

EXECUTIVE SUMMARY

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

Fair use is critically important to modern education

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

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

Fair use will make life easier for teachers

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

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

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

A series of misleading claims have recently been made by the Australian Society of Authors (ASA) and Copyright Agency suggesting that the ALRC's proposals would take fair remuneration away from Australia's authors and seriously challenge the rights and income of Australian authors and publishers. **These claims are not supported by fact.**

The Australian school sector clearly stated in submissions to the ALRC that introducing a flexible exception would **not** mean that all educational uses of copyright materials would be free, and that many uses of educational materials would continue to be paid for under collective voluntary licensing arrangements (similar to those currently in place with music collecting societies). This statement was endorsed by State, Territory and Commonwealth Education Ministers, as well as the Independent Schools Council of Australia and the National Catholic Education Office.

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

Fair use will not impact on educational publishing markets

The Australian education sector currently spends upwards of \$665 million dollars per annum on purchasing educational resources for Australian schools. This expenditure is in addition to the over \$80 million dollars spent each year on copyright licensing fees paid to copyright collecting societies.

There is no suggestion the ALRC's proposals would impact in any way the amount the Australian school sector spends on buying educational resources. Collective licences with Copyright Agency and Screenrights will continue to exist - but in a more flexible way that is more suitable to the digital learning environment.

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

Making the copyright system fairer

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

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

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

The ALRC's proposals protect copyright owners

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

Dispelling the myths about fair use

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

1. Fair use is not a foreign concept
Australia's current fair dealing provisions and fair use share a common legal history.

2. The ALRC's proposals are not radical

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

3. Fair use is not uncertain

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

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

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

5. Australia needs fair use

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

Other issues

Contractual override

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

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

Broadcasting

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

Non-consumptive uses

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

Orphan works and mass digitisation

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