

6 December 2015

Our ref: F11/1664-39

Commissioners  
Intellectual Property arrangements  
Productivity Commission  
GPO Box 1428  
Canberra City ACT 2601

**By email:** [intellectual.property@pc.gov.au](mailto:intellectual.property@pc.gov.au)

To the Commissioners

**Productivity Commission Intellectual Property arrangements issues paper**  
**ACARA's submission**

We refer to the Productivity Commission's Intellectual Property arrangements issues paper, dated October 2015 (**Issues Paper**). We thank you for your work in this area and for the opportunity for the Australian Curriculum, Assessment and Reporting Authority (**ACARA**) to provide a response. ACARA is the independent authority responsible for the development of a national school curriculum, a national assessment program and a national data collection and reporting program that supports 21st century learning for Australian students.

**1. ACARA's submissions**

ACARA's submissions relate to the effectiveness and efficiency of the Copyright Act 1968 (Cth) (**Copyright Act**). By way of background, ACARA has been advised that it is not an 'education institution' and cannot obtain the benefit of the Part VB statutory licence. Further, ACARA is unable to obtain the benefit as a government-authorised body under section 183 of the Copyright Act. ACARA's submissions are:

- a. Effectiveness - ACARA uses small amounts of third party copyright material in the reading magazines for the National Assessment Program – Literacy and Numeracy (**NAPLAN**) tests and in some published student work samples. ACARA's experience is that the Copyright Act can, in some cases, act as a roadblock to including high quality images and text in the NAPLAN reading magazines (works cannot be used as appropriate licences are not obtained). It can also mean that some really interesting student work which incorporates third party copyright materials cannot be published on our website to demonstrate various standards of learning achievement (either licences cannot be obtained or ACARA is unable to determine where the student sourced the third party copyright work from).

We also note that the Copyright Act is out of step with modern technology and contemporary practice, allowing exceptions for paper and pencil examinations (section 200(1)(b) of the Copyright Act), but not for online examinations. From ACARA's perspective, this penalises innovation and represents an obstacle to ACARA meeting its directions set by Commonwealth, state and territory governments through the COAG Education Council (NAPLAN will be moving online from 2017). Unfortunately, even if this section was amended to allow for online exams, this would not provide ACARA with a satisfactory solution. ACARA would still need to obtain licences for all third party copyright materials to enable ACARA to sub-licence for post-test use:

- ✓ to education bodies including the Commonwealth, State and Territory departments of education, state education authorities and other education bodies, including (without limitation) the Australian Institute for Teaching and School Leadership, Education Services Australia Limited and non-government school authorities,
- ✓ for the purposes of inclusion in teacher support materials; and

- b. Efficiency – ACARA's experience is that it is often expensive and time consuming to obtain licences for copyright works, particularly those works which are not images or text. As an example, ACARA was recently quoted \$2,000 for five (5) years to licence a musical work that had been included by a student in a work sample for The Arts. It is also time consuming. ACARA has three (3) to four (4) contractors creating test materials on our behalf, one of which operates in the United States of America (**USA**). It can be difficult to explain our licence requirements to our contractors, particularly the USA contractor, as the copyright laws in the USA differ in some material respects to Australian copyright law.

## 2. ACARA's previous submission to the Australian Law Reform Commission

ACARA has previously made a submission to the Australian Law Reform Commission (ALRC), dated 7 August 2013 (**attached**), endorsing the submissions made by the Copyright Advisory Group to the Council of Australian Governments' Education Council (**Copyright Advisory Group**). ACARA strongly supports the recommendations made by the Copyright Advisory Group as ACARA's uses of third party copyright material would, most likely, be allowed under a fair use exception.

## 3. Contact

If you have any queries in relation to the matters raised in this letter, please contact Peter Matheson, Board Secretary,

Yours sincerely

Robert Randall  
Chief Executive Officer

7 August 2013

Our ref: F11/1664-23

The Executive Director  
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To the Executive Director

### **Copyright and the digital economy (DP 79)**

This submission is made on behalf of the Australian Curriculum, Assessment and Reporting Authority (**ACARA**). ACARA is the independent authority responsible for the development of a national curriculum, a national assessment program and a national data collection and reporting program that supports 21st century learning for Australian students.

ACARA was established by the Federal Parliament under the *Australian Curriculum, Assessment and Reporting Authority Act 2008* (Cth). ACARA's work is carried out in collaboration with a wide range of stakeholders, including teachers, principals, governments, State and Territory education authorities, professional education associations, community groups and the general public. ACARA's public website (<http://www.acara.edu.au/default.asp>) provides further detail in this regard.

#### **1. Endorsement of CAG Schools' submission**

ACARA has had the opportunity to review the submissions to the Discussion Paper by CAG Schools, and agrees with and endorses those submissions.

#### **2. Benefits of proposed fair use exception**

The flexibility and technological neutrality of the proposed fair use exception would assist ACARA greatly in fulfilling its important public interest functions in the digital economy. ACARA would of course continue to obtain permissions in respect of uses that go beyond what is regarded as fair under the proposed new system. However, the transition to a fairness-based analysis supported by voluntary collective licences would be hugely beneficial to ACARA's educational role, because:

- a. the fact that ACARA does not fall within the technical statutory definition of an "educational institution" (heading 4(c)) would no longer preclude ACARA from relying on licences and exceptions for educational purposes;
- b. ACARA would be protected in relation to the use of third party materials in online testing (heading 4(a) and (b)); and
- c. minor, fair uses that are not unreasonably harmful to the interests of the copyright owner would no longer require the onerous permissions processes that are interfering with ACARA's ability to fulfil its statutory mandate.

In light of this, ACARA strongly supports the ALRC's proposed recommendation to introduce a new flexible fair use provision, and with the submissions made by CAG Schools in response to the Discussion Paper.

### 3. ACARA's requirements for third party licences

Third party materials are owned by third parties, licensed to ACARA and predominantly included in:

- the reading domain of the National Assessment Program - Literacy and Numeracy (NAPLAN); and
- student work samples, some of which are communicated on the Australian Curriculum website.

#### 3.1 NAPLAN

Currently, NAPLAN is a paper-based test. It is proposed that NAPLAN tests move online, with a provisional launch year of 2016. The benefits of moving testing online are many and include:

- aligning with emerging practice and the rapid spread of computers in schools, with students increasingly working on keyboards and in an online environment;
- the capacity to assess a wider range of learning outcomes and to make use of a wide range of authentic tasks and online stimulus materials; and
- the capacity to better tailor assessment to the abilities of students and avoid current ceiling and floor effects associated with single-form tests.

As the NAPLAN testing moves online, the amount of third party material that is needed will increase. This is because the tests will become "testlets" which will hone in on the level of capability of individual students through branching pathways.

#### 3.2 Student work samples

ACARA also obtains licences for third party materials used in student work samples, some of which are communicated on the Australian Curriculum website (<http://www.australiancurriculum.edu.au/>), a public website. Selected student work samples are used as illustrations of achievement.

Generally, students are asked to provide a written or oral response to an image or text. Sometimes, the image or text is owned by third parties. In many cases, it is important to include the third party material as part of the student response, so that teachers are able to gauge the strength of the response.

### 4. Existing copyright law makes it difficult for ACARA to fulfil its mandate

ACARA faces considerable difficulties in relation to obtaining appropriate third party licences for NAPLAN and student work samples under existing Australian copyright law because:

- a. Although section 200(1)(b) of the Copyright Act 1968 (Cth) (Copyright Act) allows ACARA to reproduce works in hard copy examination papers, this exception does not permit the communication of those examination papers online. ACARA will therefore lose the protection of section 200(1)(b) when NAPLAN testing moves online;
- b. Section 200(1)(b) of the Copyright Act does not cover *post-test* use of third party materials by the State and Territory Departments of Education, State and Territory statutory education authorities and Education Services Australia Limited (ESA). So,

regardless of the current protection given for hard copy exams, ACARA is required to obtain third party licences for each and every piece of third party material included in the NAPLAN tests;

- c. ACARA has been advised that it is not an “educational institution” within the very technically drafted Part VB statutory licence, and therefore is not able to rely on that licence; and
- d. Significant administrative burdens have hindered ACARA’s potential registration as a Government-authorized body under section 183 of the Copyright Act, preventing ACARA from obtaining the advantage of this statutory government licence.

As a result, ACARA is required to undertake lengthy and unwieldy permissions processes for every use of third party material, no matter how small or how pivotal to the education of Australian students. Furthermore, with the transition to online assessment, the need for, and volume of, third party material increases. This necessarily increases the complexity of managing third party licences and changes the risk profile for ACARA and other bodies that re-use test items, including States and Territories and ESA.

## **5. Contact**

If you have any queries in relation to the matters raised in this letter, please contact Peter Matheson, Board :

Yours sincerely

Robert Randall  
**Chief Executive Officer**

Cc: Ms Delia Browne and Ms Sarah Lux-Lee, National Copyright Unit, Standing Council on School Education and Early Childhood (SCSEEC)