

screenrights

Australian Law Reform Commission Inquiry into
Copyright and the Digital Economy
Discussion Paper

Screenrights submission

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Introduction

1. Screenrights is strongly opposed to the ALRC proposals to replace a system of specific free use exceptions and statutory licences with a broad fair use regime and voluntary licensing.
2. We are providing our response to the Discussion Paper in two parts. First, we respond in general terms to:
 - the proposal to introduce a broad fair use exception
 - the proposal to abolish the educational and government statutory licences (in Part VA and VII div 2 of the Copyright Act (“the Act”) respectively
 - the proposals concerning retransmission of free to air broadcasts
 - the proposals concerning the extension of exceptions relating to broadcasts to include television and radio transmissions using the internet.
3. In concentrating on these areas, we will also be addressing other related issues in the Discussion Paper, such as contracting out, and the repeal of current exceptions relied upon by Screenrights’ members in producing films and other audiovisual material.
4. These are the main areas that fall within our range of operations and expertise, and impact upon our members (rightsholders in film, television and radio) and the people who license the use of their work.
5. Following this general response, we are providing specific comments in relation to the proposals and questions in the Discussion Paper. This is in Annexure A.

Summary of views

6. The ALRC has made a leap of faith into copyright uncertainty by proposing a broad fair use regime that will undermine licensing solutions for access. The ALRC's proposals go far beyond reviews in other countries and would create a regime of copyright exceptions that are uncertain in their application and broader in scope than in any comparable jurisdiction.
7. Copyright is a fundamental property right and is the currency of the digital economy. The ALRC's proposal ignores the commercial realities of creative industries and will have a detrimental impact on the creators of material used in a digital economy.
8. In addition to introducing a broad and uncertain fair use provision, the ALRC proposes abolishing the current system of statutory licences. This is a system that provides comprehensive and flexible access to broadcast material while ensuring that rightsholders are fairly remunerated for the use of their work. In the case of the broadcast licence, it is also a system that has encouraged innovative solutions for using and managing content, with digital learning management systems able to operate without impediment under Part VA.
9. Voluntary licensing is impractical for the use of broadcast material. It will result in a few large scale (usually overseas) content producers making audiovisual material available for education, with smaller independent Australian production houses less able to clear underlying rights for this use. It is also difficult to see how digital learning management systems and their vast repositories of archived broadcast material could continue to be used under the ALRC's proposals.
10. A patchwork solution of voluntary licences and "use it or lose it" provisions to counter difficulties in obtaining comprehensive access is simply a less efficient means of trying to achieve results that are already achieved under current legislation.
11. Briefly, our views can be summarised as follows:

Fair use

- Fair use is uncertain in its application and will only be defined through litigation.
- It will operate to the detriment of creators, exacerbating power imbalances between institutions and individual rightsholders, who will be reluctant to litigate against larger institutional users of their material.
- The proposed repeal of existing exceptions (including fair dealings and other exceptions) will abolish a carefully balanced and well-understood system of exceptions, which are essential to the production of our members' works.

Statutory licensing

- The proposed abolition of the statutory licence for educational copying is ill-conceived, and the reasons given for abolishing the licence do not apply to the Part VA broadcast licence which Screenrights administers.

- The proposal ignores the very considerable advantages of statutory licences over voluntary licences, particularly in regard to the use of broadcast material, and the very serious negative consequences for existing archives, online repositories, and innovative digital services which have developed under the licence, and which rely upon the licence for their ongoing existence.
- Similarly, the proposed abolition of the statutory licence for government use of broadcast material is ill-conceived, and was not called for.

Voluntary licensing

- Neither licence can be readily replaced by voluntary licences, which are impractical in the context of broadcast use.
- The combination of fair use and patchy voluntary licences will have a significant detrimental effect on rights owners and the people who want to use their work. Rightsholders will find that their work is frequently used without payment. They will generally be unaware of this use and if they are aware, may be unable to contest the bounds of fair use in the courts (a process that is lengthy and costly). Educators will find they are no longer able to enjoy a comprehensive and legal right to use the wealth of material on television.
- A voluntary licensing system will advantage overseas works with rights cleared for global markets, and will result in reduced access to Australian produced programming, particularly independent documentary productions, which will not have the necessary rights cleared.
- Introducing a New Zealand style “license it or lose it” solution, or extended collective licensing, to counter the difficulties with voluntary licensing would result in a system that not only enables fair use but also enables free use of members’ works unless collective licensing is established. Such a proposal throws out the current balance in our system, giving users much broader free use access than even the US system.
- In any event, should copyright owners establish collective licensing under either of these proposals, the resulting system would at best only be a less efficient version of the current system under the Act.

Retransmission

- The first option on retransmission, to abolish the existing exceptions in the Broadcasting Services Act and Copyright Act, was not sought by any party in submissions to the inquiry.
- The second option on retransmission notes that a statutory licence is necessary to allow retransmission of broadcasts. This position (with which Screenrights agrees and which properly appears axiomatic in the Discussion Paper) runs completely contrary to the logic of the earlier proposals to abolish the statutory licences for educational and government uses of broadcasts.

Definition of broadcast

- The definition of broadcast in the Copyright Act should not be tied to the Broadcasting Services Act, as it leaves copyright policy subject to communications policy.
- The definition of broadcasting service should be imported into the Copyright Act in essentially its current form (including the effect of the Ministerial declaration) so as to minimize disruption of existing rights and exceptions.

- Specific exceptions may continue to require specific application of the broadcast definition. The deemed application of the definition of broadcast in Part VA should be extended to include linear television and radio services transmitted over the internet, per Proposal 16-1.

Fair use

12. Introducing a broad fair use exception to replace most of the existing exceptions may be a flexible solution on paper but it is not a fix-all panacea, and would, in Australia, create more problems than it solves.
13. While Screenrights recognises there are inconsistencies in the drafting of certain exceptions, the Act does strike a fair balance between rewarding creativity and enabling certain uses for socially beneficial purposes.
14. Instead of fixing specific problems, the Discussion Paper proposes a radical reworking of our copyright laws, swinging the balance far in favour of copyright users at the expense of creators. It fails to acknowledge the value of the forty-five years of investment by copyright owners and copyright users in the interpretation and operation of the current regime. The proposal effectively junks that investment and replaces it with fair use in the hope that imported US jurisprudence may alleviate the uncertainty necessarily created. It does not fully consider the ramifications of this uncertainty on creators, nor does it fully explore why the Hargreave's review did not recommend fair use in the UK. In addition, little consideration is given to the important role licensing can – and does play – in providing access.
15. The ALRC proposal is a leap of faith in copyright owners being able to negotiate rights in an uncertain environment and copyright users having the incentive or willingness to engage with these creators and users. In our view this leap of faith into uncertainty is not justified and will only result in copyright owners' rights being undermined.
16. The ALRC proposal is:

Broader in scope than in any other jurisdiction

17. The ALRC proposed exception is broader than other similar exceptions in any jurisdiction, including the United States. This is because the proposal must be read in conjunction with proposed prohibition on copyright owners contracting out of various fair uses (in the States, contract is paramount) and the long list of illustrative purposes which are far in excess of the US statute – taking the reach of fair use beyond known bounds.
18. In addition, the ALRC presumes that voluntary licensing will take the place of the current statutory licences. However, at least in regard to institutional use of broadcasts, the Discussion Paper proposes separate mechanisms that require the establishment of a licence in order for rightsholders to ensure that their work cannot be used for free. This is an implicit acknowledgement of the limitations of the US fair use/voluntary licensing model, but the proposed solution is to enact a further regime of exceptions. The outcome is, in effect, a US fair use regime plus a UK “use it or lose it” provision. Again, this goes far beyond any regime of exceptions in any comparable jurisdiction.

Uncertain and out of touch with commercial realities

19. The ALRC proposal is a radical restructure of our copyright laws in a time of rapid change. It ignores the commercial desirability of certainty at the expense of flexibility for users. Although some consideration is given to the commercial impact of the ALRC

proposals upon technology companies such as Google that may wish to exploit the proposed exceptions, little if any consideration is given to the negative impact upon creators trying to license rights in an uncertain fair use regime.

20. Our members will feel the impact of this uncertainty from both sides. They will face difficulties determining which rights they need to clear, and which works can be used under fair use. As they are responsible for licensing the film and underlying works to third parties, this process is essential to exploiting the finished product and receiving returns. Producers have a strong working knowledge of the current exceptions and when they do and don't need to clear rights in underlying works. A fair use regime will create a considerable lack of certainty in the process of rights acquisition. Members will also face uncertainty in licensing their rights in important markets such as the education market. They will no longer have the certainty of the fair dealing and statutory licence arrangements to rely on.
21. Some representatives of copyright owners, notably the Schools Copyright Advisory Group, dismiss the increased uncertainty from fair use as not a significant concern for them. However, the risk of uncertainty affects both sides of the copyright equation, and just because one group of stakeholders are unconcerned (not surprisingly given the full resources of government available to fund litigation on behalf of this group) this does not disqualify the concerns of the other stakeholders, ie copyright creators and owners.
22. In practical terms, this uncertainty is likely to lead to pragmatic decision making of two types:
 - A reluctance to use material under a fair use regime where the user wields less or similar economic power to the rightsholder; or
 - Permission to use material not being obtained where the user wields more power than the rightsholder.
23. As we have stated above, Screenrights is concerned about both scenarios. Our members depend day to day upon clear understandings and jurisprudence in their use of existing copyright exceptions for the purpose of including third party materials in their productions. In relation to the second scenario, Screenrights deals with institutional use of our members' works and we are particularly concerned about widespread educational use of audiovisual material without permission.
24. The likelihood of educational institutions infringing our members' copyright in these circumstances can be predicted with certainty: the education sector paid Screenrights very substantial indemnity funds upon the introduction of Part VA to cover infringements made prior to the introduction of the statutory licence.
25. The power imbalance between an individual copyright owner and an educational institution is not acknowledged anywhere in the report.

A deferral of judicial law making to the courts

26. The ALRC proposal defers the complex questions of whether new uses fall within fair use to the process of litigation, moving the decision-making realm into the sphere of the courts. Aside from this being a costly outcome for all those involved, the effect is to defer analysis of the complexity of policy making to litigation. Judicial law making in this manner is less predictable and democratic than the Parliamentary process

currently employed. Furthermore, in judgments the Courts have expressed their concerns about decisions on new technologies being left to the judiciary rather than being expressly dealt with by Parliament¹.

Reliant on US jurisprudence to resolve uncertainty

27. The Discussion Paper assumes that any uncertainty can be mitigated by relying on a long history of US jurisprudence defining the bounds of fair use.
28. To the contrary the United States experience indicates the lack of predictability in a fair use system.
29. Screenrights previously submitted research from the Kernochan Centre² on the operation of fair use in the United State with a particular focus on fair use in education.
30. This research examined a number of cases that attempted to define the parameters of fair use and concluded that fair use is difficult to assess. As the authors of the report stated: “It can often take a long time to get final fair use determinations, with lower courts being reversed with regularity.”³
31. The authors of this report are submitting a response to the Discussion Paper, stressing again the uncertainty inherent in US fair use, and citing numerous decisions stating that the doctrine is highly fact specific and context driven.
32. Aside from the fact that US jurisprudence reflects how difficult it is to draw the limits of fair use, the laws, culture, commercial practices and economies of both countries are not replicas of each other, and we cannot assume that our case law would (or should) follow US case law.
33. As Ginsburg and Besek state in their first paper previously submitted to the ALRC⁴: “Even assuming Australia were to adopt a fair use doctrine like that of the US, it is likely that the laws would diverge – first, because many US decisions have been close and could easily have gone the other way (indeed, in the US the law can sometimes diverge from circuit to circuit) and second, because the economic, legal and social aspects of the two countries can differ.”
34. The report also refers to US law being a “moving target” currently under review.

Reliant on industry guidelines to resolve uncertainty

35. The Discussion Paper also refers to industry guidelines being used to alleviate uncertainties. Again, Screenrights disputes this assumption.

¹ See for example: *National Rugby League Investments Pty Limited v Singtel Optus Pty Ltd* [2012] FCAFC 59 (27 April 2012) at par 99: “In the present matter such are the conflicting interests and values, such are the possible consequential considerations of which account might need to be taken that, if a choice is to be made to extend or otherwise modify an exception such as s 111, this requires a legislative choice to be made, not a judicial one.” Also *Roadshow Films Pty Ltd v iiNet Ltd* [2012] HCA 16 Justices Gummow and Hayne at par 120: “The history of the Act since 1968 shows that the Parliament is more responsive to pressures for change to accommodate new circumstances than in the past. Those pressures are best resolved by legislative processes rather than by any extreme exercise in statutory interpretation by judicial decisions.”

² The Kernochan Centre for Law, Media and the Arts, Columbia University School of Law, “Copyright Exceptions in the United States for Educational Uses of Copyright Works”, submitted to the ALRC by Screenrights.

³ *Ibid* at page 24

⁴ *Ibid* at page 4

36. Industry guidelines have no legal status, nor is not easy to get all the relevant parties to the negotiating table. For example, in the United States, the Motion Picture Association of America took no position on the off-air guidelines and the Association of Media Producers voted not to endorse the guidelines. In addition, guidelines can be difficult to update as required, which defeats the principal advantage of fair use: its supposed flexibility.
37. In Australia, negotiating industry guidelines has also been problematic. Seven years after amendments to the Copyright Act encouraging carriage service providers to cooperate with copyright owners in deterring copyright infringement on their networks, the internet industry is yet to develop an industry code of practice.

Unfair and a costly burden on rightsholders

38. It's all very well for the ALRC to state that the bounds of fair use can be tested in the courts but the reality is that the cost (both in dollars and in time) of litigation makes this an unrealistic option for many of Screenrights' members, and for other creators.
39. This concern was raised by SPAA (the Screen Producers' Association of Australia) in their submission to the ALRC Issues Paper.
40. It is a very real issue that would have a significant impact on our members, particularly when their work is used by a larger institution, such as a university or a government Department of Education. Aside from the fact that it may be extremely difficult to know when a work is used, a copyright owner would need deep pockets to take on a university or other relevant peak education body – and as the cases in the US have shown, a considerable amount of patience and time until the issue is resolved. In Screenrights' experience, litigation in the Copyright Tribunal costs between \$500,000 to \$2 million per case. This is in a jurisdiction intended to be less adversarial, less formal and less expensive than the mainstream courts, which would be the venue for actions relating to fair use. Again, it's notable that the education sector is less concerned about this uncertainty – and not surprising given that the power balance is in their favour.

An injection of new costs into the system

41. Under the current system of fair dealing and statutory licences, there are clear and well understood boundaries between each of these types of use. Teachers know which uses fall within the licence and which uses fall with the fair dealing provisions. This also benefits copyright owners who know that the system is operating effectively, ensuring they receive payment for uses of their work that fall outside the fair dealing provisions.
42. Aside from the potential costs of litigation, the proposed introduction of fair use in conjunction with the proposed abolition of the statutory licences would mean these clear boundaries no longer exist.
43. Users would face the cost (in time and money) of seeking advice as to whether a use should be the subject of a voluntary licence or falls within the fair use provision. If the use does require a voluntary licence, there would be additional costs in obtaining such a licence. It cannot be assumed that this cost would be less than the cost of a statutory licence.

44. As we mentioned above, rightsholders in film and television would also face new costs in determining which rights they need to obtain from underlying rightsholders and the value of these rights.

In potential contravention of our international obligations

45. In its submission to the ALRC's Issues Paper, Screenrights stated its concerns about the introduction of a fair use provision contravening our international obligations under the three-step test in the Berne Convention. We stand by these concerns and believe that the extent of the fair use regime advocated by the ALRC is even more likely to contravene Berne.
46. Advocates of fair use frequently dismiss any concerns about contravening our international obligations by arguing that the US has fair use and the US has not been prosecuted under WIPO. This defence, which is accepted in the Discussion Paper, ignores the vast position of strength which the US enjoys in international fora. Of even greater concern, the model proposed by the ALRC greatly exceeds the US approach. Even if it's accepted that a US fair use system would scrape through the three-step test, it is much more difficult to accept that the radical approach recommended in the Discussion Paper would do so.

Lacking in evidence that it will benefit digital economy

47. There is no concrete evidence that a broad fair use exception would create a more vibrant digital economy, and no evidence to this effect is presented in the ALRC paper. Screenrights notes the work of Dr George Barker and his analysis of the Hargreaves Review in the UK in 2011 which rejected a US style fair use exception, noting specifically on fair use that the economic benefits of fair use: 'may sometimes have been overstated.'⁵
48. There are many factors at play in the health of a digital economy, including government and private investment, and certainty in the licensing environment. In our view, the uncertainty and new costs associated with fair use may prove to be an impediment to the growth of the digital economy for many vital players in the market.
49. The fair use proposal undermines our members' ability to adapt and license new platforms. If the right they are seeking to license is uncertain and markets are diminished, there is little or no incentive to make their content available which would be contrary to the goal of facilitating the digital economy.

Fair use: conclusion

50. Screenrights strongly opposes the ALRC proposals concerning fair use. The proposed amendments are broader in scope than any other regime, will be uncertain in their application, introduce new costs into the system, and potentially contravene our international obligations. In addition, there is a lack of evidence that such a proposal would benefit the digital economy – particularly those creators that produce the content upon which this economy is reliant.

⁵ I Hargreaves, *Digital Opportunity: A Review of Intellectual Property and Growth* (2011), [5.16].

Abolition of the statutory licences

51. Screenrights strongly opposes the abolition of the statutory licences for broadcast copying and communication.

The current system: simple, flexible, innovative and certainly not broken

52. Australia is a world leader in enabling educational use of broadcast material. Our Part VA licence operates efficiently in the digital age to the benefit of both rightsholders and the educators who use their work.
53. The licence gives comprehensive, simple and flexible access to any program broadcast on television and radio, and because it has been drafted in technology-neutral terms, it has adapted to the digital classroom. In our previous submission, we gave examples of the many new services that are available to educators without having to negotiate individual licences.
54. In particular, we referred the ALRC to the innovative online resource centres that have been enabled by the statutory licence. These content management systems using Part VA are in two thirds of all Australian secondary schools, giving educators access to vast archives of copied programs. This access simply wouldn't be possible under the ALRC's proposed amendments. Notably, such services are not available to American copyright users under their fair use plus voluntary licences regime. We also referred in a table to the wide range of uses that are allowed under Australian copyright law compared to laws in other jurisdictions.
55. In addition, we noted that the education sector's call for the abolition of the Part VA licence was completely unheralded. Screenrights and the education sector have, until this enquiry, always worked together effectively to ensure that the licence meets the evolving needs of the sector, including at times presenting joint submissions for agreed amendments to the system.
56. In the 23 years of administering the educational licence, Screenrights has never received a single piece of correspondence from CAG or Universities Australia (or their predecessors) indicating that the licence was "broken". Even during our infrequent periods of litigation in the Copyright Tribunal, the education sector has always accepted that the licences work well. It is extraordinary, and plainly opportunistic, that this claim is being made now.
57. We also do not see any difficulties with the operation of the statutory licence for broadcast copying under s183, other than the minor problems outlined in our earlier submission concerning the fact that we cannot be appointed the collecting society for any use other than copying. We were therefore surprised that the ALRC also proposed the abolition of these licences, particularly in light of the fact that no submissions raised any problems with broadcast copying under s183.

Addressing the arguments for abolition of statutory licences

58. In this submission we would like to address each of the arguments put forward by the ALRC for this radical change to a system that is working well. We submit that these arguments are fundamentally flawed in relation to the broadcast licences, and there is no sound basis for these proposed amendments.

Derogation from rightsholders' rights

59. The ALRC states that the statutory licences are a derogation from rightsholders' rights.
60. This argument ignores the rationale behind this derogation – it was necessary to correct a market failure. In the case of broadcast copying, comprehensive voluntary licensing is virtually impossible (we discuss this further below) – in fact, these difficulties led to the introduction of the statutory licences in the first place. The other impetus for the introduction of the licence was the fact that in the absence of a licence, educational copying was an infringement, and was occurring routinely as evidenced by the indemnity payments Screenrights received when it first entered agreements with the education sector.
61. It is important to note the vast majority of rightsholders represented by Screenrights are in favour of the compulsory derogation of their rights to enable statutory licensing. They recognise that the practical difficulties with voluntary licensing of broadcast content run the risk of content either not being used or being used without permission. Rightsholders are aware that one reason for the introduction of the statutory licences was to correct the infringing copying by educational institutions that was occurring.
62. In addition, statutory licences do not preclude the concurrent operation of commercial arrangements. To the contrary, Part VA expressly provides that nothing in the part shall prevent a rightsholder from granting a (voluntary) licence.⁶ In practice, this occurs commonly alongside the statutory licence. A multitude of voluntary licences are available for educational institutions. For example, educational institutions can also obtain audiovisual content outside the statutory licence through services such as Kanopy, Alexander Street Press, and Clickview Libraries – and many do this.
63. The voluntary licences are unable to cover copying broadcasts, but they provide complementary licences for additional uses or other content.
64. Another related, and key point that seems to be lost in the Discussion Paper is that licensees are not compelled to take out a statutory licence. Participation in Part VA is solely at the election of the administering body of the educational institution. The Discussion Paper refers to the fact that a number of TAFEs are not participating in Part VA, but misses the point that this is not a criticism of the licence but rather reflects the flexibility of the system. This occurred during Screenrights' recent negotiations with TAFEs. The majority of TAFEs decided to take out a licence while the remainder didn't. This wasn't due to the sector not appreciating the benefits of the licence but due to very real budgetary constraints. The key point is that if an institution (or its administering body) does not wish to obtain the statutory licence, then they are not compelled to do so. They can obtain (albeit more limited) content through voluntary licences alone. Screenrights submits that this is a strength, not a weakness, of the Australian system.

⁶ Section 135Z

Schools and universities seek repeal

65. The education sector has stated that the statutory licences are “broken beyond repair”. As we mentioned above, this statement is strongly refuted by Screenrights. We would also like to reiterate that the licence was not enacted for the benefit of licensees only but also for the benefit of rightsholders who, in the absence of the scheme, found their work was either not used in education or used without permission.
66. The ALRC summaries the education sectors’ arguments for abolishing the licence at paragraph 6.52 of its report. We reject each of these arguments below:

“The licence is not suited to the digital environment”

67. The sector states the statutory licences are “inherently unsuited to the digital environment”. As Screenrights said in its submission, this is not the case with the Part VA licence. This licence is broadly technology neutral and allows for copying of broadcast material in any format, the storing of this material online, the use of resource centres that stream programs directly to teachers and studios, online sharing of programs and many other uses discussed in our previous submission. Clickview, a company that provides digital audiovisual services (including a resource centre) to licensed educational institutions was, in fact, named Australia’s Most Innovative Company in Business Review Weekly’s 2012 business awards and awarded Microsoft’s Education Partner of the Year. It is simply wrong to say this licence is not suited to the digital environment. In the absence of the licence it will not be feasible for educators to clear rights enabling them to use the digital technologies they currently employ to teach with television and radio.

“Data management under the licence is complex”

68. The schools state that statutory licences were created in a data vacuum and refer to inefficiencies in data management becoming more pronounced with the increased use of new technologies. Data management under the Screenrights licence is exceptionally simple. Institutions are only surveyed on their use for a short period of time. Universities conduct a very easy online survey where they simply record details of the program and whether it was copied, put online or emailed. Schools take part in a similar survey to universities, only it is paper-based. Each sector pays on a per-head basis. The system is efficient for both licensees and for Screenrights’ distribution purposes. The sample system means that universities are surveyed every three to four years and schools are surveyed on average once every 100 years. Moreover, Screenrights has moved in recent years to obtaining records of usage from intermediary bodies and this is increasingly replacing the need for surveys. Finally, many educational institutions have zero reporting requirements including the TAFE sector, ELICOS institutions and private VET providers.

“The licence is based on ‘one-copy-one-view-one-payment’”

69. The schools state that the licences are based on a “one-copy-one-view-one-payment” although they acknowledge that “in recent years” commercial deals have been struck on a per student basis.⁷ This claim is completely untrue in regard to Part VA. In fact, Screenrights and the schools have agreed fixed per student amounts every year since the statutory licence was created in 1990. There has never been a one-copy-one-view-one-payment agreement with CAG Schools or its predecessor. As in the other

⁷ CAG Schools page 49

criticisms made by the education sector of statutory licensing, an attack on statutory licences is made generally without any acknowledgement that the specifics of the attack are not relevant to all statutory licences.

“The licence disadvantages Australian schools compared to their international counterparts”

70. The schools state that statutory licences put schools at a comparative disadvantage internationally. This is not the case. Australian schools enjoy far greater access to broadcast material than their counterparts overseas. The price they pay allows them to copy whatever they like, whenever they like, wherever they like – without the cost of obtaining advice as to whether the use should be licensed, or the cost of obtaining voluntary licences. They can keep copies for as long as they like.
71. The research supplied by the Kernochan Centre in response to the Issues Paper demonstrated that the free exceptions in the US were exceptionally limited. Critically, little or no data was available on the cost of obtaining content through commercial licences in the market in which fair use applies. That is because in the United States, absent a statutory licensing regime, there is no publicly available data on payments by educational institutions for copyright material. On this basis, it does not seem possible to conclude that Australian educational institutions are paying more than their counterparts under the US fair use model for which the education sector are advocating.
72. It is a feature and advantage of the Australian system that the payments and operation of the statutory licences are transparent, and indeed the accounts of the collecting societies are submitted to Parliament. The fair use system suffers no such scrutiny.

“The licence is economically inefficient”

73. The schools sector stated that statutory licences are economically inefficient. Again, this is incorrect. In the United States there is no comprehensive broadcast copying licence available to educational institutions, because it is impossible to offer such a licence in an economically efficient way. To assume that voluntary licences would be more flexible and less expensive is simply wrong.
74. The notion that voluntary licensing would be more competitive ignores the hidden costs of having to negotiate with a number of rightsholder groups should new groups emerge to offer services in this area.
75. The key point is that if the education sector genuinely prefers a voluntary licensing system to the statutory licence in Part VA, then they are expressly entitled to go and seek that voluntary licence under current Australian copyright law. In practice, many Australian educational institutions do obtain voluntary licences for audiovisual material. Generally this is done to top up the material they obtain under their Screenrights statutory licence. The two are not mutually exclusive but happily co-exist. A minority of educational institutions prefer not to have a Screenrights statutory licence at all (per the TAFEs above), and instead rely entirely on voluntary licensing to the extent that they use audiovisual material.
76. Universities Australia say that they would like remuneration to be determined on a commercial basis without direct reference to the amount of copying and communication that has occurred. It is hard to conceive of a commercial arrangement

that would not take these factors into account when negotiating price. Screenrights finds it difficult to imagine that if the amount of usage under the statutory licence dramatically decreased that the universities would not expect a reduction in payment, yet this is the effect of their submission.

“Educational institutions are paying for uses others enjoy for free”

77. Finally, the universities also referred to having to pay for uses that the rest of the community enjoys for free. This fundamentally misunderstands the difference between a single copy made for private purposes such as time shifting (which students can enjoy) and a copy made for the institutional purpose of teaching – one that can be kept, re-used, played to a large audience and put online. This is an important market for filmmakers, particularly those that make documentaries and educational programming. This is a use that should be paid for and – as we discuss below – one that is extremely difficult to license voluntarily.

Impact of the abolition of Part VA

78. The abolition of the licence would have very serious consequences for the existing vast archives of online copies of broadcasts currently held and used by educational institutions.
79. Over two thirds of secondary schools have learning management systems with thousands of hours of broadcast content copied using Screenrights licences. The repositories are made available in reliance on Part VA and in its absence would need to be taken down. Under no interpretation would they be considered a fair use. Similarly, the innovative digital services which have grown under the umbrella of Part VA, such as the various streaming services, peer to peer and library management systems, would no longer be able to continue.

The statutory licences: conclusion

80. Australian educators enjoy the most comprehensive access to broadcast material in the world under a statutory licensing system that is flexible, simple and economically efficient. Educational institutions are under no compulsion to take out a licence, yet most choose to do so. Some also take out additional voluntary licences to “top-up” their use. Again, this is allowed under the Australian system. This system is certainly not “broken”, and the arguments put forward to this effect simply do not apply to the broadcast licence. Finally, the abolition of the licence would have a detrimental effect upon the digital economy as existing innovative systems, services and repositories would be unable to continue functioning legally.

Voluntary licences

81. The ALRC has proposed replacing the statutory licences with voluntary licences for uses that do not fall within the proposed “fair use” exception.
82. The assumption behind this proposal is that voluntary licensing would be more flexible, more efficient and less costly than the current system of statutory licences. None of these assumptions is valid.
83. As we submit below, comprehensive voluntary licensing of broadcast material is not possible. A system of voluntary licences would favour large global production houses that are able to clear all underlying rights to offer packaged content to educational institutions. Smaller independent Australian producers would be less able to obtain the rights necessary to license their content — a result that is detrimental to our industry and to our teachers and students. Using a New Zealand “use it or lose it” system or extended collective licensing to fill the gaps is simply a less efficient version of the system we currently enjoy.

The difficulties with voluntary licensing of broadcast material

Fair use is itself an obstacle to voluntary licensing

84. Fair use creates a lack of clarity about which uses should be licensed and which are “fair”. We have discussed the lack of certainty with the proposed fair use exception and referred to the considerable cost and time involved in relying on the courts to draw this demarcation line. Our principal concern is that in practical terms, teachers will simply copy, hoping the use will be “fair”, and that rightholders will either not know about the use or if they do, will be reluctant to take on the costs of litigation.
85. Fair use is also an obstacle for voluntary licensing, in and of itself. That is because under a fair use regime, particularly a newly established regime, it is very difficult to determine what rights need to be cleared. It is not industry practice to offer open-ended voluntary licences. This is because every right acquired comes at a cost, and so for reasons of economic efficiency, producers only acquire the rights that they require for their commercial purposes. Under a fair use regime, it becomes more difficult to state with certainty what rights will be required, and so it becomes more difficult to offer voluntary licences.

Comprehensive voluntary licensing for broadcasts is not practicable

86. Notably, there is not a comprehensive broadcast copying licence for educational institutions in the United States, the model fair use jurisdiction for the Discussion Paper. That is because, in the absence of specific legislative facilitation, such as a statutory licence, it is not possible to offer a comprehensive broadcast licence. Practical difficulties with clearing rights mean individual licensing is not possible for broadcast material. Program schedules are not released by the broadcasters (or even determined by the broadcasters) until two weeks prior to broadcast. This does not provide sufficient time to clear the rights to offer a voluntary licence. Furthermore, users often do not decide to copy until they see that a program they want is being broadcast. There is simply not the time to negotiate all the relevant clearances. The practical impossibility of comprehensive voluntary licensing of broadcast material is accepted

by the ALRC itself in Par 15.82 of the Discussion Paper, in reference to the retransmission licence.

Voluntary licences would be limited and dominated by overseas content

87. Screenrights' experience in administering the educational statutory licence for the past twenty-three years is that the most important category of programs for Australian educational institutions is locally produced independent documentary. These are also the programs that are most difficult to clear the rights for and license voluntarily. The market for such programs is very restricted (there is little or no international demand, or even mainstream community demand), and despite knowing that the genre itself has appeal to educators, it is extremely difficult for even Screenrights to predict what specific programs will be of interest to the education sector.
88. The probable outcome of the abolition of the statutory licence is that a patchwork of voluntary licences for specific programs will be offered, and that the programs covered by the licences will primarily be overseas produced programs from North America and the United Kingdom where all rights are cleared for global markets. Australian programs will be far less available under voluntary licences. This is already evident from the voluntary licences currently available to Australian educational institutions: they are overwhelmingly dominated by international content. A voluntary licensing scheme would tip the scales in favour of overseas content at the expense of Australian productions, especially independent documentaries most useful in education.
89. This outcome would greatly disadvantage educators, students, and Australian filmmakers.

A New Zealand or ECL system to "fill the gaps"

90. The Discussion Paper notes that under a fair use system as proposed, some uses by educational institutions may not need to be licensed as they would be "fair" but that others would not. The vast majority of uses under Part VA would not be covered by a fair use regime and would therefore be subject to licensing. This view has been confirmed in discussions with representatives of the Copyright Advisory Group for schools and TAFEs, and with Universities Australia.
91. However, the problems with voluntary licensing outlined above mean that a comprehensive broadcast licence will not be available. In recognition of this problem, the Discussion Paper seeks comment on whether a "use it or lose it" provision (as in the UK and New Zealand) or an Extended Collective Licensing provision should be enacted to enable voluntary licensing.
92. Either of these "solutions" may work to enable voluntary licensing of broadcasts, and each has advantages and disadvantages.

"Use it or lose it"

93. Screenrights administers the New Zealand broadcast copying and communication licence for educational institutions. In practice, this offers schools and other educational institutions close to comprehensive coverage with an effective indemnity covering works outside the repertoire of the licence. The disadvantages of the use it or lose it approach include the costs of establishing the licence, which took considerable time. Furthermore, this legislative model does not preclude other rightsholder

organisations from carving out their repertoire and licensing it in addition to the licences we offer, setting up a situation where educational institutions may need to obtain licences from more than one organisation. This has occurred with the print licence, where a group of newspapers withdrew from the licence offered by CLL, and offered a separate licence leading to confusion and less efficiency.

94. In our experience, the New Zealand licence has not necessarily been more flexible than the Australian statutory licence. Because Part VA is drafted in a technologically neutral manner, the statutory licence has adapted organically with the technology. Some changes, such as the introduction of the communication to the public right, have required legislative amendment – however, the same has been true in New Zealand. When the NZ Copyright Act was amended to include communication, then the enabling use it or lose it provisions also needed to be amended. In addition, whereas the Australian statutory licence always provided for educational institutions that are organisations which make copies on behalf of others (“resource centres”), no such provision was enacted in New Zealand. A specific amendment had to be made to the New Zealand Copyright Act to provide for resource centres in that country. Contrary to the presumption in the Discussion Paper that statutory licences are less flexible, a stated purpose of the amendment of the New Zealand Act was to ensure that New Zealand educational institutions enjoyed the same access to broadcast material as Australian institutions.
95. To the extent that the New Zealand system is more flexible, it is principally that the definition of covered works in section 48 of the New Zealand Copyright Act is drafted in a technologically neutral manner. Per Screenrights’ submission to this inquiry, a difficulty with Part VA is the partial and incomplete way in which audiovisual material made available on the internet is covered.⁸ The New Zealand Act clearly covers such material and so Screenrights is able to license these works under section 48.
96. In terms of the cost of the system, there is in Screenrights’ experience little difference between the Australian statutory licence and the New Zealand use it or lose it voluntary licence. The price per student is very similar in both territories. In some segments it is slightly higher, and in others lower. See the comparative table below.

Sector	Australian rate	NZ rate (NZD)	NZ rate (AUD equivalent 1:1.19)
Higher education	\$4.19 per EFTSL	\$5.40 per EFT	AUD4.54
Primary and secondary schools	\$5.56 per FTE	\$4.23 per FTE	AUD3.55

97. From this analysis, it is impossible to conclude that the voluntary licensing system in New Zealand is less expensive for educational institutions. In fact, there is little difference: some institutions paying slightly more and some paying slightly less.
98. The same cannot be said for the copyright owners. In terms of the efficiency of the systems, the cost of administration in New Zealand is significantly higher than in Australia. The reasons for this difference include the different scale of the markets, but

⁸ see pars 122-126 of this submission.

also the fundamental greater burden placed on copyright owners in administering the voluntary licence.

99. From our experience administering licences in both countries, the Australian system is more efficient. Repertoire does not need to be established. Teachers know they can copy everything they need under the one licence from us. There will never be any need to check that they are covered or to negotiate additional licences unless they wish to obtain an additional voluntary licence to use material that falls outside the provisions. Both systems ultimately depend upon Parliament to create the enabling provisions allowing the licences to function, and so both systems from time to time require legislative amendment to update the licences.

Extended Collective Licensing

100. Screenrights does not have direct experience of an Extended Collective Licensing scheme. An issue for such a scheme in regard to broadcasting may be that it is still very difficult to obtain the mandate from a sufficient proportion of rightsholders in the first place in order to meet the threshold level to achieve the extension of repertoire that the scheme offers. No doubt there are other advantages and disadvantages of such an approach, but these would need to be carefully examined and weighed.
101. However, if the aim is to ensure that teachers have simple and comprehensive access to broadcast material, why not stick with the system we have? Why create a patchy system of voluntary licensing and other statutory measures to provide this access? It would not be more efficient, for either rightsholders or the people who want to use their work. It would turn a simple and effective means of accessing material into an unnecessarily complex and less efficient system for both educators and rightsholders.

Voluntary licensing: conclusion

102. Comprehensive voluntary licensing of broadcast material is not possible due to time constraints in clearing rights prior to broadcast. A system of voluntary licensing would be dominated by programs from larger overseas commercial suppliers who have the market power to clear all rights and to sell product packages into educational institutions. Educators would miss out on smaller independent programs that are important to teaching, especially Australian independent productions. Filling the gaps with a New Zealand style scheme or extended collective licensing would simply be a less efficient version than our current system.

Retransmission

The retransmission licence is important to our media landscape and the digital economy

103. As Screenrights stated in its previous submission to the ALRC, the Part VC statutory licence for retransmission has an important role to play in Australia's media landscape. It has helped to facilitate a range of diverse services in the television market by ensuring access to free to air broadcasts.
104. It is impractical to expect retransmitters to negotiate voluntary licences with all underlying rightsholders in broadcasts. This impracticality is, as the ALRC states, due to the very limited time between notice of the broadcast content and the retransmission. (It is an extraordinary inconsistency in the Discussion Paper that while this impracticality is acknowledged as the reason for the statutory licence for retransmission, the same logic is not applied for government copying or educational use of broadcasts, which are assumed to be amenable to voluntary licensing.)
105. Removing the statutory licence for retransmission would mean that retransmission would cease. Broadcasters do not have the rights to license retransmission, and even in the United States, retransmission is provided for by statutory licensing.

The options

106. Screenrights is therefore strongly opposed to *Option 1 – the repeal of the remunerated exception*. Screenrights notes that no stakeholders called for the abolition of the statutory licence for retransmission.
107. With respect to *Option 2, the retention of the retransmission scheme*, Screenrights cannot foresee any difficulties in including broadcast signal copyright within the Part VC scheme in the same manner as other copyright subject matter.

Internet retransmission

108. The ALRC proposal to amend the existing retransmission provisions (should they remain in place) to include retransmission by way of the internet subject to geoblocking, continues to raise two concerns for Screenrights.
109. As the ALRC would be aware, Screenrights is concerned that including internet retransmissions in Part VC may fix some anomalies in the scheme for consumers, while potentially causing new problems for rightsholders.
110. We highlighted the anomaly of some IPTV services not being over the internet and therefore excluded from the scheme while others, which are over the internet, can rely on the benefits of the scheme. The current law provides considerable commercial advantage to some entrants into the market and denies those advantages to others, despite both services appearing exactly the same to consumers.
111. We believe this anomaly should, ideally, be addressed. However, as we stated in our previous submission, we are concerned that simply removing the internet exclusion, even if subject to geoblocking, would undermine the commercial interests of content providers selling their content on internet platforms. That is because it would open

up retransmission to internet services generally, not merely the television like services which are the basis of the anomaly described above.

112. In particular the sporting bodies are concerned that valuable rights for internet retransmission of events could be undermined by retransmission of these broadcasts over the internet in reliance on an amended Part VC. Such a retransmission would severely undermine the market for a voluntary licence of internet rights for this content. This would be an impediment to the development of digital services for online content.
113. The Discussion Paper asks the question whether the definition of “internet” should be clarified for the purposes of Part VC in particular in regard to internet protocol television.⁹ In Screenrights’ experience the lack of a definition has not prevented companies from using Part VC in the widest possible manner. While non-experts may struggle to differentiate between over the internet versus not over the internet, for practitioners this does not seem to be a difficulty.
114. On the other hand, Screenrights is concerned that any “clarification” of the meaning of over the internet may have the effect of making the provision harder to understand and administer as it is very difficult to conceive of wording which would assist.
115. Accordingly, Screenrights submits that no change be made to the internet exception in Part VC.
116. Screenrights has previously also expressed concern about the potential for cherry picking of content, where there is retransmission of a specific program or class of programs. Screenrights is concerned about the potential for this to occur under the current regime, a potential that would be exacerbated if the scheme was extended to the internet. The Discussion Paper states that cherry picking is prevented by the requirement that retransmission of a broadcast be simultaneous with and unaltered from the broadcast.¹⁰ Screenrights does not agree that this is clear cut, noting that the Panel case found that “broadcast” means a program as opposed to the whole broadcast schedule.¹¹ Accordingly, on one view, a simultaneous and unaltered retransmission of a broadcast could be a retransmission of a single program.
117. Screenrights notes that the ALRC has made no recommendation concerning “must carry”. Screenrights restates its previous submissions on this issue, and supports the ALRC’s decision not to make any proposal in regard to must carry.

Retransmission: conclusion

118. Screenrights submits that the statutory licence for retransmission should be retained. We foresee no difficulties in administering a licence should broadcasters be included as beneficiaries of the scheme in the same manner as other copyright subject matter. In relation to retransmissions over the internet, Screenrights is concerned that the current exclusion does create anomalies in the scheme, however including retransmissions over the internet in Part VC would cause new problems for rightsholders. We therefore submit that no change be made to the internet exception in Part VC.

⁹ Discussion Paper Question 15-2

¹⁰ Discussion Paper para 15.114

¹¹ Network Ten Pty Limited v TCN Channel Nine Pty Limited [2004] HCA 14.

Definition of “broadcast”

119. The application of the definition of “broadcast” in the Copyright Act is extremely complex. In Screenrights’ view, although a single definition is desirable, it may not be possible to have one definition applied universally that will resolve all issues in the current law.
120. However, as a starting point, Screenrights recommends that a separate definition of broadcast for the purpose of the Copyright Act should be enacted. This would ensure that the definition is no longer dependent on the Broadcasting Services Act. To minimise disruption, the definition should reflect the current definition borrowed from the Broadcasting Services Act. Such a definition should include the effect of the Ministerial declaration which excludes services delivered over the internet.
121. However, there are circumstances where section specific definitions are appropriate. For example, the Part VC retransmission scheme is limited to “free to air broadcasts”. This is only sensible, as the case for a statutory licence for retransmission of other broadcasts (such as subscription broadcasts) is extremely difficult to imagine.

Part VA

122. Screenrights comments from this point are confined to Part VA which provides for use of broadcasts by educational institutions.
123. Per our previous submission in response to the Issues Paper, Screenrights submits that the convergence of media technology is making it difficult for teachers relying on the statutory licence to be able to determine what they can and cannot copy under the licence. Depending on the transmission mechanism, the program may or may not be part of a broadcast, and therefore amenable to copying under Part VA. This is illustrated for example by IPTV services offered by FetchTV: if you receive FetchTV through iiNet or internode it is a broadcast, whereas if you receive FetchTV through Optus it is not a broadcast, and a copy would not be protected by the statutory licence.
124. As has been pointed out earlier in this submission, it is not possible to offer a comprehensive voluntary licence for broadcasts, and so Screenrights is unable to cover this gap through such a scheme.
125. Furthermore, the uses which the educational institutions routinely make of these copies would not be covered by fair use.
126. Accordingly, Screenrights recommends that the definition of broadcast in Part VA be amended to deem linear television and radio services to be broadcasts for the purposes of the Part.

Conclusion

127. Screenrights submits that the analysis of the exceptions in the Discussion Paper has failed to reach a fair balance between the rights of copyright owners and the users of their work. The ALRC has instead made a leap of faith into copyright uncertainty by proposing a broad fair use regime that is an attack on property rights and will undermine licensing solutions for access.
128. In opting for exceptionally broad flexibility, the ALRC has recommended an approach that will create more problems than it will solve, particularly for the people who make the content so essential to a healthy digital economy.
129. In particular, Screenrights submits:
- That the proposed fair use regime is an extreme and radical recommendation which cherry picks exceptions from jurisdictions around the world without including any of the balances from those systems;
 - That the proposed regime will introduce a very substantial burden upon creators, particularly Screenrights' filmmaker members who will no longer be able to rely on well established practices but will have to interpret an uncertain fair use regime;
 - That the abolition of the educational statutory licence for broadcasts in Part VA will lead to reduced Australian content being available for schools, particularly the local independent documentary which is at the heart of the licence; and, the vast digital archives of copies compiled by educational institutions under the current system will no longer be available;
 - That the proposed regime is less, not more, efficient than the current system of exceptions; and,
 - That the Discussion Paper fails to recognize the merits of the current system, in particular, the comprehensive simple operation of the broadcast statutory licences which are complemented by a network of voluntary licences for those users that prefer them.
130. Finally, Screenrights submits that the Discussion Paper's focus on the radical imposition of an entirely new regime of copyright exceptions is a missed opportunity for achievable, sensible improvements to the existing system.

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