

15 March 2016

Committee Secretary
House of Representatives Standing Committee on Education and Employment
PO Box 6021
Parliament House
Canberra ACT 2600

By email: ee.reps@aph.gov.au

Inquiry into innovation and creativity: workforce for the new economy

This submission is made by the Copyright Advisory Group to the Council of Australian Governments' Education Council (**CAG**). CAG is assisted by the National Copyright Unit (**NCU**), a small secretariat based in Sydney.

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 9500 primary and secondary schools in Australia and their 3.5 million students. CAG also represents the majority of TAFE colleges.

Copyright reform must be seen as a key aspect of education and innovation policy

This committee has been asked to consider the ways in which existing laws - including intellectual property laws - are standing in the way of tertiary education providers meeting the needs of a future workforce focused on innovation and creativity.

We consider this to be a timely inquiry. There is currently a critical disconnect between Government education and innovation policies, and Australia's copyright laws. This is not confined to tertiary education. Copyright law is operating as a major roadblock to schools making full use of digital technologies to deliver educational and innovation policy outcomes.

There is an urgent need for copyright reform if the education sector is to have any chance of meeting the Government's policy objectives of delivering the world class STEM education that will be necessary to prepare today's school children to become the creators and innovators of the future.

Education in a digital age

The internet has fundamentally changed the nature of teaching and learning in a digital age. Today's classrooms bear little if any resemblance to the classrooms of even just 10 years ago. Blackboards have long been replaced by interactive whiteboards and touch sensitive screens, and students engage with teachers and their peers via digital devices.

**NSW Department of Education – National Copyright Unit
COAG Education Council**

Level 1, 35 Bridge Street, Sydney NSW 2000 GPO Box 33 Sydney NSW 2001
T (02) 9561 8876 F (02) 9561 1189

The classroom of the near future will bear even *less* resemblance to the “chalk and talk” classroom. A recent Sydney Morning Herald report provided a snapshot of what lies just around the corner for today’s school children:¹

Interactive floorboards, colour sensitive robots and Lego furniture: welcome to the classroom of the future. ...

Mobile touch sensitive screens, cloud computing across all devices, walls and desks upon which students can write, and Lego-style furniture that allows students to sit, stand, crouch or lay their way around a classroom will become standard.

Government and industry² are agreed that education - and in particular STEM education - is crucial to the future economic and social well-being of Australia. A new Australian curriculum for Digital Technologies³ introduces computational thinking, logic and problem- solving capability into school curriculums, with simple visual programming taught in primary school and a general purpose programming language taught in high school.

These are exciting times for education, but the benefits of this classroom revolution will not be fully realised without significant reform of the educational copying regime. As we discuss below, copyright laws designed in the age of the photocopier are not working in the age of the iPad and the 3D printer, and are holding back innovation in Australia’s schools. Schools simply cannot meet the Government’s innovation goals while they are being impeded by outdated and inflexible copyright laws.

How is copyright blocking STEM education in Australian schools?

Here’s just a few examples of how copyright is operating as a roadblock to Australian schools making full use of cutting edge digital technologies to deliver educational and innovation policy outcomes:

- ***Statutory licences impose cost penalties for using digital technologies***

The Copyright Act contains two educational statutory licences that allow schools, TAFEs and universities to make certain educational uses of copyright material without the permission of the rights holder, subject to the payment of equitable remuneration. While this regime facilitates educational use of content, it is highly prescriptive and inflexible, and imposes a cost penalty for using the most up-to-date technology for teaching:

Ms A finds a science exercise that looks like it would be of interest to her Year 5 students. She prints a copy of the exercise and hands it out to 25 students.

Mr B wants to share the same science exercise with his students, but he wants to use digital technology to do so. He saves a copy of the exercise from an e-book to his laptop hard disk, emails this to his school email account, and uploads it to the school’s learning management system (**LMS**). He then uses the interactive whiteboard in his classroom to display the text to his 25 students.

¹ <http://www.smh.com.au/national/education/the-classroom-of-the-future-comes-alive-20151106-gksgt3.html#ixzz3qwi8ydFl>

² See for example recent comments by the Business Council of Australia http://www.zdnet.com/article/business-council-calls-for-coding-to-begin-with-toddlers/?tag=nl.e551&s_cid=e551&ttag=e551&ftag=TRE7ed2633

³ <http://www.australiancurriculum.edu.au/technologies/digital-technologies/curriculum/f-10?layout=1>

Under the current educational copyright regime, if Ms A's school was surveyed by Copyright Agency, she would be required to record 1 remunerable activity; ie printing 25 copies of the exercise. If Mr B's school was surveyed, he would be required to record 4 potentially remunerable activities: making a copy when he saved the text to his laptop, making a communication when emailing it to his school account, making a further communication when uploading it onto the LMS, and a communication when he displays the exercise from an interactive whiteboard to his class of 25 students.

Today's students and teachers expect everything to be available online on the web all the time. They access content from a wide array of devices: laptops, tablets, smartphones, etc. Australian schools should not be penalised if they choose to use the most modern teaching methods for the advantage of Australian students.

- ***Inflexible and technologically specific exceptions cannot accommodate new and innovative technologies***

The Copyright Act also contains a number of inflexible, technologically specific educational exceptions. These include an exception that permits a teacher to write a quote from a book on a blackboard. In today's digital classroom, a teacher would be using an interactive whiteboard rather than a blackboard, but the exception is not flexible enough to accommodate this shift in technology with the result that this activity is not technically covered by an exception.

None of the existing exceptions permit schools and universities to make use of education data mining.

- ***The educational copyright regime is ill suited to MOOCs and to collaboration with industry***

Schools are being encouraged to engage with the broader community and with industry in the course of developing critical STEM skills, but the educational copying regime is insufficiently flexible to accommodate this. Content can be copied for "school" use, but not for uses such as student/industry engagement, or use in a MOOC that can be accessed by someone outside of the school or overseas.

- ***Australian schools paying millions of dollars for non-harmful educational uses that no one ever expected to be paid for***

Another significant flaw in the educational copying regime is that Australian schools are required to pay under the statutory licences even in circumstances where the rights holder cannot be located, or where material is made freely available to use on the internet.

This has resulted in Australian schools paying **millions of dollars a year** in public funds for content that no one ever expected to be paid for. In many cases, the money collected from schools is distributed to rights holders who have no connection whatsoever with the content copied. That's because the copyright owner either cannot be identified or cannot be located. Requiring schools to pay for this copying is a highly inefficient use of scarce public resources.

In Canada, the US, Singapore, South Korea, Israel and the Philippines, schools can rely on flexible copyright exceptions such as fair use to undertake *fair* uses, for educational purposes, without payment.

What reforms are needed to fix this?

In its *Copyright and the Digital Economy* review, the Australian Law Reform Commission (**ALRC**) said that the educational copyright scheme was in urgent need of reform to enable educational institutions to take full advantage of the wealth of material and new technologies and services now available in a digital age.⁴ The ALRC made the following recommendations:

1. Simplifying and streamlining the statutory licences
2. Replacing the educational exceptions with a flexible fair use exception
3. Clarifying the Copyright Act to ensure that the existence of the statutory licences does not prevent educational institutions from relying on non-remunerable exceptions

CAG is pleased to acknowledge that the education sector has recently worked constructively with Copyright Agency Ltd, Screenrights and Universities Australia to design a simplified and streamlined statutory licence which is based on the ALRC's recommendation.⁵ This consensus solution - which would replace the existing statutory licences - was presented to Government and forms the basis of the streamlined statutory licence contained in Exposure Draft of the Copyright Amendment (Disability Access) Bill 2016 (***the Draft Bill***).

An Exposure Draft of the Draft Bill was released for public comment in December 2015. CAG submits that this Committee should recommend its introduction as a priority, to enhance the capacity of the Australian education sector to deliver innovative education to Australian students.

However, it is critical to note that the Draft Bill would only solve **one** of the problems that the ALRC identified with the educational copyright scheme; ie the fact that the statutory licences are prescriptive and inflexible. It would **not solve** the two other significant problems identified by the ALRC.

Even if the Draft Bill is enacted, the fact remains that the existing educational exceptions are entirely unsuited to a digital environment and should be replaced with a flexible fair use provision, and that the statutory licences have resulted in educational institutions having to pay for uses that are "fair" and which do not attract remuneration in comparable jurisdictions.

There is an urgent need to update Australia's copyright laws as recommended by the ALRC. This would bring Australia in line with countries like such as Israel, South Korea, Singapore and the United States that have flexible copyright law that facilitates, rather than hinders, the innovative teaching practices and classroom technologies that provide a reliable pipeline of STEM graduates. Contrary to the assertions that have been made by some rights holder groups, enacting fair use would not mean that schools could copy anything without payment. Schools would continue to enter into collective licences to use content, and continue to pay significant licence fees for educational uses of copyright materials. However, schools would no longer be disincentivised to use digital technologies due to outdated copyright exceptions, or be required to pay for uses where no copyright owner ever expected to be paid.

The need to update copyright safe harbour provisions to include educational institutions

The Copyright Act contains a "safe harbour" scheme - a simple system that gives rights holders an efficient way to seek removal of infringing content, rewards online service providers for collaborating with rights holders by granting legal protections under the scheme, and includes protections for consumers who wish to challenge incorrect claims of copyright infringement.

⁴ ALRC Copyright and the Digital Economy report paras 14.2, 8.4

⁵ Copyright Agency has also supported an amendment that extend the exam copying provision (discussed in section xx] above) to exams undertaken online.

Unfortunately an error was made during implementing the Australia - United States Free Trade Agreement (AUSFTA), which has led to Australian schools facing unintended exposure to legal risk for providing internet access to students and staff. AUSFTA requires the safe harbours to apply to “service providers” (ie, all providers of internet services, including schools and universities). The US Copyright Act scheme applies to all “service providers”.

In implementing AUSFTA, Australia incorrectly limited the scheme to the narrower term “carriage service providers” (ie, only to commercial ISPs). This mistake means that:

- Australian schools, universities and libraries are exposed to unintended and unnecessary legal risk from providing internet access to staff, students and library users.
- Commercial ISPs like Telstra receive legal protection for complying with copyright infringement notices, but there is no equivalent protection for schools, universities, libraries and other online services such as search engines and social media platforms. This risk is not merely theoretical - in 2003, music companies commenced proceedings against universities alleging that their IT systems had been used to infringe copyright.

This anomaly is also addressed in the Draft Bill, which contains an amendment that would ensure that Australia complies with its AUSFTA obligation to extend the safe harbours to all providers of internet services, including schools and universities. This reform is also required if Australia is to be in a position to comply with its obligations under the Trans Pacific Partnership (*TPP*) if enacted.

In order to be protected by the safe harbour, schools would need to meet the conditions set out in the Act, which include adequately responding to take-down notices from copyright owners regarding infringements by staff or students using school networks.

CAG understands that some copyright owners have raised objections to the inclusion of the safe harbour provisions in the draft Bill. With respect, we fail to see any sensible grounds for objection to provisions which:

- are required by Australia’s obligations under AUSFTA, and would also be required under the TPP;
- will enable the development of localised anti-piracy solutions to the benefit of all Australian copyright owners;
- require schools to appropriately respond to ‘take-down’ notices from copyright owners in order to receive the advantage of the safe harbours;
- ensure that Australian educational institutions receive the same legal protections from providing network access to staff and students as their overseas counterparts; and
- ensure that schools receive the same legal treatment as provided to commercial ISPs for the provision of internet services to staff and students.

This reform is critical to ensuring that schools are not exposed to unnecessary legal risk from providing Australian students with the tools to ensure they are fully equipped for the demands of an innovative digital workforce.

Innovation Policy - encouraging the use of OER

OER refers to openly licensed educational resources (eg textbooks, software, online learning modules, data sets or reports) which are free for anyone to use and can be freely adapted,

remixed, shared, translated and improved. An example of OER is material released under an open licence like Creative Commons.

Australia was initially a world leader in the adoption of OER policy, but is now falling behind due to a lack of practical enforcement of existing OER policies. For example:

- Australia is a signatory to the 2012 Paris OER Declaration, which calls on Governments to openly licence publicly funded educational materials⁶. However this has not been implemented.
- The Australian Government's Open Access and Licensing Framework (AusGOAL) is the world's best practice in open licensing for publicly funded information⁷. This requires Commonwealth Departments and agency materials to be licensed under a Creative Commons CC BY licence. However AusGOAL implementation has stalled.
- Other countries are moving ahead, while Australia is failing behind (see the recently announced [#GoOpen](#) campaign⁸ and the EU's Opening Up Education initiative⁹).
- Lack of Australian produced OER means teachers are forced to use OER predominantly from the US rather than Australian funded resources.

Governments around the world are recognising the benefits of OER. See for example the Obama Government's #GoOpen initiative (<http://tech.ed.gov/open-education/>)

In order to ensure that all students – no matter their zip code – have access to high-quality learning resources, we are encouraging districts and states to move away from traditional textbooks and toward freely accessible, openly-licensed materials that can be constantly updated and adjusted to meet students' needs.

OER is critical because it facilitates educational uses that can otherwise be impossible – or overly costly - because of copyright restrictions. For example:

- publicly funded resources continue to be created and licensed in a manner that doesn't enable them to be extensively used by schools, teachers and parents or openly licensed in the future. This means:
 - of the \$90 million per annum the school sector pays to licence copyright materials for use in schools, a significant proportion of this is still spent on schools paying to use Government funded resources. CAG estimates that approximately \$925,000 of the approximately \$60 million paid under the Part VB licence in 2014 was paid out for materials that should have fallen under the AusGOAL framework;
 - taxpayers are essentially paying for these materials twice: once when Government funded resources are created and then again when they are used in schools;
- restrictions in the Copyright Act limit what teachers can do with copyright-protected content (for example, a teacher can usually only copy 10% of a text-based work under the statutory licence). In contrast, OER resources enable teachers to assist students to develop skills

⁶ http://www.unesco.org/new/en/communication-and-information/resources/news-and-in-focus-articles/all-news/news/unesco_world_oer_congress_releases_2012_paris_oer_declaration/

⁷ <http://www.ausgoal.gov.au/>

⁸ <http://www.ed.gov/news/press-releases/us-department-education-launches-campaign-encourage-schools-goopen-educational-resources>

⁹ <http://www.openeducationeuropa.eu/en/initiative>

for the 21st century workplace, by using resources for remixes, code clubs, research and data mining, to collaborate with students in other schools or the wider community - the only limit is the students' imagination!

CAG would like to see:

- the Commonwealth Government requiring greater accountability in relation to existing OER policies in Commonwealth Departments – to ensure that any appropriate publicly funded content is licensed in accordance with the AusGOAL framework, that is, made widely and freely available.
- the Commonwealth Government continuing its global leadership role, by openly supporting and encouraging the use of OER (for example, developing an Australian version of #GoOpen).

OER policies do not replace the need for copyright reform. However, they are a key part of the puzzle in encouraging public access to publicly funded resources in a digital age.

Yours sincerely

Delia Browne
NATIONAL COPYRIGHT DIRECTOR