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Educational Use and the Internet – Does Australian Copyright Law Work in the Web Environment?

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Abstract

Australia is unique in the way it deals with the copying of copyright material by educational institutions. Australian copyright legislation contains compulsory licences for educational copying. It recently introduced a new flexible dealing-exception for educational instruction for works not covered by the statutory licences. As educational use of free and publicly available Internet material is increasing, the Australian Education Sector is questioning whether the current statutory licence scheme is appropriate for the educational use of free and publicly available Internet material. It has asked the Australian Government to review the scope of the statutory licences. In particular, it has asked for a new exception for the educational use of free and publicly available Internet material. This article explains the proposed reform and the rationale behind it.

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1. The Digital Education Revolution

Over the past twenty years, the World Wide Web has revolutionised the way we live. It has also revolutionised the way we educate our children. We have moved from an analogue world of textbooks and blackboards to a digital world of websites, interactive whiteboards, podcasts/vodcasts, wikis, blogs, iPhones and global positioning systems. 21st century classrooms use resources never imagined when we were at school. The capacity for sharing ideas and collaboration between students in the same classroom, between classrooms in the same school, and between classrooms in different schools in Australia, or around the world, is unprecedented. This creates exciting opportunities for education globally.

The Australian Government is actively supporting digital education in Australia through its Digital Education Revolution (DER) initiative. As stated in the Government's Digital Economy Future Directions Consultation Paper, the DER:

... is a vital step in developing the digital literacy of Australian students. The aim of the program is to contribute sustainable and meaningful change to teaching and learning in Australian schools that will prepare students for further education, training and to live and work in a digital world and participate in the digital economy. The program includes the provision of grants to schools for ICT equipment for secondary students, support for broadband connections to Australian schools, collaboration with states and territories to ensure teachers have access to training in the use of ICT to enrich student learning, and online tools and resources to support the national curriculum. By ensuring that our students have access to the necessary technology, infrastructure and skills, we are equipping the next generation of Australians with the tools, knowledge and experience necessary to engage online.¹

The new digital education initiative creates challenges for the Education Sector in managing its copyright obligations.

2. Copyright and the Classroom – the Introduction of Educational Statutory Licences

In the 20th century the two most important technological advances that assisted educators were the photocopier and the video recorder. In simple terms, the photocopier enabled teachers to make multiple copies of extracts from books and other hard copy publications to disseminate in the classroom. However, making such copies not only infringed copyright in the original material, it also deprived the copyright owners of revenue from sales and licensing. This was unfair due to the time, labour and expense of the copyright owner in creating and distributing copies of the work.

¹ Australian Government, Department of Broadband, Communications and the Digital Economy, Digital Economy, Future Directions, Consultation Paper 18 December 2008.

The video recorder allowed us to tape television programmes so that they could be viewed at a later, more convenient, time. Teachers also availed themselves of this new technology by taping the news, documentaries and other programmes to show in the classroom for educational purposes. At the time, such copying was not permitted by the Australian *Copyright Act 1968*. Australia responded to the impact of these new technologies in education through the introduction of a compulsory statutory licensing scheme. In 1980, a statutory licence was enacted to allow the copying of literary and artistic works for educational purposes (**Part VB licence**).² In 1989, a further statutory licence was enacted to permit educational institutions to make off-air copies of broadcasts for educational purposes (**Part VA licence**).³ These statutory licences enabled educational institutions to take advantage of new technologies while ensuring that the author and/or copyright owner was remunerated for their work. In effect, the licences protected an existing market, threatened by technological change, by seeking a balance between:

- The public interest in ensuring a free flow of information in education; and
- the private interests of copyright owners.

3. What Has Changed?

In 2000 the World Wide Web was hardly in use in Australia. Ownership and access to computers was not common in the average household and computer-use in schools was still in its infancy. In Australian schools computers were usually confined to computer labs, and computer access and use by students and teachers were quite dismal. Most schools had dial-up access to the Internet, which was slow and limited in bandwidth.

At that time, access to educational resources was limited. This was largely because educational resources were costly to create and disseminate. For example, the number of books published depends on the number needed to cover production costs and to turn a profit. If the book edition sells, and there is sufficient demand, another print run occurs.

Fast-forward nine years and most homes and schools have computers and high speed Internet access; and the majority of people do their banking, pay their bills and book their holidays online. What began as a network – created by universities for sharing information for research and education, and on which commercial use was forbidden until 1988 – now provides access to a vast and expanding pool of educational resources. Web 2.0 and 3.0 technologies greatly facilitate the abilities of educators and students to create, modify and share educational resources.

The Internet and new technologies have removed the prohibitive costs of production and dissemination of information. The 21st century is the age of the blog, wiki and online social networking. Anyone can set up a website using open software and publish content online. The costs of online production and dissemination are marginal and a fraction of the costs experienced in the analogue world.

² *Copyright Act 1968*, Part VB. The licence took effect on 1 August 1981.

³ *Copyright Act 1988*, Part VA. The licence took effect on 30 April 1987.

4. Scope and Operation of the Statutory Educational Licences

4.1 How do the Statutory Licences Work?

The provisions of Part VB and VA of the Copyright Act are lengthy and complex. Set out below is a general explanation of how they operate. The licences are administered by collecting societies declared by the Attorney General of Australia. The Copyright Agency Limited administers Part VB and Screenrights administers Part VA. The statutory licences contain the following provisions:

- The body administering the educational institutions must provide the declared collecting society with a remuneration notice and undertake to pay for all licensed copying and communication;
- the educational institution/s must comply with the conditions set out in Parts VA and VB;
- the body to pay equitable remuneration to the declared collecting society; and
- the amount of equitable remuneration to be negotiated between the parties or determined by the Copyright Tribunal of Australia.

In 2000, substantive changes were made to Australia's copyright legislation. This was to update the law and take into account new communications technology.⁴ Both statutory education licences were extended to cover electronic reproductions, communications of literary and artistic works, (Part VB) and television and radio broadcasts (Part VA).

4.2 Part VB and Electronic Use

The new provisions for electronic use in Part VB mirror the hard copy (photocopying) provisions. At that time there was no study conducted into the scope and type of electronic copying and communication carried out by educational institutions, nor the nature and source of the material copied. It is likely that the focus on the type of electronic materials being used, or likely to be used, were CD ROMs and eBooks rather than Internet material. Perhaps this is why the Part VB electronic use scheme provisions mimicked the hardcopy (photocopy) provisions.

Since 2005 a select number of Australian schools have participated in an Electronic Use Scheme (EUS) survey in accordance with Part VB. This survey requires teachers to record every instance of their electronic copying and communication of literary and artistic works for a four week period. The schools also elected to pay an interim EUS rate to the Copyright Agency Limited.⁵ Interestingly, a recent analysis of the survey data collected to date shows that on average approximately 90% of the pages copied and communicated by schools are from free and publicly available websites. Between

⁴ *Copyright Amendment (Digital Agenda) Act 2000.*

⁵ Schools paid the Copyright Agency Limited \$6 million (AUD) for electronic use of literary and artistic works for the period 2001 to 2004. This amount has not been accepted as full and final payment by the Copyright Agency who has reserved their rights to seek further retrospective payments in the Copyright Tribunal Australia.

5-10% of pages copied and communicated by schools are from CD ROMs and eBooks. The amount to be paid by schools in relation to electronic use is the subject of proceedings in the Copyright Tribunal. These proceedings were commenced in 2005 by the Copyright Agency Limited. The main issue in contention is the amount, if any, to be paid for free and publicly available Internet material.

4.3 Part VA and Electronic Use

Part VA was also extended to cover the electronic copying and communication of radio and television broadcasts. This allows educational institutions to do the following for their educational purposes:

- Record digital copies of radio and television programmes;
- place copy programmes on a school intranet (provided that access is password protected); and
- make further copies of the radio and television programme in any format.

In 2007, Part VA was further extended to cover podcasts, vodcasts or other free downloads of online programs of Australian free-to-air broadcasters.⁶

5. Free Use Exceptions: Important Reforms for Education

In 2007, a range of new exceptions were introduced into Australian copyright legislation.⁷ Most significantly for education, section 28 was extended to allow schools to communicate⁸ material for free in the classroom for educational purposes⁹ and a new stand-alone exception, s. 200AB (flexible dealing), was introduced.¹⁰ Previously, section 28 allowed a literary, dramatic or musical work to be performed, or a film or sound recording to be played in class for the purposes of educational instruction. The new provisions extended the scope of this section to enable teachers and students to communicate the following material in a classroom (including a virtual classroom):

- Literary, dramatic and musical works;
- film and sound recordings;
- television and radio broadcasts (including works embodied in those broadcasts); and
- artistic works.

⁶ *Copyright Act 1968*, Section 135C.

⁷ *Copyright Amendment Act 2006*.

⁸ A communication means making copyright material available online or electronically transmitting copyright material. “Making available” can include putting material on an intranet. “Electronic transmission” includes email, streaming or electronic reticulation.

⁹ *Copyright Act 1968*, Sections 28 (5)-(7).

¹⁰ *Copyright Amendment Act 2006*. The amendment commenced on 1 January 2007.

The new provisions allow teachers and students to display or project material from an interactive whiteboard or data projector; stream content from the Internet; or play a DVD through a centralised reticulation system, to a class.

5.1 New Flexible Dealing

Section 200AB allows educational institutions to copy and communicate all forms of copyright material for the purpose of giving educational instruction. It only applies where no statutory or voluntary licence is in place and where the use complies with the three-step test – a standard set by international copyright treaties of which Australia is a signatory. In order to comply, the use must be non-commercial and:

- Limited to “certain special cases”;
- not conflict with “normal exploitation” of the work; and
- not “unreasonably prejudice” the interests of the copyright owner.

Some common educational activities now covered by flexible dealing include:

Example 1: A teacher can convert an educational resource from a VHS to a DVD, provided that a DVD of the resource is not commercially available.

Example 2: A teacher can create a captioned version of a DVD for playing to a class that includes hearing impaired students, provided that a captioned version of the DVD is not commercially available.

Example 3: A teacher can download a podcast to play in the classroom, provided that the podcast/vodcast is made available for free.

Example 4: Compiling short extracts of audio-visual material for use in class (such as making a DVD of short extracts of several films for an English class), provided that it is not possible to buy a similar teaching resource.

5.2 Flexible Dealing and the Digital World

The new flexible dealing provision is a unique and important exception for Australian education. Unlike other educational exceptions, section 200AB does not specify exactly which copyright uses will be permitted. Rather, it provides guidelines for teachers to apply when deciding whether a particular use of material will be allowed. In this regard, flexible dealing is a practical way of managing copyright in a digital world where material is easily copied and used. In particular, it provides the necessary flexibility for the online environment where people from the across the globe can access, use and share material freely on the Internet. However, section 200AB cannot apply where there is a statutory or voluntary licence already in place. The implications of this are significant in light of the blanket nature of the Part VB licence, which treats the educational use of **all** online literary and artistic material as potentially remunerable.

6. Part VB Statutory Educational Licence and the World Wide Web – a Misfit?

The extension of Part VA to online free-to-air programmes is, to a certain extent, less problematic than the extension of Part VB to online material. Part VA is far more

limited in its scope when compared to the Part VB statutory licence. Part VA only applies to previously or simultaneously broadcast programmes available on an Australian free-to-air broadcaster's website. It does not extend to similar broadcast material available on international broadcasters' websites or to online audio-visual material in general.

By comparison, Part VB is a broad "catch all" compulsory licence that applies to **all** literary, musical, dramatic and artistic works, including works of very low originality. While Part VB works well for materials offered for sale (such as eBooks, CD ROMs and other discrete digital products), it does not work well for free and publicly available Internet material.

The current schools EUS data shows that the websites accessed and used by schools comprise a vast range of materials created by a huge array of copyright owners, including Australian and overseas operators, commercial publishers, governments, not-for-profit organisations and an increasing number of individuals. Websites are a tool for promotion, information and sharing stories and ideas with friends and the world at large. Many websites are used to provide information, to promote products, to create brand loyalty and reputation, or provide a free service to the public. Does this mean that the educational use of such websites should attract payment under the Part VB licence?

It is accepted that material on the Internet is protected by copyright. However, the majority of websites do not seek payment for the access and use of their material by the public. They certainly do not make their material publicly available for free on the Internet, on the basis that they will receive equitable income from Australia's Education Sector. This begs the question, should material from free and publicly available websites be within the scope of Part VB and therefore remunerable?

The effect of Part VB is that the Education Sector has a statutory obligation to pay for the educational use of freely and publicly available material, except in very limited circumstances. In practice, education pays where:

- A website has no terms and conditions of use (or no terms or conditions but a standard © notice); and
- the following words are contained in a website's terms of use:
 - personal use;
 - personal, non-commercial use;
 - personal and non-commercial;
 - private or individual use;
 - copying is not permitted; and
 - any reference to copyright protection such as ©.

The vast majority of copyright notices and/or terms of use on websites are prepared with the intent of preventing people from using their material for commercial purposes; or adapting the material for use for some other purpose that is unacceptable (such as using it on a pornography site, a competitor's site or repackaging and reselling the material). It is highly unlikely that website owners have specifically

considered how drafting their terms of use will impact on the educational use of their material, which is generally accepted as a non-commercial purpose.

7. Education's Main Concerns

Set out below are the Australian Education Sector's main concerns with regard to the application of the Part VB licence to freely and publicly available Internet material.

7.1 Compensating a Non-existent Market

The Part VB licence was devised as a response to technological advances in reprographic reproduction (i.e. the photocopier). The original policy objective behind Part VB was to compensate copyright owners for the loss of sales of commercially published materials, where teachers photocopied multiple copies of extracts or whole works for educational purposes. The scheme protected an existing market threatened by technological change. The extension of Part VB to free and publicly available Internet material is now being used as a primary market for Internet material not otherwise offered for sale.

7.2 Unsustainable Costs

The unlimited nature of the Part VB licence creates a requirement to pay where often none is sought. Under the Part VB electronic use scheme, the following activities are recorded under the sample electronic use survey and are subject to equitable remuneration:

- A teacher printing, saving, downloading, displaying, projecting or emailing Internet material for educational purposes.
- A teacher placing copies of Internet material onto a school or a learning content management system.
- A teacher telling a student to print, save, or download Internet material for educational purposes.

There is a genuine and realistic concern that the Part VB licence fees will increase to unsustainable levels.¹¹

7.3 Lack of International Reciprocal Agreements

Australian educational institutions must pay for virtually all free and publicly available material, where the majority of their overseas counterparts do not. Australian educational users are in fact marginalised compared to other users. Free and publicly available online material is used by thousands of users in Australia and around the world without objection or payment to copyright owners.

¹¹ In 1999 Schools paid around \$9.1 million under the Part VB licence. In 2008, Schools paid around \$50 million under Part VB.

7.4 Negative Impact on the Australian Government's Digital Education Revolution Initiative and Innovation Agenda

The requirement to pay for educational use of free and publicly available material on the Internet may decrease educational access to and use of the Internet. Limiting use of the Internet would reduce copyright fees, but also deprive Australian teachers and students of the resources and opportunities offered by the use of new technologies. This presents a real threat to the Australian Government's Digital Education Revolution initiative and innovation agenda.

8. Educational Use of the Internet Overseas

The limitations and exceptions related to educational use vary in number and in scope around the world. Some assume that no licence is required, or that there is an implied licence to use free and publicly available Internet material, when in fact there is a complete absence of any mechanisms to collect payments for use and corresponding international reciprocal arrangements. The Australian Education Sector cannot argue that there is an implied licence as the statutory education licence schemes obviate the presumption that there is an implied licence that allows educational institutions to use freely and publicly available Internet material.¹²

There are scant examples of collective licence schemes for the educational copying of Internet material. In Norway there is an extended collective licence that covers copying and the communication of materials from the Internet (administered by Kopinor). The blanket licence scheme only covers websites owned by the blanket licence signatories – the majority of which are traditional publishers. This arrangement covers the total repertoire of Kopinor, made available through the Extended Collective License.¹³

Many jurisdictions are reviewing their laws in respect of educational use due to the emergence of new technologies such as interactive electronic whiteboards. In 2006 the UK Gowers Review¹⁴ made the following recommendation:

Recommendation 2: Enable educational provisions to cover distance learning and interactive whiteboards by 2008 by amending section 35 and 36 of the Copyright Designs and Patent Act 1988.

In 2008, the UK Intellectual Property Office released a consultation paper in respect of the recommendations made by the Gowers Review.¹⁵ The paper discussed potential

¹² *Copyright Agency Limited v State of New South Wales* [2008] HCA 35 (last accessed 8 August 2009).

¹³ Digital licence in Norwegian Schools, Kopinor News available at http://www.kopinor.org/om_kopinor/nyheter/naa_kan_skolene_kopiere_digitalt (last accessed 8 August 2009).

¹⁴ The Gowers Review of Intellectual Property available at http://www.hm-treasury.gov.uk/gowers_review_index.htm (last accessed 8 August 2009).

¹⁵ UK Intellectual Property Office, Taking Forward the Gowers Review of Intellectual Property: Proposed Changes to copyright exceptions available at <http://www.ipo.gov.uk/consult-copyrightexceptions.pdf> (last accessed 8 August 2009).

changes to exceptions covering education and asked for feedback on a range of issues including:

- Should the definition of broadcasts be expanded to new popular web-based communication technologies such as download or video on-demand?
- The class of works affected and the need for exceptions not to be defined by media but by the intended use.
- Whether access should be subject to security measures and who should be able to access and use the material.

Interestingly, the majority of respondents support permitting distance learning for the educational use broadcast exception (section 36),¹⁶ as well as reprographic copying of literary, dramatic or musical works by educational institutions (section 35).¹⁷

Rights-holders, however, did not support any further extensions to include access to content delivered via on-demand services, or an extension of section 35 to cover all types of works as this could undermine the development of current and future business models. Users, on the other hand, supported the Gowers Review's recommendation and supported extension of the current exceptions to encourage the broadest possible access.

In 2008 the European Commission released A Green Paper, Copyright on the Knowledge Economy.¹⁸ The purpose of the paper is to foster debate on how knowledge for research, science and education can best be disseminated in the online environment. The second part of the paper deals with specific issues in relation to the exceptions and limitations – including education (teaching and research purposes). It will be interesting to see whether a White Paper will follow this consultation and what forms of proposals will be presented for development.

9. Proposed Canadian Law Reform

Canada is the only country that has extensively reviewed its copyright policy and laws relating to the educational use of the Internet. In 2008 the Canadian Government proposed an amendment to the Canadian Copyright Act to allow schools to copy for free “publicly available Internet materials” as part of *Bill C-61: An Act to amend the Copyright Act*.¹⁹

¹⁶ *Copyright Design Patents Act*, section 36.

¹⁷ *Copyright Design Patents Act*, section 35, allows educational institutions to copy broadcasts for educational purposes, subject to certain conditions.

¹⁸ Commission of the European Communities, Green Paper, Copyright in the Knowledge Economy available from http://ec.europa.eu/internal_market/copyright/docs/copyright-info/greenpaper_en.pdf (last accessed 8 August 2009).

¹⁹ Bill C-61, an Act to amend the *Copyright Act* available at <http://www2.parl.gc.ca/HousePublications/Publication.aspx?DocId=3570473&Mode=1&Language=E> (last accessed 8 August 2009). The legislative summary provided on the Canadian Parliament's website is available at <http://www2.parl.gc.ca/Sites/LOP/LEGISINFO/index.asp?List=ls&Query=5466&Session=15&Language=e> (last accessed 8 August 2009). It should be noted that the Bill lapsed as a Federal election was called in 2008 and a new Conservative Government was voted in. The new Government has publicly

9.1 Proposed Amendment

Clause 30.04 provides the following:

- It allows an educational institution (or a person acting under its authority) that reproduces, communicates or performs to a public consisting primarily of students or other persons acting under the educational institution's authority, a work available on the Internet;
- the exception is a free exception;
- the exception does not apply if:
 - the source of the work is not attributed,
 - access to the work is protected by a Technological Protection Measure (TPM),
 - the work has a clearly visible notice (whether on the website or on the work itself) prohibiting that particular use (and there is a mechanism by which the Governor in Council can make regulations prescribing what constitutes a "clearly visible notice"),
 - the educational institution "knows or should know" that the work was made available on the Internet without the copyright owner's consent.

The exception applies to works and to what would be referred to as "other subject-matter" under Australian legislation (i.e. the exception does not appear to exclude sound recordings or audiovisual works, as was initially recommended by copyright owners in Canada).

In relation to the clearly visible notice issue mentioned above, the legislation requires a clear intention to prohibit use by educational institutions.

9.2 Working Group Report

This approach came from the report of the Working Group²⁰ (consisting of both educational sector representatives and rights-holder representatives) set up by the Canadian Government to consider issues surrounding the proposal to introduce a mechanism to allow educational institutions to use Internet materials. The mandate of the group was to:

- Gather additional information on the various educational uses of materials on the Internet;
- seek a common understanding of what is meant by "publicly available" material on the Internet;

committed consulting the Canadians before introducing new copyright legislation before the end of 2009. The public consultations commenced on 17 July 2009.

²⁰ Educational Use of Internet Content, Working Group's Report available at

<http://strategis.ic.gc.ca/eic/site/crp-prda.nsf/eng/rp01116.html> (last accessed 9 August 2009).

- explore options to address the use of “publicly available” material on the Internet within the educational context and identify the advantages and limitations of each option; and
- present a report on the views and options discussed, including any recommendation on how to address the issue of “publicly available” material on the Internet.

While the Education Sector and rights-holders put forward very different proposals, the Working Group as a whole agreed to the following principles (see part 6 of the Report, “Areas of Common Understanding”):

- There are a significant number of works that are “available for free” on the Internet and that can be used by teachers and students for educational purposes without the need to obtain prior authorisation from, or to provide payment to, the copyright owner;
- such works should **not** be subject to payment under collective licensing or otherwise;
- the educational sector is willing to pay for the use of materials on the Internet where there is an expectation for remuneration;
- there is a need to maintain and encourage “learning moments”; and
- there is a need for a solution that is easily understood by teachers and students.

9.3 Categories of Websites

The Working Group categorised websites into the following four categories:

- Those where there is a clear expectation of payment;
- those where there is clearly no expectation of payment;
- those where it is unclear what the conditions of use are; and
- those where there are clear conditions of use, but not necessarily an expectation of payment.

9.4 Definition of “Publicly Available”

The Education Sector proposed that the definition should be:

[A] work or other subject-matter that is communicated to the public by telecommunication, with the consent of the copyright owner, without expectation of payment, and without any technological protection measures, such as a password, encryption, or similar techniques intended to limit access or distribution.

They later amended this proposal to say that a symbol that a work was not available could substitute for a TPM.

The rights holders proposed two different approaches depending on the situation. They said that if the legislation was amended to “*facilitate the granting of comprehensive licences in the digital environment*”, an educational institution could

copy anything unless there was a special symbol, copyright collective notice or a TPM that prohibited the use. (The draft legislation does not appear to be amended in this respect). However, if there was no collective blanket licensing regime they considered nothing should be copied unless there was an indication that such activity was permitted.

Clause 30.04(4)(b) in the Bill has adopted a combination of the approaches of the education sector and the rights holders.

10. Australian Education Sector's Proposed Reform

Although the Copyright Tribunal proceedings are still active – in light of the concerns outlined above – the Australian Education Sector²¹ wrote to the Australian Government in late 2008 requesting it to review the policy behind the general application of both statutory licences. In particular it asked the Government to consider:

- Removing free and publicly available material on the Internet from the scope of the Part VA and VB statutory licences; and
- introducing a new exception allowing educational institutions to copy and communicate free and publicly available material from the Internet for non-commercial educational purposes.

Free and publicly available material from the Internet refers to material where no payment is required in order to access or use it. The proposed exception would only operate where:

- The source material was attributed;
- the material is not infringing; and
- the material is not protected by a password, technology protection measures or other secure means.

The Australian proposal builds on the proposed exception clause 30.04 of Bill C-61. Unlike the Canadian approach, there is no added provision that the exception will not apply if there is a clearly visible notice posted on the Internet site prohibiting use. In the Australian Education Sector's experience, from participating in the Part VB electronic use surveys, this aspect would be very difficult to police and would be unworkable in practice.

The table below explains the scope of the statutory licences and the flexible dealing exception. The shaded row refers to the material that is currently within scope of the Part VB statutory licence, which, if removed, would be covered by the proposed exception.

²¹ The submission was made by the Australian Education Senior Official Committee, a committee of CEOs for education and training from all Australian jurisdictions. The submission was further endorsed by Universities Australia, the Australian Digital Alliance, the Curriculum Corporation, the National Catholic Education Commission, the Independent Schools Council of Australia and all State and Territory Ministers for Education.

Types of Material	Part VB	Part VA	s.200AB
	<ul style="list-style-type: none"> • Australian Educational Institutions can copy and communicate for educational purposes • Fee Payable • Licence administered by CAL 	<ul style="list-style-type: none"> • Australian Educational Institutions can copy and communicate for educational purposes • Fee Payable • Licence administered by Screenrights 	<ul style="list-style-type: none"> • (Flexible Dealing) • Australian Educational institutions may copy and communicate for educational instruction • No Fee Payable • Some limits
Hard Copy Publications (books, magazines, newspapers)	✓		
Hard Copy Artistic Works (e.g. photographic slides)	✓		
CD ROMs and EBooks	✓		
Publicly available Internet material (Print and Artistic)	✓		
Off air copy of Free to Air and Pay Television and Radio Programme		✓	
Online television and radio programmes available from Australian Free to Air Broadcasters' websites only		✓	
Non broadcast audiovisual material made available from Free to Air Broadcasters' websites			✓
Vodcasts and Podcasts from all other sources			✓
YouTube Videos			✓
DVDs and Videos (unless can purchase in required format)			✓
CDs into digital format (MP3) (unless can purchase required format)			✓

It is important to note that the proposed reform would not affect the operation of the Part VB licence for hardcopy materials (e.g. books, magazines) or digital products (CD ROMs and eBooks); nor would it allow use of free and publicly available Internet material for commercial purposes (such as producing materials for sale).

11. Australia's International Treaty Obligations

The Australian Education Sector's proposal to Government considered the Three Step Test, which is the central instrument in international copyright law to examine the legitimacy of national copyright limitations and exceptions. The Three Step Test requires any proposed exception:

- To be a certain special case;
- not to conflict with the normal exploitation of the work; and
- not to unreasonably prejudice the legitimate interests of the right-holder.

Over the years, there has been considerable debate about the interpretation of the Three Step Test. There had been a tendency in some jurisdictions for the test to be restrictively interpreted and the three steps of the test to be considered cumulative. In 2008 thirty copyright experts signed a declaration²² (**Declaration**) in which they advocated a more balanced interpretation of the test to be applied. The Declaration states that the three steps should be considered together and as a whole in a comprehensive overall assessment:

... rather than a step-by-step application that is usual, but misleading, description implies. No single step is to be prioritised. As a result the test does not undermine the necessary balancing of interests between different classes of right holders or between different right holders and the larger general public.

The Declaration maintains that it is important for third party interests to be taken into account when applying the Three Step Test, as well as the interests of the copyright owner. The Education sector believes that the proposed exception is more than adequate to meet the requirements of the Three Step Test, even if a more restrictive interpretation is applied.

12. Concerns With the Reform

Copies of the Australian Education Sector's proposal were provided to copyright-owner interest groups such as newspapers, broadcasters, publishers and writer organizations – as well as the collecting societies that administer the statutory licences. Set out below are some of their concerns with the proposed reform, as well as my initial responses to these concerns.

²² The Declaration is available at http://www.ip.mpg.de/ww/en/pub/news/declaration_on_the_three_step_.cfm (last accessed 8 August 2009).

12.1 Loss of Revenue to Website Owners

Currently copyright owners of websites are entitled to equitable remuneration where their materials are captured in the annual surveys conducted by schools selected on a random basis. Accordingly, some copyright owners have received income under Part VB for the educational use of their Internet material and obviously they do not wish to lose this source of income. However, many website owners/creators do not rely on, expect or desire income from the educational use of their free and publicly available Internet materials. Therefore any remuneration received through the Part VB licence is effectively a windfall. That said, the Australian Education Sector does not want to prevent those website owners/creators who wish to receive income from educational use from doing so. The question is whether a broad “catch all” licence is the appropriate mechanism for payment.

There are other alternatives such as the implementation of a payment-based subscription system. This could be far more advantageous to copyright owners as they would be paid directly for the use of their materials and would not have to rely on the arbitrary and uncertain nature of the Part VB electronic use survey. The question is whether it is appropriate for a small number of copyright owners to expect their income to be derived from Part VB licences of general and broad application.

12.2 Proposed Reform Will Hinder Emerging Business Models and Markets

The Education Sector believes that the proposed law reform does not preclude creators from receiving an income from the online exploitation of their works. If they wish to still receive remuneration for the educational use of their material, they can:

- Require users to pay an online licence or subscription fee; and/or
- limit access to their material via a technology protection measure.

In practice, website operators frequently *encourage* the use of their material in ways that are effectively an exercise of their copyright rights. For example, the *Sydney Morning Herald* website, against each article, includes buttons for “Email this story,” “Share/Bookmark story” and “Print this story.”

There are two main emerging business models on the Internet. The first model is straight-selling and licensing-of-content, such as:

- Selling digital products online (e.g. CD, DVD, MP3s from iTunes);
- providing access to content online via a subscription;
- online licences to use digital content.

This business model will not be affected as the exception does not apply to digital products for sale, or to access to online material subject to an online payment or subscription.

The second model is the advertising model. The basic model is where advertisers pay website owners with the payments normally being calibrated to the number of site visits. Recently there has been an explosion of new web-based ad formats, such as page-per-page view banners (Yahoo), pay-per-click text ads (Google), pay-per-transaction affiliate ads (Amazon) and pay-per-connection on social networking sites (Facebook). These advertising models are unlikely to be unaffected by the proposal. One of the most common uses of websites in classrooms today is to open a site using

an interactive whiteboard; engage with students and “mark up” that site; and perhaps print a copy. The website has still been visited, the hit has been recorded and the advertising revenue may still flow. Clearly this space is fast moving with new business models rapidly emerging in the new link economy. “Smart players are providing embeddable players allowing their best stuff to be posted all over the web, accompanied by links and ads that help generate additional traffic and revenue.”²³ The online marketplace has led to the proliferation of niche markets, allowing products and consumers to connect in a way that was never possible before.²⁴ Many online businesses are giving things away for free – ranging from marketing gimmicks to cross subsidiaries (providing basic services for free and charging for premium services). These new practices are termed the Freemium Economy.²⁵ It is essential that the public interests of education and access to information, alongside the private interests of copyright owners, are carefully considered in this dynamic space. It would be unfortunate if the Education Sector was unfairly prejudiced in the emerging “Freemium Economy.”

12.3 Content Owners Will Stop Putting Their Material Online

In the past, the traditional dissemination of information was controlled by the copyright owners. You obtained the information when they chose; in the format they chose; and at what price they demanded. The Internet has created a fundamental shift in how information is disseminated. It is a user-dominated environment. For example, online newspapers regularly include user-generated content and invite comments from their readers which are posted online. The absence of similar overseas compulsory or voluntary collective licences for the educational use of online materials has not caused the Internet to suddenly dry up. In fact, more and more material is being generated and made available online every day. Copyright owners have the ability to use technology to protect their works online and to charge fees to access and use their online works – (e.g. www.crikey.com and the *Australian Financial Review* www.afr.com.au).

12.4 Proposal Will Open the Floodgates to Schools Distributing Infringing Content

It is important to note that the proposal would not allow:

- Use of infringing material;
- Use of material protected by passwords or other secure means (because it requires payment for access and use of infringing content, or to be content-protected by a technological protection measure, or subject to online payment); or
- educational institutions to make commercial use of the material.

²³ A Huffington, “The Debate over Online News: It’s the Consumer Stupid”, *the Huffington Post* (2009) available at http://www.huffingtonpost.com/arianna-huffington/the-debate-over-online-ne_b_185309.html (last accessed 1 June 2009).

²⁴ C Anderson, *The Long Tail* (Reed 2007).

²⁵ C Anderson, *Free, The Future of a Radical Prince* (Hyperion 2009).

13. Conclusion

The Part VB statutory licence was introduced in response to the ubiquitous use of the photocopier and its impact on publishing-revenue – which works well in the analogue world and for digital products such as CD ROMs and eBooks. However, a model that works well in some contexts does not necessarily translate to all spheres. It is a case of whether it is a good fit and meets the current policy objectives. It is a case of what is fair and reasonable.

Technology has removed many of the barriers of entry to content production. Technology also provides affordable business solutions to online licensing and sales. Emerging and radically different online business models also need to be considered. This is a policy issue of significant public interest and it is in Australia's best interests to ensure that our students are digitally literate; able to live and work in a digital world; and can participate in a digital economy. What is needed is a policy solution that enables website owners/creators the ability to earn revenue for online exploitation and which also allows educational institutions to use free and publicly available material where there is no expectation of payment.

It is important to get this right now, as the educational use of the Internet will only increase with time. If Australian education has to pay licence fees for copying and communicating website material that is intended to be freely available to everyone in the world, then costs to education (and therefore governments, parents and taxpayers, generally) will rise exponentially and become prohibitive. The Australian Government is currently considering the Australian Education Sector's proposal, and has received many submissions from copyright-owners opposing the proposal. It is clear that more will need to be done to bring the Australian Education Sector's and copyright-owners' interests closer to understanding the other's concerns, and to formulate a practical and fair policy solution. The Australian Education Sector is preparing a supplementary submission for the Government's consideration, which it hopes addresses the main concerns of copyright-owners. It is likely that other alternatives will be presented to the Government and to copyright-owner groups for further consideration. The debate will no doubt continue for some time.