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**Educational use and the Internet – does Australian
copyright law work in the web environment?**

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The Digital Education Revolution

- Over the past 20 years the World Wide Web has revolutionised the way we live. It has also revolutionised the way we educate our children. We have moved from an analogue world of textbooks and blackboards to a digital world of websites, interactive whiteboards, podcasts/vodcasts, wikis, blogs, iPhones and global positioning systems - all these technologies are starting to be used in the classroom.
- 21st century classrooms use resources never imagined when we were at school. The capacity for sharing of ideas and collaboration between students in the same classroom, between classrooms in the same school, and between classrooms in different schools in Australia or around the world, is incredible.
- The Australian Government is supporting the growth of education in the 21st century through the 'Digital Education Revolution'. As stated in the Government's Digital Economy Future Directions Consultation Paper, the DER:

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

Copyright and the classroom - the statutory educational licences

- In the 20th century, the two most important technological advances which assisted educators were the photocopier and video recorder.

- In simple terms, the photocopier enabled teachers to copy extracts from books and other hard copy publications and provide multiple copies to the classroom. However making such copies not only infringed copyright of the original material, it also deprived the copyright owners from income from sales and licencing income. Rightly this was seen to be unfair due to the time, labour and expense of the copyright owner to produce and disseminate copies of the work.
- The video recorder allowed us to tape television programs to view later at a more convenient time. Teachers also availed themselves of this new technology by taping the news, documentaries and other programs to show in the classroom for educational purposes. Such copying was not permitted by the Copyright Act.
- Australia responded to the situation by introducing a compulsory statutory educational licensing scheme. The statutory licence for print copying was enacted in 1980, providing a solution to the needs of educational institutions to be able to take advantage of the new technologies of the time while at the same time rewarding the author of a creative work. The licence to permit copying of broadcasts was enacted in 1989.

The statutory licences provided a balance between:

- (i) the public interest in ensuring a free flow of information in education, and
- (ii) the private interests of copyright owners

They protected an existing market threatened by technological change.

- In 2000, the statutory licences were extended to cover electronic reproductions and communications of literary and artistic works and free to air broadcasts. The aim was to make the Copyright Act technology neutral and to ensure copyright owners had the first opportunity to digitise and exploit their works.

Scope and operation of the Statutory Educational Licences

- The statutory licences **work well** in the analogue world. They permit educational institutions to copy and communicate copyright material for educational purposes while at the same time ensuring that copyright owners receive remuneration for the use of their material.
- Ostensibly, the statutory licences also **work well** in the digital world for creators and publishers of e-books, CD-ROMs and other non-web based electronic resources, enabling them to receive copyright licence fees for educational use of their material. An example would be where an analogue book is scanned by a teacher for their class or a digital copy is made of an off-air television broadcast to view in a class or place in a library.
- But the broad nature of the Part VB statutory licence means that it potentially applies to everything on the internet. It can apply even though a website owner had no intention that anyone would ever pay for copying information made available on their website. It can result in Australian educational institutions paying licence fees to website owners anywhere in the world, where an Australian educational institution has printed, saved, downloaded,

networked, displayed or projected material from a publicly available website for non commercial educational purposes.

- Similarly the Part VA licence now covers podcasts, vodcasts or other free downloads of free-to-air broadcasts made freely available by the broadcaster to the general public.

Other educational exceptions

- In 2007, a range of new exceptions were introduced into Australia copyright legislation.
- Most notably for education, section 28 was extended to allow schools to communicate material for free into the classroom provided it was for educational purposes and a new stand-alone exception section 200AB (Flexible Dealing) was introduced.
- Section 200 AB allows educational institutions to copy and communicate material for the purpose of giving educational instruction. It operates where there is no statutory or voluntary licence in place. Section 200AB incorporates the three step test in the drafting of the section. Section 200AB enables educational institutions to make a risk assessment of whether an act would be permissible, among other things, if the use does not conflict with the normal exploitation of the work or would unreasonably prejudice the rights of the copyright owner.
- Section 200 AB cannot apply to internet materials where the statutory licences apply. However the statutory licences go much further than website owners often realise and intend. The majority would be unaware of the statutory licences. The statutory licences actually introduce costs for the use of internet material that would otherwise not exist.
- Australian educational institutions are the only ones that have to pay for these materials. Internet materials are generally freely available to educational institutions everywhere else in the world and, in fact, to anyone else in the world. Australian educational institutions are the only ones that have to pay for material freely available to educational institutions anywhere else in the world or to anyone else in the world. In the case of internet materials, it is not a matter of protecting an existing copyright owner's market. Instead the statutory licence is the only thing that creates an expectation of payment.

What has changed?

- The internet now provides access to a vast and expanding pool of educational resources and Web 2.0 and 3.0 technologies greatly facilitate the abilities of educators and students to create and modify educational resources and to share them using the internet.

- The nature of the World Wide Web has evolved. It began as a network that was created by universities for sharing information for research and education and on which commercial use was forbidden until 1988.
- In 2000 the World Wide Web was hardly in use in Australia. Ownership and access to computers was not common in the average household.
- In Australian schools, computers were usually confined to computer labs and computer access and use by students and teachers was pretty dismal. Most schools had dial-up access to the internet which was slow and limited in bandwidth.
- Also at that time, access to educational resources was limited and such educational resources were costly to create and disseminate. For example, the number of books you would produce would depend on the number needed to cover production costs and turn a profit. If the book sold and there was sufficient demand, another print run would occur.
- Fast forward nine years, and most homes and schools have computers and high speed internet access, most do their banking, pay their bills and book their holidays online.
- Also, the internet and new technologies have removed the prohibitive costs of production and dissemination of information. Anyone can establish a website and publish content online. The costs of production and dissemination online are marginal. They are a fraction of the costs experienced in the analogue world.
- The whole purpose of posting information on a website is to make it freely available. If you do not want it to be freely available, you protect it in some way, by password or other secure access.
- In our view the majority of website owners around the world are not seeking direct remuneration for the use of the information posted on their website. Millions of people world wide access and use websites on a non-commercial basis. No-one pays for this use – except at present the Australian education sector.

The Statutory Educational Licences and the World Wide Web – a misfit?

- The fact that the education sector is increasingly coming to the view that the statutory licences do not work well in the context of the Internet and World Wide Web does not mean that we do not support responsible use of copyright material for educational purposes, as well as fair remuneration for copyright owners.
- We do support the Part VB statutory licence for appropriate materials – and this includes CD ROMs and eBooks, which were the predominant electronic materials being used at the time the licence was extended. We also continue to support the Part VA statutory licence for off-air copying of television and radio broadcasts for educational purposes.

- The extension of the statutory licences in 2000 has meant that the millions of website owners in the world who put material on their websites for free public consumption, with no expectation of ever receiving a brass razoo in copyright royalties, could receive a windfall at the expense of Australian educational institutions and Australian taxpayers whose taxes fund the education system. It is at this point that one must ask whether the 'balance' intended by the enactment of the statutory licences is seriously out of wack. Of course this assumes that such owners can be tracked down. If not, it is a windfall for the owners that can be identified. One suspects that if a website owner in Germany was tracked down and told by an Australian collecting society that they had a cheque of \$100 for him/her provided they joined, they may think it was a scam.
- With regard to the extension of Part VA to cover free-to-air broadcasts made available on line, although this extension only covers a limited pool of material (presently broadcasters find it hard to obtain rights to third party content to make broadcast available online), it does beg the question: why are Australian schools paying for educational, non commercial use of online free to air broadcasts and the general public is not?
- No other country in the world has enacted legislation that requires educational institutions to pay to use material for educational purposes from publicly available websites.
- As there is no international reciprocal arrangement with overseas collecting societies, this means Australian educational institutions are paying overseas website owners for the educational use of their material made available from publicly available websites. It also means that non Australian educational institutions copying and communicating material for educational purposes from Australian websites do not pay and are not liable to pay equivalent licence fees due to the lack of reciprocal agreements.
- The lack of such a reciprocal agreement in relation to educational use of publicly available internet material does not appear to be a priority issue at the World Intellectual Property Organisation, nor highlighted in the recent UK Gower Report or European Union Green Paper on Copyright in the Knowledge Economy. In fact, such use appears not to be a huge concern to website copyright owners and perhaps reinforces our view that there is no market, apart from the market created by Australia's statutory licences.
- The statutory licences which aimed to increase educational access and use of materials will have the opposite effect as increased use of the internet will also lead to increasing commitment of public funds to pay copyright fees to website owners around the world. Australian schools will have little option but to limit access to the internet by its teachers and students. Limiting use of the internet would reduce copyright fees but also the teaching and the use of new technologies. This outcome would not be in Australia's best interests, but may be necessary because of the broad application of the statutory licence.
- Surely the small number of creators and copyright owners, who expect remuneration for educational use of their materials made available online, could do so by some other means rather than relying on a statutory educational licence that has general application to almost everything on the internet.

Is reform needed?

- In the view of Australia's educational institutions, the answer to this question is an emphatic 'yes'!
- Schools, TAFEs and universities believe 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 fees and that such information should be excluded from the statutory licences.
- We propose a new exception be introduced that allows educational institutions to freely copy and communicate materials from publicly available websites for educational purposes provided that the :
 - Source is attributed
 - Material is not infringing
 - Material is not protected by password or other secure means
- This exception would not affect the underlying copyright and the source of the material would still need to be appropriately acknowledged whenever the material is used for educational purposes. It should clearly not apply to 'pirated' copyright material such as music and movies uploaded to the Web without the copyright owner's authorisation. Nor should it cover copyright material where access is by subscription or protected by a password or some other means.
- The scope of the proposed exception is extremely limited. We are requesting an exception to material made available on the Web for free non-commercial use. The exception would allow educational institutions to copy and communicate such material for non-commercial educational purposes. It will only apply to educational institutions and it is only for the educational purposes of the Institution.
- Schools believe that a system that effectively penalises educational use of website materials is contrary to the goals of effective education and stymies innovation. The issue presents a real threat to the Australian Government's Digital Education Revolution initiative and the Government's innovation agenda.
- There is a genuine concern that the statutory licence fees will increase to unsustainable levels. For example, in 1999 Australian Schools paid around \$9.1 million under the Part VB (photocopying) licence. In 2008, Schools paid around \$50 million under Part VB (photocopying).
- In addition, since 2005, Australian Schools have participated in an Electronic Use Scheme (EUS) survey where a select number of schools record their electronic copying and recording of literary and artistic works and pay an interim rate to the Copyright Agency Limited under the Part VB licence. In 2005, neither CAL nor the Schools had any idea what schools copied and communicated electronically.
- The data collected from the survey shows on average that approximately 90% of the pages copied and communicated by schools are from publicly available websites. Between 5% to 10% of pages are copied and communicated from CD ROMs and eBooks.

- In 2005, the Copyright Agency Limited initiated proceedings against Schools in the Copyright Tribunal on a number of issues, one of which is the EUS rate to be payable by Schools.
- Although the Copyright Tribunal proceedings are still active. The Australian Education Senior Officials Committee (**AESOC**), a Committee of CEOs for education and training from all Australian jurisdictions, has written to the Australian Government on behalf of Australian Schools and TAFEs seeking an amendment to the Copyright Act to exclude material made freely available on the Internet from the educational statutory licences in the Act.
- Some may ask why not wait for the Copyright Tribunal to determine the equitable remuneration payable under the licence. But to do so, assumes copying and communicating publicly available material from internet has a value. We say it doesn't.
- AESOC wishes the Federal Government to review the policy behind the general application of statutory licences to the internet. Examination of policy issues is not one of the functions of the Copyright Tribunal – it is the Government's function.
- AESOC's submission has been endorsed by Universities Australia, Australian Digital Alliance, FLAG, Curriculum Corporation, the National Catholic Education Commission, Independent Schools Council of Australia and all the State and Territory Ministers of Education.
- Copies of the submission have also been provided to key stakeholders who are likely to be impacted by AESOC's proposal. We are open to discussing our proposal with copyright rights holders and addressing where we can, their concerns.

Australia's international treaty obligations

- As part of that submission, we have naturally considered the Three Step Test, which 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. In 2008, 30 copyright experts signed a declaration¹ (**Declaration**) in which they advocated a more balanced interpretation of the test be applied. The Declaration states that the three steps should be

¹ The Declaration is available at http://www.ip.mpg.de/ww/en/pub/news/declaration_on_the_three_step_.cfm

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

- The Declaration maintains that it is important for third party interests to be taken into account when applying the Three Step Test, as well as the interests of the copyright owner.
- We believe 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.

Potential concerns with the reform

Loss of revenue to website owners, which may include some authors

- Some Websites derive revenue from advertising. This will be pretty much unaffected. One of the most common uses of websites in classrooms today is to open a site using an interactive whiteboard, engage with students and 'mark up' that site, and perhaps print a copy. The website has still been visited, the hit has been recorded and the advertising revenue may flow.
- New business models are emerging in the new link economy. "Smart players are providing embeddable players allowing their best stuff to be posted all over the web, accompanied by links and ads that help generate additional traffic and revenue".²
- Some Australian creators have made their works available online with the expectation of receiving statutory licence income from the education sector. The AESOC proposal does not preclude creators from receiving an income from online exploitation of their works. The question is whether it is appropriate for a small number of creators to expect that such income be derived from statutory licences of general application. There are other options available such as direct licensing subscriptions.
- There are opportunities to provide licence solutions direct to the education sector. One example is www.audionetworks.com. This company provides affordable music for broadcasters, production houses, education and the general public.
- In practice, website operators frequently *encourage* use of their material in ways that are effectively an exercise of their copyright rights. For example, the Sydney Morning Herald website, against each article, includes buttons for 'Email this story', 'Share/Bookmark story' and 'Print this story'. If schools do this, they pay for it.

²The Debate over online news: It is the Consumer Stupid http://www.huffingtonpost.com/arianna-huffington/the-debate-over-online-ne_b_185309.html

Concern: loss of revenue from broadcasters, which may include some producers

- Australian broadcasters, producers and directors receive income from Part VA. The AESOC proposal applies only to free to air broadcasts made available for free download to the general public and at present the pool of material is extremely limited.
- Broadcasters are introducing new on demand services such as catch up television where you can either view or download an episode you missed from the Broadcaster's website. Channel Nine encourages viewers to download program episodes and share them with others using bit torrent technology³. Presumably DVDs of the same programs will also be available to purchase.
- If Broadcasters are encouraging sharing and dissemination of online programs to the general public, why then is the education sector separately required to pay and fund this activity.
- We note that one of the mandates of public broadcasters is to educate all Australians:
 - SBS – the SBS Act provides that a principal function of SBS is to provide services that educate all Australians⁴.
 - ABC – the Australian Broadcasting Corporation Act provides that the ABC's functions include providing programs of an educational nature⁵.
- It makes more sense to fund Australia's public broadcasters and program makers to make available educational material rather than have them rely on indirect funding via the statutory licences
- Overseas broadcasters make available amazing educational resources online including vodcasts and podcasts. Some like the BBC allow educational use of their material in the UK only. US broadcasters such as NBC and PBS make their material available to the entire world. We can use overseas broadcaster's material for free under section 200 AB but if Australian schools access similar material from an Australian Broadcaster, we are required to pay.

Concern: that content owners will stop putting their material online

- In the old days, the traditional dissemination of information was controlled by the copyright owners. You obtained the information when they chose, in the format they chose, and at what price they demanded.
- The internet has created a fundamental shift in how information is disseminated. It is a user dominated environment. For example, online newspapers regularly include user-generated content and invite comments from their readers which are posted online.

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<http://video.ninemsn.com.au/catchuptv/section.aspx?sectionid=2868§ionname=catchuptv&subsectionid=150543&subsectionname=ladette2lady"%20target="new>

⁴ Section 6 (2)(e) Special Broadcasting Services Act 1991

⁵ Section 6 (1) (a) (ii) Charter of the Corporation, Australian Broadcasting Corporation Act 1983.

- No other country has a statutory licence for educational use of online materials and this has not caused the internet to suddenly dry up. More and more material is being generated and made available on line every day.
- Copyright owners have the ability to use technology to protect their works online and to charge fees to access and use their online works. For example Crikey.com and the Australian Financial Review.

Concern: that it opens the floodgates to schools distributing infringing content

- AESOC's proposal would not apply to the use of infringing content.
- In addition, we are working with the copyright industry to produce teaching resources on copyright to students. The education program includes promoting the use of legitimate online material.

Conclusion

- The Australian education sector is not anti copyright. The statutory licences work well in the analogue world and for digital products such as CD ROMs and eBooks. A model that works well in some contexts does not necessarily translate to all spheres. It is a case of whether it is a good fit and meets the current policy objectives. It is a case of what is fair and reasonable.
- Technology has removed many of the barriers of entry to content production. Technology also provides affordable business solutions to online licensing and sales.
- This is a public policy issue of significant public interest.
- It is in Australia's best interest to ensure that our students are digitally literate and able to live and work in a digital world and participate in a digital economy.
- It is important to get this right now. Internet use will only increase with time. This is a good thing. If Australian schools have to pay copyright licences fees for copying and communicating website material that is freely available to everyone else in the world, then the costs to schools and therefore governments, parents and taxpayers generally will rise exponentially and become prohibitive.
- Is the general application of the statutory educational licences to the internet, the right policy solution? We think not.