

# **C**©**P**YRIGHTAGENCY

**Response to Australian Law Reform  
Commission Discussion Paper:  
Copyright and the Digital Economy  
July 2013**

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## EXECUTIVE SUMMARY

### THE DIGITAL ECONOMY NEEDS CONTENT FOR GROWTH

The context for this inquiry is the Government's desire to expand Australia's digital economy, and the ALRC's terms of reference need to be understood in that context.

In 2000, the then Minister for Communications, in his Second reading speech on the Copyright Amendment (Digital Agenda) Bill, said:

*Content is the key commodity of the information economy and our copyright laws regulate both its commercial exploitation and its accessibility. The government is committed to maintaining the balance between copyright owners and users so that the new economy will encourage research, innovation and the production of new material.<sup>1</sup>*

While the particulars of the terms of reference relate to how content is consumed and repurposed, these issues cannot be considered without regard to maintenance and growth of new source content.

The ALRC's proposals risk stifling rather than fostering the environment for the creation and dissemination of new content. This environment, and the role of the copyright system in it, is much more complex than the ALRC seems to appreciate.

Most creators of content want their content to be consumed. The issue here is when it is appropriate for a government to mandate, through legislation, the timing and terms on which this occurs.

Repurposing of content can raise different issues, partly because it is the basis of 'secondary' content industries built on other people's content. It raises questions about the extent to which the creator of the source material should be able to determine if, when and by whom content is repurposed (including doing it themselves), and when it is justifiable for a government to mandate the availability of content for repurposing and the terms.

In either case, the justification for overriding the arrangements the content creator has put in place must be clear. A combination of public interest and efficiency can be a justification, but the terms must be fair.

The ALRC risks choking the original sources of new content in its haste to embrace secondary content businesses, such as online aggregators and providers of social media platforms. The ALRC received no evidence that these businesses are impeded by the current system, but gave priority to their interests – global businesses – over those of Australia's content industries, which are making a significant contribution to Australia's economy.<sup>2</sup>

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<sup>1</sup> Senator Alston, Second Reading Speech, 17 August 2000, [http://parlinfo.aph.gov.au/parlInfo/genpdf/chamber/hansards/2000-08-17/0072/hansard\\_frag.pdf](http://parlinfo.aph.gov.au/parlInfo/genpdf/chamber/hansards/2000-08-17/0072/hansard_frag.pdf).

<sup>2</sup> See PwC report for Australian Copyright Council, The Economic Contribution of Australia's Copyright Industries, 2012, available at [www.copyright.org.au](http://www.copyright.org.au).

The ALRC has also sought to reduce expenditure on the content necessary for education and government services without consideration for the costs associated with reduced efficiencies and the implications for future content.

### LICENSING SOLUTIONS MORE EFFICIENT THAN EXCEPTIONS

A licensing solution refers to the terms on which a content creator has made their content available. Those terms may or may not include payment, or may involve payment for some but not other activities. This was not understood by the ALRC; it assumed the references to 'licensing solutions' by content creators meant they expected to be paid for each and every use that requires a copyright permission. This is a fundamental misunderstanding that raises questions about the basis for a number of the ALRC's proposals.

Licensing solutions are more efficient for business purposes because they can operate globally and can be adapted over time for changing conditions. A business seeking to rely on copyright exceptions for a product or service available in more than one territory must check the exceptions that apply in all territories.

A licensing solution also provides more certainty and less risk for a user. The application of an exception may be contested by a content creator, particularly if it is a 'flexible' exception whose application is not easily predictable, such as the fair use exception proposed by the ALRC.

There are many existing areas of regulatory oversight to ensure licensing terms are reasonable, including consumer protection laws, competition laws, the Code of Conduct for collecting societies and the Copyright Tribunal.

The encouragement of licensing solutions is a key plank of copyright policy developments internationally, and should be in Australia.

Examples are the Copyright Hub in the UK, and the Licences for Europe initiative in the EU. Other industry-led initiatives include the Global Repertoire Database for music, and the Linked Content Coalition.

The ALRC has unfortunately confined its attention to legislative change, and has not properly considered how its proposals would affect the complex 'ecosystem' underpinning copyright-based industries and creative endeavour. Nor has it considered non-legislative options for fostering Australia's digital economy.

### STATUTORY LICENCES BEST SOLUTION FOR PUBLIC INTEREST USE OF CONTENT

Underlying the ALRC's proposals seems to be a view that repeal of the statutory licences is necessary to force content creators to develop 'voluntary' licensing solutions for the education and government sectors, either themselves or through agents.

The ALRC asserts that its proposed alternative arrangements to statutory licensing would be more 'efficient' but does not explain how it formed that view. The alternative arrangements envisaged would in fact be less efficient. They would introduce increased administrative burden for all involved: users of the content (e.g. teachers and government employees), content creators and their agents (e.g. collecting societies).

The ALRC's proposals may lead to a reduction in available content. At the very least, they would require users to navigate a more complex range of terms and conditions for the 'free' exceptions, direct licences, and collective licences relied upon.

Uses of content for education, government services (including through cultural institutions and local governments) and people with disabilities are matters of public interest warranting government intervention.

Content creators accept that the most efficient way to ensure the broadest availability of content for these purposes is through statutory licensing arrangements. They also accept that compensation for the overall usage of content by the education and government sectors in reliance on statutory licences is broadly equitable.

Current arrangements include collection of data about content usage, to estimate the overall extent of reliance on the statutory licence and to assist with fair distribution of compensation. Content creators accept the limitations of this data given the extent of acceptable administrative burden, but appreciate the insight it provides into overall levels, patterns and trends of usage.

Statutory licences prevent denial of content, but not alternative licensing arrangements. Content creators can and do make alternative offers to the education and government sectors. These include subscription services, 'open' licensing arrangements (such as NEALS and Creative Commons) and the AMCOS print music licence for schools.

Statutory licences are, of course, voluntary for the education and government sectors. They are not required to rely on statutory licences, but they can rely on them to whatever extent they choose. They are free to refrain from uses of content, or to seek alternative arrangements.

Users would need to check, in ways that they don't currently, that the content they want to use is available for use under a licensing solution or an exception, and ensure they comply with the terms and conditions applicable in each case. This will necessarily lead to a more complex system than the current one, and the likely withdrawal of some content.<sup>3</sup>

The ALRC's proposals do seem to be influenced by its view about whether or not the current amounts of compensation ('what should be paid for') are appropriate, although it says its proposals are not founded on that basis. But its concerns about cost are based on a fundamental misunderstanding: that every use made in reliance on statutory licences is 'remunerated'. This is not the case, either as a matter of law or practice. Only uses that have value are taken into account for negotiations on equitable remuneration for the overall reliance on the statutory licence; 'technical' copies are not.

The question of value is, of course, determined by the Copyright Tribunal. We urge the ALRC to carefully consider the determinations of the Tribunal to clearly understand its approach to the question of value. It may be useful for the ALRC to also consult with current and former members of the Tribunal on this issue.

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<sup>3</sup> See Appendix A for some content and uses commonly excluded from voluntary licence arrangements.

## ADDRESSING PERCEPTIONS ABOUT THE COPYRIGHT SYSTEM

The submissions to the ALRC, and statements in the Discussion Paper, raise a range of issues relating to current perceptions of the copyright system.

Some of them relate to perceptions about the value of content, including the time, expertise and investment required to create it. Others relate to the ways that people feel the current system works, or doesn't work.

In many cases, the perceptions are based on misunderstanding about how things currently work. This has hindered informed discussion about the current system, and its implications for those affected. These misunderstandings need to be addressed, both to enable informed discussion, and to restore confidence where it has been eroded.

In addition, the equity of the statutory licences, particularly as they apply to schools, has been questioned in submissions from those who negotiate the compensation payable under the licences. We acknowledge that this perception creates a problem that needs to be addressed, in part so that we, and the beneficiaries of the licences, can focus on further reducing complexities and burden for teachers and others.

These improvements do not require legislative change. The current framework is amenable to developments that further facilitate the use of content whilst retaining arrangements for fair compensation. We remain open to new approaches to address some of the specific concerns raised.

## MEASURES TO FOSTER AUSTRALIA'S DIGITAL ECONOMY

Measures to transfer widespread unauthorised use of content to consumption from legitimate sources are a fundamental requirement for the growth of Australia's digital economy. Aspects of this issue were expressly excluded from the ALRC's terms of reference, but the ALRC should nevertheless have acknowledged the importance of the issue and the need for a solution. As indicated by developments in the US, a successful solution requires action by the intermediaries whose services are used to disseminate unauthorised content, and measures to increase awareness of responsibilities relating to unauthorised use of content, and the consequences of not addressing it.<sup>4</sup>

The Attorney General's Department is reviewing both the liability of online intermediaries, and the circumstances in which the consequences of liability can be limited by the intermediaries' mitigation actions ('safe harbours'). These issues are necessarily intertwined with each other, and with a number of issues under consideration by the ALRC.

For 'public interest' uses, many of the issues raised with the ALRC are based on misunderstandings of the current legislation and practices, and insufficient consideration of options.

The education sector's desire for alternative 'voluntary' licensing arrangements, not anticipated by the ALRC or by other stakeholders, could be addressed by voluntary licence offerings for those that want them. It is not necessary to repeal the statutory licences to achieve this. It is difficult to see why the education sector would not want

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<sup>4</sup> <http://www.copyrightinformation.org>.

to keep the statutory licence as a safety net for guaranteed entitlement for uses not covered by voluntary licensing arrangements or free exceptions.

The valuation of usage for determining compensation (including uses for which compensation should be zero) should remain a matter for the Tribunal.

The Attorney-General's Department Guidelines for the 'declared' collecting societies could be reviewed and updated, for example to make specific reference to the digital environment and new forms of content. These guidelines could be used to indicate to a broader group of stakeholders the Government's intentions regarding management of statutory licences. The current guidelines were developed for the education statutory licences, and have not been reviewed since being adopted in 1990. Similar guidelines could be developed for the government statutory licence, including its application to cultural institutions.

## SUMMARY OF RESPONSE TO PROPOSALS ON STATUTORY LICENCES AND FAIR USE

### Repeal of statutory licences

We oppose repeal of the statutory licences for reasons that include:

- the alternative proposed is less, not more, efficient: it would create increased administrative burden for both users (such as teachers) and content creators;
- the licences are voluntary for licensees: they can choose to what extent, if any, they want to rely on them;
- the proposal is not supported by content creators;
- content creators support the statutory licences because they:
  - are efficient;
  - are fair to both users and content creators;
  - provide a 'level playing field' that benefits smaller content providers, as it provide access to all content on equal terms; and
  - provide information about levels, patterns and trends in usage that would not otherwise be available;
- the ALRC has not properly considered the implications for all affected stakeholders, including teachers, government employees, and people with disabilities; and
- statutory licences require reporting to government by the 'declared' collecting societies that would not otherwise be required.

### Introduction of an exception for 'fair use'

We oppose the 'fair use' exception in the terms in which it has been proposed for reasons that include:

- it provides an unfair advantage to businesses that are consuming and repurposing content, particularly those with greater bargaining power than creators;
- it incorporates unnecessary uncertainties, including by:
  - leaving open the possibility that it might apply to a use already allowed under a licensing solution or a statutory licence;

- listing purposes that are covered by other provisions, such as public administration and education, without specifying (as s200AB does) that it only applies where those provisions don't;
- it does not include acknowledgement of the creator and source as a condition;
- it is based on fundamental misunderstandings about the historical development of the Australian copyright system, as well as its current operation in practice;
- it effectively outsources the hard decisions from the Parliament to the courts; and
- the ALRC has not considered the significant disruption that would be caused by transition from the current system – which has not been demonstrated as failing – to its proposed regime.

## ABOUT COPYRIGHT AGENCY

Copyright Agency is a not-for-profit company limited by guarantee, with more than 26,000 members.

Copyright Agency's operations can be broadly categorised as follows:

- in accordance with its appointments by the Australian Government:
  - management of the statutory licences for education and government services, including negotiation, collection and distribution of fair compensation for content creators;
  - management of the statutory licences for people with disabilities (no compensation is paid under these licences); and
  - management of the artists' resale royalty scheme;
- in accordance with the authority of its members and foreign affiliates, and with the oversight of the Copyright Tribunal, formulation and management of 'voluntary' licensing arrangements, principally for the corporate sector; and
- in accordance with its agreement with Viscopy, management of Viscopy's services to its members and licensees.

## ACCOUNTABILITY

Copyright Agency reports annually to the Attorney General and to the Minister for the Arts in accordance with statutory obligations in the Copyright Act and the Resale Royalty for Visual Arts Act. Annual reports are tabled in Parliament and are available from our website.<sup>5</sup>

Copyright Agency also reports annually on its compliance with the Collecting Societies Code of Conduct to the Code Reviewer. The Code Reviewer's reports are published.<sup>6</sup>

Copyright Agency also operates in accordance with the Attorney General's Department guidelines for 'declared' collecting societies.<sup>7</sup>

## SUPPORT FOR OTHER SUBMISSIONS

The Viscopy board has made a separate submission on the Discussion Paper, which Copyright Agency endorses.

Copyright Agency and Viscopy are affiliated with the Australian Copyright Council and endorse its submission.

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

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<sup>5</sup> [www.copyright.com.au/about-us/corporate-publications/annual-reports](http://www.copyright.com.au/about-us/corporate-publications/annual-reports)

<sup>6</sup> [www.copyright.com.au/about-us/code-of-conduct](http://www.copyright.com.au/about-us/code-of-conduct)

<sup>7</sup> There is a link to the guidelines from [www.copyright.com.au/about-us/governance](http://www.copyright.com.au/about-us/governance)

## CHAPTER 2: FRAMING PRINCIPLES

### SUMMARY

- the principles should be developed in the broader context of expanding Australia's digital economy
- the role of content in that expansion needs to be expressly acknowledged
- the starting point should be the description of the objectives of copyright by the Spicer Committee (see comments on Principle 2)
- while the principles themselves may be unexceptional, the ALRC's commentary on their interpretation is at times problematic
- while the purpose of the principles is to assist with the formulation of proposals, it is difficult to reconcile the proposals with the principles

### INTRODUCTION

While the device of framing principles can be useful, the ALRC has not approached the exercise from the right starting point: how to foster growth of Australia's digital economy for the benefit of Australian society as a whole.

The ALRC needs to begin by identifying factors that can promote or hinder the growth of the digital economy, including the role of 'original' and repurposed content.

Mechanisms for legitimate dissemination of content promote the digital economy, and encourage the creation of new content. An environment that enables avoidance of legitimate mechanisms through unauthorised dissemination channels and practices is a hindrance to the growth of the digital economy.

The place of Australia's digital economy in the global context also needs to be explicitly recognised. Practices that may work within Australia, under Australian law, may not work well in a global environment.

We have nevertheless commented on the ALRC's proposed framing principles and explanations of those principles, as we think they raise some fundamental misunderstandings.

We note that the ALRC has not explained how it thinks its proposals meet its framing principles. As we explain further below, we think the proposals are, in fact, inconsistent with the framing principles.

### EVIDENCE

There is much current discussion about the need for 'evidence' to support policy making, including in the area of copyright. A key recommendation of the UK Hargreaves report in 2011 was that future copyright policy should be supported by evidence. Following its acceptance of that recommendation, the UK government has implemented it in a number of ways.

These include a document entitled ‘Good evidence in policy’, which sets out standards for evidence used in the development of policy.<sup>8</sup> It sets out three criteria for good evidence: it must be clear, verifiable and peer reviewed.

The ALRC does not state what it regards as good evidence (and appears to have been unaware of this document). In some parts of the Discussion Paper, it uses the term ‘evidence’ to describe arguments or assertions.

### PRINCIPLE 1: ACKNOWLEDGING AND RESPECTING AUTHORSHIP AND CREATION

While creators share an interest with publishers and others in the content value chain, in an effective and fair copyright system, they separately assess the consequences of proposed changes for their livelihood and respect for their profession.

While the ALRC acknowledged submissions from creators on its Issues Paper, its proposals do not seem to have been influenced by their views.

Two recommendations with widespread ramifications – repeal of statutory licences and introduction of a ‘fair use’ exception – were opposed by authors.

### Acknowledgement

Authors made it clear that if their work is used without permission, they should at the very least be acknowledged as a condition of ‘free’ use. There are requirements under the moral rights provisions to attribute, but acknowledgement of the author as a condition of an exception clearly indicates the government’s intention that use of someone else’s content requires consideration of who created it, and the creator’s connection to it.

At [2.29] the ALRC says:

*Inherent in the notion of ‘fair access’ is providing appropriate remuneration to copyright owners and always, attribution and other ‘key social norms’ need to be observed.*

The ALRC does not, however, propose that attribution be a condition of its proposed exceptions.

The ALRC’s failure to comprehend the importance of acknowledgement to creators is exemplified by its decision to import an exception from the US, a country that does not explicitly recognise moral rights.

### ‘User’s rights’

The ALRC also reflects the oppositional rhetoric used by some, whereby the interests of ‘consumers’ or ‘users’ are described as ‘rights’ that must be granted in copyright legislation to ‘curb’ the exercise of copyright rights by content creators. Proponents of ‘users’ rights’ accept that the term is a rhetorical device,<sup>9</sup> but it nevertheless indicates a belittling of the skill and time involved in creating material others value.

In her testimony to the US Congress in March 2013, calling for a review of US copyright law, the Director of Copyrights said:

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<sup>8</sup> [www.ipso.gov.uk/consult-2011-copyright-evidence.pdf](http://www.ipso.gov.uk/consult-2011-copyright-evidence.pdf)

<sup>9</sup> For example, in the course of a recent forum on the ALRC proposals at University of Technology Sydney on 18 July.

*The issues of authors are intertwined with the interests of the public. As the first beneficiaries of the copyright law, they are not a counterweight to the public interest but instead are at the very center of the equation.<sup>10</sup>*

## PRINCIPLE 2: MAINTAINING INCENTIVES FOR CREATION OF WORKS AND OTHER SUBJECT MATTER

The copyright system reflects the value to society of creative endeavour. In recognition of that value, it grants property rights to those who invest their time, expertise and money in creative content. Rightsholders can choose to exercise those property rights in a variety of ways, including by choosing to give their content away for free in circumstances that they regard as appropriate. The intervention by a government to determine, through legislation, the timing and terms on which content is made available and used needs to be clearly justified in public policy terms.

The ALRC should begin with the statement about the objectives for the copyright system by the Spicer Committee, whose report preceded the introduction of the current Copyright Act:

*The primary end of the law on this subject is to give to the author of a creative work his just reward for the benefit he has bestowed on the community and also to encourage the making of further creative works.*

The system is not as simplistically utilitarian as some would suggest, and its effectiveness cannot be measured by looking at the motivations of creators in isolated instances.

The position that has relatively recently emerged that uses of content that ‘do no harm’ should be allowed without permission or payment comes from a very narrow ‘cause and effect’ view of the copyright system. What ‘harm’ means is itself a matter of debate, but the position also seems at odds with even the most liberal ‘re-imaginings’ of the three-step test. The three-step test clearly recognises that creators can be ‘prejudiced’ by activities that may not have a direct effect on a ‘market’. This suggests recognition of a more complex environment than is acknowledged by some.

### The role of publishers

A number of statements in the Discussion Paper indicate a limited understanding of the role of publishers in the content chain. Many equate publishers with distributors and appreciate neither the creative input by publishers (for example in devising publications and other content-based products, commissioning and editing) nor the investment required and its associated risks.

While talk of ‘disintermediation’ and direct relationships between creators and consumers has been fashionable for many years now, there are limits to how well this works in an environment of a publishing free-for-all, particularly for those seeking to distinguish professional or authoritative content from the morass of enthusiastic unmoderated self-publishing amateurs. Some of those who have considered the issue

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<sup>10</sup> <http://judiciary.house.gov/hearings/113th/03202013/Pallante%20032013.pdf>

have found that disintermediation can be contrary to the interests of creators, and reduce diversity of content.<sup>11</sup>

### PRINCIPLE 3: PROMOTING FAIR ACCESS TO AND WIDE DISSEMINATION OF CONTENT

People who create and invest in content generally do so for an intended audience, and want that content to be disseminated as widely as possible.

Some responses to the Issues Paper appear to assume that access and dissemination need to be mandated by statute.

In assessing the need for intervention, one has to distinguish two scenarios:

1. the copyright system operates inconsistently with the creator's intentions for the use of the content, but the creator is unaware of this and has not developed licensing solutions (including open licensing solutions) to give effect to their intentions; or
2. the copyright legislation should override the creator's intentions for 'public interest' reasons.

The first does not require legislative change, but can be addressed through assistance to creators to give effect to their intentions.

The second requires a careful assessment of the reasons for the creator's intentions, the extent to which it is necessary and justifiable to override those intentions (having regard to the importance of the 'public interest' use), and what conditions and compensation could mitigate the interference with the creator's intentions.

#### The 'public interest'

The ALRC refers at [2.24] to the views in submissions about what 'the public interest' is, which vary widely, but doesn't articulate its own view.

The use of the term 'public interest' in the context of copyright policy suggests situations in which a benefit to society as a whole requires the overriding of the propriety rights of an individual. An alternative, which seems to be implied in some submissions, is that the interest of certain sectors of society that use others' copyright content should take precedence over the interest of sectors of society that create and publish content.

We think that the 'public interest' effects of a policy have to be assessed for society as a whole, bearing in mind the different implications of a policy for different sectors of the society.

The ALRC refers to the following 'public interest' benefits put forward in submissions: advancing education and research; developing and supporting culture; participation in decision making; and promoting a transparent and accountable democracy. All are

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<sup>11</sup> For example, Guy Pessach, *Deconstructing Disintermediation - A Skeptical Copyright Perspective*, available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2257243](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2257243)

worthy and, we would think, uncontested by most people involved in the inquiry process.

The real issue is how are these benefits are best delivered, having regard to both long term and short term implications: access to and use of available content for these purposes in the short term; and the creation and availability of new content for the longer term.

### Remuneration from exclusive rights

At [2.30], the ALRC says:

*Understandably, rights owners organisations, on behalf of their constituents, argued for remuneration attaching to whatever is determined to be within the copyright owner's exclusive rights.*

This statement displays a fundamental misunderstanding of the position of Copyright Agency and others who made submissions. We clearly said that remuneration relates to the value of a use. Many uses do not generate remuneration because they have no value, or because the creator chooses to allow the use without remuneration. A licensing solution does not necessarily involve payment, but does reflect the creator's intentions for the use of their content. The issue is the extent to which it is necessary for the government to intervene, and what form the intervention should take.

### 'Consumers' and 'users'

In discussions about copyright policy, people often refer to 'consumer interests' and 'user interests' as if they are interchangeable.

It can be useful to distinguish the concepts. 'Consumer' suggests a person who has acquired content (for money or otherwise) directly or indirectly from the content creator. The policy issues relate to what the consumer can do with that content, and whether there are 'reasonable' uses that are not covered in the licensing arrangements for the content that should be mandated by legislation. The extent to which these issues may need to be addressed in copyright legislation is affected by the extent to which they are addressed by other areas of law, such as those governing interpretation and enforcement of contracts, and consumer protection laws.

The 'expectations' of 'users' who are not 'consumers' should arguably be considered differently, as users make no contribution to the creation of the content.

The debate about 'user expectations' and 'user's rights' has arisen from the vast increase in accessible content, particularly online, coupled with poor understanding of the extent to which 'viewable' content can be 'repurposed'. Some argue that expectations based on poor understanding should be codified in legislative exceptions, but efficient licensing mechanisms, such as those being developed in the UK and elsewhere, are a better way to stimulate Australia's digital economy.

### PRINCIPLE 4: PROVIDING RULES THAT ARE FLEXIBLE AND ADAPTIVE TO NEW TECHNOLOGIES

A case for change based on 'technological neutrality' needs to be carefully assessed. In many cases, technology is a proxy for an underlying principle, and that principle should first be identified and considered. In addition, the application of an exception to a particular technology can effectively limit the scale of the use.

A similar comment could be made about arguments based on analogy, such as 'viewing content online is the same as reading a book'. Analogies can be useful, including to test the consistent application of a principle, but should not obscure identification and consideration of the underlying principle.

## **PRINCIPLE 5: PROVIDING RULES CONSISTENT WITH AUSTRALIA'S INTERNATIONAL OBLIGATIONS**

We agree that compliance with international standards should not preclude discussion of those standards and the practical implications of applying them in Australia. But the ALRC's suggestion that Australia should seek revision of the three-step test seems ill-informed.

The ALRC suggests at [2.49] that it regards the three-step as insufficiently 'flexible'. It proposes that Australia seek an expansive interpretation of the three-step test at the international level.

The three-step test has, of course, recently been reconsidered and affirmed at the World Intellectual Property Organization (WIPO) Diplomatic Conference in June 2013 that resulted in a new treaty for the visually impaired.

In the context of the digital economy, the objective should be a copyright system that enables orderly use of content under arrangements that span many legal jurisdictions.

Licensing arrangements are more certain and predictable than copyright exceptions, particularly those that are seen as unfair by content creators and may be contested. As noted earlier, licensing arrangements don't necessarily involve payment; this is a key misunderstanding by the ALRC that calls into question a number of its conclusions.

For this reason, key components of copyright developments in the UK and Europe are initiatives to promote licensing solutions. The ALRC, while aware of these important developments, did not consider similar initiatives for Australia.

## **CHAPTER 4: FAIR USE**

### **SUMMARY**

We oppose the exception in the terms in which it has been proposed for reasons that include:

- It provides an unfair advantage to businesses that are consuming and repurposing content, particularly those with greater bargaining power than the creators;
- It incorporates unnecessary uncertainties, including by:
  - leaving open the possibility that it might apply to a use covered by a licensing solution;
  - listing purposes that are covered by other provisions, such as public administration and education, without specifying (as s200AB does) that it only applies where they don't;
- It does not include acknowledgement of the creator and source as a condition;
- It is based on fundamental misunderstandings about the historical development of the Australian copyright system, as well as the current practical operation of the copyright system;

- It effectively outsources the hard decisions from the Parliament to the courts; and
- The ALRC has not considered the significant disruption that would be caused by transition from the current system – which has not been demonstrated as failing – to its proposed regime.

## THE CHANGED ENVIRONMENT

The ALRC cites the following changes in justification for its proposal for a ‘fair use’ exception in Australia, since it was most recently rejected in 2006.

1. changes in digital technology, including increasing convergence of media and platforms and ‘opportunities made possible by the digital economy’;
2. a significant move from rule-directed legislation to principles-based legislation in Australia;
3. ‘an increased focus to the use of competition to encourage microeconomic reform and to enable the Australian economy to blossom in a more open world economy’;
4. ‘new understandings of the interpretation of the three-step test’; and
5. the ALRC’s views that ‘the potential benefits of introducing fair use now outweigh the transaction costs’.

The ALRC describes these changes as ‘evidence’ in support of its proposal.

None of the ‘changes’ is a convincing justification for the proposal. Even if the changes are accurately described, the relationship between them and the ALRC’s proposal is neither apparent nor explained.

### Changes in digital technology

The term ‘convergence’ is used to mean different things, including convergence of content formats (such as multimedia), and the convergence of content delivery mechanisms (particularly broadcasting and online communication).

The concept of ‘convergence’ is hardly new, and it is not clear how its ‘increase’ warrants the introduction of a fair use exception. The copyright implications of ‘convergence’ have been acknowledged since at least 1994, with the report of the Copyright Convergence Group.

The recent Convergence Review report from the Department of Broadband, Communications and the Digital Economy identified one specific copyright issue consequential to its recommendations – retransmission – but nothing in it warrants a fair use exception.

The ALRC cites a 2013 report from PwC, *The Startup Economy: How to Support Start-Ups and Accelerate Australian Innovation* in support of its proposal.<sup>12</sup>

The report says:

*Australia has one of the best regulatory environments for entrepreneurship, and an engaged and strengthening culture of inclusion and openness. However, we have a considerably higher ‘fear of failure’ rate than many other innovative countries (e.g. US & Canada) which is constraining the growth of our tech startup sector.*

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<sup>12</sup> The report was commissioned by Google.

PwC is saying that the fear of failure results from the business culture, not the legal environment. It seems to regard the legal environment as entirely adequate for increasing Australia's digital economy.

The ALRC seems to have misinterpreted the report, and mistakenly cited it as support for the ALRC's proposal.

### Move from rule-directed legislation to principles-based legislation

The adoption of principles-based legislation seems to be primarily in areas of law with a regulator. The ALRC cites examples such as the *Competition and Consumer Legislation Act 2010* (Cth) regulated by the Australian Consumer and Competition Commission, the *Broadcasting Services Act*, regulated by the Australian Communications and Media Authority (ACMA). Another example may be the Privacy Act, regulated by the Privacy Commissioner.

There is no equivalent regulator for the Copyright Act.<sup>13</sup>

### Increased focus on competition

In support of this justification, the ALRC cites a range of changes over the last 20 years:

*... freeing up the market for books, sound recordings, computer programs and other copyright material; removing parallel importing restrictions based only on labels of goods; the 'Digital Agenda' amendments; the introduction of moral rights and allowing decompilation of computer programs for the purposes of interoperability.*

While this may be an accurate description of changes to copyright legislation, it does not make a case for recent changes in competition policy that justify the introduction of a fair use exception. We note also that each of these changes was based on extensive analysis and consultation with affected industries, and resulted in very specific changes to ensure very clearly articulated policy outcomes.

The ALRC goes on to say:

*Stakeholders in this Inquiry have demonstrated their capacity to respond to change: to develop and adapt in the digital economy.*

This would indicate that the current legal environment is not an impediment to digital innovation.

### New understandings of the interpretation of the three-step test

The interpretation of the three-step test is the subject of discussion in the academic community. There has been no 'revision' process at the international level under the auspices of WIPO. To the contrary, the three-step test has recently been reinforced through its incorporation into the new treaty for the visually impaired.

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<sup>13</sup> Some aspects of licensing are determinable by the Copyright Tribunal, and there are processes for 'declaration' of collecting societies to manage certain statutory licences, but the Tribunal's role is quite distinct from that of a regulator.

### ALRC view: potential benefits now outweigh the transaction costs

There is no substantiation, let alone 'evidence', provided for this assertion. It is not clear what the ALRC thinks has changed to affect the transaction costs.

To the contrary, the ALRC seems to gravely underestimate the transaction costs that would necessarily result from the implementation of its proposal.

At the very least, a higher level of risk assessment will be needed, requiring legal advice and possibly litigation if the stakes are high.

## CHAPTER 6: STATUTORY LICENCES

### SUMMARY

We oppose repeal of the statutory licences for reasons that include:

- the alternative proposed is less, not more, efficient: it would create increased administrative burden for both users (such as teachers) and content creators;
- the licences are voluntary for licensees: they can choose to what extent, if any, they want to rely on them;
- the proposal is not supported by content creators;
- content creators support the statutory licences because they:
  - are efficient;
  - are fair to both users and content creators;
  - provide a 'level playing field' that benefits smaller content providers, as it provide access to all content on equal terms; and
  - provide information about levels, patterns and trends in usage that would not otherwise be available;
- the ALRC has not properly considered the implications for all affected stakeholders, including teachers, government employees, and people with disabilities; and
- statutory licences require reporting to government by the 'declared' collecting societies that would not otherwise be required.

### EFFICIENCY OF STATUTORY LICENSING

In areas of large-scale use of content for desirable social purposes, involving millions of small-scale transactions, statutory licences provide a solution that may not be perfect in relation to every single transaction but are efficient and equitable to both users and content creators when considered as a whole.

### STATUTORY LICENCES: 'PUBLIC INTEREST' VS 'COMMERCIAL'

Statutory licences can be broadly grouped into those that enable 'public interest' uses, such as education and government services, and those that operate for commercial entities such as broadcasters and record companies.

The ALRC's recommendations apply only to the 'public interest' licences, and not to the commercial licences, but it is not clear why it has made the distinction.

## ROLE OF SURVEYS

It appears that the ALRC has not clearly understood the role of surveys of usage, let alone how they operate in practice.

Currently, small samples of licensees participate in surveys of usage for two quite distinct purposes:

- to provide an indication of overall consumption of content in reliance on the licence by the licensee population as a whole (e.g. the school sector; the university sector; the Commonwealth government), to provide collecting societies and the licensees' copyright administrators a reference point for negotiations on the amount of compensation; and
- to provide information about whose content is being used, to assist with distribution of the compensation.

In the past, the same surveys have been used for both purposes. This is not required by the statutory licence framework, but has been seen as a way of minimising the administrative burden for licensees. Different methods can be, and are, used for estimating 'volume' and for distributing compensation.

## REPEAL OF STATUTORY LICENCES NOT JUSTIFIED BY FRAMING PRINCIPLES

### Principle 1: Acknowledging and respecting authorship and creation

Repeal of the statutory licences is not supported by authors, or by others who create or publish content. They regard statutory licences as efficient mechanisms that deliver fair compensation to them.

The ALRC chose the views of certain representatives of the education sector over those of authors. Its proposal to repeal the statutory licences for governments and people with disabilities do not seem to reflect the position of any stakeholder.

### Principle 2: Maintaining incentives for creation of works and other subject matter

Statutory licences guarantee availability of content for education and government services. Because of the scale of use allowed, they provide for fair compensation to content creators.

The ALRC's proposals would diminish that compensation in two ways:

- those in the education sector responsible for managing the compensation paid under statutory licences are clearly seeking to diminish it; it is illogical that they would be merely seeking to replace the current system with something broadly equivalent;
- replacing statutory licences with other arrangements will increase inefficiencies, and attendant costs, for content creators (as well as for users).

### Principle 3: Promoting fair access to and wide dissemination of content

Statutory licences allow the broadest access to content. The education and government sectors can use any content that is accessible to them in any form. They are not required to acquire it at source, purchase an original, or inquire into the legality of the source.

It is important to consider not only the content available, but the conditions attached to its use (e.g. non-infringing source, purchase of original 'master copy'), and the uses that can be made (e.g. no alterations).

Repealing the statutory licences will reduce the range of content, and uses of that content, in two respects:

- the available content, and the uses that can be made of it, will be reduced to that for which users can get a licence, or use under a 'free' exception; and
- the use of the content will depend on the user having done the necessary compliance check in time (Is it covered by a licence? Is it covered by a 'free' licence? Can I get a licence in time? Can I comply with all the conditions?)<sup>14</sup>

The proposals will reduce fair access in two respects:

- the expansion of 'free' exceptions will encourage unpaid uses of content in ways that content owners would otherwise choose to license, not necessarily for money but on terms important to them; and
- the statutory licence allows equal access to all content; repeal may encourage users to focus on one or two large providers in order to manage copyright administration.

#### **Principle 4: Providing rules that are flexible and adaptive to new technologies**

As noted earlier, the technological 'constraints' of an exception are often a proxy for an underlying principle.

The statutory licences managed by Copyright Agency are inherently 'technology-neutral': they allow any form of reproduction or communication, with any accessible content in any form.

Nearly all arguments made by the education sector's copyright administrators about 'technology-based' exceptions relate not to access but to compensation. They want a broader operation of 'free' exceptions in order to reduce the compensation payable under the statutory licence. Their concerns, however, are inflated by their misunderstandings about what is treated as 'remunerable' under the statutory licence, particularly in relation to 'technical' copies.

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<sup>14</sup> The proposal would result in increased administration to manage the different terms and conditions applying to the various licensing arrangements (direct and collective) and free exceptions.

Examples of misunderstandings include:

Misunderstanding	Fact
schools pay up to four times more in copyright fees to deliver education using digital technologies than using paper copies	<ul style="list-style-type: none"> <li>• 'technical copies' are not 'remunerable'</li> <li>• compensation to creators is based on 'consumption'</li> <li>• the value of 30 students looking at material displayed from a learning management system to an electronic whiteboard or individual tablets is similar to 30 students receiving a photocopy</li> </ul>
schools have to record technical copies in surveys of usage	<ul style="list-style-type: none"> <li>• Copyright Agency has never sought this</li> <li>• the survey design, and the processing of usage data, is agreed between Copyright Agency and Copyright Advisory Group</li> </ul>
schools pay millions of dollars to use content freely available on the Internet	<ul style="list-style-type: none"> <li>• only content used in reliance on the statutory licence is taken into account for compensation to creators</li> <li>• content available under 'open' licences like Creative Commons is excluded</li> <li>• the proportion of overall compensation relevant to internet content is 6%</li> </ul>
writing a quote from a book on an interactive whiteboard must be paid for out of education budgets	Copyright Agency has never sought payment for this, even if there was a way to measure it
equitable remuneration is determined according to how much material is available rather than how much is consumed <sup>15</sup>	<ul style="list-style-type: none"> <li>• negotiations for the flat fees that apply for agreed periods are based on estimates of consumption</li> <li>• the measurements that underpin those estimates are necessarily constrained by the available technology and administrative costs</li> <li>• measurements of material available on learning management systems and other servers are accompanied by measurements or estimates of consumption (e.g. intended class size)</li> </ul>

All of the essential features of technologies used in education today were contemplated by the government when introducing the Digital Agenda reforms in 2000. The amendments were expressly intended to allow the educational practices that have developed, aided by technological change.

The Attorney-General made the following comments about the amendments at the time they were introduced in 1999:

*The Copyright Amendment (Digital Agenda) Bill 1999 implements the most comprehensive package of reforms to Australian copyright law since the enactment of the Copyright Act 1968. The reforms will update Australia's*

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<sup>15</sup> See [6.67]

*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 ensure that copyright law continues to promote creative endeavour and, at the same time, allows reasonable access to copyright material in the digital environment.*

*The amendments provided by this bill are at the cutting edge of online copyright reform and clearly place Australia among the leaders in international developments in this area.*

They were echoed by comments from the then Minister for Communications:

*[The amendments] have been designed to provide the copyright framework to successfully take our communications, IT, R&D, education and arts sectors into the 21st century.*

*The unifying theme that connects these sectors is the production of content and its delivery to end users. Content is the key commodity of the information economy and our copyright laws regulate both its commercial exploitation and its accessibility. The government is committed to maintaining the balance between copyright owners and users so that the new economy will encourage research, innovation and the production of new material.*

...

*The extension of the exceptions for schools and universities to cover remunerated digital uses will allow online education to become a reality for a growing proportion of the community. The bill sets the framework to allow the education sector to work with copyright owners to deliver new innovative online educational services both in Australia and overseas.*

The evolution of the management of the statutory licences demonstrates that they encourage and enable the use of technological developments. For example, the statutory licence has enabled:

- the use of learning management systems to store, manage and publish content to students, and
- the development of mechanisms to broadly estimate the extent of reliance on the statutory licence for negotiations on fair compensation.

### **Principle 5: Providing rules consistent with Australia's international obligations**

The statutory licences continue to be consistent with international standards and practice.

Different mechanisms have developed for access to content by the education and government sectors and the visually impaired in various countries, based on the same standards.

While initially opposed by some content creators 30 years ago on principle, the statutory licences have evolved to enable orderly, legitimate use of content on fair terms, overseen by an independent arbiter (the Copyright Tribunal).

Australia's statutory licences have not been a source of complaint by foreign governments or content creators, and are the envy of foreign teachers.

## FLAWS IN REASONING FOR REPEAL

### Derogation from rights holders' rights

The ALRC received many submissions representing the views of various content creators and publishers whose content is used under statutory licences. None sought repeal of the statutory licences.

Statutory licences allow small transactions on a large scale. Content creators recognise that the effective outsourcing of licensing enabled by the statutory licence is the most efficient way for them to manage this type of use of their content.

The global coverage enabled by the statutory licence enables economies of scale that helps minimise transaction costs.

It also enables global monitoring of trends in content usage that is not overly intrusive for licensees.

For smaller content creators, the statutory licence effectively provides the same access to their content as that of larger providers. Australia has a large number of small to medium providers of content to the education sector, often former teachers.

The ALRC's proposals risk excluding the content produced by these small businesses from consideration if schools find they need to manage the increased administrative burden by reducing the number of licensing arrangements they need to deal with.

### Schools and universities seek repeal

The position adopted by the education sector's copyright administrators was unexpected. Not only had it not been raised with collecting societies, it is contrary to the interests of teachers seeking to focus on the quality of their teaching, unencumbered by administrative requirements and potential liabilities.

It can only be seen as a tactical position designed to reduce compensation to content creators. The protestations of the education sector's copyright administrators to the contrary are unconvincing.

The unanticipated position also means that content creators have not yet had an opportunity to address concerns that the education sector chose to first raise with the ALRC.

All the 'technological' issues raised by the education sector either are being, or can be, addressed, without repeal of the statutory licences.

The amount of compensation is, and should continue to be, a matter for the Copyright Tribunal. The current framework for the Tribunal enables a range of mechanisms to assist parties to resolve a variety of issues, including through alternative dispute resolution processes. Parties are also free to adopt other mechanisms that involve third party assistance to reach solutions.

Repeal of the other statutory licences – for government and people with disabilities – was not, on our reading, sought by anyone.

This seems to be borne out by the ALRC's citing of a single academic's view that the statutory licence for the visually impaired is 'messy', without consideration of how the provisions are actually in practice.

## Technical copying

The ALRC says the application of the statutory licences to ‘technical’ copies, which it regards as inappropriate, is ‘one of the more persuasive arguments’ for repeal of the statutory licences.

It is difficult to see how the ALRC arrived at this view if it properly understood the fundamental concept that all reproductions and communications are allowed, irrespective of the format or technology, but different types of use are valued differently and some are valued at zero. It also seems to have a limited grasp of the ways the statutory licences are actually managed and negotiated in practice, and the ways in which that management has evolved to encompass technological change.

The current system is thus more flexible and ‘future-proofed’ than the alternative proposed by the ALRC: it is underpinned not by technical issues, such as ‘technical copies’, but by the value of overall use as assessed from time to time (and overseen by an independent arbiter). The value of a use is not determined by the technology that happens to be used at any given time.

The statutory licence provides desirable ‘certainty’ for the intended beneficiaries of the licence: teachers. It enables them to select the content they regard as best for their teaching, without having to ask ‘Can I legally use this content?’.

The arrangements for fair payment are made by those with the necessary expertise (the collecting societies and the education sector copyright administrators or, in the absence of agreement, the Copyright Tribunal): these people assess the overall value of the licence, and make administrative arrangements that are manageable for the education sector as a whole.

## Determining equitable remuneration

The ALRC appears to have misunderstood how equitable remuneration is approached in practice. When introducing the statutory licences at various times, governments did contemplate payment for use arrangements, but also that there may be different payments for different types of content and uses.

The management of statutory licences has evolved in a number of ways, including to provide certainty for copyright administrators in the education sector through fixed-price agreements. This has occurred without legislative change. Arrangements for collecting data about usage, both for estimates of the overall level of consumption, and for distribution of compensation have also evolved without legislative change.

The ALRC seems to have formed the view that it is improper to determine compensation for ‘blanket’ access to content by taking into account the level of consumption of content. For example:

*Voluntary contracts for digital services appear to be more flexible and do not require such strict accounting of copies and communications.*

Not only is consumption a logical and equitable approach to setting licensing fees, it is not clear what alternative the ALRC is advocating.

The ALRC seems to think that compensation under the statutory licences is based on the content that is available to licensees rather than what they consume. This is a fundamental misunderstanding. All content ever created in the world is available to Australian teachers to copy if they have access to it. Compensation is negotiated

according to the content available, but according to what teachers choose to use, and how.

Monitoring of content stored on intranets and learning management systems is tied to estimates of the extent to which that content is used.

We invited the ALRC's researchers to visit our premises to assist them to get a better understanding, through demonstration of some of the processes and systems currently used. This did not occur, but may have helped them to better understand the practicalities of rights management, including ways in which processes and systems are constantly evolving, with input from the education sector's copyright administrators, with a view to increased efficiencies without unacceptable compromise to accuracy.

### Impediment to educational use of new technologies

The ALRC appears to have accepted statements made by the education sector's copyright administrators that the statutory licence has impeded the sector's use of new technologies.

It is not copyright that is impeding the use of these services, given the breadth of uses that the statutory licence allows. The issue, as with almost all issues raised by the education sector, is one of price. It is the same 'impediment' as the cost of purchasing the equipment and services necessary for adoption of technological advances. The cost of content is minuscule compared to those costs.

As noted previously, non-consumptive uses are not taken into account in estimating overall usage for negotiating compensation.

The issue then is whether some forms of consumption of content that are currently taken into account in the estimates of overall consumption should be excluded. These are forms of consumption done in reliance on the statutory licence rather than direct licences (at the school's election). There are many forms of usage that are currently excluded from 'volume estimates' for a variety of reasons. These are documented in processing protocols agreed between Copyright Agency and education sector copyright administrators.

### Complexity

The ALRC's proposals would increase, not decrease, complexity for all concerned: teachers, content creators, copyright administrators in the education sector, and the collecting societies. Complexity leads to increased cost and reduced access to content.

We acknowledge that perceptions of complexity need to be addressed. There are a range of ways of doing this, including through discussions between collecting societies and copyright administrators in the education sector.

We see the primary focus as reducing complexity for teachers, and the discussions between the collecting societies and the education sector copyright administrators should be directed to that.

While only a small proportion of teachers participate in surveys, options for reducing complexity for them are a matter of ongoing joint exploration by collecting societies and the education sector's copyright administrators.

### Specific examples of 'complexity'

The ALRC cites some examples of 'complexity' provided by the education sector's copyright administrators. It is worth noting that none of these is arbitrarily complex. Each is a deliberate 'boundary' set by the legislature. There are options, however, for minimising any administrative burden associated with them. These types of issues are the subject of ongoing discussions between Copyright Agency and education sector copyright administrators, in the context of negotiations on compensation and usage monitoring arrangements.

The provisions on 'small portions', referred to at [6.80] are free exceptions, not part of the statutory licence (though they appear in the same part of the Act). They deliberately delineate the extent of 'free' content that can be used outside the statutory licence. They are factored in to licence negotiations through an agreed overall discount. This is largely because the administrative costs of assessing each instance on a case-by-case basis is too high.

### Licensing fees

In [6.83] the ALRC appears to have made a logical leap by comparing the licence fees paid under collective licensing arrangements in various countries to conclude that the variations are directly referable to the extent of 'free' exceptions. There are many factors that contribute to the ways that content is acquired and used for education in various countries, including differences in the ways in which resources are purchased and different approaches to providing diversity of content to students.

It is also not clear how well the ALRC has understood the approach taken by the Copyright Tribunal to assessing equitable remuneration. We encourage the ALRC to review the Tribunal determinations and consult with current and former members of the Tribunal.

The following statement, at [6.87], is welcome, but difficult to reconcile with the proposals and other statements in the Discussion Paper:

*It is unclear whether the prices paid by Australian educational institutions are in fact excessive. It may well be that educational institutions outside Australia should be paying writers, publishers and other rights holders more for using their material, rather than Australian institutions paying less. The ALRC would prefer not to ground reform in this area by referring to the comparative cost of licensing these uses.*

The ALRC has clearly taken a view on the amount of compensation, and that it should be forcibly reduced through legislative change.

### Licensing vs exceptions

At [6.85] the ALRC recommends repeal of exceptions, such as section 200AB, that do not apply to uses that are licensed. The recommendation is based on a view about pricing, although it appears to be based on an assumption that every licensing arrangement involves payment.

Giving priority to licensing solutions over exceptions enables more orderly and efficient use of content, particularly in an online environment that involves the different domestic laws of many countries. Licensing solutions enable the development of terms and conditions that can be adapted to changes in technology and business

models. The terms and conditions need not involve payment, but may include other conditions that are reasonable but absent from exceptions (such as attribution).

Such arrangements are subject to regulatory oversight, including the Copyright Tribunal, the Australian Consumer and Competition Commission, and consumer protection laws.

### Availability of direct licensing

At [6.88] the ALRC refers to the late submission from the NSW government.

There is nothing to stop any licensee making direct arrangements with content creators. They are not required to rely on the statutory licences, but can if they choose. They do choose to rely on them, for uses of content that it is not efficient for them to 'clear' directly.

It is also true that governments are in a different position to the private sector in relation to legal compliance. They must demonstrate best practice, and avoid risks (e.g. of infringing copyright) that some in the private sector may be prepared to take.

The statutory licence doesn't cover uses that are allowed under direct licensing arrangements. The issue raised by the NSW government relates to how best to measure the extent of reliance on the statutory licence, and we have been exploring a range of options with various governments.

We appreciate that there are perceptions about the extent of usage in reliance on statutory licences, often based on anecdote and personal experience, but note that independent research indicates that licensees commonly underestimate the extent of their usage.

### Anti-competitive

The ALRC doubts that repealing the statutory licences would result in new rights management organisations competing with the existing ones, and queries whether that would deliver efficiencies to either licensees or rightsholders in any event.

It refers at some length to the submission by the ACCC, but says nothing about the role of the Copyright Tribunal.

Neither does it say anything about the possibility that, if the statutory licences were repealed, the rights management organisations that are 'declared' to manage statutory licences may require authorisation from the ACCC.

### Reporting on operations

Copyright Agency and Screenrights are required to provide a detailed annual report to the Attorney General, which is tabled in Parliament. This enables the Attorney General to annually review the declaration of these organisations, and scrutiny by Parliament.

These reporting requirements would presumably not be replicated if the ALRC's proposals were to be implemented.

### LICENSING USES COVERED BY OTHER EXCEPTIONS

The ALRC has made it clear that, in its view, at least some uses allowed under licensing arrangements would be allowed under its proposed fair use exception, and

thus not subject to the terms and conditions of the licensing arrangements. As noted above, those terms and conditions may or may not involve payment.

The ALRC does not say which licensed uses could be made under fair use, and seems to have taken the view that this matter would need to be resolved by litigation. It says that the 'public interest' is an important consideration, but does not say what it understands that to mean.

It is not clear whether this view only applies to licensing arrangements that involve payment, or whether it applies to any licensing arrangements.

At [6.101] the ALRC says:

*If fair use is enacted, then licences should be negotiated in the context of which uses are fair. If the parties agree, or a court determines, that a particular use is fair, then educational institutions and governments should not be required to buy a licence for that particular use.*

It is not clear how this would work in practice. The requirement to consider 'the effect of the use upon the potential market for, or value of, the copyright material' would appear to require consideration of licensing arrangements for the use. If so, the ALRC's statement appears to involve an irresolvable circularity: 'first consider whether the use is fair having regard to whether the use is available under licence', without any indication of when a licensed use would be covered by 'fair use'.

One could also read the statement using 'fair' in the everyday sense, rather than the legal meaning it has in the context of the 'fair use' exception. That would better reflect the way licences are negotiated in practice, where uses that are de minimus or do not involve consumption are excluded from consideration for pricing.

At [6.97] the ALRC says that the education and government sectors should not pay for uses that the commercial sector doesn't pay for. They may currently pay for uses that are not currently paid for by some in the private sector, but not because of any regulatory discrimination against them. Governments necessarily take a different approach to risk than some in the private sector, and are not able to risk illegal activity (such as copyright infringement) in the same way.

This raises issues about attitudes to the value of content and compliance in the private sector, and our experience in licensing the corporate sector indicates that attitudes to content, risk and compliance vary.

## **COSTS ASSOCIATED WITH UNCERTAINTY**

We note the unhappiness of some in the education sector with the perceived 'uncertainty' associated with the application of section 200AB. We also note the ALRC's attempt to distinguish its proposed fair use exception, with its attendant uncertainty, from section 200AB, but it is unconvincing. The education sector's copyright administrators say they are prepared to embrace the uncertainty, but it is not clear the extent to which they have discussed this with those who would be affected in practice.

## **THE CANADIAN EXPERIENCE**

There have recently been changes to the copyright system in Canada that affect use of copyright content in the education sector. The consequences of those changes are an indication of what may occur in Australia.

There are different interpretations of how the new law applies. Some educational institutions have elected to renew their licensing arrangements, but on a different basis to those in place previously. Others have elected to pay no licensing fees and require their teachers to become 'copyright literate'. Content creators have commenced a series of court cases to establish how the new law should be interpreted.

The environment is one of great uncertainty, potential liability, and reduced access to content in the education sector.

### DEVELOPMENTS IN THE UK AND THE US

The UK has recently amended its copyright law to allow for extended collective licensing, to assist efficient licensing solutions through collecting societies.

Similarly, in the US, the Register of Copyrights has signalled approval for extended collective licensing to be considered for uses such as education, as part of the US review of its copyright law.<sup>16</sup>

These developments indicate international developments that run counter to the ALRC's proposals.

## CHAPTER 11: LIBRARIES, ARCHIVES AND DIGITISATION

### SUMMARY

- some aspects of the library provisions interfere with commercial licensing arrangements, and so should be limited;
- the main mass digitisation and web harvesting projects are being undertaken by libraries that can rely on the government statutory licence;
- an extended collective licensing arrangement would provide a solution in other cases; and
- the reasons for repeal of section 200AB are unconvincing, as is the case for a fair use exception.

### PUBLIC AND OTHER LIBRARIES

Libraries can be broadly categorised into public and private. Some provisions, such as those allowing preservation, apply to all libraries. The principal provisions relating to external activities – section 49 (supply to clients for research) and section 50 (supply to other libraries for their collections or for their clients' research) – apply to:

- public libraries; and
- private libraries whose collections are available through public libraries via the inter-library loan system.<sup>17</sup>

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<sup>16</sup> See the Register's testimony to Congress in March 2013 (<http://judiciary.house.gov/hearings/113th/03202013/Pallante%20032013.pdf>), and her speech to Columbia University entitled The Next Great Copyright Act ([http://www.law.columbia.edu/null/download?&exclusive=filemgr.download&file\\_id=612486](http://www.law.columbia.edu/null/download?&exclusive=filemgr.download&file_id=612486)).

<sup>17</sup> This requirement was introduced in 2006 with the rationale that private libraries that make their contents available to the public via public libraries should be able to supply their clients with material from public collections.

The public interest issues in relation to each category are different, and should be considered separately.

### INTERFERENCE WITH LICENSING SOLUTIONS

The library provisions allow the supply of material to clients who can obtain the material under a licensing solution, including clients in the commercial sector.<sup>18</sup>

The provisions should therefore be limited in two respects:

- they should only allow the provision of material for private, non-commercial research; and
- they should not allow the supply of articles and portions of works to a person who can obtain the material under a reasonable licensing solution.

The ALRC's Proposal 11–7, which we support, goes some way to addressing these concerns, but not far enough.

### MASS DIGITISATION

The main barrier to mass digitisation is the cost associated with digitisation, not copyright. The libraries that are doing mass digitisation projects are mainly Commonwealth and State institutions, which can rely on the statutory licence for government services. It is not clear that a new copyright exception is necessary.

### HARVESTING OF WEB CONTENT

The harvesting of web content by the National Library as part of its Pandora project would seem to be covered by the government statutory licence.

### EXTENDED COLLECTIVE LICENSING IN OTHER CASES

An extended collective licensing framework would enable a solution for projects that are not undertaken for the services of a government. Extended collective licensing has recently been introduced in the UK.<sup>19</sup>

### SECTION 200AB

The ALRC has sought to make a distinction between the 'uncertainty' of section 200AB, of which its intended beneficiaries complain, and the ALRC's fair use proposal. It is completely unconvincing. In terms of uncertainty, the cultural sector would be at least as unhappy with fair use as they are with section 200AB. Each of the following factors identified by the ALRC as inhibiting reliance on section 200AB would apply to fair use:

- the uncertainty of the language;
- lack of case law and practice;
- lack of legal resources to interpret the provision; and
- the risk averse nature of cultural institutions.<sup>20</sup>

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<sup>18</sup> We addressed this issue in our response to the Issues Paper, including a reference to a study for the Centre for Copyright Studies by Sam Ricketson entitled *The three-step test, deemed quantities, libraries and closed exceptions* (December 2002), available at [www.copyright.org.au/news-and-policy/#research](http://www.copyright.org.au/news-and-policy/#research)

<sup>19</sup> See further the UK Intellectual Property Office (IPO) Fact Sheet *Orphan Works Licensing Scheme and Extended Collective Licensing*, available at [www.ipo.gov.uk/orphanworks-licensing.pdf](http://www.ipo.gov.uk/orphanworks-licensing.pdf)

The risks for the cultural sector associated with the fair use proposal are in fact higher, as it is opposed by content creators.

The ALRC says that it is 'clear that the provision is not working as intended'.<sup>21</sup> It is true that section 200AB is not as broad an exception as some had sought from the Government, but it does seem to be operating as the Government intended. The Explanatory Memorandum accompanying the introduction of section 200B says the following about its four criteria:

- the 'special case' criterion is 'intended to ensure that the use is narrow in a quantitative as well as qualitative sense';
- the purpose criterion is intended to 'ensure that the use is certain and clearly elaborated';
- the 'no conflict with normal exploitation' criterion requires consideration of 'whether the use closes off ways that copyright holders normally extract economic value from copyright in the Australian market or enters into economic competition with those ways, thereby depriving copyright holders of significant or tangible commercial gains. Forms of exploitation which, with a certain degree of likelihood, could acquire considerable economic or practical importance may also be considered'; and
- the 'no unreasonable prejudice to the legitimate interests of the owner or licensee' criterion requires 'an assessment of the legitimate economic and non-economic interests of the copyright owner.

The beneficiaries of section 200AB have sought fair use not because section 200AB is not working as intended, but because they want the broader exception the Government rejected in 2006.

As noted in our submission on the Issues Paper, there is willingness on the part of content creators to develop agreed guidelines with the beneficiaries of section 200AB to encourage more confident reliance on it.

## CHAPTER 12: ORPHAN WORKS

We reiterate the proposed process we set out in our response to the Issues Paper for orphan works used on a transactional basis, rather than as part of a mass digitisation project:

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:

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<sup>20</sup> At [11.28]

<sup>21</sup> At [11.28]

- 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.

This proposal was intended to address the concerns of photographers and other creators, including in the UK and the US in responses to proposed changes for orphan works. Those concerns are not addressed by the ALRC's proposals 12-1, 12-2 and 12-3.

## CHAPTER 14: GOVERNMENT USE

### SUMMARY

- We oppose the proposal to repeal the statutory licence for governments;
- We also oppose the introduction of an exception for 'public administration';
- Both of the ALRC's proposals appear to be based on a number of fundamental misunderstandings;
- These include the current position regarding incoming correspondence, FOI requests, local government licences, and government use of internet content;
- Repeal of the statutory licence for governments was not sought by anyone who made a submission on the Issues Paper;
- Under the current arrangements, government employees can make any use for government purposes;
- Under the ALRC's proposal, government employees will first need to determine whether or not the use is allowed without permission under a free exception, a direct licence or a collective licence, and, if it is, what the conditions and requirements are – and then, if it's not covered by any of these, obtain a licence and comply with the conditions and requirements;
- The ALRC's proposal appears to be based on its view about the compensation paid by governments;
- In the absence of agreement, compensation is currently determined by the Copyright Tribunal based on the value of the use;
- Many uses done in reliance on the statutory licence are agreed to be zero-rated, such as administrative uses of survey plans noted in our previous submissions;
- The ALRC has not explained why there is a case for legislatively mandating a zero rate rather than leaving this for agreement or determination by the Tribunal; and
- There are some ways in which the operation of the statutory licence for government could be improved, which we set out in our response to the Discussion Paper.

We have commented below on some of the specific issues raised in the report.

## CURRENT ARRANGEMENTS

All our agreements with governments are based on a flat per-employee rate for all copying and communicating done in reliance on the statutory licence. None require payment on a per-use basis.

Partly because of this, not all copies are 'paid for'. Negotiations to set a rate are based on estimates of the overall usage in reliance on the licence.

Some uses are agreed to be zero-rated. An example is administrative uses of survey plans.

## FAIR DEALING

Fair dealing exceptions are clearly available to government employees, provided the use is both for a fair dealing purpose and fair. A use made for government purposes is covered by the statutory licence, not a fair dealing provision.

We note the comments of the Full Federal Court in *Haines v Copyright Agency Limited* on the relationship between section 40 (fair dealing for research or study) and the educational statutory licence:

*... the essential ingredient of sec. 40 is fair dealing with a work for the purpose of research or study. What is fair dealing is not fixed by reference to the number of copies, but is to be determined by reference to the facts of each case. An answer to the question must take into account the existence and effect of [the educational statutory licence]. Moreover it is important to the proper working of the sections that a distinction be recognised between an institution making copies for teaching purposes and the activities of individuals concerned with research or study.<sup>22</sup>*

The Copyright Law Review Committee (CLRC), in its report *Simplification of the Copyright Act: Part 1*, 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.*

## USAGE DATA FROM GOVERNMENTS

We have received limited data from governments, despite canvassing a range of options and methods to obtain data. This means that a lot of commentary about usage is speculative and anecdotal.

The most recent Commonwealth survey was in 2007, and recorded only photocopying (via record forms near photocopiers). The survey distinguished photocopying of external published material (such as books and journals) 'for work purposes' from other material (including internal documents, Commonwealth publications, newspapers) and from personal copying.

The most recent survey of States and Territories was in 2002.

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<sup>22</sup> (1982) 42 ALR 549

## CHANGING PATTERNS OF GOVERNMENT USE

There is no copyright impediment to government use of material from any source or in any format: governments are entitled to do anything for government purposes, including with content that is commercially available.

The issue canvassed here is not the entitlement to use content, which is extraordinarily broad, but what factors are taken into account in assessing fair compensation. As noted elsewhere, compensation is based on value, as determined by the Copyright Tribunal if not agreed. It has been demonstrated that it is perfectly possible, under the current regime, to agree that a use is covered by the statutory licence and zero-rated.

The ALRC has taken the view that there are uses that have value, and would be taken into account for negotiations on the per-employee rate under the current system, that should instead be excluded from fair compensation.

The justification for removing an opportunity for compensation needs to be clearly articulated and it isn't.

## GOVERNMENT LICENSING COMPARED TO CORPORATE LICENSING

The ALRC seems to be under the impression that governments are at a disadvantage compared to the private sector.

Governments are in a privileged position in two respects: they are favoured in the provisions on copyright ownership, and they can use any content without permission for government purposes.

The private sector does not, of course, have the option of choosing to rely on the statutory licence. Governments, on the other hand, could choose to be covered by a voluntary licence similar to those applying to corporations.

It must be acknowledged, though, that governments operate differently to the private sector, in part because they must demonstrate best practice and cannot engage in the levels of risk that are open to the private sector.

Having said that, defences to infringement apart from the statutory licence are available to governments depending on the circumstances and the purpose of the use, including fair dealing defences and implied licence.

## FREEDOM OF INFORMATION (FOI REQUESTS)

We are not seeking payment from State and Territory governments for material provided in response to an FOI request. The ALRC appears to have misunderstood our earlier submissions and position.

## LOCAL GOVERNMENT

Copyright Agency offers a voluntary licence to local governments, but uptake has been low: about 15 out of more than 500 local councils. The licence offer does not seek payment for material supplied in response to FOI requests.

The licence offering is, however, constrained by the mandate from our members, and thus cannot be as broad as the statutory licence. Voluntary licences also expose Copyright Agency to a level of risk in order to make the licences attractive to

licensees. We provide certain indemnities to licensees, and risk those indemnities being called upon. They have, in fact, been called upon for our corporate licences.

### MATERIAL OPEN TO PUBLIC INSPECTION

At [14.48] the Discussion Paper includes the following statement:

*Ordinarily, the owner of copyright in the plan or report has been remunerated by the client, and is not motivated by remuneration for government use.*

This issue was specifically addressed by the High Court in *Copyright Agency Limited v State of New South Wales*:

*... 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.*<sup>23</sup>

It was also addressed in the many submissions from surveyors and their professional organisations, to which the ALRC appears to have given scant regard.

The statement is also an indication of the ALRC's very narrow, transactional, 'cause and effect' view of the copyright. The objectives of the copyright system are reward for the benefits to the community from creative work, and an environment that encourages creative endeavour.

### INCOMING CORRESPONDENCE

We do not know why the Victorian government thinks that Copyright Agency regards incoming correspondence as remunerable under the statutory licence. We don't. Unpublished material is specifically excluded from surveys of usage. We do, however, think that uses of the correspondence are allowed under the statutory licence, so that a new exception is not necessary.

### 'FREELY AVAILABLE' CONTENT

At [14.52] the ALRC appears to confuse express and implied licences. Creative Commons licences are express licences: they set out what people can and can't do with the content they apply to. Implied licences are a different matter, and were canvassed by the High Court in *Copyright Agency v NSW*.

Anyone, including a government, can rely on an express licence such as a Creative Commons licence, if it applies to their use and they meet any conditions (such as attribution). A government does not need to rely on the statutory licence if its use is covered by an express licence.

If the terms of use for content restrict use to 'personal use', then there is neither an express nor an implied licence to governments. They could, however, rely on the statutory licence, or they could contact the rightsholder for permission.

For the education sector, any use made in reliance on an open licence such as Creative Commons, or a direct licensing arrangement, is treated as outside the statutory licence. Copyright Agency has agreed protocols with the schools sector to identify and exclude these uses.

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<sup>23</sup> [2008] HCA 35 (6 August 2008) at [88]

Copyright Agency has not received usage data from governments since 2007 (for the Commonwealth) and 2002 (for States and Territories). In the event that we receive data from governments about usage of content from the internet, mechanisms for estimating the proportion of that content that was licensed under 'open' terms such as Creative Commons could be explored.

At [14.55], the ALRC says that governments should be 'in the same situation as individuals and businesses'. It is not clear what it means by this, but terms of use commonly distinguish personal from other uses, and 'commercial' from 'non-commercial' uses. Content creators thus intend different arrangements for individuals, not-for-profit organisations and businesses. In some cases, they specify 'educational use', which may mean a licence applies to schools but not to governments.

At [14.55] the ALRC also says that governments should be able to 'freely use' material on a website where the owner has 'no commercial purpose'. It is not clear how the ALRC would regard the following scenarios:

- Government use of photographs from a photographer's website, displayed on the website to advertise the photographer's professional services;
- A journal article from a journal published by a not-for-profit professional organisation in order to subsidise its services for members;
- An information sheet produced by a not-for-profit service organisation that is dependent on a mixture of self-generated revenue and government support (perhaps from a different government); or
- Content that a person has displayed on a website to attract visitors to the site (e.g. to encourage purchase of other products or services, or to generate advertising revenue).

## GOVERNMENT USE OF GOVERNMENT MATERIAL

The statutory licences are not intended to provide compensation to those who do not want it. Most content creators do, but some don't. In particular, most governments have adopted policies to allow free use of government materials. Our systems and processes allow for this.

For example, on instructions from the Commonwealth Attorney General's Department, we exclude content from Commonwealth government departments and agencies unless the agency instructs us to include it. It can be included for some licences and excluded for others.

To be efficient, collective licences must be administered so that, overall, they are operating efficiently and fairly for both licensees and content creators. There will necessarily be examples and anecdotes that look odd in isolation, but are not representative of the system as a whole.

As noted in our submission on the Issues Paper, the proportion of content used in schools that is government content is very small: less than 1% is from government-related agencies, authorities and local government.

## IMPROVEMENTS TO THE STATUTORY LICENCE

In our response to the Issues Paper, we addressed a number of areas for improvement of the operation of the government statutory licence. These relate to:

- extending section 183A to communications; and
- government obligations to provide information about usage.

## ALTERNATIVES WAYS OF ADDRESSING ISSUES RAISED

### NON-LEGISLATIVE SOLUTIONS

We understand that the ALRC has been presented with a range of views based on different perceptions about the practical effects of the current copyright system, and the relative impacts of those effects. The submissions received by the ALRC are driven by a range of motivations and strategies, and influenced in some cases by ignorance of alternative solutions, or an unwillingness to explore alternatives. This is exacerbated by this review exercise being done by the Law Reform Commission, which encourages a focus on law reform as the solution. One could contrast the Hargreaves inquiry in the UK, which looked more broadly at solutions; one of its key recommendations, the digital copyright exchange, was a non-legislative, industry-led solution.

We therefore think that the ALRC has given insufficient attention to non-legislative solutions. It may even regard consideration of such solutions as outside its terms of reference.

Related to this, we think that the ALRC has not well-understood the significant developments that have occurred within the current regulatory framework. This limits its capacity to acknowledge the scope for further developments.

Some of these include:

- negotiation of fixed-fee, fixed term agreements with licensees to provide them with budgeting 'certainty';
- arrangements for 'automated data capture' to reduce administrative burden for licensees; and
- protocols agreed between Copyright Agency and licensees for distinguishing uses made in reliance on the statutory licences from other licences (such as 'open' licences).

As noted above, there are some issues raised in submissions that have not previously been raised with us. In particular, non-one from the education sector had previously said that they wanted repeal of the statutory licences.

Having now been notified of this desire, we could develop voluntary licensing arrangements for the education sector to the extent of the authority from our members. It is not clear that these would result in cost savings for the education sector given the necessary attendant compliance costs for the sector, but we accept that that is a matter for them.

Educational institutions that chose voluntary over statutory licensing arrangements would need to change their practices in a number of ways, and so would their teachers. These would be likely to include:

- some uses of content no longer available because they are neither covered by a licence nor by a free exception;

- increased compliance requirements for both the institution's administrators and teachers, including:
  - checking whether a use is allowed under a licence applicable to the institution;
  - checking whether a use is allowed under a 'free' exception;
  - meeting any terms and conditions associated with either; and
  - meeting the institution's internal administration requirements for risk minimisation.
- closer monitoring of all institutions (not just those participating in surveys);
- purchase of 'master copies' for copying (as is the case under the AMCOS print music licence for schools)

### GOVERNMENT GUIDELINES FOR 'DECLARED' COLLECTING SOCIETIES

In the late 1980s, the Attorney General's Department developed guidelines for the collecting societies appointed by the Attorney General to manage the statutory licences in Parts VA and VB. These reflected the government's exceptions of the declared societies as to how they would implement the policy underlying the statutory licences. In one sense, they form the conditions of declaration, which can be reviewed at any time. The collecting societies regard them as such in their practices and in their reporting to government.

The guidelines have not been reviewed since they were introduced. A development of the guidelines may be a way of clarifying the Attorney General's intentions for implementation of the policy underlying the statutory licences.

### GUIDELINES FOR THE GOVERNMENT STATUTORY LICENCES

The Attorney General's guidelines only apply to the educational statutory licences, and there isn't an equivalent for the government sector, but we think such guidelines could be useful. They may require involvement from both the Attorney General's Department and the Copyright Tribunal, given that the declaration of collecting societies is by the Tribunal not the Attorney General.

### CULTURAL SECTOR RELIANCE ON STATUTORY LICENCE

Most of the issues raised by the cultural sector can be addressed within the existing framework. In particular, the government statutory licence would seem to allow the mass digitisation projects that many cultural institutions would like to undertake in the event that they get the funds for the digitisation.

Cultural institutions that are not the Crown may nevertheless rely on the statutory licence on behalf of the Crown for government purposes.

Cultural institutions appear reluctant to explore how the statutory licence may resolve their issues because of concerns about cost. It is likely, however, that they do not sufficiently appreciate the various options that might be available, and how to assess the costs of alternatives.

We think that the guidelines on the government statutory licence proposed above could include specific provisions on the operation of the statutory licence in the cultural sector.

## INDUSTRY GUIDELINES ON APPLICATION OF SECTION 200AB

While we are wary about the scope for codes of practice in some areas, particularly given the failure to reach an agreed code for management of unauthorised peer-to-peer filesharing, we do think that there is scope for industry guidelines on the operation of section 200AB that would increase its usefulness for the cultural sector.

## RESOLUTION OF DISPUTES

Most issues are resolved through negotiation, as indicated by the many agreements that have been entered into over the years with copyright administrators in the education and the government sectors. These agreements include both the multi-licensee agreements negotiated with the sector representatives (e.g. CAG Schools, CAG TAFE, Universities Australia and the Commonwealth Attorney General's Department) as well as with a range of individual licensees (more than 1,000 in the education, including pre-schools, schools and colleges).

Disputes on significant issues can be resolved through the Copyright Tribunal if not resolvable through litigation. This can be expensive, but is proportionate to the licence fees at stake, and the determinations underpin negotiations for many years to come.

Alternative methods of dispute resolution are available (such as mediation and arbitration), including through the Tribunal process, but have probably not been well explored to date, and should be investigated for alternative options for efficient resolution of disputes.

The least efficient dispute resolution mechanism is legislative change. It is protracted, expensive and uncertain.

## BETTER REPORTING AND TRANSPARENCY

Many of the issues put to the ALRC, and the ALRC's responses to them, arise from misunderstandings, or inadequate understanding, of the ways in which the copyright system operates in practice. Some of those relate to the operations of rights management organisations such as Copyright Agency.

We acknowledge that we need to explain better what Copyright Agency does, including how that relates to our appointments from the government to manage various statutory schemes, and the authority from our members.

A large proportion of the licence fees we collect and distribute is from the public sector, and a proper account of how those licence fees are negotiated, collected and distributed is important.

We provide detailed annual reports to the Attorney General and to the Minister for the Arts for tabling in Parliament, which are available from our website. For future reporting, we will better distinguish the collection and distribution of licence fees under statutory and voluntary licence fees respectively, and better distinguish licence fees from the public and private sectors respectively.

In addition to the formal reporting required by the legislation and in connection with our government appointments, we accept that we need to better communicate how rights management organisations work to different classes of stakeholders in ways that are effective for them and address the key issues of concern for them.

## CONCLUSION

The ALRC has formulated the proposals in its Discussion Paper based on some fundamental misunderstandings.

We look forward to engaging further with ALRC in reviewing its proposals in the light of the further submissions it has received.

## APPENDIX A: COMPARISON BETWEEN STATUTORY AND VOLUNTARY LICENCES

The following table summarises the main differences between statutory and voluntary licensing arrangements.

Issue	Statutory	Voluntary
Available content	All text and images: <ul style="list-style-type: none"> <li>from any source</li> <li>print or digital</li> <li>local or foreign</li> </ul>	As authorised: <ul style="list-style-type: none"> <li>by members</li> <li>by foreign affiliates</li> </ul>
Uses	All forms of reproduction and communication for educational purposes	As authorised: <ul style="list-style-type: none"> <li>by members</li> <li>by foreign affiliates</li> </ul>
Limitations	For certain works available for purchase: only a 'reasonable portion' can be used <sup>24</sup>	Common limitations include: <ul style="list-style-type: none"> <li>only one copy for teacher, and one for each student;</li> <li>no changes or additions<sup>25</sup></li> </ul>
Exclusions	None	In accordance with the authority from rightsholders. <sup>26</sup> Common exclusions are: <ul style="list-style-type: none"> <li>'born digital' content (e.g. from a CD-ROM or the Internet);</li> <li>standalone artworks;</li> <li>maps, charts, plans;</li> <li>workbooks, worksheets;</li> <li>business publications such as Business Review Weekly, Australian Financial Review and Harvard Business Review;</li> <li>works expressly excluded from RMO licence.</li> </ul>
Conditions	<ul style="list-style-type: none"> <li>prescribed notice on communications</li> </ul>	Conditions under voluntary licences commonly include: <ul style="list-style-type: none"> <li>'marking' copies as made under the licence<sup>27</sup></li> <li>acknowledgement of source on any copies</li> <li>copying from an 'original' rather than a copy</li> <li>copying from a non-infringing</li> </ul>

<sup>24</sup> [www.copyright.com.au/get-information/educational-use-of-content/content-teachers-can-use](http://www.copyright.com.au/get-information/educational-use-of-content/content-teachers-can-use)

<sup>25</sup> See for example the licence conditions under the New Zealand licence:

<http://www.copyright.co.nz/FAQs/1187> (Question 11).

<sup>26</sup> See for example: exclusions from Copyright Agency's voluntary commercial licences at [www.copyright.com.au/licences/excluded-works](http://www.copyright.com.au/licences/excluded-works); exclusions from Copyright Licensing Agency's licences at [www.cla.co.uk/licences/excluded\\_works/excluded\\_categories\\_works](http://www.cla.co.uk/licences/excluded_works/excluded_categories_works); exclusions from Access Copyright's licences at [www.accesscopyright.ca/exclusions-list](http://www.accesscopyright.ca/exclusions-list); and limitations in Copyright Licensing New Zealand's licences at <http://www.copyright.co.nz/FAQs/1187>.

<sup>27</sup> See, for example, the requirement under the New Zealand licence:

<http://www.copyright.co.nz/FAQs/1187> (Question 9)

		<p>source</p> <ul style="list-style-type: none"> <li>• permission to copy entire out-of-print work</li> </ul>
User administration	<ul style="list-style-type: none"> <li>• participation in surveys of use</li> <li>• 45 schools each term record photocopying</li> <li>• 100 schools a year record digital use for a term</li> </ul>	<ul style="list-style-type: none"> <li>• Check if use allowed under direct licence, collective licence or free exception</li> <li>• Comply with conditions (see above)</li> <li>• Record usage (could apply to all users, not just those in 'sampled' institutions)</li> <li>• Find alternative content if content not covered</li> </ul>
Acquisition of repertoire	None	<ul style="list-style-type: none"> <li>• acquisition and ongoing management of authority from content creators in Australia and overseas</li> <li>• management and notification of exclusions from the repertoire</li> <li>• risk assessment for extent of any indemnity that can be offered</li> </ul>
Rights Management Organisation risk	None	<p>Voluntary licences usually include an indemnity from the RMO for certain uses made outside the RMO's mandate, to make them attractive to licensees. The indemnities are called upon from time to time.</p>

## APPENDIX B: MOOCS: A CASE STUDY IN THE ADAPTABILITY OF THE STATUTORY LICENCE

A number of Australian universities are developing Massive Open Online Courses (MOOCs), following their development by a number of US universities.

MOOCs are online courses available to anyone upon registration. Participation is usually free, but the course provider may charge a fee for assessment. The business models are still being developed, including through the introduction of fee paying courses.<sup>28</sup>

The delivery of content through MOOCS is facilitated and enabled by the educational statutory licence.<sup>29</sup> The determination of the compensation payable would, of course, be affected by the particular features of MOOCS compared to other education services. These include the scale of participation and the high 'churn' of participants.

We note that the extent to which the delivery of content through MOOCs in the US is allowed by the fair use exception is a matter of debate there.<sup>30</sup>

In any event, the policy in Australia should be influenced by the fact that universities are large, complex, commercial operations, and that their development of MOOCs is tied to their strategies to attract students and funding.

The delivery of content via MOOCs to people outside Australia cannot, of course, be covered by the educational statutory licence. But nor can the US fair use exception assist with delivery of content outside the US. It could, however, be facilitated in Australia through arrangements with foreign rights management organisations brokered by Copyright Agency.

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<sup>28</sup> See for example The attack of the MOOCs, The Economist, 20 July 2013, <http://www.economist.com/news/business/21582001-army-new-online-courses-scaring-wits-out-traditional-universities-can-they?fsrc=scn/li/cp/pe/theattackofthemoocs>

<sup>29</sup> Copyright issues associated with MOOCs are raised in the Universities Australia (UA) response to the Issues Paper at 3.3. It is not clear whether UA thinks the statutory licence does not apply to MOOCs, or whether it thinks it does apply but that delivery of content via MOOCs should be covered by fair use instead because they think universities should not have to compensate the content creators at all. We note that some in the university sector seem to think the statutory licence does not apply, but we are not sure of the basis of their position: see Charis Palmer, *Universities seek copyright law reform to enable MOOCs*, The Conversation, 10 January 2013, <http://theconversation.com/universities-seek-copyright-law-reform-to-enable-moocs-11524>.

For a different perspective, see Dilan Thampapillai, *Legal learning: how do MOOCs and copyright work?*, The Conversation, 28 February 2013 <http://theconversation.com/legal-learning-how-do-moocs-and-copyright-work-11873>

<sup>30</sup> See for example *MOOCs, Copyright and the Library*, <http://blogs.cornell.edu/dsps/2013/06/19/moocs-copyright-and-the-library>.