**The Copyright Access Reforms 2021**

**11 July 2021**

Schools have been raising the urgent need for copyright reform to appropriately accommodate digital teaching methods for over a decade. Although there has been a series of government copyright reviews over the years, the much-needed copyright reforms have not yet been made.

**Copyright access reforms**

The Government announced the [copyright access reforms](https://minister.infrastructure.gov.au/fletcher/media-release/copyright-reforms-better-support-digital-environment) in August 2020.

Schools were initially advised that an Exposure Draft would be released for consultation towards the end of 2020, with an aim to introduce legislation into Parliament early in 2021. Unfortunately, the process was delayed and an Exposure Draft has not yet been released.

**What are the reforms intended to achieve?**

It is hoped that the copyright access reforms will:

* + ensure teachers can use copyright content with students whether they are teaching face to face or remotely. At present, schools are not clearly permitted to use digital technologies (such as Zoom), to provide remote teaching and learning support to Australian students in all circumstances.
	+ fix the current problem that some of the copyright exceptions do not apply if parents/guardians are helping students with learning.
	+ allow lessons to be recorded for on-demand access of all forms of copyright material.
	+ make sure the rules for displaying material on screens in a classroom apply equally to all forms of copyright materials (for example at present a public interest exception allows a teacher to show an artwork on an interactive whiteboard but a [licence](https://smartcopying.edu.au/glossary/licence/) fee is charged if [text](https://smartcopying.edu.au/glossary/text/) is shown).
	+ fix the current problem where the over-broad coverage of a statutory [licence](https://smartcopying.edu.au/glossary/licence/) means schools pay millions of dollars each year to use freely available internet materials (such as the nutrition page of the McDonald’s Australia website, free health fact sheets or free online educational resources).
	+ make the copyright rules fair for all schools.
	(Currently independent and Catholic schools can play music at their schools (for example for the school bell) under an exception, while government schools need a [licence](https://smartcopying.edu.au/glossary/licence/). A free interim [licence](https://smartcopying.edu.au/glossary/licence/) is in place for government schools, but this expires on 31 December 2021).

**Background**

The Government’s information sheet announcing the reforms stated:

*“These reforms to the Copyright Act 1968 follow two years of*[*extensive stakeholder consultation*](https://www.communications.gov.au/have-your-say/copyright-modernisation-consultation)*and will finalise the*[*Government’s response to copyright recommendations in the Productivity Commission’s 2016 Intellectual Property Arrangements report*](https://www.communications.gov.au/departmental-news/government-response-productivity-commissions-intellectual-property-report)*.”*

The Productivity Commission’s Intellectual Property Arrangements report recommended that Australia amend the *Copyright Act 1968* (the Act) by introducing a ‘fair use’ exception, which would enable many public interest uses, including digital education. The Government decided not to follow the Productivity Commission’s advice, and instead decided to introduce a package of more minimal amendments in the copyright access reforms.

**Summary of the anticipated amendments**

Schools are hopeful that the copyright access reforms will support online learning by:

**Section 28 (the ‘show and tell’ exception)**

*Ensuring that section 28 applies to all forms of teaching activities.*

At present teachers are allowed to use copyright materials “in the classroom”.  We expect section 28 to be updated to ensure the exception applies equally to all forms of learning, whether the lesson occurs in the classroom or virtually.

We are hopeful that the section will clarify that a teacher may record a lesson for later on-demand access by students.

*Removing the limitations regarding parents and guardians in section 28.*

Technically, schools can’t rely on section 28 if parents and guardians are ‘in the audience’ for the lesson. We anticipate that this limitation will be removed.

*Ensuring section 28 no longer ‘stops at the school gates’.*

Technically, schools can’t rely on section 28 if someone from outside the school is involved in the lesson (eg a member of the community who has been invited into the classroom, or if a student’s work placement supervisor is teaching part of a lesson). We anticipate that this limitation will be removed.

The law should operate so that it doesn’t matter if a student is in the classroom, at home, or on a workplace placement to access a lesson.

*Clarifying section 28 should apply equally to all forms of copyright materials.*

Currently Copyright Agency claims that the statutory [licence](https://smartcopying.edu.au/glossary/licence/) applies to the ‘display and projection’ of some forms of [literary](https://smartcopying.edu.au/glossary/literary-works/), [dramatic](https://smartcopying.edu.au/glossary/dramatic-works/) and [musical works](https://smartcopying.edu.au/glossary/musical-works/) on screens (eg displaying a static website on an interactive whiteboard), despite the exception permitting the display of all other forms of copyright materials on screens in classrooms.

We have called on the Government to clarify the intended effect of previous amendments to section 28 – that the exception should apply equally to all forms of copyright materials.

*Permitting technical copies and communications to enable classroom display.*

Sometimes a teacher may need to make a number of incidental [copies](https://smartcopying.edu.au/glossary/copy/) or [communications](https://smartcopying.edu.au/glossary/communicate/) in order to display content to students (eg temporarily upload something to a digital teaching environment to show it on the interactive whiteboard). We have called on the government to clarify that if a school displays content to students, section 28 should also apply to any incidental copies or communications necessary to make that display happen.

Teachers would be required to adopt reasonable measures to ensure that access is limited to those reasonably necessary for the [educational instruction](https://smartcopying.edu.au/glossary/educational-instruction/) (eg to students, staff and members of the school community). There will be an expectation that content is made available for the time reasonably necessary, and that steps will be taken to minimise the risks of further copies being made. These requirements would be based on National Copyright Unit’s (NCU) current guidance to teachers (eg the COVID guidelines prepared earlier this year).

**A new exception for freely available materials**

Schools have advocated for a new freely available materials exception, which will make it clear that schools would no longer be required to pay [licence](https://smartcopying.edu.au/glossary/licence/) fees for this type of content.

Some examples of the types of materials that Copyright Agency has considered “remunerable” under the statutory [licence](https://smartcopying.edu.au/glossary/licence/) in recent years are:

* + ‘About us’ pages from websites such as [Amnesty International](https://www.amnesty.org.au/), [Oxfam](https://www.oxfam.org/en) and the [Sydney Aquarium](https://www.sydneyaquarium.com.au/)
	+ free [downloadable teaching ‘printables’](http://www.3dinosaurs.com/printable/abc-letter-find) and [worksheets](http://cleverlearner.com/color-the-parts/images/parts-of-the-body-writing-and-coloring-sheet.pdf), and [educational materials designed for use by kids](https://kidsanimalsfacts.com/common-snapping-turtle-facts-for-kids/), or [specifically stated to be for school use](https://www.educationmattersmag.com.au/wp-content/uploads/2016/11/Image-1.jpg)
	+ free educational resources on a [health education partnership](https://www.n4hk.com.au/) between Nestle and the Australian Institute of Sport
	+ information about a charity’s work [regarding animals in zoos](https://www.freedomforanimals.org.uk/zoos) where website users are encouraged to share the information
	+ the landing page for a freely available [catch up TV site](https://7plus.com.au/sunday-night)
	+ [Bible verses](https://www.biblegateway.com/passage/?search=Romans+13&version=NIV) from a free online bible website
	+ information about [Lendlease’s involvement in urban regeneration](https://www.lendlease.com/expertise/what-we-do/urban-regeneration/)
	+ [bullying](https://kidshelpline.com.au/teens/issues/bullying) and [mental health](https://kidshelpline.com.au/kids/issues/talking-about-feelings) resources on the Kids Helpline website
	+ an image of a Dali painting recorded in a [Wikipedia entry](https://en.wikipedia.org/wiki/The_Persistence_of_Memory)
	+ the [definition of an emoji](https://www.dictionary.com/e/emoji/fearful-face-emoji/) from dictionary.com
	+ links to [Google](https://www.google.com.au/search?q=picture+of+a+black+cockatoo&safe=strict&tbm=isch&source=iu&ictx=1&fir=0gLzk4BZjokuQM%253A%252CJndWwcxRKZaUcM%252C_&usg=AI4_-kTVtPh0Pjeua5bXrp_o3wUuMysrYg&sa=X&ved=2ahUKEwjUibacxsvgAhWaiXAKHYgTBJ8Q9QEwBXoECAQQDg) and [Bing](https://www.bing.com/images/search?q=the+golden+kangaroo&qs=HS&form=QBIR&sp=1&pq=the%20golden%20kangaroo&sc=3-19&cvid=FE79F169A37F4F8795DF5E02E20A0569&first=1&scenario=ImageBasicHover&cw=2388&ch=1048) image search results for Australian birds and animals
	+ a [photo of a gozleme](https://www.google.com.au/search?safe=strict&hl=en-GB&authuser=0&tbm=isch&source=hp&biw=1346&bih=661&ei=TpDPXL6SKZeo9QOh65uIDw&q=gozleme&oq=gozleme&gs_l=img.1.0.0l10.3028.4837..6479...0.0..0.226.1063.0j6j1......1....1..gws-wiz-img.....0..0i10.Qfwr71Ezyo0) sourced from a Google search and attributed to sbs.com.au (whose terms of use allow personal, non-commercial purposes).

**Section 200AB (the special case exception)**

Based on the Government’s [announcement last year](https://www.communications.gov.au/departmental-news/copyright-access-reforms), schools are expecting the Government to remove subsections 6 and 6AA to clarify that the special case exception can apply to categories of [works](https://smartcopying.edu.au/glossary/works/) that are currently covered by the statutory [licence](https://smartcopying.edu.au/glossary/licence/) scheme. However, this does not mean that schools will be able to rely on the special case exception instead of paying [licence](https://smartcopying.edu.au/glossary/licence/) fees under the statutory [licence](https://smartcopying.edu.au/glossary/licence/). Section 200AB has in-built protections for copyright owners – schools can only rely on the exception if the intended use does not conflict with the normal exploitation of the work (including licensing arrangements), and the use does not cause unreasonable prejudice to the copyright owner.

The main benefit of the removal of subsections 6 and 6AA will be the flexibility achieved by enabling case by case assessments to be made, and there will be scope in the Act to deal with new technologies and educational uses over time. For example, if a teacher wants to teach students to use machine learning or other computational learning techniques, this may technically involve making a [copy](https://smartcopying.edu.au/glossary/copy/) of a copyright work.

**Orphan works**

It is expected the Bill will introduce a new orphan [works](https://smartcopying.edu.au/glossary/works/) scheme that will apply generally to individuals as well as cultural institutions and [educational institutions](https://smartcopying.edu.au/glossary/educational-institutions/) who wish to use the scheme for specific projects. This scheme will require users to conduct a reasonably diligent search to find the owner of copyright. If the owner can’t be found, the work can be used, and there will be a mechanism introduced for dealing with situations where copyright holders later come forward and identify themselves as the owner of the work.

The main issue regarding orphan [works](https://smartcopying.edu.au/glossary/works/) in the schools context is the problem that arises when orphan [works](https://smartcopying.edu.au/glossary/works/) are used under the statutory [licence](https://smartcopying.edu.au/glossary/licence/), and the copyright owner cannot be identified for distribution of [licence](https://smartcopying.edu.au/glossary/licence/) revenue. At present, the Copyright Agency retains these funds and either distributes the funds to owners who can be identified, or it seems that much of the money retained from the use of orphan [works](https://smartcopying.edu.au/glossary/works/) and freely available internet materials is held in Copyright Agency’s future fund.

**Section 106**

We anticipate section 106 will be amended to revert to its original effect, to ensure that the exception applies in the same way to government and non-government schools regarding the use of [sound recordings](https://smartcopying.edu.au/glossary/sound-recordings/).

Section 106 currently allows registered charities such Catholic and independent schools to play [sound recordings](https://smartcopying.edu.au/glossary/sound-recordings/) as part of their school activities. This means that only non-government schools can rely on this exception to play recorded music as part of their school activities, such as a school bell or at a school assembly. Up until 2012, both government and non-government schools were allowed to play recorded music as part of their school activities.

**Urgent need for change**

Many of these issues existed long before COVID-19. However, with COVID-19 requiring Australian schools to rapidly transition to ‘digital first’ or ‘digital only’ teaching strategies, many teachers and students now reasonably expect to incorporate these digital practices into their day-to-day learning environments. Copyright laws must be urgently amended to clearly facilitate digital education methods, and provide teachers with one clear set of rules for how to use copyright content with students.

The NCU will update this information sheet once the Exposure Draft has been released.