**The Copyright Access Reforms**

**26 September 2022**

Schools have been raising the need for copyright reform to appropriately accommodate digital teaching methods for over a decade. Although there have been a series of government copyright reviews over the years, these much-needed copyright reforms have not yet been made. Following the election in May 2022, Australian schools still face uncertainty and legal risk when delivering digital education to Australian students.

**Copyright Access Reforms**

The previous Government announced the [copyright access reforms](https://www.paulfletcher.com.au/media-releases/media-release-copyright-reforms-to-better-support-the-digital-environment) in August 2020, and an [Exposure Draft of the Copyright Amendment (Access Reform) Bill 2021](https://www.infrastructure.gov.au/have-your-say/have-your-say-draft-copyright-reform-legislation) (Exposure Draft Bill) was released on 21 December 2021. The Copyright Advisory Group - Schools put in a [submission](https://www.infrastructure.gov.au/sites/default/files/documents/copyrightar2021-submission-no-40-copyright-advisory-group-schools.pdf) on behalf of the schools sector.

The Exposure Draft Bill has been ten years in the making. The school sector strongly supports and welcomes these sensible reforms, which are an essential step towards facilitating digital education methods and providing teachers with one clear set of rules for how to use copyright content with students.

**What would the Exposure Draft Bill fix for schools?**

Implementing the Exposure Draft Bill would:

* 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.
* make sure the rules for displaying material on screens in a lesson applies equally to all forms of copyright materials (eg 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).
* makes the copyright rules fair for all schools. Currently, Independent and Catholic schools can play music at their schools (eg as a school bell) under an exception, while government schools need a licence. At present, a free interim licence is in place for government schools.

Importantly, these reforms have been designed in a way to minimise any impact on copyright owners and require that schools take appropriate steps to protect content used in lessons. These reforms would have very little, if any, impact on copyright owners and the existing educational licence arrangements.

The Australian school sector hopes the new Parliament will make fixing these issues a priority.

**More detail about the need for the Copyright Access Reforms**

**Background**

The previous 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.pc.gov.au/inquiries/completed/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 previous Government decided not to follow the Productivity Commission’s advice, and instead decided to introduce a package of more minimal amendments in the Exposure Draft Bill.

**Summary of the Exposure Draft Bill**

The school sector strongly supports the Exposure Draft Bill. The Exposure Draft Bill will support online learning by:

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

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

At present teachers are allowed to use copyright materials “in the classroom” under an exception in section 28 of the Act. The Exposure Draft Bill clarifies that the exception applies equally to all forms of learning, whether the lesson occurs in the classroom or virtually.

The Exposure Draft Bill clarifies 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 the exception in section 28 if parents and guardians are ‘in the audience’ for the lesson. This limitation is removed in the Exposure Draft Bill.

*Removing the limitations on who can be present during the lesson*

Technically, schools can’t rely on section 28 if someone other than the teacher and students is present during the lesson (eg a member of the community who has been invited into the classroom, such as a student’s work placement supervisor). This limitation is removed in the Exposure Draft Bill.

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

Currently, it is Copyright Agency's position that the [statutory licence](https://smartcopying.edu.au/glossary/statutory-licences/) 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 in the classroom (eg displaying a static website on an interactive whiteboard), despite the section 28 exception permitting the display of all other forms of copyright materials on screens in classrooms.

The Exposure Draft Bill clarifies the intended effect of previous amendments to section 28 – that the exception should apply equally to all forms of copyright materials.

*Permitting incidental 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 (DTE)](https://smartcopying.edu.au/glossary/digital-teaching-environment-dte/) to show it on the interactive whiteboard). The Exposure Draft Bill clarifies 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.

It is our position that teachers could 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). These requirements could be based on National Copyright Unit’s (NCU) current guidance to teachers (eg the [COVID guidelines](https://smartcopying.edu.au/covid-19-school-lockdown-copyright-guidance/)).

**Orphan works**

The Exposure Draft Bill introduces 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 for the school sector is the problem that arises when orphan works are used under the statutory licence, and the copyright owner cannot be identified for distribution of licence revenue. At present, the Copyright Agency retains these funds and either distributes the funds to owners of other unrelated works who can be identified, or it seems that much of the money retained from the use of orphan works and freely available internet materials is held in Copyright Agency’s ‘future fund’ for later use by Copyright Agency, such as to fund its law reform efforts.

**Section 106**

Section 106 currently allows registered charities such as 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.

The Exposure Draft Bill reinstates section 106 to its pre-2012 scope to ensure that the exception applies in the same way to government and non-government schools.

**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.

**Outstanding issues for the school sector**

While the school sector strongly supports the Exposure Draft Bill, it unfortunately does not solve two problems that both the Australian Law Reform Commission and the Productivity Commission recommended be solved:

1. schools pay licence fees to use the same materials that ordinary Australians can use for free every day – for example, freely available materials on the internet such as online tv guides and McDonald’s nutrition information.
2. our current Copyright Act is not future-proofed and does not encourage schools to adopt new technologies such as machine learning or other computational learning techniques. Our Copyright Act must be flexible enough to allow and support innovative technology that allows Australia to have a successful digital economy and prepare students for the jobs of the future.

These two problems can be solved by a freely available internet materials exception and amendments to the ‘special case’ exception in s 200AB.

**An exception for freely available materials**

Schools have advocated for a new freely available materials exception for years. An exception will make it clear that schools would no longer be required to pay licence fees for content that’s made available online with no commercial intent or expectation of payment.

Some examples of the types of materials considered “remunerable” under the statutory 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).

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

Based on the previous Government’s [announcement in 2020](https://www.communications.gov.au/departmental-news/copyright-access-reforms), schools expected the Exposure Draft Bill to amend section 200AB to clarify that the special case exception can apply to categories of works that are currently covered by the statutory licence scheme.

While we appreciate that there is a concern that schools would no longer have to pay licence fees under the statutory licence for certain uses, 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), the use does not cause unreasonable prejudice to the copyright owner and it amounts to a ‘special case’.

While the school sector is disappointed that these issues were not addressed in the Exposure Draft Bill, we understand there will be further consultations on these important issues. The school sector looks forward to sharing our ideas on how these issues can be fixed while having minimal market impact on copyright owners. We encourage the new Government to further consult on this as a priority.