

Creative Licensing to Expand Australia's Public Domain
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Announcing *AEShareNet*-FfE¹

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Preliminary

1. This paper explains the rules and rationale of the new *AEShareNet*-FfE ('Free-for-Education') Licence Protocol. It places the new protocol into perspective by:
 - briefly examining the historical evolution of publishing models from relatively proprietary to the new paradigm described as 'open source / open content'
 - explaining those fundamental structures and concepts underlying *AEShareNet* which are helpful in understanding the *AEShareNet*-FfE licence protocol.

Traditional Publishing Models

2. In understanding where we are and where we might be headed it is helpful to understand where we've been.
3. If we go back to, say, the time of the *Berne Convention* (1886), the main outlines of copyright law had been formed. That law was based on a publishing model² that was very different to today's complex realities. The traditional publishing industries were based on a linear supply chain proceeding through:
 - copyright authors, who are individuals - motivated both by profit and by a desire for recognition
 - publishers, who usually acquired ownership of copyright from the author
 - distributors of various kinds, whose role was to deliver the copyright content to the consumer - by sale of copies or through public exhibition / performance
 - consumers (users) - both individuals and organisational.
4. The publishers and distributors in this chain were generally commercial entities with a view to maximising profit by maximising the delivery of content to consumers. Each industry sector (including print, music, film and broadcasting) had a separate set of business practices and

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² By 'publishing model' I simply mean the nature of the relationships which connect creators and consumers of copyright materials, and all the intermediaries between them.

relationships and a vocabulary supporting that. Often these business relationships were very tightly held - as evidenced by the behaviour of UK and US publishers in dividing hegemony of the English language print publishing world between them over many years.

5. There were large upfront fixed costs associated with the publication of copyright works by traditional means (including the manufacturing expenses involved in distribution of content fixed in or on a medium such as paper, vinyl or magnetic tape). It followed that many works were simply never published. Where publication did take place it was generally accompanied by an intention to recoup the costs of publication through sales and royalties.
6. At the user end, consumers received copyright content largely as a 'commodity, at a largely standard price. They did not contribute, manipulate or perform any acts of copyright in relation to the material. Copyright was an arcane area of the law that very few people needed to understand.
7. In summary, for lack of education, opportunity or technical or commercial feasibility, very few individuals could aspire to be serious creators of copyright content for the use of others.

Transformation of Publishing

8. These realities have been profoundly transformed by the growth in technologies in the second half of the twentieth century. Users and user organisations now have the technological capacity to reproduce copies of works cheaply, and to communicate and manipulate them digitally. The 'supply chain' is no longer linear, because consumers may also be re-developers and re-publishers of copyright material.
9. Along with this 'opening up' of publishing opportunity, the range of motivations for developing and publishing copyright material has enlarged beyond the obvious, traditional motivation of making money. For example, a government department may publish:
 - to promote a public cause, e.g. government health campaign to combat obesity
 - to establish a standard
10. Even a commercial enterprise may have reasons other than direct money-making. For example:
 - loss-leading; i.e. giving away content to promote allied services or products where the real competitive advantage lies
 - advertising, pure and simple.
11. Nowhere have these developments been more pronounced than in the medium of the internet. The internet has made it possible for an individual or organisation to bypass the traditional publication channels, a process described by the National Office for the Information Economy (NOIE) as 'disintermediation'. At the same time it has given rise to new forms of intermediation, such as search engines.
12. The internet is widely used by government, business, professional and trade associations, hobbyists, political parties, lobbyists and individuals to publish copyright material that they desire to be given wide exposure. In this, the internet has certain advantages over traditional print publishing:

- it enables more effective and efficient dissemination of the desired message
- it saves duplication costs (which are shifted to the user)
- in some cases it enables the proprietor to operate fewer shop fronts.

Educational Use of the Internet - Reform Proposals


13. Given all the advantages that accrue to creators of websites it seems anomalous that education users should be asked to pay copyright owners for downloading and use of the material placed on the internet. Yet that seems to be the case under the statutory licence for educational use contained in Part VB of the *Copyright Act 1968* (Cth). The same downloading practices are undertaken by non-educational users in homes and offices all around the world - free of any charge.
14. In its submission to the 'Digital Agenda' Review, the Commonwealth Department of Education, Science and Training (DEST) accordingly recommended as follows:
 - Where a work or subject matter other than a work is made available on the internet by or with the consent of the copyright owner, and is not subject to a technological protection measure, it should not be an infringement of copyright for a person to reproduce or communicate that work or subject matter for the educational purposes of an educational institution
 - The operation of the preceding provision may be excluded or modified by agreement.
15. That recommendation reflects a viewpoint that the internet by its nature is a medium that lends itself to an 'open' rather than a 'closed' publishing model. That is, by placing copyright material on the internet, unprotected, the proprietor has elected to allow use of that material on liberal terms. They remain free to choose differently if they wish:
 - by storing material on a secure site that is only accessible to a class of users who can authenticate themselves in some way, and/or
 - by imposing contractual conditions of access which spell out a more restricted, or different regime governing use of the material.
16. The DEST recommendation was not addressed in the Phillips Fox report to the Attorney-General's Department following its Review. That is perhaps not surprising, as the terms of reference for the Review did not allow for a re-opening of policy issues that could be said to have been addressed in the Digital Agenda reforms which came into effect in 2001. Given the current focus of policy-makers on implementing the US-Australia Free Trade Agreement, it is unclear when or whether the DEST recommendation will be considered.

Practical dimensions of the problem

17. It might be argued that there is no problem to be addressed anyway: surely website proprietors who wish their material to be widely disseminated for education or other purposes can give explicit permission (i.e. a 'licence') in the copyright statement on their website? Alternatively, it may be possible to infer permission in some cases (ie, an 'implied licence' arises). But there are difficulties in practice with this approach.

18. Copyright statements on websites vary considerably.³ Some statements (relatively few) give permission which adequately covers educational use. Some sites contain no copyright statement at all. Others contain very restrictive statements that are not to be taken at face value; for example the proposition that all rights are reserved and nothing may be copied, in whole or part, without prior written permission. This ignores the fact that a user must make a copy even to view the material (including the copyright statement!) on the screen. In some cases restrictive copyright statements appear on websites that offer reproduction functions such as 'Print', 'Printer friendly format' and 'Email this article to a friend'. Yet other sites seek to prohibit all uses except 'fair dealing', and generally the implication is that printing out a copy of the whole or part of a web page or downloadable PDF document would constitute fair dealing. Many website notices, whilst they might contain some permissions relevant to education, are poorly drafted so that it is difficult to determine whether the scope of permissions voluntarily given would extend to all the kinds of educational uses that would be covered by Part VB. Few, if any, of the sites seek to force the user's attention, or impose agreement, to the copyright conditions.
19. In summary, it can be surmised that a great many website owners would willingly extend permission for educational use of their website material, *if* they were to apply their minds to the matter. But few do.
20. It might be further argued that the answer is to improve the level of general knowledge about copyright amongst website owners. In fact the Phillips Fox Report does contain a recommendation for a 'targeted education campaign, to raise awareness of copyright rights and obligations in respect of [the use of] digital works or technologies by educational institutions, under Part VB of the Act'. Such a recommendation has merit as far as it goes. But it is a far cry from educating all website owners, worldwide, about how to draft a copyright notice to give effect to their obvious intention of disseminating their material. More people are interested in learning about home brewing than about copyright!

Making it easier in practice - AShareNet-FfE

21. The alternative for the education community is a practical one. If proprietors will not come willingly to be educated, the response must be to meet them on their ground. The answer is to provide website owners with a simple and practical mechanism:
- for making a choice about whether their material is to be freely used for education and for communicating that choice unambiguously to users
 - which provides some reassurance to owners that their material will not be mis-used or misrepresented
 - *without* them having to learn too much about copyright.
22. The AShareNet-FfE licence regime provides such a mechanism. By applying the  Licence Mark to particular material the website owner indicates that that material may be used by an individual or organisation for educational purposes. The mark incorporates a link to the AShareNet-FfE home page which contains a simple summary of

³ An extensive sample of such websites appears in the annex to the DEST submission to the Phillips Fox Review.

the *AEShareNet*-FfE licence terms. For convenience the essential parts of that summary are set out below:

What can I do with material bearing the FfE mark?

You may use and copy any material covered by an FfE licence - personally or within your organisation - **for education purposes only**.

- "use" means read, view, play, perform, operate and/or execute the material (depending on its nature and format)
- "education" means a structured program of learning and/or teaching for the benefit of a learner.

If you are an **education provider or other organisation** you may make and give copies to learners, including by emailing them and/or by uploading them to an intranet within your organisation.

Free educational use applies whether or not you charge for the course. You may also charge learners for copies of FfE material on a cost-recovery only basis. You may not otherwise supply or sell copies to third parties.

If you are an **individual learner** you may include part or all of the material in an assignment (Your organisation's usual academic requirements in relation to acknowledging sources apply and you should be aware of the [Moral Rights](#) of authors).

You may use and copy the material only within limits inherent in the version legitimately acquired by you. You may not do anything to circumvent a technological protection measure.

You may not assign or sublicense any of your rights.

You are not entitled to make any substantive changes to the material. You may take an excerpt of the material, provided that you do not deal with the material in a way that might:

- mislead or deceive any person
- infringe the author's Moral Rights.

You should retain any embedded copyright information (including the FfE mark) on copies that you make, in accordance with the rules of the [AEShareNet-FfE Licence Protocol](#).

You do not need to do anything to formalise an FfE licence. The licence arises automatically if and when:

- the copyright owner has applied the FfE mark to a copy of the material (the '**source copy**')
- you hold a copy directly or indirectly derived from the source copy, on which the FfE mark is retained
- you obtained that copy by legitimate means (eg, without circumventing any technological protection measure).

...

Legal notice

It is your responsibility to confirm that the FfE mark was applied by the copyright owner. We do not warrant that all materials which might bear the mark do so with the authority of the owner. If you identify any wrongful application of the FfE mark please report it to support@aesharenet.com.au.

The FfE mark is a trade mark of *AEShareNet* Limited, ABN 34 091 619 402. *AEShareNet* is a streamlined copyright management framework established by government on a non-profit basis for the education sector. *AEShareNet* Limited does not determine the materials to which the FfE mark is applied, and gives no warranty of any sort regarding those materials.

23. The extract above is a summary only, but should be sufficient for most people. The definitive statement of FfE licence conditions may be found in the [AEShareNet-FfE Licence Protocol](#) which is read with the associated [Licence Glossary and Explanation](#).

AEShareNet Architecture

24. The *AEShareNet*-FfE licence protocol is more easily understood in the light of an understanding of *AEShareNet* system as a whole. *AEShareNet* involves a substantial legal, organisational and technical infrastructure. The legal infrastructure includes:
- Constitution of *AEShareNet* Limited: *AEShareNet* Limited is a company limited by guarantee (not shares, thus it does not distribute dividends). The guarantors are the Commonwealth, State and Territory Ministers for Education. The corporate structure provides a convenient framework for decision-making, contracting, accounting and reporting to stakeholders. The Constitution provides for a Board of Directors of between 5 and 9 Directors.
 - *AEShareNet* Charter: This contains business rules for the *AEShareNet* system, including processes for Membership, management of the Licence Protocols, rules regarding copyright in *AEShareNet* databases, dispute resolution procedures, etc. Members of the Charter are permitted to offer Licences of their copyright material. The Charter defines various aspects of the legal relationship between the company and all Members.
 - Licence Protocols: There are currently 6 Licence Protocols, each of which is designed to cover a distinct licensing requirement. There is a characteristic Licence Mark (eg, *AEShareNet*-S, *AEShareNet*-FfE) associated with each Protocol. The Licence Protocols are described briefly later in this paper.
 - Supporting Definitions: The Charter and the [Licence Glossary and Explanation](#) contain important interpretational rules and definitions that assist in construing the Licence Protocols.
25. *AEShareNet* Licence Protocols have a similar look and feel, and are set out in a tabular form to facilitate comparison. The [Licence Comparison Table](#) shows all Licence Protocols in a single document. It can be seen from the table that the Protocols implement a consistent architecture, with components as follows:
- the central component: sets out the terms and conditions of a licence that is transacted under this Protocol (see Part B)
 - a meta-level: this prescribes the processes necessary in order to transact a licence under this Protocol (see Part C)
 - a meta-meta-level: this contains certain control information relating to the Protocol (see Part C). For example it records when the Protocol came into force and if and when it was superseded by a later version. This is crucial because the Charter states that a Licence that is transacted is construed according to the version of the Licence Protocol that was in force at the time of the transaction. Thus a Licence recorded in the Licences Database can be referenced back to the applicable licence terms.
26. The Licence Protocols are built on a set of underlying concepts. It is useful to mention some of these concepts. It is important to understand that these concepts, by deliberate design, do *not* necessarily align with the 'legal' categories contained in the *Copyright Act 1968* (Cth).

Instead they correspond to real-world distinctions that are likely to be appreciated and easily applied by educational users.

27. The 'Rights' granted under a Licence may be categorised as follows:
- User Rights: the concept of 'Use' is limited to personal use (in the case of an individual licensee) or use within an organisation. It includes the right to read, view, play, perform, operate or execute the licensed material (depending on its nature and format). It may also extend to copying and supply of the material within and for the services of the Licensee organisation (but not supply of a product as such to third parties, which comes under the 'Supply Right' below)
 - Development Rights: ie, rights to develop various kinds of 'Derivative' (as described below) of the material
 - Supply Rights: ie, the right to distribute or communicate the material to third parties (as consumers) or cause it to be performed in public
 - Sublicensing Rights: ie, the right to extend your rights as licensee to a third party (as a sub-licensee).
28. The categories of Derivative under *AEShareNet* are defined as follows:
- Edited Version: this refers to minor alterations which do not entail the creation of a fresh layer of copyright
 - Enhancements: this refers to revisions in which a fresh layer of copyright arises, but which are merged into the original Material in such a way that they cannot inform or entertain independently of the original material
 - Supplementary Work: this means additional work which attracts new copyright, and which has some capacity to inform or entertain independently of the original material
 - Compilation: this means a collection including the original material and other items (which may or may not individually have copyright) which are assembled together using sufficient skill and care as to attract copyright protection for the collection as a whole.
29. Each Licence Protocol sets out rules regarding:
- what categories of Derivative are permitted to be made using the licensed material
 - who owns copyright in any fresh layer of intellectual property that is embodied in the Derivative
 - retention (or not) of the original copyright notice, including the Licence Mark.
- Most Licence Protocols allow all categories of Derivatives. They differ most frequently in relation to the treatment of Enhancements, where the original copyright is merged with a fresh layer of copyright flowing from the efforts of the Licensee.
30. The *AEShareNet* Licence Protocols include:
- *AEShareNet-S*: Standard licence
 - *AEShareNet-P*: Preserves integrity of material
 - *AEShareNet-U*: Unrestricted use

- *AEShareNet-C*: Customisable. May be Commercial
- *AEShareNet-E*: End-user licence; commoditised products
- *AEShareNet-FfE*: Free-for-Education licence.

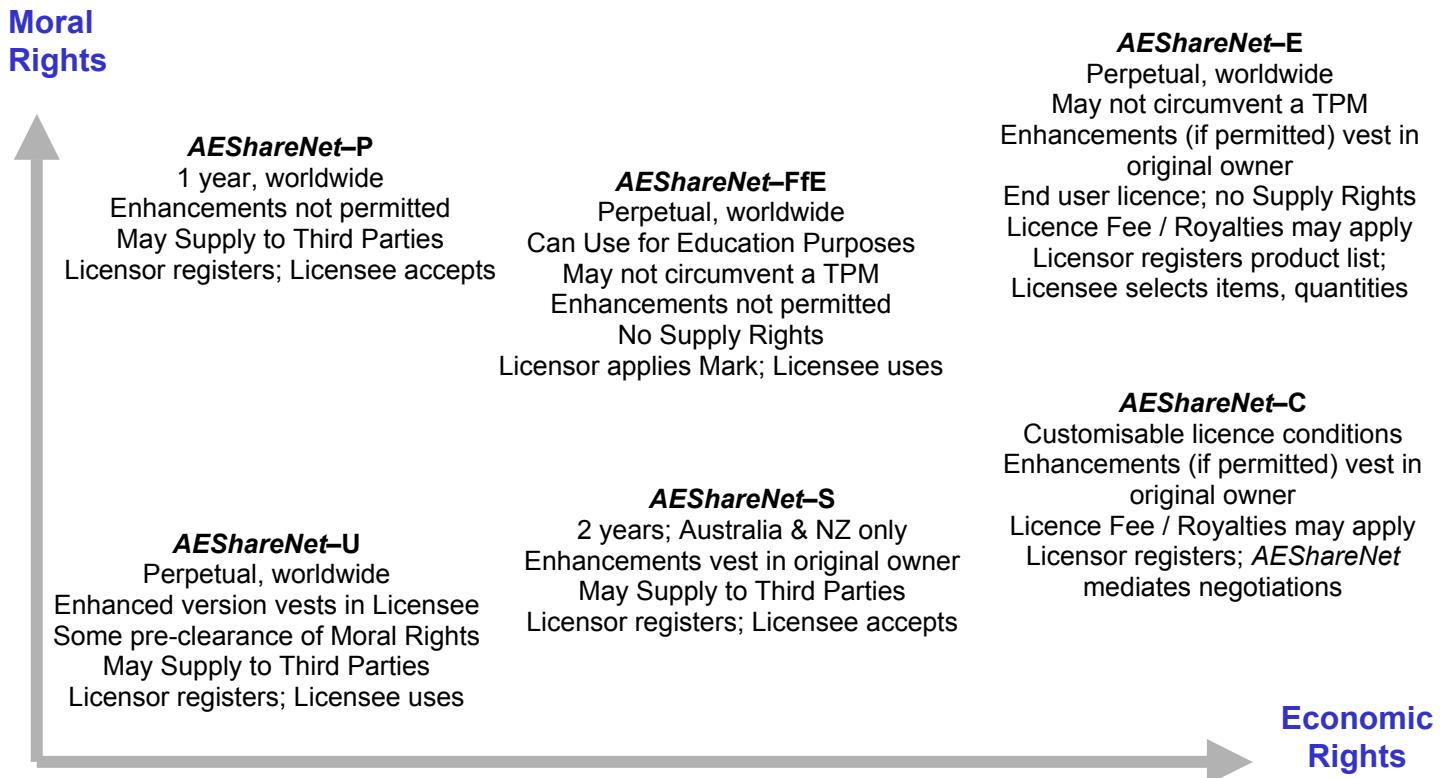
***AEShareNet-S* as the quintessential Licence Protocol**

31. The operation of the *AEShareNet* licensing system is best illustrated by reference to the *AEShareNet-S* Licence Protocol, which is in many ways typical. Recalling the distinction at paragraph 25, this may be analysed as follows:
- a) Transacting a Licence:
 - the Licensor ‘registers’ the material on the *AEShareNet* website, indicating that it is available for licensing under *AEShareNet-S*. The ‘material registration’ contains valuable metadata which enables the *AEShareNet* materials database to be used as a discovery tool for locating material of interest on a particular topic, eg home brewing
 - optionally, the Licensor may apply an *AEShareNet-S* Licence Mark to copies of the material that are circulated
 - a prospective Licensee visits the material registration and accepts the offer of a Licence
 - the Licence is then recorded on the *AEShareNet* system; the Licence record may be retrieved by the parties at any time
 - only Members may register their materials on the *AEShareNet* website. However, in general anyone can take out a Licence.
 - b) Conditions of a Licence that is transacted:
 - the Licence is free of any (initial) Licence Fee or (ongoing) Royalties
 - the Licensee has a broad right to ‘Use’ the licensed material, including the right to make copies
 - the Licensee can make any kind of Derivative
 - the Licensee is permitted to Supply the material to third parties
 - Sub-licensing is generally not permitted, nor relevant, because anyone (whether or not a Member) may take out an *AEShareNet-S* licence directly from the Licensor.
32. A central proposition of *AEShareNet* is that where Enhancements are permitted (as in the case of *AEShareNet-S*), the fresh layer of copyright arising from those Enhancements vests in the original copyright owner. To evidence this, the Licensee is required to retain the original copyright information and *AEShareNet* Licence Mark referencing the material registration. The importance of this is twofold:
- *AEShareNet* combats the fragmentation of copyright ownership and consequent licensing difficulties that typically occur when material is subject to a layer of improvements
 - the Licence offered by the Licensor to a prospective Licensee applies to the original material and in addition to any Enhanced version of that material that is created by a

previous Licensee under *AEShareNet*. Again, this supports the proposition that sub-licensing is not necessary.

Licence Protocols compared

33. The *AEShareNet-S* rules are varied in different ways under each of the other Licence Protocols. A summary of differences is contained in the [Short Licence Comparison Table](#). The differences arise largely because of differences in the relative importance of economic rights and moral rights in the material. Using those 2 dimensions the Licence Protocols may be depicted in the following graphic:



Key Attributes of *AEShareNet-FfE*

34. With the above framework in mind it is possible to understand the *AEShareNet-FfE* Licence Protocol in context. The key points which distinguish the new Protocol from other *AEShareNet* Licences include:
- a) Transacting a Licence:
 - anyone may extend an *AEShareNet-FfE* licence offer. Unlike all other Licence Protocols, it is *not* necessary to be a Member of the Charter
 - a Licence is extended by applying the *AEShareNet-FfE* Mark, with a link back to the *AEShareNet-FfE* home page. There is no requirement for a Material Registration at the *AEShareNet* website. These characteristics are a reversal of the typical processes for transacting an *AEShareNet* licence (under which registration is required, and Marking optional)
 - the Licence offer is extended to anybody with a copy which ‘legitimately attaches’ *AEShareNet-FfE* mark. The Licensor must not have obtained that

copy by circumventing a 'technological protection measure'. More is said below about these requirements

- The Licence arises automatically when the above requirements are fulfilled. There is no 'acceptance' process. and no Licence record is created on the *AEShareNet* system

b) Conditions of a Licence that is transacted:

- the Licence is limited to the 'Educational Purposes' of the Licensee. The term 'Education' is defined as a structured program of learning and/or teaching for the benefit of a learner
- the Licensee may 'Use' the licensed material. This means they can:
 - read, view, play, perform, operate or execute the material (depending on its nature and format), personally or within their organisation
 - make copies for personal/internal use

but only to the extent they can do so without interfering with any technological protection measure that is applied to the material
- however the Licensee may not:
 - Develop Enhancements
 - Supply the material to third parties
 - Sub-licence the material
- the Licence is free of any (initial) Licence Fee or (ongoing) Royalties.

35. Whilst the *AEShareNet*-FfE Licence as documented in paragraph 22 is designed to be simple to understand, there are some aspects worthy of additional comment.

Attachment principle

36. *AEShareNet*-FfE implements a so-called 'attachment principle'. Under this principle the Licensee does not need to do anything to formalise an FfE licence. The licence arises automatically if and when:

- the Licensor has applied the *AEShareNet*-FfE mark to a copy of the material (the 'source copy')
- the prospective Licensee holds a copy directly or indirectly derived from the source copy, on which the *AEShareNet*-FfE mark is retained
- the Licensee obtained that copy by legitimate means (eg, without circumventing any technological protection measure).

37. It is important to understand that that the Licence is extended to any prospective Licensee holding a copy of the Licensed Material:

- to which the *AEShareNet*-FfE Licence Mark has been legitimately applied; and
- which the Licensee has legitimately acquired.

38. The Mark is 'legitimately applied' to a copy if it is applied:
- by or with the authority of the Licensor (to the 'source copy');
 - to a subsequent copy (in the 'copying chain') made by any other Licensee under the *AEShareNet*-FfE Licence Regime; or
 - by the Licensee themselves under the immediate *AEShareNet*-FfE Licence.
39. *AEShareNet*-FfE incorporates typical *AEShareNet* rules for the retention of Copyright Information. It should naturally encourage a proliferation of copies of the material (or Derivatives) which retain the *AEShareNet*-FfE Licence Mark. These are all available for licensing. A Licence is extended if you have 'legitimately acquired' one of these copies. A copy is 'legitimately acquired':
- if it is obtained from the Licensor (eg, typically on the Licensor's website) without circumventing a technological protection measure;
 - if it is obtained from a third party acting under another *AEShareNet*-FfE Licence; or
 - if it is made by the Licensee under the immediate Licence.
40. Acquisition of a marked copy gives rise to a fresh Licence each time.
41. If at any time the Licensee fails to retain any copies bearing the Mark, they may need to go back to the Licensor's website. However in the meantime the Licensor may have substituted a version of the Material which does not bear the *AEShareNet*-FfE Mark. This is a deliberate part of the design of this Licence Protocol. It gives the Licensor some ability to extend Licences in some market sectors but not others, by making available different versions. It also gives some ability to curtail the exercise of the Licence if the Licensor later changes their mind. In theory, the Licence Duration for a Licensee who has legitimately obtained an *AEShareNet*-FfE Marked copy is permanent, but this rests on their continuing to retain a copy with the original 'pedigree'.

Rules regarding Derivatives

42. As noted above, *AEShareNet*-FfE does not permit Enhancements to be made from the licensed material. Other categories of Derivative are permitted, including Edited Versions. It is permitted to take an excerpt from the licensed material (ie, to make an exact copy of a part only). However this would not allow the preparation of an abridged or digested version of the licensed material as a whole (as this would amount to an Enhancement).
43. When making selective quotations or Edited Versions of the material, the Licensee must remember the following constraints:
- nothing in the *AEShareNet*-FfE licence affects the author's Moral Rights, which are preserved and should be respected
 - in addition the Licensee is not permitted to deal with material in any way that could 'mislead or deceive'.

The constraints are intended to provide assurance to authors, copyright owners and website proprietors that the material will not be used in a manner that would be objectionable.

The boundary between Use and Supply

44. The boundary between Use (allowed) and Supply (not allowed) is important. Amongst other things, 'Use' includes provision of the licensed material to learners, teachers and other persons (such as a parent) assisting the learner in connection with their education. These recipients are all reasonably peripheral to the delivery of education services by the Licensee. A 'nominal' charge may be imposed for provision of the material, that is a charge that is referable to the direct transaction costs of providing the material and does not include a component to cover the value of exercising copyright in the material.
45. The Licensee is not permitted to Supply the licensed material to third parties otherwise than in connection with the delivery of education services, that is they are not permitted to supply the material as a product - whether or not that is done for gain.

Application to websites

46. The *AEShareNet*-FfE Licence Protocol may be applied to any copyright material. However it is in relation to material posted on websites that it really comes into its own.
47. When applying the Licence Mark to website material the proprietor may have to make choices about whether to apply the Mark:
- to the website as a whole (in that case the website owner must ensure that they are authorised to give FfE licences for any third party material on their website)
 - to the website as a whole - subject to notification on particular material that the Licence does not apply
 - to particular material only.
48. More instructions on application of the Mark can be found in the document: [Applying the "Free for Education" mark](#).

Concluding observations

49. The *AEShareNet*-FfE Licence Protocol fits squarely into the contemporary trend towards more open or liberal publishing models, characterised by the so-called 'open source' and 'open content' movement. These movements have been documented extensively elsewhere. [Insert links].
50. It is possible that current developments in the management of Crown copyright may represent an opportunity for *AEShareNet*-FfE to take root. These developments include:
- the current Copyright Law Review Committee (CLRC) inquiry into Crown Copyright [insert link]
 - the Australian National Audit Office (ANAO) report into Intellectual Property and Practices in Commonwealth Agencies.