Archives v. Dorling Kindersley Ltd* 448 F 3d 605 (2d Cir 2006), the US Court of Appeals for the Second Circuit found that:

[A] copyright holder cannot prevent others from entering fair use markets merely by developing or licensing a market for parody, news reporting, educational or other transformative uses of its own creative work.

⁴⁸ <http://mcdonalds.com.au/#/home>

⁴⁹ <http://www.newcastle.edu.au/ecipdp>

⁵⁰ ALRC Copyright and the Digital Economy Discussion Paper (DP 79) at paragraph [4.150].

⁵¹ See Copyright Agency's supplementary submission to the ALRC Copyright and the Digital Economy Issues Paper (IP 42), Submission 287.

⁵² ALRC Copyright and the Digital Economy Discussion Paper (DP 79) at paragraph [13.56].

In Canada, fair dealing has been acknowledged by the courts as a ‘users’ right’ which should not be interpreted restrictively. In *CCH Canadian Limited v. Law Society of Upper Canada*, the court said:

*If a copyright owner were allowed to license people to use its work and then point to a person's decision not to obtain a licence as proof that his or her dealings were not fair, this would extend the scope of the owner's monopoly over the use of his or her work in a manner that would not be consistent with the Copyright Act's balance between owner's rights and user's interests.*⁵³

In a series of decisions earlier this year, the Canadian Supreme Court reaffirmed this principle. In *Council of Ministers for Education v Access Copyright*,⁵⁴ the Court held that schools could rely on fair dealing despite the fact that the collecting society, Access Copyright, was prepared to grant a licence for the relevant uses. And in *Society of Composers, Authors and Music Publishers of Canada v. Bell Canada*,⁵⁵ the Court held that an online music publisher could rely on the research and study exception to allow potential purchasers to stream short, low quality previews of musical works for free notwithstanding that the rights holders were prepared to grant a licence for this use.

The relationship between licences and fair use

CAG agrees with the ALRC that to adopt an approach where the mere offer of a licence was sufficient to preclude reliance on fair use would be “*inconsistent with the purpose of Australian copyright law*” and contrary to the public interest.⁵⁶ As the ALRC notes:

*The three-step test provides that free use exceptions should not ‘unreasonably prejudice the legitimate interests of the author’. It does not say an exception must never prejudice any interest of an author.*⁵⁷

CAG supports the ALRC’s proposal that the availability of a licence should be an important, but not determinative, consideration in determining whether a particular use is fair.⁵⁸ We note in particular the ALRC’s statement that “*the availability of a licence does not settle the question of fairness; it is not determinative. All of the fairness factors must be considered under the ALRC model.*”⁵⁹

Support for the ALRC’s approach to the availability of licences being relevant, but not determinative, to a fair use assessment, can be found in the Copyright Law Review Committee’s (CLRC) 1998 *Simplification*

⁵³ *CCH Canadian Ltd. v. Law Society of Upper Canada* [2004] 1 S.C.R. 339 at para 70, available here: <http://www.canlii.org/en/ca/scc/doc/2004/2004scc13/2004scc13.html>.

⁵⁴ *Alberta (Education) v Canadian Copyright Licensing Agency (Access Copyright)*, 2012 SCC 37.

⁵⁵ *Society of Composers, Authors and Music Publishers of Canada v. Bell Canada*, [2012] SCC 36. Available here: <http://scc.lexum.org/decisia-scc-csc/scc-csc/scc-csc/en/item/9996/index.do>.

⁵⁶ ALRC Copyright and the Digital Economy Discussion Paper (DP 79) at paragraph [13.56].

⁵⁷ *Ibid.* Emphasis in original.

⁵⁸ *Ibid.* at [13.57].

⁵⁹ *Ibid.* at [13.54].

Report. The CLRC offered strong support for the Franki Committee's characterisation of exceptions as matters of 'principle.' It said:

*The prescription of fair dealing involves the broad **balancing of competing goals** so as to maximise the public interest.*

The Committee is aware that digital technology has the potential for allowing copyright owners, through their respective collecting societies, to monitor and license the individual uses of copyright material in a way that was not previously possible. It also is aware that this has created new markets for the use of copyright materials, both whole and in part.

*The **Committee majority does not consider, however, that this new capacity to monitor and license uses of copyright materials justifies a limitation on the application of fair dealing** so as not to apply to copyright material in the digital environment. On the contrary, the majority believes that the fair dealing provisions are needed to ensure the free use of copyright material in the digital environment for purposes that are socially desirable, especially given that digital technology has the potential to restrict such use so as to enforce voluntary licensing agreements.⁶⁰*

A similar approach has recently been adopted in the United Kingdom. In its response to the 2011 Intellectual Property Office Consultation on Copyright, the Government stated:

*[T]he existence or otherwise of a licence may be an important factor in deciding whether a particular act of copying would constitute 'fair dealing' and hence be permitted. However, the Government believes that other factors are important: the terms on which the licence is available, including the ease with which it may be obtained, the value of the permitted acts to society as a whole, and the likelihood and extent of any harm to right holders. For this reason, the Government rejects the argument that the mere availability of a licence should automatically require licensing a permitted act.*⁶¹

These policy principles may seem unremarkable in principle. However, the current situation for education – as set out in CAG's Issues Paper submission – runs contrary to these principles in practice.

The policy objectives that underpin the existing educational exceptions have been increasingly undermined in a digital environment in which almost all copyright materials can be licensed. For example, s.200AB cannot be relied on for uses that fall within the Part VB statutory licence, or for which a rights holder is willing to grant a licence, regardless of whether such uses might be fair. This is despite the fact that Parliament intended this exception to permit certain socially beneficial uses.⁶²

⁶⁰ CLRC Simplification Report Part 1, Exceptions to the Exclusive Rights of Copyright Owners, 1998 paras 6.16 to 6.19. Emphasis added. For an expanded quote from the CLRC Simplification Report, see *Attachment H*.

⁶¹ See HM Government, MODERNISING COPYRIGHT: A modern, robust and flexible framework, Government response to consultation on copyright exceptions and clarifying copyright law available here: <http://www.ipso.gov.uk/response-2011-copyright-final.pdf>.

⁶² See *Explanatory Memorandum and Regulatory Impact Statement to Copyright Amendment Act 2006*.

CAG has long supported a policy position that free educational uses should not be permitted if they would cause significant harm to copyright owner interests or markets. For example, CAG's current guidance on format shifting is that a school or TAFE may only format shift if it is not possible to purchase the material in the new format within a reasonable time.⁶³ CAG does not believe, however, that it is appropriate that the mere availability or offer of a licence, or general commercial availability of a product, should preclude public interest exceptions in all circumstances.

CAG is strongly of the view that by shifting the focus to fairness, the proposed fair use exception would be much better placed than the existing educational exceptions and statutory licences to strike a fair policy balance

Fair use is better placed to strike a fair policy balance.

between the interests of rights holders and the interests of educational users. As United States Register of Copyright, Maria Pallante, recently stated:

*It is a point of pride for the United States that our past great copyright laws have served the Nation so well. American experts are fond of pointing out that we have the most balanced copyright law in the world, as well as a robust environment of free expression and an equally robust copyright economy.*⁶⁴

1.1.5 Fair use is consistent with other areas of Australian law

Contrary to claims by some critics of fair use, CAG submits that the ALRC's proposal for a principles-based approach to the reform of copyright exceptions is not inconsistent with or unsuitable for the Australian legal system. On the contrary, existing copyright law, with its rules-based approach to determining whether an exception can be relied on, is increasingly out of step with best practice regulation.

CAG submits that the reforms proposed by the ALRC would bring copyright law in line with the general trend in Australia towards regulation that provides the flexibility to “respond to technological change in a principled manner using criteria worked out between parties or ultimately a court.”⁶⁵

In Australia, examples of principles-based legislation in other legal spheres include:

- the *Australian Consumer Law*, which adopts a principles-based approach to determining whether:
 - conduct is unconscionable;⁶⁶

⁶³ See Smartcopying Website, ‘Format Shifting’ Information Sheets, available at: <http://www.smartcopying.edu.au/scw/go/pid/529> and <http://www.smartcopying.edu.au/scw/go/pid/531>. As another example, see information sheet re Using iTunes in schools and TAFEs where CAG advises educational institutions that do not have the AMCOS|ARIA|APRA licence to purchase the sound recording where it is available for purchase in a digital format as opposed to format shifting or making a copy (Smartcopying Website, ‘Using iTunes in Schools’ Information Sheet, available at: <http://www.smartcopying.edu.au/scw/go/pid/1049>).

⁶⁴ Maria Pallante, The Next Great Copyright Act, Twenty-Sixth Horace S. Manges Lecture, extended version of a lecture delivered at Columbia University March 4, 2013, 37 COLUM.J.L. & Arts (forthcoming Spring 2013), p29.

⁶⁵ ALRC Copyright and the Digital Economy Discussion Paper (DP 79) at paragraph [3.92].

- a contract is unfair;⁶⁷
- conduct is misleading or deceptive;⁶⁸
- the *Broadcasting Services Act 1992*, with its focus on co-regulation for broadcasters and online service providers, and which enables industry sectors to develop and implement their own codes of practice under a set of overarching principles or policy objectives;⁶⁹ and
- the *Privacy Act 1998*, which sets out high-level principles with which entities must comply when dealing with personal information.⁷⁰

The proposed fair use exception would also be consistent with the approach to regulation recommended by the Convergence Review, ie:

*a shift towards principles based legislation to ensure the policy framework can respond to the future challenges of convergence ... [a] principles based approach would provide increased transparency for industry and users [and] moves away from detailed 'black-letter law' regulation, which can quickly become obsolete in a fast-changing converged environment and is open to unforeseen interpretations.*⁷¹

A similar principles-based approach to regulation was also recommended by the ALRC in its recent enquiry into the Australian classification system. This review recognised the benefits of standards supported by co-regulation and industry codes to encourage innovative and efficient classification decision-making mechanisms.⁷²

CAG agrees with the ALRC that the proposed fair use exception would “*provide flexibility to respond to changing conditions and would assist innovation.*”⁷³ As the ALRC notes, both the Chair of the Productivity Commission, and the ACCC, have called for a regulatory framework that can accommodate change:

⁶⁶ *Competition and Consumer Act 2010* (Cth) Chapter 2, sections 20-22A.

⁶⁷ *Competition and Consumer Act 2010* (Cth) Chapter 2, sections 23-28.

⁶⁸ *Competition and Consumer Act 2010* (Cth) Chapter 2, sections 18-19.

⁶⁹ See for example Schedules 5 and 7 of the *Broadcasting Services Act 1992*.

⁷⁰ See the Information Privacy Principles set out in section 14 of the *Privacy Act 1988*.

⁷¹ Australian Government, Convergence Review Final Report, Executive Summary at pxii. Final report available here: http://www.dbcde.gov.au/_data/assets/pdf_file/0007/147733/Convergence_Review_Final_Report.pdf.

⁷² ALRC National Classification Scheme Review – *Content Regulation and Convergent Media Summary Report 118*, February 2012, p16.

⁷³ ALRC Copyright and the Digital Economy Discussion Paper (DP 79) at paragraph [4.93].

In May 2013, Productivity Commission chair Mr Peter Harris called for a policy-making structure that reinforces the expectation of change: a mechanism under which continuous reform is invited ... An integrated approach, where the voice of any one affected sector or region may not dominate; and where the breadth of necessary changes and the combined potential for economy-wide gains can be clearly set against any costs ... a generic way forward.⁷⁴

The ACCC endorsed a regulatory framework in which negotiating an understanding of acceptable uses of copyright material may be more effective and efficient in reducing inefficiencies than a strict enforcement regime which potentially inhibits innovation: where the parameters can be set so that the rights of copyright holders are able to be preserved and protected commensurate with the objectives of providing incentives to create copyright material ... balanced against the potential for innovative business practices to meet and develop consumer expectations and practices.⁷⁵

As such, CAG does not believe that assertions that fair use is not consistent with Australian legal approaches can be supported.

1.1.6 The benefits of flexible exceptions are being recognised internationally

As noted in CAG's submissions in response to the Issues Paper, a principles-based approach would also be consistent with the treatment of copyright law in comparable jurisdictions. CAG submits that the ALRC's proposals are consistent with an emerging global best practice for flexible copyright exceptions:

- 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.”⁷⁶
- In Israel, the fair use exception is open-ended but also refers expressly to “instruction and examination by an educational institution.”⁷⁷
- 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.”⁷⁸
- In Singapore, a new flexible fair use provision which was recently adopted echoes the fair use provisions of US copyright law.⁷⁹
- In South Korea, a newly 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

⁷⁴ Ibid, [3.89].

⁷⁵ Ibid, [3.90].

⁷⁶ 17 USC 107.

⁷⁷ Section 19 of the Copyright Act 2007.

⁷⁸ Section 185 of the Intellectual Property Code.

⁷⁹ Clause III.35 Fair dealing in relation to works.

legitimate interest of the right holder."⁸⁰ Korea's fair use factors are identical to those used in the US.⁸¹

- 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.*"⁸²
- In the United Kingdom (UK) the Hargreaves Review considered whether the more comprehensive American approach to copyright exceptions, based upon the so called Fair Use defence, would be beneficial in the UK. It concluded that "*importing Fair Use wholesale was unlikely to be legally feasible in Europe*" but that the UK could achieve many of its benefits by "*taking up copyright exceptions already permitted under EU law and arguing for an additional exception, designed to enable EU copyright law to accommodate future technological change where it does not threaten copyright owners.*"⁸³
- In March 2012 the Irish Copyright Review Committee stated "*[i]t is clear...that there is nothing intrinsically or exclusively American about the fair use doctrine. It has found homes in other common law countries, and the UK would be among them if EU law permitted.*"⁸⁴

The proposed fair use exception, with its list of fairness factors to be considered when determining whether a use is fair, would therefore be consistent with the principles-based approach to copyright in many comparable jurisdictions.

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

Many responses to the ALRC's discussion paper have suggested that fair use is a foreign concept to Australian copyright law, or that the ALRC's recommendations are radical. As we discussed above, a flexible standard like fair use is consistent with trends emerging in Australia and internationally.

Even in the context of the Australian copyright context, the ALRC's consideration of whether to recommend a fair use provision in Australia is not in fact novel. Consider the following policy timeline:

- 1996:** The CLRC was asked to examine the simplification of the various provisions and schemes that provide exceptions to the exclusive rights of copyright owners
- 1998:** The CLRC recommended the adoption of an open-ended flexible exception, similar to the ALRC's proposals:

⁸⁰ Article 35-2 of the *Copyright Act* of Korea.

⁸¹ Ibid.

⁸² Copyright Modernization Act, C-11 2012 (Canada), s 29.

⁸³ Ian Hargreaves, Digital Opportunity: A Review of Intellectual Property and Growth, Final Report, May 2011 at Executive Summary, p5.

⁸⁴ The Copyright Review Committee Consultation Paper on copyright and innovation, p116, available here: http://www.djei.ie/science/ipr/crc_consultation_paper.pdf.

*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.*⁸⁵

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.⁸⁶

June 2004: The Joint Standing Committee on Treaties (JSCOT) 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.*”⁸⁷

August 2004: A Senate Committee considering the Australia – United States Free Trade Agreement 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 do not have that power.*”⁸⁸

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*⁸⁹

Government Senators adopted the conclusions expressed by JSCOT. Labour 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.⁹⁰

⁸⁵ CLRC, Simplification Report [2.03], available here:

<http://www.ema.gov.au/agd/www/Clrhome.nsf/Page/4DD04A11F548554CA256D270020AEE9?OpenDocument>.

⁸⁶ Intellectual Property and Competition Review Committee, *Review of Intellectual Property Legislation under the Competition Principles Agreement* (2000), 129.

⁸⁷ The Joint Standing Committee on Treaties—Parliament of Australia, Report 61: The Australia-United States Free Trade Agreement (2004), Rec 17.

⁸⁸ 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.

⁸⁹ Ibid, [3.104 – 3.105].

⁹⁰ 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.

- 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.⁹¹
- 2005:** The Attorney-General's Department conducted a review considering the introduction of fair use in Australia.⁹²
- 2006:** The government introduced new exceptions for time and format shifting, and a new 'flexible fair dealing' 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.*”⁹³ 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.*”⁹⁴
- 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.*⁹⁵
- May 2013:** In its Discussion Paper, the ALRC proposed the introduction of a new flexible fair use exception.
- 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.*”⁹⁶

This timeline demonstrates that the relative merits of introducing a fair use style provision into Australian copyright law have been considered for over 15 years, with two separate recommendations for fair use being made in 2013 alone. Some reviews 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

⁹¹ 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.

⁹² 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.

⁹³ The Hon Phillip Ruddock MP, Second Reading Speech to the *Copyright Amendment Bill 2006*.

⁹⁴ Parliament of Australia, Standing Committee on Legal and Constitutional Affairs Report *Copyright Amendment Bill 2006 [Provisions]*, November 2006, p4.

⁹⁵ Regulatory Impact Statement to *Copyright Amendment Bill 2006*, p13.

⁹⁶ House of Representatives Standing Committee on Infrastructure and Communications, *At What Cost? IT Pricing and the Australia tax* (Canberra, July 2013) at xiii.

exception such as fair use. CAG submits that in 2013 the time is ripe for the introduction of fair use into the Australian *Copyright Act*.

It is important to highlight that when s.200AB was introduced the Government stated that it would “*monitor the effects*” of the new exception and “*review the new arrangements if necessary*.”⁹⁷

The ALRC has acknowledged that s.200AB has not worked as intended.⁹⁸ CAG submits that this finding strongly supports the reconsideration of the introduction of fair use that was foreshadowed by the Government in 2006.

In summary, CAG submits that fair use is not foreign to Australia’s policy deliberations, and the ALRC’s proposals are the latest in a series of recommendations about the desirability of flexible copyright exceptions in Australia.

1.2 The ‘flexibility versus certainty’ debate

The ALRC notes that some stakeholders have raised concerns about whether the risks of uncertainty outweigh the advantages of the reforms.⁹⁹ For the reasons that we discuss below, CAG submits that the uncertainty associated with fair use has been greatly overstated.

1.2.1 Significant certainty will exist from day one

CAG submits that a high level of certainty will exist in Australian schools from day one of the operation of any new copyright system based on fair use. As the ALRC acknowledges, most educational uses that are currently covered by an exception would continue to be covered by a fair use exception.¹⁰⁰ This means that existing classroom uses, uses in examinations and other uses covered by existing exceptions will continue to be clearly permissible in Australian schools, providing a significant level of certainty for many everyday educational activities.

Some activities that are currently covered by s.28¹⁰¹ that CAG considers would be considered fair for educational use under a fair use provision include:

⁹⁷ Regulatory Impact Statement, Schedule 6 (Parts 1-3) (Exceptions to infringement of copyright), Copyright Amendment Bill 2006, p13. Available here: http://www.austlii.edu.au/au/legis/cth/bill_em/cab2006223/memo_0.html.

⁹⁸ ALRC Copyright and the Digital Economy Discussion Paper (DP 79) at paragraph [11.28].

⁹⁹ See, eg, SPAA, *Submission 281*; Music Council of Australia, *Submission 269*; COMPPS, *Submission 266*; International Publishers Association, *Submission 256*; BSA, *Submission 248*; APRA/AMCOS, *Submission 247*; Foxtel, *Submission 245*; ARIA, *Submission 241*; John Wiley & Sons, *Submission 239*; Combined Newspapers and Magazines Copyright Committee, *Submission 238*; AFL, *Submission 232*; Australian Publishers Association, *Submission 225*; Australian Copyright Council, *Submission 219*; Screenrights, *Submission 215*; Australian Film/TV Bodies, *Submission 205*; IASTMP, *Submission 200*; ALPSP, *Submission 199*; Motion Picture Association of America Inc, *Submission 197*; NSW Young Lawyers, *Submission 195*; Music Rights Australia Pty Ltd, *Submission 191*; AMPAL, *Submission 189*; Arts Law Centre of Australia, *Submission 171*; Tabcorp Holdings Ltd, *Submission 164*; TVB (Australia) Pty Ltd, *Submission 124*.

¹⁰⁰ ALRC Copyright and the Digital Economy Discussion Paper (DP 79) at paragraph [4.174].

¹⁰¹ CAG acknowledges that there is some dispute about the extent to which all ‘display’ of text based material is currently covered by s.28 (see *Attachment 2A* to CAG’s submission to the Issues Paper). CAG believes that any technical distinctions in the operation of s.28 were unintended (see Explanatory Memorandum and Supplementary Explanatory Memorandum to *Copyright Amendment Bill 2006*) and are not likely to be relevant to a fair use assessment.

- Displaying or projecting material to the classroom via an interactive whiteboard or projector (eg, showing a PowerPoint presentation in a classroom or viewing material displayed on an interactive whiteboard)
- Using an electronic delivery system to transmit a television program or film from a central DVD player in a library to a monitor in a classroom
- Streaming a recording of a classroom lesson using virtual classroom software
- Playing a film recorded from television from the school intranet or learning management system to a classroom¹⁰²
- Reciting a poem to a virtual class using Skype or a Google hangout

As CAG discusses below, the NCU would ensure that clear guidelines on what is permitted in schools under fair use and voluntary licences would be available to teachers to ensure a smooth transition to any regulatory regime. CAG fully anticipates that the terms of any existing collective licences with collecting societies would be honoured for the duration of the agreements.

1.2.2 Use of guidelines and codes of practice to create certainty

CAG believes that claims that fair use is inherently uncertain cannot be supported. A report prepared for the ALRC by Gwen Hinze, Peter Jaszi and Matthew Sag discusses the certainty and predictability of fair use:

*Like the common law, it is helpful to think of fair use as both a mechanism for generating decisions about particular issues (i.e., as a system) and as a collection of actual decisions (i.e., as a body of case law). At a system level, the last 30 years of case law have generated a fairly coherent set of principles that lend themselves to forward looking application.*¹⁰³

CAG also submits that additional certainty can be created through the use of guidelines. Experience in Australia and internationally suggests that significant certainty can be achieved in practice when principles-based regulation is supported by the development of guidelines and industry codes. CAG has no doubt that this would also be the case for a fair use provision in Australia.

Guidelines in the education sector

CAG, through the NCU, has a strong history of providing reliable, comprehensive and fair guidance to teachers, to make certain their obligations under the *Copyright Act*. For example, following the 2006 copyright reforms, the NCU issued information sheets and guidelines through the Smartcopying website (www.smartcopying.edu.au), to ensure that teachers and schools had a clear understanding of what

¹⁰² CAG notes that any reproductions involved in loading a film to an intranet/learning management system would need to be separately considered under a fair use assessment and may instead be covered by a voluntary collective licence.

¹⁰³ Gwen Hinze, Peter Jaszi, and Matthew Sag *The Fair Use Doctrine in the United States – A Response to the Kernochan Report*, Submission 483 to the ALRC discussion paper, p3.

could and could not be copied under the exceptions and licences at the time.¹⁰⁴ Should fair use be introduced as a result of the present inquiry, the NCU would again be well placed to guide teachers and schools as to which uses are likely to be fair and which require remuneration under a voluntary licence. The input of copyright owners and collecting societies would be invaluable in determining appropriate guidelines.

Recent information sheets have addressed the use of cloud computing, mobile applications, You Tube, iTunes, and digital content repositories.¹⁰⁵ The NCU has also created a Creative Commons Information Pack for Educators and Students. A link to the site is on the Commonwealth Attorney-General's Department's website and other education and government websites both in Australia and overseas. The Smartcopying website is well utilised by Australian teachers with an average of 5,500 visits per month.

Smartcopying also promotes numerous copyright education initiatives:

- 'All Right to Copy?' is one of Smartcopying's initiatives which has been so effective that it is being used by the World Intellectual Property Organisation (WIPO) as an international case study exemplifying a successful IP outreach activity. This educational resource, produced in partnership with the Australian Federation against Copyright Theft, is designed to teach students about copyright and its impact on users and creators and is suitable for students aged 9-15. It can be used across a broad range of subject areas and includes a video dealing with various copyright challenges as well as written copyright information, sample permission letters, useful links and a quiz.
- 'Music for Free?' is a learning and teaching resource which explores the ethics of illegal file sharing. It forms part of the Values for Australian Schooling resource series and consists of student activity sheets, guidelines for teachers on providing additional advice, assessment suggestions and a list of resources on teacher references, books and websites.
- 'In Tune' supplements 'Music for Free?' and is a documentary on music piracy for secondary and TAFE Students. It shows Australian musicians talking candidly about creating music in today's digital era, the advantages and disadvantages of the internet, and how the digital revolution and music downloading affects them.
- 'Frank Hardcase' is an animation about music piracy for primary and secondary school students and is part of a Crime Stoppers Australia initiative against music piracy. The campaign involves a school competition based around the animation where students are invited to create an anti-piracy awareness campaign fashioned on the Frank Hardcase animation and characters. The campaign and competition are aimed at students aged 9-15.
- 'Nothing Beats the Real Thing!' is an educational module on copyright piracy for secondary and TAFE students. This resource includes quizzes, interactive games and activities across all

¹⁰⁴ See *Attachment A* for examples of guidance from the NCU through the Smartcopying website.

¹⁰⁵ For these examples and more see *Attachment A*.

curriculum areas. It focuses on film and TV copyright, and the impact of copyright piracy on creativity and society.

As with all guidelines, the fair use guidelines for the education sector will be likely to develop over time. However, as has been the case in the past, the NCU would be well placed to give clear guidance to teachers from day one of any new change as to the way in which key classroom uses of materials are

likely to be treated under the new system. CAG submits that this is actually one of the main benefits of moving to a fair use system – so that the law and related guidelines can adapt to developments in technologies and business models.

The Australian school sector is well placed to develop fair use guidelines to give clear rules to teachers about fair use.

Guidelines in other sectors

The successful use of guidelines by the education sector is of course not the only example of the use of guidelines to support certainty in regulation. There is a long tradition both in Australia and in comparable jurisdictions like the United States of using guidelines and best practice statements to develop added certainty in relation to flexible fair use or fair dealing provisions. Guidelines can be developed by a sector for use within the sector (for example, education-specific guidelines) or negotiated cross-sectorally.

The potential for industry guidelines and codes of practice as an appropriate policy tool in Australia has been recognised for many years. For example, the test for authorisation liability was codified in Australia by the Digital Agenda reforms in 2000 to include consideration of “*whether the person took any reasonable steps to prevent or avoid the doing of the act, including whether the person complied with any relevant industry codes of practice.*”¹⁰⁶

More recently, the Book Industry Strategy Group called for the development of an ‘industry code’ to combat book piracy.¹⁰⁷ The ALRC also referred to the fact that the ACCC, in its submission in response to the Issues Paper, suggested that a regulatory framework that provided greater scope for stakeholders to reach a negotiated understanding of acceptable uses of copyright material “*may be more effective and efficient in reducing inefficiencies than a strict enforcement regime which potentially inhibits innovation,*”¹⁰⁸ and said that industry guidelines had an important role to play in achieving this.

Arguably, the existing fair dealing provisions in Australia for reporting the news, parody or satire and criticism or review are as uncertain, and perhaps even less certain, than a fair use provision where ‘fairness’ is assessed by reference to statutory factors. Indeed a Senate Committee has observed that

¹⁰⁶ See ss 36(1A)(c) and 101(1A)(c).

¹⁰⁷ ALRC Copyright and the Digital Economy Discussion Paper (DP 79) at paragraph [3.78].

¹⁰⁸ Ibid, [3.90].

there has been much confusion in Australia about the scope of fair dealing.¹⁰⁹ However, industry guidelines and codes of practice have operated in Australia for many years to provide additional certainty to copyright exceptions based on a concept of fairness.

For example, in Australia, clear guidelines have been developed in relation to the exception for fair dealing for reporting the news. News Limited described in its supplementary submission to the ALRC the way in which negotiations between news and sports organisations, with the assistance of the ACCC, have led to the development of a code of practice for sports news reporting that assists news organisations when deciding how much footage they can use in reliance on the fair dealing exception.¹¹⁰

Guidelines are also being developed in Canada to respond to the recent changes introduced by the *Copyright Modernization Act* and the decision in *Alberta (Education) v Canadian Copyright Licensing Agency (Access Copyright)* (2012) 37 SCC (Canada). For example, the Ontario Ministry of Education has recently released a simple and clear nine page document providing guidance on the use of copyright protected works for education in schools under the Ministry's purview.¹¹¹ Similar guidelines were released by York University.¹¹²

In one of the most explicit examples of the certainty that can be offered by fair use paired with effective industry guidelines, the Documentary Filmmakers' Statement of Best Practices in Fair Use,¹¹³ developed by documentary filmmakers with the assistance of Professor Pat Aufderheide and Professor Peter Jaszi, provided sufficient clarity that, after its release, insurers began to provide 'errors and omissions' insurance against fair use claims after many years of refusing to do so on the basis that the law was too uncertain.

Fair use is certain enough for major US insurance companies.

In *Reclaiming Fair Use: How to Put the Balance Back in Copyright*, Aufderheide and Jaszi note that within a short time of this Statement of Best Practice being adopted by documentary filmmakers, "every single insurer of errors and omissions in the US began to offer fair use coverage routinely, and often without even a small incremental fee, because the statement had lowered the risk so dramatically."¹¹⁴ As a result of this statement being put into practice by this group of users, "fair use was no longer a grey area, an

¹⁰⁹ Parliament of Australia, Senate Select Committee on the Free Trade Agreement between Australia and the United States of America, Final Report, August 2004, p72.

¹¹⁰ Submission 286 to the ALRC Copyright and the Digital Economy Issues Paper (IP 42).

¹¹¹ Ontario Ministry of Education Policy/Program Memorandum No 157, June 21, 2013.

¹¹² The York case guidelines can be found here: <http://copyright.info.yorku.ca/fair-dealing-requirements-for-york-faculty-and-staff>. In April, Access Copyright commenced proceedings against York University alleging that the university's fair dealing guidelines authorised staff to copy in excess of fair dealing limits. No defence has yet been filed by York University. CAG notes that the scope of some guidelines in Canada is currently being challenged. However, it is clear that even though the precise boundaries of what should be considered 'fair' in Canada following the 2012 amendments and Supreme Court decisions are still being determined, the ability of educational authorities to create clear, simple and workable guidelines to determine what uses should be considered to be fair is not in question.

¹¹³ Documentary Filmmakers' Statement of Best Practices in Fair Use, available here: <http://www.centerforsocialmedia.org/fair-use/best-practices/documentary/documentary-filmmakers-statement-best-practices-fair-use>.

¹¹⁴ P Aufderheide and P Jaszi, *Reclaiming Fair Use: How to Put Balance Back in Copyright* (2011), p105.

area of indecision and anxiety, an area that put your distribution in jeopardy. It was a part of normal business practice.”¹¹⁵

Fair use is not a grey area – it is part of normal business practice.

Codes or statements of fair use best practice have also been developed by owners of copyright to help inform users as to when owners consider that use of their content is fair. A good example is the Code of

Best Practices in Fair Use for Poetry.¹¹⁶ This document, created by a group of poets, editors and publishers - again with the assistance of Professors Aufderheide and Jaszi - is relied on by schools throughout the US to determine when use of poetry for teaching purposes is likely to be fair. It contains the following statement:¹¹⁷

Members of the poetry community recognize that whether or not it qualifies as “criticism,” the teaching of poetry at every level of the educational system benefits the field. They recognize that whether teachers accomplish it through the use of anthologies and textbooks, photocopied materials, or online course sites, giving students’ meaningful access to the texts under discussion is critical to the educational enterprise.

*Under fair use, instructors at all levels who devote class time to teaching examples of published poetry may **reproduce those poems fully or partially in their teaching materials and make them available to students using the conventional educational technologies most appropriate for their instructional purposes.***

LIMITATIONS:

- *This principle does not apply to the preparation or distribution of published or commercially distributed teaching materials including anthologies and textbooks.*
- *Quoted passages should be reproduced as accurately as possible, and as completely as necessary, to reflect the creative choices embodied in the poem.*
- *Teachers should provide conventional attribution for the passages reproduced.*
- *Teachers should limit reproductions of long poems to the portions actually taught and appropriate context surrounding those portions.*
- *Teachers’ selections of poems should not substantially duplicate those of existing, commercially available anthologies or textbooks.*
- *Teachers should avoid reproducing all or most of the contents of a volume of poetry that is reasonably available for purchase by students.*

¹¹⁵ Ibid.

¹¹⁶ P Aufderheide, K Coles, P Jaszi, and J Urban, Code of Best Practices in Fair Use for Poetry available here: http://www.poetryfoundation.org/downloads/FairUsePoetryBooklet_singlepg_2.pdf.

¹¹⁷ Ibid, Emphasis added.

These examples illustrate the significant assistance that codes of best practice can provide to users who wish to rely on fair use for socially beneficial purposes.

Hinze, Jaszi and Sag have suggested that best practice guidelines developed to support fair use “*appear to function as a prophylactic against unnecessary litigation*,” finding that in the last decade, United States federal courts have been asked to decide only one case against a defendant whose conduct had been covered by a community-based best practice guideline, statement or code. Further, fair use was upheld in that case.¹¹⁸

1.2.3 Incorrect assumptions as to the level of certainty offered by the existing law

CAG submits that it is incorrect to state, as some critics of fair use do, that the existing copyright exceptions provide a significant level of certainty to either copyright owners or users.

Many of the existing copyright exceptions are uncertain and unwieldy in practice. As noted by Burrell, Handler, Hudson and Weatherall in their submissions in response to the Issues Paper:

*the existing Australian exceptions, notwithstanding the countless times these have been revisited by the legislature, are simply not well-drafted... many of the Australian exceptions have significant drafting problems such that their operation is highly uncertain. Extraordinary detail has not translated into precision, for instance where key terminology is vague or not properly defined, does not reflect terms of art, or has become redundant with changes in technology. In the Australian context, the multiple rounds of ad hoc law reform have only exacerbated this problem.*¹¹⁹

CAG endorses the extensive submissions made by Burrell, Handler, Hudson and Weatherall in relation to the level of uncertainty inherent in the existing system. CAG believes that the establishment of guidelines in relation to a new, streamlined fair use provision would be an important opportunity to clarify and restore certainty to the law in this area.

CAG agrees with the ALRC that adopting the fairness factors set out at Proposal 4-3, and expressly extending these to all uses (ie, not just dealings by way of reproduction for the purpose of research or study) would provide users and courts with **more** statutory guidance than they currently have when determining whether a use is fair.¹²⁰

Opposition to the proposed flexible fair use provision on the basis that there may be some uncertainty surrounding its application overlooks the fact that the existing system offers no greater certainty to either copyright owners or users. For example:

¹¹⁸ Gwen Hinze, Peter Jaszi, and Matthew Sag *The Fair Use Doctrine in the United States – A Response to the Kernochan Report*, submission 483 to the ALRC discussion paper, p 10-11.

¹¹⁹ Submission 278 to the ALRC Copyright and the Digital Economy Issues Paper (IP 42).

¹²⁰ ALRC Copyright and the Digital Economy Discussion Paper (DP 79) at paragraph [4.133] and [4.134]. Emphasis added.

- In the most recent judicial consideration of the fair dealing exceptions, known as the Panel Case,¹²¹ the trial judge and three judges of the Full Federal Court all differed in their views as to which uses of Channel Nine footage amounted to fair dealing either for the purpose of news, or for the purpose of criticism or review. Academics Michael Handler and David Rolph have noted that this litigation was a major missed opportunity for the Court to clarify the uncertain law in this area.¹²²

At the most general level, we suggest that there are two overarching problems with The Panel Case. First, neither Conti J at first instance nor the Full Court on appeal clearly articulated the principles governing the defences of fair dealing for the purposes of criticism or review, and of news reporting. More specifically, they 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. Secondly, and as a consequence of the first problem, the judges applied the fair dealing defences in an ad hoc manner based primarily on personal ‘impression’, without clearly or consistently explaining, by reference to external principles, the bases for their findings.¹²³

Both Conti J at first instance and the Full Court on appeal focused disproportionately on the narrow question whether the respondent’s dealings were for the purposes of ‘criticism,’ ‘review,’ and ‘reporting of news,’ rather than the overarching question whether those dealings were ‘fair’. As Handler and Rolph note, this:

implicitly encoded unduly restrictive notions of these statutory purposes in circumstances where a greater sensitivity to the practices of criticism and news reporting was needed. As a result... the Federal Court has both obfuscated the principles of fair dealing and reached outcomes that are neither clearly reasoned nor at times easy to reconcile with one another.¹²⁴

The problematic analysis and outcomes of the Panel Case are a clear example of both the inherent uncertainty of the existing fair dealing exceptions and the risk of unfair outcomes that arises from a restrictive, purpose-based approach

There is a serious need for a clear, principled and flexible approach to fair use.

¹²¹ At trial: TCN Channel Nine v Network Ten (2001) 108 FCR 235, on appeal to the Full Federal Court: TCN Channel Nine v Network Ten (2002) 118 FCR 417.

¹²² 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’ (2003) 27 *Melbourne University Law Review* 381.

¹²³ Ibid, p383.

¹²⁴ Ibid.

to copyright exceptions. As the Panel Case makes clear, there is a serious need in Australian copyright law for a clear, principled and flexible approach to fair use, as has been proposed by the ALRC.

- The uncertain scope of the existing personal time-shifting exception in s.111 of the *Copyright Act* was highlighted recently by the litigation between the National Rugby League (NRL) and Singtel Optus (Optus).¹²⁵ Again, there was a significant divergence in views and approach between the trial judge and the appeal court. Further, in finding that Optus could not rely on the exception to operate its Optus TV Now service, the Full Court of the Federal court stressed that its decision should not be taken to say that any cloud-based service would necessarily infringe copyright. The Court said:

...our concerns here have been limited to the particular service provider-subscriber relationship of Optus and its subscribers to the TV Now Service and to the nature and operation of the particular technology used to provide the service in question. We accept that different relationships and differing technologies may well yield different conclusions to the 'who makes the copy' question.

- As the ALRC has acknowledged the exception in s.200AB of the *Copyright Act* has not worked as intended, largely because of the uncertainty of the drafting.¹²⁶ The particular way in which the three-step test has been included in s.200AB has created a level of uncertainty that would greatly exceed any initial uncertainty that might be created if Australia were to adopt a fair use exception. There would be significantly more international guidance and jurisprudence available to an Australian court to draw upon in assessing the ALRC's proposed fairness factors than for an analysis under s.200AB.
- The Senate Environment and Communications References Committee recently considered the uncertainty of the current legal arrangements for broadcasting and simulcasting.¹²⁷ The Committee noted that complexity exists in the current regulatory arrangements in relation to internet simulcasts when radio stations simultaneously stream content on the internet that is identical to their terrestrial broadcasts.¹²⁸ The Committee noted that it is unsatisfactory that policy issues such as whether simulcasts should be considered to be a 'broadcasting service' became a matter for the Federal Court to resolve, and noted that much of the regulation in the broadcasting and copyright space is failing to keep up with the pace of change in technology.¹²⁹

As outlined in CAG's submission to the Issues Paper, there are many aspects of the existing statutory licensing regime that have given rise to uncertainty and been the subject of disputes between schools and collecting societies. This has partially arisen by the prescriptive nature of the statutory licences, which compel collecting societies to attempt to collect payments **for every copy and communication**

¹²⁵ National Rugby League Investments v Singtel Optus [2012] FCAFC 59.

¹²⁶ ALRC Copyright and the Digital Economy Discussion Paper (DP 79) at paragraph [11.28].

¹²⁷ Senate Environment and Communications References Committee Report *Effectiveness of the current regulatory arrangements in dealing with radio simulcasts*, July 2013.

¹²⁸ Ibid, p6.

¹²⁹ Ibid, pp26-27.

made by schools, irrespective of the circumstances, and irrespective of the fact that in many situations, the clear intention of Parliament has been to the contrary.

The statutory licences require collecting societies to collect payment for every copy or communication made by schools, irrespective of the circumstances.

CAG does not suggest that this conduct by the collecting societies is inappropriate; to the contrary, it is necessitated by the drafting and operation of the statutory licences. However, since it would be inappropriate to expend public funds from education budgets in circumstances where it was intended that no payment should actually be required, CAG and the collecting societies have been required to seek the intervention of the Government, in order to clarify the circumstances in which no payment should be made. A system requiring case-by-case Government intervention is hardly a system that can be regarded as ‘certain,’ or even reasonably workable. Consider the following examples:

- 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 was despite a clear statement in the Explanatory Memorandum to the Digital Agenda reforms that “[t]he exception for temporary reproductions is intended to include the browsing (or simply viewing) of copyright material.”¹³⁰ The dispute was only resolved by the education sector requesting that the Government amend the *Copyright 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.¹³¹
- The Copyright Agency also claimed that Part VB operates so that caching by educational institutions for efficiency purposes should attract payment under the statutory licence. In a speech to rights holders in May 2006, 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.¹³² Again, the education sector was required to request the Government to amend the *Copyright 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.

¹³⁰ Explanatory Memorandum *Copyright Amendment (Digital Agenda) Bill 1999* p32.

¹³¹ Now included as s.22 (6A) of the Copyright Act.

¹³² Michael Fraser, Copyright in the Digital Age, May 2006.

- After the introduction of the Digital Agenda Act in 2000, Screenrights felt that the terms of the newly extended operation of the Part VA statutory licence required the collection of remuneration for playing a copy of a broadcast in a classroom using centralised delivery technologies, even though playing the same copy in the same classroom using a VHS player located in the classroom would be a free use covered by s.28. Again, this technical problem had to be raised 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 in reliance on s.28.

CAG submits that these examples show that the existing regulatory arrangements have not protected the school sector from unnecessary litigation or uncertain legal interpretations. CAG has significant reason to believe that the fair use provision proposed by the ALRC may indeed be more certain than the current system of educational exceptions and statutory licences, as assessments can be made and guidance can be given against a uniform set of criteria rather than a range of provisions setting different rules for different forms of technology and subject matter.

Even if there is some litigation after the new system is introduced, CAG believes this is still better than our current system. As stated by Hinze, Jaszi and Sag in their submission to the ALRC Discussion Paper:

*We appreciate that some may regard litigation as an imperfect way of dealing with these new issues of the digital age, but it is manifestly better than a system in which all innovations are forbidden unless and until the Copyright Act is rewritten.*¹³³

1.2.4 Fair use shares the same common law history as fair dealing

Those who express concern regarding the uncertainty of a fairness-based analysis often overlook the fact that the fairness factors that apply in most fair use jurisdictions (and those that have been proposed by the ALRC)¹³⁴ share the same common law history and roots. The shared common history of fair use and fair dealing was recognised in the discussion paper.¹³⁵ It is also important to note that the recommendations of the Franki Committee in relation to the introduction of fairness factors in s.40(2) of the *Copyright Act* were influenced by the then proposed fair use provision in s.107 of the United States *Copyright Act*.¹³⁶

¹³³ Gwen Hinze, Peter Jaszi, and Matthew Sag *The Fair Use Doctrine in the United States – A Response to the Kernochan Report*, submission 483 to the ALRC discussion paper, p13. Note also on page 13 that Hinze, Jaszi and Sag state, “...until recently, there have been relatively few cases dealing with educational fair use in United States court. At the same time, there is a fairly widespread understanding that educators rely on fair use every day in producing course material and teaching classes.”

¹³⁴ ALRC Copyright and the Digital Economy Discussion Paper (DP 79) Proposal 4-3. See *Attachment I* for additional information on the fairness factors that apply in most fair use jurisdictions.

¹³⁵ ALRC Copyright and the Digital Economy Discussion Paper (DP 79) at paragraph [4.133-134].

¹³⁶ CLRC Simplification Report [5.36].

Ricketson has noted that *“by and large, [they] are similar to the types of factors taken into account in the case law dealing with fair dealing prior to this amendment.”*¹³⁷ The CLRC has also noted that the factors in s.40(2), which are substantially the same in effect as those proposed by the ALRC, do - as a matter of common law - apply broadly to all fair dealings.¹³⁸ In other words, the ALRC’s proposal that these factors be applied when determining when any use was ‘fair’ does no more than codify the common law considerations that already applied in the context of fair dealing.

¹³⁷ S Ricketson, *The Law of Intellectual Property: Copyright, Designs and Confidential Information*, Lawbook Co [11.35].

¹³⁸ CLRC Simplification Report [6.36].

PART 2. FAIR DEALING FOR EDUCATION AS AN ALTERNATIVE TO FAIR USE

Fair dealing for education would be welcomed – but as a second best option to fair use.

As stated, CAG is strongly supportive of the ALRC's primary proposal for a fair use provision, with education listed as one of the illustrative purposes. However, the ALRC submits a number of alternative proposals in the event that the Government does not accept its primary

proposals in relation to fair use. One of these alternative proposals is the introduction of a new exception for fair dealing for education. Although the introduction of an exception for fair dealing for education would be a significant advancement on the status quo, and would be supported by CAG as a policy alternative to fair use, CAG submits that this should be considered as clearly a second best reform option.

2.1 Fair dealing for education

The ALRC notes that the fair dealing exceptions, including the new exceptions proposed in the Discussion Paper, would be less flexible and less suited to the digital age than a general fair use exception.¹³⁹ CAG agrees with this assessment. Purpose-based fair dealing exceptions automatically foreclose any consideration of whether a purpose that is ancillary to one of the prescribed fair dealing purposes is fair. See our comments at 1.2.3 above for the weight that Australian courts have given to the 'purpose' of a dealing rather than a consideration of whether it is 'fair' as demonstrated in the Panel Case. CAG considers that opting for fair dealing instead of fair use - even on the expanded basis outlined in Chapter 7 of the Discussion Paper - would amount to a missed opportunity to future proof the *Copyright Act* and to inject much-needed flexibility into Australian copyright law.

However, in the event that the Government declines to enact a fair use exception, CAG submits that it would be imperative to ensure that the full range of new fair dealing provisions set out in chapter 7 of the Discussion Paper are implemented, with the exceptions for fair dealing for the purposes of education, quotation and non-consumptive use being of particular relevance and importance to the education sector.

2.2 Fair dealing and third parties

The ALRC sets out the way in which fair dealing provisions have been interpreted to be confined to the prescribed purposes - with the relevant purpose being inextricably linked to the person making the copy

¹³⁹ ALRC Copyright and the Digital Economy Discussion Paper (DP 79) at paragraph [5.43].

(or doing the dealing).¹⁴⁰ The situation in Australia following the *De Garis* case is contrasted to the situation in Canada following the Supreme Court of Canada's decision in *Alberta v Canadian Copyright Licensing Agency*, where a school was held to be able to make copies for students' purpose of research or study.¹⁴¹

As the ALRC has noted, there is currently real uncertainty as to whether, in Australia, schools and other educational institutions can rely on the research and study fair dealing exception to copy for classroom use and for distribution to students.¹⁴² Despite the fact that the *Franki Committee* appears to have intended that educational institutions, as well as their students, should be entitled to rely on this exception for copying that is 'fair', the Federal Court appears to have ruled this out.¹⁴³

Our schools are at a real disadvantage to comparable jurisdictions that are able to rely on copyright exceptions to copy for educational purposes.

As outlined in CAG's submission to the Issues Paper in Part 2.2.3, this puts Australian schools at a real disadvantage to comparable jurisdictions such as Canada, the US and Singapore, where schools can rely on fair dealing or fair use to undertake copying for educational purposes - including for the purpose of distribution to students - provided that the copying is 'fair'.

In Chapter 5 of the Discussion Paper, the ALRC says that its proposed fair use exception should apply to third party uses (ie where a third party copies or uses material on behalf of others) subject to the copying or use being fair. CAG supports this proposal. It is not clear that this intention would be achieved by the introduction of a series of additional fair dealing exceptions, unless additional statutory guidance is provided in relation to the effects of the *De Garis* and *Haines* cases.¹⁴⁴

As a matter of policy, CAG submits that there is no rationale for treating fair dealing any differently when it comes to the question of third party uses. In other words, even if the Government declines to enact fair use, there should be no *per se* restriction on third parties such as schools relying on *fair dealing* to undertake uses on behalf of persons who are themselves entitled to rely on the exception. This is the position in Canada, where schools can rely on their students' research and study fair dealing exception to undertake copying that is intended to facilitate the students' research and study.¹⁴⁵

We remain concerned, however, that in light of the current state of Australian fair dealing jurisprudence, schools would be unlikely to be able to rely on any of the existing fair dealing exceptions

¹⁴⁰ *De Garis v Neville Jeffress Pidler Pty Ltd* (1990) 37 FCR 99 (in which the Federal Court held that the research and study fair dealing exception can only only be relied on by the person who does the copying).

¹⁴¹ See discussion in ALRC Copyright and the Digital Economy Discussion Paper (DP 79) [5.38 – 5.40].

¹⁴² *Ibid*, [13.63].

¹⁴³ See *De Garis v Neville Jeffress Pidler* 18 IPR 292 (1991) above and *Haines v Copyright Agency Ltd* (1982) 64 FLR 185 9 (in which the Full Federal Court drew a distinction 'between an institution making copies for teaching purposes and the activities of individuals concerned with research or study').

¹⁴⁴ *Ibid*.

¹⁴⁵ *Alberta (Education) v Canadian Copyright Licensing Agency (Access Copyright)*, 2012 SCC 37.

to copy for educational purposes. For that reason, we consider it imperative that if fair use is not enacted, the *Copyright Act* be amended to include a new fair dealing exception that can be relied on by schools and other educational institutions for educational purposes. It should be made clear that this exception applies not only to classroom uses, but also to copying for distribution to students within fair dealing limits.

It is imperative that if fair use is not enacted, the *Copyright Act* be amended to include fair dealing for education.

While CAG supports the proposed repeal of the educational statutory licences, CAG also submits that in the event that the statutory licences are not repealed, the *Copyright Act* should be amended to make clear that schools do not require a licence for any use that would otherwise be subject to an exception, including any new fair dealing exceptions as detailed in section 1.1.4. CAG submits that the ALRC policy position expressed in paragraphs 6.100 and 6.101 of the Discussion Paper (that licences should be negotiated in the context of which uses should be considered fair) should be extended to any new fair dealing provisions introduced into the *Copyright Act* as an alternative to a fair use provision.

While such clarification may in one view be considered unnecessary in light of the ALRC's policy statements in relation to the operation of a fair use provision, we note that in its Supplementary Submission to the Issues paper, Copyright Agency submitted that any new exception should not apply if a licence is available 'on reasonable terms.'¹⁴⁶ Copyright Agency has also submitted that in the current state of the law, "a use that can be made by a user under a statutory licence is not 'fair'."¹⁴⁷ In light of this, CAG submits that it would be desirable and appropriate for it to be made abundantly clear that the mere existence of a licence - whether statutory or voluntary - will not be determinative of whether a use can be covered by a fair dealing provision. CAG strongly supports the ALRC's proposal that the availability of a licence must be a relevant but not determinative factor within a fairness analysis, and submits that the same approach should be used irrespective of whether the ultimate assessment occurs within a fair use or fair dealing context.

¹⁴⁶ Copyright Agency/Viscopy supplementary submission 287 to the ALRC Copyright and the Digital Economy Issues Paper (IP 42).

¹⁴⁷ Ibid.

PART 3. STATUTORY LICENCES

The ALRC has recommended repeal of the statutory licences, and the establishment of a copyright system based on a fair use provision supported by collective voluntary licences, as well as licences agreed directly with copyright owners. CAG strongly supports this recommendation.

CAG has explained at section 1.1.3 above that CAG members anticipate the continued operation of collective voluntary licences if the ALRC's proposals are implemented. CAG accepts that there are significant benefits to both the education sector and copyright owners flowing from the collective administration of rights. For example, the inclusion of the Independent Schools Council of Australia and the National Catholic Education Office among CAG members with the government school sector ensures that all schools can be covered by a collective licence, and collecting societies do not need to negotiate with individual schools. However these benefits flow from the collective administration of rights - not from the nature of statutory licensing itself.

CAG believes that a voluntary licensing regime would provide a more efficient and effective way to ensure the benefits of digital education are shared by all, particularly those in rural and remote areas. It would remove inefficiencies that currently prevent Australian students from fully enjoying the information benefits created by the internet and digital technologies. It would bring Australia in line with global best practice. It would also remove obstacles to the development and delivery of educational content to educational institutions. CAG submits that this would benefit not only Australian students, but also rights holders.

In particular, CAG submits that the following statements from the ALRC represent an appropriate policy outcome to ensure that Australian schools are able to take full advantage of the benefits of the digital economy:

*Like all other users of copyright materials, educational institutions ... should not need to pay for uses of copyright materials that would otherwise not infringe copyright because they are covered by an exception.*¹⁴⁸

*If fair use is enacted, then licences should be negotiated in the context of which uses are fair. If [a use is fair] then educational institutions... should not be required to buy a licence for that particular use.*¹⁴⁹

Read in isolation, these two statements may seem like an obvious statement of sensible copyright policy – indeed, they do no more than restate the position for the majority of schools around the world and the general situation for Australian corporations. However, against the background of Australia's history

¹⁴⁸ ALRC Copyright and the Digital Economy Discussion Paper (DP 79) at paragraph [6.97].

¹⁴⁹ Ibid, [6.101].

of statutory licences, these statements represent a significant and important shift away from an inequitable system to one that would more equitably balance the interests of copyright owners with the public interest of education.

The ALRC's proposals would bring fairness back to Australia's copyright system.

The ALRC raises two specific issues for further discussion, which CAG addresses below. Specifically, the ALRC calls for further comments about:

1. the 'benefits' of statutory licensing – and whether the 'benefits' of statutory licensing may be replicated under voluntary licensing.¹⁵⁰ CAG queries whether there are in fact any 'benefits' to statutory licensing per se, or whether these supposed benefits are actually benefits of collective licensing systems generally, irrespective of whether they are voluntary or supported by statute; and
2. how best to address the issue that voluntary licences may not – on their own – be sufficient to ensure that licensing solutions are available for certain rights (ie, broadcasts).

3.1 The benefits of collective licensing

The ALRC seeks comment on the extent to which the benefits of statutory licensing can be replicated by voluntary licensing.¹⁵¹ CAG agrees with the submission of various copyright owners that collective licensing offers significant benefits.¹⁵² However, CAG submits that these benefits are clearly the result of **collective licensing**, and not of **statutory licensing per se**. As a result, any positive outcomes of the existing statutory licensing system could easily be preserved in a move to a voluntary system.

As set out in our response to the Issues Paper, CAG submits that while the statutory licences made sense in the age of the photocopier, this is no longer the case. The statutory licences are broken and are out of step with comparable jurisdictions. For example:

- They prevent any reliance on public interest exceptions such as fair dealing. Schools pay for everything, while commercial users such as broadcasters can rely on fair dealing.

¹⁵⁰ Ibid, [6.35].

¹⁵¹ Ibid.

¹⁵² As Copyright Agency points out in their submission to the Issues paper at page 59, collective licensing allows copyright management organisations to enter into agreements with peak bodies as opposed to individual licensees. And as stated by APRA|AMCOS in their submission to the issues paper at para 222: "The digital economy presents opportunities for all types of licensing, and in particular maximises the potential for access and for efficient collective licensing" and para 226: "Collective licensing reduces transactions costs, removes the need to make decisions about whether an exception applies, and also means that users do not have to identify and locate individual copyright owners. The blanket licence provided by collecting societies, combined with the practically comprehensive worldwide repertoire, is certain and efficient. Collective licences can respond to the needs of the market, making them a much more flexible solution to real problems than legislative change." And para 231: "...digital technology means that with appropriate collective licensing, statutory licences for music are unnecessary – the digital download and streaming of musical works are all licensed in Australia without the assistance of any statutory licensing provisions."

- Collecting societies have relied on them to seek payment for incidental acts of copying and communication that do not attract remuneration in any other sector or any other jurisdiction. At the same time as schools are being encouraged to adopt the benefits of broadband and convergent technologies, the statutory licences provide a financial and administrative disincentive to do so.
- For so long as statutory licences are in place, they will operate as a strong disincentive for publishers to offer efficient, innovative services.

In that sense, CAG submits that framing a question in terms of whether the ‘benefits’ of statutory licensing would be replicated by voluntary licensing is asking the wrong question. We think the question that should be posed is: how can the Government ensure that the benefits of collective administration of copyright licensing are achieved under a system of voluntary licences?

3.1.1 Collective voluntary licensing models

The ability to negotiate collectively and the existence of an infrastructure for distributing royalties are two benefits that have been delivered by the statutory licences. As we discuss below, these aspects of statutory licensing can be easily replicated in a voluntary licensing regime.

Collective negotiation

Turning first to the ability to negotiate collectively, CAG notes that schools in comparable jurisdictions have for many years negotiated collectively with rights organisations without a statutory licence – or in fact any legislative support for a licence. Just some of the countries that successfully operate voluntary licensing regimes (ie, where a rights organisation issues licences to copy protected content on behalf of rights holders who have given it a mandate) include: Canada, Barbados, Argentina, the USA, Mexico, New Zealand, the Philippines, South Africa, Hong Kong, Ireland, India, Japan, Jamaica, Trinidad and Tobago and Turkey.¹⁵³

There is nothing about Australia’s legal system or educational environment that suggests that Australia could not successfully implement a collective voluntary licensing system, in the same way as this long list of other countries have done. As CAG made clear in our Issues Paper submission, CAG anticipates that if the statutory licences were repealed, collective licensing would continue to play an important role, and schools would continue to deal with Copyright Agency and Screenrights on a collective basis. As we noted in our submission:

¹⁵³ Copyright Licensing Agency (UK) fact sheet *Different Licensing Systems*, available at www.cla.co.uk/rightholders/international/different_licensing_systems.

Introducing a new 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 licence would continue to be paid for under voluntary licensing arrangements (either directly with copyright owners or collectively through blanket licence arrangements).¹⁵⁴

As outlined above, voluntary collective licensing already happens in Australia – and works very well – with the music collecting societies. The absence of a statutory licence has not prevented schools and collecting societies from reaching an agreement that suits all parties. Schools have also successfully negotiated a direct voluntary licence with Roadshow Public Performance Licensing (Roadshow PPL), which provides for uses of films in schools which would not otherwise be covered by an educational exception.

In summary, in the event that the statutory licences were repealed, collecting societies would not be facing the total fragmentation of their market into individual direct licences with the approximately 9,500 Australian schools. CAG has indicated its willingness to ensure that the benefits that can be achieved for both licensees and licensors from the collective negotiation and administration of copyright licences would continue under a voluntary licensing system.

Distribution

It is also simply not the case that rights holders would be faced with a fragmented distribution system in the absence of the statutory licences. There is nothing peculiar to the statutory licences that enable Copyright Agency and Screenrights to distribute royalties to rights holders. This is a function of their databases and relationships with rights holders built up over many years.

3.1.2 Voluntary licensing would deliver greater benefits compared with statutory licensing

If the statutory licences are repealed, Australian schools will continue to deal with rights holders (collectively through collecting societies, or in some cases directly), for all uses that are not covered by or exceed the limits of a new fair use exception. This may include situations where schools wish to copy material in excess of amounts that would be considered ‘fair’ under an exception, or for purposes that would not themselves be considered ‘fair’. CAG anticipates that this will primarily be done through voluntary collective licensing arrangements.

As the ALRC acknowledges, voluntary licences – whether direct or collective – are less prescriptive, more efficient and better suited to a digital age.¹⁵⁵ CAG submits that there is an overwhelming case to be made for the argument that, not only would voluntary licensing replicate the benefits of statutory licensing, it would actually deliver much *greater* benefits than statutory licensing, not only for users, but also for rights holders. CAG identifies at least three reasons for this:

¹⁵⁴ See CAG submission in response to the ALRC’s Copyright and the Digital Economy Issues paper (IP 42), p120.

¹⁵⁵ ALRC Copyright and the Digital Economy Discussion Paper (DP 79) at paragraph [6.3].

- a) voluntary licensing would be an efficient way of ensuring that licences do not apply to technical copying and other 'fair' uses;
 - b) voluntary licensing would create incentives for publishers to offer efficient, innovative services; and
 - c) voluntary licences would prevent the creation of false markets for copyright works.
- a) **Voluntary licensing would be an efficient way of ensuring that licences do not apply to technical copying and other 'fair' uses**

Voluntary collective licensing would allow schools to seek licences for the 'fair use plus' activities that schools wish to undertake.

Statutory licences have blanket coverage – almost all possible uses are covered (and remunerable), so schools and collecting societies have to spend time and resources to 'opt out' for those categories of uses that are considered to be fair, or new uses that should never have been covered by a statutory licence. In contrast, voluntary licensing allows licences to be offered and

sought on an opt-in basis, purely for the uses required. Schools would be able to seek licences for the 'fair use plus' activities that schools wish to undertake, rather than spend time and effort attempting to exclude from remuneration the significant set of uses which are acknowledged to be suitable for exclusion from the statutory licence, such as a wide range of freely available internet materials, open education resources and similar materials where limited educational uses would be considered to be fair.

The current arrangements require payment even for some uses that would be considered 'fair'

Under the statutory licence, schools are required to record in a survey (and potentially pay for) every technological copy and communication involved in teaching. The following example - contained in CAG's submission in response to the Issues Paper, illustrates this point:

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 dramatic exercise. He saves a copy of a scene from a play from an e-book to his laptop hard drive. 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.

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 is quite different. While Ms Jones would be required to record printing 25 copies of the scene in the Schools' EUS, 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.

*In other words, 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.** Yet in both cases, 25 students were shown a copy of a scene from a play. While Mr Smith's choice may not have direct financial implications under current negotiated agreements with collecting societies, the additional usage recorded in survey data would feed into data taken into account in future cost negotiations. The need to record every technical step of this single teaching activity in copyright surveys also means the administrative burden on teachers filling out EUS forms is significantly greater when they use newer technologies in their teaching.*

The imposition of such a strict accounting of copying and communication is not only inefficient, it is inconsistent with the purposes of copyright in ensuring incentives for creation but also facilitating public interest uses which do not conflict with the normal exploitation of copyright works or copyright markets. As the ALRC notes, one example of fair use for education may be some of the technical copying that is done when using new digital technologies in the classroom.¹⁵⁶

Could statutory licences solve this problem by setting a 'zero rate'?

Copyright Agency has acknowledged that the statutory licences cover some categories of content for which remuneration should not be paid. This content would likely be covered by a fair use exception. Copyright Agency has suggested that rather than repealing the statutory licences however, it would be open to the Copyright Tribunal to determine that some of the technical copying that schools are currently required to record when copying in reliance on the statutory licences may be subject to a zero rate.¹⁵⁷ While CAG would of course welcome confirmation that these incidental and technical copies do not attract remuneration, we have two concerns with the Copyright Agency's submission that "*not all copies and communications made under the statutory licences involve payment.*"¹⁵⁸

Firstly, Copyright Agency's apparent concession is at odds with the position it has previously adopted. As outlined in CAG's submission in response to the Issues Paper, Copyright Agency has previously sought to have each and every act of copying and communication - including caching - measured for the purpose of including this activity when determining equitable remuneration to be paid by schools.¹⁵⁹

Secondly, the position now adopted by Copyright Agency is also at odds with evidence given by Senior Counsel acting on its behalf in proceedings before the Copyright Tribunal in 2012. In proceedings

¹⁵⁶ ALRC Copyright and the Digital Economy Discussion Paper (DP 79) at paragraph [13.17].

¹⁵⁷ Copyright Agency's supplementary submission to the ALRC Copyright and the Digital Economy Issues Paper (IP 42), Submission 287, p4.

¹⁵⁸ Ibid.

¹⁵⁹ See CAG submission in response to the ALRC's Copyright and the Digital Economy Issues paper (IP 42), pp54-55.

brought by Copyright Agency against the State of New South Wales, Mr David Catterns, Senior Counsel for Copyright Agency, was asked:

[Do] you say it's not possible for one to say, where a statute provides for equitable remuneration, that that could ever be zero?

Mr Catterns replied:

Yes, that is our submission. It says "must pay."¹⁶⁰

Statutory licensing is less efficient than voluntary licensing

More importantly, however, the 'zero rate' solution outlined in Copyright Agency's supplementary submission is a clear example of the inefficiencies of the statutory licence that played a significant part in CAG's decision to ask for their repeal.¹⁶¹

As set out in detail in CAG's issues paper submission, the statutory licences cover virtually all uses of copyright materials, in all circumstances. There is no consideration of whether the use is merely a technical copy or communication made as part of the use of a particular technology, or whether the educational use should be permitted because it does not impact on the copyright owner's market for that work. In contrast, under a voluntary licence regime, the parties to the licence would reach agreement as to what uses are covered by the fair use provision (such as certain teaching activities and non-consumptive uses of copyright materials made as a technical consequence of educational uses). There would be no need to obtain a licence for this material, and no need to spend significant administrative and transaction costs on excluding these uses from the coverage of the collective licence, as is currently required under the statutory licence.

In contrast to the current prescriptive rules combined with the 'universal coverage' of the statutory licence, under a voluntary collective licence, the parties could simply concentrate on licensing the range of uses that the parties agree should be the subject of a licence – which could potentially include remuneration for uses in addition to those permitted under statutory licensing arrangements. For example, we note that Copyright Agency's voluntary commercial licences permit corporate uses of copyright content that are not as prescriptive as the terms of the statutory licence for education.¹⁶²

¹⁶⁰ *Copyright Agency Limited v The State of New South Wales*, No. CT 2 of 2003, Tuesday 2 October 2012, p11. Note in the recent *Copyright Agency Limited v State of NSW* [2013] ACoptT1, the Tribunal stated: "Although there was an earlier debate about a number of other fee-free uses by the State, these had been resolved by the time that the hearing in the Tribunal concluded. The parties agreed that in those cases an appropriate rate was zero. The jurisdiction of the Tribunal is, however, circumscribed by the need for there to be disagreement (s 183(5)) and the Tribunal does not accept that it can determine rates which are agreed."

¹⁶¹ See Copyright Agency's supplementary submission to the ALRC Copyright and the Digital Economy Issues Paper (IP 42), Submission 287.

¹⁶² See Copyright Agency's Website's information concerning Copyright Licences for Business, available here: <http://rightsportal.copyright.com.au/Pages/AboutAnnualBusinessLicenseHomePage.aspx>.

Voluntary licensing may allow copyright owners to permit and claim remuneration for activities that are currently prevented (such as the simultaneous use of educational resources in more than one classroom,¹⁶³ if agreement could be reached as to appropriate remuneration and safeguards for this use). Attention could be directed to those uses that **are** covered by the licence and therefore remunerable. There would be no need for either party to direct unnecessary resources to monitoring, measuring and processing uses that should not attract remuneration.

Compare this with the statutory licences. By Copyright Agency's own admission, each and every copy and communication must be reported under the licence arrangements, regardless of whether or not Copyright Agency intends to seek remuneration.¹⁶⁴ See, for example, Copyright Agency's supplementary submission, in which it states that schools are required to report copying and communication from all websites notwithstanding that Copyright Agency excludes from remuneration more than 50 per cent of uses of content sourced from the internet.¹⁶⁵ The costs incurred by all parties would be significantly reduced if this copying and communication were not required to be reported in the first place.

Even if Copyright Agency were in the future to adopt a position whereby some copies and communications would attract a zero rate, CAG submits that it makes absolutely no sense from an efficiency point of view to impose substantial compliance costs on schools (and Copyright Agency itself) for the purpose of collecting data on copying and communication that Copyright Agency agrees is not remunerable.

This situation is also inconsistent with the goals of Australian competition policy and principles of best practice regulation, which require regulation to remain relevant and effective over time and provide that the costs of any regulation should not outweigh its benefits.¹⁶⁶

The status quo does not benefit Australian schools

Copyright Agency appears to suggest that this 'record everything' approach to licensing is a virtue of the statutory licence, based on the fact that it is convenient for schools to be relieved of any responsibility for deciding whether a use falls within the scope of the licence. CAG strongly rejects this argument.

CAG submits that the unnecessary costs associated with collecting and processing data on uses that either fall outside of the scope of the licence, or for which Copyright Agency does not otherwise intend to seek remuneration, far outweigh the costs that would be involved in developing guidelines to educate teachers on the copying permitted under fair use and the rules agreed under a voluntary licence. The NCU currently directs substantial resources to developing and implementing the smart copying practices that are only necessary due to the inefficient operation of the statutory licence.

¹⁶³ See for example s.135ZMB(1) and 135ZMD(3).

¹⁶⁴ This reporting requirement applies during a period in which the school in question is being surveyed.

¹⁶⁵ See Copyright Agency's supplementary submission to the ALRC Copyright and the Digital Economy Issues Paper (IP 42), Submission 287.

¹⁶⁶ See Council of Australian Governments Principles of Best Practice Regulation, in particular principles 3, 4 and 8.

Indeed, CAG submits that the current system has led to unnecessary complexity for teachers. This is because the overbroad operation of the statutory licences has required NCU to educate teachers on 'smart copying' practices that encourage teachers to use educational content in a way that represents an appropriate expenditure of educational budgets.

For example, in the schools information sheet covering 'Online Free-to-Air Television and Radio Programs,' the NCU advises teachers to link to programs as opposed to copying wherever possible as linking is non-remunerable and a cost effective way of managing copyright.¹⁶⁷

The status quo imposes unnecessary costs on copyright owners

Copyright Agency itself also engages in unnecessary expenditure as a result of the inefficient operation of the statutory licence. This includes the cost of processing data relating to copying of freely available internet content, even where Copyright Agency accepts that no remuneration is payable due to the copying falling outside of the scope of the statutory licence. The money expended on unnecessary processing adds to the costs of administering the licence, potentially over time leading to less revenue for the copyright owners that the collecting society represents.

Removing these inefficiencies would be a major benefit of moving to collective voluntary licensing. As the ALRC has acknowledged, the parties could negotiate only in relation to those uses considered to be appropriately covered by the licence. A collective voluntary licensing arrangement would free both parties from the statutory constraints and inefficiencies created by the statutory licences. It would be vastly more efficient for the education sector and copyright owners alike to have uses of copyright materials that are not covered by fair use to be paid for under voluntary licensing arrangements than under the current system of statutory licensing.

CAG reiterates the points made in section 1.1.3 above that CAG does not expect that all uses of educational content would be covered by a new fair use exception. CAG restates its position that most uses that are currently paid for under the statutory licences would continue to be paid for under voluntary licence arrangements.

b) Voluntary licensing would create incentives for publishers to offer efficient, innovative services

Under the statutory licence, publishers have limited incentive to offer innovative distribution and pricing models to schools. The Commonwealth *Department of Industry, Innovation, Science and Research* has suggested that publishers of e-books should allow Australian students three purchasing options:¹⁶⁸

- hard copy (automatic electronic copy included which dynamically updates);
- electronic copy which dynamically updates; and

¹⁶⁷ See the Smartcopying information sheet here: <http://www.smartcopying.edu.au/scw/go/pid/1031>

¹⁶⁸ Commonwealth *Department of Industry, Innovation, Science and Research* submission to the Book Industry Strategy Group.

- electronic copy with optional part or whole print option (the student pays for printing if and when they decide to print).

There is no incentive to do this within the terms of the statutory licences because, in practice, the statutory licences have operated to define the limits of how publishers engage with the education sector. In contrast, a voluntary licensing system supporting flexible educational exceptions would enable schools and copyright owners (directly or through a collecting society) to negotiate for the range of content, formats and uses that best suit educational needs. Further, publishers in Australia would be free to compete on product, service delivery and price for how best to serve the education market.

The statutory licences have permitted educational publishers in Australia to engage in a form of statutory supported ‘double dipping’ to obtain a payment for schools for a licence to access a product, and then receive additional revenue from the statutory licence if a school subsequently uses the resource in a school.

Statutory licences encourage ‘double dipping’ by publishers.

For example, ‘Reading Eggs’ offers licences in the US, UK, New Zealand, China, Korea and Thailand.¹⁶⁹ Reading Eggs is a hugely successful product, but it is only in Australia, due to the operation of the statutory licence, that the publisher is able to claim both the licence fees from the sale of the product, and remuneration under statutory licence for additional photocopying, printing etc of accompanying downloadables.¹⁷⁰ Most schools are not aware these secondary educational uses will attract additional Part VB income. See CAG’s submission to the Issues Paper for more examples on how statutory licences can lead to inefficiencies in the publishing sector.¹⁷¹

In contrast, the flexibility afforded by a collective voluntary licence arrangement is well illustrated by the existing voluntary licence for the use of music in schools agreed between CAG members and music collecting societies. Indeed, this music copyright licence covers some examples of uses that the parties agree would be covered by s.200AB. Although it is accepted that some format shifting of music for educational purposes would be permitted by s.200AB, teachers expressed a desire to be able to format shift music (for example onto learning management systems) that would not be permitted by s.200AB. CAG and the music collecting societies were able to negotiate broader format shift rights than permitted by the statute under a voluntary collective licence, and were prepared to pay for the additional functionality and convenience offered by the licence. The flexibility afforded by voluntary licences offers the flexibility and opportunity to create new revenue streams for owners – but in a way that avoids the inequitable ‘double dipping’ made possible by the statutory licence.

¹⁶⁹ See Copyright Agency magazine Issue 2, 2013 at page 2.

¹⁷⁰ See for example *Copyright payments drive innovation*, in Copyright Agency Magazine Issue 2, 2013, p3.

¹⁷¹ CAG submission in response to the ALRC’s Copyright and the Digital Economy Issues paper (IP 42), Part 2.2.4.

c) Voluntary licences would prevent the creation of false markets for copyright works

The statutory licences were designed as a solution to market failure in a photocopying age. They are now being used to create ‘false markets’ in digital works – markets that would not exist ‘but for’ the statutory licences, and markets that do not exist anywhere else in the world. These false markets, and their inherently problematic nature, were examined in detail in CAG’s submissions in response to the Issues Paper. They include, for example:

Statutory licences create ‘false markets’ that do not exist anywhere else in the world.

- payment by schools for freely available internet material;
- active encouragement by collecting societies of website owners to seek payments from Australian schools for content they do not require anybody else to pay for;
- as discussed above, the imposition by publishers of ‘Australia-only’ terms and conditions that directly reference the Part VB statutory licence, demanding use-based payments that are not required by those publishers anywhere else in the world;
- double payments by schools for the same content, due to the overlap of direct and collective licences; and
- use of public funds to pay for publicly-funded content.

As noted above, CAG does not suggest that the collecting societies have acted inappropriately in seeking to collect for all uses that fall within these false markets; indeed they are required to do so in light of the drafting of the statutory licences. However, the current reform process presents a vital opportunity to address these major problems with the existing system, and to ensure, for example, that public funds are not used to support false markets for content.

3.2 Ensuring voluntary licences can operate effectively for all copyright subject matter

The collecting societies have argued in their submissions that there would be major barriers to negotiating and agreeing voluntary collective licences on behalf of their members, in the event that the statutory licences were repealed. In the case of Copyright Agency, CAG is unaware of any such barriers. In the case of Screenrights, CAG agrees that there would be a technical restriction affecting its ability to agree to voluntary licences on behalf of its members, but suggests that this could be overcome easily by way of a simple statutory solution. These issues are discussed in further detail below.

CAG believes that there are two ways in which a voluntary licence can provide the requisite coverage for both the collecting society and schools. These include:

- incorporating an indemnity clause into an agreement which states the collecting society assumes the liability for the payment of remuneration to a non-represented rights holder.¹⁷² This option does not make the use of non-represented works permissible, but only eliminates financial liability of schools.¹⁷³
- incorporating into the *Copyright Act* provisions by which a collecting society is given a general authorisation to represent right holders or it is presumed that the organisation has such a right.¹⁷⁴ This option does not give the organisation a general right of representation, but only extends an agreement concluded by the organisation to cover non-represented right holders.¹⁷⁵

3.2.1 Collective voluntary licensing to replace Part VB

CAG is aware of claims from collecting societies that voluntary licences could not operate as efficiently in Australia as statutory licences.¹⁷⁶ CAG submits that this is simply not true. Here are approaches adopted by collecting societies in Australia and overseas to securing rights in the absence of a statutory licence:

The 'excluded works/uses' model

Under this model, a collecting society with a very broad repertoire offers a licence in respect of all works etc – except for those works set out in a list of 'excluded works'. The excluded list may also set out certain uses that are not licensed with respect to some works that are otherwise included in the repertoire.

This is how Copyright Agency's existing voluntary licences operate. Currently, Copyright Agency offers a commercial licence that covers, for example, Australian and international journals, internet content, books, newspaper, magazines, reports and research.¹⁷⁷ In many cases, the uses permitted by this voluntary commercial licence greatly exceed the usage rights afforded to schools under the statutory licence. It should also be noted that Australian schools operated under voluntary licences with the Copyright Agency between 1989 and 1996 without difficulty.

In some cases, the collecting society grants an indemnity to licensees for use of works that are not listed in the list of excluded works. In other words, the collecting society carries the risk that a licensee will use a work not included in the repertoire, provided that work is not set out in the 'excluded works' list.

CAG submits that Copyright Agency is in a particularly good position to secure a near universal repertoire for a voluntary educational licence. It has a very broad membership as a result of administering the current statutory licence. It would be a simple matter for Copyright Agency to contact

¹⁷² Daniel Gervais (ed.), *Collective Management of Copyright and Related Rights* (Kluwer Law International, 2nd ed, 2010), p292.

¹⁷³ Ibid.

¹⁷⁴ Ibid.

¹⁷⁵ Ibid, pp292-93.

¹⁷⁶ See supplementary submissions to the Issues Paper from Copyright Agency (submission 287) and Screenrights (submission 289).

¹⁷⁷ Copyright Agency Annual Business Licence, information available here:

<http://rightsportal.copyright.com.au/Pages/AboutAnnualBusinessLicenseHomePage.aspx>.

existing members asking if they wished to have their works included in a voluntary educational licence. Those members who declined would be added to the 'excluded' list.

The 'included works/use' model

Under this model, a collecting society offers a licence with respect to works included in its repertoire, with licensees able to check the repertoire before using a work. This is how UK and US collecting societies offer voluntary licences to schools. It is also how the existing voluntary licences between schools and the music collecting societies operate. Schools are very comfortable with the idea of checking whether the licence covers particular works.

CAG notes the additional examples of successful voluntary licensing arrangements in the Universities Australia supplementary submission to the ALRC's Issues Paper and endorses this submission.¹⁷⁸

For the reasons that we have outlined above, there would be no need to adopt any kind of statutory support or extension model to facilitate voluntary licensing for works currently covered by the Part VB statutory licence. It is clear that collecting societies can and do licence works on a voluntary basis, both here and internationally. There is, in other words, no 'identified problem' - as contemplated by the Government's Best Practice Regulation Handbook - that warrants regulatory intervention.¹⁷⁹

3.2.2 Collective voluntary licensing to replace Part VA

Screenrights has argued in its submissions to the ALRC that the Part VA statutory licence for broadcasts should not be repealed, on the basis that Screenrights would not have authority to grant voluntary collective licences on behalf of its members for use of their broadcasts by educational institutions.

Screenrights has argued that in the absence of a statutory licence, it would not be able to clear any underlying rights in images, music, video footage and other copyright materials contained within broadcasts. In theory, Screenrights would be required to contact the owners of each of these underlying works in order to obtain their permission to license those works as part of the licensed broadcasts. This would be impractical and in many cases impossible.

A simple solution to this issue would be to introduce a legislative provision expressly empowering Screenrights (or any other collecting society) to grant voluntary collective licences on behalf of its members, irrespective of any underlying rights. New Zealand and the UK are examples of jurisdictions where legislative support has been provided for this purpose, and voluntary collective licences have been operating effectively in those jurisdictions for many years.

In the Discussion Paper, the ALRC has implied its support for the introduction of a statutory mechanism to support voluntary collective licensing of broadcasts in Australia.

¹⁷⁹ See the Government's Best Practice Regulation Handbook, which requires law reform to deliver regulation that is effective in addressing an identified problem.

3.3 ALRC question 6-1

Question 6-1 asks whether, if the statutory licences are repealed, should the *Copyright Act* be amended to provide for certain free use exceptions for governments and educational licences that only operate where the use cannot be licensed, and if so, how?

CAG submits that the answer to this question is found in paragraph 6.97 of the discussion paper:

Like all other users of copyright material, educational institutions and governments should not need to pay for uses of copyright materials that would otherwise not infringe copyright because they are covered by an exception. If governments and educational institutions were required to pay for licences for these uses, then they would be paying for uses that others, including commercial enterprises, do not have to pay for.

As CAG has stated above, we believe that the ALRC's policy position expressed in paragraphs 6.100-6.101 of the discussion paper is appropriate: ie, that the availability of a licence is an important, but not determinative consideration in the application of a fair use exception, and that licences should be negotiated in the context of which uses are fair.

As such, while CAG would support the introduction of a statutory provision to ensure that Screenrights can licence all necessary underlying rights to offer a collective voluntary licence for uses of broadcast content that would not be covered by a fair use exception, CAG would reject any suggestion that the availability of a licence should operate to shut down the operation of the ALRC's proposed fair use exception.

3.4 Governance arrangements for voluntary licences

As discussed above, CAG strongly supports the ALRC's recommendations for the repeal of the Part VA and VB statutory licences. CAG has also consistently stated its view that the repeal of the statutory licences would not mean that Australian schools would expect all educational uses of copyright materials to be free. CAG expects that it will negotiate voluntary collective licences with collecting societies for the significant proportion of educational uses that would not be covered by the fair use provision.

This is acknowledged by the ALRC:

Educational institutions and governments are likely to continue to need to enter into collective licensing arrangements with collecting societies, even if the existing statutory licences are repealed. Direct licensing is unlikely to cover all the needs of educational institutions and governments, even if micro-licensing improves considerably and new business models emerge that offer broad, blanket licences.

CAG believes that significant benefits and efficiencies can be obtained for rights holders and licensees alike from the voluntary collective administration of rights. However as the ACCC has acknowledged in its submission to the Issues Paper for this enquiry, there is a trade-off between the efficiency benefits of lowered licensing transaction costs and the possible lessening of competition in the licensing of material arising from the collecting society's market power.

CAG acknowledges that the question of governance of collective licensing arrangements is outside the scope of the ALRC's terms of reference. In the context of considering the governance arrangements for voluntary licensing arrangements however, CAG submits it is important to acknowledge that intellectual property licensing is currently treated differently under competition laws than other economic transactions in Australia.

Section 51(3) of the *Competition and Consumer Act 2010* (CCA) provides an exception to some of the restrictive trade practices provisions of that Act in relation to intellectual property licensing. This means that collecting societies administering collective copyright licences receive 'special treatment' under Australian competition law. CAG does not believe that this special treatment is justified.

The Ergas Committee recommended the repeal of s.51(3) in 2000 on the basis that s.51(3) was:

- seriously flawed;
- unclear;
- over-broad; and
- did not provide an appropriate balance between the needs of the intellectual property system and the wider goals of competition policy.

A similar recommendation was recently made by the House of Representatives Standing Committee on Infrastructure and Communications in its July 2013 report, *At What Cost? IT Pricing and the Australia Tax*.¹⁸⁰ The Committee recommended the repeal of s.51(3) on the basis that it constrains the ACCC unjustifiably from investigating restrictive trade practices in relation to intellectual property rights.¹⁸¹

The ACCC has a long-standing position in favour of repealing s.51(3), explaining that this would simply prevent copyright owners from imposing conditions in relation to the licence or assignment of their IP rights for an anticompetitive purpose or where the provisions had an anticompetitive effect. All other uses would be unaffected. The ACCC has noted that:

¹⁸⁰ House of Representatives Standing Committee on Infrastructure and Communications, *At What Cost? IT Pricing and the Australia tax* (Canberra, July 2013).

¹⁸¹ House of Representatives Standing Committee on Infrastructure and Communications, *At What Cost? IT Pricing and the Australia tax* (Canberra, July 2013), Recommendation 8.

*The object of the CCA is to enhance the welfare of Australians through the promotion of competition and fair trading, and provision for consumer protection. While recognising the importance of granting and protecting exclusive intellectual property rights, the ACCC considers that the subsequent licensing or assignment of those intellectual property rights should be subject to the same treatment under the CCA as any other property rights.*¹⁸²

CAG agrees with this view, and supports the repeal of s.51(3). This would merely ensure that voluntary licensing arrangements for copyright licensing are assessed against the same general competition law framework that applies to other transactions across the Australian economy.

3.5 Implementing the VIP Treaty

CAG was pleased to see the recent conclusion of the Treaty to Facilitate Access to Published Works by Visually Impaired Persons and Persons with Print Disabilities (VIP Treaty). CAG takes the strong view that Australia could meet its obligations under the VIP Treaty without the Part VB statutory licence.

In light of the proposed repeal of the Part VB statutory licence, CAG has assessed whether Australia would be in a position to meet its obligations upon ratification of the VIP Treaty in the event that the print disability statutory licence in Division 3, Part VB of the Act was repealed.¹⁸³

What obligations arise under the VIP Treaty?

Upon ratification of the VIP Treaty, Australia would be obliged to ensure that its domestic law contained an exception or limitation permitting:

- ‘authorised entities’¹⁸⁴ to make and supply to ‘beneficiary persons’¹⁸⁵ copies of works in an ‘accessible format’;¹⁸⁶ and
- ‘beneficiary persons’ (or someone acting on their behalf) to make an ‘accessible format’ copy of a work for the personal use of the ‘beneficiary person.’

For the purposes of the VIP Treaty, the definition of ‘works’ is applicable to literary or artistic works.¹⁸⁷

¹⁸² Australian Competition and Consumer Commission, Submission 100, p. 1, cited in House of Representatives Standing Committee on Infrastructure and Communications, *At What Cost? IT Pricing and the Australia tax* (Canberra, July 2013) at 112.

¹⁸³ We note that Division 4 of Part VB applies to institutions assisting people with an intellectual disability. However, CAG would support any exception that is introduced for the assistance of people with print disabilities also including those with intellectual disabilities. This submission concentrates on the terms of the VIP Treaty.

¹⁸⁴ As defined in Article 2(c) of the VIP Treaty.

¹⁸⁵ As defined in Article 3 of the VIP Treaty.

¹⁸⁶ As defined in Article 2(b) of the VIP Treaty.

¹⁸⁷ Article 2(a) of the VIP Treaty.

How can the obligations arising under the VIP Treaty best be met?

In its current form, the print and disability statutory licence in Division 3, Part VB of the Act does not fully meet the obligations arising under the VIP Treaty. This is because:

- the VIP Treaty obligations extend to artistic works. The print and disability statutory licence applies only to literary and dramatic works; and
- the VIP Treaty requires that an exception or limitation be available to ‘beneficiary persons’ to make copies themselves. The print and disability licence applies only to institutions assisting persons with a print disability.

CAG has considered the pros and cons of each of the following options for meeting obligations that arise under the VIP Treaty:

- **Option one:** expand the print and disability statutory licence to include all obligations arising under the VIP Treaty
- **Option two:** include “facilitating access to published works for persons who are print disabled” as an illustrative use for the purposes of a fair use exception
- **Option three:** introduce a new stand-alone exception.

Option one - expand the statutory licence

CAG submits that the print and disability statutory licence would be unworkable as a means of extending an exception or limitation to individuals as opposed to institutions. It is in the nature of a statutory licence that it is administered by a declared collecting society, thus imposing a layer of administrative obligation (eg issuing a remuneration notice) that would be unreasonably burdensome, and completely unworkable, in the context of individuals.

In light of the fact that the VIP Treaty requires Australia to provide an exception or limitation that can be relied by *individuals* to copy into accessible formats for their own personal use, a statutory licence would only address part of Australia’s VIP Treaty obligation; ie the obligation to permit ‘authorised entities’ to make copies on behalf of ‘beneficiary persons.’

Option two - fair use

CAG submits that in the event that fair use is enacted, this exception may be an appropriate way of meeting the obligations under the VIP Treaty. We note that in *Authors Guild v HathiTrust*,¹⁸⁸ a US court recently found that copying entire works for the purpose of making them accessible to persons with a print disability, fell squarely within the US fair use exception. The court said:

¹⁸⁸ This case is currently on appeal to US Court of Appeals for the Second Circuit. The District Court decision is available here: http://www.tc.umn.edu/~nasims/HathivAG10_10_12.pdf.

The use of digital copies to facilitate access for print-disabled persons is ... transformative. Print-disabled individuals are not considered to be a significant market or potential market to publishers and authors. As a result, the provision of access for them was not the intended use of the original work (enjoyment and use by sighted persons) and this use is transformative. Even if it were not, making a copy of a copyrighted work for the convenience of a blind person is expressly identified by the House Committee Report as an example of a fair use, with no suggestion that anything more than a purpose to entertain or to inform need motivate the copying.

If fair use were to be relied on in order to meet VIP Treaty obligations, it may be desirable, for better certainty, to include ‘facilitating access to published works for persons who are print disabled’ as an illustrative use. While this language does not appear in the US fair use exception, it would in our view be appropriate to include language to this effect if fair use was intended to be relied on to meet VIP Treaty obligations. It may also be appropriate to include a legislative note to the effect that Parliament intended that fair use be relied on to meet obligations arising under the VIP Treaty. This would enable a court to have regard to the terms of the Treaty when determining what kinds of uses Parliament intended should fall within the scope of the exception.

Any concern on the part of rights holders that a fair use exception may interfere with the development of markets for the creation of works in accessible formats would, in our view, be met by the fact that a fair use exception would require a court to have regard to the fourth factor when determining whether a particular use was fair. If materials are commercially available in accessible formats it is less likely for them to be fair to be copied in their entirety.

Option three: stand-alone exception

While we do not subscribe to the view that fair use is inherently uncertain, we would not oppose a decision to enact a stand-alone exception to implement VIP Treaty obligations, provided that it was drafted in a sufficiently technologically neutral way.

Technological Protection Measures

Although it is not within the terms of reference of the ALRC’s Copyright in the Digital Economy review to consider the use and circumvention of technological protection measures (TPMs), CAG submits that any exception that is relied on to meet obligations under the VIP Treaty would, in an increasingly digital environment, be of limited practical use in the event that the Act was not amended to ensure that a person who was entitled to rely on the exception was also permitted to circumvent a TPM for the purposes of doing so.

PART 4. CONTRACTING OUT

CAG agrees with the ALRC that the benefits of its proposed fair use exception may be seriously compromised if copyright licensing agreements include terms that exclude fair uses.¹⁸⁹

Support for this notion has also been expressed in strong terms in other jurisdictions. For example, in its recent Consultation Paper on Copyright and Innovation, the Irish Copyright Review Committee stated that:

The rights provided to consumers or users by the exceptions to copyright could be very easily set at naught by means of terms and conditions in contracts between rights-holders and users. Hence, section 2(10) [Copyright and Related Rights Act 2000] very sensibly provides:

Where an act which would otherwise infringe any of the rights conferred by this Act is permitted under this Act it is irrelevant whether or not there exists any term or condition in an agreement which purports to prohibit or restrict that act.

There was a great deal of support in the submissions for a provision of this sort, and there was no argument against it. However, whilst sensible, in our view, section 2(10) does not go far enough, in that it does not make clear exactly what the effect of the section is upon the impugned term or condition. For example, other consumer protection provisions make it clear that impugned terms “shall not be binding on the consumer”, or even shall be “void”, and a similar clarity would be beneficial in this context.

As a consequence, section 2(10) could be strengthened to provide that a term of contract which purports to prohibit the exercise of a copyright exception provided by the Act should be void, perhaps as follows:

Where an act which would otherwise infringe any of the rights conferred by this Act is permitted under this Act, it is irrelevant whether or not there exists any term or condition in an agreement which purports to prohibit or restrict that act shall be void.¹⁹⁰

CAG strongly endorses the notion that permitting parties to contract out of fairness-based exceptions would render those exceptions meaningless.

CAG has many concerns, however, regarding the ALRC’s proposal to establish what would appear to be a ‘hierarchy’ of exceptions and uses, particularly one that treats education as a ‘non-core’ use that would not warrant express protection from contractual override.

We discuss these concerns in detail below, but they fall into three broad categories:

¹⁸⁹ ALRC Copyright and the Digital Economy Discussion Paper (DP 79) at paragraph [17.118].

¹⁹⁰ The Copyright Review Committee Consultation Paper on Copyright and Innovation, pp85-86, available here: http://www.djei.ie/science/ipr/crc_consultation_paper.pdf.

- Firstly, as a matter of public policy, treating education as a ‘non-core’ use would be at odds with the universal acknowledgement of the role of the education sector in advancing the public interest. It would also be at odds with the many statements throughout the Discussion Paper that education is one of the clearest examples of a strong public interest in limiting copyright protection. CAG also considers that any attempt to divorce the public interest in education from the public interest in libraries, and in research and study, is highly artificial.
- Secondly, the proposed ‘hierarchy of uses’ model would inevitably give rise to interpretive difficulties that would have the potential to create great legal uncertainty.
- Thirdly, the proposed model may cause practical problems that would undermine the flexibility and balancing of interests that the ALRC has sought to achieve through its proposed reform of exceptions.

4.1 Public policy concerns

4.1.1 Education is universally acknowledged as a core public interest

The ALRC proposes to distinguish between individual illustrative purposes as ‘core’ and (by implication) ‘non-core’ uses for the purposes of Proposal 17-1 on the basis of “*the extent to which exceptions are clearly for defined public purposes.*”¹⁹¹ CAG submits that there is no better example of a clearly defined public purpose than education.

Treating education as a ‘non-core’ use would be at odds with the universal acknowledgement of the significant role of education in advancing the public interest.

The Terms of Reference for the Copyright and the Digital Economy Review expressly acknowledge the importance of education as a public interest. They include a direction that the ALRC should have regard to “*the general interest of Australians to access, use and interact with content in the advancement of education, research and culture.*” Education is universally acknowledged as being a core public interest that must be taken into account when determining appropriate limitations and exceptions to copyright. For example, the preamble to the World Intellectual Property Organization Copyright Treaty 1996 recognises “*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.*”¹⁹²

Education is universally acknowledged as being a core public interest. This must be taken into account when determining appropriate limitations and exceptions to copyright.

¹⁹¹ ALRC Copyright and the Digital Economy Discussion Paper (DP 79) at paragraph [17.115].

¹⁹² Preamble to the World Intellectual Property Organization Copyright Treaty 1996.

As the ALRC itself notes, “education has been called ‘one of the clearest examples of a strong public interest in limiting copyright protection.’”¹⁹³ The ALRC also notes that “the use of copyright material for teaching, when fair, has long been recognised as a legitimate type of exception in international law.” For example Article 10(2) of the Berne Convention provides that:

*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.*¹⁹⁴

The ALRC refers to the US fair use exception - which twice refers explicitly to education - as an example of the way in which education has been recognised, internationally, as a use that may be ‘fair’.¹⁹⁵ And, of course, the significant role played by education is reflected in the ALRC’s proposal to include education as an ‘illustrative’ fair use purpose.

The UK Government has recently released proposed copyright exceptions for technical review. In relation to the proposed new exception for the purposes of teaching, the following protection has been proposed:

*To the extent that the term of a contract purports to restrict or prevent the doing of any act which would otherwise be permitted by this section, that term is unenforceable.*¹⁹⁶

CAG notes that while the Canadian *Copyright Act* does not *expressly* prevent contractual override of exceptions, the Canadian Copyright Board recently ruled that fair dealing copying by Canadian schools is ‘non-compensable,’ despite the fact that Access Copyright purported to grant Canadian schools a licence covering this copying.¹⁹⁷

Against this background, CAG was most surprised to see education being relegated to a ‘non-core’ use in the ALRC’s discussion of copyright and contract.

Similar concerns apply to the ALRC’s proposed treatment of non-consumptive uses as being a ‘non-core’ illustrative purpose in a review of copyright law and the digital environment, given the critical importance of these uses to the technical operation of the internet, digital learning methods and common consumer uses – as well to the overall health of Australia’s digital economy.

¹⁹³ ALRC Copyright and the Digital Economy Discussion Paper (DP 79) at paragraph [13.6].

¹⁹⁴ Ibid, 13.8.

¹⁹⁵ Ibid, 13.14.

¹⁹⁶ IPO Technical review of draft legislation on copyright exceptions – Information available on the IPO’s website here: <http://www.ipso.gov.uk/types/hargreaves/hargreaves-copyright/hargreaves-copyright-techreview.htm>; and specifically here: <http://www.ipso.gov.uk/techreview-data-analysis.pdf>.

¹⁹⁷ Canadian Copyright Board ruling available here: [Ruling of Canadian Copyright Board September 19 2012.](#)

4.1.2 Artificially separating the public interest - education, libraries, research & study

CAG submits that it is artificial to distinguish the public interest in education from the public interests in:

- libraries and archives; and
- research and study.

Libraries (like schools) exist to preserve knowledge, and to facilitate research, study and education. See, for example, this statement on the *Role of the School Library* published by the Western Australian Department of Education:

*The school library is fundamental to the mission and **teaching and learning goals of the school.** Providing a wide range of facilities and services it **facilitates the work of the classroom teacher** and ensures each student has equitable access to resources, irrespective of home opportunities or constraints. ...Research demonstrates that well-resourced, properly staffed school libraries have a positive impact on student achievement....*

School library programs and services seek to:

- *Create and develop motivating, flexible physical and digital learning spaces.*
- *Run independent learning programs, which integrate information resources and technologies, to equip students with the skills necessary to succeed in a constantly changing technological, social and economic environment.*
- ***Collaborate with classroom teachers** to plan, implement and evaluate inquiry-based programs that will ensure students acquire skills to collect, critically analyse and organise information, problem-solve and communicate their findings.*
- *Provide and promote quality fiction to develop and sustain in students the habit and enjoyment of reading for pleasure and to enrich students' intellectual, aesthetic, cultural and emotional growth.*
- *Cater for differences in learning and teaching styles through the provision of, and equality of access to, a wide range of curriculum resources – fiction and non-fiction, digital, print, audio and video.*
- ***Provide teachers with access to relevant curriculum information** and professional development materials within and outside the school; and opportunities to **cooperatively plan implement and evaluate learning programs.***¹⁹⁸

The role of the school library brings to light a real practical issue in relation to the proposed hierarchy of 'core' and 'non-core' uses of copyright materials. Under the current proposal, would use of material by a school library be protected from contractual override, but use by a teacher in the same school not

¹⁹⁸ This information is published on Western Australia's Department of Education School Library Support website, and can be found here: <http://det.wa.edu.au/curriculum/support/schoollibrarysupport/detcms/navigation/supporting-learning/role-of-library-and-staff/?oid=Category-id-11911810#toc1>. Emphasis added.

have that same protection? This practical issue becomes even more complex in the case where in some regional locations, particularly in Western Australia, the school library can often fulfill community library functions.

The public interest in libraries and in research & study cannot be divorced from the public interest in education.

In reality, the public interest in libraries, and in research and study, cannot be divorced from the public interest in education. The ALRC acknowledges this fact when it says that the proposal to retain the library and archive exceptions (in amended form) is “*justified in the interests of cultural policy and the wider public interest in education and research.*”¹⁹⁹

The ALRC also suggests that the exceptions for libraries and archives ought to be protected from contractual override because the real beneficiaries of those exceptions are the third party users of the libraries and archives, who would not be parties to any licensing arrangements that may purport to override the exceptions.²⁰⁰

The case is no different in relation to schools. **Students** are the ultimate beneficiaries of education-based exceptions, and are not party to licensing arrangements made on their behalf. If the ALRC considers that users of libraries ought to be protected from contracts over which they have no control, CAG submits that the same standard should be applied to school students who are in precisely the same position.

4.1.3 Problematic policy outcome

CAG submits that the proposed hierarchy of ‘core’ and ‘non-core’ fair uses would have the problematic and presumably unintended effect of granting commercial entities greater rights and access to content than the education sector.

Specifically, the fair dealing purposes of reporting the news, criticism and review, and parody and satire, have been identified by the ALRC as ‘core’ public interests that should be protected from contractual override. CAG agrees that the preservation of these uses is important, and commends their protection from override. However, CAG submits that it is an inappropriate policy outcome for the rights of the commercial entities that primarily benefit from these exceptions (such as major news corporations, TV broadcasters and commercial publishers) to be preferred over the rights of schools, in circumstances where both sets of interests have been recognised as meeting essential public needs by their inclusion in the list of illustrative purposes for the proposed fair use exception.

It is difficult to ascertain any justifiable policy basis on which the right of a media corporation to use content to report the news should be protected from contractual override, but the right of a school to

¹⁹⁹ ALRC Copyright and the Digital Economy Discussion Paper (DP 79) at paragraph [11.3].

²⁰⁰ Ibid, [17.116].

use content to educate its students should not, in circumstances where both activities have been recognised as being fair to the interests of copyright owners. This is yet another example of the unfairness of differentiating between uses that have equally been acknowledged as fair.

4.2 Legal uncertainty

The ALRC has sought comment on whether its proposed approach to contractual override may have unintended effects. As we discuss below, CAG is concerned that the model proposed by the ALRC would create a great deal of legal uncertainty and lead to unintended consequences. This is contrary to one of the ALRC's stated motivations in proposing a fair use exception: mitigating statutory interpretation problems.²⁰¹

4.2.1 Statutory interpretation

The ALRC acknowledges that the question of whether a contract that purports to exclude or limit the operation of copyright exceptions is unsettled.²⁰² This uncertainty is due in part to the existence of s.47H of the Act, which contains an express provision against contracting in relation to computer programs.

In its review of Copyright and Contract, the CLRC gave detailed consideration to the rules relating to statutory interpretation in seeking to determine whether the existence of s. 47H can be taken to mean that Parliament intended that other exceptions could be overridden by contract.²⁰³ The CLRC ultimately concluded that "*the effect of s.47H on agreements which exclude or modify exceptions is ultimately unclear.*"²⁰⁴ It is significant, however, that this view was reached partly on the basis that the extrinsic materials were silent as to whether Parliament had turned its mind to the potential effect of s. 47H on other exceptions in the Act.

The discussion paper is silent on whether the exceptions for computer software in Part III Division 4A of the *Copyright Act* (including s.47H) would be repealed as part of the ALRC's proposed reforms. CAG is concerned that were Parliament to enact further express provisions in relation to only some specified fair use illustrative purposes being protected from contractual override, combined with the retention of s.47H, rights holders could be expected to argue that the ALRC's approach gives rise to a stronger presumption that the legal maxim *expressio unius exclusio alterius* (ie, an express reference to one matter indicates that other matters are excluded) should be applied to discern the legislative intent.

The ALRC says that in proposing limitations applicable to only some exceptions, it is "*not indicating that contractual terms excluding other exceptions should necessarily be enforceable.*" The ALRC has suggested that explanatory materials should record that Parliament does **not** intend the existence of an

²⁰¹ Ibid, [4.170].

²⁰² Ibid, [17.26].

²⁰³ Ibid.

²⁰⁴ Copyright Law Review Committee, Copyright and Contract, 2002, at paragraph [5.118].

express provision against contracting out of these exceptions to imply that exceptions elsewhere in the *Copyright Act* can necessarily be overridden by contract.²⁰⁵ Notwithstanding this, CAG is concerned that at best, the ALRC's proposed model would add to the uncertainty regarding the status of copyright exceptions, and at worst, may lead to an outcome that the ALRC appears not to intend: ie a court reaching a view that Parliament must have intended that contractual terms excluding other exceptions and uses were automatically enforceable. In this regard we refer the ALRC to a paper on statutory interpretation by the Hon James Spigelman AC QC, in which his Honour identifies a recent trend in the High Court towards a more literal approach to statutory interpretation.²⁰⁶

4.2.2 Interpretative difficulties - distinguishing 'educational' uses from 'research and study'

Throughout the discussion paper, the ALRC refers to education **and** research as closely interrelated public interests. For example:

*The fairness factors are intended to provide a framework within which a number of competing interests can be balanced. In respect of data and text mining, these can include but are not limited to....whether the use is to facilitate **education and research**...*²⁰⁷

*The ALRC also proposes that certain exceptions relating to the core functions of libraries and archives—preservation copying and document supply—be retained in an amended form. The ALRC considers that retaining some specific exceptions for these purposes is justified in the interest of cultural policy and the wider public interest in **education and research**.*²⁰⁸

*The debate in relation to document supply is, in many ways, one about what ought to be a legitimate role of libraries in a digital environment. In the ALRC's view, the emergence of markets providing licensed on demand access to journal articles and copyright works should not, of itself, override the wider public interest in **research and education**.*²⁰⁹

*The ALRC recognises that, in many cases, libraries are the only means by which people may be able to access certain types of copyright material and libraries should be able to continue their role in promoting **research, education and study**.*²¹⁰

The ALRC proposes that the Copyright Act be amended to provide that remedies for infringement be limited where an orphan work has been used and a 'reasonably

²⁰⁵ ALRC Copyright and the Digital Economy Discussion Paper (DP 79) at paragraph [17.121].

²⁰⁶ The Intolerable Wrestle: Development in Statutory Interpretation, Address by the Honourable JJ Spigelman AC, Keynote Address to the Australian Conference of Planning and Environment Courts and Tribunal, available here: [http://www.lawlink.nsw.gov.au/lawlink/Supreme_Court/ll_sc.nsf/vwFiles/spigelman010910.pdf/\\$file/spigelman010910.pdf](http://www.lawlink.nsw.gov.au/lawlink/Supreme_Court/ll_sc.nsf/vwFiles/spigelman010910.pdf/$file/spigelman010910.pdf).

²⁰⁷ ALRC Copyright and the Digital Economy Discussion Paper (DP 79) at paragraph [8.79]. Emphasis added.

²⁰⁸ Ibid, [11.3]. Emphasis added.

²⁰⁹ Ibid, [11.121]. Emphasis added.

²¹⁰ Ibid, [11.123]. Emphasis added.

*diligent search' has been conducted and the rights holder has not been found. The ALRC considers that this approach will promote the use of orphan works to further education, research and access to cultural heritage, without taking away all the rights of rights holders to their works.*²¹¹

What this appears to acknowledge is that the concepts of education and research are inextricably linked. Given this, it would be difficult (if not impossible) for a user - or a court – to determine meaningfully in any case whether a use applied to education, or to research or study, for the purpose of determining whether the use was protected from contractual override. Rights holders seeking to enforce contracts that purport to override exceptions may be empowered to argue that each of the uses described above apply to use of works 'for education' and are thus not expressly protected from contractual override. While this does not appear to be what the ALRC intends, CAG is concerned that it would be a likely outcome of the model proposed.

4.2.3 Interpretive difficulties in the fairness analysis

The creation of a hierarchy of 'core' and 'non-core' public interest uses of copyright material is likely to have much further reaching consequences that appear to be intended. Although the hierarchy is only proposed to apply to the contracting out issue, it may well become a factor in determining whether or not a use is even properly regarded as being 'fair'.

The ALRC intends that its proposed fair use factors are merely illustrative, that they do not create a presumption of fairness, and that no fairness factor should be more presumptively fair than another.²¹² CAG is concerned however that the ALRC's approach to contractual override may in fact negate this intention in practice. For example, if the purpose of reporting the news is 'core', and the purpose of education is 'non-core', will this mean that reporting the news is more likely to be regarded as a fair use within the proposed fairness exception? Will a library use *prima facie* be fairer than a school use? If so, the implications of branding some vital public interest uses as 'non-core' are even more damaging and far-reaching implications than is immediately apparent. If not, how would the ALRC propose to prevent its proposed hierarchy of uses from being employed in other areas of law and policy?

The same interpretive difficulties will arise in relation to determining the relevance of a licence to the fairness analysis. Since contracting out would be prohibited in relation to criticism or review, but left open in relation to education, would this mean that the availability of a licence in respect of the work to be critiqued would be less relevant than the availability of a licence in respect of the work to be used for teaching purposes? Again, it is difficult to identify any justifiable reason why this may be the case, and yet this kind of 'interpretative spill-over' seems highly likely on the ALRC's proposed model.

CAG has stated above that it does not believe that fair use is inherently uncertain. However CAG submits that the interpretive difficulties created by the ALRC's proposed approach to the issue of

²¹¹ Ibid, [12.62]. Emphasis added.

²¹² See Ibid, [4.157 – 4.161].

contractual override have the potential to create an unacceptable level of practical difficulty and uncertainty to fair use assessments.

4.3 Undermining the flexibility & balancing of interests the ALRC is seeking to achieve

The ALRC says that *“the introduction of a broad, flexible exception for fair use into Australian law should allow flexible and fair mediation between the interests of owners and users in the digital environment.”*²¹³ CAG supports this policy position. In that sense, a fair use exception would be completely in line with the preamble to the WIPO Copyright Treaty, which recognises *“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.”*

A fair use exception would be completely in line with the WIPO Copyright Treaty.

As we discuss below however, the ALRC’s proposed model for determining when fair use is expressly protected from contractual override has the potential to undermine the flexibility and balancing of interests that the ALRC has sought to achieve.

4.3.1 Rights holders, not Parliament, would determine the copyright balance

Central to the fair use regime outlined in the Discussion Paper is the idea that copyright exceptions play an important role in balancing the interests of owners and users. This is reflected in the ALRC’s comments on educational and government copying:

*If fair use is enacted, then licences should be negotiated in the context of which uses are fair. If the parties agree, or a court determines, that a particular use is fair, then educational institutions and governments should not be required to buy a licence for that particular use.*²¹⁴

*Like all other users of copyright material, educational institutions and governments should not need to pay for uses of copyright material that would otherwise not infringe copyright because they are covered by an exception.*²¹⁵

As noted above, CAG strongly agrees with the ALRC that the proposed fair use exception may be seriously compromised if copyright licensing agreements include terms that exclude fair uses.²¹⁶ The ALRC expressly rejected a fair use regime that would enable rights holders to avoid fair use merely by offering to license uses. It said:

²¹³ Ibid, [4.101].

²¹⁴ Ibid, [6.101].

²¹⁵ Ibid, [6.97].

²¹⁶ Ibid, [17.118].

*This argument appears to be inconsistent with the purpose of Australian copyright law. International copyright agreements also do not mandate such a principle. The three-step test provides that free use exceptions should not ‘unreasonably prejudice the legitimate interests of the author’. It does not say an exception must never prejudice any interest of an author.*²¹⁷

*In the ALRC’s view, the Copyright Act should not provide that free-use exceptions do not apply to copyright material that can be licensed. Instead, the availability of a licence should be an important consideration in determining whether a particular use is fair.*²¹⁸

CAG is concerned that the ALRC’s proposed model for contractual override has the potential to undermine these policy objectives – enabling rights holders, not Parliament, to set the scope of fair use for those uses covered by the ‘non-core’ illustrative purposes.

Parliament, not rights holders, should set the scope of fair use.

4.3.2 Third party uses

A central policy question for copyright in education is whether a school should be free to copy material for its students when the students would have been permitted to copy themselves for research or study. The ALRC suggests that this question should be determined not by asking ‘who made the copy?’ (as would currently be the case), but rather by asking ‘was the copying fair’ in light of the intended use, regardless of who made the copy.²¹⁹ This would bring Australia in line with the US, Canada and other fair use jurisdictions.

CAG is concerned that the proposed model for contractual override has the potential to undermine this intended objective. Where the ‘primary user’ and a third party facilitating that use could be considered to have different purposes, CAG submits that a model that categorises uses as being either ‘core’ or ‘non-core’ will inevitably result in a court asking ‘who made the copy?’ when seeking to characterise the use for the purpose of determining whether a contractual provision purporting to restrict the use has effect.

This would continue the approach adopted by the Full Federal Court in the Optus TV Now case,²²⁰ which focused on the question of ‘who made the copy,’ in relation to which the ALRC states in the Discussion Paper:

²¹⁷ Ibid, [13.56].

²¹⁸ Ibid, [13.57].

²¹⁹ See generally, Ibid, Chapter 5.

²²⁰ *National Rugby League Investments Pty Ltd v Singtel Optus* (2012) 201 FCR 147.

*The ALRC is wary of attempts, using new technologies, to avoid the question of whether the rights were exploited at all. In such cases, as a matter of policy, it may be preferable to give a generous interpretation to the scope of the rights, and then to consider the important question of whether the exploitation of the rights was fair.*²²¹

CAG submits that the approach to contractual override proposed by the ALRC may inadvertently make it difficult in practice to avoid questions about ‘who made the copy,’ and to focus instead on questions of fairness. This is because the proposed model requires artificial distinctions about which illustrative purpose was involved in a particular circumstance, and potentially distinctions between who copied the content in question.

4.3.3 Disincentive to enter into voluntary licences

CAG is concerned that the ALRC’s proposed model for contractual override would create a disincentive for schools to enter into voluntary licences. As the ALRC has acknowledged, one of the strongest arguments in favor of repeal of the educational statutory licences is that voluntary licensing would be more efficient and better suited to a digital environment.²²² Another argument in favour of repeal of the statutory licences is that they have resulted in schools paying for uses that would otherwise not infringe copyright because they would be covered by an exception.²²³

Contractual override would create a disincentive for schools to enter into voluntary licences.

The ALRC says that “*licences should be negotiated in the context of which uses are fair,*” in the sense that “*if the parties agree, or the courts determine, that a particular use is fair, then educational institutions and governments should not be required to buy a licence for that particular use.*”²²⁴ CAG supports this approach, and confirms the ALRC’s suggestion that licences negotiated in the context of which uses are fair are more likely to be attractive to educational licensees. However, CAG is concerned that rights holders will be unlikely to negotiate licences in the context of what is fair if it is open to them to override fair use by contractual means. There would be no incentive to take into account what is fair, if what is fair can be made irrelevant by contractual agreement. This is likely to operate as a real disincentive to the development of efficient and innovative licensing solutions for educational copying.

4.4 A proposed solution

CAG has advocated in many contexts for the need for a provision in Australia’s *Copyright Act* to prevent public interest exceptions from being capable of contractual override. As such, CAG strongly supports the ALRC’s overall policy goal of ensuring that contracts should not be able to be used to exclude the operation of public interest to exceptions.

²²¹ ALRC Copyright and the Digital Economy Discussion Paper (DP 79) at paragraph [5.35].

²²² Ibid, [6.38].

²²³ Ibid, [6.97].

²²⁴ Ibid, [6.101].

The importance of ensuring that contractual mechanisms cannot be used to exclude the effect of provisions enacted in the public interest was recently recognised by the House of Representatives Standing Committee on Infrastructure and Communications in its *At What Cost? IT Pricing and the Australia Tax* report. The Committee recommended that the

Government “investigate the feasibility of amending the Competition and Consumer Act so that contracts or terms of service which seek to enforce geoblocking are considered void.”²²⁵ The Committee quoted the ACCC, which stated that:

CAG strongly supports the policy goal of ensuring contracts should not be able to be used to exclude the operation of public interest to exceptions.

*From our point of view, if the supplier is engaging in business in Australia, supplying services to Australians, and it is doing things to stop people from getting access to lower priced goods and it is doing it for an anticompetitive purpose, then action can be taken against them.*²²⁶

CAG’s concerns set out in this submission are not in relation to the ALRC’s policy goal itself – but in relation to the proposed practical implementation of this policy goal via the creation of a hierarchy of illustrative purposes within the proposed fair use exception.

Having given detailed consideration to the question of how best to address the problem of contractual override, CAG has reached the view that the only workable model is one that would apply to fair use generally (as well as to the library and archive exceptions).

CAG submits that the simplest way to address the concerns identified in this submission would be to eliminate the division between ‘core’ and ‘non-core’ illustrative purposes in the ALRC’s proposed approach. For example, the ALRC could amend its Proposal 17-1 to remove the reference to specific illustrative purposes (and the proposed library and archive exceptions) to read as follows:

Proposal 17-1 The Copyright Act should provide that an agreement, or a provision of an agreement, that excludes or limits, or has the effect of excluding or limiting, the operation of a copyright exception has no effect.

CAG considers that the model recently proposed in the UK would be an appropriate model for consideration in Australia. CAG submits that this proposal strikes an appropriate balance between ensuring that copyright licences are relevant to an assessment of whether a particular use should be considered to be fair, while still preserving legitimate fair uses from contractual override.

²²⁵ House of Representatives Standing Committee on Infrastructure and Communications, *At What Cost? IT Pricing and the Australia tax* (Canberra, July 2013) at xiii.

²²⁶ *Committee Hansard*, Canberra, 31 October 2012, p. 4, cited in House of Representatives Standing Committee on Infrastructure and Communications, *At What Cost? IT Pricing and the Australia tax* (Canberra, July 2013) at 114.

The UK Government has released draft legislation for a range of new and amended exceptions. Some of these exceptions are absolute or ‘per se’ exceptions that are not subject to a fairness test (for example, the proposed new exception for non-commercial data mining and text mining).²²⁷ Other proposed exceptions would only apply if the use is fair (for example, the proposed new fair dealing for the purpose of instruction exception and the proposed quotation exception).²²⁸

In each case, however, the following provision is proposed to prevent rights holders from relying on contracts to override the exception:

To the extent that the term of a contract purports to restrict or prevent the doing of any act which would otherwise be permitted by this section, that term is unenforceable.

The effect of such a provision in the context of a fair dealing exception is to ensure that contracts cannot be used to *automatically* rule out reliance on fair dealing. That is **not** to say that contractual terms that purport to restrict or prevent certain uses would be of no relevance to a fairness analysis. As CAG understands the effect of the UK proposals, a contractual term that purports to restrict or exclude an exception would be **relevant to, but not determinative of**, an assessment of whether a particular use is fair. It may be that these types of terms and conditions in a contract would be an indication that a particular use should not be considered to be fair. Then again, they may not. As part of an overall fairness assessment, it may be considered that the particular use in question is fair in the circumstances. In this case, the relevant contractual term would not be enforceable as a matter of contract law by virtue of the ‘no contractual override’ provision in the UK copyright law.

Prescriptive limits on contracting out may unreasonably interfere with future developments in emerging markets & technologies.

CAG considers that this feature of the proposed UK model might also be suitable for adoption in Australia. It would address the concern outlined at paragraph 17.119 of the Discussion Paper: ie, that prescriptive limits on contracting out may unreasonably interfere with future developments in emerging markets and technologies. However it would avoid the problems identified above in relation to attempts to create distinctions between illustrative fair use purposes

for the purpose of guarding against contractual override.

CAG submits that the framework set out above is entirely consistent with the model of fair use outlined by the ALRC in the Discussion Paper. It would ensure that the benefits of fair use could not be automatically overridden by licensing arrangements that purported to restrict or exclude fair uses.

²²⁷ See the IPO’s website with information covering the Technical review of draft legislation on copyright exceptions, available here: <http://www.ipso.gov.uk/types/hargreaves/hargreaves-copyright/hargreaves-copyright-techreview.htm>.

²²⁸ Ibid.

Importantly, however, it would do so in a way that avoids the interpretive difficulties and likely unintended consequences that we have outlined above.

If the ALRC believes that it is essential to maintain a hierarchy of 'core' and 'non-core' permitted purposes, CAG submits that there are sound policy grounds for including education as one of the core permitted purposes. However, despite CAG's strong views about the need to protect copyright exceptions from being overridden by contracts, CAG believes that the potential problems caused by the ALRC's proposed hierarchy approach would be so serious that it may be preferable that the legislation did not make any reference at all to the issue of contractual override.

PART 5. BROADCASTING

As discussed above, CAG strongly supports the ALRC's proposal 6-1 that the statutory licences in Parts VA and VB of the *Copyright Act* should be repealed. However, the Discussion Paper also presents an alternative proposal (16-1) that if Part VA is retained, it should be extended to apply to the transmission of television or radio programs using the internet. CAG is strongly opposed to this alternative proposal in the event that the ALRC's primary recommendation is not implemented.

CAG has three major concerns with any proposed expansion of Part VA:

- The practical effect of this proposal would be to remove some uses of internet audio-visual materials from their current (free) coverage under s.200AB and move them to (remunerated) coverage under Part VA, without any clear policy justification for doing so.
- The Convergence Review highlighted the significant practical difficulties of attempting to provide a regulatory definition of 'the transmission of television or radio programs using the internet'. Even if an expanded Part VA could somehow be confined to 'the online equivalent of television or radio programs,' it would potentially apply to a much broader range of content than the ALRC appears to anticipate, as the line between 'TV like' and 'other' kinds of video content continues to blur.
- This recommendation would extend to the Part VA licence the problems already experienced in relation to internet materials under the Part VB licence. For example, this proposal has the very real potential to result in Australian schools becoming the only users in the world required to pay to use freely available internet video content.

5.1 The proposal captures uses currently covered under s.200AB.

Currently, schools rely on the flexible exception in s.200AB to copy and communicate freely available internet video content for the purpose of educational instruction. Schools take great care to ensure that they comply with the requirements of s.200AB when they do so.

The proposal to expand Part VA to apply to this kind of content would potentially result in Australian schools being required to pay millions of dollars to use content that they are currently permitted to use under s.200AB, as this has been assessed as a use that would be permitted by s.200AB.

Requiring Australian schools to pay to use this freely available internet video content would create a very real disincentive for Australian schools to make full use of digital technology and high-speed broadband in the classroom at the very time that we are witnessing an explosion of freely available, innovative content created with the intention that it be used by teachers and students throughout the world without payment. CAG submits that there is simply no policy justification to support any

expansion of Part VA, and that doing so would be clearly contrary to the objectives and framing principles of the ALRC's inquiry.

5.2 No easy way to distinguish between 'TV-like' content and other kinds of video content

CAG's other concern with the proposed expansion of Part VA is of a more technical nature. We note that the proposed expansion of Part VA set out in Proposal 16-1 refers only to "*the transmission of television or radio programing using the internet.*" The intention appears to be to expand Part VA to "*the online equivalent of television or radio programs.*"²²⁹

Our concern with this is that the concepts of 'television program' and 'radio program' appear intended to apply to content that has traditionally been consumed offline. However, as more made-for-internet content is created, these concepts are likely to become contested, and may be found to include a much broader range of content than was intended. The difficulties in making these distinctions were well canvassed in the Convergence Review.

5.3 Australian schools would be required to pay to use freely available internet content

As set out in our response to the Issues Paper, CAG is very strongly of the view that statutory licences are not suited to a digital environment, and that voluntary licensing would be more efficient and better suited to a digital age. Part of our reason for reaching this view is that the statutory licences have resulted in Australian schools paying for uses that are not paid for by schools (or other users) anywhere else in the world. As explained in CAG's submission to the Issues Paper, in the context of the Part VB licence, this has included paying to use freely available internet content that is placed online with no expectation of remuneration.

With the proposed expansion of Part VA, Australian Schools would be the only schools in the world paying to watch YouTube or Vimeo.

CAG is most concerned that any expansion of Part VA to content transmitted over the internet would have the potential to give rise to the same anomaly that has arisen with respect to Part VB, resulting in Australian schools paying many millions of dollars to use freely available internet content uploaded onto websites, and video sharing platforms, with no expectation of payment. This content would be likely to include an incredibly diverse array of cultural, entertainment, news, educational and general informational content.

²²⁹ ALRC Copyright and the Digital Economy Discussion Paper (DP 79) at paragraph [16.97].

PART 6. NON-CONSUMPTIVE USES

CAG is strongly supportive of the ALRC's proposal to include 'non-consumptive uses' as an illustrative purpose in the proposed fair use exception. CAG currently relies on s.200AAA for caching conducted in Australian schools, and supports a more flexible approach that may enable additional 'temporary copies' (such as those generated in using learning management systems and cloud technologies) to be considered to be fair, when assessed against the fairness factors.

Digital teaching and learning methods are likely to generate additional 'non-consumptive' uses of copyright materials. For example, modern plagiarism detection software relies on copying akin to that done by a search engine in cross checking content for plagiarism. These types of non-consumptive uses do not ordinarily harm the market for copyright works, but enable new and beneficial uses of copyright materials via the use of digital technologies. CAG believes that it is appropriate that these types of uses be considered to be an illustrative purpose, subject always to an assessment of whether the use is in fact fair.

Schools should not be legally required to pay licence fees for incidental copying.

In addition, as outlined in our submission in response to the Issues Paper, under the current educational copying regime, almost all copies and communications no matter how incidental to consumption or necessary to the use of technology, are treated as remunerable.²³⁰ Teachers are required to record these incidental copies and communications when Copyright

Agency or Screenrights is surveying their school. While it is likely that an exception permitting fair dealing for the purpose of education would cover many non-consumptive uses by schools, there is a strong public interest in favour of a general exception for non-consumptive uses of works by any user, subject only to a fairness test. CAG also submits that, if the Government does not enact fair use, the adoption of a non-consumptive use fair dealing exception would provide better certainty for schools that copyright would not continue to operate as a roadblock to schools adopting the most efficient technologies, whether for teaching or other purposes.

Due to the importance of non-consumptive uses to not only education, but to the operation of the internet and the digital economy in general, CAG also supports the ALRC's recommendation that if a fair use exception is not introduced, a new fair dealing provision should be created for non-consumptive uses. Again, CAG submits that it would be desirable and appropriate for it to be made abundantly clear that the mere existence of a licence purporting to permit a non-consumptive use is relevant, but not determinative, of whether or not such use is nevertheless fair.

²³⁰ CAG submission in response to the ALRC's Copyright and the Digital Economy Issues paper (IP 42) at p145.

PART 7. ORPHAN WORKS AND MASS DIGITISATION

CAG endorses the ALRC's approach to orphan works. In particular, this would solve the current problem in schools of use of orphan works being remunerated under a statutory licence in circumstances where the copyright owner is unidentifiable, which results in the distribution of royalties to members of the collecting society who have no relationship at all with the orphan work. CAG also supports the suggested approach of dealing with orphan works under an exception or limitation of remedies. This is a more efficient and effective way of dealing with works where the copyright owner is unreasonably difficult or impossible to identify, while still protecting the rights of owners who are subsequently identified to receive fair remuneration for uses of their works.

Orphan works payments make no sense if there is no parent to pay.

In response to Question 11-1, CAG can see the merits of creating a voluntary licence to deal with mass digitisation projects. CAG queries however, the policy justification for limiting access to any licence to libraries, museums and archives. There does not seem to be any clear rationale for excluding any other body (whether educational, government or commercial) from obtaining a licence to undertake a mass digitisation project on payment of appropriate remuneration to copyright owners under a licence. It would seem consistent with the ALRC's terms of reference to enable new digital uses to occur as widely as possible, as long as the rights of copyright owners are respected.

For more information, please contact:

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ATTACHMENT A

Examples of copyright guidance given to Australian schools from the Smartcopying website

CAG, through the NCU and the [Smartcopying website](http://www.smartcopying.edu.au), provide guidance to schools and TAFEs on copyright issues on a daily basis. Since 2007 the Smartcopying website has been available as the official guide to copyright issues for Australian Schools and TAFE and sees on average 5,500 visits per month.

Listed below are some examples of guidance on the website:

- Content Management Systems: <http://www.smartcopying.edu.au/scw/go/pid/547>
- Copyright Amendment Act 2006: <http://www.smartcopying.edu.au/scw/go/pid/756>
- Education Licences: <http://www.smartcopying.edu.au/scw/go/pid/860>
- Flexible Dealing: <http://www.smartcopying.edu.au/scw/go/pid/542>
- Format Shifting: <http://www.smartcopying.edu.au/scw/go/pid/529>
- Performance and Communication in Class: <http://www.smartcopying.edu.au/scw/go/pid/544>
- Performing & Communicating Music in School: <http://www.smartcopying.edu.au/scw/go/pid/1047>
- Podcasts - Creating: <http://www.smartcopying.edu.au/scw/go/pid/524>
- Podcasts - Using: <http://www.smartcopying.edu.au/scw/go/pid/550>
- Using Cloud Computing : <http://www.smartcopying.edu.au/scw/go/pid/1062>
- Using Digital Content Repositories: Copyright Compliance Manual for Schools: <http://www.smartcopying.edu.au/scw/go/pid/1020>
- Using Digital Content Repositories: Copyright Compliance Manual for School Authorities - relying on statutory licences: <http://www.smartcopying.edu.au/scw/go/pid/1055>
- Using Digital Content Repositories - Copyright Compliance Manual for School Authorities - not relying on statutory licences: <http://www.smartcopying.edu.au/scw/go/pid/1056>
- Using iTunes in Schools: <http://www.smartcopying.edu.au/scw/go/pid/1049>
- Using TeacherTube: <http://www.smartcopying.edu.au/scw/go/pid/858>
- Using Wikis and Blogs: <http://www.smartcopying.edu.au/scw/go/pid/944>
- Using YouTube: <http://www.smartcopying.edu.au/scw/go/pid/855>
- P2PU Copyright 4 Educators course:²³¹ <http://smartcopying.edu.au/scw/go/pid/1072>

²³¹ The NCU runs a facilitated peer learning course, Copyright 4 Educators, that covers Australian copyright law as pertains to education and equips Australian educators with the copyright knowledge to confidently use copyright material in the classroom. All participants who successfully complete the course are awarded certificates that may be used toward their professional development requirements. The August 2013 cycle of this course can be found here: <https://p2pu.org/en/courses/632/copyright-4-educators-aus/>.

ATTACHMENT B

Correspondence the ASA sent to schools

From: ATOM [mailto:editor@atom.org.au]

Sent: Wednesday, 17 July 2013 12:17 PM

To:

Subject: Copyright system under review - A message to teachers from Australian authors



A message to teachers from Australian authors

The copyright system is under review by the Australian Law Reform Commission (ALRC). The ALRC has made some proposals that we think **discriminate against Australian creators** and will also **increase the administrative burden for teachers**. The ALRC Discussion Paper which sets out these proposals can be found at <http://www.alrc.gov.au/publications/copyright-and-digital-economy-dp-79/> and we draw your attention in particular to Part 6 – Statutory Licences, and Part 13 – Educational Use.

Under the current legal framework (known as the statutory licence), teachers can use most text and images without copyright permission, because there are arrangements for fair payment to authors and publishers as the owners of the material. The payment, agreed to by education departments and independent education authorities and paid by them, is less than \$17 per student a year. For this small annual payment, an average student is able to access 240 photocopied pages plus a range of digital content from a wide variety of sources, print and digital.

Australian authors and content creators consider the current system is both efficient and fair. It allows teachers to get on with the job of teaching without having to worry about copyright issues, and supports authors, illustrators and publishers in creating new content. Instead of statutory licences, the ALRC proposes that nebulous 'voluntary' arrangements be entered into between schools and creator-owners.

We urge you to tell the ALRC what you think before Wednesday 31 July. Here are some suggested statements you could make:

- I am a primary/secondary teacher (strike out whichever is not applicable) with more than XX years' experience (add more detail if desired).
- As a teacher, I routinely photocopy, print, scan and electronically share material with students in the classroom.
- The Educational Statutory Licence system makes my job easy. I can copy and share so much material, for about the quarter of the commercial cost of a textbook, and this facilitates my classroom practice.
- It is also reassuring to know that the people who create the educational content I use receive payment for their skill, time and effort.
- As a teacher, I take pride in delivering a superior learning experience for my students. Each class is different, so it would be rare for me to use exactly the same material year-in and year-out. I tailor the material to the

challenges of each group of students.

- I understand a recommendation has been made to remove the current system and replace it with a combination of new arrangements.
- I strongly oppose any change to the current system that will create any further burden on my time.
- I strongly oppose any change to the current system that creates uncertainty about what I can and cannot share with my students.
- I strongly oppose any change to the current system that takes away fair remuneration from the people who create high-quality Australian educational resources, many of whom are teachers, which I rely on and value highly.

**Make an online submission [here](#)
or email your submission to info@alrc.gov.au.**

If you would like to copy in the ASA on any submission you make, or for further queries, please email:
comms@asauthors.org.

<https://asauthors.org>

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ATTACHMENT CCAG's response to the ASA correspondence²³²

Australian Law Reform Commission Review Copyright and the Digital Economy

What is the ALRC review?

The Australian Law Reform Commission (ALRC) is currently reviewing Australia's copyright exceptions to make sure they are suitable for the digital environment. This review is critical for Australian teachers and students. Delivering world class education requires copyright laws that are fit for purpose in a digital age.

Teachers, parents and schools all expect to be able to use the most modern and effective teaching methods for the benefits of Australian students. However, Australia's current copyright laws are stuck in the age of the photocopier.

Australian teachers currently face a complex copyright environment, which sets different rules for different types and different uses of copyright materials. These rules also apply differently to different technologies and formats. This just does not make sense in a digital age.

The ALRC has proposed two reforms that will ensure Australia's copyright system is appropriate for teachers in the 21st century:

- Introducing a fair use provision. This will future proof Australia's copyright laws and ensure that fair uses of copyright materials are permitted in Australian schools.
- Repealing the current statutory licences and replacing them with more modern and efficient voluntary collective licences. This will allow Australia's educational licences to be modernised to make sure that teachers can continue to use copyright materials in their teaching, and copyright owners will continue to receive fair remuneration.

The Australian school sector supports these reforms.

²³² This information sheet can also be found on the Smartcopying website here:
<http://www.smartcopying.edu.au/scw/go/pid/1077>.

Responding to claims by the Australian Society of Authors

The ASA has written to schools in Australia encouraging teachers to oppose the ALRC's proposals. The ASA is encouraging teachers to write to the ALRC criticising the proposals.

The schools sector **does not share** the ASA's views. We believe the ASA information misrepresents the ALRC's recommendations and the impact of reform on teachers.

The Australian education sector would never support a law reform proposal that would make things worse for teachers.

The Schools' submissions to the ALRC were made after careful consideration by all State and Territory Departments of Education, the Independent Schools Council of Australia and the National Catholic Education Commission. They are also supported by the universities, TAFE and VET sectors.

Assessing the claims by the Australian Society of Authors

Here are some of the claims made by the ASA and why the schools sector disagrees with them:

The Educational Statutory Licence makes a teacher's job easier

There will be very few differences in the way teachers can use copyright materials in class. What **will** be different is that schools will no longer be penalised financially for using digital technologies.

For example:

- writing a quote from a book on a blackboard is currently covered by an exception. Writing the same quote from the same book on an interactive whiteboard is not – and must be paid for out of education budgets.
- the default provisions of the statutory licence mean that schools pay millions of dollars of public funds each year just to use materials that are freely available on the internet, such as free tourism maps of Australia.

It is reassuring to know that people who create educational content receive payment for their skill, time and effort

The system proposed by the ALRC will continue to support the production of educational content in Australia – and will ensure that creators will continue to receive fair remuneration for their efforts.

Most uses that are currently paid for under the statutory licences will continue to be paid for in the proposed new system, under voluntary licence arrangements (similar to those currently in place and operate successfully with the music collecting societies).

The ALRC's suggested changes will fix the current situation, which creates financial disincentives to use new technologies in teaching. For example, currently showing material on an interactive whiteboard may result in up to four times as many remunerable activities than printing a copy for each student.

I oppose changes that will create a further burden on my time

The ALRC's proposals will **not** create any additional burden for teachers. Teachers will not become the "copyright police". Nor will they have to change their current copying practices.

Teachers will not be required to make copyright decisions each time they want to use materials in class. As is currently the case, uses will either be clearly understood to be covered by an exception – or they will be permitted under the terms of a collective voluntary licence that will set out the rules for teachers.

Voluntary licensing arrangements may in fact make teachers' lives easier in practice – as the licences could be updated to take account of changing practices and teaching tools.

Change to the current system will create uncertainty about what I can and cannot share with my students

At present, there are different rules as to what content a teacher can copy, depending on whether the material is an image, text, TV broadcast, film or music recording.

The ALRC's proposals will simplify the rules significantly.

As is currently the case, the National Copyright Unit will provide clear and simple guidance on what uses are allowed in schools.

I oppose changes that take fair remuneration away from the people who create high quality educational resources, many of whom are teachers

Contrary to the ASA's claims, fair use will **not** mean that all educational uses of copyright materials will be free. Schools have a long track record of paying for educational use of music under voluntary licensing arrangements with AMCOS/APRA/ARIA and under a licence with Roadshow for films.

As stated above, many uses that are currently paid for under statutory licences with Copyright Agency and Screenrights will continue to be paid for under similar voluntary licensing arrangements. The Copyright Agency and Screenrights licences will

continue to exist – but in a more flexible way that is more suited to the digital learning environment.

Some activities that are identified as fair uses will no longer be remunerable, which may have some impact on licence fees. Alternatively, the licences may be negotiated to allow a greater range of teaching activities with appropriate remuneration for creators.

Schools are not asking for a free ride – simply a fair ride.

More information

If you would like to read more about why Australian schools support the ALRC's proposed reforms, please read the Copyright Advisory Group – Schools' submissions to the ALRC's issues paper, available [here](#)²³³ and supplementary submission [here](#)²³⁴

You can also contact the National Copyright Unit on (02) 9561 1204 or email at delia.browne@det.nsw.edu.au.

The National Copyright Unit provides – and will continue to provide - clear and straightforward guidance to teachers about how copyright materials can be used in Australia's classrooms.

²³³ CAG submission in response to the ALRC's Copyright and the Digital Economy Issues paper (IP 42), available here: http://www.alrc.gov.au/sites/default/files/subs/cag_schools_submission_-_ip_42_-_corrected.pdf.

²³⁴ CAG supplementary submission in response to the ALRC's Copyright and the Digital Economy Issues paper (IP 42), available here: http://www.alrc.gov.au/sites/default/files/subs/290._org_supcopyrightadvisorygroupschools.pdf.

ATTACHMENT D

Claims made by Copyright Agency suggesting that schools only pay \$17 per student per year for the use of educational content in Australian schools.

Claim distributed by the Chair of the Copyright Agency

"Dear members,

It is rare for me to write to you all directly but this is an occasion that more than warrants it.

I am writing to appeal urgently to Copyright Agency Members, and, in fact, to all content creators and publishers, to get involved in the Australian Law Reform Commission's review of copyright. Your rights and income are being seriously challenged by a proposal that suggests, amongst other things, the repeal of the Statutory Licence.

The Law Reform Commission has produced a discussion paper that is heavily influenced by those who argue that free and cheap distribution of content is a characteristic of the digital age and the future and therefore should be enshrined in law. They have set the evidentiary bar incredibly low for the proponents of change. At the same time, they are making recommendations that would reduce the incomes of writers and publishers and have the potential to create chaos and litigation in the industry and education sector.

Our argument is that out of the \$10,000-\$13,600* it takes to educate a school student every year, less than \$17 is spent on copied and shared content (and similar numbers apply to universities and TAFE). The new recommendations would reduce this and put the onus on creators to protect their rights and prove abuse. The Statutory Licence is supported by teachers who find its invisibility and ease of use beneficial in their working day, and by our members. The Statutory Licence means there is neither misunderstanding nor illegal usage.

It is a system worth maintaining and a system that fairly compensates our members each year for the content they create.

The final recommendations of the ALRC inquiry into Copyright and the Digital Economy can still be influenced. But we need you to raise your voices now and write to the ALRC before 31 July.

Australia has a fair and efficient system in place already, one that benefits both the user and the creator.

Changes in technology have already been taken into account by this system. The ALRC is trying to use technological change as an excuse to erode or remove the rights of those who invest time, money and skills into creating material that others wish to use.

It is time for writers, artists and publishers to stand together to make clear to the ALRC Review that we value our work and that we want the same rights as any other group looking to offer intellectual property to the education community. Follow the links below to make a submission by Wednesday 31 July, 2013.

Sincerely yours
Sandy Grant,
Chair

**Gonski report*

**Make an online submission to the ALRC [here](#) or email your submission to info@alrc.gov.au
For more information, please contact communications@copyright.com.au or call **1800 066 844.**"**

Claim distributed on behalf of Copyright Agency

"As you may have heard through organisations such as Copyright Agency and the Australian Society of Authors, there have recently been troubling changes proposed to the Statutory Rights legislation with regard to copyrighted material in Australia. The Australian Law Reform Commission (ALRC) has released a discussion paper (5 June 2013) proposing sweeping changes to the existing statutory license model.

Currently, "statutory licenses":

- allow use without permission provided fair payment
- allow use of content in the education and government sectors
- allow uses of content for particular purposes (research, critique, reporting news, private use)
- see license revenues collected by Copyright Agency and Screenrights, which are distributed to creators and publishers
- sanction permission provided conditions including attribution and only part usage if work is commercially available

The ALRC's proposals are very concerning. One of the most problematic recommendations is that the statutory licence, which was introduced in response to photocopying with a key objective of ensuring teachers, had access to copyright content, and at the same time that authors and publishers were fairly remunerated, should be repealed. The suggestion is that this would be replaced with voluntary licensing. It is important the ALRC understand the implications of what they are suggesting from evidence of affected people on the ground – there appears to be a chasm between legal theory and actual practice.

Feedback to the ALRC that express your thoughts on the day-to- day implications of removing the statutory licence for you as author / illustrator / content creator will be valuable.

To assist you, the following link from Copyright Agency will guide you further on ways to make a difference.

<http://www.copyright.com.au/get-information/alrc-inquiry/alrc-have-your-say>

If you wish to make a written submission to the ALRC, the following suggested text is put forward by Copyright Agency to assist:

***CONTENT CREATOR SUBMISSION LETTER TO THE ALRC REVIEW OF
COPYRIGHT AND THE DIGITAL ECONOMY – Education Statutory Licence Focus***

I am an author/journalist/photographer/illustrator/artist who creates content for a living.

I develop something from nothing using my time, creative skills and knowledge and my material is my intellectual property. I own the copyright in my material and I expect people who use it pay for the time and effort I have expended on my creation. Not only do I expect to be paid but I rely on that payment for my income.

The statutory licences that the ALRC is recommending be repealed are very important to me. If my work is copied and shared by teachers in the classroom, I receive a copyright payment from the Copyright Agency.

These payments are recognition of the value of the material I have created, using my time, skill and experience. Just as a supplier sells paper to a school for use in a photocopier – or a retailer sells laptops to a school, my work facilitates education.

The system works very efficiently and quietly with very little administrative requirement from me. However, should the change proposed be made, how will I develop licensing arrangements myself? How will I track down copyright breaches? How will I prosecute breaches? How will I afford to mount a legal case? What compensation will I get for loss of income; to mount legal challenges or for the time it takes me to administer licensing arrangements?

I am a specialist in my field, I have little expertise in the intricacies of copyright law, nor the time to pursue breaches – no matter how concerned I am.

I completely reject the repeal of the very effective and fair Australian educational statutory licence system. Such a recommendation is a personal attack on my rights.

(Name, date, contact details).

The timeline for this inquiry is:

- July 24: online discussion board on fair use
- July 31: deadline for submissions on discussion paper
- November 30: final report

I thank you in anticipation of your support.”

ATTACHMENT E

Australian Digital Alliance's 'Copywrong' website²³⁵

#copywrong 'example'	CAL claims	ADA response
<p><u>Australian schools pay up to four times more in copyright fees to deliver education using digital technologies than using paper copies.</u></p>	<p><u>Special provisions in Australia's Copyright Act</u> allow schools to use <u>nearly all text and images, print and digital</u>, for education, provided there is fair payment for the content creators</p> <p>The Australian Government has appointed Copyright Agency to manage these provisions (known as the educational statutory licence) By agreement between schools' representatives and Copyright Agency, the schools' sector pays a flat rate per student for all print and digital content used under the statutory licence (i.e. that would otherwise require copyright permission)</p> <p>The rate is less than \$17 per year for all content</p>	<p>The <i>Copyright Act</i> requires schools to pay for each copy and communication of copyright materials made under the educational statutory licence [source: 135E; Division 2 and 2A Part VB <i>Copyright Act</i>]</p> <p>The schools and Copyright Agency have entered into agreement to cover this usage. In 2012, Australian schools paid Copyright Agency \$59,599,967 in Part VB fees. In 2012, this equated to just under \$17 per student [Source: National Copyright Unit to Standing Committee on School Education and Early Childhood]. As Copyright Agency <u>itself recognises</u> that the agreement takes into account the volume of copies and communications made under the statutory licence. The statutory requirement to record every digital copy and communication made - no matter how transient or technical, - means that this 'volume' calculation results in many more remunerable uses being recorded for the use of digital technologies than using paper copies for the same teaching activity. The current rate reflects this reality.</p> <p>For example:</p> <p>Ms Jones teaches year 1. She wants to use a copy of a scene</p>

²³⁵ See the ADA website here: <http://digital.org.au/content/yes-australian-schools-do-pay-use-free-online-content>. With a PDF of the attachment here: http://digital.org.au/sites/digital.org.au/files/Further%20information_CAL%20response%20to%20copywrong_0.pdf.

	<p>from a play for a classroom exercise. She prints 25 copies of the extract from a website and gives each child a copy.</p> <p>Mr Smith teaches year 5. He also wants to do a dramatic 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.</p> <p>If their school was part of sample survey at the time of the copying, Ms Jones would be simply required to record printing 25 copies of the scene in a survey form.</p> <p>Mr Smith would be required to:</p> <ul style="list-style-type: none">• Record one copy made when saving the text to his laptop• Record one communication made when emailing the file to his school email account• Record one copy made if he saved the file to his school computer• Record one communication when he uploads the file to the school LMS• Record the display of the scene the learning management system to an audience of 25. <p>Mr Smith is required to record up to 4 more remunerable activities than Ms Jones – simply by using digital technologies in his teaching.</p> <p>See a copy of the form Mr Smith would be required to fill out at</p>
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		<p>the source below:</p> <p>[Source: Schools Electronic Use Survey usage record form, <u>Attachment 2B CAG schools submission, ALRC Inquiry Issues paper, page 87</u>]</p> <p>These additional remunerable copies are taken into account in setting future rates payable under the licence. Over time, the 'volume' calculation for the use of modern teaching methods in Australian schools will continue to increase – by up to a factor of 4 - for the additional remunerable acts involved in digital uses when compared to paper based teaching methods.</p> <p>In contrast, the teaching activities done by Ms Jones and Mr Smith would almost certainly be considered to be fair – and free - uses of copyright materials in the US and Canada.</p>
<p><u>Australian schools currently pay millions of dollars to use content freely available on the Internet – like free tourism maps of Australia, or fact sheets for treating head lice.</u></p>	<p>The schools' sector pays a flat fee per student for all content (print and digital) used <u>in reliance on the statutory licence</u> (i.e. that they would otherwise require a clearance for)</p> <p>They do not pay Copyright Agency for other uses of content</p> <p>In calculating the 'volume' of content used in reliance on the statutory licence, which is taken into account (amongst other things) in negotiations for the flat fee, Copyright Agency follows <u>data processing protocols</u> agreed with the schools' sector</p> <p>As a result of those protocols, about</p>	<p>It is correct that certain internet uses are – quite properly – excluded from volume estimates for the purposes of calculating the remuneration payable under the licence.</p> <ul style="list-style-type: none"> Copyright Agency were able to agree that webpages that are covered by certain Creative Commons licences, or specified 'free for education' or similar, should be treated as non-remunerable under the licence. [Source: PROTOCOL FOR THE PROCESSING OF WEBSITE COPYRIGHT NOTICES FEB 09]. <p>It is <u>simply not correct</u> however, to claim that Australian schools do not pay for other internet uses. Schools still pay significant amounts of money to use content that is made freely available</p>

	<p>half of the online content used by schools is excluded from the volume estimates</p> <p>This includes content published under a Creative Commons licence, Free For Education licence or other terms allowing free use by schools</p>	<p>on the internet.</p> <p>Openly available webpages (ie, not protected by a password) made up 81.4% of the total electronic copyright materials (ie, web and non web digital materials) that were paid for under the statutory licence in 2011 [Source: Table 8, 2011 Electronic Use System, AMR Report]</p> <p>Here are some actual examples of the webpages that Australian schools paid licence fees to Copyright Agency for using in 2011:</p> <ul style="list-style-type: none"> • www.allergy.org.au An information sheet about allergies released by the Australasian Society of Clinical Immunology and Allergy • http://maps.google.com.au Google maps • www.italyguides.it/us/venice_italy/venice_travel.htm Free tourism guides • www.tourismtopend.com.au/pages/darwin Free tourism guides and maps • www.wool.com/Fibre-Selection.htm An information sheet on wool • http://dictionary.reference.com Dictionary.com • www.qsa.qld.edu.au The home page of the Queensland Studies Authority • http://wiki.answer.com/Q/What-is-a-tourist#ixzz1UVHNZTYHA A Wiki Answers webpage. <p>[Source: 2011 Schools Remunerable Data Set]</p>
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		Printing extracts of these materials for classroom use would almost certainly be a fair – and free – use in the US and Canada.
<p><u>Australian schools pay fourteen times more per student to use copyright works in schools than schools do in New Zealand. And up to seven times more than schools in the UK and five times more than schools in Canada.</u></p>	<p>The Australian statutory licence is more extensive than licences offered in other countries</p>	<p>The extensive nature of the Australian statutory licence is itself the problem. Schools in Australia are required to pay for many uses that are recognised as free and fair in other countries.</p> <p>For example:</p> <ul style="list-style-type: none"> • Australian schools pay to time shift free to air broadcasts. This is free for private citizens in Australia [Source: s.111 <i>Copyright Act</i>]. Limited educational time shifting is also usually a free use in the US. [Source: s.135E <i>Copyright Act</i>, Attachment 3C CAG issues paper submission] • Australian schools pay to hand out small extracts of books to students in classrooms. This is generally a free use in the US, Canada and Singapore. • Australian schools pay to display text on an interactive whiteboard. This is generally a free use in the US and Canada. [Source: Attachment 3C CAG schools submission, ALRC Copyright Inquiry Issues paper, page 126]
	<p>Licences in other countries commonly don't cover: workbooks, worksheets (‘consumables’)</p>	<p>Licences in other countries often don't cover many of these activities because the educational use of these materials may be considered to be a fair and free use. For example:</p>

standalone artistic works
'born digital' content
repurposing and mashups

- copying an image from a freely available website for classroom use would generally be considered a fair and free use in the US and Canada
- applying the Australian licence to workbooks and worksheets often causes unfair results, where the publisher is remunerated once when the school or parents buy a copy of the workbook, and again under the statutory licence when a teacher copies a page to use in a classroom exercise.

The Australian licence does not always permit re-purposing and mashups. This is because:

- the licence is limited to copies and communications – it does not apply to adaptations [Source: s13135ZGA, 135ZG, 135ZMA and 135ZMA(1)]
- If a person makes part of a work available online, no other part of the same work can be put online while the part previously made available online continues to be available [See for example s135ZMB(4) and 135ZMDA(3)]. This makes a classroom exercise for a group of students involving mashups virtually impossible in practice.
- The licence does not create a general right to make mashups etc. For example, schools must ensure that any materials placed online can only be received or accessed by teachers and students of the school [Source: s.135ZXA(b)]

	<p>Licences in other countries commonly require:</p> <ul style="list-style-type: none"> purchase of original versions before copying is allowed attribution 'marking' of copies checking of repertoire 	<p>The Australian licences also contain marking and notice requirements, which particularly in the case of digital materials, can be complex and almost impossible to comply with. For example:</p> <ul style="list-style-type: none"> • The hardcopy records or sampling licences impose obligations to mark each licensed copy made in hardcopy form in accordance with a form specified in regulations [Source: s135ZX] • Schools are required to give a notice, in accordance with regulations, in relation to each digital copy and communication made under the licence [Source: s.135ZXA]. <p>Attribution is also generally required wherever reasonable under moral rights provisions [Source: see sections 193, 194, 195, 195AA and 195AB]</p>
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ATTACHMENT F

Specific examples of why the statutory licences are not suited to the digital environment

As discussed in Part 2.2 of CAG's issue paper submission, the statutory licences comprise complex rules that are inappropriate in a digital environment. These rules are ill suited to making content available to students in a digital environment and prevent schools in Australia taking full advantage of the educational opportunities afforded by the internet.

The intention in extending the licences to the digital environment was to enable the Schools to take account of new technologies:

*The new statutory scheme for the electronic use of copyright material [in electronic form] has been drafted in broad terms to enable it to adapt to future technological developments. The key to the new scheme is flexibility, based on agreement between educational institutions ... and the relevant collecting societies.*²³⁶

While the amendments may have achieved their goal in terms of the flexibility permitted in negotiating the matters and processes that constitute an electronic use system, the substantive provisions of the licences themselves have proved to be less than flexible, and far from future proof.

This should not perhaps be surprising. The United States Copyright Office, for example, has recently rejected statutory licences as a useful model for educational copying, describing them to be "*mechanisms of last resort that must be narrowly tailored to address a specific failure in a specifically defined market.*"²³⁷

This Attachment sets out a number of specific problems with the statutory licences. While these issues may not by themselves amount to a significant problem, they show how the licences' detailed technical requirements are easily inadvertently breached, and encourage the imposition of artificial constraints on the use of digital technologies in schools. In some cases, the provisions set rules with which it is not technically possible to comply. Taken together, they show why the Schools believe that the educational statutory licences are not adequate and appropriate in the digital environment and should be repealed.

Online communication of works - s.135ZMD(3)

The statutory licence contains 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,

²³⁶ Second Reading Speech to the *Copyright Amendment (Digital Agenda) Bill 1999*, House of Representatives, Hansard 2 September 1999, p9749.

²³⁷ Copyright Office, Library of Congress, Notice of Inquiry – Orphan Works and Mass Digitisation (22 October 2012) 17 <http://federalregister.gov/a/2012-25932>.

learning management system²³⁸ etc or by handing out copies to each student. To illustrate, consider the following scenarios:

When making a photocopy, Teacher A can copy a reasonable portion of a science textbook for distribution to her class. Teacher B can also copy a reasonable portion of the same book for distribution to his class. In most cases, this will be up to 10 per cent of the pages or one chapter of the work. It does not matter that these two teachers have copied different parts of the same book, provided that each of them has copied no more than 10 per cent or one chapter.

If the work is copied electronically and communicated to students via the school intranet or learning management system, the rules are quite different.

Teacher A can still copy up to 10 per cent of a work (although now calculated according to words rather than pages), but no other teacher can communicate any other part of the same work to his or her students via the intranet until the part made available by Teacher A is taken down. This restriction operates regardless of whether teacher A has communicated less than 10 per cent of the work. For example, if Teacher A has only communicated 7 per cent of a work via the school intranet and Teacher B asks the school librarian if he can communicate 3 per cent of the same work to his students via the intranet, The librarian would be required to tell Teacher B that s.135ZMD(3) of the Act operates to prevent the school from doing this.

The effect of s.135ZMD(3) would be the same if Teacher A had only communicated 3 per cent of the work to her students. Nor does it make any difference that the only students who can access Teacher A's 3 per cent were students in her class. No other teacher in that school can communicate any other part of the same work via the intranet unless and until Teacher A's material is taken down.

The legislative intention appears to have been to prevent schools from simultaneously making available online more than one portion of the same work²³⁹ - even where access is limited to students in a particular class. 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.

The hardcopy provisions in Division 2 of Part VB take account of the reality that different teachers will use different parts of the same work in different ways for different groups of students. This reality is not reflected in the electronic provisions in Division 2A. Not only does

Part VB is out of date and does not recognise the realities of teaching in Australian schools.

²³⁸ See the definition of a learning management system available at http://en.wikipedia.org/wiki/Learning_management_system.

²³⁹ See the Explanatory Memorandum to the *Copyright Amendment (Digital Agenda) Bill 1999*, p80.

this impose an added level of administrative difficulty for schools, it restricts the ways in which teachers can deliver content to their students.

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. Schools can and do develop workarounds to these conditions (for example, requiring teachers to archive items to personal hard drives at the end of a class instead of deleting content from a LMS), however these administrative requirements are administratively complex and completely unsuited to the realities of teaching in a modern school.

Copying from different parts of the same work - s.135ZMB(5)

Another example is the different legal treatment of insubstantial copying depending on whether the copies made are in hardcopy form or electronic form.

It is a fundamental principle of Australian copyright law that a copy of a work that is not a 'substantial part' of a work cannot be a copyright infringement. In the educational context, this principle is reflected in the statutory licences, so that educational institutions do not have to pay remuneration for 'insubstantial copying'.

Under the hardcopy provisions, a teacher can copy up to 2 pages of a work in hardcopy form.²⁴⁰ A copy made from a work is considered to be insubstantial irrespective of whether the 2 pages are consecutive or taken from separate locations in a work. However, when the statutory licence was extended to digital copying and communication, this principle was not carried across to s.135ZMB. Under the electronic use provisions, teachers may copy up to 1% of the pages of an electronic work or 2 pages (whichever is greater) if the work is paginated, or 1% of the words in the work if the electronic work is not paginated. When the work copied is in a digital format, however, an insubstantial amount cannot be comprised of different parts of the work: the 2 pages (or 1 per cent of words if the work is not paginated) copied must be consecutive. If the 2 pages are not consecutive, the second page will be considered a separate copy and must be paid for.

Consider the following examples of this distinction:

Teacher A copies paragraph 1 and paragraph 2 from a webpage to use for a lesson. The sum total of what is copied is less than 1% of the words on the web page. The two paragraphs are consecutive on the web page. As a result, the copying is deemed to be insubstantial. Therefore, no payment is required under the educational statutory licence.

²⁴⁰ See s.135ZG.

Teacher B wants to copy from the same website, but she decides to copy paragraphs 1 and 3. The total amount copied still comprises less than 1% of the total words on the web page, but, unlike Teacher A, she has not copied ‘continuous passages’.

Teacher A’s copying would be deemed to be insubstantial (and free). As for Teacher B’s copying, the first paragraph would be deemed insubstantial (and therefore free), but Teacher B’s copying would need to be paid for under the statutory licence. The only difference between the two examples is that the passages copied are not continuous.

The result of this seemingly arbitrary distinction is that Teacher B’s copying is required to be paid for out of education budgets in a situation where the general law of copyright would most likely view the copying of such a small amount as insubstantial and therefore non-infringing.

This example would be the same if a teacher copied two sentences from a PDF file or other online work, if the two sentences were taken from different pages of the document.

This is an issue with real consequences in practice, as insubstantial copying is not excluded from the remunerable data set measured by the statutory licence copyright surveys, despite the clear intention of Part VB that such copying should not be remunerable. The technical impact of the ‘non cumulative copying’ requirement may be less significant given it is unclear how well these technical requirements are captured in the survey data. Nevertheless, these records are included in the data set and remunerated.

The Schools believe that these provisions make Part VB overly technically complex. They simply do not reflect the ‘real world’ way in which teachers use technologies in schools.

The requirement to provide copyright notices – s.135KA and s.135ZA

Both educational statutory licences require a school to give a prescribed notice ‘in relation to each communication made by it’ containing statements that the communication has been made under the relevant statutory licence and that the works or other subject matter contained in the communication might be protected by copyright.

The Schools have found that it is not technically possible to comply with this requirement in all circumstances (eg, communications made to interactive whiteboards, multiple communications made from content repositories such as LMS, etc). As such, schools have had to come up with ‘work around’ solutions, such as inserting a link to the notice in the labelling information or displaying the notice on the computer screen as the user logs into the repository. Although the Schools have not encountered significant opposition to their working solutions to this issue, it further illustrates how the technical requirements of the statutory licence are not suited to the modern teaching and learning environment.

ATTACHMENT G

Examples of online content treated as remunerable in the 2011 schools electronic use survey²⁴¹

1. <http://www.qsa.qld.edu.au/>
2. <http://www.dcnr.state.pa.us/>
3. [http://wiki.answers.com/Q/What is a tourist#ixzz1UVHNZTYH](http://wiki.answers.com/Q/What_is_a_tourist#ixzz1UVHNZTYH)
4. <http://belm.wordpress.com/>
5. <http://www.womeninthebible.net/>
6. <http://www.abc.net.au/catalyst/stories/3280498.htm>
7. <http://www.liveplaywork.com.au/>
8. <http://www.vatican.va/>
9. http://www.economywatch.com/world_economy/australia/export-import.html
10. <http://www.mapsofworld.com/world-maps/world-map-for-kids.html>
11. <http://www.csiro.au/resources/dna-model-activity#build>
12. <http://www.wool.com/Fibre-Selection.htm>
13. <http://www.29travels.com/travelmap/>
14. <http://www.allergy.org.au/>
15. <http://www.oliver.com.au>
16. <http://www.atgtickets.com/uploads/media/44/306.pdf>
17. <http://dictionary.reference.com>
18. <http://www.newcastle.edu.au/ecipdp>
19. <http://maps.google.com.au>
20. http://www.italyguides.it/us/venice_italy/venice_travel.htm
21. <http://www.bookwarehouse.com.au/orders.aspx?message=>
22. <http://www.tourismtopend.com.au/pages/darwin/>
23. <http://www.cairns.com.au/>
24. <http://www.nswtf.org.au/campaigns/stop-teacher-pay-cuts/news/get-ready-day-action-against-unjust-industrial-laws.html>
25. <http://www.sydney.com.au/>
26. <http://courses.gotafe.vic.edu.au/innoven/food%20safty/fs317.htm>
27. <http://www.taste.com.au/recipes/9573/walnut+chunky+choc+chip+cookies>
28. http://ticketstoseats.com/lady_gaga_tickets.html
29. <http://worldbank.org>
30. <http://www.oecd.org>
31. http://www.parkweb.vic.gov.au/1park_display.cfm?park=73
32. <http://www.ballarat.edu.au/future-students/open-day>
33. <http://www.street-directory.com.au/vic>
34. [HTTP://WWW2.BETTERHEALTH.VIC.GOV.AU](http://WWW2.BETTERHEALTH.VIC.GOV.AU)
35. <http://familydoctor.org/familydoctor/en.html>
36. <http://www.zoo.org.au/>

²⁴¹ All examples are from the 2011 Schools EUS Remunerable Data Set.

37. <http://www.google.com>
38. <http://www.un.org/>
39. http://www.ehow.com/about_5464927_methods-heat-transfer-cooking.html
40. <http://www.willyweather.com.au/>
41. <http://www.whitepages.com.au>
42. <http://bushfirefront.com.au/about>; <http://www.bushfiresafety.net>
43. <http://mcdonalds.com.au/#/home>
44. <http://www.ristorante-ilfocolare.it/men%C3%B9.html>
45. <http://www.australia-trips.info/aboutfauna.html>
46. <http://www.facebook.com/rugbyworldcup>
47. <http://www.manutd.com/Splash-Page.aspx>
48. <http://www.sharks.com.au/>
49. <http://www.49ers.com/>
50. <http://bruins.nhl.com/>

ATTACHMENT H

Expanded quote from the CLRC Simplification Report, demonstrating the CLRC's strong support for the Franki Committee's characterisation of exceptions as matters of 'principle'

*"The prescription of fair dealing involves the broad **balancing of competing goals** so as to maximise the public interest.*

The Committee is aware that digital technology has the potential for allowing copyright owners, through their respective collecting societies, to monitor and license the individual uses of copyright material in a way that was not previously possible. It also is aware that this has created new markets for the use of copyright materials, both whole and in part.

*The **Committee majority does not consider, however, that this new capacity to monitor and license uses of copyright materials justifies a limitation on the application of fair dealing** so as not to apply to copyright material in the digital environment. On the contrary, the majority believes that the fair dealing provisions are needed to ensure the free use of copyright material in the digital environment for purposes that are socially desirable, especially given that digital technology has the potential to restrict such use so as to enforce voluntary licensing agreements.*

Changes in technology have led the Copyright Agency Limited (CAL) to argue that copying that took place under the fair dealing provisions and that was previously regarded by rights holders and users as a subsidiary use is now—through the advent of paper-based reproduction and, more recently, digital reproduction and dissemination of substantial portions of works—perceived by authors and publishers as a main use. ...

***CAL argued that any digital copying, if allowed to take place without remuneration, will substantially adversely affect the markets, or potential markets, of copyright owners.** It suggested that a solution to the problems generated by changes in technology, which would ensure fair remuneration, would be to **replace the fair dealing provisions with voluntary licences.** It argued further that if voluntary licences are not used a statutory licence scheme similar to that set out in Part VB of the Act should be implemented. Finally, CAL submitted that if neither voluntary nor statutory licences are used an alternative is the imposition of a levy on copying equipment such as photocopiers, scanners and personal computers.*

*With the exception of one member, the Committee rejects CAL's submission for a scheme of remuneration to replace the free use of copyright material under the fair dealing provisions. Although the Committee recognises that the existence of a statutory licence may affect the operation of fair dealing, **the majority of the Committee does not agree that such schemes should be expanded so as to substitute for fair dealing. The majority considers that the replacement of fair dealing with remuneratory use would clearly place copyright owners' interests before the overall public interest.***

*The Committee majority notes and agrees with the counter-argument put forward by the Australian Vice-Chancellors Committee that the basis for the fair dealing principle is unaltered by the technology applying to the form of the expression that is the object of protection. **Submissions from publishers assert that in the digital environment all possible uses of copyright materials, including the use of short extracts, will potentially be the subject of commercial exploitation and for this reason the scope***

of fair dealing should be constrained—this view is also supported by the Committee member in the minority. **The majority of the Committee agrees in principle, however, with the submission by the Australian Council of Library and Information Services, which stated that in the interests of all Australians it is essential that a market in words and sentences, as seems to be advocated by some copyright owner representatives, be avoided and that the use of short extracts be considered fair.** The Committee notes, though, that uses of such extracts as are a substantial part of the copyright material would have to fall within fair dealing before they were an exception to copyright.

The Committee notes CAL's argument that a position often put forward to justify the fair dealing provisions is that it is impossible to monitor or collect remuneration for copying and that because of changes in technology this justification no longer applies. In support of this argument, CAL makes reference to the Franki report, which stated in relation to photocopying under the fair dealing provisions, '... we consider there are insuperable practical difficulties in obtaining permission from, and in paying remuneration to, the copyright owners in these circumstances.' Importantly, however, CAL failed to acknowledge that this statement was qualified by the sentence that immediately precedes it:

... we are satisfied that as a matter of principle a measure of photocopying should be permitted without remuneration, for purposes such as private study, to an extent which at least falls within the present limits of 'fair dealing'.

The majority of the Committee agrees with the Franki Committee on this point.

The Committee also notes comments made by the US Working Group on Intellectual Property Rights in its 1995 report *Intellectual Property and the National Information Infrastructure* (the US White Paper). The Working Group considered that the development of technological measures for tracking the use of copyright materials might lead to a reduced scope for the application of fair use principles.

This approach differs from that taken by the majority of the Committee. As stated in paragraphs 6.18 and 6.19, **the Committee considers that the technological means of monitoring and licensing (except in the instance of statutory licensing) should not have an impact on application of the fair dealing provisions.** The Committee majority notes that the Working Group appears to take a position that leans towards striking the balance in favour of copyright owners. This position is evident where the Working Group states, in relation to the application of fair use to the National Information Infrastructure, 'The Working Group rejects the notion that copyright owners should be taxed—apart from all others—to facilitate the legitimate goal of "universal access".'

In this regard the Committee agrees with Kurtz, who stated that there is no 'tax' in issue and copyright owners have never been entitled to an unlimited scope of rent for their creations. **The Working Group's comment also seems to be at odds with the understanding of the international community, as reflected in the relevant copyright conventions. The preamble to the 1996 WCT sets out the international community's recognition of 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 ...'**²⁴²

²⁴² CLRC Simplification Report Part 1, Exceptions to the Exclusive Rights of Copyright Owners, 1998 paras 6.16 to 6.27. All emphasis added.

ATTACHMENT I

US, Australian and Canadian fairness factors

The US fairness factors

Section 107 of the US Copyright contains the fair use exception and sets out a non-exclusive list of factors that a court must have regard to when determining whether a use is “fair”:

Notwithstanding the provisions of sections 106 and 106A, the fair use of a copyrighted work, including such use by reproduction in copies or phonorecords or by any other means specified by that section, for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright. In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include—

- 1 the purpose and character of the use, including whether such use is of a commercial nature or is for non-profit educational purposes;*
- 2 the nature of the copyrighted work;*
- 3 the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and*
- 4 the effect of the use upon the potential market for or value of the copyrighted work.*

The fact that a work is unpublished shall not itself bar a finding of fair use if such finding is made upon consideration of all the above factors.

The Canadian fairness factors

The Canadian *Copyright Act* contains a fair dealing exception in s 29, but the Act does not provide any guidance as to what matters are relevant when determining whether a use is “fair”. In 2004, the Canadian Supreme Court²⁴³ reviewed the common law fair dealing cases and set out the following non-exclusive list of six factors that it says emerged from the case law (including UK fair dealing cases):

- 1 The purpose of the dealing;*
- 2 The character of the dealing;*
- 3 The amount of the dealing;*
- 4 Alternatives to the dealing;*
- 5 The nature of the work; and*
- 6 The effect of the dealing on the work.*

²⁴³ *CCH Canadian Ltd. v. Law Society of Upper Canada*, [2004] 1 SCR 339.

These factors have been applied in fair dealing cases following the CCH case.

The Australian fairness factors

Section 40(2) of the Australian *Copyright Act* sets out a list of five non-exclusive factors that are relevant to determining whether a dealing by way of reproduction for the purpose of research or study that comprises more than a “reasonable portion” of a work is fair:

- 1 *The purpose and character of the dealing;*
- 2 *The nature of the work or adaptation;*
- 3 *The possibility of obtaining the work or adaptation within a reasonable time at an ordinary commercial price;*
- 4 *The effect of the dealing upon the potential market for or value of the work or adaptation; and*
- 5 *In a case where part only of the work or adaptation is reproduced - the amount and substantiality of the part copied taken in relation to the whole work or adaptation.*

In its 1998 Simplification Report, the CLRC said²⁴⁴ that it was “reasonable to assume” that these factors - which come from common law fair dealing case law - were also relevant to determining fairness with respect to other fair dealing exceptions in the Act. The CLRC recommended that the Act be amended to expressly apply these factors to all fair dealings.

²⁴⁴ CLRC Simplification Report Part 1, Exceptions to the Exclusive Rights of Copyright Owners, 1998 para 4.09.