

7 August 2013

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

**By email:** [info@alrc.gov.au](mailto:info@alrc.gov.au)

To the Executive Director

**Copyright and the digital economy (DP 79)**

This submission is made on behalf of the Australian Curriculum, Assessment and Reporting Authority (**ACARA**). ACARA is the independent authority responsible for the development of a national curriculum, a national assessment program and a national data collection and reporting program that supports 21st century learning for Australian students.

ACARA was established by the Federal Parliament under the *Australian Curriculum, Assessment and Reporting Authority Act 2008* (Cth). ACARA's work is carried out in collaboration with a wide range of stakeholders, including teachers, principals, governments, State and Territory education authorities, professional education associations, community groups and the general public. ACARA's public website (<http://www.acara.edu.au/default.asp>) provides further detail in this regard.

**1. Endorsement of CAG Schools' submission**

ACARA has had the opportunity to review the submissions to the Discussion Paper by CAG Schools, and agrees with and endorses those submissions.

**2. Benefits of proposed fair use exception**

The flexibility and technological neutrality of the proposed fair use exception would assist ACARA greatly in fulfilling its important public interest functions in the digital economy. ACARA would of course continue to obtain permissions in respect of uses that go beyond what is regarded as fair under the proposed new system. However, the transition to a fairness-based analysis supported by voluntary collective licences would be hugely beneficial to ACARA's educational role, because:

- a. the fact that ACARA does not fall within the technical statutory definition of an "educational institution" (heading 4(c)) would no longer preclude ACARA from relying on licences and exceptions for educational purposes;
- b. ACARA would be protected in relation to the use of third party materials in online testing (heading 4(a) and (b)); and
- c. minor, fair uses that are not unreasonably harmful to the interests of the copyright owner would no longer require the onerous permissions processes that are interfering with ACARA's ability to fulfil its statutory mandate.

In light of this, ACARA strongly supports the ALRC's proposed recommendation to introduce a new flexible fair use provision, and with the submissions made by CAG Schools in response to the Discussion Paper.

### 3. ACARA's requirements for third party licences

Third party materials are owned by third parties, licensed to ACARA and predominantly included in:

- the reading domain of the National Assessment Program - Literacy and Numeracy (NAPLAN); and
- student work samples, some of which are communicated on the Australian Curriculum website.

#### 3.1 NAPLAN

Currently, NAPLAN is a paper-based test. It is proposed that NAPLAN tests move online, with a provisional launch year of 2016. The benefits of moving testing online are many and include:

- aligning with emerging practice and the rapid spread of computers in schools, with students increasingly working on keyboards and in an online environment;
- the capacity to assess a wider range of learning outcomes and to make use of a wide range of authentic tasks and online stimulus materials; and
- the capacity to better tailor assessment to the abilities of students and avoid current ceiling and floor effects associated with single-form tests.

As the NAPLAN testing moves online, the amount of third party material that is needed will increase. This is because the tests will become "testlets" which will hone in on the level of capability of individual students through branching pathways.

#### 3.2 Student work samples

ACARA also obtains licences for third party materials used in student work samples, some of which are communicated on the Australian Curriculum website (<http://www.australiancurriculum.edu.au/>), a public website. Selected student work samples are used as illustrations of achievement.

Generally, students are asked to provide a written or oral response to an image or text. Sometimes, the image or text is owned by third parties. In many cases, it is important to include the third party material as part of the student response, so that teachers are able to gauge the strength of the response.

### 4. Existing copyright law makes it difficult for ACARA to fulfil its mandate

ACARA faces considerable difficulties in relation to obtaining appropriate third party licences for NAPLAN and student work samples under existing Australian copyright law because:

- a. Although section 200(1)(b) of the Copyright Act 1968 (Cth) (**Copyright Act**) allows ACARA to reproduce works in hard copy examination papers, this exception does **not** permit the communication of those examination papers online. ACARA will therefore lose the protection of section 200(1)(b) when NAPLAN testing moves online;
- b. Section 200(1)(b) of the Copyright Act does not cover *post-test* use of third party materials by the State and Territory Departments of Education, State and Territory statutory education authorities and Education Services Australia Limited (**ESA**). So,



regardless of the current protection given for hard copy exams, ACARA is required to obtain third party licences for each and every piece of third party material included in the NAPLAN tests;


- c. ACARA has been advised that it is not an “educational institution” within the very technically drafted Part VB statutory licence, and therefore is not able to rely on that licence; and
- d. Significant administrative burdens have hindered ACARA’s potential registration as a Government-authorised body under section 183 of the Copyright Act, preventing ACARA from obtaining the advantage of this statutory government licence.

As a result, ACARA is required to undertake lengthy and unwieldy permissions processes for every use of third party material, no matter how small or how pivotal to the education of Australian students. Furthermore, with the transition to online assessment, the need for, and volume of, third party material increases. This necessarily increases the complexity of managing third party licences and changes the risk profile for ACARA and other bodies that re-use test items, including States and Territories and ESA.

## 5. Contact

If you have any queries in relation to the matters raised in this letter, please contact Peter Matheson, Board Secretary, by email [peter.matheson@acara.edu.au](mailto:peter.matheson@acara.edu.au) or phone 02 8098 3116.

Yours sincerely



Robert Randall  
**Chief Executive Officer**

Cc: Ms Delia Browne and Ms Sarah Lux-Lee, National Copyright Unit, Standing Council on School Education and Early Childhood (SCSEEC)