

# CAG Schools Submission

Copyright Advisory Group – Schools (**CAG**) Submission to the Exposure Draft of the Copyright Amendment (Access Reform) Bill 2021 (**Exposure Draft Bill**) and Review of Technological Protection Measures Exceptions (**TPM Review**) (**CAG Schools Submission**)

# Summary of Submission

As the Discussion paper – Exposure Draft Copyright Amendment (Access Reform) Bill 2021 & Review of Technological Protection Measures Exceptions (**Discussion Paper**)<sup>1</sup> points out, the current copyright exceptions available to schools originated in a paper-based era. Many provisions are outdated, narrow and overly prescriptive. This creates uncertainty and exposes schools and administering bodies to a higher risk of legal liability and imposes significant administrative burden.

**Australia needs a copyright system that is flexible enough to reflect the realities of a 21<sup>st</sup> century education system.**

Australia's copyright framework has been subject to extensive review over recent years.<sup>2</sup> These reviews have consistently highlighted the need for a more flexible and adaptive framework to facilitate access to, and dissemination of, creative content in the digital environment. It is essential that Australia's copyright system is flexible enough to reflect the realities of a 21st century education system.

However, Australia's current copyright laws simply do not clearly facilitate digital education. Many of the activities critical to Australia's teaching vision are not clearly permitted under existing exceptions or educational statutory licence (**statutory licence**). For example, there is no provision in the *Copyright Act 1968* (**Copyright Act**) that clearly permits a teacher to read a story to students as part of a virtual classroom or recorded online lesson. This is despite the act of reading a story being clearly lawful (and free) if done in a physical classroom. Our educational copyright laws place an unreasonably high burden on teachers and schools, have varying rules depending on the type of content being used and result in millions of dollars from education budgets being wasted on materials that ordinary Australians can use for free.

These problems are significant roadblocks for teachers, students, parents and schools delivering a world class education system. Without urgently needed updates, we risk falling further behind other nations.

The Exposure Draft Bill fixes a number of these problems. The proposed amendments would:

- simplify the copyright rules for teachers and reduce burden on schools and teachers
- clarify parents and the school community are able to support students with their learning
- permit teachers to teach remotely and use digital teaching methods
- allow teachers to make a recording of a lesson for students to access later on-demand
- ensure that education budgets are not wasted on paying for materials where the copyright owner cannot be identified for distribution of licence revenue.

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<sup>1</sup> Discussion paper—Exposure Draft Copyright Amendment (Access Reform) Bill 2021 & Review of Technological Protection Measures Exceptions (**Discussion Paper**), p 5. Available at <https://www.infrastructure.gov.au/have-your-say/have-your-say-draft-copyright-reform-legislation>.

<sup>2</sup> Ibid.

There is an urgent need for these reforms. Getting the policy settings right to enable flexible learning is critical 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.

These reforms will **not** hurt copyright owners' markets. These reforms will not replace the statutory or voluntary licences or the need for schools to continue to purchase materials and take out direct subscriptions. The school sector is, and will continue to be, a huge contributor to the creative sector.

The NCU estimates that the school system spends between \$940 million - \$1 billion per annum purchasing content.<sup>3</sup> In addition, the school jurisdictions pay approximately \$91.5 million annually in collective copyright licence fees to Australian collecting societies.<sup>4</sup> These licence fees are then distributed to the collecting societies' members. This does not include copyright licences that are taken out by individual departments of education, schools and teachers.

The NCU has spent over 90 hours doing a thorough analysis of the last three years of available survey data, and are confident these reforms would not take money away from authors and publishers who have an expectation of payment. We would be happy to discuss these findings with the Department of Infrastructure, Transport, Regional Development and Communications (**Department**).

**The school sector is, and will continue to be, a huge contributor to the creative sector.**

CAG strongly supports the sensible copyright reforms to the education exceptions in the Exposure Draft Bill. Passing the Exposure Draft Bill will fix the most urgent copyright issues faced by schools and is a critical step towards Australia meeting its national education commitments.

To allow schools to realise the benefits of these urgently needed reforms and to prevent Australia from falling further behind, CAG calls on the Government to pass the Exposure Draft Bill as a national priority.

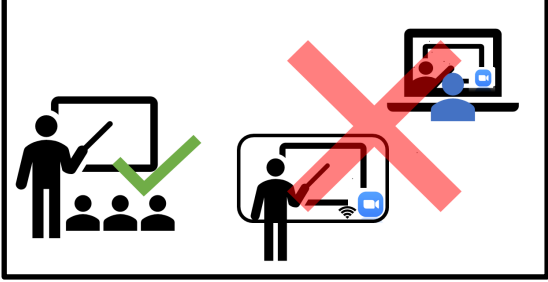
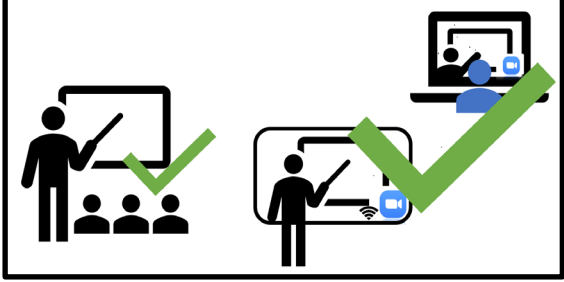
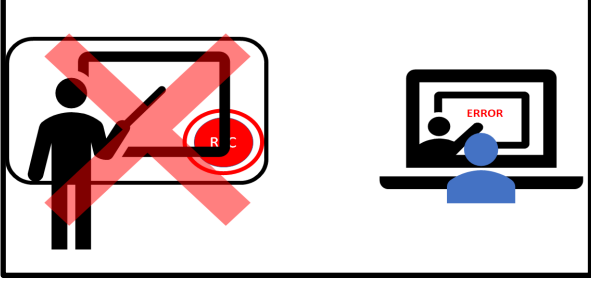
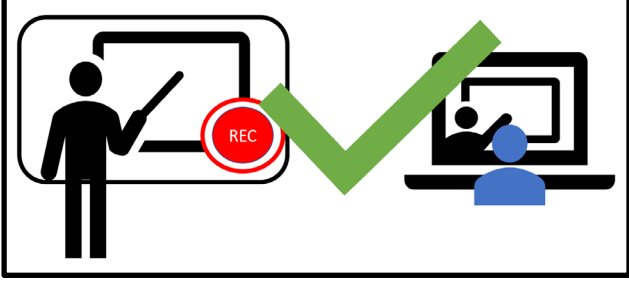
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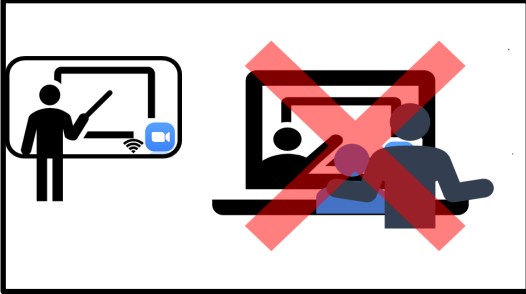
<sup>3</sup> This estimation is based on a survey of 379 schools conducted in late 2012 and early 2013. The 379 schools provided a random stratified representation of schools by State, Sector (Government, Catholic and Independent) and Level (Primary, Secondary, Combined) to allow statistically reliable 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 CPI equates to nearly \$460 million annually in 2019.

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 to over \$480 million spent on purchasing textbooks in 2017. See <https://www.commbank.com.au/guidance/newsroom/parents-brace-for-1-7-billion-back-to-school-bill-shock-201801.html>. Taking the estimated schools spend of \$460 million plus the estimated parents spend of \$480 million, the total estimated spend is \$940 million. If we estimate these numbers in today's dollars that would amount to approximately \$1 billion.

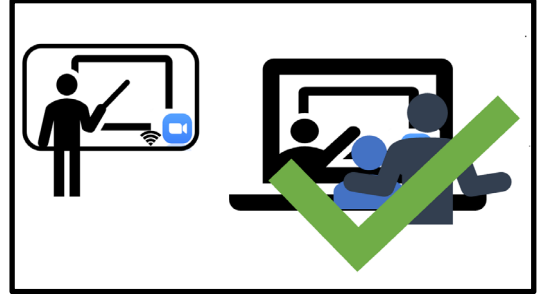
<sup>4</sup> This estimate is based off the total collective school licence fees paid by CAG to Copyright Agency, Screenrights and APRA AMCOS in 2021.

# Infographic summary of key issues

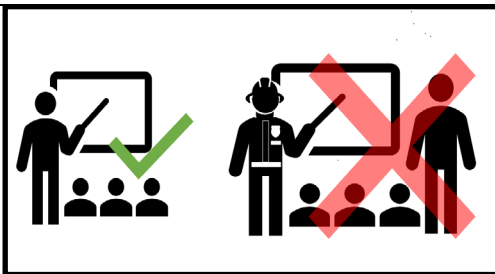
Key issue	Is this solved by the Exposure Draft Bill?
 <p>Remote learning is not clearly permitted (eg if a teacher is teaching via Zoom, Teams, etc) by the current 'show and tell' exception.</p>	 <p><b>YES</b> – The proposed amendments make it clear the 'show and tell' exception applies to online lessons (eg teaching via Zoom or similar).</p>
 <p>Making a recording of a lesson for students to access later on-demand is not clearly permitted by the current 'show and tell' exception.</p>	 <p><b>YES</b> – The proposed amendments to the 'show and tell' exception are intended to allow a teacher to record lessons for later access by students.</p> <p>This exception will <b>not</b> apply if a school puts a recording permanently onto a DTE or puts content used in a recording (eg a book referenced in a lesson) permanently onto a DTE.</p>



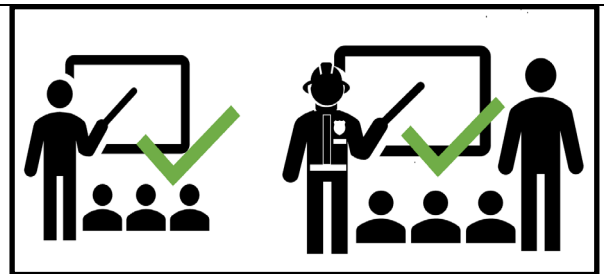
The current 'show and tell' exception may not apply if parents and guardians are involved in or present for the lesson.



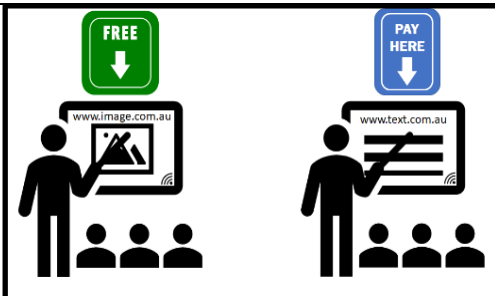
**YES** – The proposed amendments to the 'show and tell' exception will mean parents, guardians, etc are able to support students with their learning.



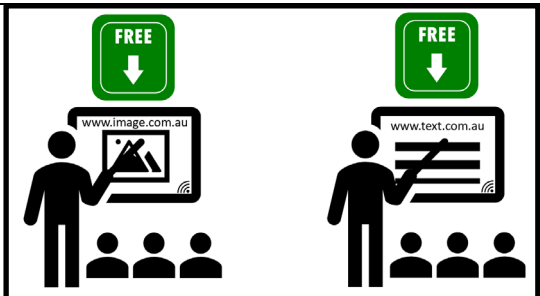
The current 'show and tell' exception 'stops at the school gates'.



**YES** – The proposed amendments to the 'show and tell' exception allow it to go 'beyond the school gates' – it can be relied on when people from outside the school (eg a member of the community, an industry expert) are involved in a lesson, or a student is at home, or on a workplace placement while accessing a lesson.



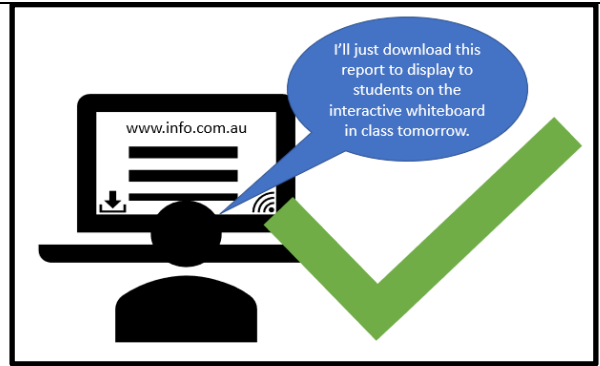
The current 'show and tell' exception does not apply equally to all forms of copyright materials.



**YES** – The proposed amendments clarify that the 'show and tell' exception applies in the same way to all types of copyright materials.

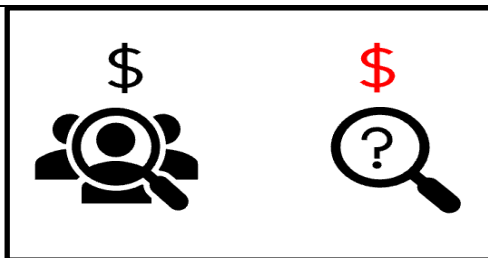


The current 'show and tell' exception does not clearly permit copies to enable classroom display.



**YES** – The proposed amendment to the 'show and tell' exception will allow copies and communications to be made to allow for content to be played or displayed as part of a lesson.

This exception will **not** apply if a school puts material permanently onto a DTE.

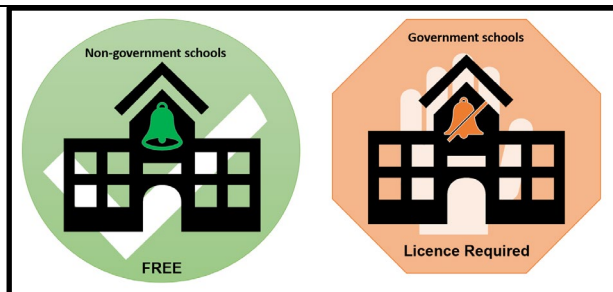


Australian schools pay to use materials where the copyright owners cannot be identified.

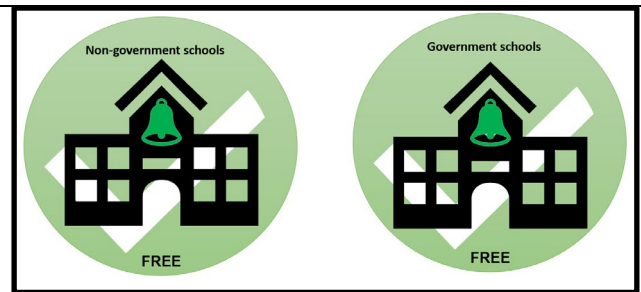


**YES** – The proposed amendments are intended to ensure that schools are not paying money to use the materials of copyright owners who cannot be identified.

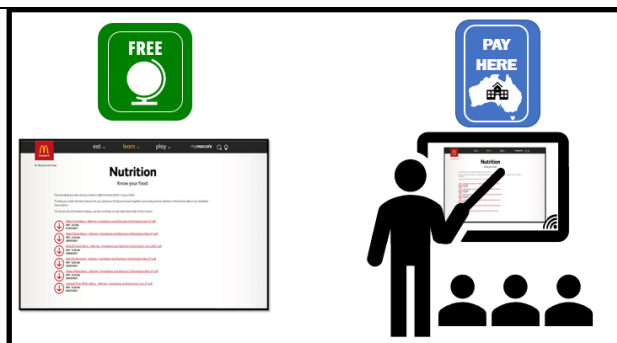
If a copyright owner can be identified, licence fees will still be paid.



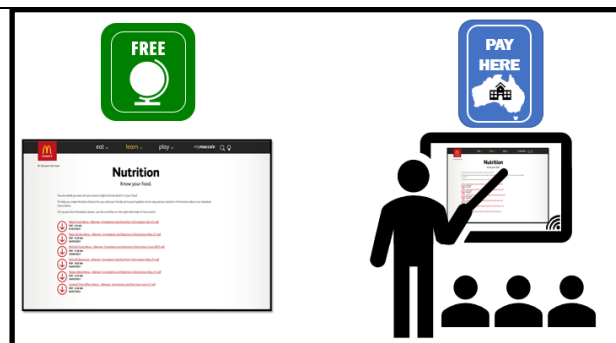
The 'school bell' exception treats schools unequally.



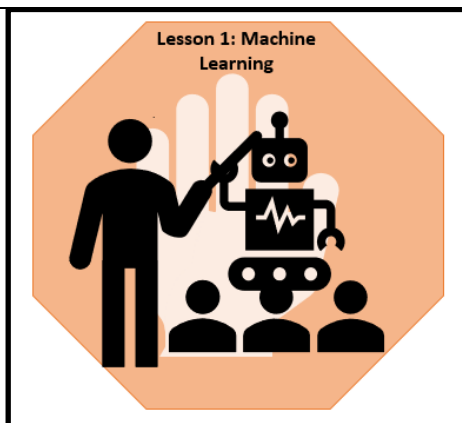
**YES** – The reinstatement of the 'school bell' exception to its pre-2012 scope will treat all schools equally.



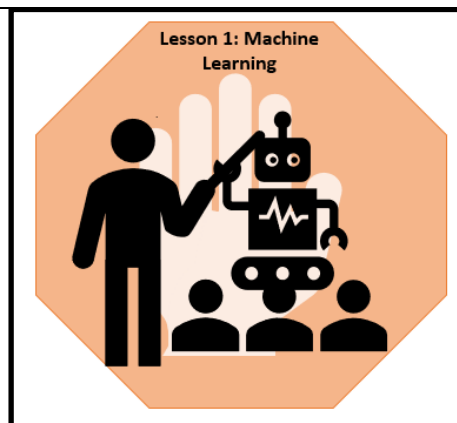
Australian schools pay to use materials that no one else in the world pays to use.



**NO** – CAG welcomes the Department's commitment to further consult on this important issue. We encourage the Government to do this as a priority in 2022.



The 'special case' exception is not flexible enough to encourage schools to use new technologies in the classroom.



**NO** – CAG strongly supported the Government's announcement in 2020 that the Government would amend the 'special case' exception and was disappointed that amendments have not been included in the Exposure Draft Bill.

We encourage the Government to further consult on this important issue in 2022. Amendments to the 'special case' exception will offer schools flexibility to use new technologies in the classroom.

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# Glossary

<b>ACARA</b>	Australian Curriculum, Assessment and Reporting Authority
<b>AESOC</b>	Australian Education Senior Officials Committee
<b>AI</b>	Artificial Intelligence
<b>AIEd</b>	Artificial Intelligence in Education
<b>AIFS</b>	Australian Institute of Family Studies
<b>AITSL</b>	Australian Institute for Teaching and School Leadership
<b>ALRC</b>	Australian Law Reform Commission
<b>APRA AMCOS</b>	Australasian Performing Right Association Limited (APRA) and Australasian Mechanical Copyright Owners Society (AMCOS)
<b>AUSFTA</b>	Australia-United States Free Trade Agreement
<b>CAG</b>	Copyright Advisory Group Schools
<b>CAG Schools Submission</b>	Copyright Advisory Group Submission to the Exposure Draft of the Copyright Amendment (Access Reform) Bill 2021 and Review of Technological Protection Measures Exceptions
<b>Code</b>	Code of Conduct for Copyright Collecting Societies 2019
<b>Copyright Act</b>	<i>Copyright Act 1968</i>
<b>Copyright Regulations</b>	<i>Copyright Regulations 2017</i>
<b>DCAR</b>	Department of Communications and the Arts Review
<b>Declaration</b>	Alice Springs (Mparntwe) Declaration
<b>Department</b>	Department of Infrastructure, Transport, Regional Development and Communications
<b>Digital Economy Strategy</b>	Digital Economy Strategy 2030 (2021)
<b>Discussion Paper</b>	Exposure Draft Copyright Amendment (Access Reform) Bill 2021 & Review of Technological Protection Measures Exceptions
<b>DTE</b>	Digital Teaching Environment
<b>DTiF</b>	Digital Technologies in Focus
<b>EDM</b>	Educational Data Mining
<b>ESA</b>	Education Services Australia
<b>Exposure Draft Bill</b>	Exposure Draft of the Copyright Amendment (Access Reform) Bill 2021
<b>EY</b>	Ernst & Young
<b>EY Report</b>	Ernst & Young report Cost benefit analysis of changes to the Copyright Act 1968
<b>Forum</b>	STEM Partnerships Forum
<b>FTE</b>	Full-Time Equivalent (student)
<b>ICT</b>	Information and Communications Technology

<b>LACA</b>	House of Representatives Standing Committee on Legal and Constitutional Affairs
<b>Modernisation Consultation</b>	Department of Communications and the Arts, Copyright modernisation consultation 2018
<b>National Skills Reform Agreement</b>	Heads of Agreement for Skills Reform
<b>NCU</b>	The National Copyright Unit
<b>NSR Agreement</b>	National School Reform Agreement
<b>NSW IAT</b>	NSW Institute of Applied Technology
<b>NSW VET Report</b>	David Gonski AC and Peter Shergold AC, 'In the same sentence: Bringing higher and vocational education together', March 2021
<b>OFAI</b>	Online Formative Assessment Initiative
<b>PC Report</b>	Productivity Commission's (PC) Inquiry into IP Arrangements
<b>PISA</b>	Program for International Student Assessment
<b>PPCA</b>	Phonographic Performance Company of Australia Ltd
<b>STEM</b>	Science, Technology, Engineering and Math
<b>TDM</b>	Text and Data Mining
<b>Tool</b>	OFAI Teaching Tools Network
<b>TPM</b>	Technological Protection Measures
<b>TPM Review</b>	Review of Technological Protection Measures Exceptions
<b>USCO</b>	United States Copyright Office
<b>VET</b>	Vocational Education and Training
<b>VETSS</b>	Vocational Education delivered to Secondary Students

# Introduction

This submission is made by the Copyright Advisory Group – Schools (**CAG**) to the Australian Education Senior Officials Committee (**AESOC**).

CAG is comprised of senior representatives from the Commonwealth, State and Territory Departments of Education, all Catholic Education Offices and Independent Schools Australia.<sup>5</sup> On copyright matters, CAG represents the almost 9,550 primary and secondary schools in Australia and their approximately 4 million students. CAG is assisted by the National Copyright Unit (**NCU**), a small secretariat based in Sydney. The NCU operates the Smartcopying website,<sup>6</sup> the official guide to copyright issues for Australian schools and TAFEs.

**The school system spends \$940 million - \$1 billion annually acquiring content and approximately \$91.5 million annually in licence fees.**

CAG has a significant interest in copyright law and policy. The NCU estimates that the school system spends between \$940 million - \$1 billion per annum acquiring content.<sup>7</sup> In addition, the school jurisdictions pay approximately \$91.5 million annually in collective copyright licence fees to Australian collecting societies.<sup>8</sup> These licence fees are then distributed to the collecting societies' members. This does not include copyright licences that are taken out by individual departments of education, schools and teachers.

CAG recognises the importance of maintaining appropriate protections and incentives for content creators to create new works and the importance of protecting the exclusive rights granted to copyright owners. CAG places a great deal of importance on the appropriate administration of copyright in Australian schools. This includes ensuring system-level and school-level compliance with the educational exceptions and licences. CAG works with government, content creators, administrators and teachers to ensure that the rights of copyright owners are respected and to ensure the highest possible levels of copyright compliance.

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<sup>5</sup> See <https://smartcopying.edu.au/contact-us/>.

<sup>6</sup> <https://smartcopying.edu.au/>.

<sup>7</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 CPI equates to nearly \$460 million annually in 2019.

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 to over \$480 million spent on purchasing textbooks in 2017. See <https://www.commbank.com.au/guidance/newsroom/parents-brace-for-1-7-billion-back-to-school-bill-shock-201801.html>. Taking the estimated schools spend of \$460 million plus the estimated parents spend of \$480 million, the total estimated spend is \$940 million. If we estimate these numbers in today's dollars that would amount to approximately \$1 billion.

<sup>8</sup> This estimate is based off the total collective school licence fees paid by CAG to Copyright Agency, Screenrights and APRA AMCOS in 2021.

However, it is also important to ensure that the copyright system provides reasonable and practical measures that reflect contemporary use of copyright material in the public interest, particularly for educational and cultural purposes. As Australia works towards its Digital Economy Strategy<sup>9</sup> goals and meeting its national education commitments, it is also critical that Australia's copyright system is flexible enough to reflect the realities of a 21st century education system.

CAG welcomes this opportunity to provide comments on the Government's Exposure Draft Bill and the review of Technological Protection Measures (**TPM Review**). CAG's submission will focus on the education provisions and the orphan works scheme included in the Exposure Draft Bill, however, where relevant will include comments on the other sections.

This submission is organised into three different parts:

- Part A: Submission to the Exposure Draft of the Copyright Amendment (Access Reform) Bill 2021
- Part B: Technical comments on the Exposure Draft Bill
- Part C: Submission to the Review of Technological Protection Measures (TPM) Exceptions.

Part A discusses the Exposure Draft Bill and is divided into 5 sections:

- Part 1 describes Australia's Digital Economy Strategy and highlights the importance that education plays in achieving this strategy
- Part 2 discusses Australia's national education vision
- Part 3 sets out what a modern education system looks like
- Part 4 discusses the current problems with the Copyright Act (where the vision and reality don't meet), and where these problems are fixed by the Exposure Draft Bill
- Part 5 assesses the economic impact of the Exposure Draft Bill.

Part B gives CAG's technical comments on the drafting of the Exposure Draft Bill.

Part C discusses the need to maintain the current TPM exceptions as well as the need for three additional TPM exceptions to achieve the Government's policy objectives.

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<sup>9</sup> Digital Economy Strategy 2030 (2021) available at <https://digitaleconomy.pmc.gov.au/sites/default/files/2021-05/digital-economy-strategy.pdf>, p 9.

# Copyright Refresher

Throughout this submission we reference the current educational provisions and address how these are amended by the Exposure Draft Bill. See below for a refresher on the current educational provisions and how they will be referred to throughout this submission:

Current provision	Proposed provision	Reference used in this submission and explanation
Section 28	Section 113MA	The ' <b>show and tell</b> ' <b>exception</b> , which allows teachers to use copyright material in class. For example, read a story, show a film or play a song in class as part of a lesson.
Section 200AB	-	The ' <b>special case</b> ' <b>exception</b> (sometimes called the flexible dealing exception), which allows schools to use copyright materials in 'special cases', as long as the use does not conflict with the normal exploitation of the work, or unreasonably prejudice the legitimate interests of the copyright owner.
Subsection 200AB(6AA)	-	A limiting provision which means that schools cannot rely on the special case exception for uses covered by the statutory licence (ie they have to pay for the use under the statutory licence rather than rely on the free exception that applies).
Section 106	-	The ' <b>school bell</b> ' <b>exception</b> , which currently allows registered charities such Catholic and Independent schools to play sound recordings as part of their school activities (such as a school bell or at a school assembly), but not Government schools.
Section 113P	-	The <b>statutory licence</b> . Allows schools to copy and communicate works and copy broadcasts and communicate those copies for educational purposes as part of licence schemes administered by Copyright Agency and Screenrights. In the case of works, the amount copied must not unreasonably prejudice the legitimate interests of the copyright owner.

Section 113Q	-	A technical provision in the statutory licence that means that the statutory licence does not apply to any uses covered by a free exception in the Copyright Act (however see note above about section 200AB(6AA)).
Section 113T	-	A provision in the statutory licence that states that nothing in the licence prevents a copyright owner from directly licensing their work (despite the existence of the statutory licence).
Section 200	Section 113MB	A collection of permitted educational uses (eg the exam exception) and some technology and subject matter specific exceptions (eg recording a sound broadcast).
Sections 113E and 113F	-	The ' <b>disability access</b> ' exceptions, which allow organisations or persons assisting students with a disability to create accessible versions of copyright materials in certain circumstances.
Section 200AAA	Section 113MC	An exception that allows proxy web caching by educational institutions.
Sections 40 and 103C	-	The ' <b>fair dealing for research or study</b> ' exceptions allow students within educational institutions to use of copyright material in certain narrow situations where required to do so as part of a course of educational instruction.

# Part A: Submission to the Exposure Draft of the Copyright Amendment (Access Reform) Bill 2021

## 1 Australia's Digital Economy Strategy

*“The first role of government is to create the policy settings for the digital economy to flourish.”<sup>10</sup>*

The Government's Digital Economy Strategy aims to secure Australia's future as a modern and leading digital economy and society by 2030 through creating a “digitally inclusive and capable Australia”. This includes ensuring **all** Australians (*emphasis added*):<sup>11</sup>

- have **access to digital skills and technology to ensure inclusivity**
- have digital capabilities that can **keep pace with new and emerging technologies**
- can maintain and build their skills through access to a range of **flexible education and training offerings that are industry-relevant** and informed.

**A digitally inclusive Australia requires copyright policy that allows all Australians to access education seamlessly, including online.**

The Government has already made significant investments in education, skills and training such as:<sup>12</sup>

- introducing the Foundation to Year 10 Digital Technologies Curriculum alongside the Information and Communications Technology (ICT) General Capability where students learn to “make the most of the digital technologies available to them, adapting to new ways of doing tasks in a digital environment”.
- reviewing the Australian Curriculum in 2021 to “ensure a focus on essential content or core concepts, that the curriculum is fit-for-purpose and is preparing Australian students for the workplaces of the 21st century”.
- supporting partnerships between business and education and training institutions, “to ensure that all Australians, have access to opportunities to upskill their digital capabilities in areas that align with job opportunities and business needs”.

In the 2021-2022 budget, the Government announced significant funding towards the Digital Economy Strategy through various means, including:

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<sup>10</sup> Digital Economy Strategy 2030 (2021) available at <https://digitaleconomy.pmc.gov.au/sites/default/files/2021-05/digital-economy-strategy.pdf>, p 9.

<sup>11</sup> Ibid p 18.

<sup>12</sup> Ibid p 32.

- “\$149.2 million over four years from 2021-22 to establish up to 15 industry owned Skills Enterprises to deliver improved skills and workforce outcomes through collaboration with industry and to ensure that the Vocational Education and Training (VET) system is responsive to industry and employer skills needs.”<sup>13</sup>
- \$10.7 million over three years from 2021-22 to trial up to four industry-led Digital Skills Cadetship pilots to develop new and innovative pathways to increase the number of Australians with high level digital skills.<sup>14</sup>
- \$22.6 million over six years from 2021-22 to establish the Next Generation Emerging Technologies Graduates Program to provide up to 234 scholarships in emerging technologies areas as well as \$24.7 million for the Next Generation AI Graduates Program.<sup>15</sup>

Moving forward, the Digital Economy Strategy promises Australians will “*be able to access education [and other essential services] seamlessly online from any location over a range of mediums.*”<sup>16</sup>

However, current copyright laws **are a barrier to achieving** this. For example, under the current Copyright Act the ‘show and tell’ exception ‘stops at the school gates’. So, if a student accesses a lesson from home or a workplace placement, there is a risk that teachers and schools may be infringing copyright, or authorising others to infringe copyright, by using copyright material in the lesson. We discuss this further in Part 4.

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<sup>13</sup> Commonwealth Budget 2021-2022 (Paper 2), pp 93-94. Available at <https://budget.gov.au/2021-22/content/bp2/index.htm>. See also the [Digital Economy Strategy 2030](#), p 36.

<sup>14</sup> [Commonwealth Budget 2021-2022 \(Paper 2\)](#), p 75. See also <https://digitaleconomy.pmc.gov.au/strategy/key-investments> and <https://digitaleconomy.pmc.gov.au/strategy/opportunities>.

<sup>15</sup> [Commonwealth Budget 2021-2022 \(Paper 2\)](#), p 74. See also <https://digitaleconomy.pmc.gov.au/strategy/key-investments> and <https://digitaleconomy.pmc.gov.au/strategy/opportunities>.

<sup>16</sup> [Digital Economy Strategy 2030](#), p 18 (emphasis added). State and Territory governments have made similar investments with a view to improving digital capabilities in school and beyond. For example, the Victorian Government allocated \$20 million to “Continue supporting our Tech Schools including expanding online teaching, as well as a new mobile delivery pilot for students in remote Gippsland, connecting more secondary students to the skills and jobs of the future”. See Victorian Budget 2021/2022 Overview, p 36. Available at <https://www.dtf.vic.gov.au/2021-22-state-budget/2021-22-budget-overview>.

## 2 Australia's education vision

The foundation of a digital economy is a world class education system that is accessible and adaptable to new technologies and ways of learning. Having a world class education system has been a high priority for successive governments. Australians expect that their children will receive a quality education to enable them to contribute to society and live fulfilling and productive lives. The approach to education required to achieve this is rapidly changing, as technology changes the way we live, work and play.

### 2.1 Alice Springs (Mparntwe) Education Goals

In December 2019, the Commonwealth and all State and Territory governments committed to the [Alice Springs \(Mparntwe\) Declaration \(Declaration\)](#).<sup>17</sup> The Declaration sets out the vision for:<sup>18</sup>

*“a world class education system that encourages and supports every student to be the very best they can be, no matter where they live or what kind of learning challenges they may face”.*

**Learning is a partnership with parents, carers, families and the broader community.**

The Declaration recognises the critical importance of digital skills and technologies to Australia's learners and to our future workforce. It also recognises that learning is a partnership with parents, carers and others in the community, all of whom have a role to play in nurturing the love of learning needed for success at school and in life.

Australia's education system is adapting quickly to embrace the benefits of the digital age and to ensure students and teachers can realise the teaching and learning opportunities provided by new forms of learning and engaging with content. This is part of Australia's vision:<sup>19</sup>

*“In an information and technology rich society we must ensure that educators are supported to continually develop their own skills, in order to teach young Australians the essential skills and core knowledge needed for a modern society and economy.”*

Unfortunately, Australia's copyright laws impose impediments to Australia achieving this national vision for education.

The Declaration sets out a range of interrelated areas for action including:<sup>20</sup>

- developing stronger partnerships

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<sup>17</sup> The Alice Springs (Mparntwe) Education Declaration, February 2020. Available at <https://www.dese.gov.au/alice-springs-mparntwe-education-declaration/resources/alice-springs-mparntwe-education-declaration>.

<sup>18</sup> Ibid p 2.

<sup>19</sup> Ibid p 11.

<sup>20</sup> Ibid p 9.

- supporting quality teaching and leadership
- embedding pathways for learning throughout life and supporting effective transitions
- promoting world-class curriculum and assessment.

In order to achieve these goals, policy makers must recognise that school education has shifted away from an entirely classroom-based ‘chalk and talk’ model, to a more modern, flexible model which ensures that students can obtain all the benefits provided by digital technologies. Australian schools need access to a broad range of content and platforms.

The impacts of the COVID-19 pandemic have only accelerated the profound shift in the future workforce towards a nation of flexible workers. For example, a report by the Australian Institute of Family Studies (**AIFS**) in June 2021 found that among the employed survey respondents, 67% were sometimes or always working from home, compared to 42% pre-COVID.<sup>21</sup> This was before the delta and omicron outbreaks.

Now more than ever, it is clear 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.

### 2.1.1 Industry-school partnerships and parent involvement

As mentioned above, **building partnerships** is a key area for action in the Declaration. It commits governments to:<sup>22</sup>

*“building partnerships that support learners’ progress through the education system, and to provide them with individualised, high quality learning opportunities and experiences, and personal development.”*

Australian schools are taking steps to broaden their engagement with industry and the broader community for the benefit of Australian students.

The STEM Partnerships Forum (**Forum**) is a collaborative action under the National STEM School Education Strategy 2016-2026, which was endorsed by all Australian education ministers in December 2015. In its 2017 Issues Paper the Forum identified that:<sup>23</sup>

**Collaboration between schools and the broader community - including business and industry - is a critical step in Australia improving its education outcomes.**

<sup>21</sup> Australian Institute of Family Studies (**AIFS**), ‘Two thirds of Australians are working from home.’, 17 June 2021. Available at <https://aifs.gov.au/media-releases/two-thirds-australians-are-working-home>. See also <https://www.abc.net.au/news/2021-09-16/work-from-home-productivity-commission-study/100465258> which suggests the percentage of Australians working from home has jumped from 8 per cent to 40 per cent in the past two years.

<sup>22</sup> [The Alice Springs \(Mparntwe\) Education Declaration](#), p 10.

<sup>23</sup> STEM Partnerships Forum, Optimising STEM Industry-School Partnerships: Inspiring Australia’s Next Generation (Issues Paper, 2017), p 5. Available at <https://www.dese.gov.au/information-schools/resources/optimising-stem-industry-school-partnerships-inspiring-australias-next-generation-issues-paper>.

*“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.”*

Since then, the Commonwealth and State and Territory governments have introduced a range of policies to encourage collaboration between schools and industry which is a critical step in Australia improving its Science, Technology, Engineering and Math (**STEM**) education outcomes.

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 future workforce needs, including vacancies and the skills required of employees both in STEM specific areas and areas where STEM skills are valued.”<sup>24</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>25</sup>

The importance of industry-school partnerships has also been a critical focus for the skills sector. For more information, see **Attachment 1**.

While the Declaration and the Forum recognise the importance of parent, industry and community partnerships, once again, current copyright laws **are a barrier**. For example, in the same way that the ‘show and tell’ exception ‘stops at the school gates’, teachers may not be able to ‘show and tell’ copyright content in class if they involve parents, industry or the community in the lesson. For more information, see Part 4.

## 2.2 National Schools Reform Agreement

The [National School Reform Agreement](#) (**NSR Agreement**) was a joint agreement signed by the Commonwealth and all State and Territory governments in November 2018 to lift student outcomes across Australia. The NSR Agreement sets out eight national policy initiatives against three reform directions that all parties have agreed to implement across the five years to December 2023.

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<sup>24</sup> STEM Partnerships Forum, Optimising STEM Industry-School Partnerships: Inspiring Australia’s Next Generation (Final Report, 2018), p 13. Available at <https://www.dese.gov.au/education-ministers-meeting/resources/optimising-stem-industryschool-partnerships-final-report>.

<sup>25</sup> Ibid p 14.

The Online Formative Assessment Initiative (**OFAI**), is one of the eight policy initiatives set out in the NSR Agreement. It is:<sup>26</sup>

*“a coordinated national response to lift educational outcomes by providing innovative tools and new resources for teachers and students, as well as professional learning and support for teachers”.*

One critical component of the OFAI, is the Teaching Tools Network (**Tool**) which will allow:

- teachers to record live lessons and upload pre-recorded lessons
- parents/guardians to access digital resources during lessons
- teachers to display content online during a lesson.

**OFAI cannot be implemented if copyright laws prevent community engagement and the recording of lessons.**

However, similar to above, these activities are not clearly permitted under our existing copyright laws. For example:

1. Using content from the Tool in the course of “virtual” educational instruction may not be covered under the ‘show and tell’ exception which permits teachers to use copyright materials in the classroom.
2. The legal situation for teachers recording lessons (live or pre-recorded) is unclear.
3. The legal situation for teachers teaching remotely (eg if a teacher is teaching via Zoom) is unclear.
4. Schools may not be able to rely on the ‘show and tell’ exception if parents or guardians, or members of the community are presenting or involved in lessons. This means parents may not be able to access digital resources under the OFAI. This is a significant barrier to educational policy which is increasingly prioritising the involvement of parents and guardians (and the wider community) in education.
5. Freely available internet materials are remunerable under the statutory licence. Uploading freely available internet materials onto a nationally available network may have significant cost implications for the school sector nationally.

Through the Education Ministers Meeting, all education ministers, including Commonwealth Minister for Education and Youth, The Hon Alan Tudge MP, endorsed the OFAI. However, the OFAI cannot be implemented as planned without these issues being addressed. For more information, see **Attachment 2**.

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<sup>26</sup> See <https://www.ofai.edu.au/>.

## 2.3 Improve Australia's PISA Ranking for Education

Australia prides itself in having a world-class education system. However, Singapore, Canada, Korea, New Zealand, the United Kingdom and Japan are all ahead of Australia in Program for International Student Assessment (**PISA**) rankings.

In a speech last year, the Minister for Education and Youth, The Hon Alan Tudge MP described his concerns that the quality of education in Australia is falling behind other countries:<sup>27</sup>

*“Since 2000, Australia’s performance in reading has declined by 26 points, or the equivalent of nine months of schooling. In maths, we have fallen 33 points since 2003, or by 14 months of schooling. In science, we have fallen 24 points since 2006, or by 11 months of schooling... The UK, Canada and New Zealand – all countries we used to outperform in education - are now ahead of us on all three assessment domains.”*

Interestingly, unlike Australia, most of the countries ahead of Australia in the PISA rankings have modern copyright laws that ensure teachers can effectively utilise a broad range of technology and resources in their teaching practices.

**Countries ahead of Australia in PISA rankings have more modern copyright laws.**

The table below shows the top-ranking PISA countries and whether their copyright laws permit digital education. All but one of the countries ahead of Australia in the PISA rankings have modern copyright laws that clearly permit digital education.

**Figure 4: PISA ratings and copyright laws**

Country	PISA rankings <sup>28</sup>	Copyright laws permit digital education
China	1	Yes
Singapore	2	Yes
Estonia	3	Yes
Canada	4	Yes
Finland <sup>29</sup>	5	Yes

<sup>27</sup> Speech by Minister for Education and Youth, The Hon Alan Tudge MP, 'Being our best: Returning Australia to the top group of education nations', 11 March 2021. Available at <https://ministers.dese.gov.au/tudge/being-our-best-returning-australia-top-group-education-nations>.

<sup>28</sup> [OECD PISA 2018 results](https://www.oecd-ilibrary.org/education/pisa-2018-results-volume-i_28450521-en), p 57. Available at [https://www.oecd-ilibrary.org/education/pisa-2018-results-volume-i\\_28450521-en](https://www.oecd-ilibrary.org/education/pisa-2018-results-volume-i_28450521-en).

<sup>29</sup> Achieved by a government funded licensing program.

Ireland	6	Yes
South Korea	7	Yes
Poland	8	Yes
Sweden <sup>30</sup>	9	Yes
New Zealand	10	No (commitment to review)
United States	11	Yes
UK	12	Yes
Japan	13	Partially
Australia	14	No

If Australia is to achieve its goal of returning to the “[top group of education nations](#)”,<sup>31</sup> our copyright laws need to align with the world class modern teaching practices Australia seeks to achieve. Australia will get further and further behind if we don't act now.

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<sup>30</sup> Achieved under a national copyright licensing scheme.

<sup>31</sup> Available at <https://ministers.dese.gov.au/tudge/being-our-best-returning-australia-top-group-education-nations>.

### 3 What does a modern education system look like

It is well recognised that the skills Australian students need to thrive in society have changed. Digital skills are critical to young people being employed and to Australia's wider goals of realising the range of opportunities that technology can bring to the economy.

The Declaration lists **delivering world-class curriculum and assessment** as a key area for action, committing governments to this action.<sup>32</sup>

In May 2021 the Government released its Digital Economy Strategy. The strategy notes that:<sup>33</sup>

*“How well our businesses, governments and workforce keep pace with changes in technology and the digital frontier will define Australia’s future prosperity. The potential benefits to the Australian economy through digitalisation have been estimated to be as much as \$315 billion over the next decade, with the potential to create up to a quarter of a million new jobs by 2025. With other countries investing heavily in their digital futures, our actions over the next 10 years will determine whether we lead or fall behind our global competitors.”*

The Chief Executive of the Australian Investment Council, Yasser El-Ansary supported its release saying that:<sup>34</sup>

*“Building a pipeline of digital skills and upskilling Australians will be critical for the development of a modern, knowledge-based economy.”*

The Digital Economy Strategy is built around three pillars:<sup>35</sup>

- The first is “building the foundations to grow the digital economy”, centred around creating the policy settings for the digital economy to flourish.
- The second is “building capability in emerging technologies”.
- The third is “setting Digital Growth Priorities to lift our ambition”.

**World-class curriculum and assessment requires embracing digital technologies.**

Schools have an important role in setting Australia up to achieve its digital economy goals.

The way students learn has changed remarkably in a short time. In a modern school system, learning occurs both inside and outside the school gates, in order to drive research and

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<sup>32</sup> [The Alice Springs \(Mparntwe\) Education Declaration, Feb 2020](#), p 15.

<sup>33</sup> [Digital Economy Strategy 2030](#), p 3.

<sup>34</sup> ‘Australian Investment Council, Digital Economy Strategy will significantly propel innovation’, Australian Investment Council, 6 May 2021. Available at <https://www.avcal.com.au/AIC/Articles/Media-Release/2021/05-May/Digital-Economy-Strategy-will-significantly-propel-innovation>.

<sup>35</sup> [Digital Economy Strategy 2030](#), p 3.

innovation, the development of STEM skills and equip students with the skills needed for the digital economy.

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.

### 3.1 Flipped classrooms

One of the methods most commonly pointed to in research to achieve Australia’s digital economy goals is the ‘flipped’ classroom model. Many schools have already moved to ‘flipped’ classroom models, which rely heavily on internet technologies.

**Flipped classrooms require fresh thinking and accessibility. Teachers need to be able to quickly, easily and legally upload content to a DTE.**

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 legally and easily upload content to a digital teaching environment (**DTE**)<sup>36</sup> 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. As the graph in **Attachment 3** shows, while teachers are using textbooks less, use of other forms of material (eg YouTube videos) has increased.

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>37</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

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<sup>36</sup> Digital Teaching Environment (**DTE**) includes online environments with features that enable students and teachers to engage with course content, manage their course work and explore material. For example, a learning management system (eg Blackboard, Moodle), a closed class area on an education platform (eg iTunesU, Google Classroom), classroom wiki’s, interactive whiteboards or password protected share-drives containing class learning materials. See <https://smartcopying.edu.au/glossary/digital-teaching-environment-dte/>.

<sup>37</sup> Linda Morris, ‘Flipping Teaching On Its Head’ Sydney Morning Herald, 31 March 2018. Available at <https://www.smh.com.au/national/nsw/flipping-teaching-on-its-head-20180327-p4z6gr.html>.

settings. Based on the results of this research, Monash University predicts that textbooks will be non-existent in classrooms within ten years, replaced by 3D 'digibooks'.<sup>38</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 for children who may not otherwise be able to physically access classrooms.<sup>39</sup>

## 3.2 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 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>40</sup>*

As noted in research findings in Victoria, looking at blended learning over a five-year period:

**Blended learning is an effective, inclusive alternative for disadvantaged schools and students who might normally lack confidence in the classroom.**

*"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>41</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:<sup>42</sup>

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<sup>38</sup> Marina Thomas, 'How will schools look in 10 years?' News.com.au, 5 February 2013. Available at <https://www.news.com.au/lifestyle/parenting/how-will-schools-look-in-10-years-time/news-story/9bd64839b68a04ebf24775f46e004930?sv=1d0bc22c646e4422008e508534b2bedf>.

<sup>39</sup> School News, 'Robots offer 'telepresence' in classrooms of the future', 2 May 2017. Available at <https://www.school-news.com.au/news/robots-offer-telepresence-in-classrooms-of-the-future/>.

<sup>40</sup> State of Victoria (Department of Education and Early Childhood Development) Blended Learning: A synthesis of research findings in Victorian education 2006–2011 (2012), p 5. Available at <https://www.education.vic.gov.au/documents/about/research/blendedlearning.pdf>.

<sup>41</sup> Ibid p 4.

<sup>42</sup> Olga Galacho, 'Culture Tech: Tasmania embraces classrooms of the future' Australian Financial Review, 13 June 2016. Available at <https://www.afr.com/technology/culture-tech-tasmania-embraces-classrooms-of-the-future-20160607-gpdd2y>.

*“If we are to provide equal opportunities for young people wherever they live we must embrace innovative technology”.*

The benefits of blended learning were highlighted in ACARA’s Digital Technologies in Focus (DTiF) project. The DTiF was a 4-year program designed to upskill teachers and support them to teach Digital Technologies, funded by the Australian Government as part of the National Innovation and Science Agenda.<sup>43</sup> The DTiF project has now been independently recognised to improve student engagement and achievement in some of the country’s most disadvantaged schools, but it also has provided timely tech skills to teachers providing important long-term change for schools.

As Julie King, ACARA Senior Manager, Curriculum said (emphasis added):

*“The need for professional learning nationally was high and particularly so in disadvantaged schools where students often have limited access to digital devices at home, and so the school’s role is critical”.*<sup>44</sup>

*“Students showed **increased engagement** in learning computational thinking, design thinking and problem solving. A lot of teachers told us they saw many students, who might normally lack confidence in the classroom, really shine, and every school involved reported **positive outcomes for student inclusion and achievement**. Many First Nations Australian students also benefited from learning Digital Technologies through a focus on story, exploring their local language, learning on Country/Place and programming robotic devices.”*<sup>45</sup>

For more information on the DTiF, see **Attachment 4**.

Blended learning is also commonly used in other countries. In the United States, the use of blended learning in schools has increased by an average of over 30% per year since 2006.<sup>46</sup>

### 3.2.1 The impact of COVID-19

As stated in the Discussion Paper, a number of law reform inquiries identified considerable access issues to digital content in Australia.<sup>47</sup> The COVID-19 pandemic has highlighted these access

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<sup>43</sup> See more information on the Digital Technologies in Focus website:

<https://www.australiancurriculum.edu.au/resources/digital-technologies-in-focus/>. For more information on the National Innovation and Science Agenda, see <https://www.industry.gov.au/policies-and-initiatives/boosting-innovation-and-science>.

<sup>44</sup> ACARA, Media Release: New Program Proven to Upskill Teachers in Crucial Digital Skills (**ACARA Media Release**), 4 November 2021, p1. Available at [https://www.acara.edu.au/docs/default-source/media-releases/20211108-media-release-dtif\\_4.pdf?Status=Temp&sfvrsn=ca6a4d07\\_4](https://www.acara.edu.au/docs/default-source/media-releases/20211108-media-release-dtif_4.pdf?Status=Temp&sfvrsn=ca6a4d07_4).

<sup>45</sup> Ibid p 2.

<sup>46</sup> Barbour, et al, ‘Online and Blended Learning: A Survey of Policy and Practice of K-12 Schools Around the World’ (2011), p 4. Available at [https://aurora-institute.org/wp-content/uploads/iNACOL\\_a-survey-of-policy-and-practice.pdf](https://aurora-institute.org/wp-content/uploads/iNACOL_a-survey-of-policy-and-practice.pdf).

<sup>47</sup> Discussion Paper, p 7.

issues, with the need for schools to make an urgent transition to widespread online and remote learning in 2020, 2021 and continuing in 2022.

A 2020 [Pearson Global Learner Survey](#) of over 7,000 people across the globe, including over 1,000 Australian participants, found that 78% of respondents believe education will fundamentally change due to COVID-19, with an increased role for online learning in schools and universities.<sup>48</sup>

COVID-19 has only accelerated the profound shift in the future workforce towards a nation of flexible workers. As noted in Part 2.1, even before the delta and omicron outbreaks, a survey found that 67% of survey respondents were sometimes or always working from home, compared to 42% pre-COVID.

**Schools cannot effectively teach digital skills if using digital technologies is not part of the ‘new normal’.**

COVID-19 has seen Australian schools pivot to adapt to a fully remote learning environment and schools that used blended learning found this transition easier to make.

As ACARA CEO David de Carvalho noted when discussing the success of blended learning under the DTiF:

*“[The DTiF] has been invaluable for many schools and teachers who participated and then found themselves delivering remote learning due to the COVID-19 pandemic”.*<sup>49</sup>

*“Teachers told us they strengthened their own digital skills and felt more able to confidently cope with students learning from home.”*<sup>50</sup>

Students and teachers are now used to this ‘digital first’ teaching environment and there is an expectation that they will be able to continue to use digital technologies as schools adapt to the ‘new normal’.

### 3.3 AI, TDM and data analytics

As Mark Scott, previous Secretary of the NSW Department of Education, recognised in a 2017 speech:<sup>51</sup>

*“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*

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<sup>48</sup> Available at [https://www.pearson.com/content/dam/one-dot-com/one-dot-com/global/Files/news/gls/Pearson\\_Global-Learners-Survey\\_2020\\_FINAL.pdf](https://www.pearson.com/content/dam/one-dot-com/one-dot-com/global/Files/news/gls/Pearson_Global-Learners-Survey_2020_FINAL.pdf).

<sup>49</sup> ACARA Media Release, p 1.

<sup>50</sup> Ibid.

<sup>51</sup> Mark Scott, ‘Preparing today’s students for tomorrow’s world’ (Speech delivered at the Trans-Tasman Business Circle), 29 June 2017. Available at <https://education.nsw.gov.au/teaching-and-learning/education-for-a-changing-world/resource-library/preparing-today-s-students-for-tomorrow-s-world>.

*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."*

Data analytics tools are being employed internationally to measure student learning and adapt teaching methods to suit individual students based on the results. As a Harvard Vice Provost for Advances in Learning has noted:<sup>52</sup>

*"Adaptive learning programs are very good at speeding up information acquisition and lengthening retention, as well as individualising learning to help learners see where they have difficulty".*

**Humans live and work alongside AI. Education systems need to adapt to meet these changes.**

A report by Pearson has analysed the speed at which the integration of AI in Education (**AIEd**) has developed.<sup>53</sup> 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.

The report also 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>54</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 21st century. Their report found:<sup>55</sup>

*"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, i.e., 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."*

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<sup>52</sup> Brett Milano, 'As AI rises, you'll likely have a job, analysts say, but it may be a different one', Harvard Gazette (2017). Available at <https://news.harvard.edu/gazette/story/2017/02/adaptive-learning-featured-in-harvardx-course/>.

<sup>53</sup> Luckin, et al, 'Intelligence Unleashed: An Argument for AI in Education' (2016), p 20. Available at <https://discovery.ucl.ac.uk/id/eprint/1475756/>.

<sup>54</sup> Ibid p 24.

<sup>55</sup> Professor John Buchanen et al, 'Future Frontiers Analytical Report. Preparing for the best and worst of times', May 2018, p 4. Available at <https://education.nsw.gov.au/teaching-and-learning/education-for-a-changing-world/resource-library/future-frontiers-analytical-report-preparing-for-the-best-and-worst-of-times>.

## 4 Copyright is standing in the way of Australia's Digital Economy Strategy and education vision

Australia's current copyright laws are an impediment to Australia achieving its Digital Economy Strategy goals and meeting its national education commitments. Many provisions are outdated, narrow and overly prescriptive. This creates uncertainty and exposes schools and administering bodies to a higher risk of legal liability and imposes significant administrative burden.

Without urgently needed updates, we risk Australian students missing out on a world class education system and falling further behind other nations.

CAG strongly supports the Exposure Draft Bill which will clarify or fix most of the school sector's urgent problems and ensure that digital teaching methods can be legally used in Australian schools. These reforms are critical to Australia achieving its Digital Economy Strategy goals and education vision.

In this part of the submission, we discuss the current problems with the Copyright Act and where these problems are clarified or fixed by the Exposure Draft Bill. For CAG's technical comments on the Exposure Draft Bill, see Part B of this submission.

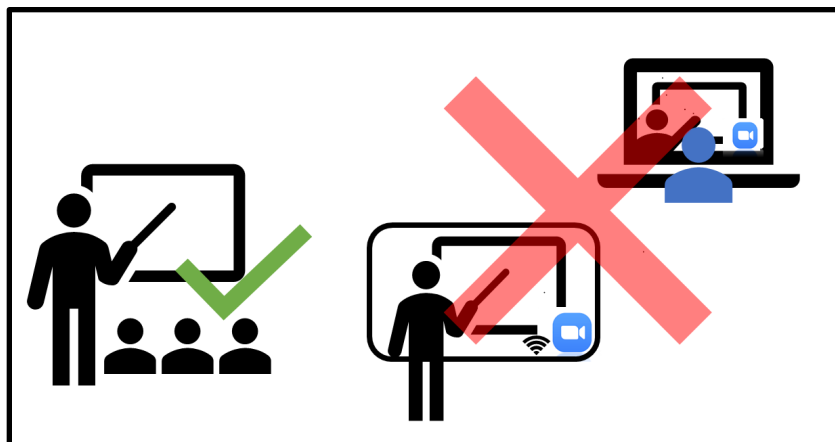
### 4.1 The 'show and tell' exception does not apply to all forms of teaching activities

Australia's current copyright system is designed predominantly for an outdated learning model where all teaching happens inside the classroom. Our copyright laws were mostly written in a time when teachers stood in front of a class with a piece of chalk, writing on a blackboard. They simply do not reflect modern, online learning practices.

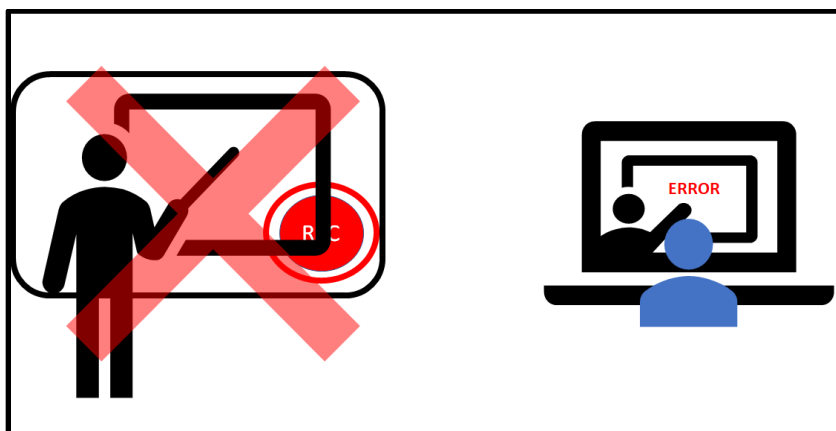
As mentioned in the Copyright Refresher on page 15, the current 'show and tell' exception allows teachers to show, play and perform copyright materials in class to their students.<sup>56</sup> However, at present the exception does not permit the use of all types of copyright materials during remote learning (eg if a teacher is teaching via Zoom, Teams, etc).

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<sup>56</sup> See section 28(1)(a) of the Copyright Act: Where a literary, dramatic or musical work is performed in class, or otherwise in the presence of an audience.



In addition, making a recording of a lesson, in which copyright materials were used, for students to access later on-demand is not permitted by the current exception.



The Exposure Draft Bill fixes these problems by clarifying the scope of the 'show and tell' exception. The proposed amendments update the status quo to allow teaching in the digital age. The amendments ensure that teachers can use digital teaching methods to teach students and record lessons.

These amendments are critically important to the school sector as well as the Government to meet their national education initiatives. For additional information on the importance of being able to make recordings of lessons for students to watch later, see **Attachment 5**. For more information on how these reforms will allow the Government to meet their national education initiatives such as the OFAI, see **Attachment 2**.

Importantly, the proposed amendments contain appropriate safeguards to protect copyright owners' commercial interests by ensuring the exception will only apply to the use of copyright materials **for lessons**. What this means is that the proposed exception **will not apply** if, for example, a teacher:

- permanently uploads a chapter of a book to a DTE

- scans a copy of a maths worksheet and emails a copy to every student in the class
- permanently uploads a recording of a lesson to a DTE
- permanently uploads a movie to a DTE.

In those circumstances, unless another exception in the Copyright Act applies, generally this would require remuneration under the statutory licence or other licence, or the permission of the copyright owner.

These updates to the ‘show and tell’ exception to allow digital education will not have any effect on the statutory or voluntary licences or the need for schools to continue to purchase materials and take out direct subscriptions. The reforms are targeted to allow teachers to teach students – whether the classroom is physical or online.

A practical example of how the proposed amendments would operate is explained below:

### **Example scenario**

A teacher is teaching a lesson in which they read a short passage from a book, display a maths problem and play two minutes of a YouTube clip.

The proposed amendments would allow the teacher to teach this lesson via Zoom and record the lesson for students who were unable to watch the live lesson so that they can watch it at a later time.

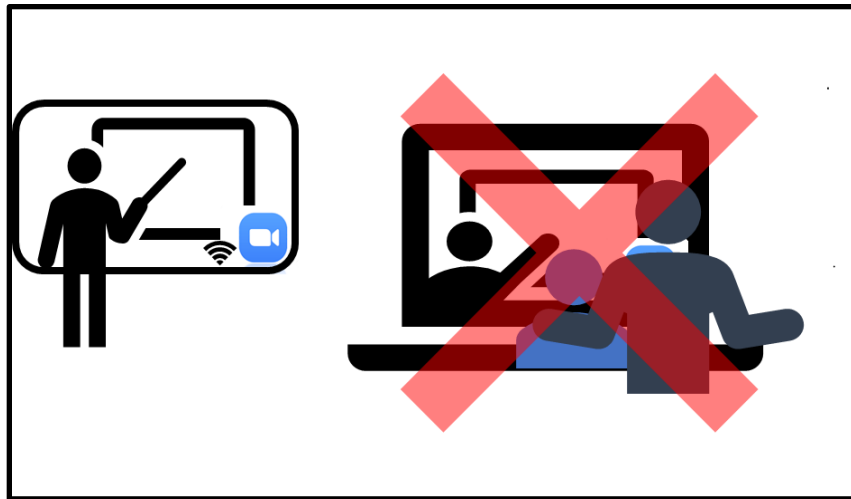
For students who were unable to watch the live lesson, the teacher can make that recording available for them to watch later via a password protected DTE. The recording would then be taken down once the students have finished with it.

The ‘show and tell’ exception currently allows teachers to deliver this lesson in a physical classroom for free. The proposed amendments simply make it clear that this lesson can also be delivered digitally (eg via Zoom, Teams, etc) and/or recorded and made available to students who need the recording for their educational purposes.

What these proposed amendments **do not allow**, for example, would be the teacher permanently uploading the recording, the book, the maths problems or the YouTube clip to the DTE, or sharing any of this material on the internet for anyone to access.

## 4.2 The ‘show and tell’ exception may not apply if parents and guardians are involved in or present for the lesson

Under the current Copyright Act, schools may not be able to rely on the ‘show and tell’ exception if parents and guardians are ‘in the audience’ for the lesson. So, if a lesson involves people not ‘connected’<sup>57</sup> with the school, teachers and schools may be infringing copyright by using copyright material in that lesson. Parents and guardians are not taken to be directly connected merely because they are a parent or guardian of a student that attends the school.



The Exposure Draft Bill fixes this problem. The proposed ‘show and tell’ exception clarifies that parents, guardians, etc are able to support students with their learning. This will raise student outcomes and allow the Government to achieve its national education goals. For more information on one of these goals, the OFAI, see **Attachment 2**.

## 4.3 The ‘show and tell’ exception ‘stops at the school gates’

The existing educational copying regime is ill-suited for a world where the provision of education strays outside the gates of the school. None of the existing educational copying provisions were designed with the kind of community and industry collaboration in mind that we now know is necessary for a modern education and a critical part of Australia’s education vision.

In the same way that the ‘show and tell’ exception may not apply if parents and guardians are involved in or present for the lesson, the current ‘show and tell’ exception ‘stops at the school

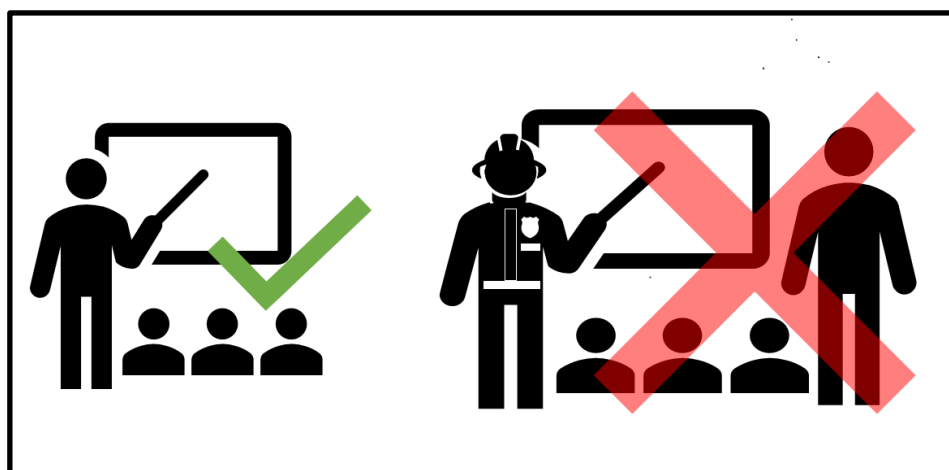
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<sup>57</sup> See section 28(3) of the Copyright Act: For the purposes of this section, a person shall not be taken to be directly connected with a place where instruction is given by reason only that he or she is a parent or guardian of a student who receives instruction at that place.

gates'.<sup>58</sup> So, if a student is at home, or on a workplace placement, and accesses a live or recorded lesson, the teacher and school may be infringing copyright, or authorising others to infringe copyright, by using copyright material as part of the lesson.

In addition, schools are prevented from relying on the 'show and tell' exception if someone from outside the school is involved in the lesson. For example, a teacher may not be able to rely on the exception to show copyright material where:

- a member of the community has been invited into the classroom
- the teacher has invited business people from 'the real world' to join the lesson
- they stream the lesson online for students to watch while they do a work placement or work from the local tech incubator learning to write code
- a student's work placement supervisor is teaching part of a lesson.



The Exposure Draft Bill fixes this problem. This amendment simply updates the Copyright Act to reflect the realities of a modern education. It reflects the importance of schools working in partnership with parents and the broader community to foster a supportive learning environment. This update will improve educational outcomes for Australian students and ensure that the Copyright Act doesn't stand in the way of the Government's Digital Economy Strategy goals, national education vision or the Commonwealth, State and Territory skills initiatives such as the NSW Institute of Applied Technology (**NSW IAT**) or VET partnerships in schools under the [Heads of Agreement for Skills Reform](https://www.pmc.gov.au/resource-centre/domestic-policy/heads-agreement-skills-reform).<sup>59</sup>

See **Attachment 6** for a case study on the NSW IAT. For more information on the importance of VET partnerships, see **Attachment 1**.

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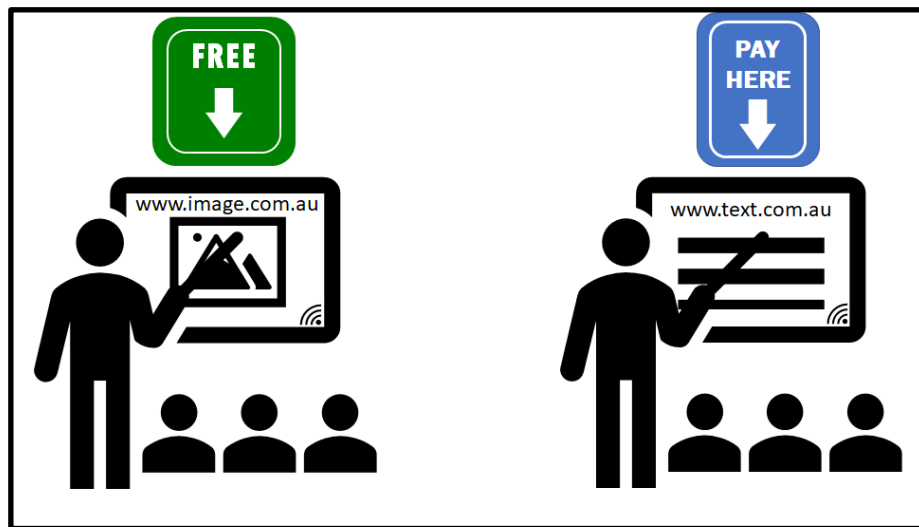
<sup>58</sup> See section 28(1) of the Copyright Act which states that a performance shall not be deemed to be a performance in public provided "the audience is limited to persons who are taking part in the instruction or are otherwise directly connected with the place where the instruction is given."

<sup>59</sup> <https://www.pmc.gov.au/resource-centre/domestic-policy/heads-agreement-skills-reform>.

## 4.4 The ‘show and tell’ exception does not apply equally to all forms of copyright materials

There has been considerable debate between Copyright Agency and CAG as to whether the ‘show and tell’ exception applies to literary, dramatic and musical works (text works) being displayed in a physical classroom. This is despite all other forms of copyright content clearly being permitted.

This long-standing interpretation issue means that schools are in the illogical position where a teacher can show a pie chart or a YouTube video on an interactive whiteboard in the classroom for free, but a licence (and payment) is needed to show students a worksheet of a maths problem on the exact same whiteboard.



In CAG’s view, the ‘show and tell’ exception always covered text works and we are grateful that the proposed amendments clarify this position. CAG considers this as simply clarifying that the ‘show and tell’ exception applies in the same way to all types of content. This is important because teachers need one simple rule for all types of copyright material they use in the classroom.

This clarification would not harm any markets for sales of books, journals or articles and there isn’t a policy rationale for treating text works differently from all other forms of copyright content.

For more information on CAG’s historical interpretation of the ‘show and tell’ exception see **Attachment 7**.

## 4.5 The 'show and tell' exception does not clearly permit copies to enable classroom display

Currently, under the 'show and tell' exception, teachers are allowed to show some types of copyright material in a physical classroom and communicate those copyright materials in order to show them in a physical classroom.

But teachers cannot rely on the exception to make a copy of copyright material in order to show or display it in the physical classroom. In everyday teaching, and increasingly when using new technologies, a teacher will need to make a number of incidental copies in order to display content to students (eg downloading material in order to transmit it to the interactive whiteboard). However, while displaying content may be covered by the 'show and tell' exception, the incidental copies are not.

Instead, teachers may need to rely on the statutory licence or another exception to make any copies needed to facilitate something being shown in a classroom. It is confusing for teachers to have different rules for what they can show in the classroom. The rules currently vary depending on how, and through what technologies, are used to show that content.



The Exposure Draft Bill fixes this problem by ensuring that the Act applies in the same way to all forms of copyright content, regardless of the technology used, when teaching students. This proposed amendment is a practical step to ensure that teachers can simply and efficiently use modern technology in their teaching.

A practical example of how the proposed amendment would operate:

- Under the current 'show and tell' exception, a teacher can show a YouTube clip as part of a lesson or they can stream a clip from a centralised device in the library.

- This proposed amendment would allow a teacher to also make a copy of the clip, if required, in order to show it to students as part of a lesson.
- This means, teachers will have a single, simple rule for how they're allowed to use all material in a lesson.

As noted in Part 4.1 above, the proposed amendment contains appropriate safeguards to protect copyright owners' commercial interests. The proposed amendment would only allow teachers to utilise technology to teach students and display material **as part of a lesson**. The proposed amendment **would not apply** if, for example, a teacher instead wanted to:

- permanently upload the YouTube clip to the DTE
- download and email the YouTube clip to every student in the class.

In these situations, the current position remains unchanged – unless another exception in the Copyright Act applies, generally this would require remuneration under the statutory licence or other licence, or the permission of the copyright owner.

This amendment simply makes it clear that any of the activities required to show material as part of a lesson will be covered under the 'show and tell' exception.

## 4.6 Australian schools pay to use materials where the copyright owners cannot be identified

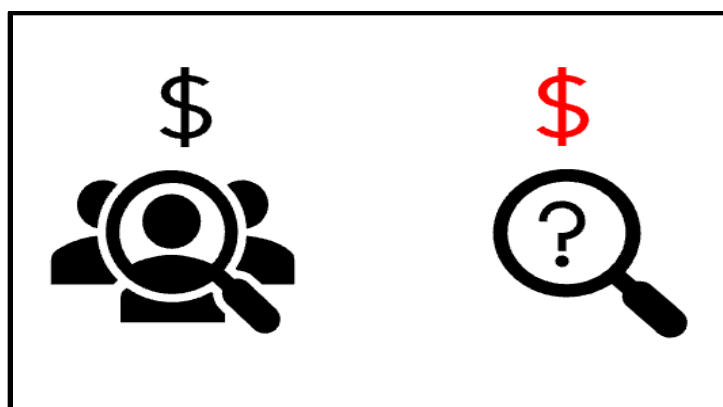
Orphan works are works where the copyright owner cannot be identified and therefore licence fees cannot be paid to the copyright owner.

When orphan works are used under the statutory licence administered by Copyright Agency, the copyright owner cannot be identified for distribution of licence revenue. However, schools still pay licence fees for the use of these materials to Copyright Agency. Those licence fees **never go to copyright owners**. Copyright Agency holds the money in their Future Fund as opposed to distributing it to authors and publishers. The purpose of the Future Fund is to finance Copyright Agency's campaign against the copyright reforms being sought by the education sector.<sup>60</sup> The Future Fund is discussed more in Part 5.1.1 and **Attachment 8**. The proposed orphan works reforms will not cause an immediate reduction to the amount schools pay to Copyright Agency under the statutory licence. The fees paid will remain the same (given schools pay a per student fee). Instead, it will assist schools in future negotiations with Copyright Agency to ensure that they are paying the appropriate licence fees under the statutory licence.

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<sup>60</sup> Copyright Agency 2015/2016 Directors' Report and Financial Report (**Copyright Agency 2015/2016 Directors' Report**), p 26. Available at <https://static-copyright-com-au.s3.amazonaws.com/uploads/2015/04/TCA4906-Copyright-Financials-30-June-2016.pdf>.

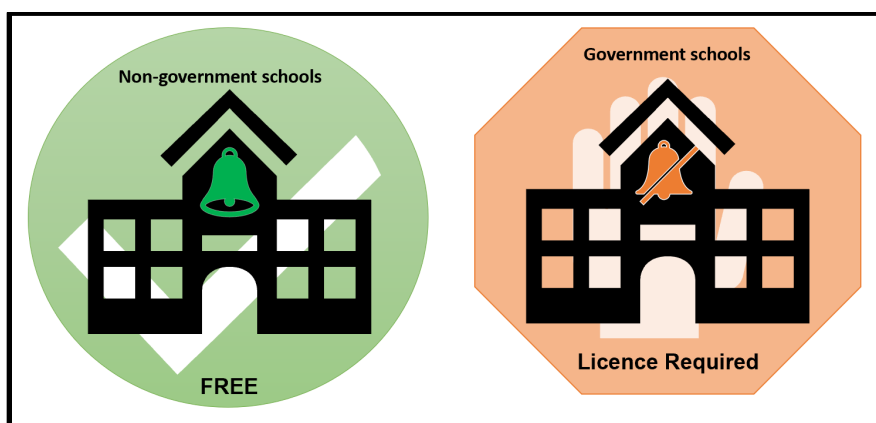
CAG only sees this as an issue in relation to the school sector's statutory licence administered by Copyright Agency. As far as CAG is aware, the school sector is not using any 'orphaned' broadcasts under the statutory licence administered by Screenrights or any 'orphaned' materials under the school sector's voluntary licences with the music collecting societies. In relation to the statutory licence administered by Screenrights in particular, it is hard to imagine a situation where the owner of copyright in a broadcast (ie a broadcaster) could not be identified. For additional information on this, see Part 5.1.1.



The Exposure Draft Bill fixes this problem. This sensible and targeted amendment will simply mean schools are not paying money to copyright owners who cannot be identified. Instead, this money will stay in education budgets where it can be used to improve academic outcomes for students.

## 4.7 The 'school bell' exception treats schools unequally

An unintended consequence of recent charities reforms meant an exception that allows the use of sound recordings in schools is now limited to registered charities. This means Catholic and Independent schools can play recorded music (eg for the school bell and at school assemblies) but Government schools cannot.



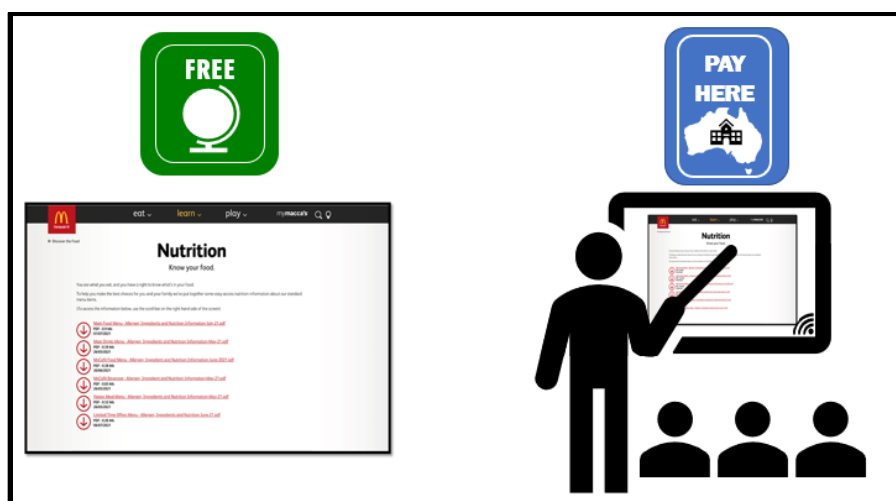
CAG would like to thank the Phonographic Performance Company of Australia (**PPCA**) for granting a free interim licence to cover Government schools while a legislative solution to fix this issue was being considered. CAG acknowledges the PPCA has some concerns regarding the treatment of music throughout the Copyright Act (separate to the 'school bell' exception). CAG would welcome further consultation on this important issue following the passage of the Exposure Draft Bill and in conjunction with the outstanding issues raised below.

The Exposure Draft Bill fixes this problem. CAG welcomes the reinstatement of this exception to its pre-2012 scope to allow all schools to play recorded music (eg for the school bell and at school assemblies). This provides greater certainty to all schools that they can rely upon this exception to play sound recordings.

## 4.8 Australian schools pay to use materials that no one else in the world pays to use

Australian schools pay to use freely available internet materials, which are works made available online with no commercial intent or expectation of payment.

Some adjustments to the processing protocol<sup>61</sup> have occurred through negotiation between Copyright Agency and the NCU to remove certain forms of web-based marketing materials from being counted as remunerable under the statutory licence. However, the vast majority of freely available internet materials used under the statutory licence are still paid for by schools.



According to Copyright Agency's own data, the fourth most commonly used website in a recent remunerable data set collected from the conduct of surveys in schools was the [nutrition information page from the McDonald's Australia website](#).

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<sup>61</sup> The processing protocol is agreed between the parties and determines how survey data is processed (eg what is considered 'remunerable' under the statutory licence and what is not).

Some recent examples of the websites that were categorised as ‘remunerable’ in survey data and that schools have paid to use under the statutory licence are:

- ‘About us’ pages from websites such as Amnesty International, [Oxfam](#) and the [Sydney Aquarium](#)
- Free [downloadable teaching ‘printables’](#) and [worksheets](#), and [educational materials designed for use by kids](#), or [specifically stated to be for school use](#)
- Free educational resources on a [health education partnership](#) between Nestlé and the Australian Institute of Sport
- Information about a charity’s work [regarding animals in zoos](#) where website users are encouraged to share the information
- The landing page for a freely available [catch up TV site](#)
- [Bible verses](#) from a free online bible website
- Information about [Lendlease’s involvement in urban regeneration](#)
- [Bullying](#) and [mental health](#) resources on the Kids Helpline website
- An image of a Dali painting recorded in a [Wikipedia entry](#)
- The [definition of an emoji](#) from dictionary.com
- A [photo of a gozleme](#) sourced from a Google search and attributed to sbs.com.au (whose terms of use allow personal, non-commercial purposes)
- Internet memes (see [this link](#), where Copyright Agency’s advised position is that the top meme based on a film is non-remunerable, but any memes based on artworks would be remunerable).

See **Attachment 9** for screenshots of recent examples of websites that schools have paid to use under the statutory licence.

CAG is disappointed that a freely available internet materials exception wasn’t included in the Exposure Draft Bill. There have been extensive consultations considering this exception and dealings between the parties for well over a decade.<sup>62</sup>

**Australian schools pay to use material that ordinary Australians and commercial users use for free.**

This as a critical issue for the school sector. A freely available internet materials exception would fix the current situation where ordinary Australians use materials on the internet such as online TV guides, fact sheets and government information for free every day, but licence fees are required if this same content is used in Australian schools.

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<sup>62</sup> See for example, CAG submissions to the [ALRC](#) (available at <https://www.alrc.gov.au/inquiry/copyright-and-the-digital-economy/submissions-received-by-the-alrc-4/>) and [Productivity Commission](#) (available at <https://www.pc.gov.au/inquiries/completed/intellectual-property/submissions>), discussing the longstanding issue in relation to freely available internet materials.

CAG notes that Singapore recently enacted a similar exception,<sup>63</sup> finding the exception to be necessary in view of how teaching and learning methods and styles have evolved over the years, and given the increasing focus on e-learning, student-directed learning and peer-to-peer learning.<sup>64</sup>

While CAG is disappointed that this issue was not addressed in the Exposure Draft Bill, we welcome the Department's commitment to further consult on this important issue. We look forward to sharing our ideas on how this issue can be fixed for the school sector without having any market impact on copyright owners. We encourage the Government to further consult on this as a priority in 2022.

For more information on why schools consider this as a critical issue that needs to be fixed as a national priority, see **Attachment 10**.

## 4.9 The 'special case' exception limits the scope of the Copyright Act to deal with new technologies and educational uses

Currently, schools cannot rely on the 'special case' exception for works that could otherwise be copied or communicated in reliance on the statutory licence scheme due to the operation of subsection (6AA) of the Copyright Act. This is despite s 113Q making it clear that the statutory licence should not apply to any uses covered by a free exception in the Copyright Act.

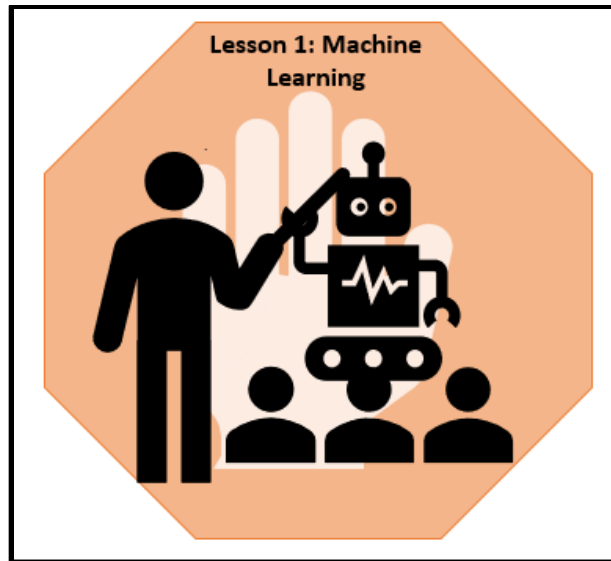
The result is a lack of flexibility to deal with new scenarios on a case by case assessment, and a lack of scope in the Copyright Act to deal with new technologies and educational uses over time. This 'future proofing' aspect (ie avoiding the need to approach government for amendments to the Copyright Act each time there is a new digital teaching practice that might not be covered by existing provisions), is one of the main reasons schools have advocated for a fair use provision. While the Discussion Paper states that the evidence base for broader reform was not clear (ie a move to a 'fair use' system), in the educational context the case was been made out.<sup>65</sup>

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<sup>63</sup> Singapore Copyright Act 2021 cl 204. Available at <https://sso.agc.gov.sg/Acts-Supp/22-2021/Published/20211007?DocDate=20211007>. The Singapore Copyright Act 2021 came into effect on 21 November 2021, replacing Singapore's Copyright Act (Chapter 63 of the 2006 Revised Edition). The new Act aims to balance the public benefit of accessing and using copyright material whilst ensuring creators continue to be incentivised to create new works. It includes a new exception for use of material available on the internet for educational purposes which permits schools to use free to access internet materials provided the as long as the source is acknowledged and the date of access is cited. For more information on the Singapore Copyright Act 2021, see the Copyright Factsheet by the Intellectual Property Office of Singapore (IPOS), pp 11-12. Available at <https://www.ipos.gov.sg/docs/default-source/resources-library/copyright/copyright-act-factsheet.pdf>.

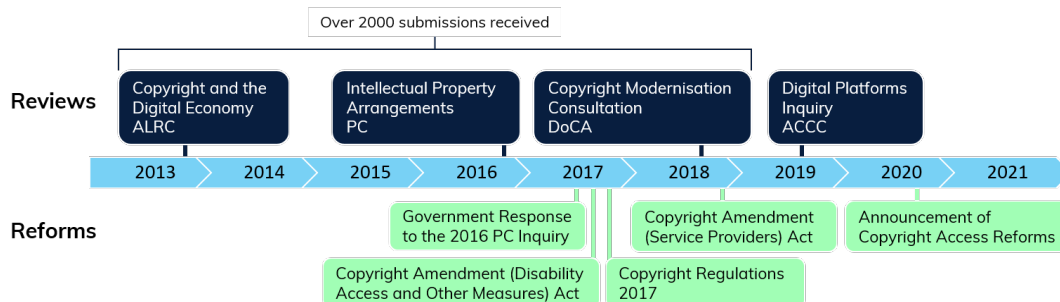
<sup>64</sup> See <https://www.ipos.gov.sg/> and <https://www.ipos.gov.sg/news/press-releases/ViewDetails/legislative-changes-to-strengthen-singapore-s-copyright-regime/>.

<sup>65</sup> Discussion Paper, p 7.



CAG strongly supported the Government’s announcement in 2020 that the Government would amend the ‘special case’ exception. CAG was disappointed that amendments have not been included in the Exposure Draft Bill.

These issues have been exhaustively reviewed by the Australian Law Reform Commission (**ALRC**), Productivity Commission and Government in the Modernisation Consultation over the past decade:



All these reviews agreed that more flexibility was needed in the Copyright Act. For additional information, see **Attachment 11**.

CAG considers an amendment to the ‘special case’ exception as necessary to encourage schools to adopt new technologies such as machine learning or other computational learning techniques.

These amendments would not impact existing licensing arrangements. It is an inherent requirement of the ‘special case’ exception that before relying on the exception, a school must establish **both** that the intended use does not conflict with the normal exploitation of the work (which includes licensing arrangements); **and** that the use would not cause unreasonable prejudice to the copyright owner.

The inflexibility of our Copyright Act is an ongoing problem that Australia needs to solve for its digital future – this must be fixed for Australia to be a digital economy and prepare students for jobs of the future. It is imperative that this issue is looked at in more detail as a national priority.

For additional information on the ‘special case’ exception and the need for urgent reform on this issue, see **Attachment 12**.

## 4.10 A full governance review of declared collecting societies is needed

While outside the scope of the current Exposure Draft Bill, CAG has long-standing concerns about the lack of appropriate governance arrangements for declared collecting societies and the practical consequences of these deficiencies.

Neither the Code of Conduct for Copyright Collecting Societies (**Code**), nor the existing legislative framework applying to collecting societies, provide any mechanism for the school sector to have these concerns addressed.

**Fit-for-purpose governance arrangements are urgently needed to address inappropriate use of market power and lack of transparency by some collecting societies.**

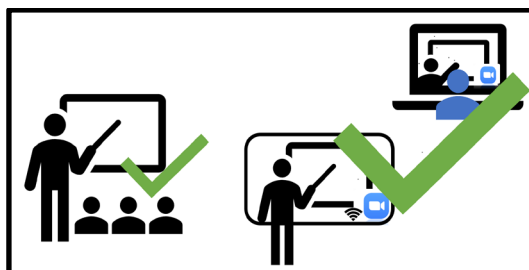
A deficient Code has enabled inappropriate use of market power to engage in rent seeking and lack of transparency of Copyright Agency’s operations. CAG submits fit-for-purpose governance arrangements need to be in place to address the concerns raised over abuse of market power and lack of transparency.

For more information on why CAG calls for a full governance review of declared collecting societies see **Attachment 13**.

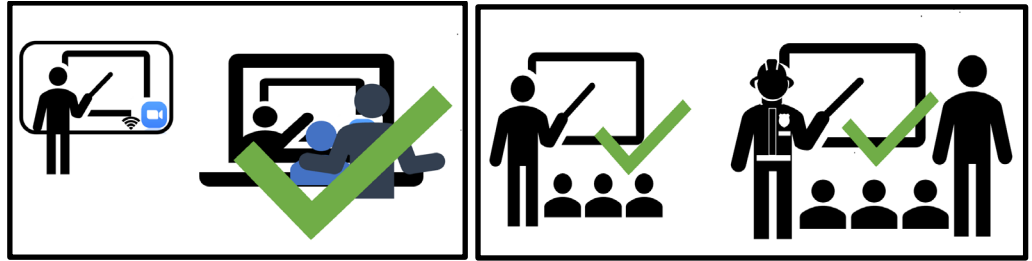
## 4.11 Conclusion

CAG welcomes these sensible copyright reforms in the Exposure Draft Bill. These proposed amendments will enable Australia to realise the benefits digital technology can bring to education by:

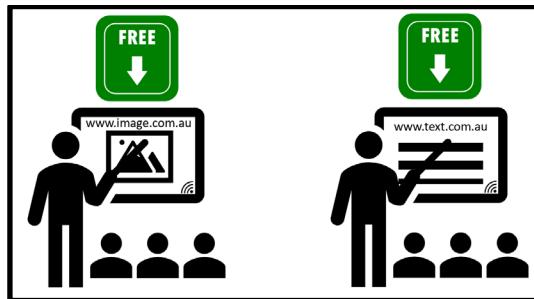
- amending the ‘show and tell’ exception to:
  - make it clearly apply to online lessons (eg teaching via Zoom or similar)



- allow parents, guardians, industry, etc to be involved in or present for lessons



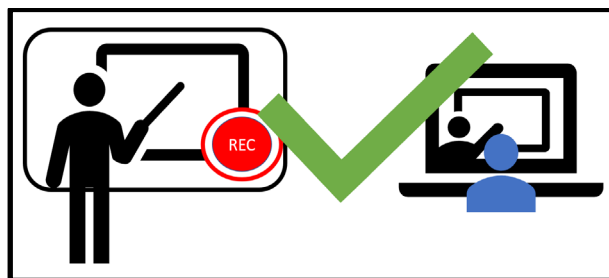
- make the display of content rules apply equally to all forms of copyright material



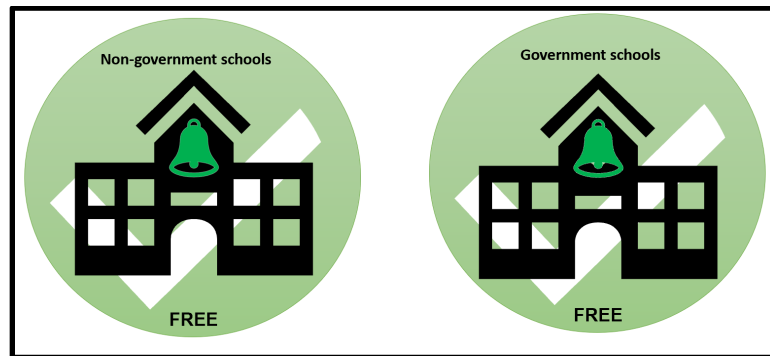
- allow incidental copies to be made in order to display content to students



- allow the recording of lessons for on-demand access by students.



- fixing section 106 so that the exception also applies to Government schools.



- adding an orphan works exception to allow schools to freely use works where the copyright owner cannot be identified and therefore licence fees cannot be paid.



These reforms are seen by the school sector as the baseline needed to ensure teachers can deliver digital education to Australian students. They will allow schools to get on with delivering world class education, including industry partnership programs, whether at school or remotely.

**The time to act is now. These reforms are considered, targeted and necessary.**

Importantly, these reforms have been designed in a way to minimise impact on copyright owners and require that schools take appropriate steps to protect content used in the classroom.

CAG asks the Government to pass these reforms as a priority to allow Australian students to receive a contemporary digital-based education, allow the Government to achieve its national education vision and digital economy strategy goals and ensure the Commonwealth, State and Territory governments can meet their skills initiatives. In this regard, we draw the Government's attention to CAG's technical comments on the Exposure Draft Bill, see Part B of this submission.

## 5 Assessing the economic impact of the Exposure Draft Bill

The reforms in the Exposure Draft Bill are considered, targeted amendments to the Copyright Act to allow teachers to embrace the benefits of the digital age and to ensure students and teachers can realise the teaching and learning opportunities provided by new forms of learning and engaging with content.

These reforms will not hurt copyright owners' markets and the school sector is and always will be, a huge contributor to the creative sector.

### 5.1 The Exposure Draft Bill will not hurt copyright owners' markets

The economic impact of the Exposure Draft Bill is minimal, with the positives far outweighing the negatives. There are three main reasons why the economic impact is minimal:

- orphan works are those works where the copyright owner cannot be identified. Therefore, any licence fees associated with the use of orphan works are not going to the copyright owners.
- there is no current market for the reforms to the 'show and tell' exception.
- the 'school bell' exception currently only applies to Catholic and Independent schools, but the PPCA has given Government schools a gratis licence while the issue is being considered by Government. The Exposure Draft Bill will only reinstate the exception so it once again covers all schools.

**The reforms are considered, targeted and necessary to allow schools to embrace the digital age.**

The reforms in the Exposure Draft Bill will not displace the current statutory licence. The current licensing arrangements will continue to exist and nothing in the reforms will harm any markets for sales of books, journals or articles. They will simply allow what can currently happen in a physical classroom to happen in the context of a virtual class (whether live or pre-recorded).

#### 5.1.1 The orphan works scheme will only apply to material where the copyright owner cannot be identified

The effect of the proposed orphan works scheme is simple:

- if a copyright owner can be located, licence fees will still be paid
- if a copyright owner cannot be identified and therefore licence fees cannot be paid, these licence fees will remain in education budgets.

This strikes an appropriate balance to ensure copyright owners are still remunerated for use of their material, but that education budgets are used to educate students.

The proposed orphan works scheme will only affect the school sector's statutory licence administered by Copyright Agency. The school sector does not see this proposed reform having any impact on the statutory licence administered by Screenrights or any of the school sector's voluntary licences with music collecting societies. As far as the school sector is aware, there is not an orphan works issue in relation to a broadcast as covered by the statutory licence administered by Screenrights (given the owner of copyright in a broadcast will be the broadcaster). On the rare occasion that there may be orphaned material included in a broadcast (eg where Screenrights cannot identify the director, producer, writer, etc), that does not make the broadcast itself an orphan work. The educational use of the broadcast would still be remunerated under the statutory licence. It would be a matter for Screenrights to assess how to distribute these funds as per their distribution policies.

The Discussion Paper asks for calculations, assumptions and other relevant context for any information provided. We cannot give accurate figures because we do not receive this information from Copyright Agency. From the data we do receive, we know that schools pay licence fees that cannot be distributed to copyright owners ('undistributed funds'). In 2019, we know Copyright Agency had undistributed funds of \$14.3 million.<sup>66</sup> From that, we estimate that \$8.2 million may have corresponded to orphan works.<sup>67</sup> However this is only an estimate, because CAG does not receive this information from Copyright Agency.

Due to the fact that:

- Copyright Agency will not disclose the above information to CAG
- Australian schools pay millions of dollars a year in circumstances where Copyright Agency will never be able to distribute the money to the rights holder as they are unknown,

CAG urgently calls for a review of the governance arrangements of declared collecting societies. For more information on the governance issues see Part 4.10 and **Attachment 13**.

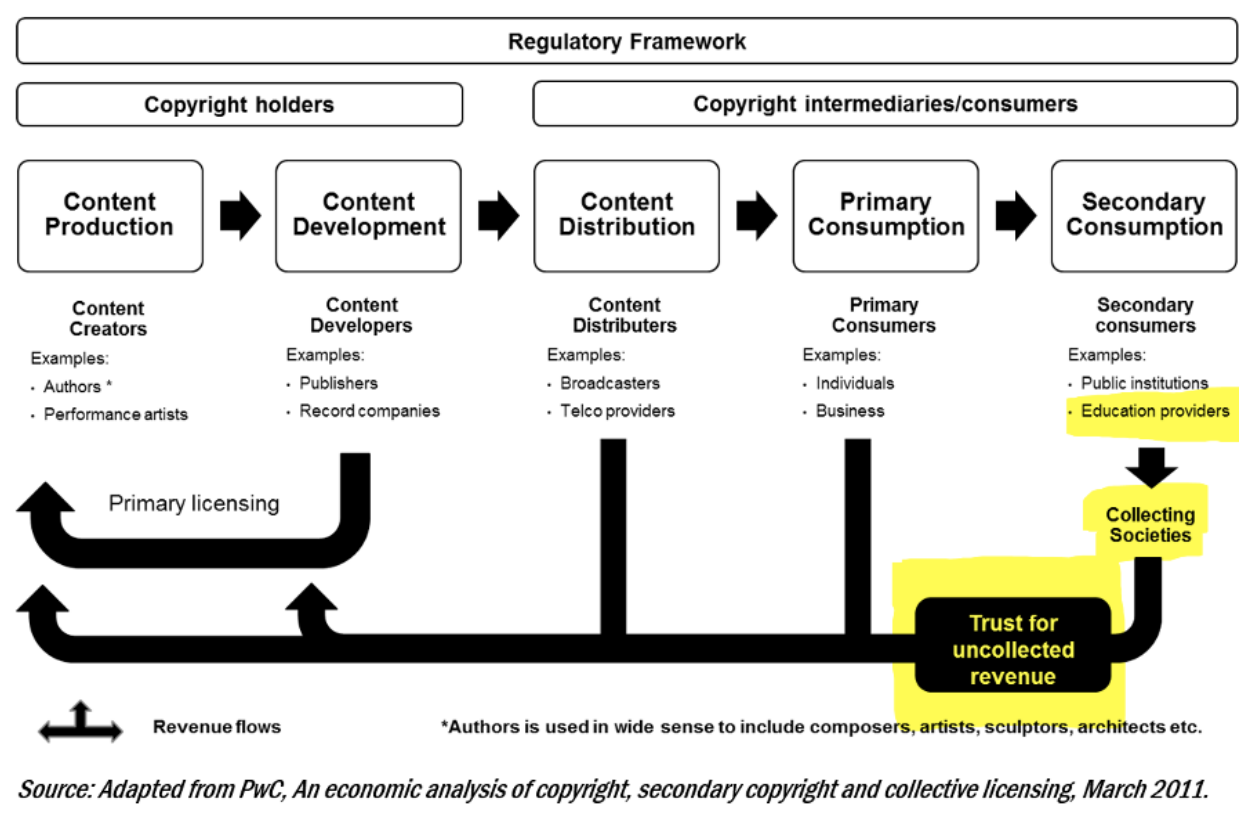
As noted above in Part 4.6, the proposed orphan works reforms will not cause an immediate reduction to the amount schools pay to Copyright Agency under the statutory licence, the fees paid will remain the same (given schools pay a per student fee). Instead, it will assist schools in future negotiations with Copyright Agency to ensure that they are paying the appropriate licence fees under the statutory licence.

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<sup>66</sup> [Copyright Agency Annual Report 2018/2019](https://www.copyright.com.au/about-us/governance/annual-reports/copyright-agency-annual-report-2019/), p 45. Available at <https://www.copyright.com.au/about-us/governance/annual-reports/copyright-agency-annual-report-2019/>.

<sup>67</sup> A note on financial estimates: Copyright Agency does not disclose its distribution practices. So, schools do not receive information about the amount of revenues actually allocated to the use of orphan works. As such, the NCU assumes that Copyright Agency distributes on a proportional basis to the information recorded as remunerable by Copyright Agency in copyright surveys. For example, if total licence revenue is \$X and the proportion of orphan works recorded in copyright surveys is Y%, we assume that the licence fee revenue attributable to orphan works is Y% of \$X million.

To illustrate the financial impact of this proposed amendment, see the figure below, which is from the Ernst & Young (EY) report *Cost benefit analysis of changes to the Copyright Act 1968 (EY Report)*:<sup>68</sup>



This figure indicates that the money collected by Copyright Agency will eventually go back to copyright holders for content production and content development. The right-hand side (highlighted yellow), illustrates how schools pay licence fees under the statutory licence to Copyright Agency for distribution to members (currently about \$55 million annually).<sup>69</sup> From the licence fees paid, 'uncollected revenue' is moved to a trust for undistributed funds. This would include money collected from the school sector for the use of orphan works.

However, these undistributed funds no longer go back to copyright owners. Copyright Agency retains these funds and pays them into what it describes as a 'Future Fund'. The purpose of the Future Fund is stated to be to finance Copyright Agency's campaign against the copyright reforms being sought by the education sector.<sup>70</sup> Between 2014 and 2016, Copyright Agency amassed a fund worth \$15.5 million. The most recently reported balance of the Future Fund is \$9.6 million.<sup>71</sup>

<sup>68</sup> Figure 3, on page 10 of the EY Report shows the copyright value chain. Available at <https://www.communications.gov.au/documents/cost-benefit-analysis-changes-copyright-act-1968>.

<sup>69</sup> Based off the 2021 school sector licence fees paid to Copyright Agency.

<sup>70</sup> [Copyright Agency 2015/2016 Directors' Report](#), p 26.

<sup>71</sup> [Copyright Agency 2020/2021 Directors' Report and Financial Report](#), p 18. Available at <https://www.copyright.com.au/about-us/governance/annual-reports/>.

These undistributed funds are exactly that: undistributed. They are retained by Copyright Agency to fight against law reform proposals such as the Exposure Draft Bill rather than being distributed to authors and publishers, or returned to education budgets.

This proposed amendment will not take money away from copyright owners but it will minimise the “Trust for uncollected revenue” box, by ensuring that public funds are no longer spent on licence fees for the use of orphan works.

### 5.1.2 There is no commercial market for the ‘show and tell’ of copyright materials in the classroom

CAG acknowledges the one area that **may** have a small negative impact on some copyright owners is clarifying that the ‘show and tell’ exception does apply to all types of works. This is due to Copyright Agency’s existing practice of collecting licence fees for this activity despite it being an area of dispute between Copyright Agency and CAG for more than a decade. For more information on the historical interpretation of the ‘show and tell’ exception see **Attachment 7**.

However, any effect on copyright owners will be very minimal. There is no commercial market for the ‘show and tell’ of copyright materials during teaching, and there are significant protections built into the proposed exception to ensure that any digital uses cannot expose the copyright work to further copying or other forms of online infringement.

**Education is universally acknowledged as being a core public interest. This must be considered when determining appropriate limitations and exceptions to copyright.**

Like orphan works, it is not possible to get an accurate estimation on how much schools pay for the display of text works because this information is not given to CAG by Copyright Agency. However, the NCU estimates that in 2019 (the most recent year of survey data

available), schools across Australia paid approximately \$659,000 for displaying text on screens in classrooms.<sup>72</sup> Note that many of the instances of display in the classroom are of very small excerpts of copyright material (ie the amount of text that can physically be displayed on a screen) and this may often result in remunerable uses that are likely to be below the threshold to distribute on pursuant to Copyright Agency’s distribution policy.<sup>73</sup> This means that the majority of revenue collected for this activity may be retained in Copyright Agency’s Future Fund, discussed above in Part 5.1.1.

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<sup>72</sup> A note on financial estimates: Copyright Agency does not disclose its distribution practices. So, schools do not receive information about the amount of revenues actually allocated to the display of text works. As such, the NCU assumes that Copyright Agency distributes on a proportional basis to the information recorded as remunerable by Copyright Agency in copyright surveys. For example, if total licence revenue is \$X and the proportion displayed text works recorded in copyright surveys is Y%, we assume that the licence fee revenue attributable to the display of text works is Y% of \$X million.

<sup>73</sup> [Copyright Agency Distribution Policy and Processes October 2021](https://www.copyright.com.au/membership/payments/distribution-policy/), p 10. Available at <https://www.copyright.com.au/membership/payments/distribution-policy/>.

Furthermore, this minimal impact must be weighed against the administrative burden on schools and teachers. CAG submits the benefits to the school sector – and specifically the impact on classroom teachers – far outweigh the very minimal impact on copyright owners.

It is also important to clarify that the ‘show and tell’ exception **does not apply when making permanent copies of material or permanently communicating that material**. Schools will continue to pay licence fees for these activities. The statutory licence will continue to exist. See the example scenarios below.

### **Example scenarios**

We understand the impact of the Exposure Draft Bill on the following teaching scenario would be:

1. A teacher holds up a textbook in class.
2. A teacher makes a copy of 3 pages of that same textbook to hand out to students in class.
3. A teacher uploads a chapter of that textbook onto a DTE for students to access.
4. Then, as part of a classroom lesson, the teacher displays the chapter of the textbook on the DTE to briefly display a few pages to students in class.

Activity 1 has always fallen under the existing exception and nothing would change following the passage of the Exposure Draft Bill.

Activities 2 and 3 have always been remunerable under the statutory licence administered by Copyright Agency. Licence fees for these activities would continue to apply following the passage of the Exposure Draft Bill.

The passage of the Exposure Draft Bill would only impact Activity 4. Copyright Agency currently charges licence fees for this activity, despite its legal capacity to do so under the exception being in dispute.

Clarifying the scope of the ‘show and tell’ exception would simply mean that Activity 4, the temporary display of a few pages of the textbook in the classroom, will also fall under this exception, bringing the treatment of text works in line with the legal treatment of all other forms of copyright content.

Activity 4 is the exact same teaching activity as Activity 1, the only difference is that in 1 the teacher shows a physical book and in 4 the teacher shows the content in digital form. These reforms are to ensure that the law applies equally to the same teaching activities, irrespective of whether they take place physically or digitally.

The amendments to the 'show and tell' exception ensure that an advancement in technology does not disrupt the way the public interest in education is protected in the Copyright Act. To encourage the use of new technology in schools, it is imperative that technological shifts do not mean that activities previously considered in the public interest (and

and therefore outside the scope of licensing) turn into either potential infringements of copyright, or are paid for under the statutory licence, simply due to the use of technology.

**Technological advancements should not mean activities previously considered in the public interest are no longer protected simply due to the use of new technologies.**

## 5.2 The benefits to the school sector from the Exposure Draft Bill are significant

Australia's education system is trying to adapt quickly to embrace the benefits of the digital age and to ensure students and teachers can realise the teaching and learning opportunities provided by new forms of learning and engaging with content. However, it is critical that we remove any unnecessary legal uncertainty surrounding digital teaching methods to ensure this can be achieved.

The proposed amendments to the 'show and tell' exception will eliminate much of this uncertainty and are an essential step towards Australia achieving its Digital Economy Strategy goals and national education vision.

As indicated above in 5.1.1 and 5.1.2, one benefit to the school sector may be some cost savings to schools which will mean education budgets can be better allocated to improving educational outcomes for students rather than paying for an activity where there is no commercial market. While cost savings are a benefit, the primary purpose of these reforms and the main benefit to schools is the updating and streamlining of the exceptions in the Copyright Act so that they are material and technology neutral, support contemporary teaching methods and facilitate remote and online learning.

Passing the Exposure Draft Bill would also relieve a heavy administrative burden on schools. Every time a public interest use is included in a statutory licence scheme, this has a flow on effect on teachers (for example, due to the increased burden in the copyright surveys). In contrast, every public interest use that is covered by an exception will lead to a commensurate reduction in burden for teachers, including because teachers would no longer be required to include these categories of copying in any surveys.

As an example, due to the differing views on the interpretation of the current 'show and tell' exception, teachers have been asked to record in copyright surveys when they display text-based

works in the classroom. If passed, the proposed amendments would potentially save teachers hundreds of hours of time filling in copyright surveys.<sup>74</sup>

Simplifying the rules will also save valuable teaching time by making it easier for teachers to understand what they can and can't do with copyright materials in a lesson.

These proposed amendments would have an immediate positive impact on Australian schools, teachers and students. CAG calls on the Government to pass the Exposure Draft Bill as a national priority.

**The proposed amendments could save teachers hundreds of hours of valuable teaching time without harming copyright owners' markets.**

### 5.3 The school sector is, and will continue to be, a huge contributor to the creative sector

The school sector is, and will always be, a huge contributor to and supporter of the creative sector. As mentioned in the Introduction, the NCU estimates that the school system spends between \$940 million - \$1 billion per annum purchasing content.<sup>75</sup> In addition, the NCU estimates Australian school jurisdictions pay at least \$91.5 million (not including copyright licences taken out by individual departments of education, schools and teachers) in collective copyright licence fees to Australian collecting societies, which are then distributed to their members.<sup>76</sup> This is made up of:

- approximately \$54.8 million for the use of literary, dramatic, artistic and musical works under the statutory licence
- approximately \$27.7 million for the use of broadcasts under the statutory licence
- approximately \$9 million for the use of music under voluntary licensing arrangements.

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<sup>74</sup> Previously, the NCU has estimated teachers spent almost 230 hours reporting display of text works (using the most recent year of survey data available, 2019) as part of the copyright surveys.

<sup>75</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 CPI equates to nearly \$460 million annually in 2019.

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 to over \$480 million spent on purchasing textbooks in 2017. See <https://www.commbank.com.au/guidance/newsroom/parents-brace-for-1-7-billion-back-to-school-bill-shock-201801.html>. Taking the estimated schools spend of \$460 million plus the estimated parents spend of \$480 million, the total estimated spend is \$940 million. If we estimate these numbers in today's dollars that would amount to approximately \$1 billion.

<sup>76</sup> This estimate is based off the total collective school licence fees paid by CAG to Copyright Agency, Screenrights and APRA AMCOS in 2021.

The Australian school jurisdictions pay some of the highest licence fees in the world:

Country	School licence fees per FTE <sup>77</sup>	
	Copyright Agency licence (or equivalent text and artistic works licence)	Screenrights licence (or equivalent broadcasts licence)
Australia	\$13.00	\$7.26
UK	\$3.89 (5-15 year olds)	\$0.93 (Primary)
	\$9.44 (16-18 year olds)	\$1.93 (Secondary)
New Zealand	\$1.63 (Primary)	\$4.37
	\$3.26 (Secondary)	

The NCU has spent over 90 hours doing a thorough analysis of the last three years of available survey data and are confident the Exposure Draft Bill would not take money away from authors and publishers who have an expectation of payment. We would be happy to discuss these findings with the Department.

**The school sector spends \$940 million - \$1 billion per annum on educational content acquisition alone.**

**These reforms will not change the school sector's investment in the creative sector.**

Initiatives in the school sector such as Book Week, the Schools Spectacular and specialist arts programs,<sup>78</sup> generate a love of the arts, exposure for creators and a symbiotic relationship between schools and the creative industries. For more information on school sector investment in the creative sector, see **Attachment 14**.

Schools, education departments and administrative bodies are, and will continue investing in the creative sector's future, ensuring that today's students are tomorrow's creators and consumers. **Nothing in the Exposure Draft Bill will harm this investment.** Rather, these reforms will ensure, valuable education budgets can be better spent on enhancing arts and other education programs in schools.

<sup>77</sup> Licence rates applicable in February 2022. All figures have been converted into Australian dollars using exchange rates available on 17 February 2022, namely 1 GBP = 1.89 AUD, 1 NZD = 0.93 AUD, see <https://www.xe.com/currencyconverter/>.

<sup>78</sup> See for example, approved specialist art programs in WA: <https://www.education.wa.edu.au/approved-specialist-programs>.

# Part B: Technical Comments on the Exposure Draft Bill

This submission focuses on the education provisions in schedule 4 of the Exposure Draft Bill. However, CAG will also address relevant provisions in the other schedules in this section.

## 1 Schedule 4 – Education

CAG strongly supports the proposed education provision amendments. These reforms will ensure Australian schools can fully realise contemporary teaching methods and achieve the goals that all Australian education ministers committed to in the [Declaration](#).<sup>79</sup>

### 1.1 Items 1 and 2

CAG supports the proposed insertion of “other than section 113MA” into section 27(4) as outlined in schedule 4, item 1 and repeal of section 28 as outlined in schedule 4, item 2. These amendments will help to ensure that the interpretation of the new section 113MA is fully realised.

### 1.2 Items 3, 4 and 5

CAG supports the reinstatement of section 106 to its pre-2012 scope in schedule 4, items 3, 4 and 5, to allow all schools to play recorded music (eg for the school bell and at school assemblies). This amendment fixes problem 4.7 in Part A. Reinstating this section will:

- remedy an unintended consequence due to the [Australian Charities and Not-for-profits Commission \(Consequential and Transitional\) Act 2012](#),<sup>80</sup> and
- simplify the education provisions by making the rules the same for all schools as well as making the provisions more fair, certain and consistent.

### 1.3 Item 6

CAG supports the drafting of schedule 4, item 6 which will ensure clarity, consistency and simplicity across the education provisions.

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<sup>79</sup> [The Alice Springs \(Mparntwe\) Education Declaration](#).

<sup>80</sup> See Australian Charities and Not-for-profits Commission (Consequential and Transitional) Act 2012. Available at <https://www.legislation.gov.au/Details/C2012A00169>.

## 1.4 Item 7

CAG was pleased to see and strongly supports the insertion of proposed Division 3A as outlined in schedule 4, item 7.

### 1.4.1 Proposed section 113MA

#### General comments

Of critical importance is that proposed section 113MA will solve a number of the problems identified in Part A, including:

1. Problem 4.1, by making it clear the exception applies to all forms of teaching (eg in person as well as via Zoom, Teams, etc) and allowing the recording of lessons.
2. Problems 4.2 and 4.3, by removing the limiting language that is in the current section 28 so that parents, guardians and 'others' (eg industry leaders, a member of the community, etc) are allowed to be present for or involved in lessons.
3. Problem 4.4, by clarifying this exception applies to all forms of copyright material.
4. Problem 4.5, by allowing copies and communications to be made to allow for content to be played or displayed as part of a lesson.

Regarding point 2 above, this reflects the importance of schools working in partnership with parents and the broader community to foster a supportive learning environment. These updates will improve educational outcomes for Australian students and ensure that the Copyright Act doesn't stand in the way of the goals set out in the Declaration (see Part 2.1 in Part A).

However, to remove any ambiguity for teachers, the Government may wish to include a note in the Explanatory Memorandum to confirm that parents, guardians and 'others' (eg industry leaders, a member of the community, etc) can be present for, or involved in, lessons. For example, the Explanatory Memorandum may include the following:

"Section 113MA has been introduced to allow parents, guardians and other people such as industry leaders or members of the community to be present for, or involved in, lessons. This includes allowing them to be present during the performance of copyright material, or an act that causes material to be seen or heard for the purposes of s 113MA, as well as to perform copyright material, or cause material to be seen or heard, for the purposes of s 113MA."

#### Comments on each proposed subsection

CAG has outlined our comments on the individual subsections of proposed section 113MA below.

#### **Proposed subsection 113MA(1)**

CAG supports the drafting of proposed subsection (1) of proposed section 113MA of schedule 4, item 7. This is consistent with the usage of 'educational instruction' throughout the Act.

### **Proposed subsection 113MA(2)**

CAG strongly supports proposed subsection (2) of proposed section 113MA of schedule 4, item 7, however CAG has comments on the drafting.

### ***Proposed paragraph 113MA(2)(a)***

CAG supports the drafting of proposed paragraph (2)(a) of proposed section 113MA, subject to one comment below. This exception will ensure teachers have the flexibility to use materials as part of their teaching practices, while balancing the rights of copyright owners to manage and protect their content.

However, the Discussion Paper notes that one of the key elements of this proposed reform is to allow lessons to be recorded and made available to students and others taking part in the lesson to view or hear later.<sup>81</sup> To ensure that this outcome is achieved and to remove any ambiguity for teachers, CAG recommends the Department amend proposed paragraph (2)(a) of proposed section 113MA so that it reads:

"(a) the use is [\[for or\]](#) in the course of giving or receiving educational instruction".

The Government may also wish to include a note in the Explanatory Memorandum to clarify the intention of this section is to enable teachers to pre-record a lesson for online teaching. For example, the Government may wish to include the following text from the Discussion Paper in the Explanatory Memorandum:<sup>82</sup>

"Where copyright material is presented as part of a lesson, teachers or lecturers will be able to record the whole or part of the lesson so that students and those assisting them can access the lesson at a later time. This may include pre-recording a lesson for online teaching or recording a 'live' lesson. This is intended to help bridge gaps in time between the giving and receiving of a lesson. There may be times when not everyone involved in the lesson (including a teacher) can attend in person or participate in a livestreamed lesson, for example due to illness, distance, technical limitations or a requirement to stay at home or self-isolate."

### ***Proposed paragraph 113MA(2)(b)***

CAG welcomes and strongly supports the listed criteria in proposed paragraph (2)(b) of proposed section 113MA. These reforms are vital to achieving the Government's policy objective of better supporting the needs of Australian schools to access and use content in the digital environment.

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<sup>81</sup> Discussion Paper, p 30.

<sup>82</sup> Ibid.

Specifically:

1. Proposed subparagraphs (i) and (ii) and the use of the word “material” throughout proposed paragraph 113MA(2)(b) are critical as they solve problem 4.4 in Part A by clarifying that this exception applies to all forms of copyright material. The proposed amendments would simplify the Copyright Act and relieve a heavy administrative burden on schools. This is in part because, due to the differing views on section 28, teachers have been asked to record when they display text-based works in the classroom in copyright surveys conducted under the statutory licence. These amendments could save teachers potentially hundreds of hours of time filling in copyright surveys.<sup>83</sup>
2. Proposed subparagraphs (i) and (ii) and the use of the words “use” and “an act that causes the material to be seen or heard” throughout proposed paragraph 113MA(2)(b) are critical and solve problems 4.1 and 4.4 in Part A in the sense that they make clear that it was always Government’s intention to allow schools to “show and tell” all forms of copyright materials as part of a lesson (see **Attachment 7**). They also make it clear that the exception applies to all forms of teaching (eg in person as well as via Zoom, Teams, etc). Critically, this will ensure consistency and certainty for teachers by making this exception material and technology neutral. Limiting this exception to educational instruction will ensure copyright owner interests in protecting their content from commercial exploitation are managed. It is important to clarify that section 28 does not apply when making permanent copies of material or permanently communicating that material. In those circumstances, unless another exception in the Copyright Act applies, generally this would require remuneration under the statutory licence or other licence, or the permission of the copyright owner. Schools will continue to pay licence fees for these activities despite proposed section 113MA.
3. Proposed subparagraphs (iii) and (iv) solve problem 4.5 in Part A. This vital reform will support the adoption of digital technologies and practices by schools that are necessary for students learning in both the classroom and the home in the long term.
4. Proposed subparagraphs (v) and (vi) solve problem 4.1 in Part A by allowing the recording of lessons. This will provide teachers and educational institutions with certainty when facilitating online and remote lessons (eg if the school is in lockdown or a student is in isolation due to COVID-19). These subparagraphs in conjunction with the rest of proposed subsection 113MA(2), as well as the school sector’s best practice guidelines (see **Attachment 15**), will provide sufficient protection for copyright owners. However, it does not solve the issue of ensuring the policy objectives under the [National School Reform Agreement](#) (NSR Agreement) such as the [OFAI](#) can be fully implemented. For additional information on the importance of allowing recordings to be made, see **Attachment 5**.

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<sup>83</sup> Previously, the NCU has estimated teachers spent almost 230 hours reporting display of text works (using the most recent year of survey data available, 2019) as part of the copyright surveys.

However, despite the above and to ensure that this proposed subsection is sufficiently clear and concise and meets the policy intentions, CAG recommends the Department amend subparagraphs (iii) to (vi) to simplify the drafting as follows:

- "(iii) the use is the copying or communication of the material, ~~and the use facilitates~~ [to facilitate] performance of the material;
- (iv) the use is the copying or communication of the material, ~~and the use facilitates~~ [to facilitate] an act that causes the material to be seen or heard;
- (v) the use is the making of an audio recording, or an audio-visual recording, of the whole or part of the material, ~~and the use facilitates~~ [to facilitate] performance of the material;
- (vi) the use is the making of an audio recording, or an audio-visual recording, of the whole or part of the material, ~~and the use facilitates~~ [to facilitate] an act that causes the material to be seen or heard;

The Government may also wish to include a note in the Explanatory Memorandum to clarify the intention of this section is to enable lessons to be recorded and made available to students and others taking part in the lesson to view or hear at a later date (as set out in the Discussion Paper)<sup>84</sup>. For example, the Explanatory Memorandum may include the following:

"Section 113MA has been introduced to allow the performance, or otherwise causing to be seen or heard, of all copyright materials in both the classroom or in online lessons that are livestreamed. It also allows lessons in which copyright materials are used to be recorded and made available to students and others taking part in the lesson to view or hear at a later time."

### ***Proposed paragraph 113MA(2)(c)***

CAG supports proposed paragraph (2)(c) of proposed section 113MA, which in conjunction with proposed subparagraphs (2)(b)(v) and (vi), will help solve problem 4.1 in Part A. However, CAG is concerned that:

- the word "temporary" has a particular meaning for the purpose of the Copyright Act because of the way that it is used in the Act (see for example sections 43A, 43B, 43C, 47J, 110AA, 111A, 111B and 200AAA), which is inapt for proposed section 113MA;
- this approach may severely impact the national OFAI, which has not been designed to accommodate such a requirement. For example, recordings may be used to track student progress across the school year. These uses may not be considered 'temporary'. For more information on the OFAI see Part 2.2 of Part A.

To ensure that this proposed subsection is sufficiently clear and workable, CAG recommends the Department amend proposed paragraph (2)(c) so that it reads:

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<sup>84</sup> Discussion Paper, p 30.

"(c) if the use is the making of an audio recording, or an audio-visual recording, of the whole or part of the material – the recording is made available ~~on a temporary basis~~ to persons [for the purposes of] taking part in the giving or receiving of the educational instruction"

This would make it clear that the recording can only be made available to persons for the purposes of them taking part in the giving or receiving of the educational instruction and the time for which it can be made available is therefore limited to that purpose. It would also make the provision consistent with existing language from the guidelines provided to schools which were previously endorsed by the Government.<sup>85</sup>

Importantly, this exception will not apply when uploading content onto DTEs on an ongoing or permanent basis, including because the use must be for or in the course of giving or receiving educational instruction to facilitate the performance of the material or an act causing it to be seen or heard. In those circumstances, unless another exception in the Copyright Act applies, generally this would require remuneration under the statutory licence or other licence, or the permission of the copyright owner. The alternative language above ensures there is still scope for licences, while ensuring administering bodies, schools and teachers can use the material for the required period of educational instruction under the proposed exception.

#### ***Proposed paragraph 113MA(2)(d)***

CAG also strongly supports proposed paragraph (2)(d) of proposed section 113MA. However, the explanation of making material available online "(whether at the premises of the educational institution or on the internet)" may not cover all educational communication tools (eg an app such as Seesaw) which are used by schools and administering bodies in the course of educational instruction.

For example, a teacher may upload a lesson to Seesaw which is password protected for use by their students. Uploading content directly through the app may not necessarily require them to be "at the premises of the educational institution" or "on the internet".

To avoid the risk of introducing ambiguity, which is contrary to the Government's policy objectives of providing certainty about the scope of rights, CAG suggests a note in the Explanatory Memorandum to clarify the intention of this section is to cover the making available online via the internet or a communication tool such as an educational application. For example, the Explanatory Memorandum may include the following:

"Paragraph 113MA(2)(d) applies if the use is making the material available online whether at the premises of the educational institution, on the internet or via a communication tool such as an educational application."

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<sup>85</sup> See <https://smartcopying.edu.au/remote-and-digital-learning-day-to-day-teaching-and-learning/>.

#### **Response to Question 4.1: Education: Online access - ‘Reasonable steps’**

The Government has asked:

*For the purposes of new paragraph 113MA(2)(d), what measures do you consider should be undertaken by an educational institution to seek to limit access to copyright material, when made available online in the course of a lesson, to persons taking part in giving or receiving of the lesson, and ensure it is used only for the purposes of the lesson?*

The school sector already has guidelines, endorsed nationally by CAG, that are best practice guidelines for using material online during periods of COVID-19 lockdowns and these guidelines will remain best practice going forward.

**Attachment 15** contains the guidelines we propose to use if the Exposure Draft Bill becomes law. We are open to feedback on these guidelines.

#### ***Proposed paragraph 113MA(2)(e)***

CAG supports the inclusion of proposed paragraph (2)(e) of proposed section 113MA. This paragraph ensures an appropriate balance between the public interest in providing clear and reasonable access to copyright material for educational purposes, while maintaining appropriate safeguards to protect copyright owners’ commercial interests. This is in line with existing guidelines provided to schools on what constitutes educational instruction.<sup>86</sup>

However, the language is inconsistent with the more recent language adopted in the Copyright Act. For example, section 113P(5)(c) requires that a use not be “sold or supplied for a financial profit”. However, as drafted, proposed section 113MA provides that the use not be “wholly or partly for the purpose of the educational institution obtaining a commercial advantage or profit”. This could have the unintended consequence of excluding some Catholic and Independent schools from relying on the exception. To avoid this unintended consequence and the risk of ambiguity as to what may be a use for the “purpose of an educational institution obtaining a commercial advantage or profit”, the Government may wish to include a note in the Explanatory Memorandum confirming that this would not preclude uses by the school done in the ordinary course of the activities of the school. For example, the Explanatory Memorandum may include the following:

*"Paragraph 113MA(2)(e) does not exclude those uses done as part of the ordinary activities of the school, including where the school charges a fee for students to attend."*

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<sup>86</sup> See <https://smartcopying.edu.au/glossary/educational-instruction/>.

### **Proposed subsection 113MA(3)**

CAG supports the drafting of proposed subsection (3) of proposed section 113MA of schedule 4, item 7 as a technical amendment. This amendment is essential to ensure that the interpretation of the proposed new section 113MA is fully realised.

### **Proposed subsection 113MA(4)**

CAG also supports the drafting of proposed subsection (4) of proposed section 113MA of schedule 4, item 7, which will provide clarity and consistency to the education provisions.

### **Proposed subsection 113MA(5)**

CAG supports proposed subsection (5) of proposed section 113MA of schedule 4, item 7. Similar to the subparagraphs (i) and (ii) of proposed paragraph (2)(b), this provision helps solve problems 4.1 and 4.4 in Part A. It clarifies the Government's policy intention that this exception was intended to include display of all materials for educational instruction and it applies to all forms of teaching activities (eg teaching via Zoom, Teams, etc). This clarification is critical as it ensures the proposed exception is material and technology neutral, which will ensure teachers can deliver digital education to Australian students.

## **1.4.2 Proposed section 113MB**

CAG supports proposed section 113MB of schedule 4, item 7. We acknowledge this provision has not changed in a substantive way, but given the Department has asked for comments on whether the proposed amendments are sufficiently clear and workable, CAG wishes to draw to the Government's attention that the updated language in proposed section 113MA refers to "copyright material", whereas proposed section 113MB refers to "works" and/or "broadcasts" in the heading and throughout various subsections.

## **1.4.3 Proposed section 113MC**

CAG supports proposed section 113MC of schedule 4, item 7. We acknowledge this provision has not changed in a substantive way, but given the Department has asked for comments on whether the proposed amendments are sufficiently clear and workable, CAG wishes to draw to the Government's attention that the updated language in proposed section 113MA refers to "copyright material", whereas proposed section 113MC refers to "works and other subject matter" in proposed paragraphs (b) and (d) of proposed subsection (1) and proposed subsections (2) and (4).

## 1.5 Item 8

CAG strongly supports proposed section 113TA of schedule 4, item 8. This clarification aligns the legal treatment for direct and implied licences, as explained in the Explanatory Memorandum to section 113Q(2) which states:<sup>87</sup>

*"Subsection 113Q(2) provides a definition of 'licensed copying or communicating'. The definition operates to exclude the statutory licence from applying to material that is copied or communicated under a direct licence from the copyright owner or under another exception in the Act. As an example, the definition does not include copying for a student with a disability which falls within the exception under the new section 113F."*

## 1.6 Item 9

CAG supports the proposed repeal of sections 200 and 200AAA in schedule 4, item 9.

## 1.7 Item 10

CAG supports the proposed amendment to paragraph (2)(a) of section 248A, as outlined in schedule 4, item 10. This will ensure that the interpretation of the proposed new section 113MA is fully realised.

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<sup>87</sup> Explanatory Memorandum to s 113Q(2).

## 2 Other Proposed Amendments

CAG welcomes and supports the proposed orphan works scheme, quotation exception and library and archives exceptions, which will alleviate the disproportionate time and cost burden for both cultural and educational institutions. Where relevant, CAG has made comments on proposed provisions below.

### 2.1 Schedule 1 – Orphan Works

CAG strongly supports the Orphan Works scheme set out in schedule 1 of the Exposure Draft Bill, subject to a number of comments on proposed sections 116AJA and 116AJB below.

The proposed Orphan Works scheme will only affect the school sector's statutory licence administered by Copyright Agency. The school sector does not see this proposed reform having any impact on the statutory licence administered by Screenrights or any of the school sector's voluntary licences with the music collecting societies. For additional information see Part 5.1.1 of Part A. To the extent that Screenrights has a distribution problem in relation to orphan works, CAG's suggested amendments to proposed paragraph (1)(c) of proposed section 116AJA may help with this problem.

#### 2.1.1 Proposed section 116AJA

CAG strongly supports proposed subsection (4) of proposed section 116AJA of schedule 1, item 2, together with the addition of section 113P(7), which is intended to clarify that orphan works should be excluded from remuneration under the statutory licence in section 113P of the Copyright Act. This is critical for schools and solves problem 4.6 in Part A, which will ensure education budgets can be used for the benefit of Australian students.<sup>88</sup>

To ensure this exception is sufficiently simple and workable for schools and to help reduce the administrative burden on teachers, it would be useful if the declared collecting society for the purpose of the statutory licence in section 113P of the Copyright Act was able to undertake the diligent search on behalf of teachers after the use. If the copyright owner or owners cannot be found, the use would not be licensed copying and communicating for the purposes of sections 113P or 113Q. CAG suggests amending proposed paragraph 116AJA(1)(c) to the following:

- "(c) a reasonably diligent search for the owner or owners of the copyright was conducted:
  - (i) within a reasonable period before that time [\[; or](#)

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<sup>88</sup> Due to an anomaly in recent data in relation to orphan works, it has been difficult to estimate the proportion of licence fees that may be attributable to orphan works. However, previous estimates from the National Copyright Unit from survey data from 2013-17 suggests that a figure of approximately \$4 to \$5 million per annum may be a reasonable estimate of the likely impact for no longer requiring schools to pay for orphan works.

(ii) in the case of copyright material copied or communicated in reliance on section 113P, by the declared collecting society for the purposes of section 113P within a reasonable time after the use was reported to the collecting society].”

The Discussion Paper appears to envisage an approach along these lines on page 13:

*"Educational institutions and governments (and other statutory licensees) will not need to pay remuneration under the statutory licences in the Act for the use of orphan works if they choose to rely on the orphan works scheme and have met the requirements... Where education and government sectors use the orphan works scheme we would encourage them to work with collecting societies to establish best practice for searching for copyright owners and identifying orphan works."*

Further, if the intention is that, where proposed section 116AJA(1) applies to the copying and communicating of orphan works the statutory licence does not apply to such copying and communicating, CAG suggests amending the end of proposed section 116AJA(1) as follows:

"the act will not constitute an infringement of copyright in the material."

By reason of section 113Q(2) of the Copyright Act, the statutory licence applies to copying and communicating of works where the copying or communicating does not infringe copyright only because of the statutory licence (defined as **Licensed Copying or Communicating**). This means that the statutory licence will apply unless the copying or communicating is not an infringement of copyright because of another provision in the Act. However, proposed subsection 116AJA(1) simply provides that a court must not grant relief “for the infringement” of the orphan work. This means the copying and communication of orphan works caught by proposed subsection 116AJA(1) is still an infringement of copyright such that it is Licensed Copying or Communicating and the statutory licence applies. This appears to be inconsistent with the intention of the reforms, as set out above in the Discussion Paper on page 13.

## 2.2.2 Proposed section 116AJB

It would be useful to clarify that where proposed section 116AJB applies, that is where a copyright owner is located and can be contacted, educational institutions can at that point rely on the statutory licence in section 113P of the Copyright Act for future acts (rather than having to agree the terms for any future acts with the owner of copyright or go to the Copyright Tribunal). Schools would have to pay for the use of those works under the statutory licence where they are captured in surveys conducted by Copyright Agency, and it would be useful to clarify that they do not need to agree separate terms and pay for the use of those works again under proposed section 116AJB.

CAG therefore suggests deleting proposed subsection 116AJB(2) so that the terms of the doing of the act are only to be agreed or fixed by the Tribunal where the statutory licence does not apply.

Existing section 113P(7) should also be amended to remove the reference to proposed section 116AJB so that it reads:

*"Exception – orphan works etc.*

- (7) Subsections (1) and (2) of this section do not apply to an act comprised in the copyright in copyright material if the act is covered by section 116AJA."

We note for consistency that this would also apply to the proposed expansion of the Government copying licence in Schedule 5 of the Exposure Draft Bill.

## 2.2 Schedule 2 – Fair dealing for quotation

CAG strongly supports the proposed fair dealing for quotation provisions and the Government's goal of simplifying and updating the process to use quotations.

To ensure this exception is sufficiently simple and workable for schools, it would be useful to amend proposed subparagraph (1)(a)(vii) of proposed section 113FA of schedule 2, item 4 to include 'study'. This is important for consistency, which will make it easier for teachers and students. It would ensure that students can rely on the exception in limited situations, for example, to enter a student's work into an external competition. CAG recommends amending the subsection so that it reads:

"(vii) by a person or organisation for the purpose of research [\[or study\]](#)."

In relation to proposed subsection (2) of proposed section 113FA of schedule 2, item 4, CAG strongly supports the use of the four factor test as the appropriate test rather than the five factor test. This is for two main reasons:

- the exception is already limited to non-commercial uses;<sup>89</sup>
- the fifth factor, "the possibility of obtaining the [copyright material] within a reasonable time at an ordinary commercial price"<sup>90</sup>, is applicable for exceptions that may allow copying or communicating more than a 'reasonable portion'. In those circumstances, it makes sense to have a commercial availability factor. With the proposed fair dealing for quotation exception, ordinarily only small extracts of material would be copied or communicated.

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<sup>89</sup> Market considerations and protections for rightsholders are already built into the exception in the third factor in proposed paragraph (2)(c) of proposed section 113FA.

<sup>90</sup> See Copyright Act ss 40 and 103C(2)(c). The 'fair dealing for research or study' exceptions in ss 40 and 103C of the Copyright Act are a good example of exceptions where the five factor test is appropriate.

## 2.3 Schedule 3 – Libraries and archives etc.

CAG supports the proposed amendments in Schedule 3.

CAG supports proposed schedule 3, item 13. The confusion caused by the application of the current definition of ‘reasonable portion’ to digital works is a long-standing issue for schools and CAG welcomes this important clarification.

## 2.4 Schedule 6 – Registrar of the Copyright Tribunal

CAG supports the amendments outlined in Schedule 6. These changes will align the Copyright Act with current practices for the appointment of other Australian court registrars.

## 2.5 Schedule 7 – Regulations relating to technological protection measures

CAG supports the drafting of Schedule 7. The streamlined process for making TPM exceptions is an important step to improve Australia’s ability to maintain a copyright framework that is fit for the digital environment.

## 2.6 Schedules 8-10

CAG supports the technical amendments in Schedules 8, 9 and 10. These changes will streamline procedural aspects of the Copyright Act, update references and improve consistency of language.

## 3 Other Drafting Suggestions

One of CAG’s roles is to give simple, practical copyright advice to schools. To be able to do that, CAG thinks there is an area in the Exposure Draft Bill that the Government could consider amending to simplify and streamline the Copyright Act. That is, the Government should consider relocating all fair dealing provisions in one spot in the Copyright Act. This would consolidate the fair dealing provisions and make it easier for these exceptions to be located and considered.

# Part C: Submission to the Review of Technological Protection Measures (TPM) Exceptions

CAG welcomes this opportunity to provide comments on the Review of Technological Protection Measures (TPM) exceptions (TPM Review).

As discussed in Part A of this submission and the Government's Discussion Paper, there is increasingly widespread use and emphasis on digital technologies in schools. The Government's policy intention in the Exposure Draft Bill is to better support the needs of Australians accessing content in the digital environment. This policy intention is not going to be met unless the existing TPM exceptions are kept and additional TPM exceptions are introduced. These TPM exceptions are vital for digital education in Australia. Put simply, without TPM exceptions, teachers cannot use necessary materials in class – preventing them from teaching Australian students and equipping them with the skills to thrive in a digital economy.

CAG recognises the importance of providing sufficient incentives to copyright owners, and the importance of protecting the exclusive rights granted to copyright owners. However, CAG also supports the need for an appropriate balance in the Copyright Act, and recognises the strong public benefits in public access to information, particularly for educational and cultural purposes. It has long been recognised that guaranteeing reasonable access to copyright material is a necessary part of delivering quality education. Keeping the existing TPM exceptions, adding two new TPM exceptions for the reforms in the Exposure Draft Bill, and a new TPM exception for fair dealing for research or study limited to students enrolled in a course of study in an educational institution, will ensure quality education is not compromised and the Government can achieve its policy objectives.

Part C of this submission is divided into four parts:

- Part 1 discusses CAG's view on how to meet the TPM exception criteria
- Part 2 applies the criteria to the existing TPM exceptions
- Part 3 outlines the evidence to support the three new TPM exceptions
- Part 4 has CAG's concluding comments.

# 1 The criteria for TPM exceptions

The process for keeping the existing TPM exceptions or seeking new TPM exceptions is subject to the criteria set out in s 249(4) of the Copyright Act. There are currently five criteria set out in s 294(4) of the Copyright Act that must be met before the Minister can recommend changes to the acts covered by the TPM exceptions, which are set out in s 40 of the *Copyright Regulations 2017* (**Copyright Regulations**)<sup>91</sup>:

- (a) a submission has been made (whether before or after the commencement of this section) to prescribe the doing of the act by the person; and
- (b) the doing of the act by the person will not infringe the copyright in a work or other subject-matter; and
- (c) the doing of the act by the person is in relation to a particular class of works or other subject-matter; and
- (d) an actual or likely adverse impact on the doing of the act by the person has been credibly demonstrated; and
- (e) the adequacy of the protection and the effectiveness of the remedies provided by Subdivision A of Division 2A of Part V and Subdivision E of Division 5 of Part V would not be impaired if the doing of the act by the person were prescribed.

For CAG's view on how to establish criteria (b)-(e) see **Attachment 16**.

Addressing the first of the five criteria in s 249(4)(a) of the Copyright Act, CAG hereby makes a submission on behalf of schools for the three existing educational TPM exceptions to be kept. CAG also requests two new TPM exceptions that are consequential to the amendments proposed in the Exposure Draft Bill and a third new TPM exception in relation to an existing provision in the Copyright Act.

CAG addresses the criteria set out in ss 249(4)(b)-(e) of the Copyright Act for the existing and new TPM exceptions requested in Parts 2 and 3 below.

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<sup>91</sup> *Copyright Regulations 2017* (**Copyright Regulations**) s 40. Available at [http://classic.austlii.edu.au/au/legis/cth/consol\\_reg/cr2017242/](http://classic.austlii.edu.au/au/legis/cth/consol_reg/cr2017242/).

## 2 The existing TPM exceptions must remain

The Copyright Act provides for a number of exceptions to criminal and civil liability for circumventing an access control TPM. These include:

- specific exceptions in subsections 116AN(2)-(8) and 132APC(2)-(8) of the Copyright Act, which CAG understands are not subject to this review, and
- additional exceptions for acts which are prescribed by the regulations. The current additional exceptions are set out in s 40 of the Copyright Regulations, and are the subject of this review.

The existing TPM exceptions applying to the school sector are critically important. The use of digital materials and teaching methods has continued to increase over the last decade and COVID-19 saw Australian schools pivot to adapt to a fully remote learning environment. Students and teachers are now used to a 'digital first' teaching environment, and there is an expectation that digital technologies will continue to be able to be used as schools adapt to the 'new normal'.

This 'new normal' and the changing technological landscape necessitates that the existing three educational TPM exceptions are kept. These are:

- 'disability access' exceptions (Copyright Act Division 2 of Part IVA) – for access by or for persons with a disability.
- statutory licence (Copyright Act Division 4 of Part IVA) – for the use of copyright content under the statutory licence.
- 'special case' exception (Copyright Act s 200AB) – for the use of copyright content in the narrow circumstances permitted by the 'special case' exception.

CAG has outlined how these TPM exceptions meet the criteria set out in ss 249(4)(b)-(e) of the Copyright Act below.

### 2.1 Existing TPM exception for the 'disability access' exceptions

These exceptions allow persons with a disability, or an organisation/person on their behalf, to make accessible versions of material irrespective of whether that material is protected by a TPM.

#### **(b) Will the act not infringe the copyright in a work or other subject-matter?**

Yes. Enabling a person to circumvent an access control TPM will not infringe the copyright in a work or other subject-matter because the 'disability access' exceptions create exceptions for the specified uses.

#### **(c) Is the act in relation to a particular class of works or other subject-matter?**

Yes. The class of works or other subject-matter is limited by:

- the type of copyright material:

- works other than a computer program and
- works or other subject matter that is not available in the required accessible format (eg in Braille for a student with a visual impairment)
- the class of user: persons with a disability or someone on their behalf for s 113E of the Copyright Act or an organisation assisting persons with a disability, or a person acting on behalf of such an organisation for s 113F of the Copyright Act
- the purpose of the use: assisting persons with a disability and
- the conditions set out in ss 113E and 113F of the Copyright Act.

**(d) Has the use of the TPM had an adverse impact on the non-infringing use by the person or body seeking the exception, or is it likely that it will have such an impact?**

Yes. Since being enacted, the ‘disability access’ exceptions have dramatically reformed how people with a disability (or organisations on their behalf) are allowed to access and use copyright materials. For example, Australian school systems are now allowed to caption DVD and other audio-visual content as necessary for students with a hearing impairment.<sup>92</sup>

If this TPM exception is not continued, there would be an adverse impact on the school sector’s ability to teach students with a disability. Schools would be limited in the materials that they could use to teach students with a disability, and the academic outcomes of those students would likely be affected.

To continue this benefit and allow equal access to copyright materials, the corresponding TPM exception for the ‘disability access’ exceptions must be kept.

**(e) Would the exception impair the adequacy of legal protection or the effectiveness of legal remedies against the circumvention of the TPM?**

No. This TPM exception only permits educational institutions to use copyright works or other subject matter in the limited circumstances outlined in ss 113E and 113F of the Copyright Act. For example, to rely on s 113E, the use must be ‘fair’ and a further four factors must be considered,<sup>93</sup> including the effect of the dealing upon the potential market.<sup>94</sup> To rely on s 113F, the material (or a relevant part of the material) must not be able to be obtained in the required format within a reasonable time at an ordinary commercial price.<sup>95</sup>

Keeping this TPM exception to use copyright works or other subject matter in the limited circumstances identified in ss 113E and 113F of the Copyright Act would not disrupt the broader legal regime intended to protect TPMs and copyright.

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<sup>92</sup> Subject to the conditions set out in the Copyright Act s 113E or s 113F.

<sup>93</sup> Copyright Act s 113E(2).

<sup>94</sup> Copyright Act s 113E(2)(c).

<sup>95</sup> Copyright Act s 113F(a).

Furthermore, schools have a long history as sophisticated and nuanced users and creators of copyright material for educational purposes. The school sector already takes extensive practical and legal steps when using material (see **Attachment 15**), and the safeguards built into the ‘disability access’ exceptions ensure that schools will only ever continue to make limited, legal uses of copyright content under the TPM exception.

CAG understands that the existing education-related TPM exceptions have not resulted in widespread (or indeed any low-level) piracy of content – this demonstrates that the TPM exceptions of this kind do not impair the adequacy or effectiveness of the existing regime.

## 2.2 Existing TPM exception for the statutory licence

This exception allows schools to make use of their limited rights to copy and communicate text and artistic works and free-to-air broadcasts under the statutory licence in Division 4 of Part IVA of the Copyright Act, irrespective of whether that material is protected by a TPM.

### **(b) Will the act not infringe the copyright in a work or other subject-matter?**

Yes. Enabling a person to circumvent an access control TPM will not infringe the copyright in a work or other subject-matter because the statutory licence creates a licence for the specified uses.

### **(c) Is the act in relation to a particular class of works or other subject-matter?**

Yes. The class of works or other subject-matter is limited to:

- the type of copyright material:
  - works other than a computer program, a compilation of computer programs; a work included in a broadcast (as set out in the Copyright Act s 113P(1)(b)) and
  - works and other subject-matter generally aligned with the curriculum standards set by each school jurisdiction for use as teaching resources<sup>96</sup>
- the class of user: body administering an educational institution or someone acting on their behalf
- the purpose of use: uses that are solely for the educational purposes of the school and
- the conditions set out in Division 4 of Part IVA of the Copyright Act.

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<sup>96</sup> See for example, <https://educationstandards.nsw.edu.au/wps/portal/nesa/k-10/understanding-the-curriculum/curriculum-syllabuses-NSW>; <https://victoriancurriculum.vcaa.vic.edu.au/mathematics/introduction/rationale-and-aims>; <https://www.qcaa.qld.edu.au/p-10/acig>; <https://www.education.sa.gov.au/schools-and-educators/curriculum-and-teaching/curriculum-south-australia-early-years-year-12>; <https://k10outline.scsa.wa.edu.au/home/teaching/curriculum-browser>; <https://nt.gov.au/learning/primary-and-secondary-students/nt-school-curriculum>. See also the Australian Curriculum which has been endorsed by all States and Territories. Available at <https://www.australiancurriculum.edu.au/>.

**(d) Has the use of the TPM had an adverse impact on the non-infringing use by the person or body seeking the exception, or is it likely that it will have such an impact?**

Yes. The statutory licence allows schools to copy and communicate text and artistic works and free-to-air broadcasts subject to the payment of equitable remuneration. The statutory licence is critical to ensure Australian teachers and students have access to such materials and that copyright owners are remunerated when the statutory licence is relied upon. It is essential to Australian students to be able to access and realise the full benefit of the statutory licence and to do so, the corresponding TPM exception must be kept.

**(e) Would the exception impair the adequacy of legal protection or the effectiveness of legal remedies against the circumvention of the TPM?**

No. Schools must still abide by the practical and legal constraints applicable to using material pursuant to the statutory licence. For example, that the copying or communicating occurs solely for the educational purposes of the educational institution and that the amount of the work copied or communicated does not unreasonably prejudice the legitimate interests of the owner of the copyright.<sup>97</sup>

Keeping this TPM exception to allow schools to use copyright works or other subject matter in the limited circumstances mentioned in the statutory licence would not disrupt the broader legal regime intended to protect TPMs and copyright.

In addition, rights holders are and will continue to be remunerated for the uses this TPM exception allows. In 2021, Australian schools paid approximately \$82.5 million to copy and communicate literary and artistic works and broadcasts under the statutory licence.

As mentioned above, the school sector already takes extensive practical and legal steps when using material (see **Attachment 15**) and the safeguards built into the statutory licence ensures that schools will only ever continue to make limited, legal uses of copyright content under the TPM exception.

CAG understands that the existing education-related TPM exceptions have not resulted in widespread (or indeed any low-level) piracy of content. This demonstrates that the TPM exceptions of this kind do not impair the adequacy or effectiveness of the existing regime.

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<sup>97</sup> Copyright Act ss 113P(1)(c)-(d).

## 2.3 Existing TPM exception for the ‘special case’ exception

This exception allows schools to make use of the limited ‘special case’ exception irrespective of whether the content is protected by a TPM.

### **(b) Will the act not infringe the copyright in a work or other subject-matter?**

Yes. Enabling a person to circumvent an access control TPM will not infringe the copyright in a work or other subject-matter because the ‘special case’ provision creates an exception for the specified uses.

### **(c) Is the act in relation to a particular class of works or other subject-matter?**

Yes. The class of works or other subject-matter is limited to:

- the type of copyright material:
  - works other than computer games
  - works and other subject-matter generally aligned with the curriculum standards set by each school jurisdiction for use as teaching resources<sup>98</sup>
- the class of user: body administering educational institution
- the purpose of use: educational instruction and
- the conditions set out in the ‘special case’ exception.

### **(d) Has the use of the TPM had an adverse impact on the non-infringing use by the person or body seeking the exception, or is it likely that it will have such an impact?**

Yes. The TPM exception for the ‘special case’ exception has enabled teachers in Australia to use audio-visual material in ways that are lawful under the ‘special case’ exception irrespective of whether it was protected by a TPM.

This has allowed schools to rely on the ‘special case’ exception and it has enriched learning in schools. For example, due to the TPM exception, a drama teacher is allowed to create a compilation of film clips in order to compare and contrast the approach of different directors for students studying film method.

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<sup>98</sup> See for example, <https://educationstandards.nsw.edu.au/wps/portal/nesa/k-10/understanding-the-curriculum/curriculum-syllabuses-NSW>; <https://victoriancurriculum.vcaa.vic.edu.au/mathematics/introduction/rationale-and-aims>; <https://www.qcaa.qld.edu.au/p-10/aciq>; <https://www.education.sa.gov.au/schools-and-educators/curriculum-and-teaching/curriculum-south-australia-early-years-year-12>; <https://k10outline.scsa.wa.edu.au/home/teaching/curriculum-browser>; <https://nt.gov.au/learning/primary-and-secondary-students/nt-school-curriculum>. See also the Australian Curriculum which has been endorsed by all States and Territories. Available at <https://www.australiancurriculum.edu.au/>.

To preserve the school sectors' right to continue to utilise the 'special case' exception, CAG requests this existing TPM exception to be kept.

**(e) Would the exception impair the adequacy of legal protection or the effectiveness of legal remedies against the circumvention of the TPM?**

No. This exception only permits educational institutions to use copyright works or other subject matter in the limited circumstances mentioned in ss 200AB(1) and 200AB(3) of the Copyright Act. For example, the use must amount to a special case, must not conflict with the normal exploitation of the work or other subject-matter and must not unreasonably prejudice the legitimate interests of the owner of the copyright.<sup>99</sup>

Allowing a TPM exception to enable these limited uses would not disrupt the broader legal regime intended to protect TPM and copyright.

As mentioned above, the school sector already takes extensive practical and legal steps when using material (see **Attachment 15**) and the safeguards built into the 'special case' exception ensure that schools will only ever continue to make limited, legal, uses of copyright content under the TPM exception.

CAG understands that the existing education-related TPM exceptions have not resulted in widespread (or indeed any low-level) piracy of content. This demonstrates that the TPM exceptions of this kind do not impair the adequacy or effectiveness of the existing regime.

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<sup>99</sup> Copyright Act ss 200AB(1)(a), (c), (d).

### 3 CAG requests three additional TPM exceptions

CAG seeks three additional TPM exceptions for acts to be added to s 40 of the Copyright Regulations to overcome the adverse impact that TPMs have had or are likely to have on non-infringing uses of copyright materials by schools. Importantly, the Government cannot achieve its policy intention with the Exposure Draft Bill without introducing corresponding TPM exceptions for the amendments proposed in the Bill.

The three new TPM exceptions requested by CAG are for the:

- new ‘show and tell’ exception (proposed s 113MA of the Exposure Draft Bill) – for the use of copyright material in lessons (for both in person and online lessons).
- new ‘exam’ exception (proposed s 113MB(2) of the Exposure Draft Bill) – for the use of copyright material in hardcopy and digital examinations.
- ‘fair dealing for of research or study’ exceptions (Copyright Act ss 40 and 103C) – for the use of copyright material in certain narrow situations by students within educational institutions where required to do so as part of a course of educational instruction.

We have set out the evidence justifying each of these new TPM exceptions as per the criteria in ss 249(4)(b)-(e) of the Copyright Act below.

#### 3.1 New TPM regarding the ‘show and tell’ exception

*Example: Use of copyright material by or on behalf of a body administering an educational institution in the circumstances set out in proposed s 113MA of the Exposure Draft Bill.*

This exception would allow schools to make use of their rights under the proposed ‘show and tell’ exception and give full effect to the Government’s intention to allow schools to deliver digital education, irrespective of whether the content is protected by a TPM.

#### **(b) Will the act not infringe the copyright in a work or other subject-matter?**

Yes. Enabling a person to circumvent an access control TPM will not infringe the copyright in a work or other subject-matter because the ‘show and tell’ exception (proposed s 113MA of the Exposure Draft Bill, which replaces the current exception in s 28 of the Copyright Act) creates an exception for the specified uses.

#### **(c) Is the act in relation to a particular class of works or other subject-matter?**

Yes. The class of works or other subject-matter is limited to:

- the type of copyright material: copyright materials generally aligned with the curriculum standards set by each school jurisdiction for use as teaching resources<sup>100</sup>
- the class of user: body administering the educational institution, or a person taking part in the giving or receiving of the educational instruction or someone acting on behalf of the body
- the purpose of use: educational instruction and
- the conditions set out in proposed s 113MA.

Additionally, CAG takes steps, and will continue to take steps, to narrow the type of copyright material used by teachers by recommending teachers use openly licensed materials where possible (eg Open Education Resources or Creative Commons material).<sup>101</sup>

**(d) Has the use of the TPM had an adverse impact on the non-infringing use by the person or body seeking the exception, or is it likely that it will have such an impact?**

Yes. The Government's policy intention for the new 'show and tell' exception cannot be achieved unless a corresponding TPM exception is enacted.

The 'show and tell' exception allows teachers to use copyright material in class as part of a lesson. However, the use of TPMs by rightsholders prevents schools from using content in ways that are intended to be permitted under the exception, thus limiting schools' ability to take full advantage of this exception and deliver the educational outcomes that the 'show and tell' exception is intended to enable.

An example of an adverse impact likely to be encountered in the absence of the requested TPM exception includes:

- Schools being prevented from relying on the exception in proposed s 113MA to use audio-visual content in class as part of a lesson:
  - *A teacher has an audiobook purchased as a CD. The school no longer has CD players in individual classrooms. The teacher will need to upload the CD audiobook onto the school's DTE to play it to students as part of a lesson and cannot purchase the audiobook in a digital format. The teacher would need to circumvent the TPM on the CD to be able to upload it onto the school's DTE to play in class but would be prevented from doing so in the absence of an exception.*

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<sup>100</sup> See for example, <https://educationstandards.nsw.edu.au/wps/portal/nesa/k-10/understanding-the-curriculum/curriculum-syllabuses-NSW>; <https://victoriancurriculum.vcaa.vic.edu.au/mathematics/introduction/rationale-and-aims>; <https://www.qcaa.qld.edu.au/p-10/acig>; <https://www.education.sa.gov.au/schools-and-educators/curriculum-and-teaching/curriculum-south-australia-early-years-year-12>; <https://k10outline.scsa.wa.edu.au/home/teaching/curriculum-browser>; <https://nt.gov.au/learning/primary-and-secondary-students/nt-school-curriculum>. See also the Australian Curriculum which has been endorsed by all States and Territories. Available at <https://www.australiancurriculum.edu.au/>.

<sup>101</sup> See <https://smartcopying.edu.au/introduction-to-oer/> and <https://smartcopying.edu.au/what-is-creative-commons/>.

In the above example, if there was a TPM exception, the teacher would be able to rely on the 'show and tell' exception to undertake this activity. Otherwise, the teacher would be prevented from playing the audiobook as part of the class.

**(e) Would the exception impair the adequacy of legal protection or the effectiveness of legal remedies against the circumvention of the TPM?**

No. This exception would only permit educational institutions and students to use copyright works or other subject matter in the limited circumstances mentioned in proposed s 113MA of the Exposure Draft Bill. For example, the copyright material must be used in the course of giving or receiving the educational instruction<sup>102</sup> (although see our comments on the technical drafting of this section in Part B) and fall within one of the scenarios listed in proposed s 113MA(2)(b).

Allowing a TPM exception to enable the limited uses set out in proposed s 113MA would not disrupt the broader legal regime intended to protect TPM and copyright.

As mentioned above, the school sector already takes, and will continue to take, extensive practical and legal steps when using material (see **Attachment 15**) and the safeguards built into the proposed exception ensure that schools will only ever continue to make limited, legal, uses of copyright content under the proposed TPM exceptions.

CAG understands that the existing education-related TPM exceptions have not resulted in widespread (or indeed any low-level) piracy of content. This demonstrates that the TPM exceptions of the kind requested would not impair the adequacy or effectiveness of the existing regime.

### 3.2 New TPM regarding proposed s 113MB(2)

*Example: Use of a copyright work or other subject matter by or on behalf of a body administering an educational institution in the circumstances set out in proposed s 113MB(2) of the Exposure Draft Bill.*

This exception would allow schools to make use of copyright material in questions to be answered as part of an examination, irrespective of whether the content was protected by a TPM.

**(b) Will the act not infringe the copyright in a work or other subject-matter?**

Yes. Enabling a person to circumvent an access control TPM will not infringe the copyright in a work or other subject-matter because the 'exam' exception (proposed s 113MB(2) of the

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<sup>102</sup> Proposed s 113MA(2)(a) of the Exposure Draft Bill.

Exposure Draft Bill, which replaces the current exception in s 200(1A) of the Copyright Act), creates an exception for the specified uses.

**(c) Is the act in relation to a particular class of works or other subject-matter?**

Yes. The class of works or other subject-matter that CAG proposes is limited to copyright material used in examinations. This will generally be copyright material aligned with the curriculum standards set by each school jurisdiction for use as teaching resources.<sup>103</sup>

**(d) Has the use of the TPM had an adverse impact on the non-infringing use by the person or body seeking the exception, or is it likely that it will have such an impact?**

Yes. The existing ‘exam’ exception permits copyright material to be used in hardcopy and digital examinations. However, the use of TPMs prevent schools from using content in ways that are intended to be permitted by the exception, thus limiting schools’ ability to take full advantage of the exception.

There has been a shift in education practice towards ‘digital first’ models. This trend has continued with exams and students now regularly take digital rather than hardcopy exams. Digital exams allow teachers to easily incorporate, for example, audio-visual content into the exam. This shift towards digital exams has highlighted the need for a corresponding TPM exception for the ‘exam’ exception.

Examples of an adverse impact encountered or likely to be encountered in the absence of the requested TPM exception include:

- Schools are prevented from relying on the ‘exam’ exception to use audio-visual content in exams:

*A teacher has a protected DVD and would like to use 2 minutes of the film as part of a question to be answered in digital exam. The teacher would need to circumvent the TPM on the DVD to incorporate the 2 minutes of the film into the digital exam but would be prevented from doing so in the absence of an exception.*

- Schools are prevented from relying on the ‘exam’ exception to use protected e-book content in exams:

*A school has purchased a class set of e-books. The teacher would like to extract a page from the e-book to include in a question to be answered in a digital exam for students. The teacher would need to circumvent the TPM on the e-book to be*

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<sup>103</sup> See for example, <https://educationstandards.nsw.edu.au/wps/portal/nesa/k-10/understanding-the-curriculum/curriculum-syllabuses-NSW>; <https://victoriancurriculum.vcaa.vic.edu.au/mathematics/introduction/rationale-and-aims>; <https://www.qcaa.qld.edu.au/p-10/aciq>; <https://www.education.sa.gov.au/schools-and-educators/curriculum-and-teaching/curriculum-south-australia-early-years-year-12>; <https://k10outline.scsa.wa.edu.au/home/teaching/curriculum-browser>; <https://nt.gov.au/learning/primary-and-secondary-students/nt-school-curriculum>. See also the Australian Curriculum which has been endorsed by all States and Territories. Available at <https://www.australiancurriculum.edu.au/>.

*able to copy the text and include it in the exam but would be prevented from doing so in the absence of an exception.*

In the above examples, if there was a TPM exception, the teachers would be able to rely on the exam exception to undertake these activities.

**(e) Would the exception impair the adequacy of legal protection or the effectiveness of legal remedies against the circumvention of the TPM?**

No. This exception would only permit educational institutions and students to use works or other subject matter in the limited circumstances outlined in proposed s 113MB(2) of the Exposure Draft Bill:

- as part of the questions to be answered in an examination;<sup>104</sup> or
- in an answer to such a question.<sup>105</sup>

Allowing a TPM exception to enable these limited uses would not disrupt the broader legal regime intended to protect TPMs and copyright.

As mentioned above, the school sector already takes, and will continue to take, extensive practical and legal steps when using material (see **Attachment 15**) and the safeguards built into the proposed exception ensure that schools will only ever continue to make limited, legal, uses of copyright content under the proposed TPM exception.

CAG understands, the existing education-related TPM exceptions have not resulted in widespread (or indeed any low-level) piracy of content. This demonstrates that the TPM exceptions of the kind requested would not impair the adequacy or effectiveness of the existing regime.

### 3.3 New TPM exception for fair dealing for research or study

*Example: Use of a copyright work or other subject matter by a student enrolled in a course of study in an educational institution solely for the purpose of, and in the circumstances set out in ss 40 or 103C of the Copyright Act, provided that the use was solely for the purpose of a student complying with the requirements of the course of instruction.*

CAG requests a TPM exception that would enable only those students enrolled in an educational institution to circumvent a TPM when relying on the ‘fair dealing for research or study’ exceptions where what they are doing is required as part of a course of educational instruction.

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<sup>104</sup> Proposed s 113MB(2)(a) of the Exposure Draft Bill.

<sup>105</sup> Proposed s 113MB(2)(b) of the Exposure Draft Bill.

**(b) Will the act not infringe the copyright in a work or other subject-matter?**

Yes. Enabling a person to circumvent an access control TPM will not infringe the copyright in a work or other subject-matter because the 'fair dealing for research or study' exceptions apply to uses that would otherwise infringe copyright.

**(c) Is the act in relation to a particular class of works or other subject-matter?**

Yes. The class of works or other subject-matter that CAG proposes is limited to:

- the type of copyright material:
  - works and other subject-matter generally aligned with the curriculum standards set by each school jurisdiction for use as teaching resources
- the class of user: students enrolled in a course of study in an educational institution
- the purpose of use: research or study for a course of instruction at the educational institute
- the conditions set out in ss 40 or 103C of the Copyright Act.

**(d) Has the use of the TPM had an adverse impact on the non-infringing use by the person or body seeking the exception, or is it likely that it will have such an impact?**

Yes. As noted above, technology is rapidly transforming the ways in which content is distributed. Content is increasingly only available in protected formats such as MP4/MP3, DVD, encrypted streams and e-books. The 'fair dealing for research or study' exceptions are intended to permit students to make use of this content for the purpose of, and within the limits prescribed by, those exceptions. TPMs are preventing this.

Questions about how students can use copyright material are regularly asked by schools and as a result, the NCU has had to publish an information sheet addressing the issue.<sup>106</sup> For example, the NCU receives enquiries from schools seeking clarification on whether their students can copy from DVDs for use in their assignments. TPMs are preventing Australian students from engaging with digital media and technology in ways that would greatly enhance their education and would be allowed under the 'fair dealing for research or study' exceptions.

Examples of an adverse impact encountered or likely to be encountered in the absence of the requested TPM exception include:

- A student would be prevented from creating compilations of excerpts from films as part of a classroom activity or assignment if the content is contained on a DVD or other format that is protected by a TPM:
  - *An English class is studying the novel "Romeo and Juliet" and the teacher wants the students to create a compilation of specific clips from film versions*

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<sup>106</sup> See for example, CAG's information sheet on Students and Copyright: <https://smartcopying.edu.au/students-and-copyright/>.

*of "Romeo and Juliet" to aid student comprehension and facilitate discussion. The students would need to circumvent the TPM on the films to incorporate the clips into their compilations but would be prevented from doing so in the absence of an exception.*

- A student would be prevented from incorporating audio-visual material into their works as part of a classroom activity or assignment:
  - *In recognition of National Reading Week and as part of a classroom activity, students are asked to create 'book trailers' promoting books they've read, in the same manner as 'film trailers' promote films. To do this, students want to incorporate sound, music and video into their works (eg sound or film clips from movie adaptations of their books) into their short videos. The students would need to circumvent the TPM on the sound, music and video to incorporate them into their short videos but cannot do so without an exception.*

In the above examples, if there was a TPM exception, the students would be able to rely on the 'fair dealing for research or study' exceptions to undertake these activities.

**(e) Would the exception impair the adequacy of legal protection or the effectiveness of legal remedies against the circumvention of the TPM?**

No. These exceptions would only permit students enrolled in an educational institution to use copyright works or other subject matter in the limited circumstances mentioned in ss 40 or 103C of the Copyright Act. For example, the use must be 'fair' and four factors must be considered, including the effect of the dealing upon the potential market and whether the material can be obtained in the required format within a reasonable time at an ordinary commercial price.<sup>107</sup>

Allowing a TPM exception to enable the limited uses set out in ss 40 or 103C of the Copyright Act would not disrupt the broader legal regime intended to protect TPM and copyright.

As mentioned above, the school sector already takes, and will continue to take, extensive practical and legal steps when using material (see **Attachment 15**) and the safeguards built into the 'fair dealing for research or study' exceptions ensure that students will only ever continue to make limited, legal, uses of copyright content under the proposed TPM exception.

CAG understands that the existing education-related TPM exceptions have not resulted in widespread (or indeed any low-level) piracy of content. This demonstrates that TPM exceptions of the kind requested would not impair the adequacy or effectiveness of the existing regime.

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<sup>107</sup> Copyright Act ss 40(2) and 103C(2).

## 4 Conclusion

Educational content is increasingly distributed in formats that are subject to TPMs, and the prohibition on circumventing TPMs to rely on exceptions in the Copyright Act has blocked teachers and students from relying on lawful, public interest exceptions.

The practical scope of the educational exceptions and statutory licence will be diminished considerably if the existing TPM exceptions are not kept. Further, if the three new TPM exceptions proposed by CAG are not added to the Copyright Regulations, Australian students will continue to be limited in their engagement with digital media and technology and the Government will not achieve the policy intentions which underly the Exposure Draft Bill.

The existing and proposed TPM exceptions are critically important to ensuring that Australian students have fair access to content in digital formats.

CAG respectfully requests the Department recommend the existing three TPM exceptions in Part 2 be continued and CAG's three proposed TPM exceptions in Part 3 be introduced.

# Attachments

## Attachment 1 – VET partnerships under the Heads of Agreement for Skills Reform

The importance of industry partnerships has been a critical focus for the skills sector. In August 2020, the [Heads of Agreement for Skills Reform](#) (**National Skills Reform Agreement**)<sup>108</sup> was signed by the Commonwealth and all State and Territory governments, informed by a number of reviews including the NSW VET Review.<sup>109</sup>

All governments are working towards a new National Skills Reform Agreement which will be finalised in the first half of 2022.<sup>110</sup>

The National Skills Reform Agreement outlines 9 priorities, including:

- strengthening VET pathways for secondary school students and improving the quality and vocational relevance of VET in schools.
- increasing real investment in VET, while undertaking agreed reforms needed to ensure this investment will improve outcomes for Australians and the economy.

State and Territory governments are also investing in skills initiatives. For example, NSW has committed to improving the quality of vocational education made available in high schools.

### Case Study: NSW

In March 2021, the NSW Government committed to implementing the 5 recommendations, from the NSW VET Review, including improving the quality of vocational education made available in high schools.<sup>111</sup> This aligns with the priorities outlined in the National Skills Reform Agreement.

### VET programs in high schools

NSW will implement the NSW VET Report recommendation to make vocational education and training attractive and accessible to secondary school students by:<sup>112</sup>

<sup>108</sup> Available at <https://www.pmc.gov.au/resource-centre/domestic-policy/heads-agreement-skills-reform>.

<sup>109</sup> David Gonski AC and Peter Shergold AC, 'In the same sentence: Bringing higher and vocational education together' (**NSW VET Report**), March 2021. Available at [https://education.nsw.gov.au/content/dam/main-education/about-us/strategies-and-reports/Final\\_VET\\_Sector\\_Report.pdf](https://education.nsw.gov.au/content/dam/main-education/about-us/strategies-and-reports/Final_VET_Sector_Report.pdf).

<sup>110</sup> See <https://www.pmc.gov.au/resource-centre/domestic-policy/heads-agreement-skills-reform>.

<sup>111</sup> See <https://education.nsw.gov.au/about-us/strategies-and-reports/our-reports-and-reviews/review-on-the-nsw-vocational-education-and-training-sector>.

<sup>112</sup> NSW VET Report, chapter 3.

- a) ensuring practical course offerings, vocational learning, work exploration and career education are available to all students
- b) increasing the number of selected vocational courses that can be incorporated in the calculation of the ATAR
- c) strengthening the opportunity for the Vocational Education delivered to Secondary Students (**VETSS**) courses they undertake
- d) providing more opportunities for externally delivered VET where that is in the best interests of the student
- e) enhancing the number of school-based apprentices and trainees.

## Attachment 2 – A case study: The Online Formative Assessment Initiative (OFAI)

The OFAI is one of Australia's 8 national educational priorities under the National Schools Reform Agreement. It has been endorsed by the Commonwealth and all State and Territory governments. The Initiative is a “*coordinated national response to lift educational outcomes by providing innovative tools and new resources for teachers and students, as well as professional learning and support for teachers.*”<sup>113</sup> It is a cross-agency project between [Australian Curriculum, Assessment and Reporting Authority \(ACARA\)](#), the [Australian Institute for Teaching and School Leadership \(AITSL\)](#) and [Education Services Australia \(ESA\)](#) and several partner organisations as well as teachers, school leaders, parents and students. Its aim is:

*“to provide Australian teachers with innovative assessment solutions that integrate resources, data collection and analytical tools in a Teaching Tools Network that is easily accessible, interactive and scalable to meet future needs. The network will be opt-in and on-demand: and will build on existing systems and approaches.”*

However, current copyright laws present a barrier to successfully implementing the OFAI and achieving the key policy objectives of this project. For example:

### **1. Using content from the OFAI Tool in the course of ‘online’ educational instruction**

While the ‘show and tell’ exception permits teachers to use copyright content to ‘show and tell’ to students as part of a lesson that takes place in person in a physical classroom, the Copyright Act does not clearly permit the use of copyright content when teachers use online teaching methods (eg via Zoom).

### **2. Recording content using the OFAI Tool**

The prototype OFAI Tool allows teachers to record a lesson (or part of a lesson) in which copyright materials are used to “record learning observations”<sup>114</sup> and may in some instances be used for students to access lessons later on-demand. This is not clearly permitted by our current educational exceptions.

### **3. Displaying ‘text based works’ (eg text resources on the Teacher Tools Network) to students in classrooms**

There has been great debate between copyright owners and schools as to whether the ‘show and tell’ exception applies to literary, dramatic and musical works (‘text based works’) being displayed in a classroom. While displaying artistic works or audio-visual content on screens in a classroom where the teacher and students are physically present is clearly free for

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<sup>113</sup> Further information is available at <https://www.ofai.edu.au/>.

<sup>114</sup> For a demonstration of the prototype OFAI Tool “Spindle”, see <https://www.ofai.edu.au/the-spindle-prototype-demo/>.

teachers, Copyright Agency claims licence fees if teachers display text based works on screens in classrooms.

#### **4. *Parents and guardians involved in lessons***

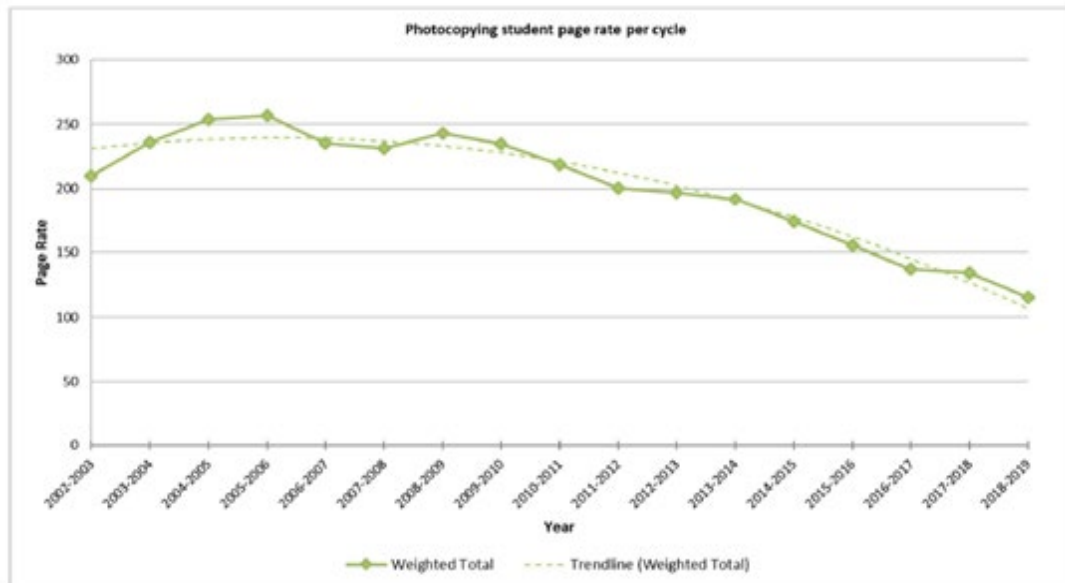
Educational policy is increasingly prioritising the involvement of parents and guardians (and the wider community) in education. This includes providing access to digital resources to parents and guardians as part of the OFAI. However, schools may not be able to rely on the 'show and tell' exception if parents and guardians are 'in the audience' for the lesson (see s 28(3) of the Copyright Act). This means that copyright content may not be able to be shown, played or read in class where parents, guardians or members of the wider community are involved in or present for lessons.

#### **5. *Freely available internet materials***

The universal coverage of the statutory licence means many freely available internet materials are considered to be remunerable under the statutory licence. Uploading freely available internet materials onto a nationally available network will have significant cost implications if schools must continue to pay licence fees to use freely available internet materials.

## Attachment 3 – The shift in education beyond traditional content

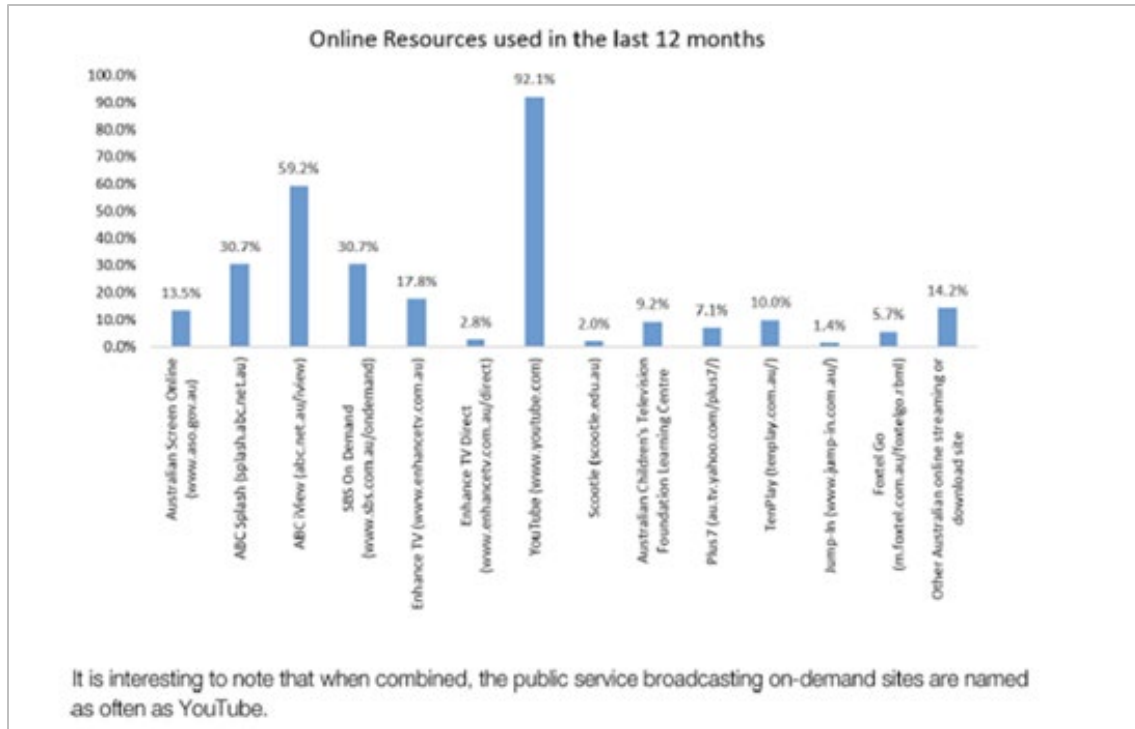
Education is moving beyond traditional books. Reliance on the statutory licence to copy and communicate text and artistic works has reduced. This is demonstrated by the decreasing photocopying in schools:<sup>115</sup>



Schools are increasingly using other content types such as apps, audio-visual materials, computer software, YouTube clips etc which are outside the scope of existing licence schemes. The shift to audio-visual content can be seen in QUT research regarding teacher use of online resources:<sup>116</sup>

<sup>115</sup> 2019 Australian Schools Copyright Collection - Annual Review Report, prepared by Kantar for Copyright Agency and COAG Education Council (not publicly available), 20 November 2020, p 35.

<sup>116</sup> Stuart Cunningham et al, 'Screen Content in Australian Education: Digital Promise and Pitfalls' (2016), p 10. Available at [https://eprints.qut.edu.au/101132/1/Screen-Content-in-Australian-Education-Report\\_lowres.pdf](https://eprints.qut.edu.au/101132/1/Screen-Content-in-Australian-Education-Report_lowres.pdf). See also news story on this report <https://www.gizmodo.com.au/2016/10/aussie-teachers-use-a-whole-lot-of-youtube-in-the-classroom/>.



## Attachment 4 – ACARA’s Digital Technologies in focus (DTiF) project

ACARA’s Digital Technologies in focus (**DTiF**) project was a 4-year program designed to upskill teachers and support them to teach Digital Technologies.<sup>117</sup> The project was funded by the Australian Government as part of the National Innovation and Science Agenda (**NISA**). Over 160 schools participated, with 49% of participating schools from regional areas, 29% from remote or very remote regions and 22% from metropolitan locations.

The project has now been independently recognised to improve student engagement and achievement in some of the country’s most disadvantaged schools, but it also has provided timely tech skills to teachers providing important long-term change for schools.

As Julie King, ACARA Senior Manager, Curriculum said:

*“The need for professional learning nationally was high and particularly so in disadvantaged schools where students often have limited access to digital devices at home, and so the school’s role is critical”.<sup>118</sup>*

*“Students showed increased engagement in learning computational thinking, design thinking and problem solving. A lot of teachers told us they saw many students, who might normally lack confidence in the classroom, really shine, and every school involved reported positive outcomes for student inclusion and achievement. Many First Nations Australian students also benefited from learning Digital Technologies through a focus on story, exploring their local language, learning on Country/Place and programming robotic devices.”<sup>119</sup>*

ACARA CEO, David de Carvalho similarly notes:<sup>120</sup>

*“This has been invaluable for many schools and teachers who participated and then found themselves delivering remote learning due to the COVID-19 pandemic.”*

*“Teachers told us they strengthened their own digital skills and felt more able to confidently cope with students learning from home.”*

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<sup>117</sup> See more information on the Digital Technologies in Focus website:

<https://www.australiancurriculum.edu.au/resources/digital-technologies-in-focus/>.

<sup>118</sup> ACARA, Media Release: New Program Proven to Upskill Teachers in Crucial Digital Skills (**ACARA Media Release**), 4 November 2021, p1. Available at [https://www.acara.edu.au/docs/default-source/media-releases/20211108-media-release-dtif\\_4.pdf?Status=Temp&sfvrsn=ca6a4d07\\_4](https://www.acara.edu.au/docs/default-source/media-releases/20211108-media-release-dtif_4.pdf?Status=Temp&sfvrsn=ca6a4d07_4).

<sup>119</sup> Ibid p 2.

<sup>120</sup> Ibid p 1.

Teachers felt empowered knowing they had the opportunity and skills to learn and embrace new technologies. As Rebecca Keough, a teacher from St Mary's, a small Catholic primary school in Moruya, New South Wales mentions:

*“Our ICT capabilities have needed to really amp up due to COVID, and staff who had participated in the DTiF program were really empowered. It enabled staff to realise that if they need to learn something new, they can.”*

The benefits were highlighted in a review by a team of academics at the Deakin University School of Education, which undertook a 3-year close-up study of 6 participating schools, and in a report published by ACARA. The reports are published here:

<https://www.australiancurriculum.edu.au/resources/digital-technologies-in-focus/about/>.

## Attachment 5 – Being able to record lessons is critical to the school sector and the Government to meet their national education initiatives

Critically important to the school sector as well as the Government to meet their national education initiatives is the ability to record lessons. CAG welcomes and strongly supports this amendment in the Exposure Draft Bill.

Schools **must** be able to record lessons in the same way as they can give those lessons in the classroom. There are at least three reasons for this:

1. Recording lessons is a requirement of the OFAI. As discussed in Part 2.2 of Part A of the CAG Schools Submission, the OFAI is a national plan to improve educational outcomes by providing innovative tools and new resources for teachers and students, as well as professional learning and support for teachers. The Minister for Education and Youth, The Hon Alan Tudge MP endorsed the OFAI as well as all State and Territory governments. The OFAI cannot be implemented as planned without a clear legal ability to record lessons.
2. There will be an ongoing need for students who are required to isolate due to exposure to COVID-19 to access lessons from home, even after face to face learning resumes.
3. Teachers need to be able to record lessons for equity reasons – to ensure all students whether living in a rural or metropolitan area have an equal opportunity to access lessons.

Consider these scenarios:

- A teacher is teaching in a classroom where most students are physically present. However due to a requirement to self-isolate, some students are learning remotely. To ensure they can still participate in the lessons, a teacher records the lesson as they teach live and then makes that recording available to the students who are in self-isolation.
- A school is subject to a stay at home order. A teacher is teaching via Zoom and uses the record function as they teach. This recording is then made available to all students in the class on demand in case they were unable to watch the live Zoom lesson. These on demand lessons are vital to families that have multiple school aged children and limited devices. In these instances, not all of the children will be able to log on and watch live lessons if they're delivered at the same time. These families need the option of being able to watch lessons later and at a time when a device is available for the student.
- A rural student has an interest in physics, but a physics class is not offered at their school. However, this student could access and watch a physics lesson on demand from a metropolitan school where it is offered.

**Recording lessons will ensure equal learning opportunities regardless of location or circumstance.**

The updates to the 'show and tell' exception would allow the pre-recording of a lesson for online teaching as well as the recording of a 'live' lesson and covers all different types of copyright materials.

As schools resume face to face learning the updates to the 'show and tell' exception would have a substantial and immediate effect on schools. COVID measures will still require entire schools and potentially jurisdictions to quickly shift to online and some students to self-isolate and access lessons from home while their peers are attending face to face lessons. For students with siblings and only one internet-connected device in a household, the ability to access lessons on-demand is essential to their learning.

CAG agrees that schools should not be able to rely on the updates to the 'show and tell' exception to upload content to a DTE on an indefinite and ongoing basis. These circumstances would likely require remuneration under the statutory licence or other licence, or the permission of the copyright owner.

However, CAG does have some concerns about the requirement for the recording to be made available on a temporary basis. Without further guidance in the Explanatory Memorandum, the current drafting of the Exposure Draft Bill may impact the national OFAI, which has not been designed to accommodate recordings only being made available on the Tool for "temporary reference". For example, recordings may be used to track student progress across the school year or be used for teacher development throughout the year.

CAG has additional comments on the drafting of proposed amendment, including with the temporary nature of the recordings, in Part 1 of Part B of the CAG Schools Submission.

## Attachment 6 – Case study: NSW Institute of Applied Technology (NSW IAT)

In 2020, Professor Peter Shergold AC and Mr David Gonski AC were commissioned by the NSW Government to lead a Review on the NSW vocational education and training sector. Their findings and 5 recommendations are available in their Report: [“In the same sentence: Bringing higher and vocational education together”](#).<sup>121</sup> In March 2021, the NSW Government committed to implementing the 5 recommendations from the Review on the NSW vocational education and training sector.<sup>122</sup>

Two key reform priorities are:<sup>123</sup>

- establishing a new form of tertiary education known as NSW Institute of Applied Technology (**NSW IAT**).
- improving the quality of vocational education made available in high schools.

These reforms align with the new [national Heads of Agreement for Skills Reform](#),<sup>124</sup> which aims to improve the VET sector and equip the future workforce with the skills required to navigate the digital economy.

As part of this reform, the NSW Government has invested \$80 million in the [NSW Institute of Applied Technology for Construction](#).<sup>125</sup> This institute will (emphasis added):

- be a signature construction training hub aligned to industry
- enable **student and staff engagement with industry partners**
- create an education environment to address skills gaps in the economy
- foster a **network between schools, VET, universities, and industry**, to co-design future-focused courses and innovative training models
- enable seamless study pathways between university and TAFE NSW
- deliver early exposure to students through programs and exclusive access to the latest technologies
- enable and encourage cross-disciplinary **collaboration, industry engagement, and educational excellence**
- enable upskilling and reskilling of workers throughout their careers
- **improve accessibility through digitally-enabled facilities, providing online classes for remote and regional NSW communities.**

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<sup>121</sup> Report available at [https://education.nsw.gov.au/content/dam/main-education/about-us/strategies-and-reports/Final\\_VET\\_Sector\\_Report.pdf](https://education.nsw.gov.au/content/dam/main-education/about-us/strategies-and-reports/Final_VET_Sector_Report.pdf).

<sup>122</sup> See <https://education.nsw.gov.au/about-us/strategies-and-reports/our-reports-and-reviews/review-on-the-nsw-vocational-education-and-training-sector>.

<sup>123</sup> Ibid.

<sup>124</sup> Available at <https://www.pmc.gov.au/resource-centre/domestic-policy/heads-agreement-skills-reform>.

<sup>125</sup> See <https://www.tafensw.edu.au/instituteofappliedtechnology>.

In addition to the IAT for Construction, the IAT for Digital Technology is being constructed as part of the [\\$154 million Meadowbank Education Precinct](#).<sup>126</sup>

Like the IAT for Construction, it promises: <sup>127</sup>

*“Technologies that facilitate ‘virtual belonging’ – video connections, remote lesson delivery, online courses, blended courses.”*

The IAT for Digital Technology is due to open in August 2022. It is critical that these reforms are implemented as a matter of urgency to ensure such innovative education projects can deliver the promised outcomes for the education and skills sectors across Australia.

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<sup>126</sup> See <https://www.nsw.gov.au/media-releases/uts-macquarie-tafe-partnership>.

<sup>127</sup> See <https://www.tafensw.edu.au/documents/60140/530438470/EC-TAFE-Meadowbank-displayposter.pdf>, p 3.

## Attachment 7 – CAG’s position on the historical interpretation of the ‘show and tell’ exception

### **Parliament always intended to include the display of text works in the ‘show and tell’ exception**

It is CAG’s position that parliament always intended to include the display of textual works (literary, dramatic and musical works) in the ‘show and tell’ exception. The differential treatment in this exception for artistic works and broadcasts from other forms of copyright materials is due to the nature of copyright for those categories of subject matter.

Section 31 of the Copyright Act grants the exclusive copyright rights to works. Subsection (1) includes the performance right in the list of copyright rights for literary, dramatic and musical works. In contrast, subsection (2) grants artistic works only 3 exclusive rights: the right to reproduce, publish and communicate. Section 87 provides a similarly limited set of rights for broadcasts.

The 2006 reforms were about extending the ‘show and tell’ exception to allow schools to communicate copyright materials in order to facilitate classroom display. Schools had always been allowed to wheel a VCR player into a classroom to show students a documentary. However, the technology at the time allowed schools to install a central DVD player in the library, and transmit the signal to screens in the classroom. The “show and tell” part of this activity was covered by the exception, but the communication from the library to the classroom was not.

The ‘show and tell’ exception never needed to include artistic works or broadcasts until 2006, as there is actually no copyright right to control the type of uses to which the exception applied – that is, there was no performance right in artistic works or broadcasts. An update to the exception was required to allow the communication of artistic works and broadcasts to a screen, but the “show and tell” of those copyright materials had always been permitted because the copyright owners of those types of materials are not afforded an exclusive right to perform them, or cause them to be seen or heard, in public under the Copyright Act. Evidence for the fact the Government intended to include artistic works in the exception in 2006 is contained in the [Further Supplementary Explanatory Memorandum](#):<sup>128</sup>

#### *“Amendment (19) Communication for educational instruction*

*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.*

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<sup>128</sup> [http://parlinfo.aph.gov.au/parlInfo/download/legislation/ems/r2640\\_ems\\_bef5fad5-f4b4-4222-8bf2-01573addae85/upload\\_pdf/ZA204fsem.pdf;fileType=application%2Fpdf](http://parlinfo.aph.gov.au/parlInfo/download/legislation/ems/r2640_ems_bef5fad5-f4b4-4222-8bf2-01573addae85/upload_pdf/ZA204fsem.pdf;fileType=application%2Fpdf).

*35. This amendment brings the communication of artistic works in line with the treatment of other works under s.28 ...”*

CAG submit that it is clear from this that the Government intended that schools should be able to “show and tell” all forms of copyright materials in classrooms. However, Copyright Agency takes a different view and has insisted that the display of literary, dramatic and musical works in the classroom is not covered by the ‘show and tell’ exception and attracts remuneration under the statutory licence.

### **International exceptions for the performance of literary works**

CAG’s position is supported by the position taken by several other countries around the world. For example, the United Kingdom, New Zealand, the United States and Canada all have exceptions that clearly allow for the performance of literary works in educational settings.<sup>129</sup>

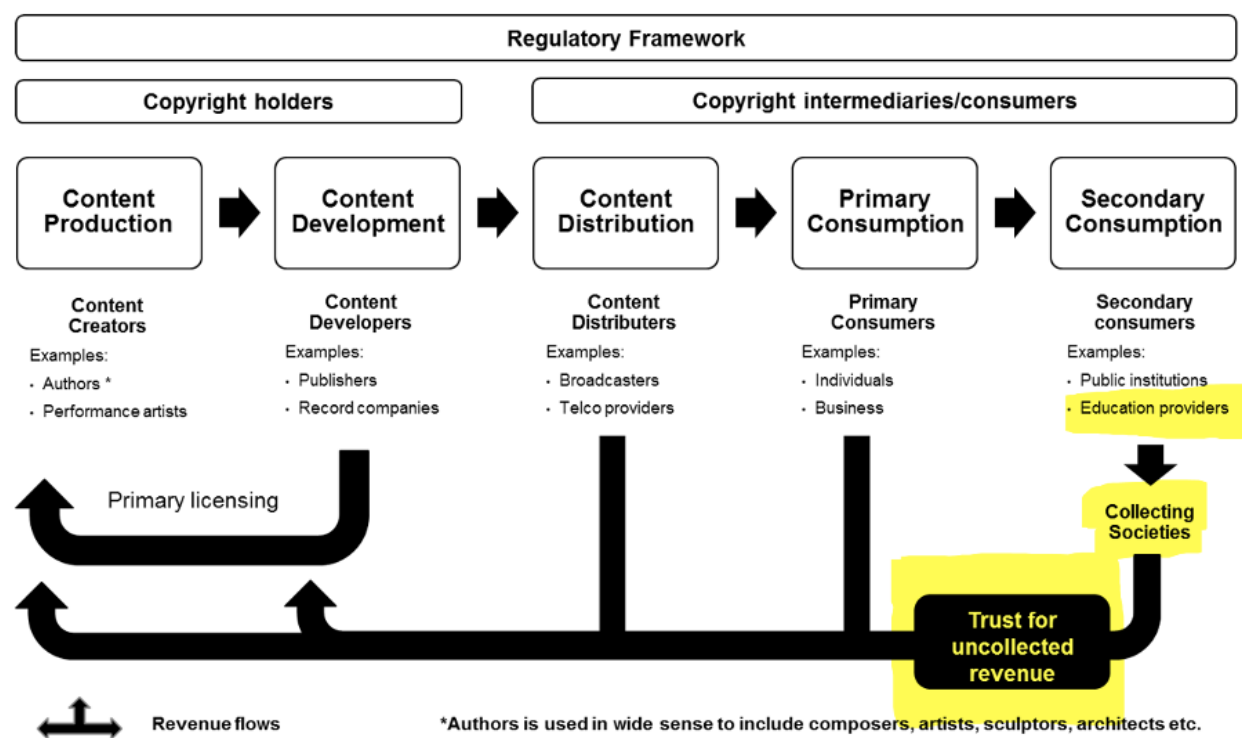
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<sup>129</sup> See [Copyright, Designs and Patents Act 1988 \(UK\)](#) s 34(1); [Copyright Act 1994 \(NZ\)](#) s 47(1); [United States Code, 2006 Edition, Supplement 5, Title 17 - COPYRIGHTS](#) § 110(1)-(2); [Copyright Act \(R.S.C., 1985, c. C-42\)](#) s 29.5(a).

## Attachment 8 – Additional information on the Copyright Agency Future Fund

In July 2015, Ernst & Young (EY) was engaged on the instructions of (what was then called) the Department of Communications and the Arts to undertake an analysis of the impact of amending the Copyright Act to implement the recommendations of the ALRC Report into Copyright and the Digital Economy. In 2016, EY published a report *Cost benefit analysis of changes to the Copyright Act 1968 (EY Report)*.<sup>130</sup>

Figure 3, on page 10 of the EY Report shows the copyright value chain:



Source: Adapted from PwC, *An economic analysis of copyright, secondary copyright and collective licensing*, March 2011.

This figure indicates that the money collected by Copyright Agency will eventually go back to copyright holders for content production and content development. The right hand side (highlighted yellow), illustrates how schools pay licence fees under the statutory licence to Copyright Agency for distribution to members (currently about \$55 million annually).<sup>131</sup> From the licence fees paid, 'uncollected revenue' is moved to a trust for undistributed funds. This would include money collected from the school sector for the use of freely available internet materials, or paying to use works where the copyright owner cannot be found (orphan works). However, in

<sup>130</sup> Available at <https://www.communications.gov.au/documents/cost-benefit-analysis-changes-copyright-act-1968>.

<sup>131</sup> Based off the 2021 school sector licence fees paid to Copyright Agency.

January 2017, CAG became aware that Copyright Agency had changed the way that it deals with 'undistributed funds'.

Prior to 2013, 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. CAG had raised concerns regarding this practice over many years, including with the ALRC during its Copyright and the Digital Economy review, and with the Productivity Commission as part of the Intellectual Property Arrangements inquiry. The Productivity Commission shared CAG's concerns: it said that any undistributable funds should be returned to the education departments that have paid to use the content.<sup>132</sup>

However, in 2013 Copyright Agency adopted a new policy regarding undistributed funds. Unbeknown to CAG, the Productivity Commission or EY, rather than distributing unclaimed funds to other copyright owners 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 the Future Fund is stated to be to finance Copyright Agency's campaign against the copyright reforms being sought by the education sector.<sup>133</sup> Between 2014 and 2016, Copyright Agency amassed a fund worth \$15.5 million. The most recently reported balance of the Future Fund is \$9.6 million.<sup>134</sup>

These undistributed funds are exactly that: undistributed. They are retained by Copyright Agency to fight against law reform proposals such as the copyright access reforms, rather than being distributed to authors and publishers, or returned to education budgets.

The impact of the Exposure Draft Bill is simple: schools will no longer need to pay for the display of text works in a lesson (as always intended by Government) or the use of orphan works by schools. However, this **does not mean** that the reforms will reduce any licence fee payments to Australian authors or publishers.

The reforms will reduce the size of Copyright Agency's Future Fund, meaning that these funds can be freed up for teaching Australian students. Australian schools should not be funding Copyright Agency's campaign against the copyright reforms being sought by the education sector.

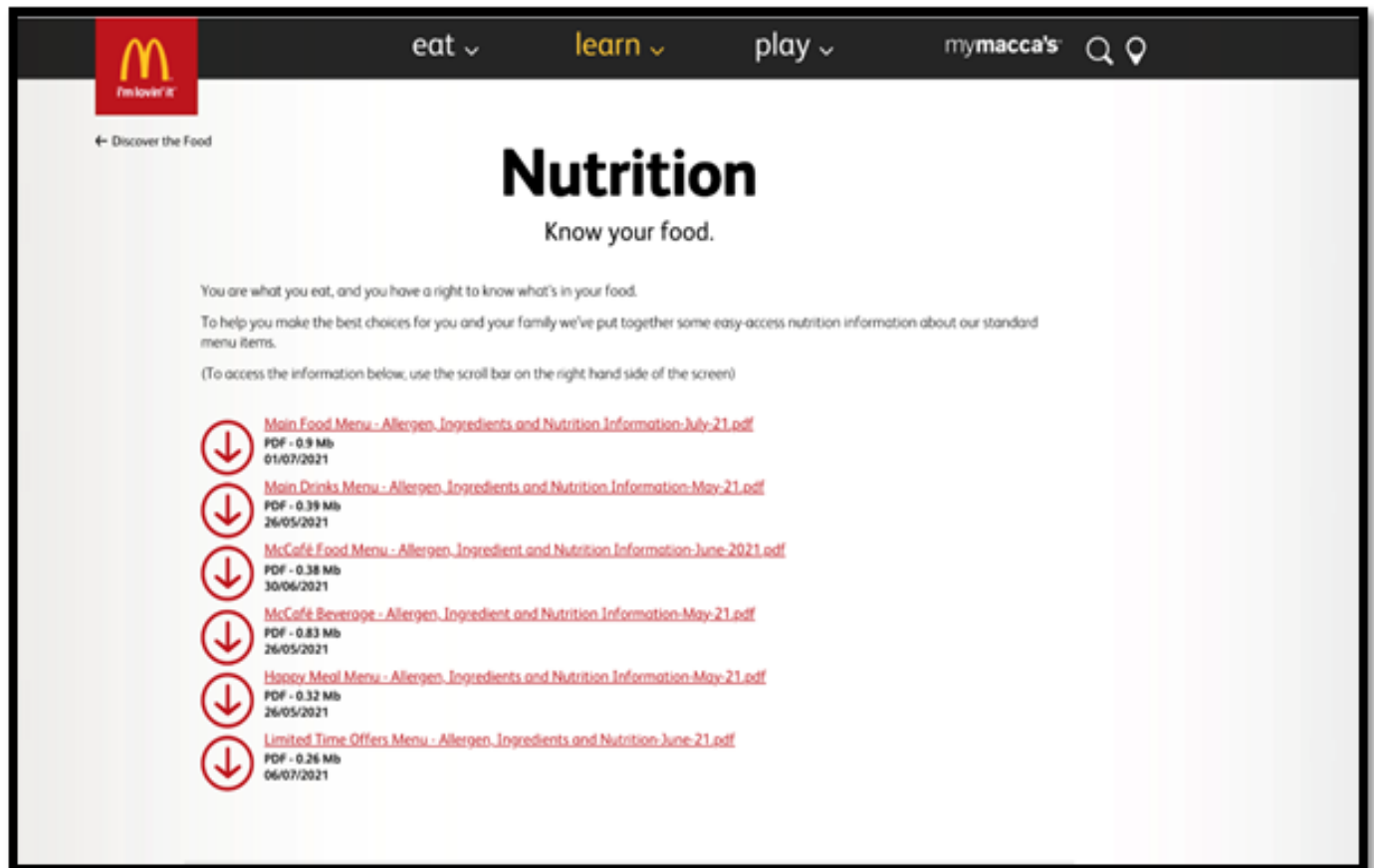
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<sup>132</sup> [Productivity Commission Intellectual Property Arrangements Report](#), September 2016, p 160.

<sup>133</sup> [Copyright Agency 2015/2016 Directors' Report](#), p 26.

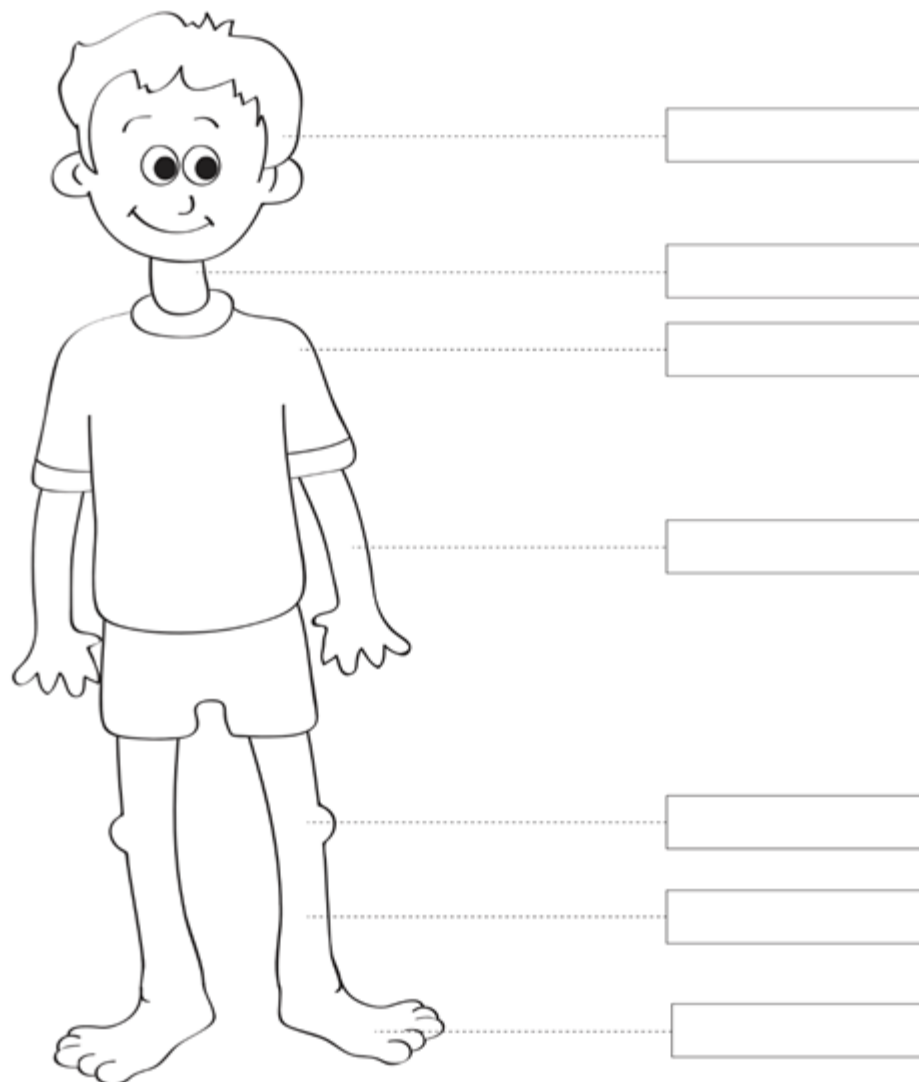
<sup>134</sup> [Copyright Agency 2020/2021 Directors' Report and Financial Report](#), p 18.

## Attachment 9 – Screenshots of materials that would be considered freely available internet materials under the Exposure Draft Bill



# Parts of the body

Complete the spaces with the following parts: Head, Neck, Shoulder, Hand, Knee, Leg and Feet



Name \_\_\_\_\_

Free activities from [www.cleverlearner.com](http://www.cleverlearner.com)



🍴 Recipe

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**FREE TEACHING RESOURCE**

## Story Map Template

in English · Writing · Text Types · Imaginative Writing

[Download](#)

Free · 1 page (PDF, Word) · Years: 1 - 3

A template to use when exploring or planning a narrative story.

Provide students with a copy of the story map template. Allow them to either plan their own narrative, or look at a familiar narrative and map out the events.

Students identify the characters, setting, problem and solution and what else happened in the story.

**Featured in**

Download this resource as part of a larger resource pack or Unit Plan.

**UNIT PLAN**  
Exploring Narrative Texts  
Unit Plan - Year 1 and Year 2

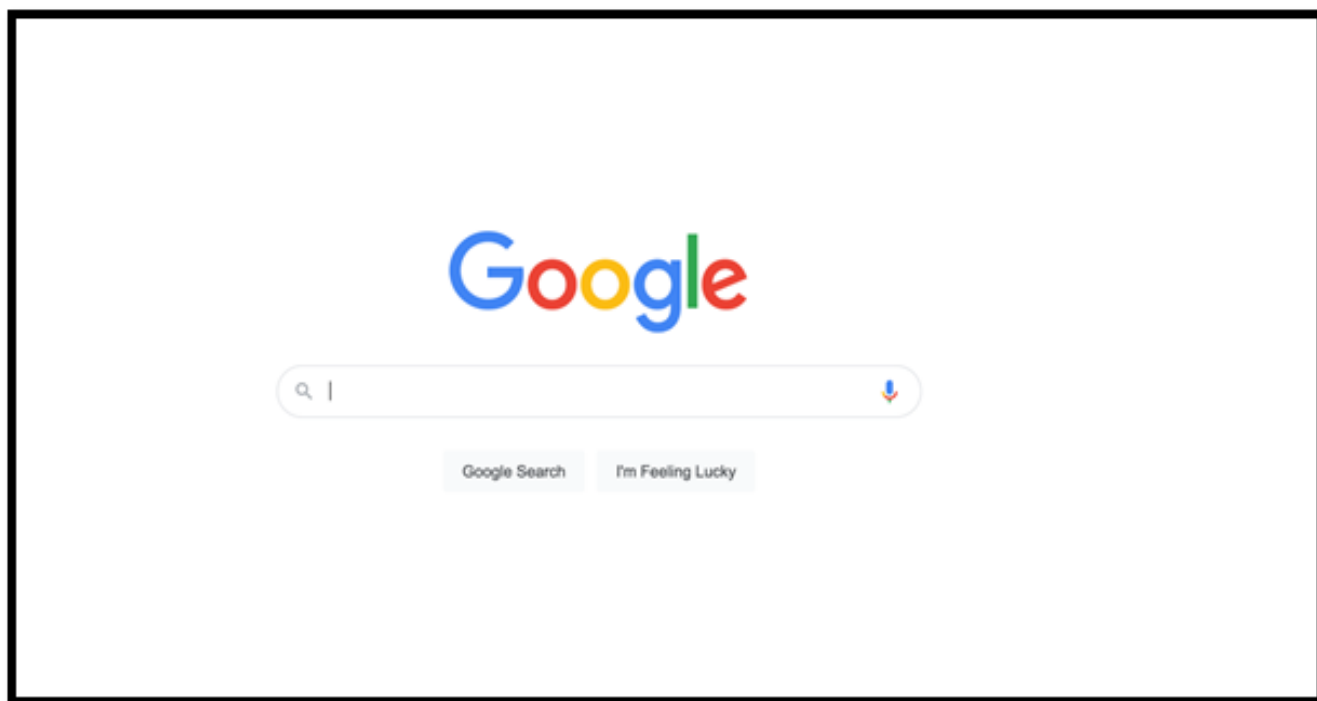
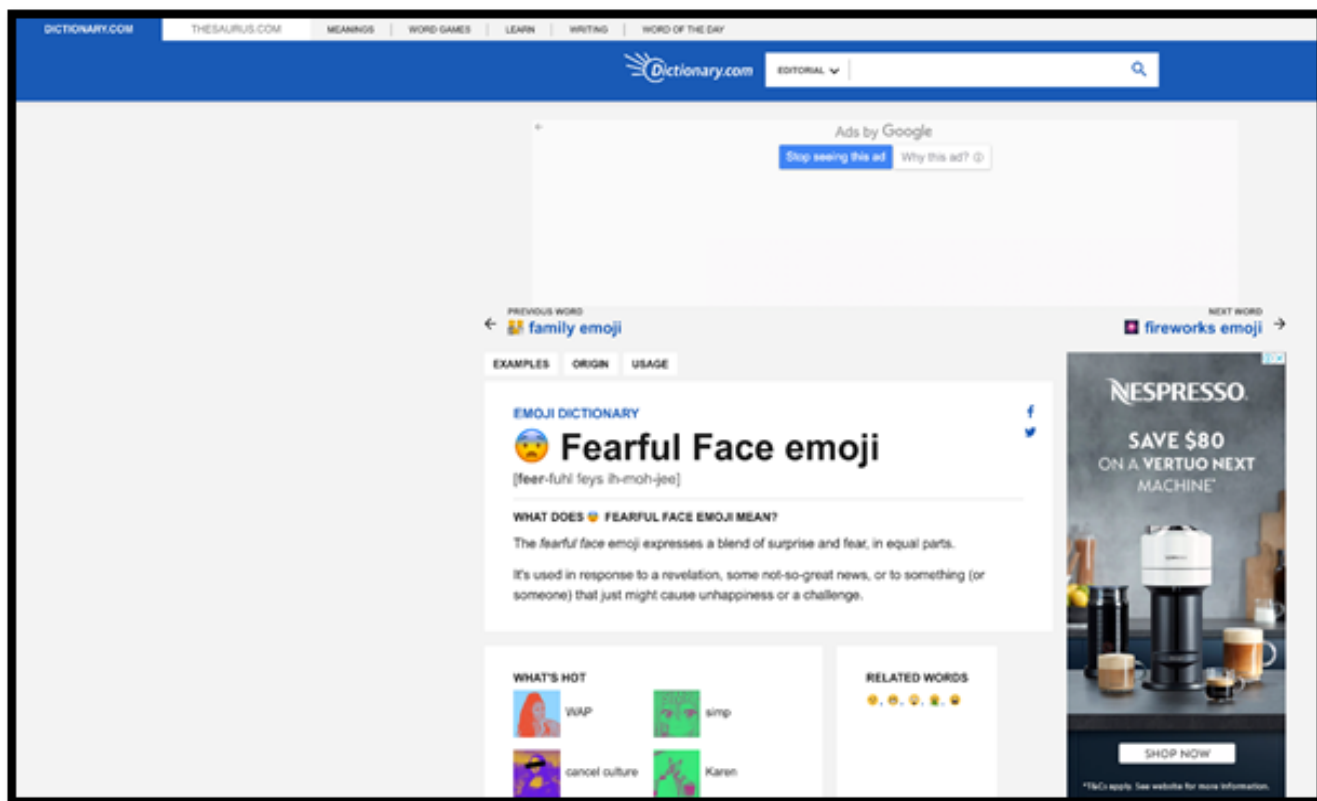
This English unit uses fairy tales to introduce the narrative text type to younger students. It...

445.00 · 3 Reviews

Year 1 - 2

View Preview

[Take a look inside](#)





## Label and color the parts of a plant

This is a free, printable activity worksheet on labelling and coloring objects for preschools, kindergartens and first graders. These quality downloadable worksheets are developed to help preschool teachers with their classroom learning activities. It is also for parents who wish to help their children learn more at home.

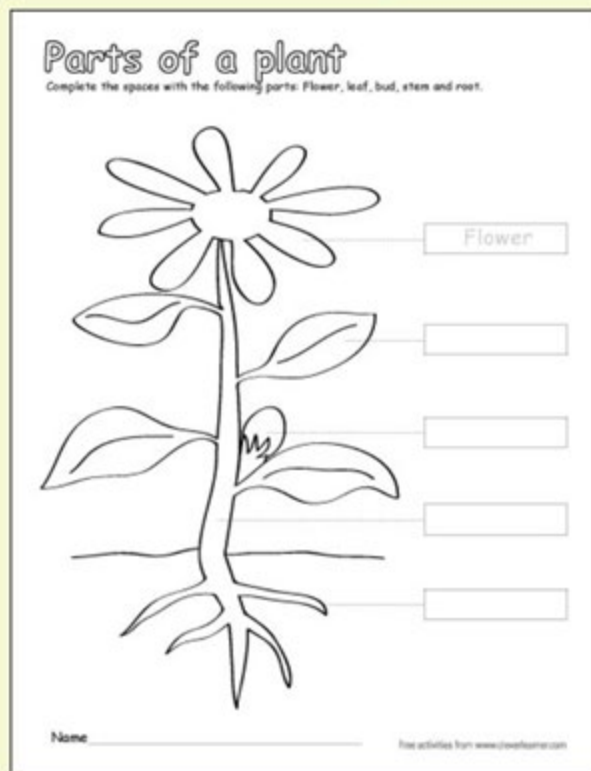
Importantly, it helps preschoolers, kindergarteners and 1st graders to:

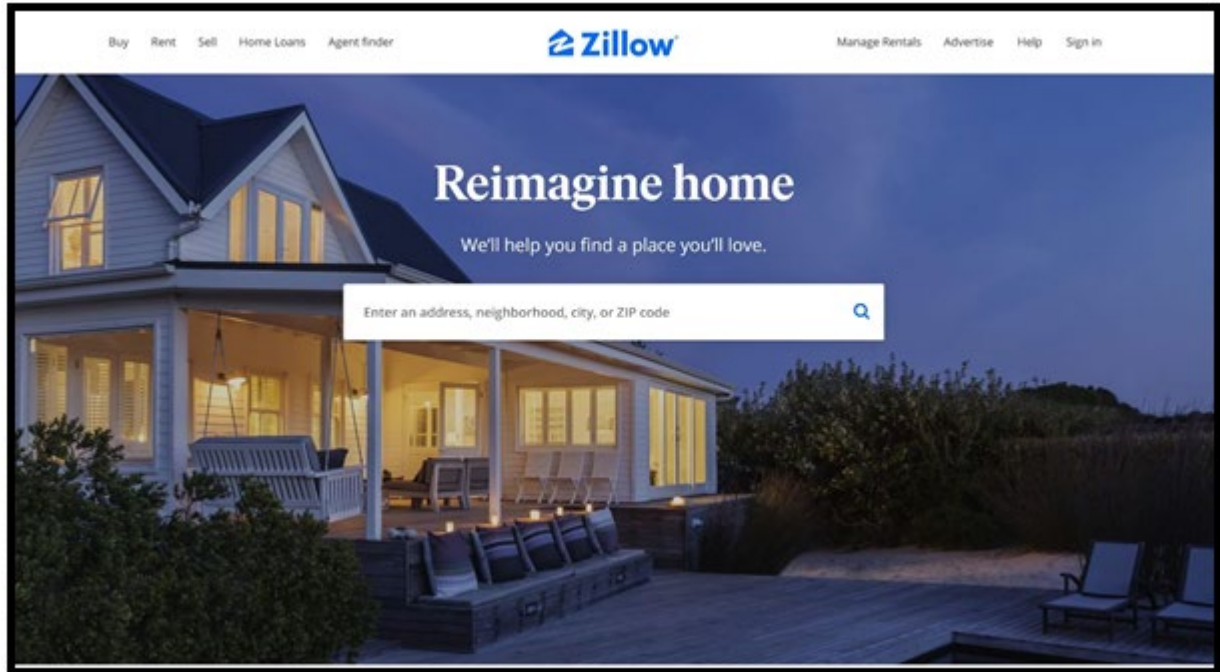
- Inspire them to draw a plant
- Learn the parts of a plant
- Label the plant
- Color the plant

School children learn better by hands-on writing and coloring. Have fun.

## Download & Print

- [Airplane](#)
- [Bird](#)
- [Body](#)
- [Bumble Bee](#)
- [Butterfly](#)
- [Car](#)
- [Cow](#)
- [Dog](#)
- [Elephant](#)
- [Fish](#)
- [Head](#)
- [House](#)
- **Plant**
- [Snail](#)
- [Spider](#)
- [Rooster](#)
- [Teapot](#)






## Bullying

Bullying is never ok. It's hurtful and can impact someone for a long time. Remember, you're not alone. There are people you can talk to and things you can do to stop the bullying.

**What effect can bullying have?**

Bullying can be very hurtful and cause lots of pain. You may:



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### Animal and plant adaptations

155 Share

Overview

For Teachers

Education Services Australia Ltd and ABC

Subject: Science  
Years: 5, 6

This primary science teachers resource explores what makes an organism suited to a particular environment? View a range of animals and plants to investigate adaptations that improve their chance of survival.

Link the adaptation which might be an external structure, an internal structure or an exhibited behaviour to its function (purpose).

Explore strategies of migration or hibernation that animals have developed to deal with temporary or seasonal changes to physical conditions of their habitat.

#### What to view next

- Animal and plant adaptations by Education Services Australia
- Life cycle of clownfish by ABC Deep Dive Into Australia
- Interconnectedness of by ABC Deep Dive Into Australia
- Interact with these min by ABC Education
- What is density? by ScienceXplosion
- Plant scan by Education Services Australia


#### Related Keywords

Animal and plant adaptations | Teachers resource | Science | Polar bear | Monarch butterfly | Mountain Pigmy Possum | Hairy nosed wombat | Water-holding frog | Emperor penguin | Explanations (Scientific inquiry) | Plant reproduction | Animal reproduction | Ecosystems | Adaptation (Evolution) | Growth (Animals) | Plant growth | Animal behaviour

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Copyright info

the power of humanity



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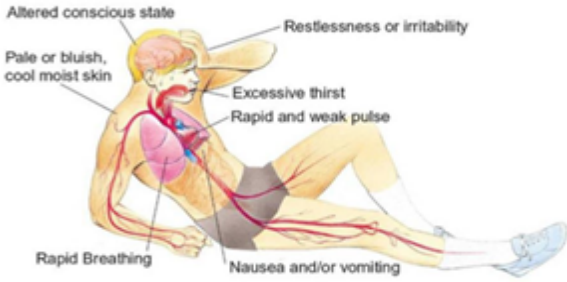
## Shock signs and symptoms

65%

The signs and symptoms of shock may include:

- rapid breathing
- weak and rapid pulse
- pale, cool, clammy skin
- thirst
- nausea or vomiting, and
- an altered conscious state.

Audio is disabled



## Attachment 10 – Additional information on freely available internet materials

CAG is disappointed that a freely available internet materials exception wasn't included in the Exposure Draft Bill.

There have been extensive consultations looking at this exception as well as the dealings between the parties on this issue for over a decade. Due to this, CAG does not believe further consultations are necessary. See **Attachment 11** for a history of copyright issues raised by CAG.

**Australian schools pay to use material that ordinary Australians and commercial users use for free.**

CAG sees the freely available internet materials exception as a critical and urgent issue for the sector. If a freely available internet materials exception was enacted, it would align Australia with countries such as Singapore and other countries with major publishing sectors such as the United Kingdom and United States,

where the use of free internet materials is either outside of the scope of licensing schemes, or covered by exceptions.

A freely available internet materials exception would fix the current situation where ordinary Australians use materials on the internet such as online TV guides, fact sheets, and government information for free every day, but licence fees are required if this same content is used in Australian schools.

Education budgets need to be used to teach students and not for the use of freely available internet materials where there is no expectation of payment. However, schools do and should pay for online education resources where authors and publishers are commercialising their works online and expect payment.

**Education budgets need to be used to teach students. Not for materials where there is no expectation of payment.**

There are several key policy reasons why CAG sees the freely available internet materials exception as a critical and urgent issue for the school sector:

1. The statutory licence was never intended to apply to freely available internet materials.
2. A freely available internet materials exception would reduce teacher burden.
3. A freely available internet materials exception could still allow any copyright owner who wants to be remunerated to be remunerated.
4. A freely available internet materials exception will not hurt copyright owners.

We look forward to discussing this in further detail with the Department in a later consultation.

## Attachment 11 – History of copyright issues raised by CAG

CAG has been raising several of the issues addressed in the Exposure Draft Bill for over 15 years, including via seeking administrative solutions, as well as in submissions to the Australian Law Reform Commission (**ALRC**) and Productivity Commission reviews, and the more recent Modernisation Consultation and roundtables.

There is a long history of public consultation leading up to the Productivity Commission's report and then further consultations reviewing the Productivity Commission's report:

- 1998 – the Copyright Law Review Committee [recommended](#) an open-ended flexible exception similar to fair use.<sup>135</sup>
- 2000 – [Ergas IP & competition review](#) highlighted the benefits of a fair use exception, but found that at the time the transaction costs involved in moving to fair use may outweigh the benefits.<sup>136</sup>
- 2004 – the [Joint Standing Committee on Treaties](#) recommended replacing Australia's closed list of copyright exceptions with fair use as part of Australia's implementation of the Australia-United States Free Trade Agreement (**AUSFTA**).<sup>137</sup>
- 2004 – the [Senate Committee on AUSFTA](#) noted the benefits of a fair use system to the Australian economy and that there was nothing in the text of AUSFTA that would prevent Australia adopting a fair use exception. Labor Senators recommended an inquiry to investigate options to make Australian copyright laws more closely reflect the fair use doctrine.<sup>138</sup>
- 2005 – the Attorney-General's Department [fair use review](#) (led to the introduction of exceptions for parody & satire, format and time shifting for personal use and the 'special case' exception, which was expressed as a semi-flexible exception).<sup>139</sup> The Howard Government committed to monitor the operation of these changes and review if necessary.
- 2013 – the House of Representatives Standing Committee on Infrastructure and Communications [IT price inquiry](#) recommended the introduction of fair use.<sup>140</sup>

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<sup>135</sup> <http://www.austlii.edu.au/au/other/clrc/4.html>.

<sup>136</sup> [https://www.ipaustralia.gov.au/sites/default/files/ergas\\_report\\_september\\_2000.pdf?acsf\\_files\\_redirect](https://www.ipaustralia.gov.au/sites/default/files/ergas_report_september_2000.pdf?acsf_files_redirect).

<sup>137</sup> Available at

[https://www.aph.gov.au/Parliamentary\\_Business/Committees/House\\_of\\_Representatives\\_Committees?url=jsct/usafat/report.htm](https://www.aph.gov.au/Parliamentary_Business/Committees/House_of_Representatives_Committees?url=jsct/usafat/report.htm).

<sup>138</sup> Available at

[https://www.aph.gov.au/Parliamentary\\_Business/Committees/Senate/Former\\_Committees/freetrade/report/final/index](https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Former_Committees/freetrade/report/final/index)

<sup>139</sup> Australian Government Attorney-General's Department, Fair Use and Other Copyright Exceptions: An Examination of Fair Use, Fair Dealing and Other Exceptions in the Digital Age, Issues Paper (2005). Available at <https://apo.org.au/sites/default/files/resource-files/2005-05/apo-nid1748.pdf>.

<sup>140</sup> Report available at <https://www.alrc.gov.au/publication/copyright-and-the-digital-economy-dp-79/4-the-case-for-fair-use-in-australia/reviews-that-have-considered-fair-use/>.

- 2014 – the ALRC [Copyright and the Digital Economy](#) report recommended the introduction of fair use, with a ‘fallback’ recommendation of additional fair dealing exceptions, including an exception for fair dealing for education.<sup>141</sup>
- 2016 – the Productivity Commission’s [Inquiry into IP Arrangements \(PC Report\)](#) recommended the introduction of fair use.<sup>142</sup>
- 2016 – the Government commissioned Ernst and Young (EY) to undertake a cost benefit assessment of the introduction of a fair use exception. The [EY Report](#) found that there are benefits to introducing a ‘fair use’ system and that the biggest positive effect is flexible exceptions for education and orphan works.<sup>143</sup>
- 2018 – the (then) Department of Communications and the Arts commenced the [Copyright Modernisation Consultation](#),<sup>144</sup> to consider the recommendations of the Productivity Commission’s IP report, including its fair use recommendation. The Consultation Paper asked questions including:<sup>145</sup>

*“Question 1 To what extent do you support introducing:*

- *additional fair dealing exceptions? What additional purposes should be introduced and what factors should be considered in determining fairness?*
  - *a ‘fair use’ exception? What illustrative purposes should be included and what factors should be considered in determining fairness?”*
- 2020 – the Government announced the [copyright access reforms](#).<sup>146</sup> Instead of announcing a fair use exception as recommended by previous consultations, it announced a series of more limited amendments to existing exceptions to solve some of the known public access issues with the Copyright Act.

Every law reform body that has ever looked at these problems has recommended fair use.

The ALRC, the Productivity Commission and EY (on behalf of the then Department of Communications and the Arts) have each identified the inability for Australian schools to rely on non-remunerable exceptions for any use that would be covered by the statutory licence as a fundamental flaw in the existing system.

The ALRC and Productivity Commission recommended that these issues be addressed by the introduction of a fair use provision, or in the alternative a new exception for “fair dealing for education”. The Modernisation Consultation suggested a “fair dealing for instruction” exception.

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<sup>141</sup> <https://www.alrc.gov.au/publication/copyright-and-the-digital-economy-alrc-report-122/>.

<sup>142</sup> <https://www.pc.gov.au/inquiries/completed/intellectual-property#report>.

<sup>143</sup> <https://www.communications.gov.au/departmental-news/economics-fair-use>.

<sup>144</sup> <https://www.communications.gov.au/have-your-say/copyright-modernisation-consultation>.

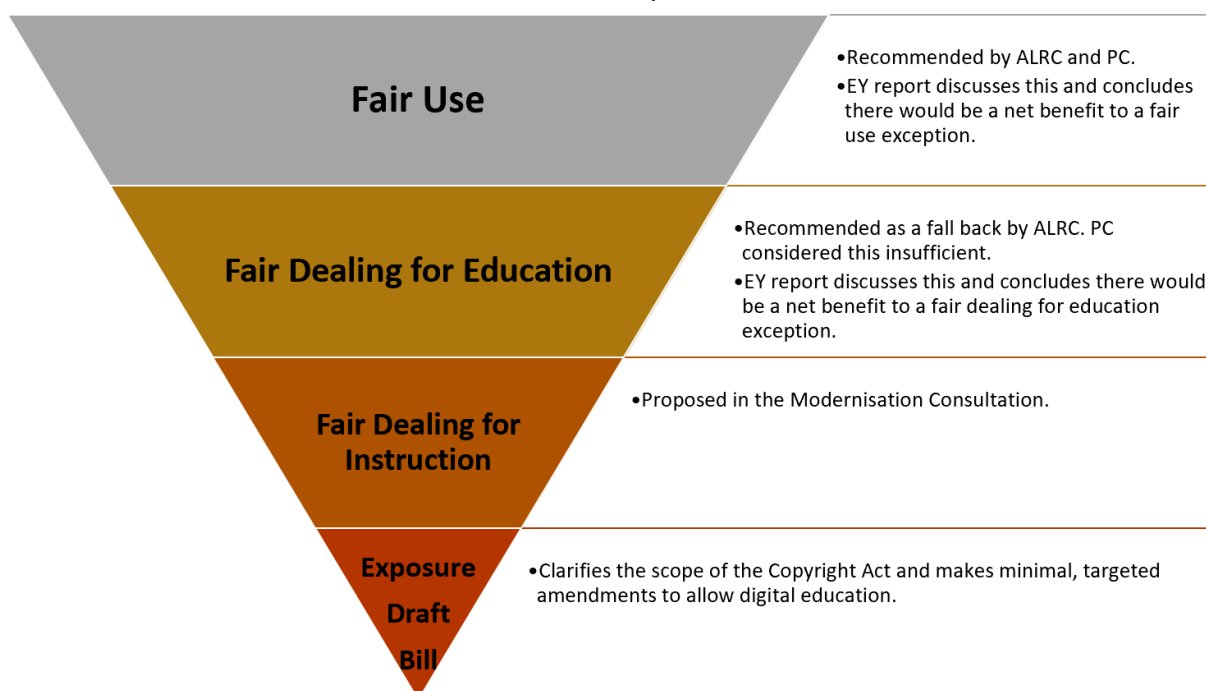
<sup>145</sup> Department of Communications and the Arts, [Copyright modernisation consultation paper](#), (March 2018), p 15. Available at <https://www.communications.gov.au/have-your-say/copyright-modernisation-consultation>.

<sup>146</sup> <https://www.paulfletcher.com.au/media-releases/media-release-copyright-reforms-to-better-support-the-digital-environment>.

These recommendations/suggestions were opposed by copyright owners including Copyright Agency. It was the preference of copyright owners to adopt a series of more minimal amendments to solve known issues with the Copyright Act.

CAG understand that rather than adopting the recommendations of the ALRC and Productivity Commission, as a compromise the Government has instead decided to proceed with a package of more minimal reforms that have been included in the Exposure Draft Bill.

The infographic below compares the recommended approaches arising from the ALRC, Productivity Commission and Modernisation Consultation with the proposed Exposure Draft Bill:



## Attachment 12 – Additional information on the ‘special case’ exception

CAG strongly supported the Government’s announcement in 2020 that the Government would amend the special case exception. CAG was therefore disappointed that amendments have not been included in the Exposure Draft Bill.

Education is moving beyond traditional books. Schools are using cutting edge technologies, interactive resources, audio and audio-visual resources. The Copyright Act needs to encourage the teaching of new technologies such as machine learning and AI, to equip students for the skills they will need in the digital economy. Many of these new technologies involve the technical use of works (eg ‘scraping’ or ‘machine reading’).

These new technologies may involve incidental, non-harmful copies of copyright materials. Deleting subsection (6AA) of the ‘special case’ exception would mean that where these uses did not conflict with the normal exploitation of the copyright work (which would include licensing arrangements) they may be allowed under the ‘special case’ exception.

CAG considers this amendment necessary to encourage schools to adopt new technologies such as machine learning or other computational learning techniques.

### **Deleting subsection (6AA) of the ‘special case’ exception will not harm copyright owners**

It is an inherent requirement of the ‘special case’ exception that before relying on the section, an educational institution must establish **both** that the intended use does not conflict with the normal exploitation of the work (which includes licensing arrangements); **and** that the use would not cause unreasonable prejudice to copyright holders.

**Removal of subsection (6AA) of the ‘special case’ exception would encourage teachers to teach machine learning and AI techniques.**

That is, schools cannot rely on the ‘special case’ exception **at all** if their use would conflict with the normal exploitation of the copyright work (sales or licensing), or if the use would cause unreasonable prejudice to the copyright owner. The statutory licence schemes will still exist, preserving revenues for Australian creators.

Whilst we generally do not believe there will be any harm to copyright owners by this reform, CAG understands this has politically become very controversial which is why we understand if this provision is deferred for further consultation.

### **Amending the ‘special case’ exception, as opposed to introducing fair use, is a much narrower and more targeted solution to these issues**

Deleting subsection (6AA) of the ‘special case’ exception is a very minimal change compared to implementing fair use or flexible dealing for education, which has been recommended numerous

times over the past decade. However, it would give the school sector some flexibility and incentive for innovation and importantly it would remove the need for the school sector to come back to the Government for new exceptions for every technological advancement.

CAG understands collecting societies are very concerned about this issue. Due to the inbuilt protections for copyright owners in the exception, CAG does not understand this concern or why the collecting societies think it appropriate for schools to pay for uses that fall within the exception for works and broadcasts (which are covered by statutory licence) when they do not have to for other types of copyright materials.

**Amending the ‘special case’ exception is much narrower and more targeted than the recommended fair use exception.**

However, CAG is prepared to consult further on this issue. We note, however, that these issues were expressly considered by both the ALRC and the Productivity Commission, and formed part of the rationale for the recommendations of each body that Australia introduce a fair use provision. Amending the ‘special case’ exception, as opposed to introducing fair use, is a **much narrower and more targeted solution** to these issues.

For a summary of the history of copyright issues raised by CAG, see **Attachment 11**.

## Attachment 13 – Additional information on why a full governance review of declared collecting societies is needed

CAG has long standing concerns about the lack of appropriate governance arrangements for declared collecting societies, and the practical consequences of these deficiencies.

Neither the Code of Conduct for Copyright Collecting Societies (**Code**), nor the existing legislative framework applying to collecting societies, provide any mechanism for the school sector to have these concerns addressed. For example, the Code Reviewer in the October 2015 Supplementary Report of the Code Reviewer concluded that it would take an “investigation far broader than that which is expected of the triennial review and than that which I am capable” <sup>147</sup> in order to reach the correct decision. In consequence, no recommendation was made.

A deficient Code has enabled inappropriate use of market power to engage in rent seeking and lack of transparency of Copyright Agency’s operations. CAG submits fit-for-purpose governance arrangements need to be in place to address the concerns raised over abuse of market power and lack of transparency.

### Use of market power to engage in rent seeking

The Code has allowed Copyright Agency to use its market power to become a monopoly declared collecting society. For example, it has:

- created a false market for the use of freely available internet materials that no one ever expected to be paid for (and for which no one else in the world is paying). See problem 4.8.
- required Australian schools to pay millions of dollars a year in circumstances where Copyright Agency will never be in a position to distribute the money to the rights holder as they are unknown. See problem 4.6.
- facilitated “double-dipping” by publishers who licence their works directly to schools in Australia and elsewhere in the world, but seek a second payment - under the statutory licence to use those works – only in Australia.
- required schools to pay when a teacher uses an electronic whiteboard to display text. See problems 4.4 and 4.5.

**Well-intentioned public policy to compensate authors and publishers for lost sales has led to the creation of ‘false markets’ that do not exist anywhere else in the world.**

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<sup>147</sup> Lindgren K Supplementary Report of the Code Reviewer (The Hon K E Lindgren AM, QC, Formerly a Justice of the Federal Court of Australia) upon a Review of the Operation of the Code of Conduct of the Copyright Collecting Societies of Australia October 2015, p 50.

For more information, see CAG's:

- [Submission to the Department of Communications and the Arts Review into the efficiency of the Code of Conduct for Australian Copyright Collecting Societies \(27 September 2017\) \(CAG DCAR Submission 27 September 2017\)](#)<sup>148</sup> and
- [Submission to the Draft Report Review of Code of Conduct for Australian Collecting Societies \(14 March 2018\)](#).<sup>149</sup>

## Lack of transparency

There is also a lack of transparency regarding the extent to which authors benefit from the monies paid by the school sector under the statutory licence.

As mentioned in Part 5.1.1, Copyright Agency's 'Future Fund' has amassed as much as \$15.5 million collected from public education budgets and from Catholic and Independent schools, instead of being paid to Australian authors and publishers or returned to education budgets.

Other than noting their use of this money to fund their litigation, there is little information in either the Directors' Reports or the Annual Reports to indicate what the Future Fund has been used for.

**Most of Copyright Agency's recent litigation costs were paid for using fees from the school sector.**

**Public funds should be paid to authors and publishers or remain in education budgets.**

In Copyright Agency's Director's Report for 2020/21, it discloses that Copyright Agency spent approximately \$4.9 million dollars on legal fees in the 2020 and 2021 financial years.<sup>150</sup> Approximately \$3.5 million of that came from the Future Fund, and just over a million from 'distribution roll over funds', which is money that until very recently was moved into the Future Fund.<sup>151</sup> **What this means is that the education sector was almost entirely the source of the funds used by Copyright Agency's in their recent litigation.** Furthermore, one of these pieces of litigation had nothing to do with education – it was in relation to voluntary licences granted to media monitoring organisations. CAG submits this is not an appropriate use of public funds.

Meanwhile, Copyright Agency has spent over \$7.3 million on marketing and communications since the Future Fund was established.<sup>152</sup> This is in addition to the almost \$12.8 million that Copyright Agency has spent on consultancy fees since 2011/2012.<sup>153</sup> This sits uncomfortably with CAG's education department obligations in relation to expenditure of public funds, and best-practice administration for Catholic and Independent school authorities.

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<sup>148</sup> Available at <https://www.infrastructure.gov.au/sites/default/files/submissions/10781-copyright-advisory-group.pdf>.

<sup>149</sup> Available at [https://www.infrastructure.gov.au/sites/default/files/submissions/copyright\\_advisory\\_group.pdf](https://www.infrastructure.gov.au/sites/default/files/submissions/copyright_advisory_group.pdf).

<sup>150</sup> Copyright Agency Annual Report 2020/2021, p 30.

<sup>151</sup> Ibid p 16.

<sup>152</sup> See Copyright Agency Annual Reports and Directors' and Financials Reports available at <https://www.copyright.com.au/about-us/governance/annual-reports/>.

<sup>153</sup> Ibid.

Greater transparency into collecting society arrangements would assist in obtaining better data to inform copyright policy decisions.

The governance arrangements applying to declared collecting societies must be capable of addressing these two concerns – ie the abuse of monopoly power that has led to rent seeking, and a lack of transparency. The current governance arrangements do not meet this requirement.

### **Proposed way forward: what governance arrangements should be in place?**

A fit-for-purpose regulatory framework for declared collecting societies should, in CAG's view, have at least the following features:<sup>154</sup>

- Legislative provisions which impose obligations on declared collecting societies with respect to licensees as well as to their members.<sup>155</sup>
- Power for the relevant Minister to review and make determinations regarding the formal structure and conduct of declared collecting societies, including powers to review and require changes to a society's constitution, distribution arrangements or reporting obligations.
- Mandatory guidelines that set out the information that must be provided in a declared collecting society's annual report.<sup>156</sup>
- A requirement that there be a very clear separation between a declared collecting society's statutory functions and any commercial functions that the society may also exercise with respect to non-statutory licences. Further consideration should be given as to whether a form of operational separation is required in order to fully achieve this.
- Independent oversight of a declared collecting society's compliance with its statutory obligations, preferably by the ACCC.

To address these issues and establish a fit-for-purpose regulatory framework, CAG encourages the Government to commence a full governance review of declared collecting societies.

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<sup>154</sup> See [CAG DCAR Submission 27 September 2017](#), pp 21-22.

<sup>155</sup> Ibid part 2.2.1.

<sup>156</sup> This should include, at a minimum, the information that CAG requested in its submission to the 2014 triennial review: see Annexure C to the Supplementary Report of the Code Reviewer (Issued 28 October 2015). Available at [https://www.screenrights.org/wp-content/uploads/2017/10/Triennial\\_Supplementary\\_Report\\_-\\_Oct\\_15.pdf](https://www.screenrights.org/wp-content/uploads/2017/10/Triennial_Supplementary_Report_-_Oct_15.pdf).

## Attachment 14 – Schools support the Australian creative sector

The Australian school sector is a significant supporter of Australian culture and the arts. Across the Government, Catholic and Independent sectors, schools have embraced the arts, recognising that it is an essential part of students' learning journey. Support for the arts, including dance, drama, media arts, music, and visual arts, is provided through the Australian Curriculum. In addition, schools offer a wide range of extra-curricular arts activities, which encourage students to create artistic works, but also to become active consumers and lifelong supporters of the arts.

### School sector investment in the Australian creative sector

The school sector is one of the largest funders of the arts in Australia, providing substantial support to the arts sector. The NCU estimates that Australian schools spend a billion dollars every year on educational content.<sup>157</sup>

We also pay some of the highest licence fees in the world:

School licence fees per FTE <sup>158</sup>		
Country	Copyright Agency licence (or equivalent text and artistic works licence)	Screenrights licence (or equivalent broadcasts licence)
Australia	\$13.00	\$7.26
UK	\$3.89 (5-15 year olds)	\$0.93 (Primary)
	\$9.44 (16-18 year olds)	\$1.93 (Secondary)
New Zealand	\$1.63 (Primary)	\$4.37
	\$3.26 (Secondary)	

<sup>157</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 nearly \$460 million annually in 2019.

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

<sup>158</sup> Licence rates applicable in February 2022. All figures have been converted into Australian dollars using exchange rates available on 17 February 2022, namely 1 GBP = 1.89 AUD, 1 NZD = 0.93 AUD, see <https://www.xe.com/currencyconverter/>.

In addition, schools host Book Week events, stage school productions, attend drama performances, cultural institutes and organise arts festivals and competitions. Schools buy books, resources, theatre tickets and rights to stage theatre productions and musicals. They support creative industries by hiring venues for large arts events. Arts practitioners work as arts consultants, set designers, musicians, curriculum developers, teachers, teachers' assistants, conductors, event organisers and theatre/musical directors.

Some of the activities schools are involved in include:

1. Book Week: A week-long celebration of books and Australian children's authors and illustrators. Schools purchase books by Australian authors, run events such as book parades and host visits and talks from Australian authors and illustrators.
2. Arts festivals and competitions: Art festivals such as the 'DreamBIG Children's Festival' in South Australia celebrate a variety of arts through programs run in schools throughout South Australia. Students take part in workshops, exhibitions and performances during the festival. There are also a wide variety of competitions run throughout Australian schools for the arts, eg 'The Battle of the Bands' held annually in the Northern Territory. In NSW, 8,449 students took part in a state music festival.
3. Large-scale performing arts productions: Events such as the 'Schools Spectacular' run in NSW and Victorian public schools, 'Beat Festival' in Northern Territorian public schools and 'Creative Generation' in Queensland public schools are large scale arena-type productions which showcase the talents of students in the various performing arts eg vocal, dance, instrumental and drama arts. These productions are usually held in large venues and are run by departmental staff who are musical directors, set designers, musicians, composers etc. To give an idea of the scale of these events, in 2017 over 5,500 students took part in the NSW School Spectacular.
4. Reading challenges: Various states have their own Premier's Reading Challenge (eg NSW, South Australia and Victoria). These reading Challenges aim to promote a love of reading in students and to read more books and to also to read more widely. In NSW, the Challenge involves nearly 400,000 students and more than 2,600 Government, Catholic, Independent and home schools.
5. Music ensembles, orchestras and choirs: From a school-level to a state-level, students have the opportunity to be part of music ensembles, orchestras and choirs. These often culminate in end of year concert opportunities in larger venues. Students are taught and mentored in these groups by school music teachers and music tutors.
6. Visual art opportunities: Artists engage with students through programs such as 'Artists in Schools' run by the Tasmanian Department of Education. 'Home' run by the NSW Department of Education connects schools to local Aboriginal artists, community, language and culture.
7. Stage productions of dramas and musicals: Schools put on productions of theatre and musical works. They buy the rights to stage these performances and students learn all aspects of stage production eg performance, stage management, set design/construction

and costume design. They also attend professional productions of dramas and musicals that they are studying as part of their English courses.

8. Embedding of the arts within the school curriculum: The arts are an integral part of the school curriculum in Australian schools. The arts are studied in music, dance, drama and the visual arts classes. But the arts are also embedded throughout the curriculum. For example, students will study a variety of texts in different modes throughout the English syllabus eg novels, films, television shows. They also watch films and documentaries in Humanities and Social Science subjects.

Departments or administering bodies often obtain separate licences to host these activities (ie they are not relying on the statutory licences or exceptions in the Copyright Act).

### **Today's students are tomorrow's creators and consumers**

It's in everyone's interest to continue a strong focus on the arts in schools. As recognised in the Discussion Paper, allowing reasonable access to that creative content is critical to enhance learning and Australian culture, and driving new creativity and innovation.<sup>159</sup> A study undertaken by Sydney University and Australia Council for the Arts found that students who are involved in the arts have higher school motivation, engagement in class, self-esteem, and life satisfaction.<sup>160</sup> In *Arts Nation, an Australian Overview of Australian Arts (2015)*,<sup>161</sup> the Australia Council for the Arts noted that the youngest cohort in the study, 15 to 24 year olds, had the highest proportion of participation in the arts, with 65% of that age group creatively participating in the arts.

Schools, education departments and administrative bodies are and will continue investing in the arts sector's future, ensuring that today's students are tomorrow's creators and consumers. Nothing in the Exposure Draft Bill will harm this investment. Rather, these reforms will ensure, valuable education budgets can be better spent on enhancing arts and other education programs in schools.

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<sup>159</sup> Discussion Paper, p 5.

<sup>160</sup> Available at <https://www.sydney.edu.au/news-opinion/news/2013/09/27/participation-in-the-arts-aids-students-in-the-classroom-and-life.html#:~:text=Students%20who%20are%20involved%20in,wellbeing%20outcomes%20for%20young%20people.&text=enjoyment%20of%20school%2C%20and,educational%20aspirations.>

<sup>161</sup> Available at [https://australiacouncil.gov.au/advocacy-and-research/arts-nation-an-overview-of-australian-arts/.](https://australiacouncil.gov.au/advocacy-and-research/arts-nation-an-overview-of-australian-arts/)

## Attachment 15 – Draft guidelines on “reasonable steps” under proposed paragraph 113MA(2)(d)

Proposed subsection 113MA(2)(d) in schedule 4, item 7 of the Exposure Draft reads (emphasis added):

“(d) if the use is making the material available online (whether at the premises of the educational institution or on the internet)—the body administering the educational institution takes **reasonable steps to limit access to the material to persons taking part in the giving or receiving of the educational instruction;**”

CAG proposes the following guidelines on what would constitute “reasonable steps”:

Reasonable steps may include the following:

1. ensure that you only use copyright material where it is for the [educational purposes](#) of the school or for the purposes of [educational instruction](#)
2. only use a small amount of the copyright material where possible (ie extracts) not the whole of a [work](#), video or song etc
3. ensure the copyright material is only made available to those students who need it as part of their studies (eg via a username and password in a closed environment not on an open internet page) rather than making it available to the whole school
4. if not at the premises of the educational institution, instruct students, where possible, to only view the material when physically located in their homes, not in a community space or their parent’s workplace
5. make the copyright material “view only”, so that no further copies can be made or downloaded
6. only make copyright material available for the period of time for which it is needed
7. archive or disable access by students to the material once it is no longer needed.

Where possible attribute the copyright owner with as much of the following information as possible:<sup>162</sup>

- author and publisher names
- title, edition or date of publication
- ISBN or ISSN or if a broadcast, the channel it was copied from and
- full URL (if copying from a website)
- date the copy was made.

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<sup>162</sup> For more information and examples, see <https://smartcopying.edu.au/labelling-and-attributing/>.

Where possible and practicable, include the following notice with the material (eg at the beginning of a recording):

*This [video recording/recording/copyright material] has been made available to you in accordance with the educational use provisions under section 113MA in the Copyright Act. No further copies or sharing of the [video recording/recording/copyright material] should be made outside the class as the material [in the recording] may be the subject of copyright protection. Do not remove this notice [insert date recording was made available to students to access].*

The above guidelines are based off existing guidelines provided by the NCU to schools,<sup>163</sup> and were previously endorsed by the Government. CAG considers these to be sufficiently clear and workable without imposing any unnecessary administrative burden on teachers.

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<sup>163</sup> See <https://smartcopying.edu.au/remote-and-digital-learning-day-to-day-teaching-and-learning/>.

## Attachment 16 – CAG’s view on how to meet the criteria in subsection 249(4)(c)-(e)

Meeting criterion (c): the doing of the act by the person is in relation to a particular class of works or other subject-matter

It is apparent from the existing TPM exceptions in s 40 of the Copyright Regulations,<sup>164</sup> that the “particular class of works” can be defined by reference to works used by a particular type of user and/or for a particular use.

For example, an existing TPM exception permits educational institutions to circumvent TPMs pursuant to Division 4 of Part IVA of the Copyright Act.<sup>165</sup> In this case, the class of works to which the exception applies is all works falling within the limited uses and classes of user specified by Division 4 of Part IVA.

CAG submits that this approach to construction of the “particular class of works” requirement is entirely appropriate:

- **Alternative, more limited, approaches (for example, that have been adopted in the United States (US)) have been rejected in Australia.**

For example, the US Copyright Office (**USCO**) in a review of TPM exceptions, has previously adopted a very narrow construction of the equivalent criterion, declining to define a TPM exception by reference to works that will be used by particular users or in particular ways. This narrow construction was considered by the House of Representatives Standing Committee on Legal and Constitutional Affairs (**LACA**) and not adopted.

- **The Australian framework is different to the US – nothing compels or recommends the US approach.**

There is nothing in the Australia-US Free Trade Agreement (**AUSFTA**)<sup>166</sup> that obliges the Department to have regard to the USCO interpretation when determining whether the requirements set out in s 249(4)(d) of the Copyright Act have been satisfied. Indeed, as was noted by the LACA committee:

*The legislative framework and history surrounding copyright regulation in the US is not the legislative framework and history surrounding copyright regulation in Australia. ...*

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<sup>164</sup> *Copyright Regulations 2017 (Copyright Regulations)* s 40. Available at [http://classic.austlii.edu.au/au/legis/cth/consol\\_reg/cr2017242/](http://classic.austlii.edu.au/au/legis/cth/consol_reg/cr2017242/).

<sup>165</sup> *Ibid* s 40(1)(g).

<sup>166</sup> Australia-United States Free Trade Agreement (**AUSFTA**). Available at <https://www.dfat.gov.au/trade/agreements/in-force/ausfta/official-documents/Pages/official-documents>.

*Thus while the USCO interpretation may be perfectly correct in the US regulatory context it has no automatic congruence or weight with the Australian regulatory context.*<sup>167</sup>

In the existing TPM exceptions, it would appear Government has agreed with these comments by the LACA committee.

- **'Purpose' is relevant, when defining a class of works.**

As was noted in the LACA Report,<sup>168</sup> at the time Australia entered into the AUSFTA, the Government indicated that article 17.4, paragraph 7(e)(viii) of the AUSFTA<sup>169</sup> was intended to protect educational interests. This suggests that the *purpose* of the use must be taken into account where appropriate, and indeed we see that approach adopted in the existing TPM exceptions in s 40 of the Copyright Regulations.

- **Narrow construction undermines technological neutrality.**

a narrow approach to construction of this requirement would undermine the principle of technological neutrality, as well as existing copyright policy as reflected in the purpose-based approach adopted for other exceptions in the Copyright Act.

- **Nothing in the legislation recommends abandoning previous construction.**

There is nothing in the statutory language of s 249(4)(d) of the Copyright Act that requires or even suggests Government should depart from its previous approach to this issue and instead formulate classes of works according to the attributes of the works themselves, or exclude external criteria such as the type of user or the purpose of the use from consideration.

For these reasons, CAG submits that the “particular class of works” requirement is met whenever the class can sensibly be identified, and that defining the scope of the exception by reference to the way in which the works are used (eg educational purposes) or the users of the works (eg schools, universities) satisfies this requirement.

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<sup>167</sup> House of Representatives Standing Committee on Legal and Constitutional Affairs (**LACA**) Review of technological protection measures exceptions (**LACA Report**), para [3.60]. Available at [https://www.aph.gov.au/parliamentary\\_business/committees/house\\_of\\_representatives\\_committees?url=/laca/protecti-on/chapter3.htm](https://www.aph.gov.au/parliamentary_business/committees/house_of_representatives_committees?url=/laca/protecti-on/chapter3.htm).

<sup>168</sup> Ibid para [3.51].

<sup>169</sup> AUSFTA article 17.4, para 7(e)(viii). Available at <https://www.dfat.gov.au/about-us/publications/trade-investment/australia-united-states-free-trade-agreement/Pages/chapter-seventeen-intellectual-property-rights>.

Meeting criterion (d): an actual or likely adverse impact on the doing of the act by the person has been credibly demonstrated

In oral submissions to the Senate Select Committee that considered the AUSFTA, the Department of Foreign Affairs and Trade assured committee members that the proposed TPM provisions were:<sup>170</sup>

*“designed to assist copyright owners to enforce their copyright and target piracy, **not to stop people doing legitimate things with legitimate copyright material**”.*

CAG submits that this policy objective must remain of central importance in construing the criteria for new exceptions, including the “adverse impact” requirement in s 249(4)(d).

Regarding what amounts to an 'adverse impact', CAG submits:

- **Restricting a user's ability to choose amounts to an adverse impact.**

In the case of educational institutions, CAG submits the adverse impact requirement will be satisfied whenever use of a TPM restricts or is likely to restrict the choices available to those institutions when determining what technology they will use to engage in non-infringing uses. It isn't reasonable to suggest that a driver forced to forego use of his car is not adversely affected because a horse and buggy is still available.

By using TPMs on their works, rights holders can effectively force schools to choose between continuing to use out-dated technology to engage in non-infringing uses or refraining from using education-specific copyright exceptions such as the proposed 'show and tell' exception.

This prevents schools from taking full advantage of the Government's proposed amendments in the Exposure Draft Bill and it also hinders the Government from achieving their digital economy and national education goals and commitments, such as those outlined in the Declaration. This must amount to an adverse impact within the meaning of s 249(4)(d) of the Copyright Act.

- **No particular degree of adversity is mandated.**

There is nothing in paragraph 7(e)(viii) of the AUSFTA that warrants the Department inquiring into the *degree* of adverse impact.<sup>171</sup> The term 'adverse impact' is not defined

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<sup>170</sup> Ms Harmer quoted in Senate Select Committee on the Free Trade Agreement between Australia and the United States of America, Final Report on the Free Trade Agreement between Australia and the United States of America (August 2004), p 88. Available at [https://www.aph.gov.au/Parliamentary\\_Business/Committees/Senate/Former\\_Committees/freetrade/report/final/index](https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Former_Committees/freetrade/report/final/index).

<sup>171</sup> [AUSFTA article 17.4, para 7\(e\)\(viii\)](#).

under the AUSFTA. In accordance with the Vienna Convention, the words should be given their ordinary meaning.<sup>172</sup>

**Any adverse impact that can be credibly demonstrated to exist or be likely to exist should be sufficient to satisfy the criterion in this respect.**

- **An adverse impact is "likely" if it is reasonably foreseeable.**

As to what is sufficient evidence of a *likely* adverse impact, CAG submits that an adverse impact that is reasonably foreseeable is sufficient to satisfy the criterion in this respect.

CAG notes this was the construction preferred by the Department in its submission to the LACA Committee,<sup>173</sup> and it respectfully agrees with that proposition.

There is nothing in paragraph 7(e)(viii) of the AUSFTA that requires a higher threshold test than this.<sup>174</sup> In particular, there is nothing in paragraph 7(e)(viii) that requires the Department to follow (for example) the approach of the USCO, which has previously required a person requesting an additional exception to prove that the adverse impact alleged is more likely than not.

In fact, CAG's submissions above in Parts 2 and 3 of Part C of this submission are almost entirely limited to situations of *actual* adverse impact that have been experienced. However, there is a real likelihood such adversity will only increase for educational institutions in the immediate future, as the pressure to use new technologies to improve the educational experience continues to increase.

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<sup>172</sup> See [Vienna Convention on the Law of Treaties \(Vienna, 23 May 1969\)](https://treaties.un.org/pages/CTCTreaties.aspx?id=23&subid=A&clang=en) (**Vienna Convention**), United Nations, *Treaty Series*, vol 1155, No 18232, p 331, art 31, para [1]. Available at <https://treaties.un.org/pages/CTCTreaties.aspx?id=23&subid=A&clang=en>. See also LACA Report para [3.81], citing the AGD submission.

<sup>173</sup> See LACA Report para [3.53], citing the Attorney-General's Department submission No. 52 to the House of Representatives Standing Committee on Legal and Constitutional Affairs (**LACA**) Review of technological protection measures exceptions.

<sup>174</sup> [AUSFTA article 17.4, para 7\(e\)\(viii\)](#).

Meeting criterion (e): the adequacy of the protection and the effectiveness of the remedies provided by Subdivision A of Division 2A of Part V and Subdivision E of Division 5 of Part V would not be impaired if the doing of the act by the person were prescribed.

As was noted in the LACA Report, any TPM exception will “impair” the prohibition against circumvention to some extent, by definition.<sup>175</sup> Clearly this criterion does not require that a new TPM exception raise *no* impairment to the 'legal protection' or 'legal remedies' of the TPM regime. Instead, the criterion requires considering whether the overall *adequacy* of copyright protection, and the overall *effectiveness* of the anti-circumvention regime, will remain unimpaired if the new TPM exception is introduced.

CAG submits that this criterion will be met as a matter of course where considering TPM exceptions limited to institutional education users such as schools and their students (as is recommended here). Extensive **practical** and **legal** safeguards are imposed on their use of content under copyright exceptions and statutory licences, including:

- **extensive practical steps – protection implemented by schools.**

The NCU has developed best practice guidelines for schools when using digital copyright content, see **Attachment 15**.

- **appropriate legal safeguards – on use of copyright material under the TPM exceptions.**

The existing education TPM exceptions, and the new TPM exceptions requested in this submission, would only permit uses that fall within the corresponding existing or proposed copyright exceptions. Those exceptions are themselves constrained by numerous conditions that sharply limit the ability of any use to impair the adequacy or efficiency of the existing regime, including for example:

- *limiting permitted uses to specific users* – eg the ‘disability access’ exceptions only apply to persons with a disability. The statutory licence, the ‘special case’ exception and proposed ‘show and tell’ exception apply (or would apply) to bodies administering educational institutions. The proposed ‘exam’ exception applies to a teacher or student while it is requested that the proposed TPM exception for fair dealing for research or study would apply only to students enrolled at educational institutions.<sup>176</sup>
- *limiting the amount that can be copied* – eg the statutory licence limits copying to an amount that “does not unreasonably prejudice the legitimate interests of the

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<sup>175</sup> LACA Report paras [3.108] – [3.109].

<sup>176</sup> See Copyright Act division 2 of part IVA; s 200AB; division 4 of part IVA; Exposure Draft Bill proposed s 113MA; Exposure Draft Bill proposed s 113MB; Copyright Act ss 40 and 103C.

copyright owner”;<sup>177</sup> the ‘special case’ exception only permits copying what is needed for educational instruction.<sup>178</sup>

- *limiting copying by reference to commercial availability* – eg copying under the ‘special case’ exception or the ‘fair dealing for research or study’ exceptions both require considering whether the desired reproductions are commercially available.<sup>179</sup>
  - *limiting the purpose for which copying can occur* – eg the ‘disability access’ exceptions are for assisting those with a disability; the statutory licence limits copying to educational purposes; the proposed new ‘show and tell’ exception is for the purpose of educational instruction; proposed s 113MB applies to exams while the fair dealing exceptions are limited to research or study.<sup>180</sup>
  - imposing access restrictions – the relevant copyright exceptions impose various practical measures intended to preserve the adequacy and effectiveness of the existing regime – eg proposed s 113MA(2)(d) requires “the educational institution takes reasonable steps to limit access to the material to persons taking part in the giving or receiving of the educational instruction”.<sup>181</sup>
- **proven track record – experience with existing exceptions has shown no impairment.**

CAG understands that the existing education-related TPM exceptions have not resulted in widespread piracy of content. This demonstrates that the TPM exceptions of the kind requested would not impair the adequacy or effectiveness of the existing regime.

The smooth operation of the existing educational TPM exceptions provides significant evidence that educational TPM exceptions can and will exist alongside adequate and effective legal protection and remedies.

This experience is unsurprising, given schools' long history of sophisticated, measured and controlled use of copyright materials.

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<sup>177</sup> Copyright Act s 113P(d).

<sup>178</sup> Copyright Act s 200AB.

<sup>179</sup> Ibid.

<sup>180</sup> See Copyright Act division 2 of part IVA; s 200AB; division 4 of part IVA; Exposure Draft Bill proposed s 113MA; Exposure Draft Bill proposed s 113MB; Copyright Act ss 40 and 103C.

<sup>181</sup> Exposure Draft Bill proposed s 113MA(2)(d). This is in addition to best practice guidelines for schools developed by the NCU such as suggested labelling requirements and warning notices. See for example, <https://smartcopying.edu.au/guidelines/library-exam-and-disability-copying/disability-access-exceptions/>.