

# Copyright Advisory Group to the COAG Education Council (CAG)

## Submission to copyright modernisation discussion paper

July 2018

### Executive Summary

A key finding of Gonski 2.0 is that a modern education system must be complemented by policies which support an adaptive, innovative and continuously improving education system.<sup>1</sup> However the Australian Law Reform Commission (**ALRC**) and Productivity Commission (**PC**) have found that Australia's educational copyright system is not flexible, and recommended that Australia adopt a flexible fair use provision to enable the appropriate use of digital technologies in Australian schools.

The Government's Gonski 2.0 agenda cannot be fully implemented without reform to the Copyright Act. This is because Australia's current educational copyright system is simply not flexible enough to fully implement the Gonski reforms.

- The Gonski 2.0 agenda is designed to move Australia's education system away from 20th century thinking to adopt a 21st century approach to education - ensuring that all the technological advancements of the 21st century can be used for the benefit of all Australian students. As the Government recognised in the context of the *Copyright Amendment (Service Providers) Bill 2018*,

*Classrooms are increasingly interactive and connected, with virtually every aspect of education today involving some use of digital technology.*<sup>2</sup>

However Australia's copyright laws are still stuck in the 20th century. Copyright laws designed for the age of the photocopier are wholly inadequate in the age of iPads, interactive whiteboards, virtual reality and 3D printers.

- The Gonski 2.0 agenda focuses on tailored learning solutions and individual learning outcomes.

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<sup>1</sup> Department of Education and Training, *Through Growth to Achievement: Report of the Review to Achieve Educational Excellence in Australian Schools* (2018) 13.

<sup>2</sup> *New copyright laws strengthen Australia's digital landscape*, Senator the Hon Mitch Fifield, Media Release, 27 June 2018.

However Australia’s educational copyright provisions are still based on “chalk and talk” learning models and either disincentivise or simply do not permit many educational uses of new technologies in Australian schools.

- The Gonski 2.0 agenda focuses on learning that occurs both inside and outside the school gates.

However Australia’s current educational copyright system is designed predominantly for an outdated learning model where all teaching happens inside the classroom. There are many copyright impediments preventing school and industry collaboration or parent engagement.

In its response to the PC’s report, the Government noted the ALRC and PC recommendations for fair use, and stated that its aim is to create a modernised copyright exceptions framework that keeps pace with technological advances and is flexible to adapt to future changes.<sup>3</sup>

CAG submits that introducing a fair use exception into the Copyright Act is the best way to achieve this modernised copyright exceptions framework, and to ensure that Australia’s copyright system is capable of supporting the Government’s vision for a 21st century school system as outlined in the Gonski 2.0 report.

A truly modern education system needs truly modern copyright laws.

If the Government is serious about its education reform agenda, it must introduce a fair use provision into the Copyright Act. This will ensure that Australia’s copyright system is capable of supporting the Government’s vision for a 21st century school system as outlined in the Gonski 2.0 report.

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<sup>3</sup> Department of Industry, Innovation and Science, *Australian Government Response to the Productivity Commission Inquiry into Intellectual Property Arrangements* (2017) 7.

## Introduction

This submission is made by the Copyright Advisory Group to the COAG Education Council (**CAG**). CAG welcomes this opportunity to provide comments on the Government's *Copyright Modernisation Consultation Paper* (**Consultation Paper**).

CAG members include Commonwealth, 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 approximately 3.8 million students. CAG is assisted by the National Copyright Unit (NCU), a small secretariat based in Sydney. NCU operates the Smartcopying website,<sup>4</sup> the official guide to copyright issues for Australian schools and TAFEs.

The Modernisation Consultation comes at a critical time for the Australian school sector. At the same time as the Government is considering the best way to modernise the *Copyright Act 1968* (**Copyright Act**), the Government is also focused on modernising the Australian school system, following the recommendations of the *Review to Achieve Educational Excellence in Australian Schools* (**Gonski 2.0**).<sup>5</sup>

Prime Minister Turnbull has described the Gonski 2.0 recommendations as important directions for reform, designed to move the Australian school system towards a more flexible approach:

*So instead of having - dare I say it - a 20th century as opposed to a 21st century approach to education... we need some changes to ensure that all of the tools and insights of the 21st century are brought to bear to enable our children to get the best out of their time at school.*<sup>6</sup>

CAG submits that a similar flexible approach is required in Australia's Copyright Act to ensure that Australia's copyright modernisation and educational policy goals are aligned. A truly modern education system needs truly modern copyright laws.

The ALRC and the PC have both recommended that the best way to introduce flexibility into the Copyright Act is to introduce a fair use provision. CAG strongly agrees with these recommendations.

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<sup>4</sup> <http://smartcopying.edu.au/>.

<sup>5</sup> Department of Education and Training, *Through Growth to Achievement: Report of the Review to Achieve Educational Excellence in Australian Schools* (2018).

<sup>6</sup> Prime Minister Malcolm Turnbull, 'Doorstop at Ermington West High School with Mr David Gonski AC' (Transcript, 30 April 2018).

In its response to the PC's report, the Government noted the ALRC and PC recommendations for fair use, and stated that its aim is to create a modernised copyright exceptions framework that keeps pace with technological advances and is flexible to adapt to future changes.<sup>7</sup>

CAG submits that introducing a fair use exception into the Copyright Act is the best way to achieve a modernised copyright exceptions framework, and to ensure that Australia's copyright system is capable of supporting the Government's vision for a 21st century school system as outlined in the Gonski 2.0 report.

This submission is divided into 8 parts:

1. Modernising the Australian school system: Gonski 2.0;
2. Implementing Gonski 2.0 requires copyright reform;
3. Why Australia's educational copyright system needs to be modernised;
4. What does a modern educational copyright system look like?;
5. Flexible education systems need flexible copyright laws. Australian schools need fair use;
6. Fair use will not harm copyright owners;
7. Copyright, contract and TPMs; and
8. Orphan works.

## **Part 1: Modernising the Australian school system - Gonski 2.0**

In July 2017 the Australian Government established the Gonski 2.0 review to provide advice on how to improve student achievement and school performance.<sup>8</sup> The goal of the reforms is to ensure that all Australian students receive a world-class school education, tailored to individual learning needs, and relevant to a fast-changing world. The Government has accepted all Gonski 2.0 recommendations in principle.<sup>9</sup>

The Minister for Education and Training, Senator the Hon Simon Birmingham, called the Gonski 2.0 recommendations "a blueprint for everyone involved in school education" and stated that

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<sup>7</sup> Department of Industry, Innovation and Science, *Australian Government Response to the Productivity Commission Inquiry into Intellectual Property Arrangements* (2017) 7.

<sup>8</sup> Department of Education and Training, *Through Growth to Achievement: Report of the Review to Achieve Educational Excellence in Australian Schools* (2018).

<sup>9</sup> Department of Education and Training, *Through Growth to Achievement: Report of the Review to Achieve Educational Excellence in Australian Schools FAQs* (8 May 2018) <<https://www.education.gov.au/through-growth-achievement-report-review-achieve-educational-excellence-australian-schools-faqs>>.

“Together, we can ensure Australia’s education system is a world leader for generations to come”.<sup>10</sup>

However, in order to achieve this goal, policy makers must recognise that school education has shifted away from an entirely classroom-based “chalk and talk” model, to a more flexible model which ensures that students can obtain all the benefits provided by digital technologies. Getting the policy settings right to enable flexible learning is essential to ensure that Australian students receive the best possible education, and Australia’s future workforce is fully equipped with the skills needed to be highly skilled participants in the digital economy.

CAG submits that these policy objectives must also inform the Government’s consideration of how best to modernise the Copyright Act. It is essential that Australia’s copyright system is flexible enough to reflect the realities of a 21st century education system.

## **1.1 Developments in education best practice**

The digital age provides many opportunities for Australian teachers and students. Developments such as “flipped classrooms”, “blended learning” techniques, and the use of technologies such as artificial intelligence (**AI**), text and data mining (**TDM**), 3D printing and robotics, mean that digital technologies can provide incredible learning opportunities for Australian students.

As the Government recognised in the context of the *Copyright Amendment (Service Providers) Bill 2018*,

*Classrooms are increasingly interactive and connected, with virtually every aspect of education today involving some use of digital technology.*<sup>11</sup>

These developments in educational best practice provide the context for the Government’s Gonski 2.0 agenda, and equip students with the tools they will need to excel in the digital economy, which will require greater flexibility in a less a less predictable world.

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<sup>10</sup> Prime Minister Malcolm Turnbull and Minister for Education and Training Senator Simon Birmingham, ‘A Blueprint for Education Success’ (Joint Media Release, 30 April 2018).

<sup>11</sup> *New copyright laws strengthen Australia’s digital landscape*, Senator the Hon Mitch Fifield, Media Release, 27 June 2018.

A recent report from the Australian Computer Society (ACS) prepared by Deloitte Access Economics forecast that demand for ICT workers is set to grow, with the Australian economy requiring an additional 100,000 skilled ICT workers by 2023.<sup>12</sup>

As ACS President Yohan Ramasundara stated when the report was released:

*The demand for digital skills in our economy is exploding ... The growth of artificial intelligence, automation and the internet of things is driving significant disruption across all industries, and highly trained ICT professionals are in more demand than ever before.*

*If we want to be competitive in the world economy, we need to invigorate the education and training sectors to increase Australia's ICT talent pool.*<sup>13</sup>

As was recognised by the Secretary of the NSW Department of Education, Mark Scott: “we cannot be in the business of predicting what employers will want in 2030, much less in 2050”.<sup>14</sup> This lack of certainty demands that policy makers take a “broader perspective about what we judge good education to be” in order for students to “be best placed to flourish in a world of intelligent machines”.<sup>15</sup> This means adopting a view of education that looks beyond maths and science, ensuring that students are also digitally literate and capable of designing creative solutions to the problems of the future.

### ***Flipped classrooms***

The *Connecting Australia* report has recognised the profound shift that ubiquitous access to broadband infrastructure will bring to Australian businesses and the future workforce. The report highlights that access to the NBN “is expected to help create a nation of flexible workers with up to 47,300 additional people working from home in 2021, compared to 3,000 additional workers in 2017”.<sup>16</sup>

The next generation of Australian workers will need to be adept at collaboration and lateral thinking. Learning environments need to be built around the development of these skills. One

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<sup>12</sup> Deloitte Access Economics, *ACS Australia's Digital Pulse: Driving Australia's international ICT competitiveness and digital growth* (Report, 2018) 3.

<sup>13</sup> Australian Computer Society, *Digital leadership requires an additional 200,000 Australian tech workers* (Media Statement, 27 June 2018).

<sup>14</sup> Mark Scott, ‘Preparing today's students for tomorrow's world’ (Speech delivered at the Trans-Tasman Business Circle, 29 June 2017).

<sup>15</sup> Ibid.

<sup>16</sup> AlphaBeta, *Connecting Australia: Changing the way we work – an economic study into how we work, live and connect* (2018) 15.

of the methods most commonly pointed to in research to achieve these goals is the ‘flipped’ classroom model.

Many schools are already moving to ‘flipped’ classroom models, which rely heavily on internet technologies. In flipped classrooms, teachers typically deliver instructional content to students at home through online videos, collaborative discussions or readings. Students then come to class and apply the conceptual knowledge that they have learnt at home in a group setting, allowing them time to work collaboratively and receive more individual attention from teachers.

This model relies on accessibility to technology. In order for flipped classrooms to function effectively, teachers need to be able to easily upload content to Learning Management Systems for students to view outside of the classroom. This could involve teachers creating their own content, but the best results have come from teachers being able to curate a wide range of material for students to access. Australian teachers who have adopted flipped classroom methods have said that they wouldn’t return to their ‘old methods of working out of textbooks’.<sup>17</sup>

The anecdotal evidence provided by teachers who have adopted flipped classroom methods is consistent with research, conducted as far back as 2013, at Monash University into the sociology of technology use in educational settings. Based on the results of this research, Monash University predicts that textbooks will be nonexistent in classrooms within ten years, replaced by 3D ‘digibooks’.<sup>18</sup> In the next decade, ‘telepresence robots’ will enable students to remotely connect to the classroom. These devices combine the portable teleconferencing capabilities of tablets with the ability to tilt and pan the device’s camera and could have a profound impact on children who may not otherwise be able to physically access classrooms.<sup>19</sup>

### ***Blended learning***

Blended learning combines teaching and learning methods from both face-to-face, mobile and online learning and it includes elements of both synchronous and asynchronous online learning options. The integration of new mobile technologies and online media is proving highly effective in helping schools meet the expectations of 21st century learners, while addressing the challenges of limited resources and the special needs of many students.<sup>20</sup>

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<sup>17</sup> Linda Morris, ‘[Flipping Teaching On Its Head](#)’ *Sydney Morning Herald* (Online) 31 March 2018.

<sup>18</sup> Marina Thomas, ‘[How will schools look in 10 years?](#)’ *News.com.au* (Online) 5 February 2013.

<sup>19</sup> School News, ‘[Robots offer ‘telepresence’ in classrooms of the future](#)’ (May 2017)

<sup>20</sup> State of Victoria (Department of Education and Early Childhood Development) [Blended Learning: A synthesis of research findings in Victorian education 2006–2011](#) (2012) 7.

In the United States, the use of blended learning in schools has increased by an average of over 30% per year since 2006.<sup>21</sup>

*“We live in a connected world with unparalleled access to a vast array of online information and experiences. Our children are growing up in a world where excitement and opportunities are just a screen touch away.”<sup>22</sup>*

Since 2014, the Tasmanian Department of Education has been working with Telstra to design a framework that would allow schools to deliver blended learning options to as many students as possible. In particular, blended learning options assist students who would otherwise be excluded from accessing senior schools. In 2016, this problem was noted by the then Education Department secretary, Jenny Gale, who highlighted the “tyranny of distance” as a significant issue that continues to have an impact on Tasmanian students. “If we are to provide equal opportunities for young people wherever they live we must embrace innovative technology”.<sup>23</sup>

### **AI, TDM and data analytics**

As Mark Scott, Secretary of the NSW Department of Education, recognised in a recent speech:

*“There are dozens of examples of AI being used in classrooms around the world – Carnegie Learning’s Intelligent tutoring and assessment systems used in Philadelphia schools to transform the maths classroom; Third Space Learning’s online math tutoring platform used by over 500 schools in the United Kingdom; Brainly’s Intelligent support for collaborative learning which has 80 million unique users monthly across 35 countries and which uses a social network to help millions of students collaborate through the power of AI.”<sup>24</sup>*

Data analytics tools are being employed internationally to measure student learning and adapt teaching methods to suit individual students based on the results. As Harvard Vice Provost for Advances in Learning has noted, “Adaptive learning programs are very good at speeding up information acquisition and lengthening retention, as well as individualising learning to help

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<sup>21</sup> Barbour, et al, [‘Online and Blended Learning: A Survey of Policy and Practice of K-12 Schools Around the World’](#) (2011) 4.

<sup>22</sup> State of Victoria (Department of Education and Early Childhood Development) [Blended Learning: A synthesis of research findings in Victorian education 2006–2011](#) (2012) 4.

<sup>23</sup> Olga Galacho, [‘Culture Tech: Tasmania embraces classrooms of the future’](#) *Australian Financial Review* (Online) 13 June 2016.

<sup>24</sup> Mark Scott, [‘Preparing today’s students for tomorrow’s world’](#) (Speech delivered at the Trans-Tasman Business Circle, 29 June 2017).

learners see where they have difficulty”.<sup>25</sup>

A report by Pearson has analysed the speed at which the integration of AI in Education (**AIEd**) has developed. The report notes that as humans live and work alongside increasingly smart machines, it is imperative that our education systems are adapted to meet these changes. It finds that AIEd algorithms will soon be able to analyse a student’s interactions with the tool in order to deliver the most appropriate content to suit the student’s learning style and needs.<sup>26</sup>

The report notes that a number of AIEd technologies are already being employed in schools and universities in the United Kingdom. These include ‘educational data mining’ (**EDM**) tools which are able to track the behaviour of students in order to identify students at risk of withdrawing from their studies.<sup>27</sup>

Student engagement with AI will become increasingly important. The NSW Department of Education recently challenged a consortium of University of Sydney academics to consider the question of what today’s kindergarteners will need to thrive and not just survive in the 21<sup>st</sup> century. Their report found:

*There is a need to engage more effectively with AI and its broader impacts. Increasing ICT literacy is important but involves much more than teaching all students how to code. Rather, it involves equipping young people with digital fluency, ie, the ability to handle the ‘covert’ and ‘amplifying’ impact of AI as well as its more overt consequences for job destruction and transformation of job content.*<sup>28</sup>

## 1.2 The Gonski 2.0 report

The Gonski 2.0 report sets three priorities for the Australian school system:

*Priority 1. Deliver at least one year’s growth in learning for every student every year;*<sup>29</sup>

*Priority 2. Equip every child to be a creative, connected and engaged learner in a*

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<sup>25</sup> Brett Milano, [Harvard Gazette](#) (2017).

<sup>26</sup> Luckin, et al, [Intelligence Unleashed: An Argument for AI in Education](#) (2016) 20.

<sup>27</sup> Ibid 24.

<sup>28</sup> Professor John Buchanen et al, *Future Frontiers Analytical Report. Preparing for the best and worst of times. A report prepared for the NSW Department of Education on the key implications for school education of artificial intelligence and other emerging transformations*, University of Sydney, Sydney Policy Lab, May 2018, p4

<sup>29</sup> Department of Education and Training, [Through Growth to Achievement: Report of the Review to Achieve Educational Excellence in Australian Schools](#) (2018) x.

*rapidly changing world;*<sup>30</sup> and

*Priority 3. Cultivate an adaptive, innovative and continuously improving education system.*<sup>31</sup>

The following extracts from the Gonski 2.0 report highlight the Government's vision for a modern Australian school system:

*The goal of the reforms is to ensure Australian students receive a world-class school education, tailored to individual learning needs, and relevant to a fast-changing world.*<sup>32</sup>

*School education must prepare students for a complex and rapidly changing world.<sup>33</sup> Every young Australian should emerge from schooling as a creative, connected, and engaged learner with a growth mindset that can help to improve a student's educational achievement over time.*<sup>34</sup>

*Shifts in technology and jobs are changing the balance ... of the knowledge, skills and education students need to develop through school.<sup>35</sup> Ensuring that curriculum, learning and pedagogical models can respond to these changing needs must be a key goal of the Australian education system in the next decade.*<sup>36</sup>

*Australia needs to review and change its model for school education ... Australia still has an industrial model of school education that reflects a 20th century aspiration to deliver mass education to all children. This model is focused on trying to ensure that millions of children attain specific learning outcomes for their grade ... It is not designed to differentiate learning or stretch all students to ensure they achieve maximise learning growth each year, nor does it incentivise schools to innovate and continually improve.*<sup>37</sup>

*These reforms ... depend on creating the conditions that will enable teachers and schools to successfully adopt practices that support tailored teaching for growth, such as*

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<sup>30</sup> Ibid x.

<sup>31</sup> Ibid xi.

<sup>32</sup> Ibid viii.

<sup>33</sup> Ibid ix.

<sup>34</sup> Ibid x.

<sup>35</sup> Ibid xi n 6.

<sup>36</sup> Ibid xi.

<sup>37</sup> Ibid ix.

*collaborative planning, teaching and assessment, and personalised learning for students.*<sup>38</sup>

The report made a number of findings and recommendations that CAG submits mean copyright reform is needed in order to achieve the Government's Gonski 2.0 goals:

*Finding 1*

*Achieving educational excellence in Australian schools will require a focus on achievement through learning growth for all students, complemented by policies which support an adaptive, innovative and continuously improving education system.*

*Finding 3*

*There is strong and developing evidence of the benefit of parent engagement on children's learning.*

*Finding 6*

*Fit for purpose school-community engagement undertaken to respond to identified student needs is an effective way to improve the relevance of learning, and to support personal development and student learning growth. School-industry collaboration, mentoring and extra-curricular activities are effective forms of engagement to help achieve this.*

*Finding 7*

*There is compelling evidence, in Australian schools and internationally, that tailored teaching based on ongoing formative assessment and feedback are the key to enabling students to progress to higher levels of achievement.*

*Recommendation 3*

*Ensure all students have the opportunity within schools to be partners in their own learning.*

*Recommendation 8*

*Strengthen school-community engagement to enrich student learning through the establishment of mechanisms to facilitate quality partnerships, including engagement in mentoring, volunteering and extracurricular activities, between schools, employers, members of the community, community organisations and tertiary institutions.*

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<sup>38</sup> Ibid x.

*Recommendation 10*

*Accelerate the development of contemporary pedagogy through the use of collaboration, mentoring, observation, and feedback ... by incorporating these practices into the core role of teachers and creating the conditions to enable teachers to engage in them.*

(emphasis added)

CAG submits that these findings and recommendations cannot be fully implemented without reform to the Copyright Act.

## **Part 2: implementing Gonski 2.0 requires copyright reform**

A key finding of Gonski 2.0 is that a modern education system must be complemented by policies which support an adaptive, innovative and continuously improving education system.<sup>39</sup> However the ALRC and PC have each found that Australia's educational copyright system is not flexible, and recommended that Australia adopt a flexible fair use provision which would enable the appropriate use of digital technologies and teaching methods in Australian schools.

The ALRC noted in its 2013 report *Copyright and the Digital Economy (ALRC report)*:

*... the existing exceptions for educational use of copyright material are due for reform. New exceptions are needed to ensure educational institutions can take full advantage of the wealth of material and new technologies and services now available in the digital age.*

*Education should not be hampered or stifled by overly prescriptive and confined exceptions. Licences should not be required for fair uses of copyright material that do not harm rights holders and do not reduce the incentive to produce educational material.*

*The ALRC has concluded that fair use is a suitable exception to apply [for] educational use.<sup>40</sup>*

The PC supported this recommendation, noting in its 2016 report *Intellectual Property Arrangements (PC report)*:

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<sup>39</sup> Ibid 13.

<sup>40</sup> Australian Law Reform Commission, [Copyright and the Digital Economy, Report No 122](#) (2013) 311.

*The Commission considers there are firm grounds now, and even stronger grounds looking to the future, for amending the Copyright Act to replace Australia’s current exceptions with a broader fair use exception. The key policy question for Government should be how to design exceptions that maximise the net benefit to the community. Importantly, fair use would not replace payment for copyright works that are commercially available to users, but reinforces that user interests should also be recognised by Australia’s copyright system. Adopting fair use would benefit follow on creators and innovators, Australian consumers, schools, other education institutions, libraries and archives.*<sup>41</sup>

In its response to the PC’s report, the Government noted the ALRC and PC recommendations for fair use, and stated that its aim is to create a modernised copyright exceptions framework that keeps pace with technological advances and is flexible to adapt to future changes.<sup>42</sup>

CAG submits that Australia’s current educational copyright system is simply not flexible enough to fully implement the Gonski reforms. In particular:

- The Gonski 2.0 agenda is designed to move Australia’s education system away from 20th century thinking to adopt a 21st century approach to education - ensuring that all the technological advancements of the 21st century can be used for the benefit of all Australian students.

However Australia’s copyright laws are still stuck in the 20th century. Copyright laws designed for the age of the photocopier are inadequate in the age of iPads, interactive whiteboards, virtual reality and 3D printers.

- The Gonski 2.0 agenda focuses on tailored learning solutions and individual learning outcomes.

However Australia’s educational copyright provisions are still based on “chalk and talk” learning models and either disincentivise or simply do not permit many educational uses of new technologies in Australian schools.

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<sup>41</sup> Productivity Commission, [Intellectual Property Arrangements, Report No 78](#) (2016) 184–5.

<sup>42</sup> Department of Industry, Innovation and Science, [Australian Government Response to the Productivity Commission Inquiry into Intellectual Property Arrangements](#) (2017) 7.

- The Gonski 2.0 agenda focuses on learning that occurs both inside and outside the school gates, including in collaboration with parents and the community.

However Australia's current educational copyright system is designed predominantly for an outdated learning model where all teaching happens inside the classroom. There are many copyright impediments preventing school and industry collaboration or parent engagement.

There are two main aspects of the Gonski 2.0 agenda that are hampered by Australia's current copyright system:

1. Parental involvement and industry collaboration; and
2. Implementation of flexible teaching and learning methods.

## **2.1 Parental involvement and industry collaboration**

The Gonski 2.0 report envisages a modern school system where learning occurs both inside and outside the school gates.<sup>43</sup> This is consistent with other State, Territory and Federal Government policies to encourage collaboration between schools and industry and is a critical step in Australia improving its STEM education outcomes.

The STEM Partnerships Forum is a collaborative action under the *National STEM School Education Strategy 2016-2026* (endorsed by all Australian education ministers in December 2015). In its 2017 Issues Paper the Forum identified that:

*Industry is in a privileged position to inspire and lead students. Industry's role is not just as an employer, it can play a greater role in developing a skilled workforce by connecting the concepts taught in our classrooms to real-world applications.*<sup>44</sup>

The Forum's Final Report to the COAG Education Council included the following recommendations:

- *The Australian Government, in partnership with State and Territory Governments and industry associations should collaborate to develop a more detailed understanding of*

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<sup>43</sup> Department of Education and Training, [Through Growth to Achievement: Report of the Review to Achieve Educational Excellence in Australian Schools](#) (2018) 42.

<sup>44</sup> STEM Partnerships Forum, [Optimising STEM Industry-School Partnerships: Inspiring Australia's Next Generation](#) (Issues Paper, 2017) 5.

*future workforce needs, including vacancies and the skills required of employees both in STEM specific areas and areas where STEM skills are valued.*<sup>45</sup>

- *Education authorities should support principals and lead teachers to engage with industry and other partners to develop and implement high quality, contemporary professional learning materials and teaching practices in mathematics, science and technology.*<sup>46</sup>

Australian schools are taking steps to broaden their engagement with industry and the broader community for the benefit of Australian students. **Attachment A** to this submission contains a number of examples of these types of innovative educational initiatives.

However, despite broad agreement from State, Territory and Federal Governments that collaboration between schools and the broader community - including business and industry - is a critical step in Australia improving its education outcomes, the current educational copyright framework makes it difficult to fully achieve these goals.

The existing educational copying regime is ill-suited for a world where the provision of education strays outside the walls of the school. That's because none of the existing educational copying provisions were designed with this kind of community and industry collaboration in mind.

The educational statutory licences and educational copying exceptions do not apply to activities that occur outside of the school, or that involve collaboration between schools and the wider community. This means that the types of collaboration envisaged by Gonski 2.0 are not permitted by the Copyright Act, which is at odds with government policies requiring schools to forge closer collaborations with industry to drive research and innovation.

For example, the classroom performance exception (s 28) that allows teachers to show copyright content to students applies only to activities that occur "in class", or otherwise in the presence of an audience that is limited to "persons who are taking part in the instruction or are otherwise directly connected with the place that the instruction is given" (s 28(1)(a) and (b), emphasis added). Subsection (3) makes clear that parents and guardians are not taken to be persons who are "directly connected" with the place that instruction is given. Activities that

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<sup>45</sup> STEM Partnerships Forum, [Optimising STEM Industry-School Partnerships: Inspiring Australia's Next Generation](#) (Final Report, 2018) 13.

<sup>46</sup> Ibid.

occurred in the presence of members of the general community or industry collaboration would also fall outside the scope of this exception.

CAG submits that there is an urgent need for reform to ensure that schools can rely on educational exceptions to allow students to engage with the broader community and industry.

CAG does not suggest that licences should not be required for activities such as end of year musical performances for parents and the community, as is currently the case. However CAG submits that schools should not lose the benefit of an educational exception in the Copyright Act simply because student learning activities occur in conjunction with a local business.

The ALRC and PC's recommendations for a fair use exception would solve this problem. A fair use exception would allow teachers to use small amounts of copyright materials for students when fair to do so (ie, where the use would not harm rights holder markets), but would not be limited to activities that are conducted within the gates of the school, or the door of the classroom.

## 2.2 Flexible teaching and learning methods

As well as learning occurring outside the school gate, the Gonski 2.0 vision for Australian students is for tailored education, where students are partners in their own learning.

A 21st century education system adopts “flipped” classrooms and other forms of collaborative learning, where students play an active part in their own learning. However, many of the educational exceptions apply only to uses done by a teacher as part of “teaching” or “educational instruction”.

For example,

- s 28 applies only to activities by a teacher “in the course of giving educational instruction” or by a student “in the course of receiving such instruction” (s 28(1)(b)). In other words, the exception is premised on a teaching model that is rapidly becoming a thing of the past. It is not capable of applying to copying that occurs outside of this traditional model;
- s 200AB applies only to traditional classroom activities (ie, “giving educational instruction” s 200AB(3)(b)).

These limitations are not consistent with the modern education system envisaged by Gonski 2.0.

In addition, none of the existing educational exceptions - or other exceptions in the Copyright Act - clearly apply to new technologies such as AI, TDM, machine learning, cloud computing, virtual reality or other innovative digital uses. This means that uses of the most innovative and ground breaking technologies of the 21st century are not covered by an exception to allow use in Australian schools.

A fair use provision does not come with inherent limitations based on outdated assumptions about classroom-based teaching methods, and would allow digital technologies to be used to educate Australian students where these uses are for socially beneficial purposes and do not cause harm to copyright holders.

### **Part 3: Why Australia's educational copyright system needs to be modernised**

As well as the general impediments to implementing the Gonski 2.0 recommendations identified in Part 2 of this submission, the ALRC and PC have found that the existing educational copyright system is not generally fit for purpose in a rapidly changing digital environment and is in urgent need of reform.

The ALRC and PC identified 3 significant problems with Australia's educational copyright provisions which - in combination - mean Australia's educational copyright system is not operating appropriately in the digital age:

1. Schools cannot clearly rely on general copyright exceptions;
2. Narrow and prescriptive educational exceptions are not operating as intended by Parliament; and
3. The scope of the educational statutory licence is overbroad as it applies in the digital environment.

CAG submits that modernising the Copyright Act requires solving each of these problems.

#### **3.1 Schools cannot rely on fair dealing or other copyright exceptions**

Many people are surprised to learn that in Australia there is no generally applicable educational copyright exception that can be relied on by teachers to use small amounts of copyright material for the benefit of Australian students, even in circumstances where the use could not

cause any harm to rights holders, if the use is of the type of material covered by the educational statutory licence.

This is because:

1. There is no general exception allowing fair uses or fair dealings of small amounts of copyright materials for the purposes of education;
2. The limitation in s 200AB(6)(2) means that schools cannot rely on the flexible dealing exception for any educational uses if the type of use might be covered by the statutory licence; and
3. Even student uses of copyright materials that would otherwise be covered by general fair dealing provisions are treated as remunerable under the statutory licence if the student uses material at the direction or suggestion of their teacher.

The combination of these factors means that there is virtually no scope for Australian schools to rely on copyright exceptions for small, non-harmful uses of copyright content that would be considered fair uses of copyright material (and thus not require a licence) in other countries. This also puts Australian schools in a worse position than commercial users of copyright material - such as media companies or law firms - who are not required to obtain a licence if their use would come within one of the fair dealing exceptions such as reporting news, research or study, or providing professional advice.

The ALRC, the PC, and Ernst & Young (on behalf of the Department of Communications and the Arts) have each identified the incapacity of Australian schools and universities to rely on non-remunerable exceptions for any use that would be covered by the statutory licence as a fundamental flaw in the existing educational copying regime.

The ALRC noted:<sup>47</sup>

*8.59 It is sometimes argued that where a licence is available, unremunerated exceptions should not apply. ...In the ALRC's view, the availability of a licence is an important consideration, both in crafting exceptions and in the application of fair use—but it is not determinative. Other matters, including questions of the public interest, are also relevant.*

***8.60 The ALRC considers that it would be unjustified and inequitable if educational institutions, institutions assisting people with disability, and governments could not***

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<sup>47</sup> Australian Law Reform Commission, [Copyright and the Digital Economy, Report No 122](#) (2013) 194.

***rely on unremunerated exceptions such as fair use. Statutory licences should be negotiated in the context of which uses are permitted under unremunerated exceptions, including fair use and the new fair dealing exception.*** If the parties agree, or a court determines, that a particular use is fair, for example, then educational institutions and governments should not be required to buy a licence for that particular use. Licences negotiated on this more reasonable footing may also be more attractive to other licensees.

8.61 This reform, combined with the ALRC's recommendations for the enactment of fair use and other exceptions, ***does not imply that the ALRC considers that all uses now licensed under the statutory licences would instead be free under new unremunerated exceptions. There are many uses of copyright material under the statutory licences that would clearly not be fair use or permitted under other exceptions, and for which users will need to continue to obtain a licence.***

8.62 It should also be noted that although it is not necessary to obtain a licence for uses that do not infringe copyright, this does not necessarily mean that parties to a licence must agree on the scope of fair use and other copyright exceptions. As Professor Daniel Gervais has written, in a collective licence, 'rights holders and users could agree to disagree on the exact scope of fair use, yet include some of the marginal uses in the scope of the license and reflect that fact in the price'.

8.63 The Copyright Act provides that if the parties cannot agree on the amount of equitable remuneration, then this can be determined by the Copyright Tribunal. The Act should be amended to provide that, when determining equitable remuneration, the Copyright Tribunal should have regard to uses made in reliance on unremunerated exceptions, including fair use.

*Recommendation 8–1 The Copyright Act should be amended to clarify that the statutory licences in pts VA, VB and VII div 2 do not apply to a use of copyright material which, because of another provision of the Act, would not infringe copyright. This means that governments, educational institutions and institutions assisting people with disability, will be able to rely on unremunerated exceptions, including fair use or the new fair dealing exception, to the extent that they apply.*

(emphasis added)

The PC said:<sup>48</sup>

*In the Commission's view, adoption of a fair use exception appropriately recognises that some uses of copyright material, whether by the general community or the education sector (such as the examples provided above by the Copyright Advisory Group and in box 6.5), should not be remunerated. **Future negotiations around the remuneration payable under the statutory licences would be informed by the fair use exception, recognising complete coverage of school copying is neither efficient, nor the purpose of the statutory licence scheme.** Even so, fair use will not allow unrestricted and unremunerated copying by the education sector. **The claims made suggesting fair use will eliminate the bulk of, or all, statutory licence fee revenue are implausible.** Moreover, the purported impact on the education publishing sector ignores evidence from those jurisdictions where fair use and education publishing already coexist, or the fact that statutory licence fees make up only a small component of the sector's revenue, with direct licensing and purchasing of content a substantial proportion. ...*

(emphasis added)

Ernst & Young also recognised that Australian schools are required to pay for uses under the statutory licence that would otherwise be free uses:<sup>49</sup>

*Most of the problems raised by the ALRC with respect to the current arrangements relate to what gets counted and paid for under statutory licenses. The main advantage of statutory licenses is that they provide education institutions with considerable flexibility to use copyright material without the transaction costs associated with obtaining permission, provided they pay equitable remuneration to the collecting society for the use. Remuneration is determined by conducting a sample of educational institutions to determine the material being copied. In practice this has meant that uses that nobody else is paying for are being remunerated for by schools and universities under the licenses.*

*This view has been heavily criticised by the statutory collecting societies – the Copyright Agency and Screenrights - who argue that education institutions pay a flat rate for all content they use in reliance on the statutory licenses, which 'does not vary according to actual use of content during the period of the agreement'.*

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<sup>48</sup> Productivity Commission, [Intellectual Property Arrangements, Report No 78](#) (2016) 177.

<sup>49</sup> Ernst & Young, *Cost benefit analysis of changes to the Copyright Act 1968* (Report, 2016) 50–1.

However, the ALRC does not consider this to be a convincing argument stating that:

***The objection that some uses are 'zero-rated' and that institutions pay a flat fee per student or per employee does not seem to undermine the key objections, that the uses are nevertheless counted and that payment for the uses can be sought and negotiated and may go to the final per person flat rate.***

(emphasis added).

#### **A case study: 'tell students to print'**

The existence of the statutory licence is relied on by the Copyright Agency not only to require schools to pay for copying that they do for distribution to students, but also to argue that fair dealing copying by students should be treated as remunerable under the statutory licence, and paid for by schools, when it is done at the direction or suggestion of a teacher.

Although Copyright Agency appears to accept that governments can rely on fair dealing for research or study when their staff copy for this purpose<sup>50</sup> (despite the fact that there is a statutory licence that covers copying by governments), it has taken a different approach to schools. It relies on the case of *CAL v Haines*<sup>51</sup> to prevent schools from relying on fair dealing for any copying that could potentially fall within the scope of the statutory licence.

#### **Example - student research for an assignment**

Student A is completing an assignment on Romeo & Juliet. The teacher has handed out a list of suggested readings, but Student A decides to undertake her own research. She finds an article that looks like it will be relevant and she makes a copy.

Student B is completing the same assignment on Romeo & Juliet, but he decides to stick with what's on the reading list. He chooses one of the articles on the list and makes a copy.

Student A and Student B are both copying for the purpose of completing their school assignment, but Student A's copy is treated as having been made by her under the fair dealing for research or study exception while Student B's copy is treated as having been made by the school under the educational statutory licence (which means that the school pays for the copying).

<sup>50</sup> See *Copyright Agency Limited v State of NSW* [2013] A CopyT 1

<sup>51</sup> *CAL v Haines* [1982] 1 NSWLR 182.

The only difference is that Student B has copied material that was suggested by the teacher and Student A has made her own decision about what to copy.

The position adopted by Copyright Agency has given rise to what CAG submits is a perverse policy outcome: if a student decides to copy a small extract of a work as part of their studies, that use would be covered by the fair dealing exception for research or study, but if a teacher asks that student to copy the same material for a classroom or homework exercise, that copy is treated as remunerable under the statutory licence.

In the 2016 electronic use copyright survey, 5.94% of the electronic use student page rate was from the 'tell students to print/save' activity classification (ie, Student B in the above example).

Contrast this situation to that in Canada, where the Canadian Supreme Court has found that a teacher providing copies of short extracts of works to students was a fair dealing for research or study:

*In the case before us, however, there is no such separate purpose on the part of the teacher. Teachers have no ulterior motive when providing copies to students. Nor can teachers be characterized as having the completely separate purpose of "instruction"; they are there to facilitate the students' research and private study. It seems to me to be axiomatic that most students lack the expertise to find or request the materials required for their own research and private study, and rely on the guidance of their teachers. They study what they are told to study, and the teacher's purpose in providing copies is to enable the students to have the material they need for the purpose of studying. The teacher/copier therefore shares a symbiotic purpose with the student/user who is engaging in research or private study. Instruction and research/private study are, in the school context, tautological.<sup>52</sup>*

### **3.2 Educational copyright exceptions are not operating as intended in the digital environment**

As discussed above, the Copyright Act does not contain a general educational exception to enable teachers to use small amounts of copyright materials for the benefit of Australian students where to do so would not harm copyright owners. Instead, the Copyright Act contains a number of narrow, prescriptive educational exceptions, such as the classroom performance exception (s 28) and the 'flexible dealings' exception (s 200AB). CAG submits that these

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<sup>52</sup> *Alberta (Education) v. Canadian Copyright Licensing Agency (Access Copyright)*, 2012 SCC 37 [23].

exceptions are not operating as intended, and illustrate how a narrow, prescriptive approach to copyright exceptions is not suitable for a digital age.

### ***The classroom performance exception: section 28***

Section 28 of the Copyright Act has traditionally allowed teachers to show copyright content to students (for example, showing a documentary on a television to students in a classroom). It was extended in 2006 to permit teachers to communicate and perform copyright material in class.<sup>53</sup>

Copyright Agency takes the view, however, that this exception is limited in a way that Parliament did not appear to intend. They say that the exception can be relied on by teachers to display artistic works on a classroom whiteboard etc, but not when displaying the majority of text-based works. This interpretation is contrary to statements in the Further Supplementary Explanatory Memorandum to the *Copyright Amendment Bill 2006*:

*33. This amendment adds artistic works, radio and television broadcasts to the exception to the communication right for the strictly limited purposes of s 28.*

*34. The effect of this amendment is to extend the operation of s 28 to the communication of artistic works, live broadcasts, or recordings of broadcasts by educational institutions so that they may be screened or played in the classroom.*

*35. This amendment **brings the communication of artistic works in line with the treatment of other works under s 28** and implements the Government's intention that schools should not be paying broadcasters when they distribute/communicate either, live broadcast programs, or recordings of broadcast programs for use in the classroom.*

(emphasis added)

Despite this clear statement in the Explanatory Memorandum, Copyright Agency takes the position that s 28 does not apply to the display of literary, dramatic and musical works to prevent schools from relying on this exception to display a website or other document to students on an interactive whiteboard or similar screen.

Consider the real-world implications of this interpretation:

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<sup>53</sup> *Copyright Amendment Bill 2006* (Cth).

Teacher A is an English teacher. She reads an extract from a novel out loud to her class.

Teacher B is an art teacher. He brings his laptop to class and plugs it into the classroom's interactive whiteboard to show students some pictures of modern art works.

Teacher C is a music teacher. She plays a MP3 file from her iPod via bluetooth speakers to her class.

Teacher D is a drama teacher. He plays a DVD of a scene from a film to his students in class.

Teacher E is an economics teacher. She brings her laptop to class and plugs it into the classroom's interactive whiteboard to show students the text of a page from a freely available website that discusses recently released economics data.

Teacher F is a history teacher. He found a copy of a policy document from the Vietnam war on a website. He saves a PDF copy of the document to his USB drive then plugs that into an interactive whiteboard to show his class on screen.

All of these teachers are going about their daily activities of teaching Australian students. Yet these activities are treated differently under copyright law:

Teacher A	Covered by s 28 - free use
Teacher B	Covered by s 28 - free use
Teacher C	Covered by s 28 - free use
Teacher D	Covered by s 28 - free use
Teacher E	<b>CA claims this is not covered by s 28 and remunerable under the statutory licence</b>
Teacher F	<b>CA claims this is not covered by s 28 and remunerable under the statutory licence</b>

These are some of the types of works recorded as remunerable under the “display or project” category in the 2016 electronic use survey:

- The Visit Wollongong website<sup>54</sup>;
- A water quality information webpage on the Hornsby Shire Council website<sup>55</sup>;
- A website allowing searches of names of the Australian Olympic team for the Rio Olympic Games<sup>56</sup>;
- A ‘living smart’ website with healthy living tips<sup>57</sup>; and
- A mental health fact sheet for Aboriginal and Torres Strait Islander peoples on the Beyond Blue website<sup>58</sup>.

To be clear: to the best of CAG’s knowledge, these websites were not copied by teachers, merely displayed on screen in a classroom to show to students as part of their education.

The absence of a copyright exception that permits teachers to show content on screens to students has potentially significant cost consequences for schools given that text works make up the vast majority of works used in Australian schools, and the display and projection of content in class makes up about half of all electronic uses of copyright materials in the classroom. For example, the ‘display’ category made up 50.11% of the pages recorded as remunerable in the 2016 schools electronic use survey. This also has a significant impact on teacher time, as teachers are required to record instances of ‘display’ as part of their survey obligations.

It is worth noting that even some publishers find it hard to believe that Copyright Agency seeks payment for this activity. In a submission to the Productivity Commission's review of Intellectual Property Arrangements, Macmillan Science and Education Australia submitted that “Copyright Agency has never sought payment for this, even if there were a way to measure it.”<sup>59</sup>

Unfortunately, this is not the case. In a letter dated 9 May 2008,<sup>60</sup> Copyright Agency’s solicitors, Banki Haddock Fiora, confirmed that Copyright Agency was “of the strong view” that this use

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<sup>54</sup> <http://www.visitwollongong.com.au/>.

<sup>55</sup> <http://www.hornsby.nsw.gov.au/environment/waterways/water-quality>.

<sup>56</sup> <http://corporate.olympics.com.au/olympians?athleteName=&sex=&medalType=&sport=&games=3016>.

<sup>57</sup> <http://www.livingsmartqld.com.au/>.

<sup>58</sup> <https://www.beyondblue.org.au/who-does-it-affect/aboriginal-and-torres-strait-islander-people>.

<sup>59</sup> Macmillan Science and Education Australia, [Submission to the Productivity Commission review](#), *Intellectual Property Arrangements*, 30 November 2015, 4.

<sup>60</sup> Note: this correspondence was prior to Copyright Agency agreeing that Teacher E’s activities could be covered by s 28.

(ie, Teacher E and F above), should be recorded by schools during the period of a survey and paid for. In addition, Copyright Agency's solicitors added that their clients considered it to be "highly damaging" that displaying art works on a whiteboard (ie, the activity engaged in by Teacher B above) was not remunerable, and that Copyright Agency reserved its rights to advocate for this activity to also be remunerable.

The fact that Australian schools are currently required to pay for this activity means that Australia is out of step with comparable jurisdictions such as the UK,<sup>61</sup> Canada<sup>62</sup> and the US<sup>63</sup>, where schools rely on a non-remunerable exception to display copyright content in the course of teaching.

### ***The 'flexible dealings' exception: section 200AB***

In explanatory material for the *Copyright Amendment Bill 2006*, the Government stated that the flexible dealing exception in s 200AB was introduced in response to its review of whether Australia should have an exception based on the principles of fair use.<sup>64</sup> In other words, the Government intended that the new exception would be relied on by educational institutions to undertake uses that were 'fair'.<sup>65</sup>

In practice, however, this exception has had very limited application. There are two reasons for this.

Firstly, as currently drafted, s 200AB provides no scope at all for schools to make "fair" uses of copyright content without remuneration if the use would be covered by the educational statutory licence. That's because subsection 200AB(6)(b) prevents a teacher from relying on the flexible dealing exception if the use would be covered by another exception or statutory licence. As a result, we have the ludicrous situation of an exception that was intended to permit "fair" uses of content for educational purposes not applying to use of freely available internet content, or orphan works, for no other reason than that these uses fall within the scope of the statutory licence.

Secondly, the language used in s 200AB is both overly complex and ambiguous. A report by Policy Australia Pty Ltd commissioned by the Australian Digital Alliance and the Australian

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<sup>61</sup> See, eg *UK Copyright Designs and Patents Act* s 32.

<sup>62</sup> See, eg *Canadian Copyright Act* s 29.4(1).

<sup>63</sup> See, eg *US Copyright Act* ss 107, 110.

<sup>64</sup> *Copyright Amendment Bill 2006*, Explanatory materials for Exceptions and other Digital Agenda Review measures, 5.

<sup>65</sup> Explanatory Memorandum to the *Copyright Amendment Bill 2006* [6.53]

Libraries Copyright Committee in 2012 found that the drafting of s 200AB (particularly the inclusion of the so-called “three step test”<sup>66</sup>) has led to a much greater degree of confusion and uncertainty than could have been expected had the legislature opted for a fair use exception.<sup>67</sup> Policy Australia reported:

*...most of the institutions we spoke to had in place well developed “fairness” assessments that they applied when determining what uses they could make of copyright works. As is clear from the stakeholder comments set out above, the language of fairness is one that these institutions are already very familiar with. It is central to their every-day risk assessment framework, and despite their risk-averse nature, they feel able to apply a fairness framework in a way that allows them to engage in the public purposes for which they were set up. In contrast, s 200AB does not lend itself to that kind of analysis. As we’ve discussed above, the way in which the three step test has been incorporated into s 200AB is extremely complex and uncertain. Most of the institutions that are intended to benefit from the exception do not have in-house legal counsel, nor a budget that extends to consulting external lawyers on a regular basis. While some groups have prepared guidelines to assist in interpreting s 200AB, the complexity of the drafting is such that many are reluctant to use it in any but the most straightforward cases.*<sup>68</sup>

Policy Australia found that there had been a great deal of reluctance to rely on the exception, and that this could not be fully explained by a general culture of risk aversion amongst the institutions that were intended to benefit from it:

*While [risk aversion] is clearly part of the story, the most common reasons expressed for the sectors’ lack of use of s 200AB related to the section itself, and specifically the particular complexities created by the drafting choices in implementing the three step test in s 200AB.*<sup>69</sup>

The Policy Australia report concluded that any exception that was intended to be relied on by public institutions will not be fit for purpose unless it has regard to the institutional and cultural

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<sup>66</sup> The three-step test is included in both the Berne Convention and the WIPO Copyright Treaty and in Article 13 of the World Trade Organisation (WTO) Agreement on the Trade Related Aspects of International Property (TRIPS Agreement). It is a test that is intended to be applied by signatories of the Berne and TRIPS treaties when determining whether a copyright exception that they wish to enact would comply with their obligations under these treaties.

<sup>67</sup> Ibid.

<sup>68</sup> Policy Australia, [Flexible exceptions for the education, library and cultural sectors: Why has s 200AB failed to deliver and would these sectors fare better under fair use?](#) (Report, 2012).

<sup>69</sup> Ibid.

realities of public institutions, including the fact that many operate on limited budgets and do not have regular recourse to legal advice. It said:

*It does appear from the evidence provided in consultations that despite their generally risk averse nature, educational institutions, libraries and cultural bodies would be more likely to use an exception that required them to engage in a fairness risk assessment. This, in our view, is significant. There would be little point seeking to replace s 200AB with a provision such as fair use if the institutions intended to benefit from such an exception were no more likely to use it than they have been to use s 200AB. Our consultations suggest that this would not be the case.<sup>70</sup>*

In the Explanatory Memorandum to the *Copyright Amendment Bill 2006*, the Government stated that it would monitor the effects of the introduction of s 200AB, and review the new arrangements if necessary.<sup>71</sup> CAG submits that this Modernisation Consultation is an opportunity to move beyond narrow purpose-based exceptions to ensure that Australia's policy goals for achieving a flexible education system are supported by a truly flexible copyright system.

### **3.3 The educational statutory licence does not work appropriately in the digital environment**

As noted above, due to the absence of generally applicable exceptions for public interest educational uses in the Copyright Act, the educational statutory licence applies to virtually all uses of copyright works by schools.

In the pre-digital environment, this did not pose a problem. That was because the majority of content that schools were copying in reliance on the statutory licence was content that was being commercially exploited by copyright owners, such as chapters from textbooks or articles from journals.

Schools have never objected to paying for this type of content, and indeed, have made commitments at the highest levels of the education sector that this type of content would continue to be paid for under the statutory licence even if fair use were to be introduced. See **Attachment B** for recent public statements affirming these commitments.

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<sup>70</sup> Ibid.

<sup>71</sup> Explanatory Memorandum, *Copyright Amendment Bill 2006*, 13.

However the broad application of the statutory licence to virtually all uses of all works - hardcopy and digital - causes significant problems in the digital environment. In the digital world, schools are also using large amounts of digital content that was never intended to be commercially exploited, much of it made freely available on the internet.

### ***A case study - freely available internet materials***

Much of the internet material copied by teachers and paid for under the statutory licence is made freely available online for promotion or information, where there is no commercial market, and the website owner is not seeking payment for use of the information made available on the website.

Some examples of website materials recorded as remunerable in the 2016 electronic use survey include:

- A public domain ebook<sup>72</sup>;
- An engineering instruction manual made freely available under a Creative Commons licence<sup>73</sup>;
- A printable world map, containing a statement '*Free Printable Maps are great for teachers to use in their classes. Students can use them for mapping activities and self-study*'<sup>74</sup>;
- A blog page from The Guardian, made available under 'Open Licence' terms that allow use free of charge by students in coursework or dissertations created in the course of study at a place of learning, provided that coursework or dissertation is not released for external publication;<sup>75</sup>
- An online shoe sale website<sup>76</sup>;
- A travel booking website<sup>77</sup>;
- An online chemistry lesson<sup>78</sup>;
- Online multiplication tables<sup>79</sup>; and
- 'Free' educational puzzles<sup>80</sup>.

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<sup>72</sup> <https://ebooks.adelaide.edu.au/p/plato/p71al/introduction.html#alcibiades>.

<sup>73</sup> <http://www.instructables.com/id/Digital-Manufacturing-project-two-desk-name-plat/>.

<sup>74</sup> <http://www.printableworldmap.net>.

<sup>75</sup> <http://www.theguardian.com/culture/australia-culture-blog/2013/oct/30/women-central-australian-history-forgotten>.

<sup>76</sup> <https://www.shoesofprey.com/>.

<sup>77</sup> <https://portdouglasmeridian.com/>.

<sup>78</sup> <http://www.physics-chemistry-class.com/chemistry/dissolving-a-solid-in-water.html>.

<sup>79</sup> <http://www.johngom.com/tables.html?scope=Exclude&num=45&type=Multiplication&print=on>.

<sup>80</sup> <http://www.kidspuzzlesandgames.co.uk>.

This type of material is made available online for promotion or information, for which no one ever expected to be paid, and for which there is no commercial market.

The statutory licence also applies to the uses of orphan works, where the rights holder cannot be found or identified (see below at Part 8 for additional comments in relation to orphan works). In 2016, nearly 14% of the remunerable pages from the electronic use survey and nearly 12% from the hard copy survey potentially represented orphan works.<sup>81</sup>

### ***Comparing the Australian statutory licence***

CAG submits that the overbroad application of the Australian educational statutory licence helps to explain why Australian schools are paying significantly more educational licensing fees per student than in equivalent countries:

<b>Country</b>	<b>School Price Pre FTE (Educational Statutory Licence or equivalent)<sup>82</sup></b>
Australia	\$16.93
UK	\$4.16 <sup>83</sup>
Canada	\$2.44 <sup>84</sup>
New Zealand	Primary Students \$1.53 <sup>85</sup> Secondary Students \$3.06

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<sup>81</sup> These calculations are done using the processed datasets from the 2016 Australian Schools Electronic Use System (EUS) and Australian Schools Copyright Collection (ASCC) surveys. To reasonably estimate orphan works, all pages where the title, publisher and URL are unknown were considered 'orphan works'. Orphan works made up 13.95% of the 2016 EUS dataset and 12.57% of the ASCC dataset. To eliminate accidental double counting of pages in the surveys, we applied a hierarchy to the data. We did this by removing the data relating to one proxy before moving onto the next as follows: Display/Project, Freely Available Internet Material, Orphan Works. Therefore the Orphan Works calculation does not include any pages that we classified as 'Freely Available Internet Material' or as 'Display/Project'.

<sup>82</sup> All figures have been converted into Australian dollars using exchange rates available on 25 June 2018, namely 1 AUD = GBP: 0.559, CAD: 0.986, NZD: 1.075.

<sup>83</sup> The UK uses a tier system for licensing based on the age of students. This figure is an average per student figure based on the total collected fees from CLA UK's 2017 Annual Report (<https://cla.co.uk/sites/default/files/ATR-2017.pdf>) divided by the total population of UK schools taken from the schools, pupils and their characteristics: January 2017 report from the UK Department of Education ([https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/650547/SFR\\_28\\_2017\\_Main\\_Text.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/650547/SFR_28_2017_Main_Text.pdf)).

<sup>84</sup> The Access Copyright, information available at <http://www.accesscopyright.ca/educators/new-k-12-schools-copying-tariff/>.

<sup>85</sup> The Get Licensed website: <http://www.getlicensed.co.nz/licence-options/read-more/> is a joint initiative of the NZ collecting societies developed to enable schools to make an informed decision about what level of copyright cover they need.

It has been claimed by Copyright Agency that the universal coverage of the Australian statutory licence is a positive feature that not only explains, but justifies, the price differential between Australian schools and the rest of the world. However, as recognised by the ALRC and PC, CAG submits that it is this universal coverage that makes the operation of the statutory licence highly problematic in the digital environment.

In assessing these claims, CAG submits that it is instructive for the Department to compare the Australian and international experience. Consider the United Kingdom approach:

The collective licence offered by the UK Copyright Licensing Agency (**CLA**) only covers content that is included in the CLA repertoire: the licence does not cover “everything in the world” in the way that the Australian statutory licence does. However, when assessing the relative value of the two licences, there are two other important factors that need to be taken into account.

Firstly, the CLA repertoire is extensive.<sup>86</sup>

Secondly, the UK *Copyright Designs and Patents Act* contains a free exception that can be relied on by schools to make multiple copies of works if a licence is not available.<sup>87</sup> Typically, that exception will be relied when a school wants to copy the kind of content that a rights holder had no interest in commercially exploiting.

In other words, UK schools can copy pretty much “everything in the world” in the same way that Australian schools can, but due to the absence of an educational exception allowing free uses of content that is not being commercialised, Australian schools are paying approximately four times more than their UK counterparts for a broadly equivalent licence.

The drafters of the statutory licence could never have anticipated the ways in which it is currently being used to attract remuneration for content that has no separate commercial value. This is a significant flaw. CAG submits that this flaw must be remedied to ensure that Australia’s copyright system is capable of meeting the Government’s Gonski 2.0 goals.

The educational copyright system cannot be said to be fit for purpose in the digital age when it results in Australian schools paying millions of dollars of public funds each year to use content:

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<sup>86</sup> [https://www.cla.co.uk/sites/default/files/CLA-Education-Licence-User-Guidelines\\_old.pdf](https://www.cla.co.uk/sites/default/files/CLA-Education-Licence-User-Guidelines_old.pdf).

<sup>87</sup> *Copyright, Designs and Patents Act 1988* s 36.

- where the use causes no harm to rights holders (such as display of a website on an interactive whiteboard);
- where there is no expectation of remuneration for use of the content (such as freely available internet materials); or
- where the rights holder cannot be identified (such as with use of orphan works).

#### **Part 4: What does a modern educational copyright system look like?**

The ALRC and PC exhaustively considered options for improving the educational copyright system in Australia. The ALRC and PC identified that modernising the Copyright Act to ensure Australian schools can meet the needs of students in a digital age requires two fundamental changes:

1. An educational statutory licence that facilitates fair and efficient licensing, but which does not need to be relied on for uses that caused no harm to rights holders.
2. A flexible, future-proofed exception that can be relied on by schools for uses (including currently known uses and uses that may have not even been thought of yet) that are fair, regardless of whether these uses solely occur in the classroom, or when students are engaged in collaborative activities with the broader community and industry.

##### ***Fix one: addressing the overbroad nature of the educational statutory licence***

The Government has already taken the first step in addressing the overbroad nature of the educational statutory licence. The new educational statutory licence<sup>88</sup> contains a provision - s 113Q(2) - which provides that a school need only rely on the statutory licence if the copying/communication cannot otherwise be done under another exception or licence. This provision sends a clear message that Parliament anticipated that the statutory licence would not “cover the field”; ie, schools would only need to rely on the licence if their intended use did not fall within an exception.

While CAG strongly welcomed this reform, it is very much a first step in what is essentially a three-stepped process of bringing the statutory licence into the digital age. The next two steps are:

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<sup>88</sup> As amended by the *Copyright Amendment (Disability and Other Measures) Bill 2017* (Cth).

- Enacting a flexible, future-proofed exception that can be relied on by schools for uses that are fair; and
- Ensuring that it is clear on the face of the Act that this exception can be relied on regardless of whether or not a use could also be done under the statutory licence.

Reforming the educational copying regime in this way would not cause harm to rights holders. As CAG has consistently acknowledged, any use which was capable of causing market harm to rights holders if it was done without payment would, by definition, not be “fair”, and would therefore continue to be paid for under the statutory licence. In other words, authors and publishers of educational content would continue to be paid for educational uses that would harm their markets.

***Fix two: enacting a flexible, future proofed exception***

CAG was pleased to see that in its response to the PC report, the Government acknowledged the need to inject flexibility into copyright law, and flagged its intention to “*create a modernised copyright exceptions framework that keeps pace with technological advances and is flexible to adapt to future changes*”.

We were also pleased to see that the Consultation Paper for this review seeks comment on “*flexible exceptions, which need to adapt over time to provide access to copyright material in special cases as they emerge*”.

CAG submits that the appropriate policy question in the context of the Government’s Gonski 2.0 agenda is not “do we need more flexible copyright law?”, but rather “what is the best way to achieve greater flexibility?”

**Part 5: A flexible education system needs a flexible exception. Australian schools need fair use**

CAG urges the Government to accept the findings of the expert bodies who have considered this question.

The ALRC report stated:

*Despite the many benefits common to both fair use and fair dealing, a confined fair dealing exception will be less flexible and less suited to the digital age than an open-ended fair use exception. Importantly, with a confined fair dealing exception, many*

*uses that may well be fair will continue to infringe copyright, because the use does not fall into one of the listed categories of use. For such uses, the question of fairness is never asked.*

(emphasis added)

The PC conducted its own exhaustive review and agreed with the ALRC's finding: enacting a fair use exception is the only way of future proofing copyright law. Stopping short of doing this, and opting instead to introduce new fair dealing exceptions to address "known" problems, is a short-term fix at best. Purpose-based exceptions are not flexible and not able to adapt over time.

In the education context, the most crucial difference between an open-ended "fair use" exception (with education listed as an illustrative purpose) and a "fair dealing for education" exception is that the latter would potentially be confined to classroom activities, (ie, that it might not apply when schools were engaging in collaborative activities with the broader community and industry). It is possible of course that Australian courts would construe a fair dealing for education exception sufficiently broadly to allow it to be used in such circumstances, but it is also possible that the exception would be construed narrowly. Given that Australian courts have a history of construing copyright exceptions very narrowly, there would be an inherent risk that a fair dealing for education exception did not extend to the very activities that schools are being urged to undertake as part of the Gonski 2.0 Report and the *National STEM School Education Strategy*. This is the inherent problem with purpose-based exceptions and a large part of the rationale for the ALRC and PC's recommendations that Australia adopt a fair use exception.

**Attachment C** provides additional context for CAG's view that an incremental approach to reform is not the answer, and why failure to implement the ALRC and PC's recommendations would be at best a short-term fix for some known problems.

## **5.1 What illustrative purposes should apply?**

This question has been given exhaustive consideration by the ALRC and the PC, and we urge the Government to accept the recommendations of these expert bodies as to the illustrative purposes that should apply.

CAG was concerned to see that the Consultation Paper refers to "certain educational uses". It goes without saying that only "certain" educational uses would come within a fair dealing for education/fair use exception; ie, only those uses that are fair. This is central to how fairness

exceptions work. As the ALRC said, and as CAG has always acknowledged, *“There are many uses of copyright material under the statutory licences that would clearly not be fair use or permitted under other exceptions, and for which users will need to continue to obtain a licence.”*<sup>89</sup>

It does not, however, make sense to seek to identify in advance of enacting a new exception precisely what particular educational uses it should apply to. Firstly, doing so is contrary to the stated policy intention of injecting flexibility into copyright law. Any new exception would be forever stuck in time and place, and incapable of adapting to changed circumstances. Secondly, it begs the question: why have a fairness analysis at all if the intention is to identify in advance the “certain” uses that a new exception would apply to? How would a fairness analysis apply to such an exception? CAG is not aware of anywhere else in the world that has adopted such an approach to fair dealing or fair use.

## 5.2 Which fairness factors should apply?

CAG was surprised to see that in the Consultation Paper for this review, the Department suggests that if a fair use exception were enacted it would include the fairness factors that are set out in ss 40(2) and 103C(2) of the Copyright Act.

The ALRC gave a great deal of consideration to what the fairness factors ought to be for any new fair use/fair dealing for education exception. In particular, the ALRC considered whether the factor in s 40(2)(c) – ie, “the possibility of obtaining the work or adaptation within a reasonable time at an ordinary commercial price”<sup>90</sup> - should be included in any new exception and concluded that it was not necessary. The reasons for this included the following:

- The factor is “related to, or possibly a subset of” the fourth factor concerning market effect, which means that to the extent that it is relevant, it will be considered as part of a fairness determination.<sup>91</sup>
- An “ordinary commercial price” factor may not be appropriate in determining the fairness of a range of uses including, for example, “criticism or review” and “parody or satire”.<sup>92</sup>

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<sup>89</sup> Australian Law Reform Commission, [Copyright and the Digital Economy, Report No 122](#) (2013) [8.61].

<sup>90</sup> Australian Law Reform Commission, [Copyright and the Digital Economy, Report No 122](#) (2013) 125.

<sup>91</sup> *Ibid* 142.

<sup>92</sup> *Ibid* 143.

- While such a factor is said to be derived from case law on fair dealing, “there is little such case law, compared with that concerning the other fairness factors”.<sup>93</sup>

Some rights holders argue that fair use should never apply when a work is readily available for purchase, regardless of how *de minimis* the intended use is. In our submission, there are many instances where a *de minimis* use of a work may be fair, even in circumstances where the work might otherwise be available for purchase. For example, schools are currently required to rely on the statutory licence to display a page from a book on an electronic whiteboard. This kind of use is not capable of causing market harm to the rights holder, and would almost certainly be found to be “fair” if the ALRC’s proposed fairness factors were applied. CAG is concerned that the inclusion of an “ordinary commercial price” factor could potentially be relied on by rights holders to argue that any use that is currently paid for under the statutory licence - regardless of whether or not there is a “market” for the particular use - would for that reason fail a fairness analysis if this factor is included.

It is significant, in our view, that the legislative history of this factor makes clear that it was included on the recommendation of the Franki Committee to address concerns on the part of the university sector that there was no reliable method of obtaining texts from overseas publishers in a timely manner. This was at a time when works took weeks, if not months, to become available in Australia. The university sector was seeking legislative guidance as to the circumstances in which it would be fair to copy more than a reasonable portion of a work for educational purposes, including for the purpose of research or study. The Franki Committee considered that such guidance was warranted given that the unavailability of texts, and the unreliability when texts were ordered from overseas, was “putting Australia at a serious disadvantage compared with many other countries”.<sup>94</sup> The Committee said “some responsibility rests upon copyright owners to meet demand in a practical way as a condition of unrestricted enjoyment of their rights”.<sup>95</sup> CAG submits that this legislative history explains why the Franki Committee recommended the inclusion of this factor notwithstanding that it did not appear in the US list of fairness factors (which the Franki Committee was aware of, in draft form, at the time it made its recommendations). Clearly, the circumstances that led to the inclusion of the factor no longer apply.

There is a similar legislative history in Singapore, which also includes the commercial availability factor in its open ended fair dealing exception. A 2016 discussion paper released by the Singapore Government as part of its ongoing review of copyright exceptions suggests that

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<sup>93</sup> Ibid.

<sup>94</sup> [Report of the Copyright Law Committee on Reprographic Reproduction](#) (1976) [1.51].

<sup>95</sup> Ibid.

policy rationale for the inclusion of the commercial availability factor in Singapore was in line with the rationale that led to the adoption of the commercial availability factor in Australia in 1980; ie, ensuring that academics and students were not disadvantaged as a result of texts being unavailable.<sup>96</sup> The discussion paper noted that while the Singapore exception was “adopted from the US”, the inclusion of the commercial availability factor “*came at a time when copyright works were still largely distributed in a physical medium*” which meant that “*it might have been difficult to obtain a legal copy of the work if it was not being officially distributed within Singapore, and thus a copy made without permission might have been considered “fair” due to unavailability*”.<sup>97</sup>

The Singapore Government has proposed removing this factor on the ground that

*“the current technology landscape as well as globalisation means that true unavailability of copyrighted works is less common”*

and that

*“the last factor seems to have less relevance in light of certain new platforms and uses for content creation and distribution, such as the use of music in the background of home videos put up online”*.<sup>98</sup>

The discussion paper noted that courts would still be free to “*consider the situation in the last factor on a case-by-case basis, but it will no longer be specifically identified in the CA*”.<sup>99</sup>

Finally, CAG is concerned that the inclusion of five fairness factors in any new fair use or fair dealing exception would give rise to real uncertainty as to how the new exception was intended to be applied. To illustrate:

- Currently, the factor in s 40(2)(c) (“the possibility of obtaining the work or adaptation within a reasonable time at an ordinary commercial price”) only has effect if the copying is in excess of a “reasonable portion”. Anything less than this is deemed to be fair, whether the work can be purchased at a reasonable commercial price or not. It is clear, therefore, that the factor in s 40(2)(c) is only relevant when more than a reasonable portion of a work is being copied, and is not capable of being construed as preventing

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<sup>96</sup> Ministry of Law and the Intellectual Property Office of Singapore, [Public Consultations on Proposed Changes to Singapore’s Copyright Regime](#) (2016).

<sup>97</sup> Ibid [3.49].

<sup>98</sup> Ibid [3.50].

<sup>99</sup> Ibid [3.51].

reliance on the exception whenever the work can be obtained commercially.

- In 2017, Parliament enacted a new fair dealing exception: the fair dealing for disability exception in s 113E of the Act. The fairness factors for that exception are based on the four fairness factors recommended by the ALRC; ie, they do not include the factor regarding the “possibility of obtaining the work or adaptation within a reasonable time at an ordinary commercial price” factor.

It is clear from the Explanatory Memorandum to the *Copyright Amendment (Disability Access and Other Measures) Bill 2017* that the decision not to include this factor did not mean that Parliament intended that commercial availability was not a relevant consideration in the fairness analysis. On the contrary, the EM states that the third factor in s 113E (ie, the effect of the dealing upon the potential market for or value of the material) would require consideration of whether the material is commercially available:

*If material is commercially available, factors one, two and four become more important, noting that a use may still be considered fair even if the material is commercially available. Only a substantial market harm from the individual use should be considered unfair.*<sup>100</sup>

As a general matter of statutory construction, it is unclear how an Australian court should interpret any new exception, enacted after s 113E, that adopts the five factors in s 40(2). Although CAG is unaware of an Australian court ever suggesting that the factor in s 40(2)(c) means that copying could **never** be fair if a licence was available, would a court conclude that by adopting a five factor fairness test Parliament must have intended for the new exception to operate this way, regardless of how *de minimis* the use? If so, Australia would be out of step with the rest of the world, where the commercial availability of a work is relevant, but not determinative, of whether a particular use is “fair”.

CAG submits that if the Government decides to use existing Australian fair dealing factors, rather than adopt the PC and ALRC’s recommendations, any new exception must use the same four factors as s 113E in order to avoid significant confusion and difficulties in statutory construction. This would not mean that the commercial availability of a work is not relevant to a fairness assessment. Rather, as the Government notes in the Explanatory Memorandum to s 113E, this approach would simply mean that the commercial availability – or otherwise – of a

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<sup>100</sup> Explanatory Memorandum, Copyright Amendment (Disability Access and Other Measures) Bill 2017 (Cth), 15.

particular work, would be considered as part of assessing the impact of any use on the potential market for, or value of, the relevant work or works.

### 5.3 Fair dealing for education as a ‘second best’ approach

It has been suggested that if the Government does not introduce a fair use exception, a new “fair dealing for education” exception should be introduced instead. The ALRC identified this as an alternative approach to solving some of the copyright problems experienced by Australian schools. The ALRC described this alternative approach as:

*... a second best option, but it is more likely to enable educational institutions to make use of new digital technologies and opportunities than the existing exceptions ...*<sup>101</sup>

CAG agrees with the ALRC. **Attachment C** contains further context for CAG’s views as to why an incremental approach to reform is not an optimal approach.

Implementing a “fair dealing for education” exception instead of fair use would not achieve the policy goals of adaptability and innovation so strongly recommended by Gonski 2.0, the ALRC and PC. That is because - by its very nature - fair dealing is not “adaptable”. Fair use is. There is also a risk that a fair dealing exception would be interpreted to “stop at the door of the classroom” rather than enabling industry collaboration “outside of the school gate”. However a fair dealing for education exception would at least ensure that Australian schools are not entirely prevented from implementing the Gonski 2.0 reforms.

## Part 6: Fair use will not harm copyright owners

CAG has considered all of the evidence raised by the ALRC, the PC and Ernst & Young as well as international experience, and is confident that the introduction of a fair use exception to allow non-harmful public interest uses of copyright materials for educational purposes would not cause harm to Australian copyright owners. This is for three key reasons:

1. As the Government recognised at the time of introducing the *Copyright Amendment (Service Providers) Bill 2017*, “the education, cultural and disability sectors generally take a very risk-averse approach to protecting and managing the copyright of others”.<sup>102</sup> This proven historical approach to respecting the rights and interests of Australian creators

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<sup>101</sup> Australian Law Reform Commission, *Copyright and the Digital Economy*, Discussion Paper No 79 (2013) 280 [13.62].

<sup>102</sup> Second Reading Speech, *Copyright Amendment (Service Providers) Bill 2017* (Cth).

will continue if fair use is introduced. Statutory licences will continue to apply to the educational uses of works - particularly works being sold or otherwise commercialised - that would not be covered by a fair use exception. (See **Attachment B** for previous CAG commitments in this regard).

However, it is not in the public interest for educational budgets to pay for copyright uses that would be covered by fair use, that would in no way harm copyright owner markets, such as display of website materials on interactive whiteboards, use of freely available internet materials, or use of orphan works.

2. Fair use will not impact in any way on the amount of educational content purchased by Australian schools or parents and guardians. The school sector currently spends millions of dollars each year in purchasing educational resources (including textbooks, apps and educational licence subscriptions) which will in no way be impacted by the introduction of fair use.
3. Claims that the introduction of a fair dealing exception in Canada have caused significant harm to rights holders are not supported by a rigorous approach to assessing the available evidence.

## **6.1 Fair use will not impact rights holder markets**

CAG submits that it is self-evident that no rights holder would be harmed if Australian schools were permitted to rely on fair use to use copyright material in contexts where there is no market for that work, such is the case when works are temporarily displayed on a screen in a classroom, or where teachers use freely available internet materials for educational purposes. Nor would such uses reduce in any way existing incentives to produce educational material or other copyright content.

There would be no harm to authors and publishers if the Australian school sector was no longer required to pay millions of dollars in public funds that Australian schools pay each year for uses such as displaying websites on whiteboards, or using orphan works and freely available internet materials.

CAG submits that the existence of the Copyright Agency Future Fund is itself proof that no rights holder would suffer harm if Australian schools could rely on a non-remunerable exception for uses such as freely available internet material and orphan works.

This fund arose as a result of a change in policy in the way that Copyright Agency deals with “undistributed funds”; ie, where the relevant rights holder cannot be identified or located, or where the amount owing is less than \$200. A great deal of internet copying and ‘fair’ copying by schools falls into this category, as does copying of orphan works.

Previously, Copyright Agency had a policy of retaining this money in trust for four years, after which it was paid to Copyright Agency members who had no connection with the content that had been copied.

In 2013 Copyright Agency adopted a new policy. Rather than distributing unclaimed funds to other rights holders whose works have been copied by schools, Copyright Agency began retaining these funds, and paying them into what it describes as a “Future Fund”, the purpose of which is to finance Copyright Agency’s campaign against the copyright reforms being sought by the education sector.<sup>103</sup>

CAG was not notified of this change in policy, and only became aware of it in January 2017.

In the period 2013 to 2016, Copyright Agency also paid all interest earnings on statutory licence payments into the Future Fund. In just three years, the size of this fund grew significantly:<sup>104</sup>

- \$5.1 million as at 1 July 2014 (the first year of the Future Fund)
- \$9.3 million as at 30 June 2015
- \$15.5 million as at 30 June 2016.

In other words, over the course of three years, Copyright Agency amassed a fund worth \$15.5 million - collected from public education budgets and from Catholic and Independent schools – for purposes such as funding its campaign against the introduction of fair use.

CAG submits that this is compelling evidence to suggest that allowing schools to rely on a fair use provision for uses that do not interfere with copyright owner markets would not impact on the revenue that would continue to be received by Australian authors and publishers under the statutory licence for educational uses that would continue to be covered by the statutory licence.

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<sup>103</sup> Copyright Agency, [2015/2016 Directors’ Report](#) (2016) 26.

<sup>104</sup> Ibid 14.

## 6.2 Fair use will not affect expenditure on educational content in any way

The education sector is a huge contributor to the publishing and creative industries. This support goes well beyond the significant amounts spent on copyright licence fees. There is no suggestion that fair use would impact in any way the amount that Australian schools spend on buying educational resources.

Australian schools, as well as parents and guardians, represent a significant market for textbooks, apps, online subscriptions and other forms of educational and other copyright content. NCU estimates that parent and school spend on educational resources is somewhere between \$930 million dollars and \$1.9 billion dollars each year. This expenditure will never be affected by fair use, and is in addition to the over \$96 million dollars paid each year to copyright collecting societies to use these resources.<sup>105</sup> As previously discussed, collective licences with Copyright Agency, Screenrights and APRA AMCOS will continue to exist if fair use is introduced.

### *School sector content expenditure*

NCU estimates that Australian schools currently spend approximately \$450 million dollars per annum purchasing educational resources.<sup>106</sup> In addition to school spending, according to a recent survey by the Commonwealth Bank, parents and guardians also spent upwards of \$480 million dollars a year on textbooks in 2017.<sup>107</sup> This may be a conservative estimate as research done by NCU, looking at various school book lists, suggests the spend may be closer to \$400 per student per year, which would put the total spend by parents at approximately \$1.5 billion dollars annually.<sup>108</sup> For example:

- the parents of year 7 students at an Independent School in New South Wales located on the Central Coast will pay approximately \$380.80 for the textbooks for their child's first year of high school. By year 10 with the addition of electives like Commerce and Chinese

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<sup>105</sup> This \$96 million is the 2017 copyright licence fees: \$24.7 million to Screenrights, \$63.9 million to Copyright Agency, and \$7.8 million to APRA AMCOS.

<sup>106</sup> This estimation is based on a survey of 379 schools conducted in late 2012 and early 2013. The 379 schools provided 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. In 2012 the content acquisition figure by schools was \$400 million, which when indexed by the CPI equates to approximately \$750 million annually in 2018.

<sup>107</sup> The Commonwealth Bank's survey found that parents spent, on average \$127 per student on textbooks. There are 3.8 million schoolchildren in Australia, which equals over \$480 million dollars spend on purchasing textbooks in 2017. <https://www.commbank.com.au/guidance/newsroom/parents-brace-for-1-7-billion-back-to-school-bill-shock-201801.html>.

<sup>108</sup> \$400 per student x 3.8 million students = \$1.52 billion dollars.

the cost of that student's textbooks will increase to approximately \$486.65. If the student chooses to study different electives like French and Music the cost of textbooks will increase even further to approximately \$518.20.

- the parents of year 7 students at a Public High School in Queensland in the Brisbane metropolitan area will pay approximately \$317.90 for textbooks, licences, digital texts and resources for classroom activities per year. By year 10 it will cost approximately \$357.30 for textbooks, licences, digital texts and resources for classroom activities. Parents will also need to pay additional fees for electives like Engineering (\$50) and Home Economics (\$50) or Hospitality (\$85).
- the parents of year 7 students at an Independent School in South Australia in the Adelaide metropolitan area will pay approximately \$328.80 for textbooks for their child's first year of high school. By year 10 with the addition of elective languages this cost will increase to between approximately \$382.70 (studying German) and \$429.15 (studying Mandarin).

Schools and parents will continue to be major purchasers of educational resources and other content (such as apps and digital subscriptions) if fair use were introduced.

### **6.3 The Canadian experience**

CAG is aware that there have been claims made by various organisations that the introduction of a fair dealing provision for education in Canada has harmed the Canadian publishing industry. CAG submits that the evidence of the Canadian experience does not support those claims.

#### ***Evidence to the Canadian Standing Committee on Industry, Science and Technology***

The Canadian *Standing Committee on Industry, Science and Technology* is currently conducting a review into Canadian copyright law. Evidence presented to this Committee suggests that declining royalties from collecting society Access Copyright has had virtually no impact on Canadian publisher revenues.

At a recent committee hearing, David Lametti, the Parliamentary Secretary for the Minister of Innovation, Science and Economic Development, pressed the Association of Canadian Publishers (**ACP**) to back up their assertion that copyright reform had decimated publishers. Mr Lametti said:

*We get submissions from various people as part of the committee, and we have submissions from two small Canadian publishers. Broadview Press claim in their submission to us that their annual revenue is \$3.5 million, that the drop in Access Copyright revenue for them is \$30,000. That's a drop of less than 1%.*

*House of Anansi in their submission to us say their annual revenue is \$7 million with a loss of about \$15,000 to \$17,000 in access copyright money in the education sector. Again, that's a loss less than 1%, actually a quarter of 1%.*

*That seems to be a very different picture for small Canadian publishers in terms of their loss from Access Copyright revenues than we're being told. That's in their very own submissions to us.<sup>109</sup>*

In her response to this question, the ACP representative, Ms Kate Edwards, noted that Broadview Press had “shifted their focus to the American market”.<sup>110</sup> She said that this was because “there's not a market here for them to sell into anymore”.

However, the US has had a fair use provision since the 1970s. CAG submits that the evidence does not support any claims that fair use (or fair dealing for education) would negatively impact on Australian publishing markets on the basis that Canadian publishers are allegedly being driven from Canada (which has fair dealing for education) to the US (which has fair use) as a result of copyright reform.

### ***Evidence from Statistics Canada***

**Attachment D** to this submission is a document prepared by the Canadian Council of Ministers of Education (CMEC) Copyright Consortium headed “*Statistics Canada Data on Canada's Publishing Industry and K–12 Education-Sector Spending*”. This document, which was submitted by the CMEC in evidence to the Standing Committee on Industry, Science and Technology, shows that since the 2012 copyright reforms the Canadian education sector has continued to purchase hundreds of millions of dollars of Canadian publishers' books annually, and K–12 schools are the second largest customer category for publishers (behind major chain bookstores and campus bookstores). Contrary to claims that the 2012 copyright reforms have damaged the Canadian educational publishing sector, the data compiled by the CMEC - which is

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<sup>109</sup> Minutes of Proceedings, House of Commons Canada, [Standing Committee on Industry, Science and Technology](#), 26 April 2018.

<sup>110</sup> Ibid.

taken from Statistics Canada reports of the book publishing industry for the relevant years – shows that Canadian publishing is a healthy industry and is not in decline.

**Attachment E** to this submission is a document, “*Statistics Canada Data on Average Income of Authors and Writers*”, also prepared by the CMEC and submitted in evidence to the *Standing Committee on Industry, Science and Technology* copyright review. This document shows that since the 2012 copyright reforms, the financial situation of Canadian authors and writers remains stable with a slight increase.

### ***Evidence from the ACP***

It’s also worth noting that the ACP recently commissioned a report<sup>111</sup>—*Digital Trends and Initiatives in Education: The Changing Landscape for Canadian Content*.<sup>112</sup> It identified a number of factors impacting on educational publishing, but copyright barely rated a mention.

As Canadian copyright academic, Michael Geist, has noted about the report:

*“..despite the ACP’s insistence in lobbying efforts that copyright is at the heart of publisher concerns, copyright and fair dealing are limited to a single reference with no discussion or analysis.*

*Instead, the ACP’s study confirms much of what the education community has been saying, namely that the **combination of open educational resources and paid access is driving the educational shift to digital, not fair dealing.***

*The ACP study examines the availability of open educational resources, describing it as an emerging cornerstone of the educational system:*

*The OER movement continues to grow and is becoming a cornerstone of the Canadian K–12 educational system. The proliferation of OER content is evident across the country and there are numerous initiatives that support the development, access, and distribution of content.*

*The study notes that OERs form part of the key sources of materials for education:*

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<sup>111</sup> [Digital Trends and Initiatives in Education: The Changing Landscape for Canadian Content](#), ACP, March 2017.

<sup>112</sup> The report has not been made available on the ACP’s own website, but can be accessed on the [Ontario Media Development Corporation website](#).

*While the use of digital content is increasing, print-based resources continue to be widely used in Canadian classrooms to support and enhance learning. The shift from print to digital resource use varies from province-to-province, district-to-district, school-to-school, and classroom-to-classroom. Some jurisdictions and schools continue to purchase print-based supplementary resources and some are acquiring core curriculum resources that include digital components. Others are shifting from print-based textbooks to eTextbooks. Some are purchasing very few resources, making do with what they have until funding for new resources is available and/or the technology and technical infrastructure is in place. Meanwhile, teachers and students have access to more free and open content than ever before given the ubiquity of content via the Internet, as well as the proliferation of content repositories, databases, portals, and applications.*

*In a review of sources of materials, there is no reference to fair dealing or copyright. However, there are numerous references commonly licensed or free digital content collections or databases, none of which implicate Access Copyright or its licence.”<sup>113</sup>*

Geist also notes that the ACP study acknowledges the huge investment that the Canadian education sector has made in the digital products offered by publishers:

*Digital supplements as well as eBooks available from the major educational publishers have pushed digital sales to more than 50% of their educational revenue. Pearson reports that digital products now account for more than 50% of their revenue and McGraw-Hill announced that digital unit sales overtook print unit sales in its U.S. Higher Education Group in 2015. Although eBooks are the cornerstone of publishers’ digital offerings, digital courseware such as assessment and testing software and homework or study guides are becoming more popular with instructors and students.<sup>114</sup>*

Finally, Geist notes:

*“While the ACP regularly cites copyright as a key issue, its own study – **that it has not even posted on its publicly available portion of its site** – is far more consistent with the*

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<sup>113</sup> Michael Geist, [Digital Trends and Initiatives in Education: The Study the Association of Canadian Publishers Tried To Bury](#), 17 April 2018.

<sup>114</sup> Ibid.

*views of the education community, which is spending record amounts on digital materials and making increasing use of the wide range of openly licensed works”.*<sup>115</sup>

(emphasis added)

CAG submits that the evidence suggests that various digital disruptions - from open access publishing, student preferences for second-hand books, to increasing spending by schools on digital products - must be taken into account in adopting an evidence-based approach to assessing any impact on Canadian publishers from the 2012 copyright reforms.

***The problem that rights holders have with Canada is not with the fair dealing exception itself, but rather how it has been applied by Canadian schools***

CAG submits that the concerns that rights holder groups have with the operation of fair dealing in Canada are not related to the existence of a fair dealing for education exception per se, but rather potentially with the nature of the fair dealing copying guidelines<sup>116</sup> that were adopted by Canadian schools and universities following the decision of the Canadian Supreme court in *Alberta (Education) v Canadian Copyright Licensing Agency (Access Copyright)*.<sup>117</sup>

In that case (which was in relation to previous Canadian law and had absolutely nothing to do with the new fair dealing for education exception), the Canadian Supreme Court held that schools could rely on the research and study fair dealing exception to make multiple copies for distribution to students provided that the copying was “fair”. The lawyers who prepared the fair dealing educational copying guidelines construed this case as permitting schools to copy up to 10 per cent or one chapter of a work. This was based on existing Canadian fair dealing jurisprudence.

When considering the relevance of this to the copyright reform debate in Australia it is important to keep the following in mind:

- The ‘bright line’, formulaic approach that was adopted by Canadian schools – ie, copying up 10 per cent of a work will always be fair - is a very different approach to that which applies in countries such as the US and Singapore, where schools and universities routinely rely on fair use. For example, the guidelines that US teachers follow are

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<sup>115</sup> Ibid.

<sup>116</sup> Council of Ministers of Education Canada, [Fair Dealing Guidelines](#).

<sup>117</sup> [Alberta \(Education\) v. Canadian Copyright Licensing Agency \(Access Copyright\)](#), 2012 SCC 37.

typically much more nuanced and require teachers to weigh up all four “fairness factors” when deciding if a use is fair.

- As set out in **Attachment B** to this submission, the Australian schools sector has consistently stated – and restates in this submission - that it would adopt a nuanced, fact-specific approach to fair use (or fair dealing for education) in the event that an exception of this kind is enacted. This is very different to the approach that has been adopted by schools in Canada.

CAG submits that the international evidence suggests that Australian authors and publishers would not be harmed by the introduction of a fair use exception in the Australian context. CAG submits it is significant in assessing claims in relation to the Canadian experience, that the following fair use jurisdictions all refer expressly to purposes that support the public interest in education and scholarship/research in their open-ended exceptions:

- In the US, education is given express recognition in the fair use exception in s 107 of the US Copyright Act that is open ended but refers expressly to teaching (including multiple copies for classroom use) as well as “scholarship or research”.
- In the Philippines, the fair use exception in s 185 of the Intellectual Property Code is open-ended but also refers expressly to teaching including multiple copies for classroom use as well as "scholarship and research".
- In South Korea, the fair use exception is open ended but refers expressly to "education and research".
- In Singapore, the open-ended fair dealing exception in s 35 of the Copyright Act (which applies to “any purpose” other than criticism/review or reporting current events, which are dealt with separately) refers to education in the fairness factors. The first fairness factor is “the purpose and character of the dealing, including whether such dealing is of a commercial nature or is for nonprofit educational purposes”.

## **Part 7: Copyright, contract and TPMs**

CAG welcomes the Government’s in-principle support for the Productivity Commission’s recommendations on contracting out and the use of technological protection measures (TPMs) to prevent legitimate uses of copyright material, and the acknowledgement that statutory rights to deal fairly with copyright content must be protected. CAG submits that this policy

objective will only be fully achieved by amending the Act to prevent contractual override of all copyright exceptions, and by enacting corresponding TPM exceptions to apply to any new copyright exceptions enacted as a result of this review.

The Consultation Paper seeks comment on whether a prohibition on contracting out should apply to some exceptions only.

CAG submits that as a matter of principle, it should be made expressly clear that contracts are not capable of overriding any exception in the Act, including any new exceptions enacted as a result of this review. CAG holds this view for two reasons:

1. Ensuring that the policy balance struck in exceptions continues to have practical effect; and
2. Avoiding possible unintended consequences from rules of legal interpretation.

## **7.1 Protecting the policy balance**

Copyright exceptions are fundamental to defining the boundaries of the grant of copyright. They provide certain public benefits, determined by democratic means. CAG submits that private contracts should not be able to be used to rewrite the copyright balance that Parliament has deemed appropriate.

CAG supports the approach to this issue contained in s 2(10) of the Irish Copyright Act:

*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.*

Alternatively, the language used in the UK *Copyright, Designs and Patent Act* could be used:

*To the extent that a term of a contract purports to prevent or restrict the doing of any act which, by virtue of this section, would not infringe copyright, that term is unenforceable.*

## **7.2 Avoiding unintended consequences**

CAG submits that any provision that expressly prohibited contractual override of some exceptions and not others could have unintended consequences. As the ALRC acknowledged in

its Copyright and the Digital Economy report, the question of whether a contract that purports to exclude or limit the operation of copyright exceptions is unsettled.<sup>118</sup> 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 *Copyright and Contract* report, the Copyright Law Review Committee (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.<sup>119</sup> The CLRC ultimately concluded that “the effect of s 47H on agreements which exclude or modify exceptions is ultimately unclear.” 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. 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, the legal maxim *expressio unius exclusio alterius* (ie, an express reference to one matter indicates that other matters are excluded) could be applied to discern a legislative intent that contractual terms excluding other exceptions and uses were automatically enforceable. This could have significant negative consequences for Australian students, and particularly the use of digital resources and technologies in Australian schools.

### **TPMs**

The Consultation Paper notes that preventing contractual override of exceptions will not prevent rights holders from relying on TPMs to achieve the same purpose. We note that the Government intends to implement a simplified process for future TPM exception reviews. CAG supports this intention and submits that it will be imperative to ensure that equivalent TPM exceptions are introduced to apply to any new copyright exceptions enacted as a result of this review.

## **Part 8: Orphan works**

Unlike other users of copyright content, who are often prevented from using orphan works at all, schools are permitted to rely on the statutory licence to use orphan works, but they are paying millions of dollars a year to do so. As we have already discussed above, it is a significant flaw in the educational statutory licence that has led to Copyright Agency collecting licence fees for orphan works when - by definition - it is difficult or impossible to identify the proper owner.

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<sup>118</sup> Australian Law Reform Commission, [Copyright and the Digital Economy, Report No 122](#) (2013) [17.26].

<sup>119</sup> Copyright Law Review Committee, *Copyright and Contract* (2002) [5.118].

CAG was pleased to see that in its response to the PC report, the Government supported the Commission's recommendation to enact the orphan works regime proposed by the ALRC. CAG strongly supports that model.

CAG supports an orphan works model that contains a limitation of remedies based on "reasonable compensation" for "future use" for non-commercial uses.

## **Conclusion**

A key finding of Gonski 2.0 is that a modern education system must be complemented by policies which support an adaptive, innovative and continuously improving education system.<sup>120</sup>

The ALRC and PC looked at all the evidence, and found that the best way to achieve a flexible copyright system that meets the needs of schools in a digital age is to introduce a fair use exception.

CAG submits that the only way to truly modernise the Copyright Act for a modern education system is to introduce a flexible copyright exception such as fair use.

As Secretary of the NSW Department of Education Mark Scott recently put it: "The future in the classroom is now. We are at a crossroads and we can't sit back and wait for the revolution to happen to us. We need to lead the change. This is education's moment."<sup>121</sup>

CAG urges the Department to ensure that the Copyright Modernisation review ensures that the Copyright Act is sufficiently flexible to ensure that Australian schools are able to rise to the challenges of this moment.

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<sup>120</sup> Ibid 13.

<sup>121</sup> Mark Scott, 'Preparing today's students for tomorrow's world' (Speech delivered at the Trans-Tasman Business Circle, 29 June 2017).

## Attachment A

### Examples of School Partnerships

#### Industry Partnerships

Article/Programme	School/s	Website/Media Article
<p>First Lego League – partnership between FIRST and the LEGO Group – robotics and STEM program, international and also involving Macquarie Uni</p>	<p>Grace Lutheran College – QLD</p>	<ul style="list-style-type: none"> <li>• <a href="https://www.teachermagazine.com.au/articles/building-teacher-capacity-in-digital-technologies?utm_source=CM&amp;utm_medium=Trending&amp;utm_content=June7">https://www.teachermagazine.com.au/articles/building-teacher-capacity-in-digital-technologies?utm_source=CM&amp;utm_medium=Trending&amp;utm_content=June7</a></li> <li>• <a href="http://www.firstlegoleague.org/about-fl">http://www.firstlegoleague.org/about-fl</a></li> </ul>
<p>Pathways in Technology (P-TECH) Skilling Australia Foundation with Government Investment partnering industry with schools, industry partners include PWC, IBM, MARS and Telstra.</p>	<ul style="list-style-type: none"> <li>• McCarthy Catholic College</li> <li>• Newcomb Secondary College</li> <li>• Federation College</li> <li>• St Patrick’s Technical College</li> <li>• Cecil Andrews College</li> <li>• Wyong High School</li> <li>• Hunter River High School</li> <li>• Burnie High School</li> <li>• Parklands High School</li> <li>• Yolla District High School</li> <li>• Hellyer College</li> </ul>	<ul style="list-style-type: none"> <li>• <a href="https://www.ptech.org.au/">https://www.ptech.org.au/</a></li> </ul>
<p>Tech Schools – VIC initiative creating spaces where different schools can meet to work on STEM projects and courses with industry partners.</p>	<p>Numerous local schools attend each Tech School</p> <ul style="list-style-type: none"> <li>• <a href="https://ballarattechschool.vic.edu.au/about-us/partner-schools">https://ballarattechschool.vic.edu.au/about-us/partner-schools</a> <ul style="list-style-type: none"> <li>○ 15 Schools</li> </ul> </li> </ul>	<ul style="list-style-type: none"> <li>• <a href="https://ballarattechschool.vic.edu.au/learning-programs">https://ballarattechschool.vic.edu.au/learning-programs</a></li> <li>• <a href="http://yrts.boxhill.edu.au/programs.html">http://yrts.boxhill.edu.au/programs.html</a></li> <li>• <a href="https://www.teachermagazine.com.au/articles/podcast-special-australias-chief-scientist-on-stem-partnerships">https://www.teachermagazine.com.au/articles/podcast-special-australias-chief-scientist-on-stem-partnerships</a></li> </ul>

	<ul style="list-style-type: none"> <li>• <a href="http://yrts.boxhill.edu.au/about.html">http://yrts.boxhill.edu.au/about.html</a> <ul style="list-style-type: none"> <li>○ 20 schools</li> </ul> </li> </ul>	
Optimising STEM Industry Partnership: inspiring Australia's Next Generation – Report by STEM Partnership Forum		<ul style="list-style-type: none"> <li>• <a href="http://www.educationcouncil.edu.au/site/DefaultSite/filesystem/documents/Reports%20and%20publications/Publications/Optimising%20STEM%20Industry-School%20Partnerships%20-%20Final%20Report.pdf">http://www.educationcouncil.edu.au/site/DefaultSite/filesystem/documents/Reports%20and%20publications/Publications/Optimising%20STEM%20Industry-School%20Partnerships%20-%20Final%20Report.pdf</a></li> </ul>
The STEM Programme Index 2016	The first national STEM Programme Index (SPI 2016) is an accessible guide to business, university, government and community-led STEM initiatives. It includes in-class, after school, holiday and online activities and resources, catering to a wide and growing range of students.	<ul style="list-style-type: none"> <li>• <a href="http://www.chiefscientist.gov.au/wp-content/uploads/SPI2016_release.pdf">http://www.chiefscientist.gov.au/wp-content/uploads/SPI2016_release.pdf</a></li> <li>• <a href="http://www.chiefscientist.gov.au/2016/01/media-release-an-index-for-australias-future-innovators/">http://www.chiefscientist.gov.au/2016/01/media-release-an-index-for-australias-future-innovators/</a></li> </ul>
STEM international Science Vacation Camp	Essington School Darwin	<ul style="list-style-type: none"> <li>• <a href="http://www.essington.nt.edu.au/news-articles/stem-international-science-vacation-program-july-2017">http://www.essington.nt.edu.au/news-articles/stem-international-science-vacation-program-july-2017</a></li> </ul>
School of the Future	Armidale and Duval High School	<ul style="list-style-type: none"> <li>• <a href="https://www.armidalefutureschool.com.au/">https://www.armidalefutureschool.com.au/</a></li> </ul>
What education might look like in the Future	Alt School- a US educational Startup Pearsons – educational publisher	<ul style="list-style-type: none"> <li>• <a href="https://www.youtube.com/watch?v=Yj4mO4N3ErU">https://www.youtube.com/watch?v=Yj4mO4N3ErU</a> (Pearsons)</li> <li>• <a href="https://www.youtube.com/watch?v=JZlgYiXzu58">https://www.youtube.com/watch?v=JZlgYiXzu58</a> (alt school)</li> <li>• <a href="https://www.youtube.com/watch?v=DftkLkQc_nI">https://www.youtube.com/watch?v=DftkLkQc_nI</a></li> </ul>
School of the Future Speech delivered by Mark Scott		<ul style="list-style-type: none"> <li>• <a href="https://education.nsw.gov.au/our-priorities/innovate-for-the-future/education-for-a-changing-world/thoughts-on-the-future/preparing-todays-">https://education.nsw.gov.au/our-priorities/innovate-for-the-future/education-for-a-changing-world/thoughts-on-the-future/preparing-todays-</a></li> </ul>

		<a href="#">students-for-tomorrows-world</a>
Sharing good practice: gonski and school partnerships		<ul style="list-style-type: none"> <li>• <a href="https://www.teachermagazine.com.au/articles/sharing-good-practice-gonski-and-school-partnerships?utm_source=CM&amp;utm_medium=bulletin&amp;utm_content=June12">https://www.teachermagazine.com.au/articles/sharing-good-practice-gonski-and-school-partnerships?utm_source=CM&amp;utm_medium=bulletin&amp;utm_content=June12</a></li> </ul>
The Options for the future of Secondary Education in Griffith	Wade High School	<ul style="list-style-type: none"> <li>• <a href="http://www.wade-h.schools.nsw.edu.au/documents/3895926/3902029/24176_griffith_brochure.pdf">http://www.wade-h.schools.nsw.edu.au/documents/3895926/3902029/24176_griffith_brochure.pdf</a></li> </ul>
'Pretty damn critical': Education experts urge big business to step into the classroom		<ul style="list-style-type: none"> <li>• <a href="https://www.smh.com.au/politics/federal/pretty-damn-critical-education-experts-urge-big-business-to-step-into-the-classroom-20180501-p4zcnk.html">https://www.smh.com.au/politics/federal/pretty-damn-critical-education-experts-urge-big-business-to-step-into-the-classroom-20180501-p4zcnk.html</a></li> </ul>
Project Firestorm	St Ives North Public School and the Rural Fire Service	<ul style="list-style-type: none"> <li>• <a href="https://www.teachermagazine.com.au/articles/connecting-the-classroom-with-the-community-natural-disaster-education?utm_source=CM&amp;utm_medium=Trending&amp;utm_content=June7">https://www.teachermagazine.com.au/articles/connecting-the-classroom-with-the-community-natural-disaster-education?utm_source=CM&amp;utm_medium=Trending&amp;utm_content=June7</a></li> </ul>
Remote education: Flexi-calendar meeting school community needs See Section on Industry Partnerships with Gunbalanya Station and Energy Resources Australia	Gunbalanya School	<ul style="list-style-type: none"> <li>• <a href="https://www.teachermagazine.com.au/articles/remote-education-flexi-calendar-meeting-school-community-needs">https://www.teachermagazine.com.au/articles/remote-education-flexi-calendar-meeting-school-community-needs</a></li> </ul>
STEM horizons for High Achievers- Winner “The Showcase Award for Excellence in Industry Partnerships”	Morton Bay Environmental Education Centre	<ul style="list-style-type: none"> <li>• <a href="https://moretoneec.eq.edu.au/Calendarandnews/News/Pages/STEM-Horizons-for-High-Achievers---Year-7.aspx">https://moretoneec.eq.edu.au/Calendarandnews/News/Pages/STEM-Horizons-for-High-Achievers---Year-7.aspx</a></li> <li>• <a href="https://www.youtube.com/watch?v=AJlevMdyRQU&amp;list=PLgJv5epyrnQC1phXS5mxhFnoXMBzulWEC&amp;index=14">https://www.youtube.com/watch?v=AJlevMdyRQU&amp;list=PLgJv5epyrnQC1phXS5mxhFnoXMBzulWEC&amp;index=14</a></li> </ul>

Coding in the classroom via the Online College of Coding Finalist - The Showcase Award for Excellence in Industry Partnerships	Gympie State High School	<ul style="list-style-type: none"> <li>• <a href="https://www.youtube.com/watch?v=lQzngQJnpYY&amp;index=10&amp;list=PLgJv5epyrnQC1phXS5mxhFnoXMBzulWEC">https://www.youtube.com/watch?v=lQzngQJnpYY&amp;index=10&amp;list=PLgJv5epyrnQC1phXS5mxhFnoXMBzulWEC</a></li> <li>• <a href="https://www.gympietimes.com.au/news/gympie-high-continues-its-story-of-success-in-2017/3250580/#/0">https://www.gympietimes.com.au/news/gympie-high-continues-its-story-of-success-in-2017/3250580/#/0</a></li> <li>• <a href="https://gympieshs.eq.edu.au/Supportandresources/Fo rmsanddocuments/Documents/coding.%2026th%20Feb%20pptx.pptx%20with%20gov%20logo.pdf">https://gympieshs.eq.edu.au/Supportandresources/Fo rmsanddocuments/Documents/coding.%2026th%20Feb%20pptx.pptx%20with%20gov%20logo.pdf</a></li> </ul>
JETS – Jobs Education Training Success	Bundaberg State High School, Bundaberg North State High School, Kepnock State High School	<ul style="list-style-type: none"> <li>• <a href="https://www.youtube.com/watch?v=pepNEfzvUfY&amp;index=3&amp;list=PLgJv5epyrnQC1phXS5mxhFnoXMBzulWEC">https://www.youtube.com/watch?v=pepNEfzvUfY&amp;index=3&amp;list=PLgJv5epyrnQC1phXS5mxhFnoXMBzulWEC</a></li> </ul>
The Outback College of Hospitality	Longreach State High School, Aramac State School, Barcardine State School, Blackall State School and Winton State School	<ul style="list-style-type: none"> <li>• <a href="https://www.youtube.com/watch?v=RvgfgcWgwiQ&amp;index=16&amp;list=PLgJv5epyrnQC1phXS5mxhFnoXMBzulWEC">https://www.youtube.com/watch?v=RvgfgcWgwiQ&amp;index=16&amp;list=PLgJv5epyrnQC1phXS5mxhFnoXMBzulWEC</a></li> </ul>
Winner - Secretary's School Achievement Award 2017	Aurora College – NSW's First Virtual School	<ul style="list-style-type: none"> <li>• <a href="https://publiceducationfoundation.org.au/secretarys-school-achievement-award-2017/">https://publiceducationfoundation.org.au/secretarys-school-achievement-award-2017/</a></li> <li>• <a href="http://www.aurora.nsw.edu.au/">http://www.aurora.nsw.edu.au/</a></li> <li>• <a href="http://www.aurora.nsw.edu.au/blog/2015/02/04/technology-partners-announced-by-deputy-premier-and-education-minister-in-dubbo/#.Wyxpm4huaUk">http://www.aurora.nsw.edu.au/blog/2015/02/04/technology-partners-announced-by-deputy-premier-and-education-minister-in-dubbo/#.Wyxpm4huaUk</a></li> </ul>
Remote WA Schools win at nationwide STEM awards	Wiluna Remote Community School Leonora District High School	<ul style="list-style-type: none"> <li>• <a href="https://www.education.wa.edu.au/web/newsroom/-/remote-wa-schools-win-at-nationwide-stem-awards">https://www.education.wa.edu.au/web/newsroom/-/remote-wa-schools-win-at-nationwide-stem-awards</a></li> </ul>
Humanities based partnerships	Albert Park College	<ul style="list-style-type: none"> <li>• <a href="http://www.albertparkcollege.vic.edu.au/specialist_program.html">http://www.albertparkcollege.vic.edu.au/specialist_program.html</a></li> <li>• <a href="http://www.education.vic.gov.au/about/awards/Pages/veeawinners16.aspx">http://www.education.vic.gov.au/about/awards/Pages/veeawinners16.aspx</a></li> </ul>
DoEducation Awards for Excellence 2017 - Telstra Outstanding Use of Innovation or Technology –	Launceston College Elizabeth College	<ul style="list-style-type: none"> <li>• <a href="https://www.youtube.com/watch?v=Bagl6lLbu1Q&amp;list=PLWFK6wYaexKjGt94I_9VpO6GHdWi-gOuF&amp;index=12">https://www.youtube.com/watch?v=Bagl6lLbu1Q&amp;list=PLWFK6wYaexKjGt94I_9VpO6GHdWi-gOuF&amp;index=12</a></li> </ul>

TAS		
Google Investing in STEM programs in Aus run by FIRST		<ul style="list-style-type: none"> <li>• <a href="https://www.smh.com.au/technology/stem-education-gets-milliondollar-boost-from-google-australia-20150729-gin1sz.html">https://www.smh.com.au/technology/stem-education-gets-milliondollar-boost-from-google-australia-20150729-gin1sz.html</a></li> </ul>
High school students pilot Mars mission by sending code into space	Barker College, Fort St High School, Gosford High School, James Ruse Agricultural High School and North Sydney Boys High School	<ul style="list-style-type: none"> <li>• <a href="https://sydney.edu.au/news-opinion/news/2017/01/19/high-school-students-pilot-mars-mission-by-sending-code-into-spa.html">https://sydney.edu.au/news-opinion/news/2017/01/19/high-school-students-pilot-mars-mission-by-sending-code-into-spa.html</a></li> </ul>
F1 in schools challenge international STEM challenge	Mountain View High School NSW Brighton Secondary College, South Australia Tumut High School, NSW Haileybury College, Victoria	<ul style="list-style-type: none"> <li>• <a href="https://www.cessnockadvertiser.com.au/story/5285602/meet-our-stem-stars-of-the-future/">https://www.cessnockadvertiser.com.au/story/5285602/meet-our-stem-stars-of-the-future/</a></li> </ul>
Fintona school visits NASA	Fintona Girls' School	<ul style="list-style-type: none"> <li>• <a href="https://www.fintona.vic.edu.au/news/NASA_trip_2017">https://www.fintona.vic.edu.au/news/NASA_trip_2017</a></li> </ul>
Korowa Anglican Girls' School visits NASA	Korowa Anglican Girls' School	<ul style="list-style-type: none"> <li>• <a href="https://www.korowa.vic.edu.au/page/programs/experiential-learning/usa-space-school/">https://www.korowa.vic.edu.au/page/programs/experiential-learning/usa-space-school/</a></li> </ul>
Radford College and the STEM Sells program	Radford College ACT	<ul style="list-style-type: none"> <li>• <a href="https://www.radford.act.edu.au/news-and-events/latest-news-and-achievements/article/?id=stem-sells">https://www.radford.act.edu.au/news-and-events/latest-news-and-achievements/article/?id=stem-sells</a></li> <li>• <a href="http://www.stemsells.com.au/#about">http://www.stemsells.com.au/#about</a></li> </ul>
"Curious Minds program hopes to foster young women's passion for science, maths"	Lyneham High School	<ul style="list-style-type: none"> <li>• <a href="https://www.canberratimes.com.au/national/act/curious-minds-program-hopes-to-foster-young-womens-passion-for-science-maths-20151209-glj99s.html">https://www.canberratimes.com.au/national/act/curious-minds-program-hopes-to-foster-young-womens-passion-for-science-maths-20151209-glj99s.html</a></li> </ul>
"Alfred Deakin High School student behind university's image of Jupiter"	Alfred Deakin High School	<ul style="list-style-type: none"> <li>• <a href="https://www.canberratimes.com.au/national/act/alfred-deakin-high-school-student-behind-universitys-image-of-jupiter-20160408-go1c0d.html">https://www.canberratimes.com.au/national/act/alfred-deakin-high-school-student-behind-universitys-image-of-jupiter-20160408-go1c0d.html</a></li> </ul>
Maker Culture in schools essential for jobs of the future	Orana Steiner School	<ul style="list-style-type: none"> <li>• <a href="https://www.familycapers.com.au/maker-culture-in-schools-essential-for-jobs-of-the-future/">https://www.familycapers.com.au/maker-culture-in-schools-essential-for-jobs-of-the-future/</a></li> </ul>
Perth students get a byte of	Aquinas College, Balcatta Senior	<ul style="list-style-type: none"> <li>• <a href="http://news.curtin.edu.au/media-releases/perth-">http://news.curtin.edu.au/media-releases/perth-</a></li> </ul>

STEM careers – “BiG Day In” event	High School, Ballajura Community College, Cecil Andrews College, Ellenbrook Secondary College, Frederick Irwin Anglican School, Governor Stirling Senior High School, Helena College, John XXIII College, Lumen Christi College, Mercedes College, Mindarie Senior College, Perth Modern School, Thornlie Senior High School, and Wesley College	<a href="#">students-get-byte-stem-careers/</a>
Woodside	This is their landing page for all of their STEM education initiatives	<ul style="list-style-type: none"> <li>• <a href="http://www.woodside.com.au/Working-Sustainably/Technology-and-Innovation/Pages/STEM-Education.aspx#.WyyM1lhuaUk">http://www.woodside.com.au/Working-Sustainably/Technology-and-Innovation/Pages/STEM-Education.aspx#.WyyM1lhuaUk</a></li> </ul>
Eddie Woo	Cherrybrook Technology High School	<ul style="list-style-type: none"> <li>• <a href="http://www.abc.net.au/news/2018-03-19/eddie-woo-maths-teacher-celebrity-status-rising/9553234">http://www.abc.net.au/news/2018-03-19/eddie-woo-maths-teacher-celebrity-status-rising/9553234</a></li> </ul>
Orica - STEM partnership reaches 500th high school		<ul style="list-style-type: none"> <li>• <a href="https://www.youtube.com/watch?v=tCFUfUEiEqs">https://www.youtube.com/watch?v=tCFUfUEiEqs</a></li> </ul>
STEM Video game Challenge sponsored by PWC		<ul style="list-style-type: none"> <li>• <a href="https://www.youtube.com/watch?v=gSpS7dZyQXI">https://www.youtube.com/watch?v=gSpS7dZyQXI</a></li> <li>• <a href="https://www.digitalpulse.pwc.com.au/pwc-stem-video-game-challenge-2014/">https://www.digitalpulse.pwc.com.au/pwc-stem-video-game-challenge-2014/</a></li> </ul>
Regional Development Australia ME Program		<ul style="list-style-type: none"> <li>• <a href="http://www.meprogram.com.au">http://www.meprogram.com.au</a></li> </ul>
Smart Seeds – GHD		<ul style="list-style-type: none"> <li>• <a href="http://www.smartseeds.org">http://www.smartseeds.org</a></li> </ul>

## Collaboration Across Community

Article/Programme	School/s	Website/Media Article
Big Picture	Morisset High School, Lake Macquarie	<ul style="list-style-type: none"> <li>• <a href="https://www.bigpicture.org.au">https://www.bigpicture.org.au</a></li> </ul>
Riverland eChallenge – Adelaide University		<ul style="list-style-type: none"> <li>• <a href="https://rdamr.com.au/mentors-ready-to-rise-to-the-challenge/">https://rdamr.com.au/mentors-ready-to-rise-to-the-challenge/</a></li> </ul>

### Collaboration with Not-For-Profit

Article/Programme	School/s	Website/Media Article
Salvation Army Workshops		<ul style="list-style-type: none"> <li>• <a href="http://www.salvationarmy.org.au/en/get-involved/Schools-involvement/Contact-Us1/Victoria/Salvos-School-Tours/">http://www.salvationarmy.org.au/en/get-involved/Schools-involvement/Contact-Us1/Victoria/Salvos-School-Tours/</a></li> </ul>
Programming the Future – Save the Children		<ul style="list-style-type: none"> <li>• <a href="https://www.savethechildren.org.au/Our-work/Our-programs/Australia/Programming-the-Future">https://www.savethechildren.org.au/Our-work/Our-programs/Australia/Programming-the-Future</a></li> </ul>

### Stem Related Collaboration

Article/Programme	School/s	Website/Media Article
NBN CoSTEM+X Initiative		<ul style="list-style-type: none"> <li>• <a href="https://www.nbnco.com.au/blog/education/growing-new-careers-from-stem.html">https://www.nbnco.com.au/blog/education/growing-new-careers-from-stem.html</a></li> </ul>
Questacon Invention Convention		<ul style="list-style-type: none"> <li>• <a href="https://www.questacon.edu.au/outreach/programmes/questacon-smart-skills-initiative/questacon-invention-convention">https://www.questacon.edu.au/outreach/programmes/questacon-smart-skills-initiative/questacon-invention-convention</a></li> </ul>
Shell Questacon Science Circus		<ul style="list-style-type: none"> <li>• <a href="https://www.questacon.edu.au/outreach/programs/science-circus">https://www.questacon.edu.au/outreach/programs/science-circus</a></li> </ul>
Code Club		<ul style="list-style-type: none"> <li>• <a href="https://codeclubau.org">https://codeclubau.org</a></li> </ul>
Robogals		<ul style="list-style-type: none"> <li>• <a href="https://codeclubau.org">https://codeclubau.org</a></li> </ul>

Robotics@QUT – Queensland University of Technology Outreach		<ul style="list-style-type: none"> <li>• <a href="https://www.qut.edu.au/news?news-id=108297">https://www.qut.edu.au/news?news-id=108297</a></li> </ul>
Tech Schools – Victorian Government		<ul style="list-style-type: none"> <li>• <a href="https://www.education.vic.gov.au/about/programs/learningdev/techschools/Pages/default.aspx?Redirect=1">https://www.education.vic.gov.au/about/programs/learningdev/techschools/Pages/default.aspx?Redirect=1</a></li> </ul>
Students Send Messages into Space	Dalkeith Primary School	<ul style="list-style-type: none"> <li>• <a href="https://www.csiro.au/en/Education/Programs/STEM-Professionals-in-Schools/Partnership-support/Partnership-stories/Dalkeith-Primary-School">https://www.csiro.au/en/Education/Programs/STEM-Professionals-in-Schools/Partnership-support/Partnership-stories/Dalkeith-Primary-School</a></li> </ul>
Nesting Boxes – La Trobe University	Macleod College	<ul style="list-style-type: none"> <li>• <a href="https://www.teachermagazine.com.au/articles/students-become-citizen-scientists?utm_source=Gonski&amp;utm_medium=article&amp;utm_content=Part1">https://www.teachermagazine.com.au/articles/students-become-citizen-scientists?utm_source=Gonski&amp;utm_medium=article&amp;utm_content=Part1</a></li> </ul>
Marine Science Lessons	Cocas Islands High School	<ul style="list-style-type: none"> <li>• <a href="https://www.teachermagazine.com.au/articles/making-science-learning-meaningful">https://www.teachermagazine.com.au/articles/making-science-learning-meaningful</a></li> </ul>
NASA Visit – Reaching for the Stars	Kyogle High School	<ul style="list-style-type: none"> <li>• <a href="https://www.teachermagazine.com.au/articles/making-science-learning-meaningful">https://www.teachermagazine.com.au/articles/making-science-learning-meaningful</a></li> </ul>
Gravitational Wave		<ul style="list-style-type: none"> <li>• <a href="https://readnow.isentia.com/articlepresenter.aspx?GUID=dfb31aed-0da2-4c87-94dc-d4aa47a20477&amp;serID=85701&amp;ArticleID=871077614&amp;output=txt">https://readnow.isentia.com/articlepresenter.aspx?GUID=dfb31aed-0da2-4c87-94dc-d4aa47a20477&amp;serID=85701&amp;ArticleID=871077614&amp;output=txt</a></li> </ul>

## Entrepreneurship Examples

Article/Programme	School/s	Website/Media Article
Jump Start		<ul style="list-style-type: none"> <li>• <a href="http://www.jumpstartproject.com.au">http://www.jumpstartproject.com.au</a></li> </ul>
Young Change Agents		<ul style="list-style-type: none"> <li>• <a href="http://www.youngchangeagents.com">http://www.youngchangeagents.com</a></li> </ul>
UNE Smart Farm		<ul style="list-style-type: none"> <li>• <a href="http://www.une.edu.au/research/research-centres-institutes/smart-farm">http://www.une.edu.au/research/research-centres-institutes/smart-farm</a></li> </ul>

## Attachment B

### Public statements by the Australian schools sector that schools would continue to pay under the statutory licence if fair use is enacted

#### [CAG submission in response to ALRC Copyright and the Digital Economy Discussion Paper](#)

(This submission was made in response to the ALRC's Discussion Paper, which included a draft recommendation to replace the educational statutory licences with voluntary licensing. In its final report, the ALRC recommended that the statutory licences be retained, but greatly simplified.)

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.<sup>122</sup>*

It is important in this context to restate 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*

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<sup>122</sup> Copyright Advisory Group, Submission to the Australian Law Reform Commission, *Copyright and the Digital Economy Issues Paper*, 2012, 6–7.

*Australian Government expressing support for the submission and its recommendations.*<sup>123</sup>

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.

### **CAG submission in response to Productivity Commission Draft Report**

#### *Australian schools would still pay licence fees*

Copyright Agency/Viscopy has suggested - wrongly - that a fair use exception could lead to Australian schools and universities refusing to pay licence fees for the vast amount of copyright material to which they now have access. In support of this claim, they point to Canada, where they say the enactment of a fair dealing for education exception resulted in Canadian schools refusing to pay for any classroom copying.

Australian schools spend upwards of \$700 million per annum in purchasing educational content for students. The sector pays an additional approximately \$90 million each year on collectively negotiated copyright licences paid to copyright collecting societies.

There is no suggestion whatsoever that fair use would have any impact on the upwards of \$700 million that Australian schools spend acquiring educational resources. Schools will continue to acquire content - whether that be textbooks, software, educational games or apps. As the Commission has rightly noted in its draft report, a fair use exception - even one that listed education as an illustrative use as has been proposed by the ALRC - would not mean that all uses by schools or other educational institution would be "fair" and therefore no longer remunerable. ...

The education sector at the highest levels has given repeated assurances over a number of years that the sector would continue to enter into collective licensing arrangements if a fair use exception were to be introduced. These claims have been endorsed by the State, Territory and Commonwealth Education Ministers, as well as the National Catholic Education Commission and the Independent Schools Council of Australia. It is disappointing that organisations such as the Copyright Agency/Viscopy continue to make misleading claims on this issue. ...

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<sup>123</sup> Standing Council on School Education and Early Childhood, Submission to the Australian Law Reform Commission, Copyright and the Digital Economy Issues Paper, 2012.

There is absolutely no foundation to the suggestion that a fair use exception would apply to all - or even most - ways in which schools currently use content in reliance on the sector's collective licence with Copyright Agency. **As repeatedly guaranteed by the sector, these licences will continue to exist in a fair use environment.** (Emphasis in original.)<sup>124</sup>

### [Statement on the Smartcopying website](#)

(the official guide to copyright issues for Australian schools and TAFEs)

The Australian school sector spends over \$700 million each year purchasing educational content for students. This is in addition to the \$94 million dollars spent by the sector each year on licence fees paid to collecting societies to use copyright content in Australian schools.

If fair use was enacted, Australian schools would continue to pay for the significant proportion of educational uses that would not be covered by a fair use exception. Any use that caused unreasonable harm to an author or rights holder would not fall within a fair use exception.

Therefore, fair use would not impact in any way on the amount that the school sector spends buying educational resources. The school sector would never support reforms that would deprive creators of an ability to earn a living — schools do not want a free ride, simply a fair ride.

Australian schools need fair use not so they can avoid paying copyright fees, but so that teachers can get on with the job of using leading edge technologies for the benefit of their students.

*What about claims that schools will pull out of licensing arrangements with copyrights owners if the ALRC's reforms are implemented?*

The ALRC's recommendations would not mean that all educational uses of copyright materials would be free. Any use that causes unreasonable harm to an author or rights holder would not fall within a fair use exception. Collective licensing arrangements would continue to exist for educational uses that were not covered by a fair use exception.

The reform would however resolve the issue where currently, as a direct result of the statutory licence and inflexible copying exceptions, Australian schools pay millions of dollars each year for uses that are free in comparable jurisdictions and for uses of content that no copyright owner ever expected to be paid.

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<sup>124</sup> Copyright Advisory Group, Submission in response to the Productivity Commission Draft Report, *Intellectual Property Arrangements*, 2016, 13–4.

The reforms recommended by the ALRC would not in any way impact on the amount that the school sector spends buying educational resources, which is estimated to be over \$700 million every year. They would simply ensure that licence fees paid by schools to copyright collecting societies - which in 2016 amounted to over \$94 million under statutory and voluntary licences - were appropriately directed to authors who are trying to make a living from their works.

The school sector supports the ALRC's proposals because they would simply ensure that educational licence fees are paid to use education content by authors who are writing to earn a living.

## Attachment C

### Modernising the Copyright Act - why incremental reform is not the answer

There have been suggestions made during the Modernisation Consultation that the concerns that schools have raised could be addressed by making minor changes to the existing educational copying exceptions.

This would be a short-term fix at best. As technology and educational uses change - as they inevitably do - today's fix would rapidly become tomorrow's problem.

Australia has a long history of incremental copyright reform. In the educational context, this can be largely attributed to the long history of copyright collecting societies seeking to exploit inflexible, technologically-specific exceptions to seek payment from Australian schools for uses that cause no harm to rights holders. They have been able to do this because an activity that was covered by an exception can fall outside the scope of the exception for legal or technical reasons as schools take advantage of new technologies. This has made it necessary for the education sector to request successive governments to make incremental adjustments to the Copyright Act to reflect the realities of new technologies.

CAG submits that although this incremental approach to solving copyright problems has been undertaken by governments with the best of intentions, experience has proven this approach has largely failed.

Further, short-term incremental reform is at odds with the Government's vision of creating a flexible, world-leading education system for the benefit of Australian students.

#### Examples of the problems of incremental reform

Specific exceptions introduced to address a particular technological problem have been successful in solving known problems for a short period of time. However, in CAG's experience, they have often led to other problems in the face of technological change, sometimes creating problems worse than the initial problem that Government was trying to solve.

***Copyright Agency wanted schools to pay when students clicked on a link or viewed a website***

In a case that was described by a leading copyright expert as “giving copyright a bad name”,<sup>125</sup> Copyright Agency argued that schools should pay whenever a teacher directed a student to view a website.

Copyright Agency’s argument was that, when a student clicks on a hypertext link to view a freely available website - for example the CSIRO website, or the NASA website - the student is “communicating” the website content to him or herself, and that the school is authorising this communication. Despite the fact that this activity occurs in homes, businesses and classrooms all around the world, every day, without anyone having to pay, Copyright Agency argued in the Copyright Tribunal that Australian schools *should* be paying for. In other words, a teacher asking a student to go to the library to read a book would not attract a payment, but a teacher telling the same student to go to the library to browse a website would.

Associate Professor Kim Weatherall described the case this way:

*Please, someone, tell me what I’m missing here. Because if I could see a reason why copyright owners were suffering as a result of teachers telling their students to view material online, I would perhaps be more inclined to be sympathetic. But I’d be grateful if anyone could enlighten me how there is any loss to copyright owners here.*

*I also don’t think that the government ever intended such a result – that schools would pay for telling people to look at stuff.*

Schools were reasonably confident that the law was on their side. The Government had, after all, enacted a temporary copying exception that the Explanatory Memorandum to the Digital Agenda reforms said was “intended to include the browsing (or simply viewing) of copyright material.”<sup>126</sup>

Despite this, schools were forced to spend public money resisting Copyright Agency’s claim in the Copyright Tribunal. The dispute was only resolved when the schools requested that the Government amend the 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. This is now made expressly clear in s 22(6A) of the Act. Copyright Agency opposed this reform.<sup>127</sup>

<sup>125</sup> See 2006 [blog post on the case](#) by Associate Professor Kim Weatherall.

<sup>126</sup> Explanatory Memorandum, Copyright Amendment Bill (2006) 5.

<sup>127</sup> See Copyright Agency, [Submission to the Senate Legal and Constitutional Committee on the Copyright Amendment Bill 2006](#) [5.1]–[5.10].

***Copyright Agency wanted schools to pay when they used proxy caching for efficiency purposes***

Copyright Agency also saw an opportunity to seek payment from schools for proxy caching. Schools use this technology for a number of reasons, including to improve the efficiency of their IT systems as well as to ensure that students are not exposed to inappropriate internet content.

In 2006, the then Copyright Agency CEO Michael Fraser told Copyright Agency's members: "new technology brings new uses ...such as caching" which "provide opportunities for rights holders to seek payment."<sup>128</sup>

No one in the world was paying for this kind of caching, but Australian schools were faced with the prospect of being forced to pay for caching under the educational statutory licence. This was averted when schools asked the Government to enact a new exception - s 200AAA - to ensure that they were not required to pay for this activity. Copyright Agency opposed this reform.<sup>129</sup>

That exception is already out of date. On its face, it applies to computer systems "operated by or on behalf of a body administering an educational institution". It would clearly apply if a school was operating its own computer system, as well as if it was using a computer system operated by a government department or other educational body on its behalf. But what about if the caching was undertaken by a commercial cloud-based provider. Would a service of this kind be operated "by or on behalf of the school"? The answer is not clear. In other words, s 200AAA is an example of an exception that was enacted to address a legislative gap, but which is not future-proofed against technological developments that may take the practices it was intended to address outside the scope of what was anticipated at the time the exception was drafted.

***Screenrights wanted schools to pay when a teacher used the latest technology to show TV programs in the classroom***

We have already discussed the classroom performance exception in s 28. This exception was drafted when schools used old technology (VCR machine in the classroom) and didn't apply

<sup>128</sup> Michael Fraser, Copyright in the Digital Age, May 2006.

<sup>129</sup> See Copyright Agency, [Submission to the Senate Legal and Constitutional Committee on the Copyright Amendment Bill 2006](#), [6.24]–[6.31].

when schools began using new technology (ie a central AV room instead of VCR in each classroom).

In 2006, Screenrights argued that by using this technology to deliver the TV program to the classroom, schools were exercising the “communication” right. In other words, using a VCR machine came within the scope of the exception, but using new technology to do essentially the same thing - play a TV program to students in the classroom - did not.

Schools were required to seek an amendment to this exception to bring it in line with changes in technology. Just to be clear, schools do pay when they make a copy of the program, as well as when they upload a copy onto a school intranet etc. This exception is just about allowing them to show the program to their students in the classroom without the need for further payment.

What all of these examples show is that the existing regulatory arrangements have not protected the school sector from unnecessary litigation or uncertain legal interpretations.

**None** of the teaching activities that we’ve discussed above would cause any harm to rights holders, and yet CAG was required to seek Government intervention each time a collecting society sought to exploit inflexible, technologically specific exceptions in order to seek greater payments from schools.

An educational copying regime that requires case-by-case Government intervention to fix problems as technology develops is not a system that can be regarded as being able to “adapt over time to provide access to copyright material in special cases as they emerge”.<sup>130</sup>

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<sup>130</sup> Department of Communications, [Copyright Modernisation Consultation Paper](#) (2018) 4.

## Attachment D

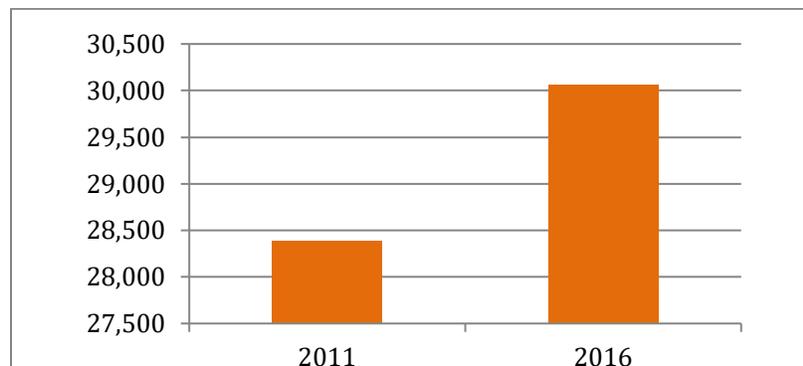
CMEC Copyright Consortium<sup>131</sup>

May 2018

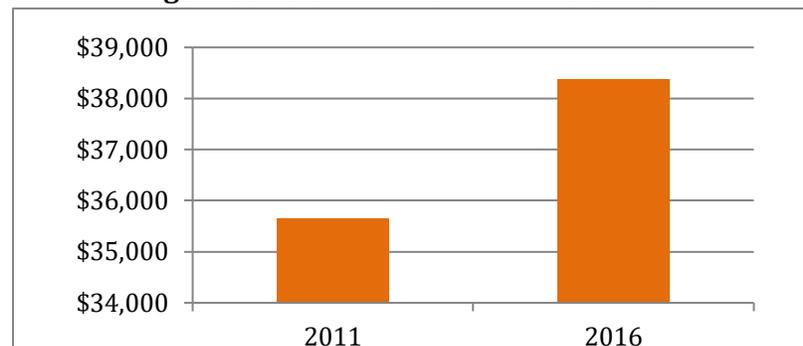
### Statistics Canada Data<sup>132</sup> on Average Income of Authors and Writers

Since the 2012 Supreme Court decision and the education sector's adoption of the *Fair Dealing Guidelines* in January 2013, figures show that the financial situation of authors and writers remains **stable with a slight increase**.

**Numbers of authors and writers in Canada**



**Average income of authors and writers in Canada**



<sup>131</sup> The CMEC Copyright Consortium is composed of the ministers of education of the provinces and territories with the exception of Quebec.

<sup>132</sup> Statistics taken from Statistics Canada reports on 2011 National Household Survey, 2016 Census, and on the book-publishing industry

<http://www12.statcan.gc.ca/global/URLRedirect.cfm?lang=E&ips=99-014-X2011042>

<http://www12.statcan.gc.ca/global/URLRedirect.cfm?lang=E&ips=98-400-X2016375>

<http://www5.statcan.gc.ca/cansim/a26?lang=eng&id=3610095&p2=33>

<http://www.statcan.gc.ca/daily-quotidien/180323/dq180323c-eng.pdf>

In 2011, 28,385 people aged 15 and over were classified as authors/writers, with an average income of \$35,643. In 2016, 30,060 people aged 15 and over were classified as authors/writers, with an average income of \$38,363.

Note that Canadian authors accounted for 51.1% of total sales of Canadian publishers in 2016 at \$701.2 million, up from 48.9% in 2014.

In 2016, 30% of new titles by Canadian authors were educational titles.

## Attachment E

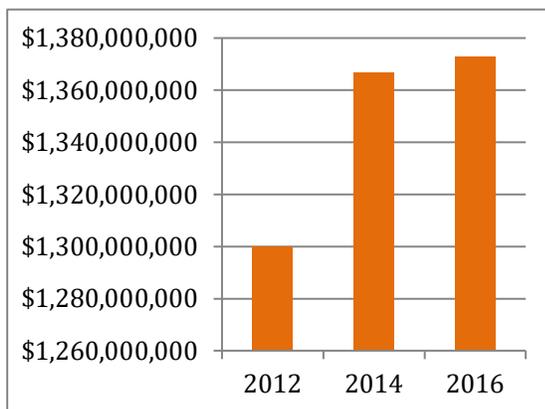
CMEC Copyright Consortium<sup>133</sup>

April 2018

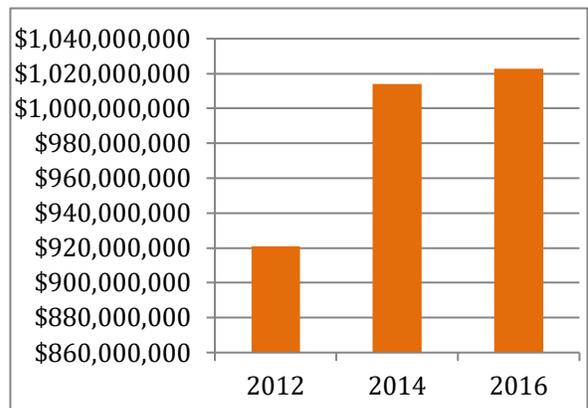
### Statistics Canada Data<sup>134</sup> on Canada's Publishing Industry and K–12 Education-Sector Spending

Since the 2012 Supreme Court decision and the education sector's adoption of the *Fair Dealing Guidelines* in January 2013, figures show that Canadian publishing is a healthy industry and is not in decline.

**Book sales in Canada**



**Book sales in Ontario  
(accounting for 66% of all Canadian sales)**



<sup>133</sup> The CMEC Copyright Consortium is composed of the ministers of education of the provinces and territories with the exception of Quebec.

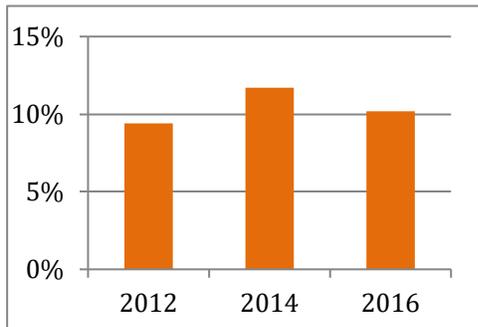
<sup>134</sup> Statistics taken from Statistics Canada reports on the book-publishing industry (2012, 2014, and 2016)

<http://www.statcan.gc.ca/daily-quotidien/180323/dq180323c-cansim-eng.htm>

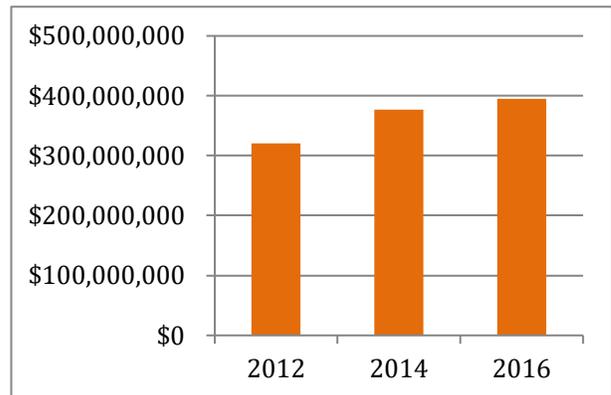
<http://www.statcan.gc.ca/daily-quotidien/160519/dq160519e-cansim-eng.htm>

<http://www.statcan.gc.ca/pub/87f0004x/2013001/tablesectlist-listetableauxsect-eng.htm>

**Canadian publishing-industry profit margin**



**Canadian publishers' sales of their own titles to K-12 educational institutions**



The education sector continues to purchase hundreds of millions of dollars of Canadian publishers' books annually, and K-12 schools are the second largest customer category for publishers (behind major chain bookstores and campus bookstores).

Canadian publishers' sales of their own titles to K-12 educational institutions continue to be on the rise.

Note: Of all new book titles published by Canadian publishers between 2014 and 2016, the percentage of new titles published for the K-12 education sector has remained constant at 24%.

