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**Submission to Australian Law
Reform Commission Inquiry into
Copyright and the Digital Economy
November 2012**

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OVERVIEW OF OUR POSITION

The recent report from the Convergence Review confirmed the importance of Australian content to Australian society and cultural identity.¹ How best to ensure the creation and dissemination of that content is a key issue for this inquiry. While there is a role for direct government funding and indirect incentives such as tax breaks, these are unlikely to ever be on a scale sufficient to produce the content needed for a flourishing Australian culture and knowledge economy.

There has been much debate about the role of the copyright framework in a digital environment, particularly a global one. Business models and practices enabling access to content are evolving to adapt to a rapidly changing, environment. Some of these involve payment, and some not (e.g. Creative Commons licences that allow unpaid uses of content subject to conditions such as attribution).

These are uncertain times for content creators. Our recent survey of members shows that their primary concern about participation in digital publishing is piracy, a concern that has increased since our previous survey 18 months ago. They are keen to participate in the digital economy, but anxious about the associated risks.

As noted by the Australian Publishing Association's submission, publishing is a highly speculative business. Publishers' revenue is declining, and so are the incomes of authors and journalists.²

At the same time, the digital economy has raised expectations about availability and access to content, and altered people's perceptions about the value of content created by others. We acknowledge that this is a significant challenge for policy makers, and that the task of determining which expectations of access are reasonable is a difficult one. To a certain extent, consumers are understandably confused about content creators' attitudes towards the value of the content they produce. Creators seeking to generate income are experimenting with how best to use the online environment. Enthusiastic amateurs, on the other hand, just want to be seen and heard.

As noted in the Copyright Council's submission, there are limits to the extent that exceptions in national legislation can address access to content in a digital environment. That is why one of the key planks of the Hargreaves report to the UK government was licensing solutions (a digital copyright exchange), and why the UK government engaged Richard Hooper to investigate the licensing solutions already developed and how they might be encouraged to develop further.

It is important to note that licensing solutions can allow unpaid uses in appropriate circumstances. They are a more flexible way of managing access to content on fair

¹ *Convergence Review Final Report*, available at www.dbcde.gov.au/digital_economy/convergence_review.

² Industry sources indicate that, up until November 2012, there was a fall in volume of trade book sales of

² Industry sources indicate that, up until November 2012, there was a fall in volume of trade book sales of almost 10% and a fall of over 13% in the value of those sales compared to last year. *The Economic Contribution of Australia's Copyright Industries 1996–97 to 2010–11*, available at www.copyright.org.au, shows that although copyright-based industries continue to make a significant contribution to the Australian economy, they have had lower or negative growth over the last five years. The Australian Society of Authors submission refers to declining income for authors.

terms than 'hard-wired' exceptions that may, over time, have unintended applications. There is much debate about the merits of the Optus TV Now service, but it is clear that the time-shifting exception, introduced in 2006, was neither intended nor envisaged to apply to a commercial service. It is fair to say that creators are anxious about the Trojan horse implications of exceptions: exceptions can be introduced to allow a use with seemingly limited implications for content creators, but later used to develop a commercial offering.

There are licensing solutions already operating for the digital environment. All statutory licences enable the use of content in the digital environment. The contention with these is not access to content but value. What is the value of uses enabled by the statutory licences and who should determine it? This is at the heart of some of the issues raised in the issues paper. Cultural institutions that are part of a government can digitise their collections (including orphan works) under the government statutory licence. The question is not access but equitable remuneration: how it should be determined, and whether it should be paid by the institution or by the content creators forgoing any remuneration. Schools' use of internet content is similarly not an issue of access but of value: should equitable remuneration be payable for content that people make available on the internet and, if so, in what circumstances?

We have been engaged in discussions and formal consultations on these issues, particularly with the education, cultural and government sectors, and we welcome the opportunity provided by the review to reach some solutions.

There are also non-statutory licensing solutions that have been developed, both 'blanket' (all of repertoire) and transactional (pay per use). These include solutions developed by content creators and organisations that license content on their behalf, as well as solutions developed by others, such as Google's Content ID system for YouTube that enables content creators to license content for YouTube in return for advertising revenue.

Our automated online licensing facility is enabling automated licensing of content on both a transactional and blanket basis. While launched relatively recently, it demonstrates the feasibility of such solutions, and is being adopted in a number of other countries.

The role of the Copyright Tribunal in overseeing licensing solutions is fundamental to public confidence. The Tribunal is an independent body with expertise in determining equitable remuneration and other aspects of licensing solutions. As we explain in our submission, the role and operation of the Tribunal is often misunderstood, but it has successfully managed a large range of determinations, from small claims involving unrepresented applicants to very large claims involving tens of millions of dollars.

We have set out in this submission some initial views on a range of issues raised by the terms of reference and issues paper. We appreciate that many of the issues are complex, and we look forward to learning more about them from submissions and subsequent consultations in order to participate in the development of solutions.

The issues before the ALRC are encapsulated in the following statement by Dr Francis Gurry, Director General of the World Intellectual Property Organization:

The enticing promise of universal access to cultural works has come with a process of creative destruction that has shaken the foundations of the business models of our pre-digital creative industries. Underlying this process of change is a fundamental question for society. It is the central question of copyright policy. How can society make cultural works available to the widest possible public at affordable prices while, at the same time, assuring a dignified economic existence to creators and performers and the business associates that help them to navigate the economic system? It is a question that implies a series of balances: between availability, on the one hand, and control of the distribution of works as a means of extracting value, on the other hand; between consumers and producers; between the interests of society and those of the individual creator; and between the short-term gratification of immediate consumption and the long-term process of providing economic incentives that reward creativity and foster a dynamic culture.³

When approaching reform of copyright legislation, it is helpful to bear the following in mind:

- copyright legislation is just one part of a complex environment of law, practice and behaviours:
 - measures to promote the creation of new content for the benefit of Australian society as a whole, and to provide access to content for socially desirable purposes, need not involve legislative change: e.g. a key recommendation by the Hargreaves Review, accepted by the UK government, was the establishment of a Digital Copyright Exchange
 - the practical implications and consequences of exceptions and statutory licences are sometimes different to those indicated by a reading of the legislation alone
 - the focus should be on aspects of the legislation that underpin practices that are inconsistent with the objectives of copyright
- the commonly cited dichotomy between ‘free’ exceptions and statutory licences is misleading:
 - in practice, many uses are made in reliance on statutory licences without payment, and reliance on ‘free’ exceptions often involves unacknowledged compliance costs
 - in practice, the difference between a ‘free exception’ and a statutory licence is not between free and paid, but between case-by-case applications of an exception and blanket coverage for a range of uses of all content in a class (e.g. text and images)
 - there are necessarily higher risks and compliance burdens associated with free exceptions than with statutory or other licensing solutions
- the objectives of copyright regulation are to support an environment that promotes the creation of new content for the benefit of Australian society as a whole:
 - that environment includes *incentives* to create and disseminate new content, *reward* for people who produce content that is valuable to others, *respect* for those who produce content that is valuable to others, and *responsibilities* for those who benefit from content produced by others

³ *The Future of Copyright*, address to Blue Sky Conference: Future Directions in Copyright Law, Sydney, February 25, 2011, available at http://www.wipo.int/about-wipo/en/dgo/speeches/dg_blueskyconf_11.html

- most content creators create new content for an audience or market:
 - the copyright system enables them to determine the terms on which the content reaches that audience or market;
 - those terms will be influenced by a wide range of factors, including the level of investment in the content, and whether the content creator needs a return on that investment
 - content creators can, and do, enable the use of their content without payment for a variety of purposes (e.g. under 'open' licences such as Creative Commons)
 - when considering exceptions the question is: when is it justifiable for the government, rather than the content creator, to determine if and when the content should be used by a particular person for a particular purpose, and on what terms?
- there is a difference between situations in which a use with a socially desirable purpose would be unreasonably impeded by a requirement to get a copyright clearance and situations in which the user is licensed to use the content (under a statutory licence or a licence offered by or on behalf of rightsholders) but feels they should not have to make fair payment;
- the world is not divided into 'owners' and 'users' of content: everyone is one and/or the other in a variety of circumstances:
 - good copyright policy should address our shared responsibility as a society to ensure the creation and dissemination of new content for the benefit of society as a whole;
- 'simplification' of the legislation should focus on internal inconsistencies and unnecessary distinctions that have consequences in practice; and
- there is more certainty and less risk for businesses who disseminate other people's content online using licensing solutions rather than exceptions, particularly given the global nature of online businesses and the differences in exceptions from country to country.

We submit that the ALRC should recommend:

- that existing 'free' exceptions be made more consistent, 'certain', compliant with international treaty obligations and equitable by making them conditional upon:
 - the absence of a licensing solution (overseen by the Copyright Tribunal) available to the user;
 - acknowledgement of the work and creator; and
 - retention of any rights management information (such as metadata)
- that the existing statutory licences be made simpler and fairer for both licensees and content creators by:
 - extending the government statutory licence to local governments;
 - enabling the appointment (declaration) of a collecting society for government communications as well as government copies;
 - repealing the 'small portions' exceptions for education to remove the administrative burden of distinguishing 'small portions' from other content used for education, reduce complexity arising from misunderstandings about the scope of the exceptions, and enable fair payment in appropriate circumstances;
 - extending the statutory licences for educational use to certain 'interactive' content, to ensure a consistent approach for interactive content and still images;

- the introduction of provisions that enable extended collective licensing along similar lines to the approach recommended by the UK Hargreaves Review and currently being implemented by the UK government;
- the introduction of provisions that enable the licensing of orphan works in certain situations (such as digitisation by collecting institutions that are not covered by the government statutory licence), subject to safeguards to protect the interests of creators;
- that for any new exceptions under consideration, the following be taken into account:
 - the *purpose* of the use and the justification for allowing a use for this purpose;
 - that ‘legitimising’ unauthorised use of content that is currently difficult to license or prevent (having regard to factors such as current technology) is not, in itself, a justification for an exception;
 - that different considerations apply to uses of content by individuals than by institutions and corporations;
 - that different considerations apply to private uses than to ‘social’ uses that disseminate content widely and deliver benefits to intermediaries;
 - the collateral benefits to businesses that disseminate other people’s content (such as advertising or personal data);
- government support for a ‘copyright hub’, similar to that being considered in the UK and elsewhere, to enable Australians to participate in this important global development

ABOUT COPYRIGHT AGENCY|VISCOPY

Copyright Agency and Viscopy are not-for-profit rights management organisations. Each is affiliated with similar organisations operating in other countries.

Since July 2012, Copyright Agency has been managing Viscopy’s services for licensees and members. Viscopy remains a separate legal entity with its own members and board, but is managed by Copyright Agency. We refer to the organisations together as Copyright Agency|Viscopy.

Copyright Agency’s nearly 25,000 members include writers, artists, photographers, surveyors and publishers. Viscopy represents more than 8,000 Australian artists, of whom more than 50% are Indigenous.

Copyright Agency is appointed by the Australian government to manage the statutory licences for educational and government use of text and images, and the artists’ resale royalty scheme.⁴ It also licenses the use of text and images as non-exclusive agent for its members and those of its foreign affiliates. These licences are most ‘blanket’ (whole of repertoire) – for example, for use of text and images by corporations – but Copyright Agency also offers ‘transactional’ licences for one-off uses, including through an online licensing facility.⁵

Viscopy’s licences are mostly transactional rather than whole of repertoire, but some are multi-work licences.

⁴ www.resaleroyalty.org.au

⁵ <http://www.rightsportal.com.au>

The licensing solutions managed by Copyright Agency|Viscopy cover digital and online uses of content.

The statutory licences allow digital use, and so do most of the ‘voluntary’ licences.

Viscopy’s licence offerings have evolved over the last few years to cater for the increasing use of artistic works in digital and online environments. Input arrangements with members have been flexible enough to respond to the new things that licensing customers want to do. We are now licensing works into smart phone apps and social networking sites for example. We have recently partnered with the National Gallery of Australia and the Art Gallery of New South Wales to allow them to provide online access to their collections through the Google Art Project (see Appendix 4).

OTHER SUBMISSIONS

This submission is made of behalf of the members of Copyright Agency and Viscopy, representing more than 32,000 Australian content creators and producers.

Copyright Agency and Viscopy are affiliated with the Australian Copyright Council and the Australian Content Industry Group, and endorse their submissions.

We also support, in general, submissions supporting the rights of our members, including those from the Australian Publishers Association, the Australian Society of Authors, and the National Association for the Visual Arts.

EVIDENCE

QUESTION 1: EVIDENCE

The ALRC is interested in evidence of how Australia's copyright law is affecting participation in the digital economy. For example, is there evidence about how copyright law:

- a) affects the ability of creators to earn a living, including through access to new revenue streams and new digital goods and services;*
- b) affects the introduction of new or innovative business models;*
- c) imposes unnecessary costs or inefficiencies on creators or those wanting to access or make use of copyright material; or*
- d) places Australia at a competitive disadvantage internationally.*

We set out here some data and information relating to four aspects of the current copyright system:

- the contribution of copyright-based industries to the Australian economy;
- our members' views about the role of copyright-related factors in their creation of new content;
- our members' views about digital publishing; and
- the benefits (to licensees and content creators) and costs of collective licensing for the education sector.

PwC report on economic contribution of copyright-based industries

A report recently launched by the Australian Copyright Council assesses the contribution of copyright-based industries to the Australian economy. The report, prepared by PwC, found that Australia's copyright industries:

- generated AUD\$93.2 billion in economic activity (6.6 percent of GDP);
- accounted for just over AUD\$7 billion in exports (2.9 percent of all exports); and
- employed more than 906,000 people (8 percent of the nation's workforce).⁶

Members' views on role of copyright for new digital content

We recently invited members to tell us about the importance of copyright-related factors to their development of new content. More than 2,300 members provided us with their views. They included writers, artists, organisations whose core business is publishing, and organisations for which publishing is a secondary business.

The following table shows how respondents viewed the importance of a number of copyright-related factors:

⁶ Available at www.copyright.org.au

Copyright-related factor	% who said important for new content
being able set licence terms for the legitimate use of content	91%
being able to take enforcement action for unauthorised use of content (such as takedown notices)	87%
metadata (rights data for the content)	85%
technological protection measures such as encryption (commonly referred to as 'DRM' in publishing)	72%

The importance of these factors was highest for organisations whose core business is publishing, and lowest for organisations in which publishing is a secondary business.

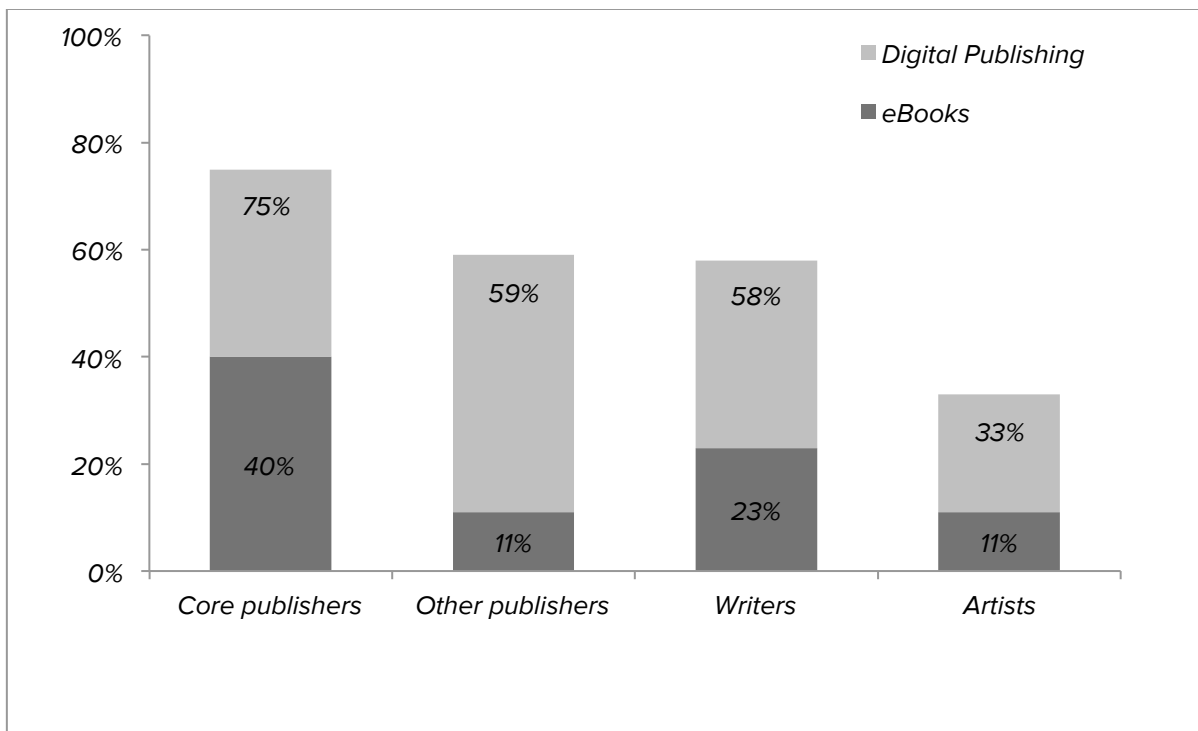
In Appendix 1, we have set out some comments from members about the role of copyright in their business or profession.

Members' views on digital publishing

We recently asked our members for information about their involvement in, and views about, digital publishing. The following are key findings.

Involvement in digital publishing

We asked members whether they were involved in digital publishing and, if they were, whether they publish or provide content for eBooks. The following indicates their involvement, by member category:



Concerns about Digital Publishing

Members involved in digital publishing were asked to indicate their concerns about digital publishing. Piracy is the most serious concern, followed by market domination of large multinational distributors such as Apple, Amazon and Google.

	Core publishers	Other publishers	Writers	Artists
Piracy	60%	50%	56%	53%
Market domination	53%	37%	48%	51%
Lack of technical expertise	45%	55%	49%	48%
Lack of digital marketing skills	44%	50%	46%	49%
Low price of ebooks	37%	15%	36%	29%
Ability to compete internationally	29%	13%	23%	31%
Other	11%	11%	12%	11%

We compared the results of our recent survey to the one we conducted 18 months ago. The comparison indicates an increase in the level of concern about the first three factors.

	2010	2012
Piracy	35%	56%
Lack of technical expertise	34%	49%
Lack of digital marketing skills	30%	47%
Market domination	41%	46%
Low price of ebooks	29%	28%
Ability to compete internationally	17%	22%
Other	23%	11%

Use of content under statutory and collective licences

We explain how statutory and other collective licences operate in practice in our response to Question 40.

The efficiencies of statutory and other collective licences is demonstrated by the amount of content used, compared to the transaction costs.

For example, the Part VB educational statutory licence allows the provision of text and images from any source (printed and digital) to 3.5 million school students. For nearly all teachers and students, compliance requirements are minimal. A small proportion of Australia's 9,405 schools are surveyed each year for a limited period: 180 schools (2%)

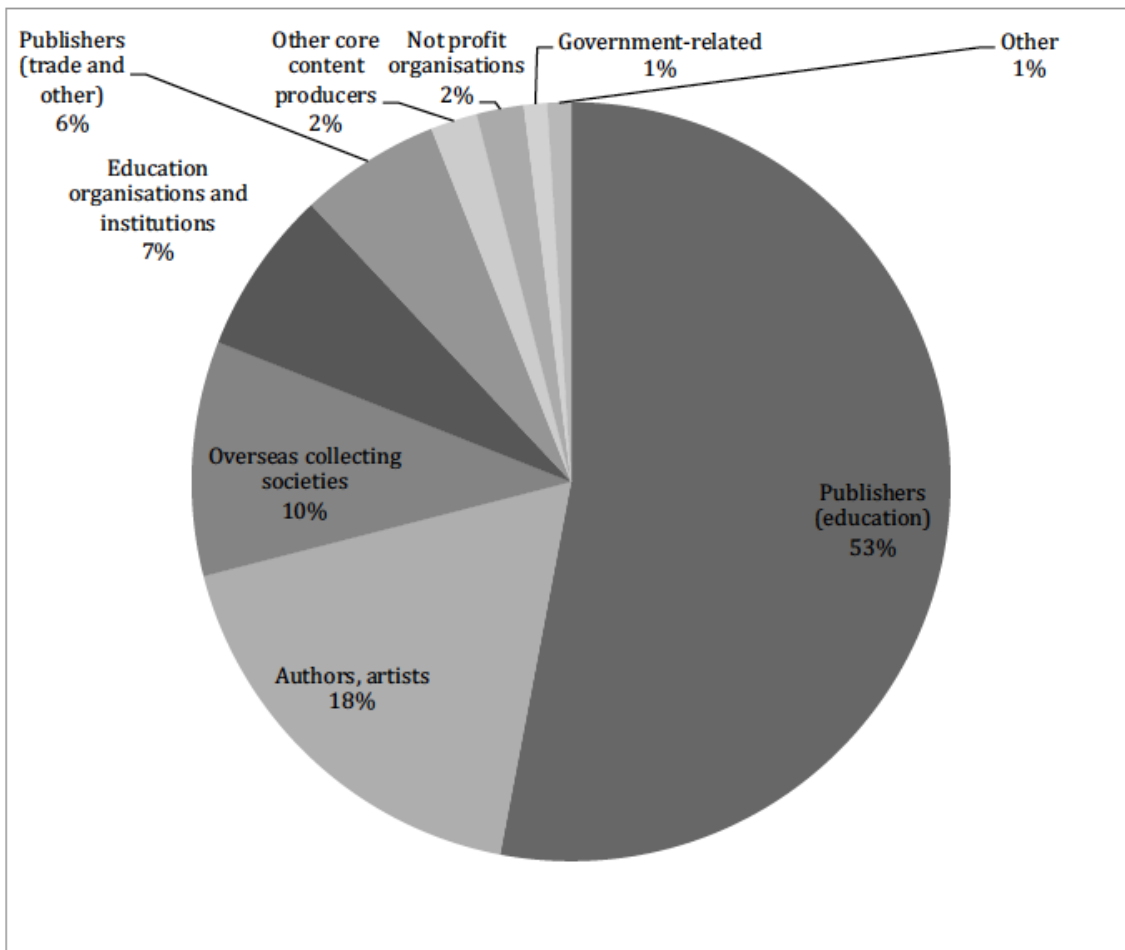
providing information for a term on their photocopying, and 100 schools (1%) providing information for four weeks on their use of digital content.

The content provided to Australian school students in reliance on the statutory licence includes, on average, 240 photocopied pages per student per year, plus digital content made available in a variety of ways (e.g. from learning management systems, emails, printouts). This translates to nearly a billion pages of material that would otherwise require transactional licences.

In 2012, we distributed nearly \$54M to more than 4,300 content creators and publishers whose content had been used in schools in reliance on the statutory licence. The deduction from licence fees for the collection, allocation and distribution of the fees is currently about 14%.

The following shows the classes of recipients who received payments in 2012 from licence fees paid by schools. Each recipient undertakes to on-pay any amounts due to others, so the number of eventual recipients is larger, and in particular the number of creators who ultimately receive payments is larger than indicated by the table.

Publishers (education)	53%
Authors, artists and their beneficiaries	18%
Overseas collecting societies	10%
Education organisations (that produce education resources) and institutions	7%
Publishers (trade and other)	6%
Other core content producers including print media, film, TV	2%
Not profit organisations, inc arts, culture, sport, health	2%
Government-related agencies, authorities, local government	1%
Other	1%



GUIDING PRINCIPLES FOR REFORM

QUESTION 2: GUIDING PRINCIPLES

What guiding principles would best inform the ALRC's approach to the Inquiry and, in particular, help it to evaluate whether exceptions and statutory licences in the Copyright Act 1968 (Cth) are adequate and appropriate in the digital environment or new exceptions are desirable?

We comment below on each of the proposed principles, but first make some initial observations on principles.

Objectives of copyright regulation

The objectives of copyright regulation are to support an environment that promotes the creation of new content for the benefit of Australian society as a whole.

An environment conducive to the creation of new content encompasses:

- *Incentives* for the creation and dissemination of new content
- *Reward* to those whose content is valuable to others who lack the time or skill to create the content themselves
- *Respect* for those who create content that is beneficial to others
- *Responsibilities* on those who benefit from others' content to ensure the availability of those incentives and rewards

The principal incentive to create new content is the opportunity to determine how that content will be used by others, including the amount (if any) of payment. Even those who may not be seeking payment in certain cases can set the terms of use of their content, based on their copyright rights (e.g. the copyright framework enables people to set the terms of use – such as attribution, non-commercial use only – in Creative Commons licences).

The principle of reward enables equitable treatment of content creators for work that is valuable to others, irrespective of whether or not the work was created for reward.

Exceptions to copyright owners' exclusive rights reduce the incentive to create new content. They can, however, be justifiable to enable socially desirable uses of content on equitable terms, where this is not occurring through licensing practices.

The impact on the creator or rightsholder is likely to be greater if the use is:

- by an institution or corporation rather than an individual
- public rather than private
- a use that enables subsequent unauthorised or otherwise unpaid uses by others

Institutions and corporations can be reasonably expected to have legal compliance policies, risk minimisation strategies and corporate social responsibility policies. They

can thus be reasonably expected to avail themselves of licensing solutions that assist them to implement these policies and strategies.

Incentives for licensing

We draw the ALRC's attention to recent comments by Michel Barnier, Member of the European Commission responsible for Internal Market and Services, in a speech entitled *Making European copyright fit for purpose in the age of internet*.⁷ In addressing the 'balance' that should be enabled by good copyright policy he said:

I do not share the view of those that think copyright protection should be weakened so others can develop new commercial services free of cost. This would simply amount to legislating for free-riding: shifting wealth from the content industries – many of which are based in Europe creating jobs and paying taxes here – to other industries. This cannot be right.

We need to ensure that bargaining power and the capacity to invest and innovate remain fairly distributed along the value chain. If this is not the case, we all lose, in the end.

The right balance between rights and limitations is one that preserves the necessary incentives for licensing.

While the role of the copyright framework in providing an incentive for the creation of new content is commonly acknowledged, providing the right environment for licensing on fair terms is equally important.

Framework for more comprehensive and efficient licensing solutions

A key recommendation of the Hargreaves report in the UK was the development of a 'digital copyright exchange': an online rights marketplace created by enabling interoperability amongst various online licensing solutions developed by rights management organisations and others (such as image libraries). The UK government accepted the recommendation, and engaged Richard Hooper to undertake a feasibility study. Hooper recommended the development of a 'copyright hub' by rightsholder organisations, comprising four features: information, copyright education, rights registries, and digital copyright exchanges (licensing). UK copyright industries have accepted the recommendations and established a steering committee to take the proposal forward.

Richard Hooper recently visited Australia and outlined how the proposal could work here. Content industry representatives and rights management organisations will be investigating options for developing a copyright hub for Australia. Some 'digital copyright exchanges', as described by Hooper, are already in operation. In Appendix 3, we describe the operation of the online licensing portal we launched in 2011.

One of the other key recommendations in the Hargreaves report was the introduction of an extended collective licensing framework, to enable rights management organisations to develop new licensing solutions based on an extended mandate.

⁷ http://europa.eu/rapid/press-release_SPEECH-12-785_en.htm?locale=EN

Amendments to enable extended collective licensing are currently before the UK Parliament, and the UK government is engaged in consultations with stakeholders to develop the details of how the mechanism will work in practice.

In Australia, an extended collective licensing mechanism could, for example, enable the licensing of digitisation of collections by cultural institutions where this is not covered by the government statutory licence.

Perceptions of business risk

A recent report discusses the risks associated with the uses that internet intermediaries make of other peoples' content.

It says:

... internet intermediaries rely largely on presuming that rights holders wish intermediaries to handle (and thus copy) their content especially since many intermediaries automate the process by which rights holders can opt out of the process.⁸

The report also argues that there is

... substantially more risk to [internet] services in Australia than in the US and in comparable countries like Singapore⁹

And that

*As a result, the current copyright regime in Australia is **likely** to be discouraging innovation and investment in intermediary activities and in the digital economy more broadly.¹⁰ [emphasis added]*

These statements raise a number of issues, including:

- the extent to which the intermediaries' activities are allowed under implied licences;
- the level of risk associated with uses that are not covered by implied licences; and
- the extent to which, if any, perceptions of risk are, in practice, impeding the development of products or services beneficial to Australian society.

Implied licence

In some situations, a perceived risk may be vitiated or mitigated by an implied licence.

A licence can be implied from the circumstances or from the terms of an agreement. There are a range of situations in which courts have found that a licence was implied.

Much online intermediary activity is likely to be impliedly licensed, and businesses are proceeding on the basis that it is. Implied licences have the benefit of reflecting

⁸ Lateral Economics, *Excepting the Future* at page 29

⁹ Ibid at pages 3 and 15

¹⁰ Ibid at page 15

rightsholders' intentions, and adapting to changing circumstances. Exceptions can do the opposite on both counts.

There are limits, of course, to the extent of any implied licence. For example, there are limits to the extent to which people can 'consume' content made available on the internet under an implied licence.

While some people make content available on the internet with the aim of having it disseminated as widely as possible, content creators' intentions regarding the use of their content vary widely. In particular, they commonly want people to get the content at source (from their website), not from a second-hand source, for example to:

- promote other products or services available from the site;
- generate advertising revenue;
- capture customer data; and
- ensure that visitors are getting the most up-to-date version of the content.

Where people do contemplate 'offline' uses of their content, they often want to confine that to individual, personal use. Content owners' intentions are often reflected in the terms of use for a website: for example, the terms of use may restrict the use of the content to personal use. Sometimes, however, this is not the case.

Risks impeding development of Australia's digital economy

While there has been much speculation about the effect of perceived risks on the development of Australia's digital economy, we are not aware of any evidence that a service or product beneficial to Australian society has not been developed because of aspects of Australia's copyright framework.

When considering the risks associated with the copyright environment in one country with that in another, one needs to consider both:

- liability for infringement; and
- the consequences of liability.¹¹

It has been asserted that internet intermediaries are more likely to be liable for copyright infringement in Australia than in other jurisdictions.¹² This seems an odd statement given the High Court decision in the iiNet case, and the introduction of schemes in other countries for the management of unauthorised peer-to-peer filesharing that include a role for online service providers. These countries include the US, UK, France, South Korea and New Zealand.

The consequences of liability in Australia are lower than in other countries, such as the US, which has an entitlement to statutory damages for successful litigants.

¹¹ Internet intermediaries are actively seeking an extension of the safe harbour provisions, which limit the consequences of liability (rather than the liability itself): that issue is explicitly outside the terms of reference for this inquiry.

¹² Lateral Economics, *Excepting the Future*, at page 15

In Australia, an applicant can be successful but be awarded limited damages in compensation. A court can, however, award additional damages if the infringement was flagrant (e.g. the infringer failed to act on a notification of infringement).

Internet intermediaries are introducing practical measures to limit the consequences of potential liability, through processes (usually automated) to act upon notification of infringement. For example, Google has developed the Content ID system for managing unauthorised upload of content to YouTube,¹³ and in August 2012 announced a change to its search algorithms to take into account valid copyright takedown notices.¹⁴

We query whether, in practice, the current copyright framework is actually impeding the development or introduction of new products or services that are beneficial to Australian society.

In any event, the idea that we could create a risk-free environment for online businesses by 'flexible' exceptions in the Australian Copyright Act is fanciful. Apart from all the other risks (legal, technological, political and otherwise), online businesses are global businesses, and effectively subject to the copyright law in each country in the world.

Assertions about the extent to which the current copyright environment in Australia is impeding the beneficial development of Australia's digital economy should thus be treated with caution. Similar assertions have been made elsewhere, and received with some scepticism. For example, the Hargreaves Review in the UK doubted that the copyright environment was a significant factor in the establishment and development of industries based in Silicon Valley:

*Does this mean, as is sometimes implied, that if only the UK could adopt Fair Use, East London would quickly become a rival to Silicon Valley? The answer to this is: certainly not. We were told repeatedly in our American interviews, that the success of high technology companies in Silicon Valley owes more to attitudes to business risk and investor culture, not to mention other complex issues of economic geography, than it does to the shape of IP law. In practice, it is difficult to distinguish between the importance of different elements in successful industrial clusters of the Silicon Valley type. This does not mean that IP issues are unimportant for the success of innovative, high technology businesses.*¹⁵

Litigation in Australia vs rest of world

In the context of outlining the copyright risks associated with doing online business in Australia, a recent report asserts that there is an unacceptably high level of litigation about copyright exceptions because they are 'too narrow', and that adopting 'more flexible' exceptions would result in a boost to the economy.¹⁶

¹³ <http://www.youtube.com/t/contentid>

¹⁴ <http://insidesearch.blogspot.com.au/2012/08/an-update-to-our-search-algorithms.html>

¹⁵ <http://www.ipa.gov.au/ipreview.htm> at [5.17].

¹⁶ The Australian Digital Alliance's media release announcing two reports commissioned from Lateral Economics says: 'The reports found that Australia's tightly defined exceptions are relatively frequently contested in the courts.' See also Lateral Economics, *Excepting the Future* at pages 34–35

We conducted an analysis of decisions of the Federal Court over the last five years, and found that very few turn on the application, let alone the interpretation, of an exception: see Appendix 2.¹⁷

Principle 1: Promoting the digital economy

Reform should promote the development of the digital economy by providing incentives for innovation in technologies and access to content.

We note, and agree with, the ALRC's characterisation of the digital economy as encompassing social as well as economic benefits.

'Access' should be qualified as 'fair access' or 'equitable access', for consistency with Principle 4.

Principle 2: Encouraging innovation and competition

Reform should encourage innovation and competition and not disadvantage Australian content creators, service providers or users in Australian or international markets.

We make the following points about this proposed principle:

- changes to the regulatory environment may introduce new responsibilities for people who benefit from the use of other people's content. These changes should not be characterised as 'disadvantaging' those people; and
- Australian participation in international markets will be largely influenced by the regulatory environments in those markets, not Australia's.

Principle 3: Recognising rights holders and international obligations

Reform should recognise the interests of rights holders and be consistent with Australia's international obligations.

There are really two separate principles here:

- interests of rightsholders; and
- Australia's international obligations.

We think that rhetoric about 'balancing' the interests of rightsholders with those of users can be unhelpful. An alternative formulation for 'interests of rightsholders' could be: 'the need to provide incentives and reward for the creation of new content'.

Apart from international obligations, we need to recognise how copyright operates in practice in other countries, given that the digital economy is largely global. While not

¹⁷ This analysis accords with similar analysis in the UK. The fair dealing exceptions in the Australian Copyright Act are similar to those in the UK. Research conducted by law firm TaylorWessing for the British Copyright Council indicated that, since 1978, there have been, on average, two cases a year in the UK on fair dealing. By contrast, the report estimates that there have been, on average, about eight cases a year in the US on fair use. See Appendix I of the British Copyright Council's submission to the Hargreaves Inquiry, available at <http://www.ipso.gov.uk/ipreview/ipreview-c4e.htm#ipreview-atoz-b>

wanting to stifle new ways of promoting the creation and dissemination of content, an Australian solution that is too far out of step with overseas practice is unlikely to succeed.

Principle 4: Promoting fair access to and wide dissemination of content

Reform should promote fair access to and wide dissemination of information and content.

We agree with this principle, and in particular endorse *fair* access.

There are different ways to do this including:

- providing confidence in the digital environment by minimising unauthorised use;
- other incentives for rightsholders to license their content more broadly; and
- statutory and other collective licensing solutions that guarantee access in all cases, but provide fair compensation.

Principle 5: Responding to technological change

Reform should ensure that copyright law responds to new technologies, platforms and services.

‘Responds to’ sounds reactive, though arguably reflective of a common perception that copyright regulation is always lagging behind technological and other developments.

We query this perception. The current copyright environment has enabled a large range of business models and practices that are built on the opportunities provided by technological developments. Some of these are revenue-generating, and some enable the free use of content in accordance with the rightsholders’ wishes, such as Creative Commons licences.

An alternative formulation could be: ‘Reform should ensure that the objectives of copyright law can be achieved through its application to new technologies, platforms and services.’

Principle 6: Acknowledging new ways of using copyright material

Reform should take place in the context of the ‘real world’ range of consumer and user behaviour in the digital environment.

While we appreciate the sentiment underlying this principle, in many cases users’ behaviour and ‘expectations’ do not reflect the social responsibility of those who benefit from others’ content to contribute to the creation of new content.

An alternative formulation could be: ‘Reform should seek to enable access to and use of content in ways that recognise current technology and behaviour, provided (consistently with Principle 4) the access is on fair terms’.

Principle 7: Reducing the complexity of copyright law

Reform should promote clarity and certainty for creators, rights holders and users.

We agree that internal inconsistencies and complexities should be removed from the legislation.

Having said that, the legislation is for lawyers and other specialists. It cannot be used by non-specialists as a guide to the application of the law, largely because of extrinsic materials that affect its application: principally court decisions. Non-specialists have access to explanatory materials about the application of law in practice; in particular those available from the Australian Copyright Council.

It is also worth noting that there is an inevitable tension between 'flexibility' and 'certainty'. Very detailed and prescriptive provisions provide 'certainty' but are more likely to become outdated. Provisions based on principles are more 'flexible' and less likely to become outdated, but lack certainty.

Principle 8: Promoting an adaptive, efficient and flexible framework

Reform should promote the development of a policy and regulatory framework that is adaptive and efficient and takes into account other regulatory regimes that impinge on copyright law.

The regulatory framework should promote equitable licensing solutions and access to content.

While the regulatory regime should take into account other regulatory regimes that impinge on copyright law, we think:

- exceptions in other legislation (such as Freedom of Information legislation) should be avoided, because people assume that all copyright exceptions are contained in the Copyright Act; and
- definitions and other provisions that depend on other legislation (such as the Broadcasting Services Act) should be avoided (because changes to the other legislation can have unintended consequences for the Copyright Act).

CACHING, INDEXING AND OTHER INTERNET FUNCTIONS

QUESTION 3: CACHING IMPEDED BY CURRENT LAW

What kinds of internet-related functions, for example caching and indexing, are being impeded by Australia's copyright law?

At the moment, we are not aware of any internet-related functions that are beneficial to Australian society and are being impeded by Australia's copyright law. However, we look forward to understanding this issue better from our reading of submissions and participation in consultations, and to contributing to the development of solutions.

QUESTION 4: CACHING EXCEPTIONS

Should the Copyright Act 1968 (Cth) be amended to provide for one or more exceptions for the use of copyright material for caching, indexing or other uses related to the functioning of the internet? If so, how should such exceptions be framed?

See our response to Question 3.

CLOUD COMPUTING

QUESTION 5: CLOUD COMPUTING IMPEDED BY CURRENT LAW

Is Australian copyright law impeding the development or delivery of cloud computing services?

At the moment, we are not aware of any cloud computing functions that are beneficial to Australian society and are being impeded by Australia's copyright law. However, we look forward to understanding this issue better from our reading of submissions and participation in consultations, and to contributing to the development of solutions.

QUESTION 6: EXCEPTIONS FOR CLOUD COMPUTING

Should exceptions in the Copyright Act 1968 (Cth) be amended, or new exceptions created, to account for new cloud computing services, and if so, how?

See our response to Question 5.

COPYING FOR PRIVATE USE

QUESTION 7: EXCEPTIONS FOR LEGALLY ACQUIRED CONTENT

Should the copying of legally acquired copyright material, including broadcast material, for private and domestic use be more freely permitted?

We acknowledge that there are reasonable consumer expectations regarding how they may use content that they have purchased. These are often addressed by the terms of use for the content. The extent to which these expectations are reasonable may be affected by whether the consumer has purchased the content, or legally acquired it by other means.

The issue here is what uses should be guaranteed by the legislation when they are not expressly allowed by the terms of use for the content.

We note that in many countries, private copying is allowed but content creators are compensated from levies on copying equipment and media.

To the extent that the current 'private use' exceptions continue to apply, we think that they should address uses:

- by individuals;
- for private and domestic use;
- where the material is not available in a suitable form under the authority of the rightsholder (e.g. as an authorised download); and
- to the extent that a licensing solution does not apply for the user's use.

QUESTION 8: FORMAT SHIFTING EXCEPTIONS

The format shifting exceptions in the Copyright Act 1968 (Cth) allow users to make copies of certain copyright material, in a new (eg, electronic) form, for their own private or domestic use. Should these exceptions be amended, and if so, how? For example, should the exceptions cover the copying of other types of copyright material, such as digital film content (digital-to-digital)? Should the four separate exceptions be replaced with a single format shifting exception, with common restrictions?

See our response to Question 7.

QUESTION 9: TIME-SHIFTING EXCEPTION

The time shifting exception in s 111 of the Copyright Act 1968 (Cth) allows users to record copies of free-to-air broadcast material for their own private or domestic use, so they may watch or listen to the material at a more convenient time. Should this exception be amended, and if so, how? For example:

- a) *should it matter who makes the recording, if the recording is only for private or domestic use; and*

b) should the exception apply to content made available using the internet or internet protocol television?

See our response to Question 7.

QUESTION 10: BACK-UP AND DATA RECOVERY

Should the Copyright Act 1968 (Cth) be amended to clarify that making copies of copyright material for the purpose of back-up or data recovery does not infringe copyright, and if so, how?

Any exception being considered for this purpose should meet the criteria set out in our response to Question 7.

ONLINE USE FOR SOCIAL, PRIVATE OR DOMESTIC PURPOSES

QUESTION 11: CURRENT USE FOR SOCIAL, PRIVATE OR DOMESTIC PURPOSES

How are copyright materials being used for social, private or domestic purposes—for example, in social networking contexts?

Members have raised concerns about the use of their works on social networking sites, such as the publication of unattributed photographs on Pinterest. The licensing arrangements that are available for online publication are equally available for social network sites.

QUESTION 12: EXCEPTIONS FOR SOCIAL, PRIVATE OR DOMESTIC PURPOSES

Should some online uses of copyright materials for social, private or domestic purposes be more freely permitted? Should the Copyright Act 1968 (Cth) be amended to provide that such use of copyright materials does not constitute an infringement of copyright? If so, how should such an exception be framed?

A 'private' use means a use by an individual for the benefit of that individual. Our view on the criteria for exceptions for 'private use' is set out in our response to Question 47.

Online uses of content may be 'social' but not 'private', because the content is 'shared'. Indeed, para [97] of the Issues Paper refers to an OECD definition of 'user-generated content' as (inter alia) 'content made publicly available over the Internet'.

A 'social' use is different in two ways:

- it enables the content to be viewed/consumed by many people (e.g. a person's 'friends' on a social networking site)
- it may provide benefits to an intermediary (such as advertising revenue or personal information to a provider of online services).

These uses can be enabled on fair terms through licensing solutions, which can be overseen by the Copyright Tribunal.

QUESTION 13: CONDITIONS FOR EXCEPTIONS FOR SOCIAL, PRIVATE OR DOMESTIC PURPOSES

How should any exception for online use of copyright materials for social, private or domestic purposes be confined? For example, should the exception apply only to (a) non-commercial use; or (b) use that does not conflict with normal exploitation of the copyright material and does not unreasonably prejudice the legitimate interests of the owner of the copyright?

See our response to Question 12.

TRANSFORMATIVE USE

QUESTION 14: EXAMPLES OF TRANSFORMATIVE USES

How are copyright materials being used in transformative and collaborative ways—for example, in ‘sampling’, ‘remixes’ and ‘mashups’. For what purposes—for example, commercial purposes, in creating cultural works or as individual self-expression?

The current Australian copyright framework enables ‘transformative’ uses in a number of ways. These include:

- if the use is of part of a work, and that use is not a ‘substantial part’;¹⁸
- the use is licensed;
- the work is used for the purposes of parody, satire, criticism (critique) or review;
- the work is used for the purposes of reporting news;
- the work is otherwise used in reliance on an exception or statutory licence (no exceptions or statutory licence prohibit the use of a work in another work: for example the educational statutory licence allows a teacher to create a new work using all or parts of other works.

So the question is: to what extent are there socially beneficial ‘transformative’ uses of works that cannot be enabled by existing exceptions and/or available licensing solutions?

We note that there are many people who are happy to make their content available for mash-up, for example under a Creative Commons licence. Those who want to mash up other people’s content thus have an available pool of content that they can use for this purpose.

QUESTION 15: EXCEPTIONS FOR TRANSFORMATIVE USE

Should the use of copyright materials in transformative uses be more freely permitted? Should the Copyright Act 1968 (Cth) be amended to provide that transformative use does not constitute an infringement of copyright? If so, how should such an exception be framed?

In the US, ‘transformative use’ is an aspect of the ‘fair use’ exception. A use (particularly a commercial use) is more likely to be ‘fair’ if it is ‘transformative’ (i.e. creates a new work) rather than passive or consumptive, and does not compete with the work used.

As set out in our response to Question 14, transformative uses are allowed under the current Australian copyright framework.

There is a lot of scope, in the existing environment, for the creation of new works based on others, and we are not convinced that any further exception is necessary. There may,

¹⁸ The determination of whether a part is ‘substantial’ can be affected by whether the ‘new’ work is competing, and by the motivation of the user. See The fact that there is commentary in some of the cases on the meaning of ‘substantial part’ that a part used in a new non-competing work

however, be a case for allowing the making (but not uploading or other 'sharing') of 'transformed' content for private and domestic use.

QUESTION 16: SCOPE OF ANY TRANSFORMATIVE USE EXCEPTION

How should transformative use be defined for the purposes of any exception? For example, should any use of a publicly available work in the creation of a new work be considered transformative?

See our response to Question 15.

QUESTION 17: LIMITATIONS ON ANY TRANSFORMATIVE USE EXCEPTIONS

Should a transformative use exception apply only to: (a) non-commercial use; or (b) use that does not conflict with a normal exploitation of the copyright material and does not unreasonably prejudice the legitimate interests of the owner of the copyright?

If there were to be an exception for transformative use, it should be limited by (at least) both factors in the question. Acknowledgement of the source and author is another obvious condition.

The notion of 'non-commercial' is tricky when content is published online. The person publishing the content may not be seeking commercial gain, but the publication may produce commercial benefits (such as advertising or personal data) to the service provider enabling the publication. In addition, publication online will usually be on a 'commercial scale' to a vast number of viewers.

If a new exception were to be introduced, it should be confined to private and domestic use, not apply where there is a licensing solution available to the user, be subject to the other fair dealing criteria in section 40(2), and not apply to the uploading to an online platform, or other forms of 'sharing'.

QUESTION 18: AMENDMENTS TO MORAL RIGHTS PROVISIONS

The Copyright Act 1968 (Cth) provides authors with three 'moral rights': a right of attribution; a right against false attribution; and a right of integrity. What amendments to provisions of the Act dealing with moral rights may be desirable to respond to new exceptions allowing transformative or collaborative uses of copyright material?

We recently invited members to let us know their views about exceptions: see Appendix 1. They identified attribution as a key concern. The responses indicate that any proposals to water down the moral rights provisions would be unlikely to be supported by our members.

On the contrary, the responses indicate that exceptions, including any new exceptions, should be conditional upon acknowledgement of the source of the work used, as well as its author.

Transformative uses are currently made in compliance with moral rights obligations; the 'reasonableness' defence provides sufficient qualification to the rights.

LIBRARIES, ARCHIVES AND DIGITISATION

QUESTION 19: PRACTICES IMPEDED BY CURRENT LIBRARY PROVISIONS

What kinds of practices occurring in the digital environment are being impeded by the current libraries and archives exceptions?

While in general the role of the library provisions in enabling individual research is uncontested, their availability to commercial entities conflicts with licensing solutions, such as licences offered by rightsholders and rights management organisations.

Making different provisions for commercial entities would not impede their access to the content. They could still acquire material from libraries, but under arrangements that enable a fair return to the creators and publishers of the material. Libraries commonly charge a 'cost recovery' fee for the supply of material. This charge could include a copyright fee. Alternatively, libraries could supply the materials to corporations that are covered by a licensing solution for the use of the material.

QUESTION 20: PROBLEMS WITH SECTION 200AB

Is s 200AB of the Copyright Act 1968 (Cth) working adequately and appropriately for libraries and archives in Australia? If not, what are the problems with its current operation?

As we note elsewhere in our submission, there is a necessary trade-off between 'certainty' and 'flexibility'. Section 200AB is intended to be 'flexible', in order to cover situations not covered by more explicit exceptions.

We think the application of the law in practice is less 'uncertain' than some think. There are now a number of guides to the operation of section 200AB for libraries and other cultural institutions. There is much more commonality than difference in these guides, and we think there is scope to identify more common ground. The additional 'confidence' that some institutions would like can be achieved through a guide that is endorsed by representatives of both cultural institutions and organisations representing creators and publishers of content. There have been initial discussions with a view to producing such a guide.

QUESTION 21: DIGITISATION OF WORKS HELD BY CULTURAL INSTITUTIONS

Should the Copyright Act 1968 (Cth) be amended to allow greater digitisation and communication of works by public and cultural institutions? If so, what amendments are needed?

It is important to consider digitisation and publication separately. In general, there is much less concern about digitisation (for example, for preservation of works) than about what is done with the digitised content.

Libraries and other cultural institutions can already digitise material for a number of purposes, including preservation, supply to clients for research, and supply to other libraries for their clients and collections.

Many libraries are covered by the government statutory licence and can digitise and communicate works for government purposes provided there is provision for equitable remuneration. 'Government purposes' is very wide; in the legal proceedings regarding the NSW government's uses of surveyors plans, it was accepted that the government's sale of plans to the public, directly and through brokers, was 'government purposes'.

The approach to equitable remuneration payable by a cultural institution would vary according to the content and the use. Likely factors would include:

- the benefit to the cultural institution, including the benefit of not having to get a copyright clearance;
- the value of the content and the use to the content owner (likely to be affected by factors such as the currency of the content, the nature of the use, and how many people can receive or view the content).¹⁹

For mass digitisation, the approach to equitable remuneration would be similar to that for other blanket licences: all uses are licensed but a global fee takes account of higher value uses and content, lower value uses and content, and uses that are 'zero-rated'.

There is a public policy question about who bears the cost of equitable remuneration. Should it be the government through its funding of the cultural institution, or should it effectively be the content owners, by forgoing any remuneration?

For libraries and other cultural institutions that are not covered by the statutory licence, licence schemes could be developed under an extended collective licensing framework for approval by the Copyright Tribunal, along similar lines to the mechanism currently being introduced in the UK.

QUESTION 22: ISSUES FOR DIGITISATION OF INDIGENOUS WORKS

What copyright issues may arise from the digitisation of Indigenous works by libraries and archives?

Viscopy and Copyright Agency members include Indigenous creators; more than 50% of the artists represented by Viscopy are Indigenous. Through our Indigenous Communications Coordinator, Trish Adjei, Copyright Agency|Viscopy has participated in a number of World Intellectual Property Organization (WIPO) forums on traditional knowledge and Indigenous intellectual property. We are also a signatory to protocols on the use of Indigenous works, and a registered supporter member of the Indigenous Art Code.

¹⁹ The Copyright Tribunal regulations set out a series of factors for the Tribunal to take into account when determining equitable remuneration. See regulation 25B for equitable remuneration under Part VB of the Copyright Act.

We agree with the submissions from Terri Janke and the Arts Law Centre that digitisation and other uses of Indigenous works by libraries, archives and other cultural institutions should be subject to the principle of free (not coerced), prior informed consent. This principle is reflected in existing protocols for libraries and other cultural institutions. It is also an international standard, reflected in a number of international instruments, including the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP); the Draft WIPO Intergovernmental Committee's work on Genetic resources, Traditional Knowledge and Folklore; Convention on Biological Diversity's 2010 Nagoya Protocol; and the International Labour Organization (ILO) Convention 169 on Indigenous peoples and tribal peoples.

ORPHAN WORKS

QUESTION 23: ORPHAN WORKS AND EFFECT ON DISSEMINATION OF WORKS

How does the legal treatment of orphan works affect the use, access to and dissemination of copyright works in Australia?

All exceptions and statutory licences apply to orphan works in the same way that they apply to other works. Thus, any use that can be made under an exception can be made with an orphan work.

In particular, as discussed in our response to Question 1, cultural institutions covered by the government statutory licence can, for example, digitise and make available their collections for government purposes (including any works that are 'orphan').

In addition, the use of orphan works is facilitated by current collective licensing practices. Copyright Agency's blanket 'voluntary' licences, for example for corporations, include an indemnity for the use of works outside our mandate, provided they have not been explicitly excluded by rightsholders. A similar approach is taken by other rights management associations (e.g. Copyright Licensing Agency in the UK).

Copyright Agency has also been able to assist with some projects that involve orphan works, such as BarNet's One to 100 project.²⁰ That project involved the digitisation of the first 100 volumes of the Commonwealth Law Reports, including the headnotes for the cases. We are assisting by searching for the headnote writers and their beneficiaries, and making arrangements for the publication of the headnotes.

The licensing of orphan works in other cases would be facilitated by an extended collective licence mechanism such as the one currently being introduced in the UK.

We note that any solution needs to accommodate the concerns of rightsholders, and photographers in particular. Photographers have two major concerns:

- that images are more likely to be 'orphaned' than other types of works, including because rights information is often removed when others make images available online; and
- that images are more substitutable than other works, and that allowing the easy use of orphan images, particularly for commercial purposes, will interfere with the licensing of images, for example through image libraries.

The concerns raised in relation to digitisation of Indigenous works, raised by Question 22, would also apply in this context.

We set out an approach for 'licensing' orphan works in our response to Question 24.

²⁰ <http://openlaw.org.au/>

QUESTION 24: EXCEPTION OR LICENSING SCHEME FOR ORPHAN WORKS

Should the Copyright Act 1968 (Cth) be amended to create a new exception or collective licensing scheme for use of orphan works? How should such an exception or collective licensing scheme be framed?

Cultural institutions that are covered by the government statutory licence can digitise and communicate orphan works for government purposes under the existing provisions in the Act.

For cultural institutions not covered by the statutory licence, licence schemes could be developed under an extended collective licensing framework such as the one being introduced in the UK.

An extended collective licence scheme could also enable the licensing of orphan works in other cases, in ways that address the concerns of photographers and other rightsholders.

This could include 'transactional' or case-by-case licences for uses that are currently licensed by rights management associations, such as those licensed under Viscopy licences and through Copyright Agency's online licensing portal.²¹

One of the guiding principles should be that there is no benefit to a licensee in choosing to use an orphan rather than an equally suitable identified work, merely arising from the work's orphan status.

The process could involve:

1. an assessment of whether an equally suitable licensed work is available (e.g. a photo from an image library), and authority to refuse a licence where a substitutable work is available (we envisage guidelines developed in consultation with bodies such as the Australian Institute of Professional Photography);
2. an assessment of the value of the licence (having regard to the fee normally charged for the type of use, for example through Copyright Agency's online licensing portal);
3. the payment of a licence fee;
4. a search for the rightsholder that is proportionate to the value of the licence;
5. if the rightsholder is found and:
 - a. wants to license their work, payment of the licence fee less the search cost;
 - b. does not want to license their work, refund of the licence fee less the cost of the search;
6. if the rightsholder is not found, the licence fee is held in trust for a specified period (e.g. four years) to enable an opportunity for the rightsholder to be identified;
7. if identified, the rightsholder receives the licence fee, less the collecting society's reasonable administrative fee;
8. if the rightsholder is not identified within the specified period, the licence fee is used for the benefit of rightsholders in the same class (e.g. photographers), provided the collecting society has done a proportionate search.

²¹ <http://www.rightsportal.com.au>

DATA AND TEXT MINING

QUESTION 25: VALUE OF, AND IMPEDIMENTS TO, DATA AND TEXT MINING

Are uses of data and text mining tools being impeded by the Copyright Act 1968 (Cth)? What evidence, if any, is there of the value of data mining to the digital economy?

We are not aware that data and text mining that is beneficial to Australian society is being impeded by the current copyright framework.

Depending on how data and text mining is defined, it likely to be covered to some extent by the statutory licence for education if done for educational purposes. Similarly, if it is done by a body that is covered by the government statutory licence, it is covered if done for government purposes.

We also draw the ALRC's attention to the following:

- Text and Data Mining: STM (representing scientific, technical and medical publishers) Statement & Sample Licence (March 2012)²²
- Announcement: Associations agree on text and data mining (September 2012)²³

QUESTION 26: EXCEPTION FOR DATA AND TEXT MINING

Should the Copyright Act 1968 (Cth) be amended to provide for an exception for the use of copyright material for text, data mining and other analytical software? If so, how should this exception be framed?

No, we do not think such an exception is justified. These uses are currently being licensed, and those licensing solutions will be further developed in the future.

QUESTION 27: ALTERNATIVE SOLUTIONS FOR DATA AND TEXT MINING

Are there any alternative solutions that could support the growth of text and data mining technologies and access to them?

Licensing solutions for data and text mining have been developed, and will continue to develop. We note the reference by EU Commissioner Michel Barnier in a recent speech:

Again, I want to discuss with all stakeholders how to create win-win situations. To develop innovative services while respecting copyright and the market opportunities it provides: from one click licences for small users to model licensing clauses for text and data mining.²⁴

²² <http://www.stm-assoc.org/text-and-data-mining-stm-statement-sample-licence/>

²³ http://www.researchinformation.info/news/news_story.php?news_id=1007

²⁴ http://europa.eu/rapid/press-release_SPEECH-12-785_en.htm?locale=EN

EDUCATIONAL INSTITUTIONS

QUESTION 28: AMENDMENTS TO PART VA

Is the statutory licensing scheme concerning the copying and communication of broadcasts by educational and other institutions in pt VA of the Copyright Act 1968 (Cth) adequate and appropriate in the digital environment? If not, how should it be changed? For example, should the use of copyright material by educational institutions be more freely permitted in the digital environment?

See our general comments on statutory licences in our response to Question 44.

We support the submission from Screenrights on this issue.

The statutory licensing scheme managed by Screenrights results in payments to artists, who are principally members of Viscopy and/or Copyright Agency.

The term 'freely permitted' in this context is (as often) ambiguous.

The statutory licence allows educational institutions to record, copy and communicate any broadcast. The compliance requirements are minimal. Licensees are not even required to check whether the broadcast is available for purchase. It is difficult to envisage how the use of broadcasts could be more 'freely permitted' in this sense.

'Freely permitted' could also mean 'without equitable remuneration'. As discussed elsewhere in this submission, this raises the policy question: in what circumstances should a content creator subsidise the value of a use of their content by others, and on what justification?

As we have pointed out elsewhere in this submission, the compliance requirements associated with use under a statutory licence are less onerous than those for 'free' exceptions; this is part of the value of statutory licences. Allowing uses of broadcasts, that are currently covered by the statutory licence, under a 'free' exception means that copying and communication would be less 'freely permitted' in the first sense.

QUESTION 29: AMENDMENTS TO PART VB

Is the statutory licensing scheme concerning the reproduction and communication of works and periodical articles by educational and other institutions in pt VB of the Copyright Act 1968 (Cth) adequate and appropriate in the digital environment? If not, how should it be changed?

See our general comments on statutory licences in our response to Question 44.

See also our research on how teachers use content in Appendix 5.

The Part VB statutory licence was amended in 2001 to enable educational institutions to digitise printed material, and to reproduce and communicate digital content. Almost all text and images can be used: local and foreign, published and unpublished, and from any source (including an infringing source).

The main limitation is that, in some circumstances, the licence does not allow the use of an entire work that is available for purchase. Another exclusion is that the licence does not cover the use of some interactive content.²⁵

The compliance requirements for nearly all licensees are minimal, and less than those for 'free' exceptions, because equitable remuneration is payable. The main compliance requirements are for the small number of licensees at any given time who are recording their usage as part of a usage survey.²⁶ There are a number of ways that even this limited compliance burden can be reduced using technological and other advances, and these are currently being explored jointly by Copyright Agency and educational institutions.

It is worth noting that the statutory licence now applies to for-profit as well as not-for-profit educational institutions: the definition of 'educational institution' was amended in 1998 to apply to for-profit institutions, on the basis that equitable remuneration payable by for profit bodies could be assessed differently to that for not-for-profit bodies.

The statutory licence covers the use of material from the internet (this was an expressed intention of Parliament when the 2001 amendments were introduced).

Schools' representatives and Copyright Agency have agreed protocols for distinguishing uses of content that are presumed to have been made in reliance on the statutory licence from other uses, including uses of content from the internet. Under these protocols, we exclude usage records for content that is presumed to have been used outside the statutory licence.

The major process for internet content involves the application of a presumption based on the terms of use for the website that was the source of the content. All content from websites with terms of use such as Creative Commons, Free for Education, Free for Use in your Organisation and Non-Commercial Use is presumed to have been used outside the statutory licence, and is not taken into account in the negotiation of licence fees. Currently, more than 50% of internet content is excluded under these processes.

Analysis of content used by schools

Schools that participate in surveys of usage provide data about *all* their uses of content, both in reliance on the statutory licence and otherwise. We then process that usage data according to protocols agreed between us and the schools.²⁷

There are two separate surveys:

- photocopying survey; and

²⁵ In some cases, the licence does apply, because the use involves the reproduction or communication of text or images (e.g. printing an image from a digital source that can be animated on demand). Other cases result in technical arguments about whether or not the interactive content is a 'cinematograph film' or computer program and thus excluded from Part VB, raising arbitrary distinctions and administrative assessments that would otherwise be unnecessary.

²⁶ See our response to Question 1.

²⁷ Available on our website at www.copyright.com.au/what-we-do/collect-and-distribute-licence-fees/analyse-usage-data/data-processing-protocols

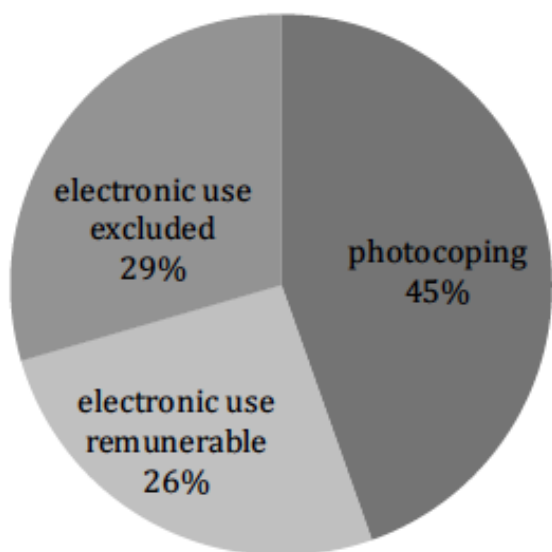
- ‘electronic use’ survey (EUS): all uses of digital content (such as saving to learning management systems, adapting, emailing and printing), and digitisation (scanning) of hardcopy content.

We take into account content used outside the statutory licence in two ways:

1. we make global deductions from the total content copied to allow for factors such as:
 - copying of music done in reliance on the AMCOS licence rather than the statutory licence;
 - use of ‘small portions’ in reliance on sections 135ZG and 135ZMB;
 - content that does not meet the originality threshold;
 - use of parts that are less than a ‘substantial part’;
 - ‘blackline masters’ (workbooks sold with a licence to the purchaser to photocopy for certain purposes);
 - clip art, logos, advertisements;
 - notified exclusions;
 - content covered by NEALS (National Educational Access for Schools) licence;
 - ‘global’ licences (licences applicable to all schools).
2. when processing records from surveys, we apply a series of exclusions, such as:
 - content from websites with terms of use that indicate free use by schools (this covers both uses directly from the website, such as printing and downloading, as well as ‘downstream’ uses such as photocopying printouts and making downloaded content available from an intranet); and
 - content that is directly licensed to schools (irrespective of whether or not the use is covered by the licence).

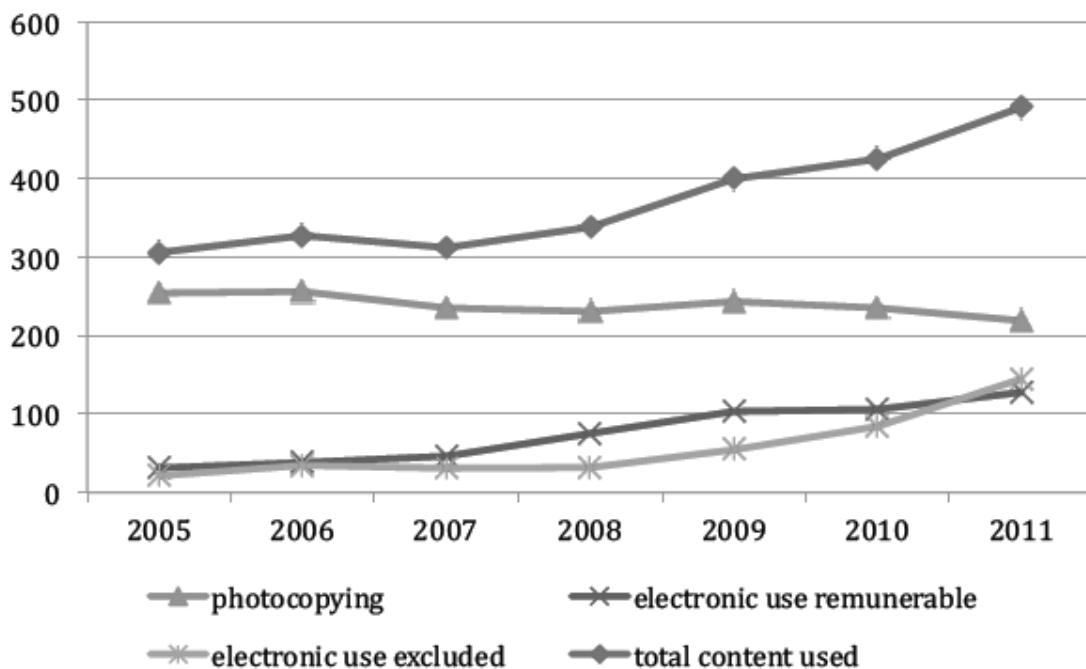
The chart below shows the top-level results for usage of content in schools in 2011, based on survey data processed according to protocols agreed with schools’ representatives. The chart indicates, for all the content recorded as used by schools, the relative proportions of:

- photocopying;
- ‘remunerable’ electronic uses (presumed done in reliance on the statutory licence); and
- ‘excluded’ electronic uses (presumed done outside statutory licence)



The following chart shows the trends in usage of content in schools over the years 2005–11. The overall content used has increased, but so has the proportion of excluded digital uses.

Schools photocopying & digital pages per student



Note that:

- the pages per students for photocopying are based on a two-year rolling average, because the survey covers half the states and territories in one year and the remainder in the next; and
- for digital pages per student, a 'page' of content displayed to a class is counted as if each student had received a page of content.²⁸

QUESTION 30: USES COVERED BY 'FREE' EXCEPTIONS INSTEAD OF STATUTORY LICENCES

Should any uses of copyright material now covered by the statutory licensing schemes in pts VA and VB of the Copyright Act 1968 (Cth) be instead covered by a free-use exception? For example, should a wider range of uses of internet material by educational institutions be covered by a free-use exception? Alternatively, should these schemes be extended, so that educational institutions pay licence fees for a wider range of uses of copyright material?

See our general comments on statutory licences in our response to Question 44, including the relationship between statutory licences and 'free' exceptions.

The provisions covering the use of content by educational institutions would be simpler and more equitable if the statutory licence covered:

- the use of 'small portions' currently covered by sections 135ZG and 135ZMB;
- the communication of artistic works covered by section 28(7); and
- certain interactive content that is not currently covered.

'Small portions': ss 135ZG and 135ZMB

The headings for these exceptions confusingly refer to copying of 'insubstantial parts of works': the exception is only necessary for parts that are, in fact, 'substantial' given that there is no infringement if only a part of a work used, and that part is not 'substantial' (section 14).

The sections allow 1% or two pages of a *work* in an edition, but are commonly misunderstood to allow 1% or two pages of an *edition* (which may contain many works). In addition, the exception does not apply if a portion of the work has been used in the previous 14 days.

This exception creates an unnecessary administrative burden for both licensees and the collecting society because it requires mechanisms to identify:

- whether the content used is only 1% or two pages of a work in an edition (which can be difficult when dealing with a 'copy of a copy' where there is no reference to the original source); and
- whether or not the same work has been copied in the previous 14 days.

²⁸ By agreement with schools' representatives, content that is displayed live from the internet will be treated as 'non-remunerable' from 2013. We don't yet know what proportion of displayed content this will represent.

It also operates arbitrarily and inequitably in a number of respects, because:

- its scope is commonly misunderstood (in particular, the notion of a 'work' in an edition is not easy to understand, and can be difficult even for experts);
- it allows free use of 'accompanying' artistic works; and
- it allows 'cherry picking' of the most valuable parts of a work (the 1% used need not be continuous).

The use of parts that are not substantial (and thus do not infringe under section 14) are already taken into account in the overall estimates of the proportions of usage made in reliance on the statutory licence, for the purposes of negotiating licence fees.

The current s135ZG effectively replicated a previous provision, section 53A, which was introduced in 1980 following a recommendation in the Franki Report²⁹ at [1.54]:

... the Committee recommends that the making of multiple copies in non-profit educational establishments of up to two pages or 1 per cent of the number of pages (whichever is the greater) in an edition of a work or of two or more works in any period of 14 days should be permitted without infringement of copyright and without remuneration to copyright owners, provided (except in the case of a diagram, map, chart or plan) the part copied does not comprise or include a separate work.

This was a majority recommendation and the members recommending this provision considered it to be a desirable one for the benefit of education and in general would involve an amount of copying in respect of which any royalty would be very small and probably uneconomic to collect.

The Franki Committee envisaged that schools would report and pay for every single use made in reliance on the statutory licence. As explained elsewhere, the management of the statutory licence has evolved in numerous ways. One of the most significant is that usage information is gathered by surveys of usage by a sample of licensees, not comprehensive reporting of use.

The majority's recommendation was largely driven by a practical concern that managing payments for uses of small portions would be administratively burdensome. With the evolution of the statutory licence, the opposite is now true: excluding usage of small portions is administratively burdensome. The provision also creates inequities because it is commonly perceived to have a wider operation than it fact does.

It would be administratively simpler (for both educational institutions and Copyright Agency) if the uses currently covered by s135ZG, and its equivalent for digital content (section 135ZMB) were instead covered by the statutory licence.

²⁹ *Copyright Law Committee on Reprographic Reproduction* (the Franki Report) (1976), available from the Attorney General's Department here: <http://www.ag.gov.au/Copyright/CopyrightLawReviewCommittee/Reports/Pages/CopyrightLawCommitteeonReprographicReproduction.aspx>

Communication of artworks: s28(7)

Section 28(7) allows communication of artistic works to a class. Its intended purpose, when introduced in 2006, was to:

- bring 'the communication of artistic works in line with the treatment of other works under s.28' and
- implement 'the Government's intention that schools should not be paying *broadcasters* when they distribute/communicate either live broadcast programs or recordings of broadcast programs for use in the classroom'.³⁰

The provision was, however, drafted too widely and has the effect of disentiing *artists* from payments they might otherwise receive under the educational statutory licence.³¹

It should be limited so that it does not cover uses that would otherwise be covered by the Part VB statutory licence.

Educational use of internet content

Many people find it difficult to understand why equitable remuneration is payable for educational use of content from the internet, particularly in schools.

There are matters relating to both the principle and the practice that are not well understood.

The main points about the principle are:

- content creators who authorise the publication of their content on a website usually want people to view the content online in the context of the website
- they do not necessarily want it to be used without permission or payment in other ways (e.g. made available on a learning management system, emailed to students or included in a coursepack)
- there are a range of reasons for this including:
 - advertising revenue from visits to the website,
 - attracting visitors to the website to view or possibly purchase products or services (e.g. engage a photographer to take photographs, or apply for a licence to use the photographs),
 - the content is a sample (e.g. of a textbook) intended to encourage purchase
- statutory licences enable (but do not require) content creators to be compensated for the use of their content without permission
- content creators can choose to make their content available for educational use without payment, for example under open licences such as Creative Commons licences: educational institutions do not pay for their use of this content

³⁰ Copyright Amendment Bill 2006 Further Supplementary Explanatory Memorandum at 35].

³¹ The provision was not included in the initial version of the Copyright Amendment Bill 2006, which was the subject of an inquiry and report by the Senate Legal and Constitutional Affairs Committee: http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Committees?url=legcon_ctte/complete_d_inquiries/2004-07/copyright06/index.htm. The Committee recommended that the proposed new section 28A in the Bill be replaced by a different provision, and referred to an alternative agreed between Screenrights and the Copyright Advisory Group (CAG). The eventual form of the amendments, however, were different to the Screenrights/CAG version, and inadvertently disadvantaged artists.

- the statutory licence allows the use of content from an infringing source, but ensures that the infringement is not compounded (in practice, educational institutions can find it difficult to determine whether or not the source is legitimate)
- for the reasons above, when the statutory licence was amended in 2000 to cover digital material, the amendments were explicitly intended to cover content from the internet.³²

Here's how it works in practice:

- payment is *not* made on a use-by-use basis;
- educational institutions pay a flat rate for all the content they use in reliance on the statutory licence (including digital and hardcopy, online and offline, published and unpublished, local and foreign, from legitimate and infringing sources)
- for schools, that is currently about \$17 per student per year
- content provided to school students in reliance on the statutory licence currently includes 240 photocopied pages, as well digital content (both scanned and originally digital) delivered in a variety of ways (e.g. from a learning management system, by email, and by printouts)
- the negotiations to set the flat rate for a period take account of past uses in reliance on the statutory licence as an indicator of the likely level of use during the period;
- schools report all uses of content to us: we identify which uses are presumed to have been made in reliance on the statutory licence, and which not
- our processes follow protocols that are agreed with schools' representatives when determining which uses are presumed to have been made in reliance on the statutory licence³³
- those processes are audited by an external auditor and inspected by schools' representatives
- in 2012, more than 50% of the digital content recorded as used by schools was identified as *not* used in reliance on the statutory licence (and will thus not be taken into account in assessments of past usage for future licence negotiations)
- we changed our processes to enable the ascertainment of a rightsholder's intentions regarding the use of their content, including the use of internet content by schools, before any licence fees are allocated to that rightsholder.

What our members say

The following are comments from our members about the use of their content which is accessible from the internet:

³² The Explanatory Memorandum to the Digital Agenda Bill says:

Users of copyright material, such as libraries, archives and educational institutions, are concerned about being able to obtain reasonable access to copyright material available on the Internet. [Introductory comments, at 1]

In his Second Reading Speech, the then Attorney-General similarly stated:

The reforms will update Australia's copyright standards to meet the challenges posed by rapid developments in communications technology, in particular the huge expansion of the Internet ... The central aim of the bill, therefore is to promote creative endeavour and, at the same time, allow reasonable access to copyright material in the digital environment [House of Representatives, *Hansard*, 2 September 1999, at 9748–9749]

³³ These protocols are published on our website here: <http://www.copyright.com.au/what-we-do/collect-and-distribute-licence-fees/analyse-usage-data/data-processing-protocols>

At Oxford University Press Australia & New Zealand (OUPANZ) we use the Internet as our shopfront and as a portal to assist communication between OUPANZ and our customer base. We post samples of our printed and digital learning materials on web pages that are freely available to all. The purpose of posting the samples on the site is to allow the customer to try before they buy. The material is copyrighted and only intended for marketing purposes. It is certainly not posted for institutions or individuals to repurpose for their own means. [Peter van Noorden, Oxford University Press ANZ]

My sites are FREE, provided that users use the sites for student completion of the interactive activities ONLY. Downloading, copying, distribution and storing on Learning Management Systems etc is strictly prohibited. The major reason for this prohibition is that it allows me to enter into commercial publishing contracts, here and overseas, for CD (or other delivery) versions of the works with clear-cut guidelines for territory, distribution rights and copyright infringement processes. [Jenny Eather, Author/Publisher]

We provide pdf samples on our website - the complete internals of all books and also complete packs of wall charts. We have our samples watermarked with a copyright statement. Even so, our authors (also teachers) have on occasion seen teachers take these materials off the web and use them instead of buying the books or charts - either in printed form or on IWBs. However, under the current copyright system, we and our authors are at least still compensated through CAL payments. In the future we will also want to provide sample interactive activities, video clips and so on [on] our website, in order to promote sales of the works. [Stewart Gill, Macmillan Publishers Australia]

The [proposal] could put ATOM out of business within a couple of years. In the 2008 calendar year ATOM paid its freelance writers [for internet content] over \$100,000. If the AESOC amendment is enacted the money available to pay writers to produce new educational material on current issues would fall to about \$20,000 a year. [Peter Tapp, Australian Teachers of Media (ATOM)]

Material on our website is extracted from existing hard copy publications. The development of intellectual property comes at enormous expense to the AATE, even when utilising the voluntary contributions of members. Allowing educational institutions access to this material free of charge would reduce income and threaten the AATE's ability to continue to produce quality academic material and useful classroom resources which are highly valued by the profession... The suggestion that we should protect our material behind a login screen is completely unworkable, as the articles placed on the site are there for the benefit of people who are not currently known to us (ie not members, not subscribers). It is impossible to allocate a login to an unknown person. [Mark Howie, Australian Association for the Teaching of English (AATE)]

Cengage is a commercial, for-profit organisation and we do not invest to create materials, the sole purpose for which is to be given away free of all obligations. Certainly we provide elements of our textbooks and other resources for free download and review as a marketing exercise to generate purchase. This is no different to a car dealership providing a free test drive. The prospective customer

is not expected to book a test drive every day to gain a continual free use of the vehicle including petrol. [David O'Brien, CENGAGE]

This should be on the same terms as use of print material [writer]

...I would be happy to put all our materials on-line if royalties were payable [publisher]

We use selected open access (free) papers and reviews from the journal to entice readers to subscribe to the journal...if a teacher feels it is appropriate to re-use our papers] in their teaching materials then perhaps fair payment may be expected [publisher]

...As digital publishing becomes the norm rather than a marketing strategy for works in printed form, other strategies to pay writers (if not in kind, at least in recognition) will need to be considered [writer]

...If I see an area of content that attracts such payments, it would also inform me to either improve or expand the content (which I have done) [publisher]

This is an important component of my income. Teachers make extensive use of material on my websites. They particularly make use of content that provides overview, analysis, chronology, definitions and detailed explanations. Teachers and students also make use of worksheets, test papers, exams, and similar material provided on my websites. Fair payment for the use of these is very important to me. As a former teacher, I know that internet material is now used by schools and universities as a substitute for textbooks [writer]

I worked to create it, therefore I should own it. I really resent others using it without paying me. Few people would pinch my stuff from shops, why do they think its OK to pinch my efforts. I'm very worried about how copyright is shaping with regard to this. [writer]

...My webpages are copyright and contain a statement that they are for personal use only and not to be copied or communicated to other parties without permission. [writer]

We place some materials we cannot fit into our books on our website...We place copyright statements on each item so would expect CAL payments if copied during a survey period [publisher]

Publishers I work with rely on advertising to generate revenue, and if the ads aren't displayed I don't get paid. So I'm happy for teachers to provide their students with links to my material, but any other use (e.g., distributing printed copies or PDF files) should be paid for [writer]

All uses in which I would be entitled to payment as if a teacher had photocopied my work from the newspaper: e.g. if a teacher prints a story from my newspaper's website to give to his/her class, how is that different from photocopying the work from the hard copy? [writer]

It's a choice whether to just view and read material available online or to view, read and download in some form. It's the download option that should then attract payment [writer]

We expect to be (and are) paid when teachers make multiple copies of our materials for direct use by students [publisher]

Options for schools' use of internet content

We have had a series of discussions and correspondence with schools' representatives about alternative ways of managing schools' use of internet content.

Given our current agreed protocols for processing records of usage of internet content according to the terms of use of websites, the discussion is largely focused on whether the rightsholders of the following content should receive a share of licensing fees paid by schools:

- content from websites with no copyright notice and no terms of use; and
- content from websites with a copyright notice, but no further terms of use.

The issue is whether or not the rightsholders should be presumed to permit the uses allowed by the statutory licence, without payment.

Schools representatives have also proposed that schools do not pay for internet content unless the content is 'commercially available'.

Many rightsholders expect payment from educational use of their internet content, but do not advertise that content for sale, for a range of reasons. These include the many variables in the ways educational institutions use internet content (including type of use, number of recipients, and time period the material is available).

And content owners make their content available online for a range of business reasons that are undermined by the 'offline' uses allowed by the statutory licence. These include:

- advertising revenue from visits to the website;
- publishing 'samples' to encourage purchase of a publication or resource;
- publishing examples of work (e.g. photographs) to advertise their services.

Canadian exception for internet content

The Canadian Copyright Act has recently been amended by the Copyright Modernization Act to introduce a new exception that allows educational use of internet content in certain circumstances (section 30.04).³⁴

The exception is conditional upon the acknowledgement, in any use of the work, of the source of the work and, if given in the source, the author.³⁵

The exception does not apply if:

³⁴ <http://www.parl.gc.ca/HousePublications/Publication.aspx?Language=E&Mode=1&DocId=5697419>

³⁵ There are other acknowledgement requirements for audiovisual material.

- the work or the website is protected by a technological protection measure that restricts access, or the use of the work;
- ‘a clearly visible notice — and not merely the copyright symbol — prohibiting that act is posted at the Internet site where the work or other subject-matter is posted or on the work or other subject-matter itself’; or
- ‘the educational institution or person acting under its authority knows or should have known that the work or other subject-matter was made available through the Internet without the consent of the copyright owner’

The Act allows (but does not require) regulations to prescribe what constitutes a ‘clearly visible notice’. We understand that any regulations would describe the features of a clearly visible notice, but would not prescribe particular wording.

The new exception has some similarities with the current processes, agreed between Copyright Agency and schools’ representatives, for identifying content which the rightsholder appears to intend to be used by schools without permission or payment. Under these processes, content covered by licence terms such as Creative Commons, Free for Education or Non-Commercial Use is excluded from calculations about the volume of content used in reliance on the statutory licence, and from distributions of licence fees.

The main practical differences if such an exception were adopted in Australia are:

- content from websites with no copyright notice or terms of use, or from websites with a copyright notice and no terms of use, could be used by schools without payment, provided it is non-infringing;³⁶
- mechanisms would need to be developed to identify infringing content (these are not necessary at the moment, as the statutory licence allows use of all content, irrespective of whether or not it has been sourced from an infringing copy);³⁷
- mechanisms for schools to ensure they acknowledge the source of the content; and
- increased risk and compliance for schools arising from introducing and managing the above two mechanisms.

We look forward to discussing this issue further with schools’ representatives and the ALRC. We think, however, that the features of any solution should include:

- an opportunity for a rightsholder to choose to license uses of their content through a rights management organisation (under a statutory or voluntary licence), irrespective of whether they license those uses themselves; and
- alignment with solutions that have been developed, or are being developed, in other countries such as the UK and Canada.

³⁶ Under the current processing protocols, agreed with schools’ representatives, such content is presumed to be covered by the statutory licence, to protect rightsholders who believe that it is not necessary to assert their rights in relation to uses of content not allowed under the Copyright Act

³⁷ This means that schools do have to try and work out whether the source is infringing or not (e.g. song lyrics on a ‘fan’ website), and ensures that the infringement is not compounded for the rightsholder when a school uses the content.

QUESTION 31: OTHER CHANGES TO EXCEPTIONS AND STATUTORY LICENCES FOR EDUCATION

Should the exceptions in the Copyright Act 1968 (Cth) concerning use of copyright material by educational institutions, including the statutory licensing schemes in pts VA and VB and the free-use exception in s 200AB, be otherwise amended in response to the digital environment, and if so, how?

We do not think amendments to section 200AB are necessary. The section is intentionally 'flexible', and thus necessarily complex and uncertain. Its application in practice requires guidelines that take into account the criteria based on the three-step test in international treaties.

See also our response to Question 20.

CROWN USE OF COPYRIGHT MATERIAL

QUESTION 32: CHANGES TO GOVERNMENT STATUTORY LICENCE

Is the statutory licensing scheme concerning the use of copyright material for the Crown in div 2 of pt VII of the Copyright Act 1968 (Cth) adequate and appropriate in the digital environment? If not, how should it be changed?

See our general comments on statutory licences in our response to Question 44.

In general, the government statutory licence is adequate and appropriate for the digital environment. It allows governments to use any copyright material for a government purpose, including by reproducing and communicating it.

Communication of material under s 183

The Copyright Tribunal is empowered to 'declare' a collecting society for the purposes of collecting and distributing equitable remuneration for 'government copies', or a class of government copies. Copyright Agency is declared for 'works and published editions of works, other than works that are included in a sound recording, cinematograph film or a television or sound broadcast'.³⁸

The Tribunal is not, however, empowered to declare a collecting society for communications. This appears to have been an oversight, and should be remedied.

Copyright Agency is an agent for its members, and governments can thus notify us under s 183(4) and negotiate terms with us under s 183(5). Alternatively, we can offer voluntary licences to governments for communication (the terms of such licences, including payment, can be referred to the Copyright Tribunal under ss 154 and 155 of the Copyright Act). Our agreement with the Commonwealth relating to government use effectively includes a voluntary licence for communication.

States and Territories have declined to negotiate voluntary licences from us for communication, and nor do they notify us of their communications. We do not know the extent to which, if any, States and Territories are meeting their statutory obligation under s 183(4) to notify copyright owners.

The reasons for introducing s 183A for government copies apply equally to government communications. The Act thus needs to be amended so that a collecting society can be declared for government communications as well as for government copies.³⁹

For consistency with the educational statutory licence, we also propose that there be an equivalent provision to section 135ZWA(2A), which provides that a reproduction that is communicated for longer than 12 months (for example, by being available on an intranet) is deemed to have been reproduced again.

³⁸ The declaration is available on Copyright Agency's website at <http://www.copyright.com.au/what-we-do/governance>.

³⁹ Consideration should also be given to enabling declaration of the collecting society for copyright uses other than reproduction and communication, such as first publication and adaptation.

Local government

We note the acknowledgement in footnote 227 of the Issues Paper that it is unclear whether or not local government bodies are part of the Crown (and thus covered by the statutory licence). Copyright Agency has proceeded on the understanding that local governments are not covered by the statutory licence, and has developed licences for local government organisations based on its mandate from its members. These licences have some restrictions reflecting the extent of the authority from our members.⁴⁰

The extension of the government statutory licence to local government would enable more comprehensive use of material by local governments on fair terms.

Government policies for use of government material and third party content

We note the comment in the Issues Paper at [199] that ‘principles of openness may conflict with property rights in copyright material owned by third parties’.

Copyright Agency’s processes encompass exclusions for government material that is made available under licences such as Creative Commons licences. Our processing protocols agreed with education sector representatives require us to exclude such content, even if the licence terms have been erroneously applied (e.g. to material that includes third party content).

This can create difficulties in practice, because our processes can result in the exclusion of third party content not covered by the Creative Commons licence.

Payment of equitable remuneration under s 183A

Section 183A(2) obliges a government to pay equitable remuneration to Copyright Agency if it makes government copies in reliance on s 183(1) in a particular period. Section 183A(2) provides that the amount of equitable remuneration payable is to be worked out using a method agreed between the parties or determined by the Copyright Tribunal. Subsections 183A(3) and (5) provide that the method (agreed or determined) must take into account the estimated number of copies, and must specify the sampling system to be used to estimate the number of copies.

Section 183C empowers the collecting society to carry out sampling, but only after a method for working out equitable remuneration has been agreed or determined.

Because Copyright Agency has been reluctant to institute Copyright Tribunal proceedings against a government, and negotiations with States and Territories for agreement both on remuneration and a sampling system have been protracted, sampling (surveys of copying) has been carried out in some periods but not others.

Based on their interpretation of s183A(3), some States and Territories have queried their obligation to pay equitable remuneration for government copies made in periods during which there was no sampling.

⁴⁰ <http://www.copyright.com.au/licences/not-for-profit-sector/local-government>

In our view, s 183A(3) allows equitable remuneration for a period to be assessed according to sampling in a different period. It cannot have been the intention of Parliament that a government could avoid payment of equitable remuneration for government copies made in a particular period by refusing to reach agreement on a method for assessing remuneration for that period. In any event, in our view, the term sampling (which is not defined in the Copyright Act) refers to information that can be used, with some statistical validity, to estimate copying during a particular period. That information may relate to copying in a different period, and/or may relate to copying by another government, department or agency.

From our position, s 183C has not operated as intended. Governments are under no obligation to provide any information about their copying unless and until they have agreed to a method for determining equitable remuneration, or there is a Tribunal determination.

One option is an amendment to s183C which would empower the collecting society to carry out sampling in accordance with a method set out in the Copyright Regulations where no method has been agreed or determined. The method set out in the Regulations could be based on sampling methods currently being used in other sectors.

The legislation would be less complex, and less open to misinterpretation, if the provisions for providing usage information under the government statutory licence mirrored those for the educational statutory licence.

Compulsory sampling methodology

States and Territories have argued that:

The compulsory sampling methodology requires reform because sampling is an administrative burden on governments which is costly and difficult and because the accuracy of sampling is dubious. The S&Ts note that for the education sector, a wider choice of methodologies for setting rates is provided by the Act (see s 135ZB definitions of notices).⁴¹

The wider choice of methodologies is apparently a reference to s 135ZU(2), which allows an educational institution to elect whether equitable remuneration is to be assessed according to a records system, a sampling system or an electronic use system.

No educational institution with a current remuneration notice with Copyright Agency has elected to keep records of every single copy made. Sampling has proved to be both a lesser administrative burden for educational institutions, and a more reliable mechanism for collecting information about use.

The electronic use systems currently in operation are effectively a form of sampling; records of electronic use are kept by a statistical sample of educational institutions for a period of time.

⁴¹ *Comments by States and Territories Copyright Use Group*, provided to attendees at Attorney-General's forum on copyright 9 May 2009.

The only requirement of s183A is that the equitable remuneration paid by the government take into account the number of copies made, estimated according to a sampling system. All other matters can be agreed between the parties or determined by the Copyright Tribunal.

The Explanatory Memorandum to the Copyright Amendment Bill 1997, which introduced s 183A says at [149–150] that the amendments:

streamline the system for owners of copyright in works and other subject matter to be paid when their materials are copied by Commonwealth, State and Territory governments.

The amendments will enable the governments to avail themselves of an administratively simple procedure for calculating and making payments of equitable remuneration to copyright owners for the use of their copyright materials by the governments.

And at [152]:

The amendments ... will vary the operation of s.183(4) and 183(5) of the Act to permit payments for the reproduction of copyright materials by a government to be made the basis of sampling, rather than the present method of full record-keeping ...

In *Copyright Agency Limited v State of New South Wales* [2008] HCA 35, at [19], the High Court said:

These provisions alleviate the administrative burden of giving notice and fixing terms for each individual government copy under ss 183(4) and (5). Notification of the making of copies instead occurs by a process of sampling.

These comments indicate the government's view that a sampling system is a more efficient way for governments to record government use than full record-keeping.

One collecting society for each class of works

Representatives of States and Territories have asked why collecting societies need to be exclusive in their respective fields.

In response, limiting the number of collecting societies reduces the administrative burden for licensees, and concerns about exclusivity are addressed by the jurisdiction of the Copyright Tribunal. Governments are, of course, always at liberty to negotiate clearances directly with copyright owners; it is only if they want to relieve themselves of this burden that they need to negotiate with the collecting society or seek a determination from the Copyright Tribunal

In *Reference by Australian Spatial Copyright Collections Ltd* [2004] ACopyT 1, the Copyright Tribunal said, at 10]:

Prior to (and since) the introduction of s 183A, it was (and has been) possible for an organisation, either as the authorised agent of copyright owners or as the

assignee of copyright, to deal with governments. But this leaves at large those copyright owners who neither authorise the organisation to act as their agent, nor assign their copyright to it. Section 183A assists governments, first, by shifting the problem of the unidentified or otherwise 'problematic' copyright owner to the declared collecting society, and, secondly, by permitting the working out of equitable remuneration by reference to a sampling system rather than by more cumbersome methods. It assists copyright owners too, both in the latter respect, and by facilitating protection of them if, for whatever reason, they have not assigned their copyright to, or appointed as their agent, an appropriate organisation.

Who can rely on s 183

Some agencies are uncertain about whether or not they are the Crown for the purposes of s 183 and/or whether copies they make are for the services of the Crown. The former issue (whether an agency is the Crown) also arises in relation to the government ownership provisions, and was considered by the Copyright Law Review Committee (CLRC) in its report on Crown Copyright.

The CLRC recommended:

The Committee recommends that a non-exhaustive list of entities included as part of the 'Commonwealth and or a State' be created by the Commonwealth for Commonwealth entities and by the individual States/Territories for State/Territory entities.⁴²

We support the CLRC's recommendation.

We also offer a voluntary licence, which operates similarly to the government statutory licence, to quasi-government entities.

QUESTION 33: REGULATORY REQUIREMENTS SUCH AS DISCLOSURE

How does the Copyright Act 1968 (Cth) affect government obligations to comply with other regulatory requirements (such as disclosure laws)?

Copyright Agency does not seek payment for each and every use made under a statutory licence. Given that the management of statutory licences has evolved so that licensees now pay an agreed fee or rate for a period, Copyright Agency is seeking to negotiate an overall fair payment for all uses made in reliance on the statutory licence.

In the course of negotiations between licensees and Copyright Agency, it is often agreed that classes of use are allowed by the statutory licence but will not be taken into account for fair payment. For example, in the recent negotiations regarding the sale of surveyors' plans by governments, Copyright Agency and surveyor's representatives agreed that a range of administrative uses of the plans are covered by the statutory licence but would not be taken into account for the determination of fair payment.

⁴² Recommendation 9, at [9.61].

On this basis, it makes sense for all uses of copyright material by governments to be covered by the government statutory licence. It is confusing, and can lead to inconsistencies, if there are copyright exceptions in other legislation (such as Freedom of Information legislation).

QUESTION 34: EXCEPTION FOR DEPOSITED OR REGISTERED MATERIAL

Should there be an exception in the Copyright Act 1968 (Cth) to allow certain public uses of copyright material deposited or registered in accordance with statutory obligations under Commonwealth or state law, outside the operation of the statutory licence in s 183?

We refer to our response to Question 33. All uses of copyright material by governments for government purposes can be done in reliance on the government statutory licence. The extent to which certain uses done in reliance on the statutory licence are taken into account for the negotiation of fair payment can vary according to emerging technology and other developments. This approach thus provides consistency, simplicity and equity.

There are many types of documents that are registered or deposited under statutory obligations. These range from surveyors' plans, to publications that must be deposited with various libraries.⁴³

With all these documents, it is important to note that the statutory licence allows a vast range of uses of registered and deposited documents. But the equitable remuneration is assessed having regard to all uses allowed (taking into account relative proportions of high value, low value, and 'zero-rated' uses), not on a case-by-case basis.

Government use of surveyors' plans

Equitable remuneration for government uses of survey plans has been recently considered by the Copyright Tribunal in *Copyright Agency v State of NSW*. A determination is expected in 2013.

Governments make a range of uses of survey plans that are registered. All are allowed under the government statutory licence.

In the proceedings before the Tribunal, Copyright Agency, on behalf of its surveyor members, was seeking a determination in relation to just some of those uses: the supply of copies of the plans to the public for a fee, including through commercial brokers. Surveyors are not seeking payment in relation to uses associated with registration.

The vast majority of survey plans registered with the NSW government that are supplied to the public are supplied through information brokers with which the government has commercial contracts: 92% of all paid electronic documents, including registered plans, are provided through these information brokers. The remainder are provided directly by the Land and Property (LPI) department, either through its website or over the counter.

⁴³ With the National Library under section 201 of the Copyright Act, and with various other libraries under State legislation.

The NSW government recovers its direct and indirect costs plus a return of 12%, and the information brokers recover their costs and presumably also make a profit.

In 2008, the High Court held that the NSW government did not have an implied licence to supply copies of registered plans to the public.⁴⁴ The court noted:

On the one hand, the State uses the plans in direct response to lodgement of the survey plans by an applicant to effect, if appropriate, registration, and to issue title. This includes making a working copy of the plans. These uses are directly connected with private contracts for reward between surveyors and their clients for the preparation of plans for the specific purposes of lodgement, registration and the issue of title. On the other hand, there are uses of survey plans by the State which flow from registration and which involve copying the plans for public purposes or communicating them to the public via a digital system.⁴⁵

The court also noted at [88]:

... neither a surveyor nor a surveyor's client could be expected to factor into remuneration under any contract of engagement between them, such copying for public uses as may be engaged in by the State.⁴⁶

⁴⁴ <https://jade.barnet.com.au/Jade.html#article=81347> and <http://www.austlii.edu.au/au/cases/cth/HCA/2008/35.html>. There are links to the High Court decision and transcripts here: <http://www.copyright.com.au/get-information/policy-and-research/court-decisions>.

⁴⁵ At [46].

⁴⁶ At [88].

RETRANSMISSION OF FREE-TO-AIR BROADCASTS

QUESTION 35: RETRANSMISSION: REMUNERATION TO BROADCASTERS

Should the retransmission of free-to-air broadcasts continue to be allowed without the permission or remuneration of the broadcaster, and if so, in what circumstances?

This issue can affect artists whose works are included in films and television programs. Those artists may be members of Viscopy and/or Copyright Agency.

We support the submission from Screenrights on this issue.

QUESTION 36: RETRANSMISSION: APPLICATION OF STATUTORY LICENCE TO THE INTERNET

Should the statutory licensing scheme for the retransmission of free-to-air broadcasts apply in relation to retransmission over the internet, and if so, subject to what conditions—for example, in relation to geoblocking?

This issue can affect artists whose works are included in films and television programs. Those artists may be members of Viscopy and/or Copyright Agency.

We support the submission from Screenrights on this issue.

QUESTION 37: RETRANSMISSION: APPLICATION TO IPTV

Does the application of the statutory licensing scheme for the retransmission of free-to-air broadcasts to internet protocol television (IPTV) need to be clarified, and if so, how?

We support the submission from Screenrights on this issue.

QUESTION 38: APPROPRIATE FORUM FOR THESE ISSUES

Is this Inquiry the appropriate forum for considering these questions, which raise significant communications and competition policy issues?

We support the submission from Screenrights on this issue.

QUESTION 39: IMPLICATIONS FROM CONVERGENCE REVIEW

What implications for copyright law reform arise from recommendations of the Convergence Review?

We support the submission from Screenrights on this issue.

STATUTORY LICENCES IN THE DIGITAL ENVIRONMENT

QUESTION 40: IMPROVEMENTS TO STATUTORY LICENCES

What opportunities does the digital economy present for improving the operation of statutory licensing systems and access to content?

How statutory licences operate in practice

Copyright Agency is appointed by the Australian government to manage the statutory licence for the use of text and images for education use (Part VB) and government use (s183A).

These statutory licences allow the use of all copyright content that would otherwise require a copyright clearance. This includes:

- all local and foreign content;
- all published and unpublished content;
- all printed and digital content;
- content used from any source (including an infringing copy); and
- content the rightsholder may otherwise want to exclude from collective licensing.

In addition, the statutory licences allow any type of 'reproduction' (including 'first digitisation' of non-digital work) and any type of communication (such as making available from a learning management system or emailing).

In recognition of the value of the use of the content, and the absence of an obligation to negotiate transactional clearances, statutory licences require 'equitable remuneration' (fair payment).

In practice, Copyright Agency enters into fixed term agreements with licensees (or, more commonly, their peak bodies) that enable licensees to use all content in reliance on the licence for an agreed flat fee or per capita rate. The fee or rate does not vary, up or down, according to actual use of content during the period of the agreement. This allows licensees certainty, and enables them to budget.

Information about usage is collected from a sample of licensees. This information is used for two purposes: to distribute the licence fees collected to rightsholders, and as an indication of overall usage, to be taken into account in future rate negotiations.

In most cases, Copyright Agency receives information about all usage of content by licensees, both in reliance on the statutory licence and otherwise (e.g. content in the public domain, content used in reliance on an open licence such as Creative Commons).

Copyright Agency processes the usage information in accordance with protocols agreed with licensees. The processes include identification of uses that Copyright Agency and licensees have agreed are non-remunerable. For example, these processes exclude more than 50% of the content schools use from the internet.

Copyright Agency is also appointed to manage the statutory licences allowing use of copyright content for people with a print disability or intellectual disability. These statutory licences allow for payment of equitable remuneration. The Copyright Agency board has decided, however, not to seek payment for these uses.

Equitable remuneration

The following determine equitable remuneration:

- the value of the use of the content to the licensee's purpose (e.g. educational outcomes; government services);
- the cost saving to the licensee of not having to get individual clearances, or to assess and comply with 'free' exceptions on a case by case basis; and
- compensation to the content creator for having lost the opportunity to license on their own terms or to refuse a licence.⁴⁷

Role of Copyright Tribunal

The Copyright Tribunal can determine equitable remuneration, and other terms of statutory licences, where these issues have not been agreed through negotiation.

There is a perception that determinations by the Tribunal are expensive. They are for determinations that involve tens of millions of dollars. But the Tribunal has also determined small claims, often involving unrepresented parties, in an efficient and relatively informal manner, without significant costs to the parties.⁴⁸

The Tribunal has broad discretion regarding the conduct of proceedings, is not bound by the rules of evidence, and is required to conduct proceedings with as little formality, and as expeditiously, as possible.⁴⁹

Where determinations involve millions of dollars, there will necessarily be more expense involved. These determinations, however, usually underpin negotiations for the future. For example, the determinations regarding equitable remuneration payable by universities (1999) and schools (2002) have underpinned negotiated outcomes since then.

QUESTION 41: MORE EFFECTIVE OPERATION OF STATUTORY LICENCES

How can the Copyright Act 1968 (Cth) be amended to make the statutory licensing schemes operate more effectively in the digital environment—to better facilitate access to copyright material and to give rights holders fair remuneration?

⁴⁷ See Regulation 25B

⁴⁸ For example: Seven Dimensions Pty Limited [1996] ACopyT 1 (determination of \$5,000 for training video used by NSW government); Marine Engineering & Generator Services Pty Ltd V State of Queensland (Queensland Emergency Services) [1997] ACopyT 2 (determination of \$3,900 for copying of the generator test and maintenance log by Queensland Fire Service); The Copyright Tribunal of Australia: A summary of its work from 1995 to 1999,

<http://www.ag.gov.au/Documents/CLRC+Jurisdiction+and+Procedures+of+the+Copyright+Tribunal+Background+Papers+-+Summary+of+Tribunal's+work.pdf>

⁴⁹ Section 164

We refer to our responses to Question 40 above, Question 30 (Part VB educational statutory licence) and Question 32 (government statutory licence).

QUESTION 42: NEW STATUTORY LICENSING SCHEMES

Should the Copyright Act 1968 (Cth) be amended to provide for any new statutory licensing schemes, and if so, how?

An alternative to new statutory licences is a mechanism to enable extended collective licensing. This form of licensing, developed in Scandinavia, enables a rights management organisation to apply to an authority to extend its mandate to offer a more attractive licence to a licensee or class of licensees. It differs from statutory licences in that rightsholders can opt out. It is also a more flexible approach to blanket licensing, as it allows licensing solutions to be developed from time to time for approval of an authority such as the Copyright Tribunal. The UK is in the process of introducing provisions to enable extended collective licensing, following recommendations from the Hargreaves review.

As stated in our response to Question 32, we support the proposal that the government statutory licence be extended to local government.

QUESTION 43: SIMPLIFICATION OF STATUTORY LICENSING SCHEMES

Should any of the statutory licensing schemes be simplified or consolidated, perhaps in light of media convergence, and if so, how? Are any of the statutory licensing schemes no longer necessary because, for example, new technology enables rights holders to contract directly with users?

Statutory licences do not prevent users making direct arrangements with rightsholders. They do, however, entitle them to use content that is not readily available under a direct licence, including foreign content, unpublished content, and content not yet available in the format that the user wants (e.g. material that is available in printed but not digital form).

We are open to exploring whether some of the detail regarding requirements under statutory licences could be covered in regulations rather than in the legislation. This would provide more flexibility to enable some of the requirements to be amended to reflect technological and other developments.

We are also open to exploring a provision that would enable approval by the Copyright Tribunal of a voluntary licensing scheme for a class of works to replace the statutory licence for those works. This could enable the development of licensing solutions that deliver additional benefits for both licensees and content creators, for example by allowing the use of entire works in situations not allowed under the statutory licence.

We also refer to our answers to other questions dealing with statutory licences.

QUESTION 44: SHOULD ANY STATUTORY LICENCE USES BE 'FREE'

Should any uses of copyright material now covered by a statutory licence instead be covered by a free-use exception?

We refer to our responses to Question 30 (Part VB educational statutory licence) and Question 32 (government statutory licence).

Statutory licences and ‘free’ uses

People often make a distinction between statutory licences and ‘free’ uses. The dichotomy is misleading in two respects:

- statutory licences allow free uses; and
- there are costs associated with ‘free’ exceptions, that are not associated with statutory licences.

Examples of statutory licences allowing free uses of content are:

- under the statutory licences for use of content for people with disabilities, no payment is made;
- under the statutory licences for education and government, some uses made in reliance on the statutory licence are excluded from volume estimates, such as:
 - copying of logos and advertisements by schools;
 - a range of administrative uses of survey plans by governments
- because licence fees are flat, usage that exceeds the flat rate is effectively free.

Compliance costs

Because equitable remuneration is paid, there are minimal compliance requirements for most licensees under statutory licences. The compliance requirements mostly fall on the small sample of licensees who are required to report usage under surveys of usage.

For example, there are currently 9,405 schools registered with DEEWR in Australia. Each year there are two copyright surveys undertaken:

- 180 schools complete a survey about their use of printed (hardcopy) content, with each selected school participating for a term, and
- 100 schools complete an electronic use survey, with each selected school participating for a period of 4 weeks.

Once a school has participated in either survey, they are exempt from participating for at least eight years.

Free licences, on the other hand, require a use-by-use assessment of whether or not the use is covered by the free exception. There is therefore a licensee cost associated with reliance on free licences that is often unacknowledged.

The costs of assessing whether or not an exception applies in a given case, and managing copyright clearances on a case-by-case, can involve significant resources, and needs to be taken into account when comparing ‘free’ exceptions with licensing solutions that cover all uses.

Who should bear the costs of equitable remuneration?

The Issues Paper asks, in this and some other questions, whether some uses that are currently covered by statutory licences should instead be covered by free uses.

In truth, this is not a discussion about whether a use should be covered by a free exception (with its attendant compliance costs), but about the *value* of the use allowed without permission, and who should bear the cost of equitable remuneration for that value. Should the cost be borne by the user, or, in effect by the content creator?

For example, many cultural institutions are part of the Commonwealth, a State or Territory government and thus entitled to rely on the statutory licence for government use. This allows them to digitise and make available works in their collections, including 'orphan' works, with minimal compliance obligations. We do not need new exceptions to enable these uses by these institutions. The question, though, is: should the institutions pay equitable remuneration for the value of statutory licence (including the the effective outsourcing of the requirement to identify and find rightsholders to a collecting society), or should these uses be effectively subsidised by content creators?

Relationship between statutory licences and 'markets'

The Part VB statutory licence (educational use of text and images) is designed to enable use of material that is not currently separately sold in the formats or portions that a teacher wants in a particular instance. In most cases, teachers are using portions or parts of material that is normally sold as an 'edition', such as a book or journal. The licence does not apply to certain material that is available for purchase in a suitable format.

Not only does the statutory licence provide for more efficient management of the use of parts and portions from any source, and conversion to alternative formats, but it enables comprehensive access to all material, published and unpublished, local and foreign.

While educational institutions can *choose* to get a direct licence from a rightsholder, there is no provision for a rightsholder to 'opt out' of the statutory licence and require an educational institution to get a direct licence.

Compensation for lost opportunity to refuse licence or set terms

A creator or publisher may not want their material to be used in all the ways allowed by the statutory licence. For example, many rightsholders are concerned that the statutory licence allows 'first digitisation' (e.g. by scanning) of printed material without any of the safeguards the rightsholder may want to use (such as embedded metadata).

The Copyright Act was amended in 2000 by the Digital Agenda Act to, amongst other things, allow 'first digitisation' of non-digital material under exceptions and statutory licences. Those amendments did not reflect the recommendation of the Parliamentary Committee that reviewed the Digital Agenda Bill:

The Committee's rationale for constructing a barrier to the first digitisation of print material is manifold. Firstly, as explained above, the Committee is aware of the enormous potential for unauthorised use of digital material. The risk of copyright

infringement is increased because the exceptions will apply within the digital domain. That being so, the Committee is concerned that the decision to expose material to such a risk should be a considered decision made by the copyright owner, rather than by the user. Therefore, the owner generally should control the first digitisation of the work. Secondly, the Committee envisages that access to copyright material will not be hindered by requiring the consent of the copyright owner to first digitisation. The Committee expects that copyright owners would be willing to provide digital versions of their works, and that market forces would ensure they do so on reasonable terms. This restriction will not affect the access arrangements that exist in the print environment, as the exceptions will continue to apply to print to print reproductions and to digital to digital reproductions. Thirdly, as explained above the Committee views digitisation of material as akin to a form of publication. Therefore, the right to digitise a work is akin to a moral right: the creator should be able to choose whether or not to make his or her work available in digital form. To the extent that the right of publication is a moral right protected under Australian copyright law, it is consistent to provide protection to the right to first digitisation.⁵⁰

But the licence is compulsory, and content creators are entitled only to compensation for the loss of the opportunity to set their own terms or, indeed, refuse the use.

Collective licences offered by rights management organisations in other countries exclude a range of content and uses, reflecting the concerns and authority of their members. For example, the licences offered by Copyright Licensing Agency (CLA) in the UK exclude:

- any work on which the copyright owner has expressly and prominently stipulated that it may not be copied under a CLA licence
- workbooks, workcards or assignment sheets⁵¹

⁵⁰ Advisory Report on the Copyright Amendment (Digital Agenda) Bill 1999 at [1.28], available from http://www.aph.gov.au/Parliamentary_Business/Committees/House_of_Representatives_Committees?url=la-ca/digitalagenda/contents.htm

⁵¹ http://www.cla.co.uk/licences/excluded_works/excluded_categories_works.

FAIR DEALING EXCEPTIONS

QUESTION 45: PROBLEMS WITH FAIR DEALING PROVISIONS

The Copyright Act 1968 (Cth) provides fair dealing exceptions for the purposes of:

- a) *research or study;*
- b) *criticism or review;*
- c) *parody or satire;*
- d) *reporting news; and*
- e) *a legal practitioner, registered patent attorney or registered trade marks attorney giving professional advice.*

What problems, if any, are there with any of these fair dealing exceptions in the digital environment?

Fair dealing for research or study

As noted in the Issues Paper:

The Australian courts are yet to determine whether fair dealing for the purpose of research or study applies only to non-commercial research, or extends also to research of a commercial nature.⁵²

There are two issues:

- whether the activity is ‘research’ for the purposes of the exception; and
- whether the use is ‘fair’.

The first issue would be clarified if the provision explicitly stated that it did not apply to research for commercial purposes. This is the approach in the UK, where commercial research is allowed, but under licences from rightsholders and rights management organisations.

The second issue is complicated by s 40(3), which deems that reproduction of a ‘reasonable portion’ is fair.⁵³ In a report published in 2002, Professor Sam Ricketson took the view that this deeming provision was not consistent with international treaty obligations, because there are instances where use of a reasonable portion is not ‘fair’ (that is, it conflicts with a normal exploitation of a work, or unreasonably prejudices the rightsholder).⁵⁴

⁵² At [28.60]

⁵³ 10% of pages, or a chapter, of an edition of work is a ‘reasonable portion: s10(2).

⁵⁴ The report, *The Three-Step Test, Deemed Quantities, Libraries and Closed Exceptions*, is available at <http://www.copyright.org.au/news-and-policy/#research> under 2002.

We accept that ‘reasonable portion’ provides a useful guide, but a more equitable outcome would be achieved if the use of a reasonable portion were *presumed*, rather than deemed, fair.

In addition, section 40 would be more certain and equitable if it explicitly stated that a use that can be made by a user under a statutory licence is not ‘fair’. This is in line with the current law. It is also consistent with the approach in section 200AB, and the view of the Copyright Law Review Committee (CLRC), in its report *Simplification of the Copyright Act: Part 1*. It said at [7.16]:

It is also noted that where a licensing agreement is in operation the principle enunciated in Copyright Agency Limited v Haines would apply; that is, an existing licensing agreement would need to be taken into account before any royalty-free copying under the fair dealing provisions could be justified.

QUESTION 46: SIMPLIFICATION OF FAIR DEALING EXCEPTIONS

How could the fair dealing exceptions be usefully simplified?

There are some changes that would provide greater consistency, and thus simplicity. These include:

- a requirement in all cases that the source and author be acknowledged;
- an obligation to retain any rights management information (e.g. metadata);
- an express condition that the exception not apply if there is a licensing solution applicable to the user; and
- an express condition that the other factors in section 40(2) apply to all fair dealings.

QUESTION 47: NEW FAIR DEALING EXCEPTIONS

Should the Copyright Act 1968 (Cth) provide for any other specific fair dealing exceptions? For example, should there be a fair dealing exception for the purpose of quotation, and if so, how should it apply?

Australian law already allows for quotation: there is no infringement of copyright for use of less than a substantial part of a work. This is a flexible doctrine that takes into account the circumstances of the use.

If the part is substantial, there are a number of existing exceptions that apply including:

- fair dealing for criticism or review; and
- the educational statutory licence.

OTHER FREE-USE EXCEPTIONS

QUESTION 48: ANY OTHER PROBLEMS WITH EXCEPTIONS

What problems, if any, are there with the operation of the other exceptions in the digital environment? If so, how should they be amended?

In principle, no exception should allow a use that a user can make under a licensing solution available to them.

In particular, the following exceptions should be limited to uses that are not covered by a licensing solution:

- sections 65 (reproductions of public three-dimensional artworks);
- sections 67 ('incidental' filming of artworks)
- section 68 (publication of a reproduction made under section 65; showing or televising of a film made under section 67)

In addition, some exceptions have a wider application than intended. An example is section 28(7) that allows the communication of artistic works for education, without the entitlement to fair payment that would otherwise be provided by Part VB.

We elaborate on each of these issues below.

Licensing solutions for uses covered by existing exceptions

Many 'free' exceptions were introduced a long time ago, when licensing solutions were limited and the content could not otherwise be used for a socially desirable purpose in an efficient way.

When reviewing all these exceptions, the availability of the content under a licensing solution available to the user should be taken into account.

We submit that, in general, existing free exceptions should be confined to:

- individual users
- for private and domestic use.

Existing free exceptions should only remain available to other types of users (institutional, corporate, government) for:

- socially desirable purposes
- that are not covered by a licensing solution.

We note that this approach:

- will promote the development of licensing solutions;
- licensing solutions are overseen by the Copyright Tribunal to ensure efficiency and equity for all affected;

- has worked effectively in other countries (e.g. in the UK and New Zealand for educational use of audiovisual content); and
- ensures that Australia's exceptions meet the requirements for exceptions in our international treaty obligations.

High volume, low value transactions

High volume, low value transactions can be, and are, efficiently and equitably enabled by collective licensing solutions. The licensee does not need to assess each use on a case by case basis, and the identification of rightsholders is done 'after the fact' by the collecting society.

This is currently done by collecting societies managing statutory licences (comprehensive coverage of content) and 'voluntary' licences covering uses authorised by members and overseas affiliates. Voluntary 'blanket' licences commonly provide an indemnity for uses of content that are not expressly excluded, rather than requiring licensees to check the mandate in each case.

The UK is in the process of introducing amendments to enable 'extended collective licensing' following models adopted in Scandinavian countries.⁵⁵ Under an extended collective licence, a collecting society with sufficient mandate for a class of works can be authorised to license all works in that class, unless a rightsholder has 'opted out'.

We propose that the Copyright Act be amended to enable extended collective licensing in Australia. We envisage that extended collective licences could be approved by the Copyright Tribunal on public interest grounds, having regard to matters such as the mechanisms for 'opting out'.

Public artworks (sections 65 and 68)

There are exceptions that allow the reproduction (section 65) and publication (section 68) of certain artworks that are permanently displayed in public places.

The exceptions (particularly section 68) are unfair because they deprive artists of licensing income otherwise available to them. For example, Viscopy licences cover reproduction and publication of public murals and temporarily displayed sculptures (which are not covered by the exceptions), but is impeded from licensing the reproduction and publication of permanently displayed sculptures and works of artistic craftsmanship.

The detriment to artists is exacerbated by the digital environment, which provides much greater opportunity for the publication of images and potential income to artists.

While it may be acceptable for section 65 to continue to apply to individuals making reproductions of public art for private use, section 68 is unfair, detrimental to artists, and should be repealed.

⁵⁵ See a brief outline in Annex I to *Copyright Works: streamlining copyright licensing for the digital age* (the second Hooper report) available at <http://www.ipa.gov.au/types/hargreaves/hargreaves-copyright/hargreaves-copyright-dce.htm>.

This exception was considered by the 2002 Myer report of the Contemporary Visual Arts and Craft Inquiry and identified as a significant concern for the arts community. The report noted the inconsistency of an exception which applies to some types of public art but not others (murals, for example) and found there are no compelling policy arguments in favour of retaining the provisions.

Publication of public artworks: examples

Following are some examples of artists missing out on licensing revenue because of the exceptions.

By contrast to the examples below, Viscopy has licensed public artworks not covered by the exception, such as Peter Day’s mural ‘Great Southern Wall’: it is a permanent public artwork but not a sculpture or work of artistic craftsmanship.⁵⁶ This highlights the arbitrariness and inequity of the exception.

Loretta’s Quinn’s ‘Within Three Worlds’	Loretta’s Quinn’s bronze sculpture Within Three Worlds (1995) is in Princes Park, North Carlton, Victoria. In 2012, Loretta discovered that a photograph of the sculpture had been reproduced on a brochure for Yarra Trams.
Bert Flugelman’s ‘Spheres’	Bert Flugelman’s Spheres, situated in Adelaide’s Rundle Mall, was used by Adelaide Bank on its student card.
Jan Mitchell’s ‘Baywalk Bollards’	Jan Mitchell created sculptures known as the Baywalk Bollards for a council in Victoria – see http://www.visitgreatoceanroad.org.au/geelong/bollard-trail These sculptures were photographed and published in a calendar produced by Bartel Publications – see http://www.bartelpc.com.au/about_us
Ron Robertson-Swan’s sculptures ‘Vault’ and ‘Ventex’	Ron Robertson-Swan’s sculptures ‘Vault’ ⁵⁷ and ‘Ventex’ have been published on a number of occasions in reliance on the ‘public art’ exception.
John Radford’s TIP	The New Zealand Copyright Act includes similar public art exceptions to Australia’s. In 2007, the New Zealand High Court rejected a copyright infringement claim by sculptor John Radford relating to reproductions of his sculptural installation TIP on t shirts. The court held that there was no infringement because of the public art exception. ⁵⁸ The sculptures can be viewed here: http://johnradford.co.nz/general-public-artworks/tip/

⁵⁶ <http://www.environmentalartanddesign.com.au/murals.htm>

⁵⁷ [http://en.wikipedia.org/wiki/Vault_\(sculpture\)](http://en.wikipedia.org/wiki/Vault_(sculpture))

⁵⁸ *Radford v Hallensteins Bros Ltd* [2009] DCR 907

Incidental filming and broadcasting of artworks (sections 67 and 68)

Section 67 allows the 'incidental' inclusion of an artwork in a film, and section 68 allows the film to be shown and broadcast.

We give some examples below of situations in which an artwork could have been licensed for the artist's benefit, but for the exception.

Kevin Lincoln's work in the TV program 'Grand Designs'	In 2010, a work by Kevin Lincoln was included in an episode of the Australian version of the series 'Grand Designs'.
John Millington's painting in the feature film 'Mental'	The recently-released Australian P.J. Hogan film <i>Mental</i> screens a fairly long sequence in the Mayoral office of Tweed Shire, Murwillumbah which features for some minutes, a large painting by John Millington entitled 'How come They Don't Burn Their Houses'. It was acquired by the Tweed Regional Gallery in the mid 1990s.
Bernadette Smith	Bernadette's work was used in a television commercial for the Commonwealth Bank.
Gail English	Gail English's painting 'Light and Air in my Tropical Garden' appeared in some episodes of Channel 9's 'The Block' earlier this year.
Peter Day's mural 'Great Southern Wall'	As noted above, Viscopy has licensed Peter Day's mural 'Great Southern Wall' on a number of occasions. The work has also been used, however, without licence in reliance on the 'incidental filming' exception.

QUESTION 49: EXCEPTIONS TO REMOVE

Should any specific exceptions be removed from the Copyright Act 1968 (Cth)?

In general, our approach has been to suggest amendments to existing exceptions to enable access on more equitable terms, rather than repealing them altogether.

QUESTION 50: NEW EXCEPTIONS

Should any other specific exceptions be introduced to the Copyright Act 1968 (Cth)?

By international standards, the Australian copyright environment already has a considerable allowance for uses of content without the copyright owner's permission.⁵⁹

It is important that when considering whether to introduce new exceptions, or change existing ones, the current operation of the copyright environment, in practice, be taken into account.

⁵⁹ See for example *WIPO Study on Limitations and Exceptions of Copyright and Related Rights in the Digital Environment* available at http://www.wipo.int/meetings/en/doc_details.jsp?doc_id=16805.

This includes:

- the legislation and regulations relating to exceptions and limitations, and the interaction between them;
- how these are managed in practice;
- court decisions on subsistence of copyright (originality and authorship in particular);
- court decisions on liability (on whether the part used is 'substantial' in particular, but also other issues such as authorisation)
- the consequences of liability (including that there are no statutory damages in Australia, the requirements for additional damages, and the safe harbour provisions)

If new exceptions for new purposes are under consideration, then they should be subject to criteria such as those in section 40(2), which are connected to the second and third limbs of the 'three-step test' in international treaties.

There may be scope for criteria for the 'special cases' in which a new exception might apply, that allows some 'flexibility' but still meets the first ('special case') requirement of the three-step test.⁶⁰

Such criteria could allow for uses made by an individual for private and domestic use, but not extend to the 'sharing' of content (for example, by upload to a social networking site).

QUESTION 51: SIMPLIFICATION OF FREE-USE EXCEPTIONS

How can the free-use exceptions in the Copyright Act 1968 (Cth) be simplified and better structured?

The focus should be on the actual practical implications of aspects of the current framework.

There are areas in which inconsistencies could be removed, thus providing greater certainty and simplicity. For example, as set out in our response to Question 46, there are some inconsistencies in the fair dealing exceptions that should be addressed.

⁶⁰ See the reference in our response to Question 52 to the report prepared for WIPO by Professor Sam Ricketson.

FAIR USE

QUESTION 52: SHOULD THERE BE A FLEXIBLE EXCEPTION

Should the Copyright Act 1968 (Cth) be amended to include a broad, flexible exception? If so, how should this exception be framed? For example, should such an exception be based on 'fairness', 'reasonableness' or something else?

See also our response to Question 47.

As noted in the Issues Paper, this question has been considered in Australia on a number of previous occasions. Proposals for introduction of a fair use exception have also recently been rejected in Canada and the UK.⁶¹

There are two aspects of exceptions:

- the *purpose* of the use;
- the *conditions* for application of the exception.

As a matter of principle, we think that the policy rationale for any new exception should be based on the *purpose* for which content can be used without permission. This purpose should, as matter of public interest, be more important than a content creator's right to manage the use of their work.

References to a 'flexible' exception usually refer to an exception for which the purpose of the use is not a criterion. Having said that, section 200AB (available to libraries, educational institutions and people with a print disability), often referred to as a flexible exception, does have purpose criteria.

'Flexibility' and purpose

The model for a 'flexible exception' is usually the fair use exception in the US. The factors for determining whether or not a use is 'fair' for the purposes of fair use in the US are very similar to those for fair dealing for research or study in Australia.

The real issue is the extent to which the *purpose* of a use is a necessary factor in determining whether or not an exception applies. The Australian fair dealing exceptions explicitly require a consideration of purpose, before considering whether the fairness factors apply.

The US fair use exception lists some purposes that can be covered by the exception, but leaves open the possibility that non-listed purposes may be covered by fair use. There has been much debate about other purposes that are, and are not, covered by fair use as a result of the many court decisions on fair use.

The approach to exceptions in international treaties includes a requirement that they be confined to 'certain special cases'. There has been considerable academic discussion of

⁶¹ Barry Sookman, Fair Use for Australia (23/8/2012) <http://www.barrysookman.com/2012/08/23/fair-use-for-australia/>

this and the other requirements of the three-step test, as well as consideration by the World Trade Organization (WTO) Panel.⁶²

In an analysis prepared for and published by the World Intellectual Property Organization (WIPO), *WIPO Study on Limitations and Exceptions of Copyright and Related Rights in the Digital Environment*,⁶³ Professor Sam Ricketson states that, to comply with the 'certain special cases' requirement, 'a proposed exception (case) should be both clearly defined and narrow in its scope and reach'.⁶⁴

Professor Ricketson considers the compliance of the US fair use exception with the 'certain special cases' requirement, and concludes:

... it is unlikely that the indeterminate other purposes that are covered by Section 107 [the US fair use exception] meet the requirements of the first step of the three-step test, although it is always possible that, in any given case, they will find support under other provisions of Berne, such as Articles 10 and 10bis.

Irrespective of the requirements of international law, good domestic copyright policy should have regard to the value to Australian society of uses allowed by exceptions, and to what extent (if any) it is necessary for uses to be facilitated by exceptions.

Some proponents of 'flexible exceptions' argue that the only criterion for an exception is whether or not they 'undermine the ability of rightsholders to exploit their work'. While this is a necessary condition for an exception, it is not the only one in international law, and should not be the only one in good domestic copyright policy.

'Flexible' exceptions and business risk

Developing a business model based on the unlicensed use of other people's content and reliance on an exception necessarily involves risk of litigation if the use is on a commercial scale because the stakes are high. If the exception is a 'flexible' one such as fair use the uncertainty and risks are even higher. It is difficult to see that flexible exceptions reduce risk.

See also our response to Question 2 on proposed Principle 2.

'Fair use' and 'substantial part'

We note that some situations in which there may be a perceived need for a 'flexible exception', where part of a work is used, may not be infringements because the part is not 'substantial'. A person's motive and purpose in using part of someone else's work, and whether or not the use competes with that of the original, can be factors in determining whether or not the part used is 'substantial'.

⁶² DISPUTE DS160, United States — Section 110(5) of US Copyright Act, http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds160_e.htm

⁶³ http://www.wipo.int/meetings/en/doc_details.jsp?doc_id=16805

⁶⁴ At p 22. There are differing views, outlined on p22, about whether an exception requires a clear public policy rationale.

It is interesting to note that recent reports of a claim by the estate of William Faulkner in relation to the use of a quote in the film *Midnight in Paris* characterise the case as a fair use one. In Australia, however, a case like this would likely turn on whether or not the quote was a 'substantial part'.

All exceptions should be subject to 'fairness'

All exceptions should be both for a specified public interest purpose, and subject to 'fairness' criteria.

The fairest exceptions are those that allow for fair payment (i.e. statutory licences).

In other cases, an exception is never fair if it allows a use that can be made by the user under a licensing solution.

QUESTION 53: NEW EXCEPTION OR CHANGE TO EXISTING EXCEPTIONS

Should such a new exception replace all or some existing exceptions or should it be in addition to existing exceptions?

The purpose of a use should remain a criterion for any exception.

There could, however, be some rationalisation of the conditions for the various fair dealing exceptions; there are some inconsistencies and anomalies.

The conditions for all should include:

- the use is not covered by a licensing solution; and
- acknowledgment of the creator and the source of the material.

CONTRACTING OUT

QUESTION 54: ENFORCEABILITY OF AGREEMENTS THAT LIMIT EXCEPTIONS

Should agreements which purport to exclude or limit existing or any proposed new copyright exceptions be enforceable?

It is not clear to what extent provisions in contracts that may prohibit reliance on a copyright exception are problematic in practice. We note arguments that in at least some cases contracts can be interpreted to allow for the operation of copyright exceptions.⁶⁵ We also note the reference in the Issues Paper to the operation of the Consumer and Competition Act and other legislation (some of which has been introduced since the Copyright Law Review Committee released its recommendations on this issue in 2002).

If there is to be consideration of a special provision in the Copyright Act, we submit it should only apply to private uses by individuals. Institutions and corporations can and do negotiate terms of contracts they elect to enter into.

QUESTION 55: AMENDMENTS TO PROHIBIT CONTRACTING OUT

Should the Copyright Act 1968 (Cth) be amended to prevent contracting out of copyright exceptions, and if so, which exceptions?

We refer to our response to Question 54.

⁶⁵ For example, Peden, E & Carter, J W & Stammer, K, 'Contractual Restrictions and Rights Under Copyright Legislation' (2007) 23 (1 & 2) *Journal of Contract Law* 32-54

APPENDIX 1: WHAT OUR MEMBERS SAID

We recently invited members to provide us with their views on exceptions, and specifically asked them about exceptions raised by the Issues Paper.

We received responses from more than 3,000 members. They included organisations whose core business is publishing, organisations for which publishing is a secondary business, writers and artists.

They indicated their views on whether or not there should be exceptions as follows. A significant proportion indicated that there should be no exception at all for some purposes (highest for social networking and 'transformative' use). The others indicated that exceptions were acceptable in certain situations, subject to limitations and conditions.

	No	Yes provided limitations/conditions	Not sure
'Transformative' uses (using other people's work to create a new work)	47%	45%	8%
Posting to social networking sites such as Facebook and Pinterest	46%	46%	8%
Use of 'orphan' works (copyright owner is unidentifiable)	19%	68%	13%
Research	15%	82%	4%
Supply of copies by libraries	30%	63%	8%
Reporting news	21%	71%	8%

Of the respondents who were in favour of exceptions in certain situations (conditional upon limitations), the majority said:

- exceptions for social networking, transformative use, research and reporting news should be subject to attribution of the creator (and a significant proportion took this view in relation to other exceptions)
- exceptions for any of the above uses should be subject to one or more of the following conditions or limitations: individual use only; non-commercial use only; fair payment; absence of a licensing solution.

The following is a selection of the comments made by our members.

Writers:

- *Fewer rather than more exceptions. Currently there is no respect for authors and poor understanding of what it means to create a work.*
- *Generally I believe that it's not fair for copyright material to be used for commercial use or research or education without paying the author. I also do not believe people can ignore copyright laws just because they don't personally want to pay for movies*

or music and feel it is not fair to the artists and musicians who are being deprived of income.

- I agree works should be available for transformative use, but I also think this use should be paid and attributed in all cases.*
- I am concerned at the growing expectation of the general public that all material should be available for use without recompense to its creators.*
- I am firmly of the view that authors and creators should be paid for content that is reprinted without permission, particularly as we see the trend towards digitisation (which will allow Government agencies/libraries/ corporations etc to 'scan' a document and then distribute via electronic means, as opposed to traditional photocopying).*
- I am very happy with the current system that sees us as educational text book writers reimbursed through the Copyright Agency under the educational licences for schools and other educational institutions.*
- I believe it is fair for copyright material to be used without permission when the copyright owner cannot be found. As an educational writer of nonfiction tracing ownership is a nightmare. At least half my time is spent on research. Unfortunately much of it is wasted as I fail to find an author due to the fact that publishers and companies have either merged, or no longer exist.*
- I don't feel copyright material should be used at all without permission, even for research. I feel this very strongly. People don't go into shops and 'use' clothes for sale there. Even for research, I think they should get permission to use material. I've found all my works 'pirated', some even by teachers claiming them as their own course notes. It's a full time job asking people to remove my material from their websites, and I can't begin to catch all of them, because I'm too busy writing. I don't think we should call it 'pirating' by the way, because it's too glamorous. It's stealing!*
- I don't think anyone has the right to use material created by someone and not pay for the use. An author/publisher makes its income by people buying their works. If we extend the exceptions to a broader use then authors will be cheated of potential income. The current system in place by CAL compensates authors for works being copied and distributed. It is a fair system and works efficiently.*
- I think that there should be at least attribution and disclaimer that there is no money involved. There are plenty of Creative Commons websites out there, which do give permission for usage of various kinds, so why raid a website that doesn't give permission? Sometimes it isn't possible to ask permission, in which case only a small amount should be used and attribution made. But NOBODY should simply help themselves and make money out of someone else's hard work because information should be free!*
- In general I think posting material to social networking sites puts it into a completely uncontrolled environment which is replete with people who have no respect for, or even understanding of, copyright. Therefore, unless and until there is a robust rights management scheme in place, the copyright owner should be the only party allowed to post it.*
- In my experience, the shortest work can take up to a year to complete. Copyright is not just for financial gain but also encourages recognition of the time and effort involved in creating a book. As an educational author, I don't mind that my income from writing is very limited. However, I am aware of the photocopying in schools which does not always comply with regulations. If copyright restrictions remind*

teachers that every book they take to the copier has taken at least 12 months of meticulous writing and editing, then the law has been worthwhile.

- *Social Media is an entirely new world that is opening-up vast tracts of new media, and should be subject to copyright. It's being used for wide-ranging purposes, including news and politics.*
- *The assumption should be that it should not be usable without permission (otherwise, what is the point of copyright ?) unless a strong and specific case can be made for exception, and the copyright owner should be advised and able to contest the exception.*
- *Transformative use is code for plagiarism on an industrial scale. Google and anyone else with the technology can argue that they are transforming the existing content by simply being able to copy it more efficiently than in the past. The statutory licence scheme in Australia works fine but the statistical nature of it is not understood. It is quite a smart idea for spreading the money around. We can all be digitally encrypted islands for a very low cost these days.*
- *The education sector has put forward a very dangerous proposition: that content published for 'free' on the Internet means that the inherent value of the IP within that work should be waived. In other words, the education sector should not have to pay licensing fees to use such work. But these web sites are not 'free' at all – they generate revenue through a different business model and those revenues are just as substantially impacted as if the educational decided to not pay licensing fees to the declining number of print publications which still rely on subscription revenue from readers. The business model is reliant on 1) attracting an audience to the website 2) having that audience behave (or transact) in a certain way at the website. Display advertising remains the core component for most companies. Most companies live-and-die by their traffic numbers. While the business model is evolving, this should not be an opportunity to pare back – or even eliminate – crucial IP rights which should hold even more value.*
- *Protecting creators' copyright in the digital age is crucial. There is a much larger undercurrent of 'piracy' and unauthorised use which is now easier (and will never be stopped), but this does not undermine the concept of copyright itself. Government-subsidised sectors, such as educational institutions and government departments themselves, as well as major corporations, must continue to pay for the right to use others' work no matter what platform it is published on. The value of this work is not inherently lessened because of the (digital) platform.*

Artists:

- *An Artist's income is derived from the reproduction of that Artist's work. Whether it be visual, written or audible. To reproduce said work without permission is theft. End of story.*
- *At some stage in the past ten years the assumption has arisen that it is OK to use material found on the web (and in print, as a result) for whatever purpose, with neither attribution or payment. Along with that has come an alarming erosion in the value of licence fees for a whole range of publishing applications (I am talking about photography mainly, but it is also a generic comment). Perhaps those of us who grew up and developed businesses based on traditional copyright and licensing protocols are now fighting a hopeless rearguard action, but I for one would not like*

to see any further relaxation of an author's right to control artistic, moral and commercial rights for his or her work.

- *I am totally opposed to my material which is very badly photographed, misstated, reinterpreted, wrong attribution being circulated on the internet.*
- *I don't think – except for a personal use that IS strictly personal and NOT sent on to any other party in either digital or hard-copy form – that there should be free downloads available.*
- *I feel schools and institutes for learning use too much under the argument that it's for the students learning. Their licence is too open and generally I feel there should be tighter restrictions there and payment to artists.*
- *It is already hard enough for artists, why make it easier to people to steal? And people don't equate not paying for the use of art as stealing! For example, a generation now expects music for free, and that they can appropriate what they like without acknowledging the true author. It is ignorant behaviour. Artists should not tolerate it.*
- *It is NOT fair for copyright material to be used without permission AND payment . There are no exceptions and the movement or sense of community entitlement to so called sharing of this creative property undermines the environment that creates sustainable creativity in the Visual Arts. I am a Professional full time Artist and that is my only source of income. If I cannot protect my Art I am unable to work without doing other occupations. So the theft of this property for the unauthorised use by others will damage my income, business, value of the artworks and impede my production of art and creativity. This cannot be good for the preservation and development of the Visual Arts. The uniqueness of the individual as an Artist is diminished by any diminishing of Copyright laws. A very firm stance should be taken against unauthorised sharing of copyright material. As Artists, we work very hard in our occupation to make any sort of living. We work for nothing until we (or a gallery) sells a painting, unless we have a confirmed commission. It is totally unfair for anyone to think they are entitled to take income away from us. We battle with commercial galleries and some artists are often not paid at all for their work that has sold. The only solution is engaging the Police as galleries are not required to put monies from sales into Trusts. So to think that any person out there can steal from us by breaching copyright is abhorrent.*
- *Pastiche and commentary allows that an art work may be commented on by another. This does not require payment or attribution of a creator or that the work be licensed. If an artist's parody of the work of another results in income, this is their right as the creator of an original art work (even insofar as they incorporate references to or arts of another original work).*
- *Permission should always be sought when the user is publishing for profit, on paper, or digitally, on line. Even works put on Facebook or other networking sites should be protected from unauthorized use in publications, or appropriation by other artists, filmmakers etc. unless permission to copy and publish is specifically granted by the artist, filmmaker or writer when placing the work in the public realm. The original artist should always be credited, and informed even when work is shared on Facebook etc. Transformative use should never be done without permission from the artist/author.*
- *Social media is a huge problem because of assumptions about rights and usage that some, in particular Facebook, lay claim to. I would not for instance want any of*

my work used out of context or for commercial gain by other orgs or individuals, The whole area is so complex that I don't feel I have fully come to grips with it yet.

- *The principle of copyright should not be played around with. If you do, you are opening a HUGE can of worms. With enormous time, energy and costs spent on amendment after amendment to all the in-between situations that will have to be interpreted. Just because usage on social networking sites is hard to police is not a reason to change the law!*
- *There is no real reasonable usage without direct permission by the creator. They should always have the right to be aware of each case their work is being used and then judge it on merit as to payment or non-payment. Without knowledge of usage there is no control.*
- *'Transformative' uses – really depends upon whether it is commercial in the sense of making money vs. commercial as selling an artwork in a fine art/contemporary art context where appropriation does not have making money as its only goal – hence satire, remediation, quotation of art history, something with aesthetic merit. I don't self-post my work to Facebook although I have had others do so. Pinterest is a very interesting case and deserves further investigation. Not just as a commercial issue but one of non-attribution and ethically having no control over the context of on-use of your imagery. e.g. it would really get my goat to have my work making money literally or generating traffic to their page if they were neo-nazis or something I didn't support.*
- *Why should MY image or any artist's IMAGE be stolen (used) without permission? Whether an image is billboard size or on Facebook that image is cherished by the user just as much. In fact when used on Facebook it has a much higher usage/copy rate so it should be purchased at a much higher rate or at least reward the artist with free naming and advertising wherever used.*

Publishers:

- *I think the law is liberal enough already, and doesn't need more exceptions added. Publishers like us can choose when to offer a free sample or free resources, and when payment for a license is expected. It should not be up to a teacher/library/etc to decide that they want to be able to use the material without permission outside the exceptions already permitted.*
- *The encouragement of greater use of copyright material without fair payment or support of licencing systems will cause many non-profit academic journals such as ours to foldup, cease for lack of financial support. Any changes which deprive not for profit publishers of ways of financially supporting production costs must be accompanied by financial support in compensation, if a democratically arranged knowledge community is to continue to be viable.*
- *The parody exception should be maintained and should be available for both commercial and non-commercial use. Hyperlinking to content on someone else's website should be specifically permitted under the Copyright Act, given that questions have been raised about whether this is a copyright violation or not. It should, of course, be possible for content creators to authorise the use of their content under, for example, the Creative Commons licence.*
- *This is a vexed question. Authors have a right to fair payment for their works, but with the proliferation of the internet, Google copying, wikis, file sharing, social media, and epubliishing, protection of authors' and creators' rights have been*

eroded. Creators and authors find it extremely difficult to protect their rights and it will probably become even more difficult in the future. That said, authors should be paid royalties when it is possible to trace lending, file sharing and creation of transformative works. We publish a lot of archival material for which it is difficult or impossible to trace the copyright owners. Generally these works have no commercial value, but are of historical interest. Generally we assume there is low risk in publishing such material and do so without the creator's permission.

- *We depend upon copyright fees to continue to publish our NFP refereed journal in addition to the member subscriptions. We subsidise student/not in paid employment subscriptions by 50%, i.e. below printing costs.*
- *Teachers don't work for free, why should I? Librarians don't work for free, why should I? Researchers and journalists/reporters expect someone to pay for them to work, so why isn't it reasonable for me to expect to be paid for the use of my work?*

APPENDIX 2: COPYRIGHT LITIGATION

We have analysed a sample of copyright cases with a view to determining the proportion in which a copyright exception was the deciding factor.

Using the search and analysis tools on JADE (jade.barnet.com.au), we looked at reported cases from single judges of the Federal Court between 1 July 2006 and 30 June 2012.

Of the 353 decisions with the subject 'intellectual property', 94 (27%) were tagged 'copyright'. Some of the decisions relate to the same case (e.g. one decision on a procedural issue, or on remedies or costs).

In the table below, we have identified the main copyright issue in each case.

In only four of the cases was the operation of an exception a key issue. In only one of them (the TV Now case, *Singtel Optus Pty Ltd v National Rugby League Investments Pty Ltd*) did the case turn on the court's interpretation of an exception.

Case	Citation	Main copyright issue
Facton Ltd v Toast Sales Group Pty Ltd (19 June 2012)	[2012] FCA 612 MIDDLETON J	remedies
TV Plus Broadcasting Company Pty Limited v United Broadcasting International Pty Limited (17 May 2012)	[2012] FCA 565 BROMBERG J	remedies
Allen House Mirror & Glass Pty Ltd v Hamilton (04 May 2012)	[2012] FCA 464 BENNETT J	remedies
Ladakh Pty Ltd v Quick Fashion Pty Ltd (19 April 2012)	[2012] FCA 389 JESSUP J	whether copying
Hill v Lang (05 April 2012)	[2012] FCA 349 BESANKO J	ownership of copyright
Bell v Steele (No 3) (16 March 2012)	[2012] FCA 246 COLLIER J	remedies
Phonographic Performance Company of Australia Ltd v Commercial Radio Australia Limited (15 February 2012)	[2012] FCA 93 FOSTER J	scope of licence
CA, Inc. v ISI Pty Limited (03 February 2012)	[2012] FCA 35 BENNETT J	subsistence
Singtel Optus Pty Ltd v National Rugby League Investments Pty Ltd (No 2) (01 February 2012)	[2012] FCA 34 RARES J	exception (s111): time-shifting tv program
Facton Ltd v Mish Mash Clothing Pty Ltd (27 January 2012)	[2012] FCA 22 JESSUP J	infringement; substantial part
Complete Technology Integrations Pty Ltd v Green Energy Management Solutions Pty Ltd (18 November 2011)	[2011] FCA 1319 KENNY J	subsistence; substantial part
Sanofi-Aventis Australia Pty Ltd v Apotex Pty Ltd (No 4) (18 November 2011)	[2011] FCA 1307 JAGOT J	exception (s44BA): product information about medicines
Spotless Group Limited v Blanco Catering Pty Ltd (24 August 2011)	[2011] FCA 979 MANSFIELD J	subsistence; infringement
Sanofi-Aventis Australia Pty Ltd v Apotex Pty Ltd (No 3) (29 July 2011)	[2011] FCA 846 JAGOT J	subsistence; infringement; implied licence
Micro Focus (US) Inc v State of New South Wales (New South Wales Police Force) (15 July 2011)	[2011] FCA 787 JAGOT J	infringement; whether defence under Ombudsman's Act
Dynamic Supplies Pty Limited v Tonnex International Pty Limited (No 2) (16 June 2011)	[2011] FCA 675 YATES J	remedies
EdSonic Pty Ltd v Cassidy (No 2) (31 May 2011)	[2011] FCA 577 MOORE J	assessment of damages

Dynamic Supplies Pty Limited v Tonnex International Pty Limited (13 April 2011)	[2011] FCA 362 YATES J	subsistence, infringement, substantial part
Facton Ltd (formerly known as G-Star Raw Denim KFT) v Seo (12 April 2011)	[2011] FCA 344 GORDON J	remedies
Facton Ltd v Rifai Fashions Pty Ltd (30 March 2011)	[2011] FCA 290 BROMBERG J	remedies
Barrett Property Group Pty Ltd v Dennis Family Homes Pty Ltd (18 March 2011)	[2011] FCA 246 DODDS-STREETON J	infringement; substantial part
Lynx Engineering Consultants Pty Ltd v The ANI Corporation Limited trading as ANI Bradken Rail Transportation Group (No 5) (11 March 2011)	[2011] FCA 216 MCKERRACHER J	practice and procedure
United Broadcasting International Pty Limited v Turkplus Pty Limited (No 2) (16 December 2010)	[2010] FCA 1413 YATES J	practice and procedure
Urban Ventures Pty Limited v Solitaire Homes Pty Limited (14 December 2010)	[2010] FCA 1373 JAGOT J	remedies
Optical 88 Limited v Optical 88 Pty Limited (No 2) (10 December 2010)	[2010] FCA 1380 YATES J	infringement; substantial part
Wills v Australian Broadcasting Corporation (No 3) (11 November 2010)	[2010] FCA 1227 GILMOUR J	ownership of copyright
Young v Wyllie (11 October 2010)	[2010] FCA 1098 YATES J	refuse leave to appeal
EdSonic Pty Ltd v Cassidy (17 September 2010)	[2010] FCA 1008 MOORE J	ownership of copyright
Fairfax Media Publications Pty Ltd v Reed International Books Australia Pty Ltd (07 September 2010)	[2010] FCA 984 BENNETT J	subsistence
Ron Englehart Pty Ltd v Enterprise Constructions (Aust) Pty Ltd (12 August 2010)	[2010] FCA 820 JESSUP J	infringement; substantial part
Larrikin Music Publishing Pty Ltd v EMI Songs Australia Pty Limited (No 2) (06 July 2010)	[2010] FCA 698 JACOBSON J	infringement; substantial part
Flashback Holdings Pty Ltd v Showtime DVD Holdings Pty Ltd (No 6) (02 July 2010)	[2010] FCA 694 PERRAM J	remedies
Wang v Anying Group Pty Ltd (29 June 2010)	[2010] FCA 684 FOSTER J	subsistence
AAA Embroidery & Screen Printing Pty Ltd v Vanny Dan (23 June 2010)	[2010] FCA 656 FOSTER J	summary judgment
Acohs Pty Ltd v Ucorp Pty Ltd (10 June 2010)	[2010] FCA 577 JESSUP J	subsistence; infringement
Budget Eyewear Australia Pty Limited v Specsavers Pty Ltd (19 May 2010)	[2010] FCA 507 BENNETT J	subsistence; infringement; substantial part
M.D.I. International Pty Ltd v Trio Brothers (18 May 2010)	[2010] FCA 486 GREENWOOD J	remedies
Jin v University of Melbourne (05 May 2010)	[2010] FCA 471 BROMBERG J	practice and procedure
Primary Health Care Limited v Commissioner of Taxation (04 May 2010)	[2010] FCA 419 STONE J	subsistence
Goodall v Nationwide News Pty Ltd (13 April 2010)	[2010] FCA 350 GILMOUR J	practice and procedure
Young v Wyllie (30 March 2010)	[2010] FCA 283 MOORE J	practice and procedure
Larrikin Music Publishing Pty Ltd (ACN 003 839 432) v EMI Songs Australia Pty Limited (ACN 000 063 267) (17 March 2010)	[2010] FCA 242 JACOBSON J	infringement; substantial part
Telstra Corporation Limited v Phone Directories Company Pty Ltd (08 February 2010)	[2010] FCA 44 GORDON J	subsistence
Larrikin Music Publishing Pty Ltd v EMI Songs Australia Pty Limited (04 February 2010)	[2010] FCA 29 JACOBSON J	infringement; substantial part
Roadshow Films Pty Ltd v iiNet Limited (No. 3) (04 February 2010)	[2010] FCA 24 COWDROY J	infringement; authorisation

Blackmagic Design Pty Ltd v Overliese (22 January 2010)	[2010] FCA 13 JESSUP J	infringement; implied licence
Aristocrat Technologies Australia Pty Ltd v Global Gaming Supplies Pty Ltd (15 December 2009)	[2009] FCA 1495 JACOBSON J	infringement; authorisation; remedies
Deckers Outdoor Corporation Inc v Farley (No 5) (13 November 2009)	[2009] FCA 1298 TRACEY J	subsistence; infringement; authorisation
Australian Medic-Care Company Ltd v Hamilton Pharmaceutical Pty Limited (ACN 008 204 635) (30 October 2009)	[2009] FCA 1220 FINN J	subsistence; infringement; importation
TVBO Production Limited v Australia Sky Net Pty Limited (07 October 2009)	[2009] FCA 1132 FOSTER J	infringement; communication; broadcast
Intelmail Explorenet Pty Limited v Vardanian (No 2) (11 September 2009)	[2009] FCA 1018 MOORE J	ownership; implied terms
Larrikin Music Publishing Pty Ltd v EMI Songs Australia Pty Limited (30 July 2009)	[2009] FCA 799 JACOBSON J	infringement; substantial part
Rutter v Brookland Valley Estate Pty Limited (30 June 2009)	[2009] FCA 702 BUCHANAN J	remedies
Elwood Clothing Pty Ltd (ACN 079 393 696) v Cotton On Clothing Pty Ltd (ACN 052 130 462) (12 June 2009)	[2009] FCA 633 GORDON J	remedies; costs
State of Victoria v Pacific Technologies (Australia) Pty Ltd (ACN 065 199 439) (No 2) (10 June 2009)	[2009] FCA 737 EMMETT J	subsistence
Interville Technology Pty Ltd v Commonwealth Office of the Director of Public Prosecutions (08 May 2009)	[2009] FCA 481 JACOBSON J	appeal from Local Court; penalties for offences
Lynx Engineering Consultants Pty Ltd v The ANI Corporation Limited trading as ANI Bradken Rail Transportation Group (No 2) (17 April 2009)	[2009] FCA 363 MCKERRACHER J	practice and procedure
Roadshow Films Pty Ltd v iiNet Limited (15 April 2009)	[2009] FCA 332 COWDROY J	practice and procedure
Pakula Tackle Australia Pty Ltd v Zacatak Lures Australia Pty Limited (11 February 2009)	[2009] FCA 71 LOGAN J	practice and procedure
Flashback Holdings Pty Limited v Showtime DVD Holdings Pty Ltd (No. 2) (10 December 2008)	[2008] FCA 2008 PERRAM J	amendment of claim
Krueger Transport Equipment Pty Ltd v Glen Cameron Storage & Distribution Pty Ltd (No 2) (09 October 2008)	[2008] FCA 1493 GORDON J	remedies
Caroma Industries Ltd v Technicon Industries Pty Ltd (02 October 2008)	[2008] FCA 1465 COWDROY J	infringement; remedies
Boyapati v Rockefeller Management Corporation (No 2) (09 September 2008)	[2008] FCA 1375 KENNY J	infringement; remedies
Racing & Wagering Western Australia v Software AG (Australia) Pty Ltd (ACN 090 139 503) (29 August 2008)	[2008] FCA 1332 MCKERRACHER J	exception: s 47C, s 47F
Boyapati v Rockefeller Management Corporation (02 July 2008)	[2008] FCA 995 KENNY J	subsistence; infringement; remedies
Nine Network Australia Pty Ltd v IceTV Pty Ltd (27 June 2008)	[2008] FCA 925 BENNETT J	subsistence; infringement
Centrestage Management Pty Ltd v Riedle (20 June 2008)	[2008] FCA 938 SUNDBERG J	implied licence
Inform Design and Construction Pty Ltd v Boutique Homes Melbourne Pty Ltd (18 June 2008)	[2008] FCA 912 WEINBERG J	infringement; copying; substantial part
Plunkett v Commonwealth Director of Public Prosecutions (13 June 2008)	[2008] FCA 908 TAMBERLIN J	appeal from sentence
Krueger Transport Equipment Pty Ltd v Glen Cameron Storage (30 May 2008)	[2008] FCA 803 GORDON J	infringement; causal connection; ideas/expression
Futuretronics.com.au Pty Limited v Graphix Labels Pty Ltd (No 2) (27 May 2008)	[2008] FCA 746 BESANKO J	infringement; remedies
Wills v Morris (14 May 2008)	[2008] FCA 784 GILMOUR J	ownership
Garrett v Emap Australia Pty Ltd t/as Zoo Weekly (02 April 2008)	[2008] FCA 431 BUCHANAN J	ownership; standing
Barrett Property Group Pty Ltd v Carlisle Homes Pty Ltd (20	[2008] FCA 375	subsistence; infringement;

March 2008)	HEEREY J	copying; substantial part
The Polo/Lauren Company L.P. v Ziliani Holdings Pty Ltd (05 February 2008)	[2008] FCA 49 RARES J	exceptions: ss44C; 77(2)
Dais Studio Pty Ltd v Bullet Creative Pty Ltd (20 December 2007)	[2007] FCA 2054 JESSUP J	subsistence; infringement; copying; substantial part
Gaunt v Hille (18 December 2007)	[2007] FCA 2017 SIOPIS J	appeal from local court of WA; liability; remedies
Woodtree Pty Ltd v Zheng (07 December 2007)	[2007] FCA 1922 HEEREY J	subsistence
Futuretronics.com.au Pty Limited v Graphix Labels Pty Ltd (29 October 2007)	[2007] FCA 1621 BESANKO J	infringement
Barrett Property Group Pty Ltd v Metricon Homes Pty Ltd (28 September 2007)	[2007] FCA 1509 GILMOUR J	infringement; copying; substantial part
Vu v New South Wales Police Service (20 August 2007)	[2007] FCA 1508 RARES J	offence; penalty
Nine Network Australia Pty Ltd v IceTV Pty Ltd (09 August 2007)	[2007] FCA 1172 BENNETT J	subsistence infringement; substantial part
Vu v New South Wales Police Service (03 August 2007)	[2007] FCA 1192 RARES J	offence; appeal
Racing & Wagering Western Australia v Software AG (Australia) Pty Ltd (05 June 2007)	[2007] FCA 1345 GILMOUR J	pleadings
Universal City Studios LLLP v Hoey t/as DVD Kingdom (31 May 2007)	[2007] FCA 806 BUCHANAN J	offences; penalty
Norm Engineering v Digga Australia (No. 2) (25 May 2007)	[2007] FCA 860 GREENWOOD J	remedies
Norm Engineering v Digga Australia (18 May 2007)	[2007] FCA 761 GREENWOOD J	subsistence; infringement; copying
TS & B Retail Systems Pty Ltd v 3Fold Resources Pty Ltd (No 4) (04 May 2007)	[2007] FCA 635 FINKELSTEIN J	costs
Foxtel Management Pty Limited v The Mod Shop Pty Limited (28 March 2007)	[2007] FCA 463 SIOPIS J	infringement; remedies
TS & B Retail Systems Pty Ltd v 3Fold Resources Pty Ltd (No 3) (20 February 2007)	[2007] FCA 151 FINKELSTEIN J	ownership; infringement; implied licence; remedies
Microsoft Corporation v RP Distribution Pty Ltd (22 December 2006)	[2006] FCA 1842 TAMBERLIN J	default judgment
Australasian Performing Right Association Limited v Monster Communications Pty Limited (21 December 2006)	[2006] FCA 1806 RARES J	infringement; remedies
Peter Balasoglov Bell v The State of Queensland (15 December 2006)	[2006] FCA 1788 KIEFEL J	offences; appeal from Magistrates Court
Midamarine Pty Ltd v DMC International Pty Ltd (03 November 2006)	[2006] FCA 1458 SPENDER J	practice and procedure

APPENDIX 3: ONLINE LICENSING

In 2011, Copyright Agency and key news organisations launched an online licensing portal, known as RightsPortal. The facility addresses both the licensees' need for an automated licensing solution, and our members' need for an efficient system for case-by-case copyright clearances.

The portal currently enables:

- 'transactional' (case-by-case) licences for news content;
- applications for new annual 'blanket' licences, specifically targeted to small and medium enterprises; and
- renewal of existing annual blanket licences.

The online facility is supported by licensing staff, who manage queries about licences and licensing solutions not yet offered through the portal.

In 2011–12, the portal generated \$251,000 in licensing fees for participating rightsholders (a fourfold increase from the previous year).

A major development was an agreement with Fairfax Media, whereby its websites include a 'reprints and permissions' button that links readers to the RightsPortal to purchase a licence to use content.

Future plans include extending the licensed content to material from books and artistic works.

APPENDIX 4: GOOGLE ART PROJECT

An example of licensing of artistic works for an online project is Viscopy's licensing of the images for the Google Art Project (www.googleartproject.com). The project enables online viewing of high-resolution images of items in collections in galleries and museums from around the world.

A number of Australian galleries are participating in the project, including the National Gallery of Australia and the Art Gallery of NSW.

Images of items in their collections are covered by a Viscopy licence to the galleries that enables them to authorise legitimate use of the images with a return for the artists.

Those uses include:

- filming as part of galleries' collection spaces and displaying via Google Museum View
- including in video footage shown on YouTube with curator commentary or to promote Google Art Project
- promoting the Google Art Project
- the "Create An Artwork Collection" and "Share Your Artwork Collection" functions

The licences are subject to conditions that include:

- reference to the artist's name, title of the work, year of work
- copyright notice
- measures to prevent the unauthorised downloading of the works

APPENDIX 5: HOW TEACHERS USE CONTENT

We commissioned research to understand better how teachers search for and select learning materials. The research included consultations with 44 teachers and six principals/administrators in a combination of small focus groups and one-on-one interviews in Sydney and Melbourne. The research was exploratory and qualitative in nature, not quantitative (measurement focused).

The following sets out the main findings from the research.

WHY TEACHERS SEARCH FOR MATERIAL

Teachers are time-poor and are under intense pressure given changes to the curriculum, technology adoption and continual assessment. The current dominant teaching philosophy is focused on construction of lesson plans that are tailor-made to teach the curriculum most effectively, based on the needs of the individual students in a teacher's specific class. Within given time and cost constraints, this underlying philosophy drives the search and selection of lesson material, including core texts. While there is some frustration in the length of time spent on materials search, it is also in some ways a badge of honour: 'I care so much about tailoring material for my class that I will spend this much time and effort doing it!' Many teachers of course are pursuing a vocation – they search high and low for the best material simply so that they can provide the most rich, varied and appropriate lessons for their students that they can.

RELIANCE ON MAIN TEXT VERSUS SUPPLEMENTARY MATERIAL

While in general reliance on a core text is lower than 10 or more years ago, there is still widespread agreement that to effectively teach a subject, a core text or commercial publishing product is still a must. The level of reliance on a core text is highest among secondary teachers (especially those teaching Years 11 and 12 and those taking maths and science) and teachers who exhibit a lower level of proactivity in conducting out-of-school hours lesson preparation. Some teachers believe they could effectively teach to the curriculum without a core text (though not in senior secondary), although this would require an additional effort in sourcing supplementary material that would be prohibitively time-consuming, given current search and selection practices. At the other end of the spectrum, teachers taking senior secondary classes in science and, especially, maths believe it is possible – though perhaps not desirable – to teach solely from the text and its collateral material. Reliance on text-based teaching during lessons varies widely by year, subject, school and teacher preference. In Years 7 and 8 text-based material is often used for a minority of lesson time. In years 11 and 12, especially for science or maths, it may be relied on 50-90% of the time. In primary school, reliance on text-based material is generally lower, hence the relatively greater time spent by primary teachers searching for supplementary material.

THE SEARCH AND SELECTION PROCESS

The core text is always provided by a commercial publisher and is key to providing the framework for lesson delivery. There are many competing content options which are

perceived to be of good quality and fit for purpose. Text selection is usually a collegiate decision made by teachers from the school who collectively teach the Year or Subject in question. Consensus decision-making is the norm, with divergent views (which are relatively rare) usually arbitrated by a Subject or Year Head.

The text alone is seen as inadequate to deliver what teachers regard as a lesson plan of acceptable quality. To provide an engaging lesson and one that is well suited to the needs of their specific class, teachers need to supplement the core text. In doing so they seek material from publishers, other teachers, on-site (storeroom or library) resources and from a plethora of Australian and overseas external websites. The decision of what supplementary material to use is typically made by each individual teacher – although this is informed by discussion with others.

Teachers report huge growth in the amount of supplementary teaching material available online in the last few years. Classroom use of such material has been further fuelled by the widespread availability of student laptops funded by the Government's Education Revolution. This presents opportunities for teachers to source from a wide and rich array of interactive online resources.

ROLE OF STATUTORY LICENCE

The statutory licence enables teachers to get the material that best meets their needs and their students' needs, from any source (digital or print). It allows them to provide or communicate material to their students in whatever way they think is most effective, including printouts, photocopies, by email, on a memory stick, display on an electronic whiteboard, or access to a learning management system.