

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

**SUPPLEMENTARY SUBMISSION TO THE
AUSTRALIAN LAW REFORM COMMISSION INQUIRY
INTO COPYRIGHT AND THE DIGITAL ECONOMY**

PREPARED BY THE NATIONAL COPYRIGHT UNIT

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Introduction

The Copyright Advisory Group - Schools (CAG) appreciates this opportunity to provide the Australian Law Reform Commission (ALRC) with a brief supplementary submission addressing some of the issues raised in submissions in response to the Discussion Paper. A full explanation of CAG and its interest in copyright is provided in our primary submission to the Discussion Paper. This submission should be read as complementary to CAG's previous submissions to the ALRC.

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

Before turning to the detail of this submission, CAG feels it is important to restate a number of key points from its previous submissions as they may not have been fully understood by some submitters:

1. The introduction of a fair use provision would not mean that all educational uses of content would be free. A significant proportion of educational uses of copyright materials would not be covered by a fair use provision and would still require a licence (with accompanying payment to copyright owners). These statements have been endorsed at the highest level in the education sector – including by Commonwealth, State and Territory Education Ministers.
2. The repeal of the educational statutory licences would not mean that copyright owners would be required to negotiate individually with schools, nor would schools and teachers be required to seek individual permissions or licences for their use of copyright materials in classrooms. Collective voluntary licensing arrangements would continue to exist under the ALRC's proposals. The Departments of Education, and the Catholic and independent schools' administrative bodies, would continue to negotiate collective voluntary licences with the collecting societies on behalf of Australian schools.
3. Fair use would not make life harder for teachers. Under the current system, teachers need to learn different copyright rules for different types of content, and when using 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 a teacher standing at a photocopier or interactive white board. In contrast, fair use would allow clear and simple guidelines to be created for teachers to use in their day-to-day activities. These guidelines could apply irrespective of the teaching method or technology being used.
4. Critically, the flexibility of fair use would allow guidance to be provided about how teachers should be allowed to use emerging technologies in Australian classrooms.

Our experience in working with teachers is that teachers want to do the right thing. Fair use would make it safer for teachers to use new technologies and teaching tools in the classroom.

In this supplementary submission, we address three matters:

- Voluntary collective licensing.
- Comments made by the Australian Competition and Consumer Commission (ACCC) regarding the reforms proposed by the ALRC.
- Statutory damages.

1. Voluntary collective licensing - why teachers and authors have nothing to fear

The ALRC has received a great many submissions from teachers and authors (many of which were standard form letters) expressing concern that the proposed repeal of the Part VB statutory licence would be detrimental to them. At the behest of Copyright Agency and the Australian Society of Authors, many teachers voiced concerns that they would no longer have easy access to a wide range of educational content for classroom use, and many authors expressed concern that they would not be paid when their works were used by schools. Similarly, at the behest of Screenrights, the ALRC has received submissions from audio-visual rights holders who are concerned that repeal of the Part VA statutory licence would mean the end of collective licensing for educational use of broadcasts.

As set out above, and in detail in our response to the Discussion Paper, CAG submits that these submissions are based on a false premise: ie, that repeal of the statutory licences would mean the end of collective licensing for educational use of content.

CAG submits that voluntary licensing is not only possible, it is preferable to the existing prescriptive and technology specific statutory licences. The fact that voluntary licensing is beneficial to copyright owners is evidenced by the submission of the Motion Picture Association of America to the Discussion Paper, which asserts the importance to copyright holders of voluntary licensing arrangements:

... the ALRC's approach to copyright law reform ought to reflect the paramount importance of voluntary licensing in the exploitation of copyright works. More broadly, one important aspect of evaluating a proposed change to copyright law should be its impact on incentives to enter into voluntary licensing arrangements, on the development of market-based practices, and on other means of letting markets – rather than government agencies, courts or similar bodies – dictate the terms on which those who have not created or published original works are empowered to exploit them ...

... sound copyright policy must encourage and defer to voluntary licensing arrangements to the greatest extent possible. Licensing has enormous power to deliver the broadest possible access to consumers while preserving strong incentives for more investment in

production and dissemination of works. A policy to maximize flexibility in licensing advances these goals.”¹

1.1 Voluntary collective licensing for works

CAG notes the acknowledgement by Copyright Agency that it could offer a voluntary collective licence to schools. Copyright Agency’s confirmation that it could operate a voluntary collective licence for schools is proof that teachers and authors have nothing to fear from the proposed repeal of the educational statutory licences.

CAG welcomes the confirmation by Copyright Agency that rights holder fears that the ALRC’s proposed reforms would mean the end of collective licensing are misplaced. Following the alarmist and misleading warning from the Australian Society of Authors that repeal of the statutory licences would result in “a radical diminution if not complete destruction of the Copyright Agency as our major collecting society”², Copyright Agency has now confirmed that it would continue to play a significant role with respect to collective licensing in the education sector, and that authors would be free to appoint it to negotiate a collective licence with schools on their behalf.³ CAG also emphasized that the Departments of Education and the Catholic and independent schools’ administering bodies would continue to negotiate with collecting societies on behalf of Australian schools. Schools and teachers would not need to negotiate separate licences with publishers, but will be able to rely on the voluntary collective licences negotiated between the School sector as a whole and the Copyright Agency.

Despite this, however, Copyright Agency continues to assert that voluntary licensing would impose “increased compliance requirements” on both school administrators and teachers. CAG submits that this statement is completely without foundation. Voluntary collective licensing arrangements may in fact make teachers’ lives *easier* in practice – as the licences could better reflect real world uses of copyright materials, and be updated over time to take account of changing practices and teaching tools.

¹ Submission of the Motion Picture Association of America to the ALRC’s Discussion Paper, July 30 2013, at pp 4-5 and 13.

² The ASA Bulletin, June 2013 <http://us6.campaign-archive2.com/?u=c26dc641565f5d18273cad4dd&id=c057ec0659&e=a466c5e84d>

³ Copyright Agency submission in response to Discussion Paper, p 38

In the table below, we respond to specific claims of “increased compliance requirements” made by Copyright Agency:

Copyright Agency claims regarding “increased compliance requirements”	CAG’s response
<p><i>Schools would have to check whether a particular use is allowed under a licence, and meet any terms and conditions of the licence</i></p>	<p>This is absolutely no different to the situation under the existing educational copying regime.</p> <p>Under the existing regime, schools need to know whether a particular use is covered by one of the statutory licences, one of the voluntary licences with music collecting societies, or an exception such as s 200AB or s 28. Schools are assisted in this regard by the National Copyright Unit, which provides clear and simple guidance on what uses are allowed in schools, and what terms and conditions must be complied with.</p> <p>There would be <u>no</u> increased burden on schools.</p>
<p><i>Schools would have to check whether a use is allowed under a free exception, and meet any terms and conditions of the exception</i></p>	<p>As discussed above, schools are already required to check whether a use is permitted under a free exception, and to meet the terms and conditions of the exception.</p> <p>CAG believes that under a fair use regime the decision making process would be <i>simpler</i> than it is at present. The National Copyright Unit would develop clear and simple ‘fair use guidelines’ that could be applied by teachers irrespective of the type of content or teaching method being used. This would make it easier - not harder - to use emerging technologies in classrooms.</p> <p>There would be <u>no</u> increased burden on schools.</p>
<p><i>Schools would have to meet internal administration requirements for risk management</i></p>	<p>Schools are already required to meet internal administration requirements for risk management.</p> <p>For example, a teacher may be uncertain whether a particular use would be covered by one of the existing licences (statutory or</p>

	<p>voluntary), or one of the existing exceptions.</p> <p>While in many cases the National Copyright Unit is able to provide a clear yes or no answer, in some cases the answer is not clear cut. In these situations, schools make an assessment based on their own internal administration requirements for risk management.</p> <p>The same would apply under the regime proposed by the ALRC. There would be <u>no</u> increased burden on schools.</p>
<p><i>There would be “close monitoring of all institutions”</i></p>	<p>It is fanciful to suggest that under voluntary collective licensing, Copyright Agency would engage in “close monitoring of all institutions”.</p> <p>Australian schools successfully operated under a voluntary licence with the Copyright Agency from 1989 – 1996 and no such ‘close monitoring’ occurred.</p> <p>In comparable jurisdictions - where voluntary collective licensing is the norm - the relevant collecting society does not “closely monitor” all schools.</p> <p>There would be <u>no</u> increased burden on schools.</p>

1.2 Voluntary collective licensing for broadcasts

In our submission in response to the Discussion Paper, we acknowledged that Screenrights would not be in a position to operate a comprehensive voluntary collective licence for educational use of broadcasts unless the Act was amended to include a legislative provision expressly empowering Screenrights (or any other collecting society) to do so. This is because, unlike print and graphic works, broadcasts generally contain a number of underlying works and it would be difficult if not impossible for Screenrights to clear all the rights before granting a collective voluntary licence to schools to use broadcasts.

CAG – via the Director of the National Copyright Unit – has discussed this issue with Screenrights and indicated a) an acknowledgement of the potential need for statutory support for a voluntary licence for broadcasts and b) a willingness to discuss the appropriate nature of such statutory support with Screenrights.

New Zealand, Canada and the UK are examples of jurisdictions where legislative support for collective voluntary licensing of broadcasts has been provided for this purpose. Voluntary collective licences have been operating effectively in those jurisdictions for many years. Set out below is some further detail on how voluntary collective licensing of broadcasts operates in these jurisdictions. What this shows is that there are workable options for voluntary collective licensing of broadcasts for educational use.

The Canadian model for educational use of broadcasts

The Canadian Copyright Act (*the Canadian Act*) contains the following regime for educational use of broadcasts (including underlying works):

Firstly, there is a free exception permitting schools to copy and perform news programs and news commentary programs for “educational or training purposes”.⁴

Secondly, there is a new fair dealing for education exception that is likely to apply to some educational uses of broadcasts that fall outside of the free news/news commentary exception.⁵

Thirdly, there is an exception permitting schools to copy and perform other types of broadcasts (ie non-news or news commentary programs) for educational and training purposes provided that they pay royalties as determined by the Copyright Board and comply with certain terms and conditions set out in the Act.⁶ No remuneration is payable if the copy was made for preview purposes only and is destroyed (without having been shown to students) within 30 days of the copy being made.⁷ These provisions have the effect of authorising the relevant collecting society (Educational Rights Collective of Canada (ERCC)) - to grant a voluntary collective licence to schools without having first obtained authority from the relevant rights holders.

It would be a simple matter to amend the Act to incorporate a provision of the kind contained in s 29.7 of the Canadian Act. This would have the effect of authorising Screenrights to grant a voluntary licence to schools for uses of broadcasts that exceeded what was permitted in reliance on fair use/fair dealing for education.

The UK/New Zealand model for educational use of broadcasts

The UK and New Zealand have adopted a slightly different approach to Canada.

Both the UK Copyright Designs and Patents Act (CDPA)⁸ and the New Zealand Copyright Act (New Zealand Act)⁹ contain an exception that permits schools to copy and perform broadcasts

⁴ s 29(6) of the Canadian Act

⁵ s 29 of the Canadian Act

⁶ s 29.7(2) and (3) of the Canadian Act.

⁷ s 29.7(1) of the Canadian Act.

⁸ s 35 of the CDPA

⁹ s 48 of the New Zealand Act

(including underlying works) without remuneration unless a licensing scheme has been certified under the relevant Act. This model is sometimes referred to as a “licence it or lose it” model.

The main difference between this model and the Canadian model is that in Canada, the relevant collecting society is authorised by the Canadian Act to grant voluntary licences for educational use of broadcasts without the need to obtain consent from all rights holders, while in the UK and New Zealand, the relevant collecting society can only grant a voluntary collective licence on behalf of rights holders who have expressly authorised it to do so. Schools in the UK and New Zealand can take advantage of a free exception if the rights holder has not agreed to the content being licensed for educational use.

The UK Box of Broadcasts service

A good illustration of the flexibility of the UK voluntary licence for educational use of broadcasts is the Box of Broadcasts (BoB) service operated by the British Universities Film and Video Council (BUFVC).

BoB is an off-air recording and video archive service available to staff and students of educational institutions who have a licence with the UK equivalent of Screenrights, the Educational Rights Association (ERA). As well as allowing staff and students to watch or listen to programmes missed in the last week, it allows them to request that a recording be made of an upcoming program from more than 50 television and radio channels. Once recorded, the content can be retained indefinitely (subject to disc storage space). Content can be viewed on or off campus. There is also an editing service that allows users to create specific clips, tag these, and share them with other users.¹⁰

It would be a simple matter to amend the Act to include a provision of the kind contained in either s 35 of the CDPA or s 48 of the New Zealand Act. This would have the effect of encouraging rights holders to authorise Screenrights to include their content in any voluntary licence it granted to schools. It would also ensure that schools were free to use broadcasts for educational purposes, whether or not rights holders were prepared to grant a licence for this use.

CAG has not formed a final view as to what model of statutory provision (ie, the Canadian model, the UK/New Zealand model, or some alternative model) would be most appropriate for Australia. However the international experience shows that it is perfectly possible for voluntary collective licensing of broadcasts to work.

As CAG has already submitted, a major shortcoming of the existing statutory licence for broadcasts is that there is no scope for *any* non-remunerable use, regardless of how “fair” the use might be when considered in light of the ALRC’s proposed fairness factors.

¹⁰ <http://www.jisc.ac.uk/news/box-of-broadcasts-launched-to-institutions-nationwide-19-may-2009>

CAG has freely acknowledged that many ways in which they currently use broadcasts in the classroom would exceed what would be permitted under fair use or fair dealing for education and therefore require a licence. In our submission, however, irrespective of the model chosen, it would be imperative to ensure that it was absolutely clear on the face of the Act that there was no requirement for schools to obtain a licence for uses that would be permitted under fair use or fair dealing for education. In its submission in response to the Discussion Paper, the ACCC has highlighted the importance of ensuring that uses that fall within a fair use exception do not require a licence.

CAG submits that a less prescriptive voluntary licensing regime is likely to be better placed to respond in a nimble fashion to changed practices and teaching methods that are an inevitable feature of a rapidly developing technological environment. We also note that in its submission in response to the Discussion Paper, the ACCC said that it did not oppose repeal of the educational statutory licences,¹¹ which suggests that the ACCC does not share Screenrights' view that voluntary collective licensing would be "less efficient" than Part VA. The ACCC's only expressed concern with the ALRC's proposal to replace statutory licensing with voluntary collective licensing was the importance of ensuring that collecting societies were not in a position to abuse market power. We discuss this further below.

2. Comments on the ACCC submission

CAG welcomes the submission by the ACCC in support of fair use.¹² It is, in our view, significant that Australia's competition regulator has given full consideration to the ALRC's proposals, as well as to objections from rights holder groups, and reached the view that fair use would "promote an appropriate balance between socially beneficial incentives to create and incentives to disseminate and use copyright", as well as "provide the degree of flexibility required for meeting the demands of users and rights holders as changes occur in the digital economy".¹³

It is also significant that an independent body such as the ACCC has rejected the suggestion by some rights holder groups that fair use would be unduly uncertain. CAG agrees with the ACCC that while there may be a *degree* of uncertainty, this is "likely to be at the margins or in new(er) areas of copyright use, where the flexibility and adaptability of the law is arguably most necessary".¹⁴

Statutory licences

As we have already noted above, while the ACCC has said that it has no objection to the proposed repeal of the educational statutory licences, it has sounded a word of warning regarding the possibility of collecting societies being in a position to abuse market power when negotiating with user groups. The ACCC has suggested, for example, that concerns may arise

¹¹ ACCC submission in response to the Discussion Paper, para 7.2

¹² ACCC submission in response to the Discussion Paper

¹³ Ibid para 1.7, 1.8

¹⁴ Ibid para 4.21

as to the efficiency and fairness of the terms and conditions negotiated during such negotiations, and has urged the ALRC to further consider potential solutions to these concerns.

CAG agrees that further consideration may need to be given to ways of ensuring that collecting societies are not in a position to abuse market power.

The ACCC has also submitted that “where high transaction costs are prevalent in direct voluntary licensing arrangements, there may be a rationale for the introduction of statutory licensing schemes to ensure users can licence copyright materials”.¹⁵ CAG submits that the transaction costs associated with Copyright Agency or Screenrights operating a voluntary collective licence for schools could be expected to be no higher than the transaction costs of operating the statutory licences. In fact, Copyright Agency’s transaction costs may well be significantly lower under a voluntary collective licence, as it would be relieved of what it considers to be its obligation to collect and seek to distribute payments for content - such as freely available internet content - that no rights holder ever expected to be paid for.

Fair use and licensing

CAG welcomes the ACCC submission to the effect that users should not need to obtain a licence for uses that are considered ‘fair’ under a fair use exception.¹⁶

We note that the ACCC has raised a concern that “if what is ‘fair’ is unclear, licensees may negotiate licences for uses that may not infringe copyright”.¹⁷ However CAG anticipates that, as has occurred in the United States, user communities would, in conjunction with their legal advisors, develop fair use guidelines that would provide a great deal of assistance for members of their community when deciding whether a particular use required a licence.¹⁸

The fourth fairness factor - harm to the market or “potential market”

CAG agrees with the ACCC that further consideration may need to be given to ways of ensuring that courts do not define “market” in a manner that is overly broad when they come to consider the proposed fourth fairness factor; ie, ‘the effect of the use upon the potential market for, or value of, the copyright material’. The ACCC has highlighted the risk that an overly broad application of this factor may result copyright rights being extended “in ways [that] effectively create monopoly-type characteristics in markets that are ancillary to the primary market for the copyright materials”.¹⁹

In the education context, a relevant example would be copying by a teacher of the television news for the purposes of playing an item to students in class the next day. Educational use of this kind of content is completely ancillary to the primary “market” for the content.

¹⁵ Ibid para 7.3

¹⁶ Ibid para 7.21

¹⁷ Ibid

¹⁸ For more on this, see p 34 of our submission in response to the Discussion Paper

¹⁹ Ibid para 4.24

Contracting out of fair use

CAG strongly endorses the ACCC submission to the effect that the ALRC should reconsider the proposed parameters of its contracting out limitations by extending the limitations to all fair use exceptions.

We agree with the ACCC that extending the proposed prohibition on contracting out to cover all instances where the use of copyright material would be considered fair use would likely be in the best interests of users and competition.²⁰ As the ACCC notes in its submission, this should follow if the proposed fair use exception is grounded in a proper cost-benefit framework.²¹

3. Statutory damages

In its submission in response to the Discussion Paper, APRA/AMCOS submitted that the availability of statutory damages in some circumstances in the US was a factor that was relevant to any consideration of the US fair use exception as an appropriate model for Australia.²² The suggestion appears to be that the presence of statutory damages in the US shapes the behaviour of would-be users.

CAG submits that notwithstanding the absence of statutory damages in Australia, would-be users are actually in a similar position to their US counterparts when it comes to the potential deterrent effect of facing a significant damages award should they not adopt a reasoned and prudent approach to determining whether they are entitled to rely on fair use. As was noted in the submission by Burrell et al,²³ the fact that in Australia compensatory damages can be awarded at large,²⁴ as well as the fact that additional damages (often in excess of compensatory damages) can be awarded for flagrant infringements,²⁵ are each likely to have a similar

²⁰ Ibid para 6.6

²¹ Ibid

²² APRA/AMCOS submission in response to the Discussion Paper, para 2.7.

²³ Submission by Robert Burrell, Michael Handler, Emily Hudson and Kimberlee Weatherall in response to the Discussion Paper, p 32

²⁴ Cases referred to Burrell et al: *Spotless Group Ltd v Blanco Catering Pty Ltd* (2011) 93 IPR 235; *Foxtel Management Pty Ltd v Mod Shop Pty Ltd* (2007) 165 FCR 149; *Columbia Picture Industries Inc v Luckins* (1996) 34 IPR 504; *Enzed Holdings Ltd v Wynthea Pty Ltd* (1994) 3 IPR 619

²⁵ Cases referred to by Burrell et al: *Corby v Allen & Unwin Pty Ltd* (2013) 297 ALR 761 (total compensatory damages payable to applicants \$9,250; additional damages \$45,000); *Facton Ltd v Rifai Fashions Pty Ltd* (2012) 199 FCR 569 (compensatory damages \$14,213; additional damages \$25,000); *Aristocrat Technologies Australia Pty Ltd v Global Gaming Supplies Pty Ltd* (2009) 84 IPR 222 (compensatory

²⁵ damages US\$44,800; additional damages A\$450,000); *Futuretronics.com.au Pty Ltd v Graphix Labels Pty Ltd* (2009) 81 IPR 1 (compensatory damages nominal at \$10, additional damages \$10,000); *Deckers Outdoor Corporation Inc v Farley (No 5)* (2009) 262 ALR 53 (compensatory damages \$3.04 million; additional damages \$4 million); *Aristocrat Technologies Australia Pty Ltd v DAP Services (Kempsey) Pty Ltd (in liq)* (2007) 239 FCR 564 (compensatory damages \$80,000; additional damages \$200 000); *Microsoft Corporation v PC Club Australia Pty Ltd* (2005) 148 FCR 262 (compensatory damages of US\$188,950; additional damages of US\$350,000 against the corporate respondent and US\$350,000

deterrent effect to statutory damages. In other words, would-be users in Australia would most likely be every bit as reasoned and prudent as their US counterparts when relying on fair use, notwithstanding the non-availability of statutory damages.

against its director with day-to-day control); *Universal Music Australia Pty Ltd v Hendy Petroleum Pty Ltd* (2003) 59 IPR 204 (compensatory damages of \$299, additional damages of \$17,500).