

THE COPYRIGHT ADVISORY GROUP TO THE  
SCHOOLS RESOURCING TASKFORCE

OF THE

MINISTERIAL COUNCIL ON EDUCATION EMPLOYMENT TRAINING  
AND YOUTH AFFAIRS

Submission to the Department of Broadband,  
Communications and the Digital Economy

Digital Economy Future Directions  
Consultation Paper

February 2009

## Digital Economy Future Directions Consultation Paper

The Copyright Advisory Group of the Schools Resourcing Taskforce (**CAG**) commends the Department of Broadband, Communications and the Digital Economy on the release of the Digital Economy Future Directions Consultation Paper. As identified by the Australian Government, “the effective use of networked information and communication technologies (**ICTs**), especially the internet is imperative to Australia's productivity growth and Australians' community participation in the digital economy”.

### Background

This submission is made on behalf of the Copyright Advisory Group to the Schools Resourcing Taskforce of the Ministerial Council on Education, Employment, Training and Youth Affairs Taskforce on Copyright (**CAG**).

CAG is responsible for copyright policy and administration for the Australian school and TAFE sector, including the management of obligations under educational statutory licences. CAG represents almost all primary and secondary school educational authorities in Australia. Its members include State and Territory Departments of Education, all Catholic Education Offices, the Independent Schools Council of Australia, and the great majority of TAFE colleges.

As noted in the Consultation Paper, digital and media literacy is crucial to the success of Australia's digital economy and the Digital Education Revolution is a fundamental element of developing Australians' digital and media literacy:

'The Digital Education Revolution, a major part of the Australian Government's Education Revolution, is a vital step in developing the digital literacy of Australian students. The aim of the program is to contribute sustainable and meaningful change to teaching and learning in Australian schools that will prepare students for further education, training and to live and work in a digital world and participate in the digital economy. The program includes the provision of grants to schools for ICT equipment for secondary students, support for broadband connections to Australian schools, collaboration with states and territories to ensure teachers have access to training in the use of ICT to enrich student learning, and online tools and resources to support the national curriculum. By ensuring that our students have access to the necessary technology, infrastructure and skills, we are equipping the next generation of Australians with the tools, knowledge and experience necessary to engage online.' (p11)

As the representatives of the great majority of schools in Australia, we are keen to see the development of these skills and the Digital Education Revolution supported in all aspects. It is in this capacity that we are providing this response to the Consultation Paper.

CAG is pleased to see that the Government is cognisant of how important it is that Australia's legal framework support the development of the digital economy.

There are two issues upon which we wish to comment:

- open availability of public sector information and the development of the OER movement; and
- the need for additional copyright law reform in particular the extension of the copyright safe harbour provisions and allowing appropriate flexibility for educational use of copyright materials

### **Open availability of public sector information**

CAG strongly supports the open availability of publicly funded, non-confidential public sector information. There are a myriad of benefits to making this information openly available.

Advantages of using the creative commons model have been identified in *Creative commons licensing for public sector information: Opportunities and pitfalls*<sup>1</sup> as follows:

- “Creative Commons licenses are ‘ready to use’, automated and standardised; public sector bodies do not need to draw up their own licenses but can benefit from the expertise brought together in CC.
- Use of the licenses, nationally and internationally, is expanding quickly, aiding recognition and acceptance.
- The licenses are standardized which adds to transparency for the user; at the same time however the licensor still has a fair amount of flexibility because the optional conditions of use, enables a public sector body to choose the license most suited to its information policy for particular data/content. The lack of transparency in public sector licenses is a much criticized phenomenon.
- The icons and the human readable Commons Deed are user friendly and give citizens (including businesses, interest groups) a much clearer indication of which rights are reserved and to what extent, and what kind of use is allowed.
- The licensing information is linked to the content, in the metadata of the website, its pages or individual files (e.g. as exchanged in peer-to-peer networks or other distribution outside the web), providing stable clarification of which documents (or works) fall under the license and which do not.
- Creative Commons (and iCommons) offers community based development of free tools to improve the infrastructure for licenses and standards, allowing public sector bodies to share knowledge and benefit from the work of others.

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<sup>1</sup> Creative commons licensing for public sector information: Opportunities and pitfalls Mireille van Eechoud Brenda van der Wal. Available at [http://learn.creativecommons.org/wp-content/uploads/2008/03/cc\\_publicsectorinformation\\_report\\_v3.pdf](http://learn.creativecommons.org/wp-content/uploads/2008/03/cc_publicsectorinformation_report_v3.pdf)

- The technical implementation of the license makes it easier to search for re-usable works. Creative Commons stimulates interoperability of its licenses with other open information licenses.”

CAG urges the Government to press for a whole of Government approach to making publicly funded, non-confidential information open for all to use. Such an approach would be consistent with a recent recommendations made in the beta version of the Report United Kingdom by the UK Power of Information Taskforce<sup>2</sup>. See below:

#### Recommendation 10

(a) Government should ensure that there is a uniform system of release and licensing applied across all public bodies; individual public bodies should not develop or vary the standard terms for their sector.

(b) The system should be a creative commons style approach, using a highly permissive licensing scheme that is transparent, easy to understand and easy to use, modelled on the ‘Click Use’ licence, subject to the caveats below....

#### Recommendation 11

Public information should be available at marginal cost, which in practice means for free. Exceptions to this rule should pass stringent tests to ensure that the national benefit is actually served by charging for information and thus limiting its reuse by exploiting the monopoly rights conferred by intellectual property regimes....

CAG suggests that a highly credible approach to openly available information is the creative commons licencing model and the most common licence used for open content.

For example the Australian Bureau of Statistics has licenced its website under Creative Common Attribution Only licence.

### **The Development of the OER movement.**

CAG also notes the increasing worldwide trend and support for open educational resources (OER).

OER is most commonly defined as digital or digitised materials offered freely and openly for educators, students and self learners to use and reuse for teaching, learning and research.

In essence, OER are educational resources that provide the freedom:

- to study the work and apply the knowledge from the work
- to re distribute copies, in whole or in part, of the work
- to make improvements and other changes and to disseminate modified copies

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<sup>2</sup> <http://poit.cabinetoffice.gov.uk/poit/>

## ***OER and the knowledge economy***

OER is understood to be an important element of policies aimed at leveraging education for the knowledge economy and society.

While educational and learning resources are of high intellectual property value, governments, institutions and individuals are increasingly sharing digital resources over the internet on an open and no cost basis. This radically new approach to sharing knowledge comes at a time where the effective use of knowledge is viewed as being key to economic success.

## ***OER as copyright management***

Teachers and students are now engaged in a culture of copy and paste, remix, collaboration and instant internet access. Copyright law does not contemplate these digital activities effectively hampering teacher and student activities in the digital environment.

Although most jurisdictions provide exceptions or compulsory licences to the copyright owner's monopoly rights, these exceptions are invariably restricted in scope and confined to particular circumstances and a specific jurisdiction.

Open content licensing is being increasingly adopted by the education sector as an important option in copyright management, distribution and use of educational resources. Creative Commons licences are by far the best known and most used licence for open content.

CAG is currently developing a practical guide for educators and students on how to find, use and licence under Creative Commons.

We also refer the Government to the following international OER reports and activities:

- Open e-Learning Content Observatory Services (OLCOS) Project<sup>3</sup>, - the OLCOS Roadmap 2012, a European Union funded project which provides an overview of current and future developments of OER and recommendations on how various challenges could be met.
- OECD report *Giving Knowledge for Free: The Emergence of Open Educational Resources*<sup>4</sup> which states "There are three arguments for governments to support [Open Educational Resources] projects:
  - They expand access to learning for everyone but most of all for non-traditional groups of students and thus widen participation in higher education.

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<sup>3</sup> <http://www.olcos.org>

<sup>4</sup> OECD Report *Giving Knowledge for Free: The Emergence of Open Educational Resources* at p90. Available at <http://www.oecd.org/dataoecd/35/7/38654317.pdf>

- They can be an efficient way of promoting lifelong learning for both the individual and the government.
- They can bridge the gap between non-formal, informal and formal learning.”
- The Cape Town Open Education Declaration is a statement of principle, strategy and commitment that was prepared by a wide group of education professionals interested in promoting open resources, technology and teaching practices.<sup>5</sup> The Declaration has been signed by “hundreds of learners, educators, trainers, authors, schools, colleges, universities, publishers, unions, professional societies, policymakers, governments, foundations and other kindred open education initiatives around the world.”

The Declaration is centred around three strategies (emphasis added):

1. Educators and learners: First, we encourage educators and learners to actively participate in the emerging open education movement. Participating includes: creating, using, adapting and improving open educational resources; embracing educational practices built around collaboration, discovery and the creation of knowledge; and inviting peers and colleagues to get involved. *Creating and using open resources should be considered integral to education and should be supported and rewarded accordingly.*

2. Open educational resources: Second, *we call on educators, authors, publishers and institutions to release their resources openly.* These open educational resources should be freely shared through open licences which facilitate use, revision, translation, improvement and sharing by anyone. Resources should be published in formats that facilitate both use and editing, and that accommodate a diversity of technical platforms. Whenever possible, they should also be available in formats that are accessible to people with disabilities and people who do not yet have access to the Internet.

3. Open education policy: Third, *governments, school boards, colleges and universities should make open education a high priority.* Ideally, *taxpayer-funded educational resources should be open educational resources.* Accreditation and adoption processes should give preference to open educational resources. Educational resource repositories should actively include and highlight open educational resources within their collections.<sup>1</sup>

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<sup>5</sup> <http://www.capetowndeclaration.org/>

## Need for Copyright Law Reform

There are a number of outstanding copyright law reform issues.

### ***Copyright safe harbours***

As noted in the Consultation Paper, the safe harbour provisions of the *Copyright Act 1968 (Cth)* (**Copyright Act**) and accompanying Copyright Regulations 1969 were introduced as a result of the Australia–United States Free Trade Agreement (**AUSFTA**). 'The present scheme does not apply to all types of online service providers. That is, of the vast array of digital economy companies that offer such online activities, many do not qualify as a 'carriage service provider', which is defined by reference to the *Telecommunications Act 1997*.'

Schools, school systems and TAFE institutes throughout Australia provide network access and online services to thousands of students and staff. This includes the provision of transmission services and caching facilities. Further, material is hosted on local networks and, through intranets, students and teachers are referred to various online locations.

However, as schools and TAFE institutes are not 'carriage service providers', they are excluded from being able to take advantage of the safe harbour provisions. This means that the remedies potentially available against a school or TAFE for copyright infringements that they do not control, initiate or direct are not limited even if they met the conditions of the scheme. It also means that there is a reduced incentive for schools and TAFE institutes to assist copyright owners to respond to alleged infringements of copyright.

CAG submits that schools and TAFE institutes should be classified as online service providers to whom the safe harbour provisions can apply. This is consistent with the objectives of the safe harbour provisions, as well as the AUSFTA.

The AUSFTA states that the following service providers may be covered by the safe harbour provisions:

- in relation to providing facilities or services for transmitting: those who provide 'transmission, routing, or connections for digital online communications without modification of their content between or among points specified by the user of material of the user's choosing'; and
- in relation to caching, hosting and referring: those who provide or operate facilities for online services or network access.

Schools, school systems and TAFE institutes are service providers within the meaning of the AUSFTA definitions.

CAG requests the Government to amend the Copyright Act to align the characterisation of service providers to whom the safe harbour provisions can apply with the definition of 'service provider' as set out in the AUSFTA.

### ***Appropriate flexibility for digital technologies***

CAG supports the responsible use of copyright material for educational purposes as well as fair remuneration for copyright owners. At the same time, CAG believes that it is imperative that Australia's copyright law is sufficiently flexible to support all Australians, including those within schools and TAFE institutes, to embrace new digital technologies and services.

### ***An exception for educational use of freely available Internet materials***

CAG strongly believes that, as a matter of policy, educational institutions should be able to use publicly available information on websites for non-commercial, educational purposes without having to pay copyright licence fees. At present, Australian schools and TAFEs may be required to pay for the copying of such material as a result of the broad application of the educational statutory licence in Part VB Division 2A of the Copyright Act. CAG does not consider it equitable or appropriate that Australian educational institutions have to pay for using material that anyone else, and educational institutions elsewhere in the world, can and do use for free.

CAG has proposed an amendment to the Copyright Act to allow the non-commercial use by educational institutions of material that is freely available online. However, it is proposed that the exception should *not* apply to:

- material protected by password, or only intended to be used on a subscription basis;
- any commercial use of the material by educational institutions; or
- use of material that infringes copyright.

CAG has written earlier to the Hon Julia Gillard, the Hon Robert McClelland and the Hon Kim Carr in relation to this matter. A copy of the detailed submission from the Australian Education Senior Officials Committee that was enclosed with the letters referred to above is at Attachment A.

This matter is of critical importance to the success of the Digital Education Revolution. As the law currently stands, the increased use of internet materials in schools and TAFE institutes will result in the increasing commitment of public funds for the payment of copyright fees for use of freely available internet material. Therefore, schools and TAFE institutes will have little option but to limit internet usage. This would reduce copyright costs but inhibit the use of new technologies in schools and TAFE institutes and impact upon the development of strong digital and media literacy skills for all Australian students.

This issue also has significant implications for the Australian Government's innovation agenda. The *Venturous Australia* report stated clearly that high quality human capital is critical to innovation and requires a commitment to high quality education. The current system, which effectively penalises the educational use of Internet materials, has the opposite effect – it hampers effective education and stymies innovation.

Given the above, this matter is of serious concern to the future of Australia's digital economy and must be resolved with the greatest urgency. The Australia 2020 Summit Final Report<sup>6</sup> noted that quality of education is intrinsically linked to long term national productivity. It is crucial that the intellectual capital of the future is supported to learn in the best possible environment with the best possible resources, including those available freely online.

It was agreed at the Australia 2020 Summit that "Australia needs to focus on ... (equipping) all Australians with the capacity to contribute and innovate through an education and training system that leads the world in excellence and inclusion." ICT, including Internet technologies, are already integral to education. Supporting the use of freely available Internet materials in schools and TAFE institutes is central to providing Australia's youth with the best possible education.

Further, the *ABC and SBS: Towards a digital future Discussion paper*<sup>7</sup> noted the suggestion of the ABC that a dedicated digital education channel (ABC5) be developed which could be streamed online and used in classrooms. CAG believes that, if this proposal is adopted, appropriate allowances must be made in the Copyright Act and the use of such an educational resource in classrooms should not attract copyright licence fees. The content will have been created with public funds and therefore should not later attract an indirect revenue source through copyright fees when the main objective is to further the education of Australia's youth.

### ***Orphan works and the interaction of copyright and contract***

Finally, CAG would like to take this opportunity to stress once again the importance of two further copyright issues:

1. The introduction of a regime for orphan works. It is of critical importance that a regime is developed with a mechanism for resolving the situation where educational institutions are required to pay copyright fees under statutory licences even where the copyright owner cannot be identified and paid. We would be pleased to provide further detail on this issue.
2. Clarification on whether contract will override specific statutory exceptions, particularly those in relation to educational use. In 2002 the Copyright Law Review Committee published a report on the relationship between copyright and contract. No response was ever issued to that report by the previous Government. The inter-relationship between copyright and contract and whether contractual provisions override statutory copyright exceptions remains an issue for educational institutions given their reliance on the statutory exceptions. Again, we would be very happy to provide further details.

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<sup>6</sup> [http://www.australia2020.gov.au/docs/final\\_report/2020\\_summit\\_report\\_1\\_productivity.doc](http://www.australia2020.gov.au/docs/final_report/2020_summit_report_1_productivity.doc)

<sup>7</sup> [http://www.dbcde.gov.au/media\\_broadcasting/consultation\\_and\\_submissions/abc\\_sbs\\_review/discussion\\_paper/abc\\_and\\_sbs\\_towards\\_a\\_digital\\_future\\_discussion\\_paper](http://www.dbcde.gov.au/media_broadcasting/consultation_and_submissions/abc_sbs_review/discussion_paper/abc_and_sbs_towards_a_digital_future_discussion_paper)

The above issues do not directly arise from, or are confined to, the digital environment. However, they become more pronounced as issues when operating in the digital world.

## **Conclusion**

CAG thanks the Australian Government for the opportunity to provide these comments in response to the Consultation Paper. We are facing very exciting times, where we have the opportunity to craft an Australia in which the future generations will engage in the global digital economy and drive Australia's success. CAG is pleased that the Government is engaging with all Australians to identify the course of action to lead Australia to continued success.

We would be pleased to discuss any aspect of this submission with you further. Please do not hesitate to contact me.

Yours sincerely

A handwritten signature in black ink, appearing to read 'Delia Browne', with a long horizontal flourish extending to the right.

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## **Submission by Australian Education Senior Officials Committee on Part VB of the *Copyright Act 1968* and educational copying of material from the Internet**

Australian Education Senior Officials Committee (**AESOC**) represents all government schools in Australia.

AESOC is concerned about the practical outcome of an aspect of the statutory electronic use scheme for educational institutions introduced into the *Copyright Act* in the *Copyright Amendment (Digital Agenda) Act* in 2000 (**Digital Agenda Act**).

While the amendments achieved significant improvements there is one area of immediate concern where the changes are creating difficulties and do not reflect the necessary balance between the need to create incentives for copyright owners and the need for users to obtain the benefit of appropriate exceptions. This relates to the use by Schools of materials which are freely available online.

AESOC strongly encourages the Government as a matter of urgency to amend the *Copyright Act 1968* (Cth) (**Act**) so that materials freely available on the Internet can be reproduced and communicated by educational institutions without infringing copyright in those works, and without making payments under the statutory licence contained in Part VB of the Act.

### 3. Executive Summary

- 3.1 AESOC submits that the Act should be amended to provide that the reproduction and communication by educational institutions for non commercial purposes of non infringing materials contained on the internet and which are not protected by technological protection measures will not constitute an infringement of copyright.
- 3.2 The copying and communication of these materials constitutes approximately 95% of all electronic materials copied and/or communicated by schools under Part VB of the Act in circumstances where the copyright owner has made these materials available for that widest possible dissemination without seeking remuneration and it is inappropriate that educational institutions are the sole organisations required to pay for the use of such materials where they do not seek to commercialise them.

- 3.3 The Canadian Government has recognised this need in introducing a Bill which makes provision for free use of such materials.
- 3.4 The proposal does not offend any of Australia's obligations under international treaties.
4. The History of Part VB of the *Copyright Act*
- 4.1 The provisions of Part VB of the Act have their genesis in the Report of the Copyright Law Committee on Reprographic Reproduction (Franki Report) which was published in October 1976.
- 4.2 The Franki Committee examined the then comparatively new phenomenon of reprographic reproduction or photocopying and was asked to '*recommend any alterations to Australian copyright law and any other measures the Committee may consider necessary to effect a proper balance of interests between the owners of copyright and the users of copyright material in respect of reproduction*'<sup>8</sup>.
- 4.3 The Committee approached the issue by considering whether its recommendations would be '*to the unreasonable prejudice of the economic or other legitimate interests of the author*'. At that time the Committee did not, of course, consider the issue in the context of electronic reproduction and communication, which was not a technology that was available.
- 4.4 The Franki Committee recommended that a statutory licence scheme should be introduced for copying performed in educational institutions.
- 4.5 The recommendations of the Franki Committee were largely implemented in the *Copyright Amendment Act 1980* (Cth). Subsequently various amendments were made revising the provisions and including them in a new Part VB of the Act. The last amendments were made by the *Copyright Amendment (Digital Agenda) Act (2000)* (Cth) (**Digital Agenda Act**).
- 4.6 The *Copyright Amendment (Digital Agenda) Act* introduced a new Division 2A into Part VB of the Act. This came into effect on 4 March 2001 and provided a structure permitting the reproduction and communication of works that existed in electronic

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<sup>8</sup> Spicer Report, para 1.01

form subject to compliance with provisions of Part VB. The new provisions mirrored the 'hard copy' provisions of the educational statutory licence. The only changes made were those necessary to reflect the need to cover the reproduction and the communication of copyright works in the digital environment.

## 5. Part VB's Application of Division 2A in Practice

- 5.1 At the time the Digital Agenda Act amendments were made, there had been no study to identify the value of electronic copying and communication or the nature of the material being copied and the source of that material. It was known that schools received some materials in electronic form, such as CD Roms and ebooks. The amendments to the Act reflected the use of this material and therefore largely replicated the provisions relating to copying of books and magazines.
- 5.2 In proceedings before the Copyright Tribunal which were heard in October 2000, relating to amounts which should be paid by schools for copying materials, Copyright Agency Limited (CAL) had sought payments for copying of materials which were either in hard copy or electronic form. The Tribunal declined to fix a rate for digital copying as there was insufficient evidence for the Tribunal to make a decision, even on an interim basis (*Copyright Agency Ltd v Queensland Department of Education and Others* 92002) 54 IPR 19).
- 5.3 In order to implement the Digital Agenda Act amendments, the Schools, together with CAL, worked together to create an appropriate survey to determine the nature of use of electronic material in schools.
- 5.4 The first pilot surveys were conducted in 2003. The pilot surveys, while revealing some information about practices in schools, did not reveal any meaningful information about volumes or the nature of materials.
- 5.5 It was not until June 2005 that the first official survey of electronic use took place. In 2005, 88 schools were surveyed. Since 2006, a survey involving 100 schools has been conducted each year.
- 5.6 The surveys have demonstrated that approximately 95% of material that was being used by schools is material freely available on the Internet. AESOC believes that that

the copying of this type of material was not given any detailed consideration when Division 2A of the Act was introduced.

6. Licences

6.1 In the absence of an agreed or arbitrated rate for copying under Division 2A of Part VB of the Act, and the fact that any rate would be likely to be based on the number of pages copied, the Schools were and remain anxious to ensure that copying volumes are accurately reflected. They therefore require that processing be performed with precision. This in turn requires CAL to use expensive resources to process the records to exclude material which would not be remunerable because it is licensed for use by educational institutions.

6.2 An analysis of survey material has disclosed that internet materials have varying terms and conditions. Some websites contain a statement that material can be copied freely. Other websites state 'copying not permitted'. In 2006 the Schools commissioned research from survey records to ascertain the types of restrictions that were placed on materials made available on the website. The research identified the following common 'statements' accompanying material that was available on the internet:

- (a) Personal Use;
- (b) Non commercial use;
- (c) Use in your organisation;
- (d) Free Copying;
- (e) Free for Education;
- (f) No terms and conditions but containing a copyright statement;
- (g) No terms and conditions;
- (h) Copying not permitted; and
- (i) Password protected.

CAL accepted these classifications as being reflective of the factual position.

6.3 CAL and the Schools subsequently agreed that records classified as:

- (a) Non commercial use;
- (b) Use in your organisation;
- (c) Free Copying; and
- (d) Free for Education,

would be excluded from determinations of the volume of potentially remunerable copying.

6.4 CAL is seeking substantial payments for the use of materials which are not excluded.

6.5 It follows from the above that the mere addition of a copyright notice (©) or the failure to make any statement as to copying will result in those reproductions being included as remunerable copying.

6.6 As a result of this the National Copyright Unit of the Schools Resourcing Taskforce has contacted various organisations with commonly used websites to obtain express licences for schools to copy and communicate materials from their websites. However this is a time consuming process and often requires detailed explanation of why permission is sought. Some of the organisations contacted expressed surprise that it would even be contemplated that they should receive payment.

6.7 AESOC understands that CAL has experienced significant difficulties in determining the applicable terms and conditions applying to a particular website, or materials contained on the website. For example the website may have a copyright symbol (©) or a statement stating '*Copying not Permitted*', but documents contained on the site may have a licence permitting copying for educational purposes. In order for CAL to determine which material is remunerable it is necessary for its employees to undertake considerable research into websites from which copies have been made. This is a very labour intensive exercise and is prone to error.

## 7. Possible Value of Copying

7.1 CAL is currently claiming that the Schools should pay CAL the same amounts for materials copied under the Division 2A (including internet materials which are freely available) as under the 'hard copy' licence which are approximately:

- Text: 5 cents per page;
- Artistic works: 8 cents per page;
- Poetry, Short Stories and Plays: 10 cents per page;
- Overhead transparencies, slides and permanent display: 53 cents per page.

7.2 AESOC takes the view that the amount which should be paid for copies which are freely available on the Internet is nil or virtually nil. In AESOC's view, exclusions to this approach are websites that are protected and cannot be accessed without permission.

7.3 For completeness, AESOC wishes to make it clear that it does not dispute that materials which are purchased and contained on devices such as CD Roms (ie not freely available online) may attract remuneration under the licence.

7.4 AESOC believes that materials freely available on the Internet should not attract remuneration for non commercial educational use for reasons including:

- (a) website materials, which comprise by far the majority of electronic materials recorded as part of the survey process, are by their nature made publicly available (unless of course the materials are password protected);
- (b) a number of the websites encourage use of the particular record, either by schools or by the public generally;
- (c) the content of most materials likely to be used by schools suggest that remuneration is not likely to be sought for their use by schools either because of the type of information copied, and/or the identity of the author or owner;

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- (d) the further dissemination of this material by schools on a non commercial basis appears to accord with the copyright owner's desire for wide and freely available access;
- (e) provided the educational institution does not charge for these materials or making commercial use of them, the educational institution is not profiting from the use of the materials;
- (f) as the person or organisation is not charging for access to the materials, use by educational institutions' failure to make a payment will not bring about a lack of incentive to create materials;
- (g) it is likely that CAL would have extreme difficulty in distributing any money collected because of the difficulty of identifying the copyright owner and the large number of owners to whom distributors would need to be made;
- (h) payment of a fee would unjustly prejudice schools (as opposed to Australians generally) that wish to use this material. Educational institutions would be the only bodies paying licence fees for the non commercial use of such materials; and
- (i) even if the copies were accorded some remunerable value, that amount is likely to be so small that it would not justify the collection by CAL under the EUS.

## 8. Proposed Solution

8.1 AESOC has noted with interest the proposed amendments to the *Canadian Copyright Act* which recognise the need to address this issue. Section 30.04 of Bill C-61 provides that it will not be an infringement of copyright for an educational institution to reproduce, communicate or publicly perform a work, subject to complying with the provisions of that section.

8.2 An important requirement is that the source of the work and, if given, the name of the author must be mentioned. Also, the draft provision does not apply to works that are protected by technological protection measures or which are likely to be infringing. AESOC agrees that these are appropriate exclusions.

- 8.3 AESOC strongly believes that a similar exception is needed in Australia.
- 8.4 AESOC proposes that the circumstances where the exception does not apply shall be:
- if works are protected by technological protection measures,
  - the works are infringing, or
  - the educational institution is making a commercial use of the works.
- 8.5 AESOC notes that the Canadian Bill provides that the exception should not apply if there is a clearly visible notice (not just a copyright symbol) posted on the Internet site prohibiting the use. AESOC submits that this exception is not appropriate to be included in Australia as:
- Australia's experience to date shows that it would be very difficult to police and unworkable in practice, and
  - if a copyright owner wishes to protect their work they can employ a login/password approach or other technological protection measure to prevent their work from being copied or communicated under the exception.
- 8.6 AESOC notes that there are a number of websites whose revenue model is based on advertising and which make no payment for access. The proposed change to the Act would not affect this revenue model as a copyright exception would make no difference to the 'hits' on a website than under the current regime.
9. The 'Three Step Test'
- 9.1 In order to comply with Art. 13 the Agreement on Trade-Related Aspects of Intellectual Property Rights (**TRIPS Agreement**) and Art. 9 (2) the Berne Convention for the Protection of Literary and Artistic Works (**Berne Convention**), it is necessary for the requirements of the 'three step test' to be met. The 'three step test' is the central instrument in international copyright law to examine the legitimacy of national copyright limitations and exceptions. It requires the proposed exception:
- (a) to be a certain special case;

- (b) not to conflict with the normal exploitation of the work; and
- (c) not to unreasonably prejudice the legitimate interests of the right holder.

Over the years there has been considerable debate about the interpretation of the Three Step Test. There had been a tendency in some jurisdictions for the test to be restrictively interpreted and the three steps of the test to be considered cumulative. On 20 July 2008, 30 copyright experts signed a declaration<sup>9</sup> (**Declaration**) in which they advocated a more balanced interpretation of the test be applied. The Declaration states that the three steps should be considered together and as a whole in a comprehensive overall assessment '*rather than a step-by-step application that is usual, but misleading, description implies. No single step is to be prioritised. As a result the test does not undermine the necessary balancing of interests between different classes of right holders or between different right holders and the larger general public.*'

- 9.2 The Declaration maintains that it is important for third party interests to be taken into account when applying the Three Step Test, as well as the interests of the copyright owner. A copy of the Declaration is attached.
- 9.3 AESOC is of the view that the proposed exception is more than adequate to meet the requirements of the Three Step Test, even if a more restrictive interpretation is applied. The reasons for this are set out more particularly below.

### **First Step**

- 9.4 The exception proposed is a **certain special case** in the sense that it is clearly defined and narrow in its scope and reach. The WTO Panel on the US 'Homestyle Exception' (15 June 2000, at p 33) determined that the first step should be interpreted as follows:
  - '*certain*' means '*that ... an exception or limitation in national law must be clearly defined. However, there is no need to identify explicitly each and every possible situation to which the exception could apply, provided that the scope of the exception is known and particularised. This guarantees a sufficient degree of legal certainty.*'

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<sup>9</sup> The Declaration is available at [http://www.ip.mpg.de/ww/en/pub/news/declaration\\_on\\_the\\_three\\_step\\_.cfm](http://www.ip.mpg.de/ww/en/pub/news/declaration_on_the_three_step_.cfm)

- 'Special'- *'an exception or limitation should be narrow in a quantitative as well as in a qualitative sense. This suggests a narrow scope as well as an exception or distinctive objective.'*

9.5 This step requires that all aspects of the proposed exception, such as the rights and works covered, the persons who may take advantage of it, and the purpose of the exception, are determined. The exception proposed would precisely define the rights that are covered, as it is limited to the reproduction or communication of a work. They would be clearly defined rights which are narrow in both a qualitative and quantitative sense. The exception proposed meets the requirements also in this respect. Furthermore, the exception proposed also defines the circle of persons that may take advantage of it, namely educational institutions, such as schools and universities. They would only be allowed to copy or communicate the work for their students and then only for educational purposes.

### **Second Step**

- 9.6 The exception proposed **does not conflict with the normal exploitation of the work**. The WTO Panel Decision analysed in the 'Homestyle case' the meaning of 'exploitation' and 'normal'.
- 9.7 The WTO Panel stated that *'exploitation ... refers to the activity by which copyright owners employ the exclusive rights conferred on them to extract economic value from their rights to those works'*. In regard to the meaning of "normal" the WTO Panel stated everything *'what is regular, usual, typical or ordinary'* (empirical nature) as normal as well as everything that is *'conforming to a type or standard'* (normative nature). The WTO pointed out the following at page 48 of its decision: *'In contrast, exceptions or limitations would be presumed not to conflict with a normal exploitation of works if they are confined to a scope or degree that does not enter into economic competition with non-exempted uses'*.
- 9.8 In applying these interpretations for the exception proposed, it is clear that there is no conflict with a normal exploitation of the works contained on websites. The fact that these materials are made freely available on the Internet without any password control or similar technological protection measure which would prevent use suggests that further dissemination by schools, on a non commercial basis is likely to accord with

the author's desire to obtain wide dissemination and access to the materials. Freely accessible website content is usually associated with the provision of material for information, advertising, promotion or debate.

- 9.9 In addition, the copyright owner always has the option on implementing a login/password control or other technological protection measure.

### **Third Step**

- 9.10 The exception proposed **does not unreasonably prejudice the legitimate interests** of the owner of the copyright. The WTO Panel held in the 'Homestyle case' that the term 'legitimate' refers to the lawfulness of the author's use and the normative aspect of protecting interests that are justifiable in light of the objectives that underlie the protection of exclusive rights. 'Interests' commonly includes a legal right or title to a property or to the use or benefit of a property.
- 9.11 In this context, the moral rights of an author of a work are relevant and provided acknowledgment is made, where the author and the source is identifiable, there will be no prejudice to these legitimate interests.
- 9.12 The legitimate interests of an author or right holder include also the right to restrain others from using their work and possibly be paid fair remuneration. In this context, it is difficult to see how the author or right holder will be unreasonably prejudiced by the exception proposed. "Unreasonable" has the connotation of not being '*within the limits of reason, not greatly less or more than might be thought likely or appropriate*' or '*of fair, average or considerable amount or size*'. The WTO Panel took the view that 'not reasonable' connoted a slightly stricter threshold than 'reasonable'.
- 9.13 In this context and in the context of the text as a whole if the approach of the Declaration is to be followed, it is important to consider the public benefit. The exception will allow access without cost to a large range of educational institutions of material which is freely available to the individual students of these institutions. It will promote and encourage the use by students of a wide range of sources, which is a significant public benefit. This must be weighed against the fact that the author would normally receive no remuneration for this use.

- 9.14 The provisions limiting use to educational institutions and preventing them from commercially exploiting such materials would prevent those institutions from 'riding on the backs' of the endeavours of authors to the detriment of their legitimate interests. Authors wishing to receive remuneration for their online works are free to do so by installing a pay-per-view solution or password protected area.
10. Conclusion
- 10.1 There are strong arguments from a public policy perspective that educational institutions should not be penalised for using materials that others can, and do, use freely.
- 10.2 It is clear that the value of electronic materials made available on the Internet for free would be nil or virtually nil, and the cost of surveying and collecting royalties for such use would far outweigh any value that could be attributed to them.
- 10.3 The exception proposed is in accord with accepted international practice and does not contravene either TRIPS or Berne.
- 10.4 It is submitted that the proposed amendments should be enacted without delay.