

# Copyright Advisory Group to the COAG Education Council

## Submission in response to the Productivity Commission Draft Report Intellectual Property Arrangements

### Executive summary

Australia's copyright laws operate as a serious roadblock to preparing children to be the creators and innovators of the future.

Government policy and community expectations require schools to take an increasing role in STEM education, industry collaboration, and equipping students with the digital skills they need to be successful in the workforce of the future. However, Australia's copyright laws - designed in the age of classroom-based "chalk and talk" teaching - are simply not appropriate for today's world of flipped classrooms, digital learning, and collaboration. Laws designed for photocopiers are ill-equipped to cope with interactive whiteboards, tablets and robotics.

Fair use would fix the current situation, where Australian schools pay millions of dollars each year in licensing fees to use freely available internet materials for students or orphan works for which no author can be identified. Fair use would also enable sensible digital uses of copyright materials in Australian schools, in situations where there is no harm to copyright owners' markets from the use.

Introducing a fair use exception would bring the Copyright Act into the digital age.

The Productivity Commission's draft fair use recommendation is neither novel, nor unprecedented (despite the near hysterical reaction from some stakeholders to the draft report). Successive policy reviews over almost 20 years have recommended that Australia adopt a flexible copyright exception such as fair use.

Leading digital economies such as the United States, Israel, South Korea and Singapore have all adopted fair use style copyright exceptions with great success. If Australia wants to be a world leader in innovation, it needs to adopt world best practice copyright laws.

Fair use will not destroy educational licensing in Australia. The claim that it would was specifically tested - and rejected - by the Australian Law Reform Commission. The education sector at the highest levels has given repeated assurances over a number of years that the sector would continue to enter into collective licensing arrangements if a fair use exception were to be introduced. These claims have been endorsed by the State, Territory and Commonwealth Education Ministers, as well as the National Catholic

Education Commission and the Independent Schools Council of Australia. It is disappointing that organisations such as the Copyright Agency/VISCOPY continue to make misleading claims on this issue.

It is also misleading to suggest - as has been suggested in multiple submissions to the Commission - that the decline in the Canadian publishing sector can be solely attributed to copyright changes. Much is made of the fact that some Canadian publishers have moved to the United States and that this coincided with changes to Canadian copyright laws. However, the United States has a fair use exception! It defies logic to claim that a flexible copyright exception can be the cause of a decline in the publishing sector, when the solution is to move publishing to a jurisdiction that has a flexible copyright exception.

Australian schools spend upwards of \$700 million per annum in purchasing educational content for students. In addition to this, the sector pays approximately \$90 million each year on collectively negotiated copyright licences. As repeatedly guaranteed by the sector, ***these licences will continue to exist in a fair use environment.*** Schools do not shy away from the fact however, that fair use would correct the current untenable position where millions of dollars of public funds are spent each year on public interest educational uses of orphan works, freely available internet materials, or non-harmful uses such as placing thumbnail images of book covers on a school intranet to show students what books are available in the school library.

Fair use does not mean that all educational uses will be free. Australian schools are not asking for a free ride - simply a fair ride.

The schools sector also strongly endorses the Productivity Commission's recommendations in relation to copyright safe harbours. This is a long overdue change which will simply ensure that Australia complies with its international obligations, and that Australian schools receive the same legal protections for providing internet access to staff and students as is provided to commercial ISPs.

## Overview of submission

This submission addresses the following issues:

1. Some context for the Commission's fair use recommendation
2. Why Australian schools need fair use
3. Correcting the record - a response to fair use fear mongering
4. The importance of the Commission's safe harbour recommendation
5. Responding to the Commission's requests for further information:
  - 5.1. Proposed changes to educational statutory licences
  - 5.2. The capacity to provide guidance about fair use
  - 5.3. Governance arrangements for the educational statutory licences
  - 5.4. Copyright and contract
  - 5.5. The importance of strong leadership on OER.

## Part 1. The context for the Productivity Commission's recommendations

Australian copyright has expanded over time to the point where it now operates as a serious roadblock to Australian schools preparing today's school children to become the creators and innovators of the future. Unbalanced copyright law results in Australian schools paying millions of dollars of public funds each year to use content where the original rights holder is not identifiable, or for uses which the rights holder never expected to be paid for. It prevents schools from engaging with business and industry in collaborative partnerships required by Government policy, and makes it harder for teachers to use modern teaching methods to develop the STEM skills needed by Australian students.

Australia's current copyright system penalises Australian schools for using cutting edge digital technologies in the classroom.

As the Productivity Commission has recognised, successive amendments to the Copyright Act since 2000 have strengthened Australia's copyright laws, without a compensating approach to modernising copyright exceptions. Indeed, the Parliamentary Committee examining Australia's adoption of the Australia - United States Free Trade Agreement (**AUSFTA**) noted that AUSFTA would significantly strengthen copyright rights, without the corresponding balancing effect of the US fair use provision.<sup>1</sup>

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<sup>1</sup> Joint Standing Committee on Treaties, [Report 61 Australia - United States Free Trade Agreement](#) para 16.50

## Australia has a long history of fair use recommendations

The Productivity Commission's fair use recommendation is neither novel, nor unprecedented. The issue of whether Australia should adopt a flexible copyright exception like fair use has been extensively examined in Australia, and a fair use style copyright exception has now been recommended by **six independent review committees** over almost 20 years of in-depth consideration.

There are only two reviews over this time that have not recommended the adoption of a fair use exception. However both of these reviews highlighted the significant benefits to Australia of a more flexible copyright exception such as fair use. The Intellectual Property Competition Review Committee ( **Ergas Review** ) recognised the benefits of fair use, but considered that the transaction costs of shifting to fair use did not outweigh the benefits *at that time* (2000).<sup>2</sup> It is perhaps not surprising given the immense technological developments that have occurred since that time, that the Productivity Commission has reached a different view in 2016.

The other review ( **Attorney-General's Department** ) identified the benefits of fair use, but during public consultations no significant stakeholder supported fully adopting fair use at that time (2005).<sup>3</sup> This is certainly not the case in 2016.

The Commission is simply the latest in a long line of independent and Government inquiries to recommend that Australia adopt a fair use style copyright exception:

- It is now almost 20 years since the Copyright Law Review Committee ( **CLRC** ) identified the need for an open ended exception to inject greater balance into Australian copyright law. The CLRC said that an open ended exception would “strike a fair balance between the competing interests of copyright owners and users” by “describ[ing] the limits to copyright owners’ rights in a manner that maximises public interest”.<sup>4</sup> While the CLRC described this exception as an open ended “fair dealing” exception, it anticipated that the exception would operate in the same way as the US fair use exception.<sup>5</sup>
- The Parliamentary Joint Standing Committee on Treaties ( **JSCOT** ) considering AUSFTA warned that the balance of interests between copyright owners and

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<sup>2</sup> Intellectual Property and Competition Review Committee, *Review of Intellectual Property Legislation under the Competition Principles Agreement* (2000)

<sup>3</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) and Explanatory Memorandum, *Copyright Amendment Bill 2006*, p10

<sup>4</sup> Copyright Law Review Committee report on Simplification of the Copyright Act Part 1: Exceptions to the Exclusive Rights of Copyright Owners (1998) para 6.12.

<sup>5</sup> *Ibid* para 5.36

users would be further undermined by adopting AUSFTA’s intellectual property chapter, unless Australia enacted a broad and flexible fair use exception. The JSCOT said that “the evidence suggests that [the balance between the rights of copyright owners and users] will be altered under the AUSFTA” **unless** the existing fair dealing exceptions were replaced with a broad and flexible fair use exception at the same time as the copyright term was extended. <sup>6</sup> (our emphasis)

- Similarly, the Senate Select Committee that considered 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.<sup>7</sup>
- It is now three years since the House of Representatives Standing Committee on Infrastructure and Communications called for the clarification of fair use rights for consumers, businesses and educational institutions.<sup>8</sup>
- And it is now two years since the Australian Law Reform Commission (**ALRC**) called for the enactment of fair use. The ALRC highlighted the myriad ways in which overbroad and inflexible copyright laws were imposing unjustifiable costs on Australian schools and standing in the way of Australian teachers making full use of cutting edge digital technologies in the classroom. The ALRC said copyright must “leave breathing room” for new works and new productive uses that make use of other copyright material”,<sup>9</sup> and said that fair use would achieve this where the existing exceptions regime did not.

CAG strongly welcomes this latest confirmation from the Productivity Commission of the benefits of Australia moving to a fair use system.

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<sup>6</sup> [Joint Standing Committee on Treaties, Report 61 Australia - United States Free Trade Agreement](#), para 16.50

<sup>7</sup> [Senate Select Committee on the Free Trade Agreement between Australia and the United States of America Final Report](#) (2004) p72

<sup>8</sup> [House of Representatives Standing Committee on Infrastructure and Communications, At What Cost? IT pricing and the Australia tax](#) (July 2013) at xiii

<sup>9</sup> ALRC Report 122 [Copyright and the Digital Economy](#) (2014) para 4.73

## Part 2 Why Australian schools need fair use

As the Commission - and multiple other reviews - have identified, Australia's copyright laws are out of balance. Fair use would fix this.

CAG submits that the Government must now urgently update the Copyright Act to introduce a fair use exception. There is no longer any justification for ignoring the collective weight of the nearly two decades worth of detailed policy reviews that have recommended the introduction of fair use in Australia. We agree with the Commission that fair use would redress the inefficiencies and lack of balance in Australian copyright law that arise as a result of strong copyright protection being extended to works that were never intended to be commercially exploited, or for which no owner can be identified or located.

We also agree with the Commission that there is compelling evidence that this important reform would **not** harm the interests of Australian educational publishers and authors, as some groups have suggested. CAG has been greatly surprised by the degree of scare mongering - much of it seriously misleading - that the Commission's draft report has generated. Fair use has been in operation for many decades in the US, and the educational publishing sector in that country is not only thriving, it is booming. We address this issue further in Part 3.

### How did Australian copyright law become so unbalanced?

Australian copyright law is out of balance. Most people would be quite surprised to know that our existing copyright laws mean that Australian schools are having to spend public funds on activities that do not affect copyright owner markets such as:

- printing out online TV guides
- printing out health fact sheets and the 'About Us' page on corporate websites
- printing out free tourism maps of Australia
- asking a student to print a map from Google maps for a homework exercise
- a teacher taking screenshots of sections of a web page to teach students how to use computer software
- reproducing thumbnail images of book covers on a school intranet to show students what books are available in the school library.

The Commission has correctly identified the source of this problem - overbroad copyright protection that is not tempered by broad and flexible copyright exceptions that are such a central part of the copyright balance in the US and comparable jurisdictions.

That extensive protection applies not only to creative content that was produced in order to earn an income - such as a novel, or a textbook - but it also applies *automatically* to a vast amount of content which is used daily by Australian schools students, but which was not created with the intention or expectation of earning an income. It is a feature of copyright law that would probably come as a surprise to most people that a screenshot of a Snapchat post or a Facebook meme receives the same degree of copyright protection as a best selling novel, or a painting that has taken months or years to complete. However, any educational use of these works is covered by Australia's statutory licences, and required to be recorded as a remunerable activity.

The Commission has rightly noted that Australia is prevented - by the AUSFTA and international treaty obligations - from unilaterally deciding to shorten the term of copyright, no matter how strong the economic arguments for doing so. But that makes it all the more important to ensure that the exceptions to copyright are sufficiently broad and flexible to prevent overbroad copyright from blocking limited, public interest uses of copyright material.

When we entered into the AUSFTA in 2005, copyright protection lasted for the life of the author plus 50 years. By signing up to the AUSFTA, Australia agreed to extend the term of copyright protection even further, to life plus 70 years.

It is clear from the public record that the Australian officials who were responsible for negotiating the AUSFTA were aware that agreeing to a 20 year extension for the term of copyright would inevitably tip the copyright balance further in favor of rights holders and against the interests of users.<sup>10</sup> That is why the Parliamentary committee that was tasked with reviewing the draft agreement said that it would be important to enact a fair use exception if Australia were to sign up to the AUSFTA. The JSCOT said that it would be imperative to ensure that the "balance of interests between users and owners is maintained", but that "the evidence suggests that it will be altered under the AUSFTA" **unless** the existing fair dealing exceptions were replaced with a broad and flexible fair use exception at the same time as the copyright term was extended.<sup>11</sup>

This observation by copyright expert Professor Bernt Hugenholtz is significant:

*The United States has emerged as a world leader in promoting long and strong copyright, but policy makers in other countries need to know that what has made US*

<sup>10</sup> See in particular Chapter 16 of the [Joint Standing Committee on Treaties, Report 61 Australia - United States Free Trade Agreement](#).

<sup>11</sup> Joint Standing Committee on Treaties, [Report 61 Australia - United States Free Trade Agreement](#) at

*copyright (and copyright industries) successful is the fact that it **balances** strong protection and meaningful exceptions - thus clearing a space for artistic as well as technical innovation.*<sup>12</sup>

The decision by the Australian Government in 2005 not to adopt the JSCOT recommendation led to Australia taking on the “burden” of longer copyright terms without the “benefit” of a broad and flexible exception that operates to temper such strong copyright protection in the US. While that might have suited US rights holders who advocated strongly for greater protection under Australian copyright law, CAG submits that it was not in Australia’s overall best interests.

Addressing this imbalance is now long overdue. More than 20 years after the CLRC highlighted the need for more flexible copyright exceptions, the time has well and truly come to enact this important reform.

## Unbalanced copyright law harms Australian students

There are three main ways in which Australia’s unbalanced and inflexible copyright laws are having a detrimental impact on Australian schools:

1. They were designed to address teaching practices and technologies such as blackboards and photocopiers; **not** electronic whiteboards, iPads and Massive Open Online Courses (**MOOCs**). Our existing copyright laws are stuck in a place and time that bears little - if any - resemblance to today’s digital classroom, and are operating as a significant roadblock to Australian schools making full use of cutting edge digital technologies.
2. They stand in the way of the collaboration that is such a critical part of modern education. The Government is encouraging Australian schools to engage in collaborative partnerships with business and industry to develop the STEM skills of Australian students, but the existing copyright regime only permits use of content in traditional classroom contexts.
3. They have resulted in Australian schools paying millions of dollars each year for orphan works, out of commerce materials and freely available internet materials. This is an unjustifiable waste of public funds with no corresponding benefit to the creators of those works.

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<sup>12</sup> *A Note on the International Environment*, P. Bernt Hugenholtz, in *Reclaiming Fair Use: How to Put Balance Back into Copyright*, Patricia Aufderheide and Peter Jaszi, University of Chicago Press, 2011

## Australian schools are not able to take full advantage of digital technologies

There are several examples of how Australia's current copyright system does not match the needs of a modern, world class education system

### **MOOCS**

None of the existing copyright exceptions or licences enable Australian schools to take full advantage of modern education methods such as MOOCs.

In submissions to Government,<sup>13</sup> Copyright Agency has wrongly suggested that Australian educational institutions can rely on the statutory licence to use content in MOOCs. This is simply not true. The Copyright Act does not permit these types of activities.

By definition, MOOCs are open; ie MOOC courses are not confined to students enrolled at a particular educational institution. Neither the statutory licence, nor the research and study fair dealing exception, usually apply when content is shared with people outside the school.<sup>14</sup> A fair use exception on the other hand is concerned not with the question of who has access to the content, but only with the question of whether the use is "fair". In the US, schools and universities routinely rely on fair use when using small amounts of content in MOOC courses in ways that cause no prejudice to the rights holders.<sup>15</sup>

### **Online exams and assessments**

One of the most ludicrous examples of how the existing copyright regime is stymying use of digital technologies in schools is the exam copying provision in s 200(1)(b) of the Act.

Currently, this exception permits teachers to use small amounts of a copyright work in an exam paper, but only if the students who will be taking the exam are in the classroom. If the students are distance students taking the exam online, the exception does not apply.

This is a hangover from the days when all teaching took part in a classroom and students did paper exams in physical locations.

Earlier this year, CAG reached agreement with Copyright Agency to jointly approach the Government to fix this anomaly by amending the Act to make clear that the exception

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<sup>13</sup> Copyright Agency [Submission to the Review of Australia's Innovation Industry](#) 2014

<sup>14</sup> Technically, people who are not covered by a remuneration notice issued by an educational institution in accordance with Part VB of the Copyright Act.

<sup>15</sup> See, for example, this guidance to academics prepared by the University of Pennsylvania Library: <http://guides.library.upenn.edu/content.php?pid=244413&sid=3375306>

applies to exams conducted online. That reform has not yet been enacted, although an amendment was contained in the Exposure Draft *Copyright Amendment (Disability and Other Measures) Bill 2015*. However, even the terms of this amendment would only allow some digital exam uses and not others (it would not extend to the use of artistic works or audiovisual materials in exams).

This kind of piecemeal reform to make copyright fit for purpose in the digital age would not be necessary if we had a flexible fair use exception that was capable of adapting to technological developments and changing teaching practices. Copying small amounts of content for use in exams - whether conducted in the classroom or online - is the kind of non-harmful use that should fall within the scope of a fair use exception.

A fair use exception would be much better placed to adapt to meet the challenges of new teaching methods enabled by technological advancement. It would allow Australian schools to take full advantage of international best practice teaching methods. It would also remove the need for piecemeal amendments to the Act; such as the proposed amendment to the exam copying provision.

## Copyright laws preclude school collaboration with business and industry

State, Territory and Federal Governments agree that collaboration between schools and the broader community - including business and industry - is a critical step in Australia improving its STEM education outcomes. For example:

- The Council of Australian Governments Education Council National STEM School Education Strategy identifies parents and the broader community, including business and industry, as key STEM education partners. The strategy envisages mentoring and outreach activities, initiatives to raise students awareness of STEM career paths, and industry work placements and programs for pre-service teachers.<sup>16</sup>
- The Federal Government has provided \$500,000 funding to support the establishment of a STEM focused P-TECH pilot. The P-TECH model is based on a partnership between education and industry that is focused on supporting young people to make a successful transition from school to further education, training and work.<sup>17</sup>

Unfortunately, the existing educational copying provisions were not designed with this kind of collaboration in mind. Unlike the US, Israel and other jurisdictions with a fair use

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<sup>16</sup>Education Council [National STEM School Educational Strategy](#) December 2015

<sup>17</sup> See the Department of Education and Training website '[Restoring the focus on STEM in schools](#)'

exception, Australia has no copyright exception that allows collaborative educational uses. None of the existing fair dealing exceptions - including the exception that permits fair dealing by an individual for the purpose of his or her own research or study - would permit schools to use small amounts of copyright material when engaging in the broader collaborative projects that are envisaged in the National STEM School Education Strategy.

Nor does the Part VB statutory licence (for which schools pay approximately \$60 million a year) apply if a third party is provided with access to copies. These kind of collaborative uses are automatically prevented under current laws, regardless of whether they would be socially useful, regardless of whether they are required by government policy, and regardless of whether or not they would unreasonably prejudice rights holders. This makes the existing regime singularly unsuited to enabling schools to fully engage with the broader community and industry.

There is no such limitation with fair use. If the use was “fair”, it would be allowed. If it harmed rights holder markets, it would not. This flexibility is much better suited to an environment where schools and other educational institutions are increasingly expected to engage with industry and the wider community, and bring us in line with countries like such as Israel, South Korea, Singapore and the United States that have laws that facilitate this collaborative engagement.

## Millions of dollars is being spent each year on freely available internet content and orphan works

Australian schools are required to pay to use copyright materials even in circumstances where the rights holder cannot be located (known as ‘orphan works’) or where the rights holder has made the material freely available on the internet ***without expectation of being paid.***

For example, there are myriad educational resources that have been made freely available on the internet with the intention that they be used - without payment - by students around the world. Quite often the website will have a generic copyright notice eg “Copyright, Website Owner 2015”. If so, Australian schools are required to pay under the statutory licence.

Our schools are paying millions of dollars a year for uses that do not attract payment anywhere else in the world, and which do not cause any harm to rights holders. CAG estimates that payments for works in this category may represent approximately \$9.16 million of total amounts that schools paid to Copyright Agency licence payments in 2014. This sits uncomfortably with public sector obligations regarding expenditure of public funds: public monies paid for orphan works are not returned to education budgets, but result in windfall gains to other copyright owners who have no connection with the work that has been copied.

This is a major flaw in the existing educational copying regime. It is an unjustifiable drain on the public purse with no corresponding benefit to rights holders. Fair use would bring an end to the current situation where millions of dollars of public funds are wasted on paying for school use of orphan works and freely available internet content.

## Part 3: Correcting the record. A response to fair use fear mongering

Since the Commission released its draft report, there has been a great deal of fair use fear mongering by groups opposed to this reform.

CAG wishes to respond to what we consider to be misinformation about the impact that fair use would have on Australian publishers and authors.

### Australian schools would still pay licence fees

Copyright Agency/Viscopy has suggested<sup>18</sup> - wrongly - that a fair use exception could lead to Australian schools and universities refusing to pay licence fees for the vast amount of copyright material to which they now have access. In support of this claim, they point to Canada, where they say the enactment of a fair dealing for education exception resulted in Canadian schools refusing to pay for any classroom copying.

Australian schools spend upwards of \$700 million per annum in purchasing educational content for students.<sup>19</sup> The sector pays an additional approximately \$90 million each year on collectively negotiated copyright licences paid to copyright collecting societies.

There is no suggestion whatsoever that fair use would have any impact on the upwards of \$700 million that Australian schools spend acquiring educational resources. Schools will continue to acquire content - whether that be textbooks, software, educational games or apps.

As the Commission has rightly noted in its draft report, a fair use exception - even one that listed education as an illustrative use as has been proposed by the ALRC - would **not** mean that all uses by schools or other educational institution would be “fair” and therefore no longer remunerable.

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<sup>18</sup> See for example Suckling A “Good for Lawyers, Bad for Creators” *ArtsHub* May 2016 available at: <http://www.artshub.com.au/news-article/opinions-and-analysis/grants-and-funding/adam-suckling/good-for-lawyers-bad-for-creators-251347>

<sup>19</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 was \$665 million, which when indexed by the CPI equates to more than \$700 million annually in 2016.

Fair use will not destroy educational licensing in Australia. The claim that it would was specifically tested - and rejected - by the ALRC. The education sector at the highest levels has given repeated assurances over a number of years that the sector would continue to enter into collective licensing arrangements if a fair use exception were to be introduced. These claims have been endorsed by the State, Territory and Commonwealth Education Ministers, as well as the National Catholic Education Commission and the Independent Schools Council of Australia. It is disappointing that organisations such as the Copyright Agency/Viscopy continue to make misleading claims on this issue.

In the US - a fair use jurisdiction - educational institutions continue to rely on blanket and transactional licences for uses that exceed what would be permitted under fair use.

The US Copyright Clearance Centre offers an annual copyright licence<sup>20</sup> for those institutions wanting blanket coverage, as well as a transactional pay-per-use licence for institutions who wish to licence content as needed.<sup>21</sup>

There is absolutely no foundation to the suggestion that a fair use exception would apply to all - or even most - ways in which schools currently use content in reliance on the sector's collective licence with Copyright Agency. As repeatedly guaranteed by the sector, ***these licences will continue to exist in a fair use environment.***

CAG does not resile from the fact however, that fair use would correct the current untenable position where millions of dollars of public funds are spent each year on public interest educational uses of orphan works, freely available internet materials, or non-harmful uses such as placing thumbnail images of book covers on a school intranet to show students what books are available in the school library, or printing out free tourism maps of Australia for classroom exercises.

Australian schools are not asking a free ride - they are simply asking for a fair ride.

Australian educational authors and educational publishers will not be harmed by fair use

Opponents of fair use claim that it would harm Australian educational authors and publishers, and they have pointed to the Canadian experience in ways that CAG considers to be seriously misleading<sup>22</sup>.

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<sup>20</sup> See Copyright Clearance Center at: <http://www.copyright.com/academia/annual-copyright-license/>

<sup>21</sup> See Copyright Clearance Center at: <http://www.copyright.com/academia/pay-per-use/>

<sup>22</sup> See, for example, "[A change that would cost way more than \\$1.3bn](#)" *The Australian* (2016) and "[Fair use does not mean free: Copyright recommendations would crush Australian content](#)" *The Sydney Morning Herald* (May 2016)

The US experience is a much more instructive illustration than is Canada of the impact of fair use on the profitability of educational publishers

Fair use has been in operation in the United States since the 1970s. And educational publishing is flourishing.

In the US, educational publishing is a thriving business, at least for those publishers who have been able to adapt to disruption from forces that have nothing whatsoever to do with copyright.<sup>23</sup> This is **despite** the fact that US schools have for decades relied on fair use for many of the everyday educational uses that Australian schools are paying millions of dollars for each year.

See, for example, a recent article in Wired magazine headed "Why Educational Publishing is Big Business".<sup>24</sup>

*In 2009, Pearson's Education division alone brought in more revenue than any other book publisher besides number two, Reed Elsevier, whose biggest businesses are Lexis-Nexis and Elsevier Science.*

*Education publishers dwarf trade presses. Only the top trade press, Random House (itself owned by Bertelsmann) is bigger than Cengage, the little-known education publishing division that Thomson spun off in 2008 before merging with Reuters.*

*Education publishers are also much bigger than other media companies that attract much more attention. Pearson is far bigger than AOL or The New York Times Company (and much more profitable). In order to find publishers with greater revenue or profits, you have to go up the ladder to companies like News Corp that include global television markets, or retail entities, like Amazon. This makes companies like Pearson too big to ignore, especially when they're willing to partner up.*

*We talk a lot about the transformation to an information economy, but companies like Pearson, Elsevier, Thomson Reuters and McGraw-Hill epitomize it.*

***Textbooks and institutional publishing services lie at the exact juncture of knowledge and money.*** (our emphasis)

If fair use really was an impediment to a thriving educational publishing sector, you would expect to see that reflected in the profitability of US educational publishers, but it is not. It is clear that fair use has not put a dampener on the ability of educational

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<sup>23</sup> See the discussion below on the disruptions affecting the educational publishing sector

<sup>24</sup> Carmody T "Why Education Publishing is Big Business" *Wired* 2012 available at: <http://www.wired.com/2012/01/why-education-publishing-is-big-business/>

publishers to profit in the US, and there is no reason to believe that it would do so in Australia.

### **Other countries' experience with fair use**

Singapore has had fair use since 2005, and it is one of the leading exporters of educational publishing from Asia,<sup>25</sup> marketing a range of cutting edge products in both analogue and digital format. Even the Copyright Agency sees growth potential for educational licensing in the fair use environment of Singapore, successfully launching into the market:

In January 2015, Copyright Agency partnered with the Copyright Licensing and Administration Society of Singapore (CLASS) to develop new licensing markets in Singapore. Throughout 2015, Copyright Agency and CLASS have collaborated to establish licensing in the previously untapped Singaporean private education sector to the direct benefit of our respective rights holder members.<sup>26</sup>

Similarly in Israel, the fair use economy has driven innovative products and service delivery in educational publishing. A good example is the recently announced partnership between longstanding educational publisher OUP and three Israeli startups. Paul Riley, Director of Channels and Partnerships at OUP explained:

Edtech ventures are increasingly influential as they shape and improve the educational experience. Through this relationship, OUP is introduced to inventive Israeli startups, which provide us with opportunities to combine our high-quality content with groundbreaking technology. This allows us to develop innovative products and services that improve the lives of teachers and learners globally.<sup>27</sup>

Another fair use country, South Korea, is one of the 10 largest book markets, and one of the 10 largest ebook markets, in the world.<sup>28</sup> Educational publishing dominates the market, with 65% market share. Libraries, one of the key beneficiaries from flexible exceptions, play a key role with close to a 1000 libraries servicing the population, one for every 56,000 people.<sup>29</sup> It is

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<sup>25</sup> Fong A [Educational Resource Development in Asia](#) (2015) A Marshall Cavendish Education Presentation

<sup>26</sup> Copyright Agency [Annual Review 2014-2015](#)

<sup>27</sup> British Embassy Tel Aviv [OUP partners with 3 Israeli start-up tech companies](#) (February 2016)

<sup>28</sup> The Markets: Global Publishing Summit [Market overview: South Korea - education sector dominates the book market](#) (2015)

<sup>29</sup> TanT [Why South Korea is succeeding in children's and education publishing](#) (2015) The Markets

widely seen as a growth potential market, being one of the seven dynamic markets featured at Frankfurt Book Fair 2015, the London Book Fair's market focus country of 2014<sup>30</sup> and launch pad for innovative educational products.<sup>31</sup>

### What's really happening in Canada?

We think it's important to set the record straight on the highly misleading claims that are being made about Canada.

As to the claims that educational publishing companies have ceased publishing in Canada as a direct result of copyright reforms that permit schools to make fair dealing copies for students, it is clear from the public record that in many cases there is **no causal relationship** between copyright reform and publishers exiting the Canadian market. For example:

- Oxford University Press (OUP) has told the Productivity Commission that the most significant reason that it ceased publishing in its schools divisions in Canada was "the loss of licensing income" from Access Copyright. And yet, in its 2013/2014 Annual Report, it says nothing about copyright reform, and instead says that the decision to wind back its schools division in Canada followed "*a decade-long decline in the Canadian market for educational resources during which purchases of materials have fallen by nearly 50 per cent.*" OUP added that the decision to wind back in the schools market does not affect the company's other activities in Canada "*including our market-leading Higher Education and ELT programmes.*"
- OUP also asserts that the 2012 copyright reforms were the reason that Canadian educational publisher Nelson Education Ltd failed. And yet, an affidavit filed by Nelson's CEO in what were effectively bankruptcy proceedings, the company lists reduced spending on new curriculum by Canadian schools, increasing use of open education resources, the use of used textbooks, and the transition from traditional print books to digital products (which is said to be "having a transformative effect on the business") as matters that negatively impacted on the company's ability to remain profitable.

There is a staggering lack of logic in the suggestion that fair use is driving educational publishers away from Canada and back to the US.

In an information sheet on the Productivity Commission's draft report, The Australian Copyright Council suggests that the Canadian copyright reforms have resulted in the

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<sup>30</sup> The London Bookfair [The London Book Fair celebrates the official Market Focus Handover from Turkey to Korea](#) (2013)

<sup>31</sup> Tan T [Here Come the K-books: Digital Publishing in Korea](#) 2014 (2014) Publishers Weekly



A report by PwC commissioned by the Association of Canadian Publishers (**ACP**)<sup>33</sup> acknowledged that publicly funded OER was a “threat” to the Canadian publishing industry:

*Open Educational Resources are a threat to traditional publishers as they provide textbooks and course materials for free. Some schools boards have access to digital content developed by the Ministry and/or teachers free of charge.*

This was a frank admission that educational publishers would prefer that teachers continued to pay for traditional textbooks - at increasingly exorbitant and unaffordable prices - rather than switch to publicly funded resources that can be used freely by any school.

The move towards OER will not go away any time soon. A recent article in Book Business magazine discussed the way in which the quality of OER was increasing, making it more attractive to teachers:

*OER’s popularity has been on the rise, given that it can save school districts significant amounts of money on textbooks and other materials.*

*Years ago, when OER first began to surface, publishers who felt threatened by this no-cost competition could argue that the free resources were generally of lower quality than professionally produced curriculum materials — the “you-get-what-you-pay-for” argument.*

*This argument has weakened as the quality of OER has improved, in part because there is serious money behind OER development.*

...

*Amazon’s positioning itself to be the curator of record for OER is a significant move that should get Google’s and Apple’s attention while giving educational publishers even more reasons to lose sleep over the growing importance of OER.<sup>34</sup>*

Similarly, a report by Boston Consulting Group (**BCG**) on The Digital Disruption of Education Publishing<sup>35</sup> pointed to the rise of OER as a real threat for textbook publishers. The BCG report focuses on the US, but the trends that it identifies are of equal significance to Canada, and Australia for that matter. BCG says:

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<sup>33</sup> PriceWaterhouseCoopers [Economic Impacts of the Canadian Educational Sector’s Fair Dealing Guidelines](#) (June 2015) p 51

<sup>34</sup> Goff N [What Amazon’s OER Platform means for Education Publishers](#) *Book Business* (March 2016)

<sup>35</sup> Baily A, Davis P, Henry T, Loureico K [The Digital Disruption of Education Publishing](#) *BCG Perspectives* (2014)

*Organizations such as Khan Academy, BetterLesson, and Gooru offer increasingly sophisticated tools that enable teachers, students, and parents to find and customize high-quality resources at low or no cost.*

*Of the K–12 educators who said they were aware of OER, 96 percent described themselves as “receptive” to it, and half expected to use more of these resources over the next three years.*

See also a report by Austrade<sup>36</sup> on opportunities arising from disruptive technologies in education:

***OER has the potential to disrupt the publishing industry, in particular academic research. The current model of academic publishing involves the producer of the research (i.e. the academic) giving away the research for free to the academic journals that review and publish the research. The journal is then sold back to the university (at considerable cost) through a package of subscriptions. Essentially, the journals act as ‘middlemen’ between the producers (researchers) and consumers (other researchers and students). OER offer new ways of thinking around publishing of academic research.***

It is also becoming increasingly easy for teachers to find OER to replace traditional textbooks. A report earlier this year revealed that Amazon Education is working on a platform that will enable schools “to upload, manage, share, and discover open education resources from a homepage that in some ways resembles the one shoppers are accustomed to accessing on the massive online retailer’s website”. The report says that schools will be able to “curate open resources, self-publish material they have developed, and put a school’s entire digital library that is open and freely available online”.<sup>37</sup>

The increasing uptake of OER is - of course - driven largely by economics. A recent analysis of the US textbook market found that prices for high schools textbooks had increased **812** per cent between 1998 and 2014. Over the same period, the CPI had increased by 250 per cent. The author says:

*Publishers capitalized on professors’ willingness to adapt new editions of a book every two or three years. Textbooks became less about educating the masses and more about exclusivity and profitability. By the 1990s, the textbook market was an oligopoly, and prices skyrocketed.*<sup>38</sup>

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<sup>36</sup> Austrade [More than MOOCS: Opportunities arising from disruptive technologies in education](#) (2013)

<sup>37</sup> Molnar M [Amazon Education to Launch New Website for Open Education Resources](#) *Edweek Market Brief* (2016)

<sup>38</sup> Crockett Z [Why Are Textbooks So Expensive?](#) *Priceconomics* (2014)

It is hardly surprising that educational administrators around the world are looking increasingly to OER as a means of ensuring that education remains affordable. CAG is a strong supporter of OER resources. Over time, it is quite likely that Australian schools will rely less on the educational statutory licence as more and better OERs become available. That will have nothing whatsoever to do with fair use or copyright reform generally, but everything to do with disruption in the publishing industry.

### ***Students buying secondhand textbooks***

Another pressure point for educational publishers is students purchasing secondhand textbooks.

A recent “open letter” from the ACP<sup>39</sup> complained about Canadian university bookshops selling secondhand books. The ACP said that while they understood that bookshops were under pressure to offer only the lowest priced options, there were important reasons to stop selling secondhand books, that that “students deserve the choice of purchasing new books”:

*“We know that some students actually prefer to purchase new—a copy with no dog ears, no yellow highlighting, no scribbled notes, no pages about to fall out.”<sup>40</sup>*

The evidence would appear to suggest that when it comes to choice between exorbitantly priced textbooks and dog eared textbooks, many cashed strapped Canadian students have been opting for the latter. Australian students are no different in this regard.<sup>41</sup>

### ***Competition from new players***

Traditional educational publishers are also facing increasing competition from new players.

The PwC report commissioned by the ACP noted that “media players such as Apple and Google” were emerging as a new source of disruption for Canadian educational publishers by “seeking to introduce new business models and alternative content distribution channels.”<sup>42</sup>

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<sup>39</sup> Association of Canadian Publishers [Open Letter: The Case for Stocking New Books](#) (2014)

<sup>40</sup> Ibid.

<sup>41</sup> See for example <http://www.abc.net.au/news/2016-02-20/call-for-cheaper-university-textbooks/7186214>

<sup>42</sup> PwC [Economic Impacts of the Canadian Educational Sector’s Fair Dealing Guidelines](#) (June 2015) p 51

See also a 2015 article on the impending “textbook wars”:<sup>43</sup>

*Amazon and Apple’s sought-after “democratization” of textbook production could alter education irrevocably in the coming years. And these developments may affect academic publishing more rapidly, as it’s an industry whose strengths are also its weaknesses.*

Educational publishers are also facing competition from online learning alternatives such as MOOCs. The PwC Canadian report said that some industry experts expected MOOCs to offer “open content to displace traditional published works”, and noted that if this happened, it would put additional pressure on “traditional educational publishers”.<sup>44</sup>

Apple’s iTunesU - a free online portal where students can access content from some of the world’s top universities, including Yale, Stanford and Harvard <sup>45</sup> - is widely used by schools around the world, including in Canada and Australia. A recent BBC News report highlighted the way in which resources like iTunes U were rapidly replacing traditional textbooks in the classroom:

*Teachers at the [Stephen Perse Foundation school] are making their own online library of lessons and course materials for GCSE, A-levels and International Baccalaureates.*

*These are interactive resources, with video links and lesson notes, customised for the specific needs and speeds of their classes. There are extension exercises and links to further reading and ideas.*

*They are made to share on iTunes U, the academic version of Apple’s iTunes download service, so pupils can access them at school or at home or anywhere else.*

*It still requires excellent teachers - to make them and to make sense of them - but you can see the far-reaching possibilities of creating the exam course equivalent of a box set of a TV series.*

*[Teacher Tricia Kelleher] sees how **online technology is about to change the traditional textbook. "You're getting beyond the one-size-fits-all textbook. As a resource, I can't see it being bettered. You might buy a textbook, but half of it might not be relevant to your school."***<sup>46</sup> (our emphasis)

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<sup>43</sup> Sturgeon J [Beware! The Second Coming of the Textbook Wars](#) *Flavorwire* (January 2015)

<sup>44</sup> PwC [Economic Impacts of the Canadian Educational Sector’s Fair Dealing Guidelines](#) p 52

<sup>45</sup> See <http://itunes.stanford.edu/>, <http://www.harvard.edu/itunes>, <http://itunes.yale.edu/>

<sup>46</sup> Coughlan S [Textbooks replaced by iTunes U downloads](#) *BBC News* (January 2014)

## ***The shift to digital***

The BCG report also lists the increasing shift to digital resources as something that is “eating away at the new-book market”:

*Publishers were once protected from competition by high barriers to entry. They had the relationships with authors, knowledge of buying processes, and distribution clout to ensure their position—and their dominant market share.*

*But their positions are now under attack as the business shifts toward digital content and away from a reliance on print textbooks. The beneficiaries have been classroom-oriented testing companies and providers of practical tools that supplement core instruction, along with educational software and courseware builders, which have provided schools and colleges with greater flexibility in meeting varied learning needs.*

...

*In short, the **position of traditional education publishers is under threat.** These companies are built around scale-based business models and capabilities designed for competition in a learning environment dominated by the printed book. (our emphasis)*

See also a 2010 submission by Canadian publisher Nelson Education to the Canadian Government’s Digital Canada review.<sup>47</sup> This review took place *before* the Canadian copyright reforms. It is patently clear that the Canadian developments that rights holder groups would have the Commission believe were triggered by copyright reform in that country were very much in play before those reforms were implemented:

*Canada’s cultural and information industries have changed dramatically over the past decade, driven by a variety of economic, technological and competitive factors. **Book publishing, and most specifically the educational textbook sector, has been materially impacted by profoundly important technological influences, including the adoption of web-based tools, products and services,** which are rapidly changing the face of the industry and user expectations.*

*The educational publishing sector has been subject to great consolidation, and for many years most major competitors have been controlled by foreign-owned operations. In competition with these foreign-owned competitors **Nelson Education has navigated many industry currents and trends, including: shifts in provincial curriculum requirements, significant decreases in***

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<sup>47</sup> Nelson Education [Supporting Canada’s Educational Publishing Sector In A Digital Economy](#) Submission to Digital Canada 150 (2010)

***school text book budgets, and the growth in demand for educational supplementary material rather than traditional textbooks. Most significantly, however, the emergence of classroom-based and other learning technologies are providing a new level of threat and challenge for educational publishers. The business model for traditional educational book publishing is especially vulnerable to such innovations as digital books, e-readers and other portable devices, in-class smart boards, and print-on-demand publishing.*** (our emphasis)

Nelson Education also complained about “*dramatic industry spending declines within K-12 school markets*” and “*increasing use of digital solutions as educators and students embrace the Web*”.

In short, the publisher and rights holder groups who have asked the Commission to believe that copyright reform is to blame for troubles facing some Canadian publishers should in truth be blaming the disruptions set out above - ie, the increasingly popularity of OER, student preferences for second-hand books, competition from new players such as Google and Apple, and the shift from print textbooks to digital. They have asked the Commission to simply take it on faith that any financial difficulties that Canadian publishers claim to be experiencing are directly related to the 2012 copyright reforms, when conversely, publishers in the US in a fair use environment are thriving.

Australian educational authors have long complained that it is publishers - not schools - who are limiting the income that they are able to earn

The Australian Copyright Council has said that fair use would have “significant impacts on authors and creators” of educational content.<sup>48</sup> Similarly, Copyright Agency/Viscopy has said that enacting the Commission’s fair use recommendation would “have an adverse effect on the production of Australian educational resources, opening the door for materials dominated by US and British creators”, and would “strip millions away from Australian storytellers and content creators because ... large education institutions who now pay to use content, would stop paying as much or stop paying at all”.<sup>49</sup>

This suggestion that authors and creators of educational content would suffer under a fair use regime flies in the face of complaints that have been made for many years by the Australian Society of Authors (ASA) that the authors of educational content benefit *very little* from the educational statutory licence. The ASA has publicly complained that authors of educational content that is copied in schools are receiving little - and in some cases none - of the payments that Copyright Agency receives from schools. That is not because schools are not paying to use this content: schools *are* paying, but the money is going not to the creators of the works, but to the publishers, most of whom are overseas-based corporations.

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<sup>48</sup> Australian Copyright Council Information Sheet [Fair Use and the Productivity Commission](#) May 2016

<sup>49</sup> Williams K [Fair use does not mean free: Copyright recommendations would crush Australian content](#) *The Age* (May 2016)

See, for example, a report by the ASA, *Educational Publishing in Australia: What's in it for authors?*<sup>50</sup>

The report includes the following:

*To bolster declining profits, **publishers have turned on authors and used their market dominance to force them to sign over all copyright, write for a one-off, minimal fixed fee rather than royalties, and forgo their right to additional sources of income such as CAL payments and Lending Rights payments. This means the ability for educational authors in Australia to make a living has been severely curtailed.***

*There has also been consolidation in the educational sector in response to the threat of digitally available educational materials. **The sector in Australia remains overwhelmingly under the control of overseas corporations.***

...

*Evidence from ASA members suggests that a **number of large educational publishers are offering contracts that allocate all or a major portion of CAL payments to themselves.** Some educational authors are asked to accept a mere 20% of payments from CAL and other collecting societies.*

*The ASA is also aware of older contracts that have no clause covering collection or sharing of CAL payments, with publishers collecting for authors when they have no licence to do so and retaining funds to which they have no legal entitlement. **Authors are therefore being deprived of additional income.***

***Educational publishers are displaying a profound disregard for the basic rights and entitlements of authors,** and have been getting away with it because individual authors are coned into thinking that they're being offered a good deal relative to the rest of the market.*

*This is not only myopic business practice, it is also a self-fulfilling prophecy that is **leading to more and more authors giving up the craft, leaving us with a financially and intellectually impoverished culture industry.** When one educational author attempted to confront her publisher Simon and Schuster with what she thought was unfair business practice, the response she received was: 'So sue us. But remember, Viacom is richer than you are.' (our emphasis)*

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<sup>50</sup> Australian Society of Authors [Educational Publishing in Australia: What's in it for authors?](#) (2008)

As for the suggestion that fair use would harm Australian educational publishers, the ASA lamented in 2008 that the educational publishing sector in Australia “*remains overwhelmingly under the control of overseas corporations*”.<sup>51</sup> This, of course, accords with the Commission’s finding that Australia is a net importer of intellectual property including copyright works.

Due to the fact that distributions from the Copyright Agency/Viscopy are not broken down into creator types or nationalities, it is impossible to get exact figures on the amount Australian authors receive from the statutory licences each year.<sup>52</sup> However using data from the Australian Research Council funded study into the The Australian Book Industry,<sup>53</sup> we can see that the average educational author earned \$1,400 per year from Copyright Agency payments in 2013/2014, while the average Australian author earned \$400 per year.<sup>54</sup> Estimating that there are 8000 authors in Australia,<sup>55</sup> this would suggest that Australian authors are receiving about \$3.2 million per annum in Copyright Agency payouts from a distribution of \$136 million,<sup>56</sup> or a little over 2.4% of annual distribution.

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<sup>51</sup> Ibid

<sup>52</sup> See further discussion of this issue at section 5.4 below.

<sup>53</sup> The Australian Book Industry: Authors, publishers and readers in a time of change is a three-year research project funded by the Australian Research Council and Macquarie University, lead by [Professor David Throsby](#) along with [Dr Jan Zwar](#), [Mr Paul Crosby](#) and Mr Callum Morgan. The project started in February 2014, will be completed in early 2017 and is the source for the much quoted statistic that the average author earns less than \$13,000 per annum (see for example [Australian Publishers Association](#))

<sup>54</sup> Zwar, Throsby, Thomas [Australian authors Industry Brief No. 3: Author’s Income](#) (October 2015) The study was based on a survey of 979 Australian authors reporting on their incomes for the 2013/2014 financial year.

<sup>55</sup> In the 2011 Australian census 4,283 nominated ‘book author or script editor’ however as Zwar, Throsby and Thomas point out, that number is likely to be an underrepresentation ([Australian authors Industry Brief No. 2: Demographics of Australian Book Authors](#) (October 2015)) and may not capture authors who have retired and whose work is in circulation. Public Lending Right (PLR) payments in 2014-2015 went to 7409 authors who had books in Australian libraries and is probably a better indication. Note that other content creators, such as journalists, consultants, companies, government etc are not included in this estimation.

<sup>56</sup> [Copyright Agency Annual Report 2014-2015](#) at 3

## Part 4: The importance of safe harbour reform

CAG welcomes the Commission's draft recommendation to expand the copyright safe harbours to apply to all online service providers. CAG agrees with the Commission that this reform - which is now long overdue:

- will improve the adaptability of Australia's copyright regime as new online services develop;
- is consistent with Australia's international obligations.( Australia is in fact in breach of its obligations under the AUSFTA as a result of not having enacted this reform by now.); and
- is an important balance to the expanded protections for rights holders that Australia accepted as part of its international agreements.

The entire education sector has been asking for this reform for more than 10 years. Schools, TAFEs, and their governing bodies - including State and Territory Departments of Education - are providing network access and online services to millions of students and staff every day. Schools and TAFEs provide transmission services and caching facilities to students and teachers. They host content on local networks. They also operate intranets and learning management systems through which students are referred to various online locations. Increasingly, consistent with community and government expectations, they also employ digital technology to engage more widely with parents and the community. TAFE colleges in particular have strong relationships with local businesses in the course of providing vocational education. By their very nature, these digital technologies involve making copies and communications, and that potentially exposes schools to a risk of copyright infringement that did not exist in a pre-digital classroom.

While schools and TAFEs take all reasonable steps to ensure, so far as possible, that their systems and facilities are not used to infringe copyright, they remain vulnerable to actions by copyright owners in respect of alleged infringing conduct by staff and students using school owned IT systems and computers for educational purposes.

Expanding the safe harbours to include educational institutions will put Australian schools, TAFEs and universities on the same footing as their counterparts in the US, who can claim the benefit of US *Digital Millennium Copyright Act* safe harbours - on which the Australian safe harbour regime was intended to be based.

Importantly, this reform will ensure that Australian schools receive the same legal protections in providing internet access to staff and students, as those given to commercial ISPs such as Telstra and Optus.

The delay in enacting this reform has put Australia out of step internationally. In its 2011 submission to the Government's Online Copyright Infringement paper, the Attorney-General's Department noted that the Australian safe harbour scheme has more restrictive scope than the equivalent safe harbour schemes in the US, Singapore, and Korea.

CAG also strongly welcomes the Commission's rejection of the erroneous suggestion that has been made by some rights holder groups that there is a link between authorisation liability and the safe harbours, and that the safe harbours should not be expanded unless authorisation liability is also expanded. As the Commission has noted, the operation of authorisation liability and the coverage of Australia's safe harbours regime are completely separate issues.

## Part 5: the Commission's requests for information

### 5.1 Proposed changes to the educational statutory licences

CAG strongly supports the proposed simplification of the statutory licences. This reform would be a significant first step in making the educational copying regime fit for purpose in a digital environment.

As the Commission has noted, the streamlined statutory licence that is contained in the draft *Copyright Amendment (Disability Access and Other Measures) Bill 2016 (draft Bill)* reflects a consensus position reached by all relevant stakeholders: CAG, Universities Australia Copyright Agency and Screenrights. CAG was pleased to have led that collaboration.

Together with these stakeholders we have communicated our support for the draft Bill to the Government, subject to a small number of minor amendments.

If enacted, this reform would fix one of the flaws that the ALRC identified with the statutory licences; ie the fact that they are inflexible and overly prescriptive.<sup>57</sup> However, the ALRC was also highly critical of another aspect of the statutory licences: the fact that they had resulted in Australian schools paying millions of dollars for uses that should be covered by unremunerated exceptions. The ALRC said that schools should not be required to rely on the statutory licence for uses that would be covered by a fair use exception.<sup>58</sup> CAG agrees with the Commission's observation that "absent broader reforms to Australia's copyright exceptions, simplification [of the statutory licences] will only go so far to reduce the administrative burden on users of the educational statutory licensing scheme".

### 5.2 The capacity to provide guidance about fair use

The Commission has sought comment on the merits of options to provide guidance to users relying on fair use.

CAG submits that the experience in the US - particularly the Codes of Best Practice developed by various user groups including libraries and educators<sup>59</sup> - provides very good evidence of the extent to which those who rely on fair use are more than capable of developing tools that provide a great deal of predictive certainty as to kinds of uses

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<sup>57</sup> ALRC Report 122 [Copyright and the Digital Economy](#) (2014) at 8.88-8.101

<sup>58</sup> *Ibid* at 8.60

<sup>59</sup> See for example The Association of Research Libraries (ARL) [Code of Best Practices in Fair Use for Academic and Research Libraries \(PDF\)](#); [Documentary Filmmakers' Statement of Best Practices in Fair Use](#)

that are likely to be “fair”. There is an emerging consensus that these kinds of tools are a highly effective way of providing guidance for teachers, librarians and others who are required to make fair use decisions on a day to day basis.

### **Fair use best practice guidelines have been shown to be effective**

In the US, insurers now recognise the *Documentary Filmmakers’ Statement of Best Practices in Fair Use*<sup>60</sup> as an effective guide to fair use principles, and offer errors and omissions insurance to filmmakers who comply with it when using unlicensed copyright content in films.<sup>61</sup>

Prior to the development of this tool, US documentary filmmakers often found it either impossible or prohibitively expensive to take out insurance if their film contained even the smallest amount of third party content.

In *Reclaiming Fair Use: How to Put the Balance Back in Copyright*, Professor Pat Aufderheide and Professor Peter Jaszi note that within a short time of this Statement of Best Practice being adopted by documentary filmmakers, “*every single insurer of errors and omissions in the US began to offer fair use coverage routinely, and often without even a small incremental fee, because **the statement had lowered the risk so dramatically.***”<sup>62</sup> (our emphasis)

As a result of this statement being put into practice by this group of users, “*fair use was no longer a grey area, an area of indecision and anxiety, an area that put your distribution in jeopardy. It was a part of normal business practice.*”<sup>63</sup>

CAG - through the National Copyright Unit (**NCU**) - has a strong history of providing reliable, comprehensive and fair guidance to teachers, to help provide clarity about their copyright obligations. For example, following the 2006 copyright reforms, the NCU issued information sheets and guidelines through the Smartcopying website ([www.smartcopying.edu.au](http://www.smartcopying.edu.au)), to ensure that teachers and schools had a clear understanding of what could and could not be copied under the exceptions and licences at the time. See **Annexure A** to this submission for more information on this. The NCU has also created a Creative Commons Information Pack for Educators and Students.<sup>64</sup> The Smartcopying website is well utilised by Australian teachers, with more than **8000**

<sup>60</sup> Centre for Social Media [Documentary Filmmakers’ Statement of Best Practices in Fair Use](#)

<sup>61</sup> [Flexible Exceptions for the Education, Library and Cultural Sectors: Why Has s 200AB Failed to Deliver and Would These Sectors Fare Better Under Fair Use?](#) (2012), report prepared for Australian Digital Alliance/Australian Libraries Copyright Committee by Policy Australia Pty Ltd

<sup>62</sup> P Aufderheide and P Jaszi, *Reclaiming Fair Use: How to Put Balance Back in Copyright* (2011), p105.

<sup>63</sup> Ibid

<sup>64</sup> Smartcopying [Creative Commons information pack for teachers and students](#)

visit per month. In the last five months alone there have been **98,678** visits to this copyright information resource.

Should fair use be enacted, the NCU would again be very well placed to guide teachers and schools as to which uses are likely to be fair, and which require remuneration under the statutory licence or a direct commercial licence.

As with all guidelines, the fair use guidelines for the education sector would be likely to develop over time. However, as has been the case in the past, the NCU would be well placed to give clear guidance to teachers **from day one** of any new change as to the way in which key classroom uses of materials are likely to be treated under the new system. CAG submits that this is actually one of the main benefits of moving to a fair use system – so that the law and related guidelines can adapt to developments in technologies and business models.

#### 5.4 Governance arrangements for the educational statutory licences

The Productivity Commission has asked (Information Request 5.2) whether the code of conduct for collecting societies is sufficient to ensure they operate transparently, efficiently and at best practice.

CAG submits that there are two aspects to consider in assessing whether governance arrangements for collecting societies are appropriate and operating effectively:

- The legislative framework regulating collecting societies in the Copyright Act; and
- The scope and operation of the code of conduct.

##### The legislative framework

CAG has raised with successive governments since at least 2000 the lack of appropriate governance arrangements in relation to licensees in relation to the statutory licences.

In its submission to the Productivity Commission's Issues Paper, the Department of Communications highlighted:

*"In recent decades, worldwide, copyright protection has been greatly expanded in response to the growth of the digital economy and ever changing technologies. However, excessive copyright protection can lead to market dominance by owner distributors, particularly in relation to the control exercised over the dissemination and licensing of copyright material. This has the potential to harm both creators and consumers.*

*There is widespread agreement that the statutory licensing provisions in the Copyright Act are complex and outmoded. In particular, the methodology for*

*ascertaining licence fees is complicated, cumbersome and does not suit modern copying practices and technology. The Act is inflexible as it does not provide for alternative methods for negotiating licence fees. **There are also few requirements to be transparent about how remuneration that is collected is to be distributed to members and non-members of collecting societies*** (emphasis added).<sup>65</sup>

CAG shares the Department's view that there are few legal requirements on collecting societies to act transparently - or to act fairly - in relation to licensees.

The Act does not give the Minister any power to direct collecting societies to act in any particular way in relation to licensing or distribution of royalties, or in their general obligations to members or licensees.

The Ergas Competition Review examined these powers and recommended:

*The grounds for ministerial revocation ... should be broadened to cover all collecting society arrangements, both input and output, including the disclosure of information to members and the public. Relevant ministers should issue guidelines to each collecting society, in the spirit of a contract between the society and the community, that specify the government's expectations regarding the society's conduct, including the terms of the information required to be disclosed and the process for disclosure".<sup>66</sup>*

A collecting society formed to administer the statutory licences under the Act must be 'declared' by the Minister for that purpose. The Act also provides that such declaration can be revoked by the Minister in certain limited circumstances (section 135ZZC), but the result of revocation would have such a devastating effect on copyright owners and licensees it is extremely unlikely this power would be exercised by a Minister other than in the most extreme circumstances. Other than this power to revoke declaration, the Minister does not otherwise have a general power to direct the collecting societies in relation to their activities in relation to the administration of the licensees, or their conduct towards members or statutory licensees.

CAG submits that the Government should consider amending the governance provisions in the Act to require declared collecting societies to take into account the interests of *statutory licensees* as well as the interests of members.<sup>67</sup>

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<sup>65</sup> Department of Communications and the Arts [Submission DR 154](#) (2015) p2

<sup>66</sup> Intellectual Property and Competition Review Committee, *Review of intellectual property legislation under the Competition Principles Agreement*, 2000, p127.

<sup>67</sup> The governance provisions are included in their current form in the amended statutory licence provisions contained in the Exposure Draft *Copyright Amendment (Disability and Other Measures) Bill 2016*. At a minimum, CAG submits that proposed ss 113W (1)(d), 113X (1)(b) and 113Z (5) should be amended to include obligations towards statutory licensees.

Imposing obligations in relation to licensees is not without precedent. For example, the *UK Copyright (Regulation of Relevant Licensing Bodies) Regulations 2014* requires collecting societies to enact a code of practice that includes the following obligations:

- ensure that its dealings with licensees or potential licensees are transparent;
- consult and negotiate fairly, reasonably and proportionately in relation to the terms and conditions of a new or significantly amended licensing scheme; and
- provide to licensees, and to any potential licensees who have requested it, information about its licensing schemes, their terms and conditions and how it collects royalties.

### The collecting societies code of conduct

As the Productivity Commission is aware, Australia's copyright collecting societies are governed by a voluntary code of conduct.

The code is designed to promote confidence in collecting societies and the effective administration of copyright licence, to set out the standards of services that members of licensees can expect from collecting societies, and to establish a process for complaints handling and dispute resolution in relation to collecting societies.<sup>68</sup> Collecting Societies' compliance with the code is reviewed annually, and the Code itself is reviewed triennially.

CAG submits that a major failing of the code in its current form is the lack of precision in the scope of collecting society obligations, and the absence of any significant independent oversight or capacity for meaningful enforcement to resolve identified disputes.

For example, a number of issue arise from the most recent triennial Code Review in 2014 and the subsequent Supplementary Review in 2015.

While the code requires the collecting societies to set "fair and reasonable" licence fees, there is no mechanism or process for the code reviewer to review whether those fees are indeed fair and reasonable. The code reviewer, The Hon KE Lindgren, after noting the impracticality of the code reviewer adjudicating such matters, accepted the proposition of the Australian Performing Rights Association that the wording in Clause 2.3(d) be altered to "each collecting society's policies, procedures and conduct in connection with the setting of licence fees for the use of copyright material will be fair unreasonable".<sup>69</sup> While noting this solution was "not ideal" as it may involve "arduous" investigation of collecting society's policies, procedures and conduct, the Reviewer could not think of a better solution. To date, the recommendation has not been implemented.

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<sup>68</sup> *Code of Conduct for Copyright Collecting Societies*, Clause 1.3

<sup>69</sup> Lindgren, K, *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* 30 April 2015 at 25

Indeed, it is unclear what is the process for amending the Code. In his 2015 supplementary report the Code Reviewer opines that nothing short of unanimity of the Collecting Societies will be sufficient to change the code, so in cases where the collecting societies are opposed to changes that would strongly suggest against making the recommendation.<sup>70</sup> And importantly while the a review of the Code must be undertaken every three years, there is no requirement that the review recommendations be adopted or progressed in any way.

For issues requiring greater change than the recommendation above, the Code Review process has proven to be completely unsuitable. As an example, the 2014 triennial review addressed a request from the State of NSW and CAG for greater transparency/disclosure, principally to discover the percentage of the monies paid that were going to the classes of rightsholders. One benefit from this would have been to inform the market for direct licensing. However the issue was decided to be too substantial for the triennial review, so a supplementary review was undertaken. That second review 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” in order to reach the correct decision.<sup>71</sup> In consequence, no recommendation was made.

Instead, the Reviewer offered three options for the parties seeking code amendment:

- they could seek a related ruling from the Copyright Tribunal, which may address some of the practical outcomes while not changing the fundamental basis of the code and practices;
- the Minister for Arts could be approached; or
- they could muster political support for changes to the *Copyright Act 1968 (Cth)*.

All these options require substantial resources and time, and none directly fix the shortcomings within the voluntary code of conduct.

However, the issues before the Code Reviewer were not, in CAG’s opinion, particularly difficult, or novel when compared with international experience. In summary, CAG and the NSW Government sought more transparency with regards to the distribution of statutory licence revenue between classes of recipient (for example, the breakdown between authors and publishers, or domestic and international royalty recipients). This information is not sensitive, nor confidential. Access Canada’s annual report provides similar information in a simple infographic format.<sup>72</sup> This information would not only

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<sup>70</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 at 9 and then 46

<sup>71</sup> *Ibid* at 50

<sup>72</sup> Access Canada Annual Report 2015, pp7-8.

benefit licensees in assessing market-based licensing opportunities, but also authors and creators in having better visibility of the flow of royalty distributions.

These shortcomings with the code process - combined with the lack of legislative obligations in relation to statutory licensees - mean there is significant room for improvement in the oversight and transparency requirements in relation to Australia's system of statutory licences.

The last major review of the operation and effectiveness of copyright collecting societies was the Simpson Review in 1995. One of the central recommendations of this review was the creation of an Ombudsman for collecting societies. The report stressed that such a role should be "independent of, not a creature of, the societies".<sup>73</sup> CAG submits that this central recommendation of independence is as critical today as it was in 1995.

CAG certainly does not seek to suggest that the findings in the most recent supplementary Code Review<sup>74</sup> are in any way related to the role of the Code Reviewer not being formally independent to the collecting societies who are members of the review. The issues identified by the more recent review are of a more structural nature. However, as a result of the limitations of the code review process, and the lack of independent oversight of the collecting societies, CAG has unfortunately lost confidence in the code review process as a meaningful way of addressing concerns in relation to the conduct of collecting societies.

In conjunction with the Productivity Commission's recommendations in relation to the repeal of s51(3) of the *Competition and Consumer Act 2010*, CAG submits that it is time for further review into the improvements that are required to be made to ensure truly independent and effective governance arrangements for Australia's copyright collecting societies.

## 5.4 Copyright and contract

CAG strongly agrees with the Commission's finding that the imposition of contractual provisions which seek to exclude (or which conflict with) statutory exceptions is an important issue that needs to be addressed. As the Commission notes, exceptions play a central role in balancing the interests rights holders and users. Any ability for rights holders to rely on licence agreements to override exceptions puts at risk the public benefit that they are intended to provide.

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<sup>73</sup> Simpson Review of Australian Collecting Societies, July 1995 , Executive Summary p5

<sup>74</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.

The UK Government recognised this when it recently legislated to prevent contractual override of a number of new copyright exceptions enacted as a result of recommendations made by Professor Ian Hargreaves in his Review of Intellectual Property and Growth. The UK Minister for Intellectual Property explained that the rationale of the UK contractual override provisions was to “...provide legal certainty and protect beneficiaries of statutory rights”.<sup>75</sup>

The importance of ensuring that contractual mechanisms cannot be used to exclude the effect of provisions enacted in the public interest was also recently recognised by the House of Representatives Standing Committee on Infrastructure and Communications in its *At What Cost? IT Pricing and the Australia Tax* report. The Committee recommended that the Government “investigate the feasibility of amending the Competition and Consumer Act so that contracts or terms of service which seek to enforce geoblocking are considered void”.<sup>76</sup> The Committee quoted the ACCC, which stated that:

*From our point of view, if the supplier is engaging in business in Australia, supplying services to Australians, and it is doing things to stop people from getting access to lower priced goods and it is doing it for an anticompetitive purpose, then action can be taken against them.*<sup>77</sup>

The problem that the Commission has identified with respect to contractual override of statutory exceptions is not confined to the library and archive exceptions: it is problem that increasingly arises with respect to electronic resources aimed at primary and secondary schools. For example, the Jacaranda Plus suite of digital products explicitly restricts uses that would be allowable under fair dealing and the statutory licences.<sup>78</sup> The terms and conditions for the Jacaranda Plus Spyclass product allow teachers to make digital or photocopies for class use only if all the students have legitimate access to Spyclass, and specifically excluding Part VB licence uses. The terms also explicitly prohibit modification of materials, prohibiting teachers from making accessible versions of the work for students with disabilities as allowed under the statutory licence.<sup>79</sup> Other academic journal databases purport to exclude uses that would otherwise be permitted - and paid for - under the Part VB statutory licence.<sup>80</sup>

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<sup>75</sup> [Work of the Committee in Session 2013-14 - Secondary Legislation Scrutiny Committee](#)

<sup>76</sup> House of Representatives Standing Committee on Infrastructure and Communications, *At What Cost? IT Pricing and the Australia tax* (Canberra, July 2013) at xiii

<sup>77</sup> Committee Hansard, Canberra, 31 October 2012, p. 4, cited in House of Representatives Standing Committee on Infrastructure and Communications, *At What Cost? IT Pricing and the Australia tax* (Canberra, July 2013) at 114

<sup>78</sup> See terms and conditions on the JacPlus website at <https://www.jacplus.com.au/jsp/general-nav/terms/terms.jsp>

<sup>79</sup> Ibid

<sup>80</sup> See Council of Australian University Librarians [Submission 122](#) at 46

For that reason, CAG strongly supports the enactment of a provision that would prevent contractual override of **all** statutory exceptions rather than being confined to one class of user.

CAG also considers that any contractual override provision that was expressly confined to the library and archives exceptions would run the risk of having unintended consequences, and should for that reason be avoided. The reason for this is as follows:

Currently, the question of whether a contract that purports to exclude or limit the operation of copyright exceptions is unsettled. This uncertainty is due in part to the existence of s.47H of the Act, which contains an express provision against contracting in relation to computer programs. In its 2002 review of *Copyright and Contract*, the CLRC gave detailed consideration to the rules relating to statutory interpretation in seeking to determine whether the existence of s. 47H can be taken to mean that Parliament intended that other exceptions could be overridden by contract.<sup>81</sup> The CLRC ultimately concluded that “the effect of s.47H on agreements which exclude or modify exceptions is ultimately unclear.” It is significant, however, that this view was reached partly on the basis that the extrinsic materials were silent as to whether Parliament had turned its mind to the potential effect of s. 47H on other exceptions in the Act.

CAG is concerned that the enactment of a further express contractual override provision - ie a provision relating only to the library and archives exceptions - may have the unintended effect of answering the question of whether contracts be relied on to override other exceptions in the Act. The risk that we envisage is that a court may apply a rule of statutory construction known as “*expressio unius exclusio alterius*” (ie, an express reference to one matter indicates that other matters are excluded) in order to discern the legislative intent. This would add to the uncertainty regarding the status of copyright exceptions, and could potentially lead a court to determine that Parliament must have intended that contractual terms excluding other exceptions and uses, such as educational uses, were automatically enforceable.

## 5.5 The importance of strong leadership on OER

CAG welcomes the Commission’s draft recommendation that Australian, and State and Territory Governments should implement an open access policy for publicly-funded research.

Improving access to publicly funded research must be a central plank in an effective innovation policy.

CAG also submits that there is an urgent need for the Commonwealth Government to ensure greater accountability in relation to existing OER policies. This could be done by openly supporting and encouraging the implementation of The Australian Government’s Open Access and Licensing Framework (**AusGOAL**) in Commonwealth Departments,

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<sup>81</sup> Copyright Law Review Committee, *Copyright and Contract*, 2002, at paragraph 5.118.

and ensuring that any appropriate publicly funded initiative/project/resource openly licences the resources in accordance with the AusGOAL framework, making them widely and freely available.

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

## Conclusion

CAG strongly endorses the Commission's draft recommendations and urges the Commission to proceed to convert them into final recommendations.

If you would like any further information please contact Ms Delia Browne, National Copyright Director on 02 9561 8876 or [delia.browne@det.nsw.edu.au](mailto:delia.browne@det.nsw.edu.au).

## ANNEXURE A

### Examples of copyright guidance given to Australian schools and TAFEs from the Smartcopying website

#### For Schools

- [Applying a Creative Commons Licence](#)
- [Content Management Systems](#)
- [Copying Sheet Music in Schools](#)
- [Copyright Amendment Act 2006](#)
- [Creative Commons: A Quick Overview](#)
- [Creative Commons Information Pack](#)
- [Educational Licences](#)
- [Flexible Dealing](#)
- [Format Shifting](#)
- [Labelling School Material](#)
- [Labelling Third Party Content in Creative Commons Licensed Material](#)
- [Parody and Satire](#)
- [Performance and Communication in Class](#)
- [Performing and Communicating Music in Schools](#)
- [Podcasts - Creating](#)
- [Podcasts - Using](#)
- [Proxy Caching](#)
- [Playing Films for Non-Educational Purposes](#)
- [Playing Films, Television and Radio in Schools](#)
- [Screening Pirated DVDs](#)
- [Students and Copyright](#)
- [Technological Protection Measures](#)
- [Understanding Website Terms and Conditions](#)
- [Using Applications \(Apps\) in the Classroom](#)
- [Using Cloud Computing](#)
- [Using Digital Content Repositories: Copyright Compliance Manual for Schools](#)
- [Using Digital Content Repositories: Copyright Compliance Manual for School Authorities - relying on statutory licences](#)
- [Using Digital Content Repositories - Copyright Compliance Manual for School Authorities - not relying on statutory licences](#)
- [Using iTunes in Schools](#)
- [Using TeacherTube](#)
- [Using Wikis and Blogs](#)
- [Using YouTube](#)

#### For TAFEs

- [APRA/AMCOS & PCCA Non-Educational Use Music Licenses for TAFEs](#)
- [Attribution of Text and Artistic Works: TAFE](#)
- [Content Management Systems](#)
- [Copyright Amendment Act 2006](#)
- [Education Licences](#)
- [Educational Use of Music in TAFE](#)
- [Flexible Dealing](#)
- [Format Shifting](#)
- [Open and Non PCCA/APRA Music for Non-Educational Purposes of TAFEs](#)
- [Parody and Satire](#)
- [Performance and Communication in Class](#)
- [Podcasts - Creating](#)
- [Podcasts - Using](#)
- [Proxy caching](#)
- [Students and Copyright](#)
- [Technological Protection Measures](#)
- [Use of Television Programs and Film by TAFE Institutes without a Screenrights Licence](#)
- [Using Cloud Computing](#)
- [Using Learning Management Systems: Practical Tips for TAFE Teachers](#)
- [Using Music](#)
- [Using TeacherTube](#)
- [Using YouTube](#)