8. Statutory Licences

Contents

Summary

8.1 Statutory licences allow for certain uses of copyright material, without the permission of the rights holder, subject to the payment of reasonable remuneration. They are a type of compulsory licence. Where the licence applies, rights holders cannot choose not to license their material.

8.2 The statutory licences in pts VA, VB and VII div 2 of the *Copyright Act* were criticised by educational institutions and governments during this Inquiry. There were strong calls for the licences to be repealed. However, the ALRC has concluded that there is, at least for now, a continued role for these statutory licences.

8.3 Retaining the statutory licences will ensure educational institutions, institutions assisting people with disability, and governments are not inhibited from performing their important functions. This may also benefit rights holders, who strongly opposed their repeal, despite the fact that in theory the statutory licences detract from their rights.

8.4 Further, many of the criticisms of the statutory licences seem better directed at the scope of unremunerated exceptions. The enactment of fair use and new exceptions for government use should address many of the criticisms of the statutory licences. If new exceptions such as these are not enacted, then the case for repealing the statutory licences becomes considerably stronger.

8.5 The *Copyright Act* should be clarified to ensure the existence of the statutory licences does not imply that educational institutions, institutions assisting people with disability and governments cannot rely on unremunerated exceptions, including fair use.

8.6 The ALRC also recommends other reforms of the statutory licences. The licences were not intended to be compulsory for licensees wishing to use copyright material. This should be clarified in the *Copyright Act*. The ALRC also concludes that the statutory licences should be made less prescriptive.[1]

What is a statutory licence?

8.7 Compulsory licences grant broad rights to use copyright material 'subject to the payment of a fixed royalty and the fulfilment of certain other conditions'.[2] Rights holders cannot opt out of the statutory licence. Professors Ricketson and Creswell write that compulsory or statutory licences represent 'a form of "forced taking" or compulsory acquisition from the copyright owner'.[3]

8.8 A leading UK work on copyright law identifies seven factors which have seemed to influence when the UK legislature has favoured non-voluntary licences:

> (i) where a change in the law (such as extension of the term of copyright, or the addition of new rights) alters the assumptions upon which owners may have acquired copyright and potential users planned their activities;
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> (ii) where in the light of technological change (such as the emergence of sound recordings), the refusal to license the use of copyright works might impede the emergence of certain industries or activities, or a negotiated price might give the copyright owner an unjustified windfall;
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> (iii) where the copyright owner has failed to supply the needs of the public and other producers and distributors are available;
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> (iv) where copyright owners have refused to license use of their works or have imposed conditions which do not reflect the purposes for which copyright is granted;
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> (v) where there is evidence of abuse of monopoly;
>
> (vi) where there exist otherwise insuperable transaction costs or delays;
>
> (vii) where a negotiated price would be too high and it is deemed desirable to subsidise users, for example those which are public institutions.[4]

8.9 The most common policy justification for imposing a statutory licence seems to be market failure due to prohibitively high transaction costs—that is, where 'the costs of identifying and negotiating with copyright owners outweigh the value of the

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1 This chapter concerns the statutory licences for educational and other institutions and the licences for government. The statutory licences for retransmission of broadcasts and for broadcasting of published sound recordings in s 109 is discussed in Chs 18 and 19 respectively.

2 Thomson Reuters, *The Law of Intellectual Property: Copyright, Designs and Confidential Information*, [12.0].

3 Ibid, [12.0].

4 K Garnett, G Davies and G Harbottle, *Copinger and Skone James on Copyright* (16th ed, 2011), [28-08].

resulting licence'.[5] The Franki Committee, which recommended the introduction of the statutory licences for educational institutions, stated that it was usually not practicable for educational institutions to obtain specific permission in advance from individual copyright owners to make copies. It said that

> very often the administrative costs involved in seeking permission would be out of all proportion to the royalties reasonably payable in respect of the reproduction of the work.[6]

8.10 Professor Jane Ginsburg has expressed reservations about such transaction cost analyses, in part because 'in many cases transaction costs may be subdued by voluntary collective licensing'.[7] Ginsburg finds the purpose of compulsory licences elsewhere:

> The effect, and, I would argue, the real purpose of a compulsory license is to reduce the extent to which copyright ownership of the covered work conveys monopoly power, so that the copyright owner must make the work available to all who wish to access and exploit it. Imposition of a compulsory license reflects a legislative judgment that certain classes or exploitations of works should be more available to third parties (particularly 'infant industries') than others.[8]

8.11 Statutory licences are largely enacted for the benefit of certain licensees, such as educational institutions. If the licensees claim they do not want or need a statutory licence, because they are inefficient and costly, then this may suggest the statutory licences should be repealed.

Australian statutory licences

8.12 There are two statutory licensing schemes in the *Copyright Act* for the use of copyright material by educational institutions and institutions assisting people with a print disability: one relates to the copying and communication of broadcasts, in pt VA; the other concerns the reproduction and communication of works and periodical articles, in pt VB.[9]

8.13 The pt VB licence applies to all copies and communications of text and images, including digital material, from any source, including the internet, but 'in some cases, the licence does not allow the use of an entire work that is available for purchase'.[10]

8.14 The statutory licensing scheme for Crown or government use is contained in pt VII div 2 of the *Copyright Act*.[11] Under this scheme, copyright is not infringed by a

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5 E Hudson, 'Copyright Exceptions: The Experience of Cultural Institutions in the United States, Canada and Australia', *Thesis*, University of Melbourne, 2011, 56.

6 Copyright Law Committee, *Report on Reprographic Reproduction* (1976) (the Franki review), [6.29].

7 J Ginsburg, 'Creation and Commercial Value: Copyright Protection of Works of Information' (1990) 90 *Columbia Law Review* 1865, 1926.

8 Ibid, 1926.

9 Exceptions and statutory licences for people with disability are discussed in Ch 16.

10 Copyright Agency/Viscopy, *Submission 287*.

11 Sections 183 and 183A refer to 'the Crown', 'the Commonwealth or a State' and 'a government'. These phrases appear to be interchangeable. The position of local government is discussed in Ch 15.

government use of copyright material if that use is 'for the services of the Commonwealth or State'.[12]

8.15 Under these schemes, educational institutions and Commonwealth and state governments pay fees or royalties—'equitable remuneration'—to collecting societies for certain uses of copyright material. Collecting societies distribute royalties to their members—authors, film-makers and other rights holders.

8.16 Copyright Agency is the declared collecting society for text, artworks and music (other than material included in sound recordings or films). Screenrights is the declared collecting society for the copying of audiovisual material, including sound recordings, film, television and radio broadcasts.[13]

8.17 The *Copyright Act* mandates various administrative requirements for each scheme. For example, it requires that notice be given to rights holders or collecting societies when copyright material is used.

8.18 The Spicer Committee recommended the introduction of a statutory licence for government in 1959. The majority were of the view that

> the Commonwealth and the States should be empowered to use copyright material for any purpose of the Crown, subject to the payment of just terms to be fixed, in the absence of agreement, by the Court. ... The occasions on which the Crown may need to use copyright material are varied and many. Most of us think that it is not possible to list those matters which might be said to be more vital to the public interest than others. At the same time, the rights of the author should be protected by provisions for the payment of just compensation.[14]

8.19 The statutory licensing schemes for education were a response to widespread photocopying in educational institutions. In *University of New South Wales v Moorhouse*,[15] the High Court of Australia

> established the potential liability of universities for authorising infringements of copyright that occurred on machines located on their premises, and this gradually led to a greater awareness, on the part of these institutions, of the need for them to comply with copyright laws.[16]

8.20 Soon after *Moorhouse*, the Franki Committee recommended the introduction of a statutory licence for educational establishments:

> the very considerable element of public interest in education, together with the special difficulties that teachers and others face in Australia in obtaining copies of works

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12 *Copyright Act 1968* (Cth) s 183(1).

13 Australian Government Attorney-General's Department, *Australian Government Intellectual Property Manual* <www.ag.gov.au> at 9 August 2012.

14 Copyright Law Review Committee, *Report to Consider What Alterations are Desirable in the Copyright Law of the Commonwealth* (1959), 77. Two members of the Committee considered that governments' rights to use copyright material without the rights holder's consent should be confined to use for defence purposes.

15 *University of New South Wales v Moorhouse* (1975) 133 CLR 1.

16 Thomson Reuters, *The Law of Intellectual Property: Copyright, Designs and Confidential Information*, [12.100].

> needed for educational instruction, justifies the institution of a system of statutory licences in non-profit educational establishments.[17]

8.21 The Franki Committee made this recommendation despite concerns that a statutory licensing scheme for educational institutions 'might seem to favour the interests of education as against the interests of copyright owners'.[18] It is therefore surprising that some thirty or so years later, educational institutions called for the statutory licences to be repealed.

8.22 The Australian Publishers Association submitted that 'the basis on which statutory licensing was initially introduced for the educational sector was a matter of pragmatics, and not high principle', and referred to the Franki Committee's discussion of the practical difficulties and high transaction costs of educational institutions licensing material voluntarily.[19]

Repeal of the statutory licences?

8.23 In the Discussion Paper, the ALRC proposed the repeal of the statutory licences for government, educational institutions and institutions assisting people with disability. Australian schools, universities and TAFEs called for the statutory licences to be repealed.[20] Licences should instead be negotiated voluntarily, they submitted.

8.24 The Copyright Advisory Group—Schools (CAG Schools) expressed their objection to the statutory licences in strong terms:

> This submission should be read as a strong statement on behalf of every Government school in Australia, and the vast majority of non-Government schools, that the current system for educational copyright use in Australia, based on statutory licensing, is broken beyond repair and must be replaced with a more modern and fair system.[21]

8.25 CAG Schools submitted that the statutory licences are economically inefficient and 'inherently unsuitable to the digital environment'.[22] They also said the licences 'put Australian schools and students at a comparative disadvantage internationally and do not represent emerging international consensus regarding copyright in the digital environment'.[23] Various government agencies also made strong criticisms of the statutory licences. Criticisms of the statutory licences are discussed further below.

8.26 However, the ALRC has decided not to recommend the repeal of the statutory licences. The ALRC maintains that voluntary licences would be more efficient and better suited to a digital age. The mere fact that the very institutions the statutory licences were designed to help have called for their repeal, highlights that the licences should be reformed. However, in light of widespread opposition to outright repeal of

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17 Copyright Law Committee, *Report on Reprographic Reproduction* (1976) (the Franki Report), [6.40].
18 Ibid, [6.63].
19 Australian Publishers Association, *Submission 225*.
20 Copyright Advisory Group—Schools, *Submission 231*; Copyright Advisory Group—TAFE, *Submission 230*; Universities Australia, *Submission 246*; ADA and ALCC, *Submission 213*.
21 Copyright Advisory Group—Schools, *Submission 231*.
22 Ibid.
23 Ibid.

the statutory licences, particularly by rights holders and collecting societies,[24] the ALRC instead makes recommendations designed to encourage and facilitate voluntary licensing. These recommendations are made later in this chapter.

8.27 Importantly, many of the arguments for repeal of the statutory licences are better and more directly addressed, first, through new exceptions to permit the fair use of copyright material,[25] and second, by clarifying that the statutory licences do not operate to make institutions pay for or otherwise licence these fair uses. This Report recommends new exceptions for certain government uses and the introduction of a fair use or new fair dealing exception. This Report also recommends that the Act be clarified to ensure that payment for these uses are not required under the statutory licences.

Arguments for and against repeal

8.28 Many of the arguments for repeal of the statutory licences are discussed later in this chapter, in the context of specific changes to licences. This section focuses on arguments presented to the ALRC for retaining the statutory licences.

8.29 However, it is important to first note a fundamental criticism of statutory licences—that they compel rights holders to license their material. 'In general, if copyright owners choose not to allow others to exploit their rights then that is their prerogative.'[26] The Australian Film/TV Bodies submitted that compulsory licences undermine rights holders exclusive right to authorise the reproduction or communication of a copyrighted work.[27]

8.30 For this and other reasons, international standards are said to be 'generally antipathetic' to compulsory licences.[28] Ginsburg has written that compulsory licences are 'administratively cumbersome, unlikely to arrive at a correct rate, and contrary to copyright's overall free market philosophy'.[29]

8.31 The United States is wary of statutory licences, preferring licences to be negotiated on the free market. A 2011 report of the US Copyright Office about mass digitisation stated:

> Congress has enacted statutory licenses sparingly because they conflict with the fundamental principle that authors should enjoy exclusive rights to their creative works, including for the purpose of controlling the terms of public dissemination ... Historically, the Office has supported statutory licenses only in circumstances of genuine market failure and only for as long as necessary to achieve a specific goal. In fact, Congress recently asked the Office for recommendations on how to eliminate

24 See, eg, Free TV Australia, *Submission 865*; ABC, *Submission 775*; ARIA, *Submission 731*; Australian Copyright Council, *Submission 654*.

25 Whether under fair use, fair dealing, or specific exceptions.

26 L Bentley and B Sherman, *Intellectual Property Law* (3rd ed, 2008), 270.

27 Australian Film/TV Bodies, *Submission 205*.

28 K Garnett, G Davies and G Harbottle, *Copinger and Skone James on Copyright* (16th ed, 2011), [28–06].

29 J Ginsburg, 'Creation and Commercial Value: Copyright Protection of Works of Information' (1990) 90 *Columbia Law Review* 1865, 1872.

> certain statutory licenses that are no longer necessary now that market transactions can be more easily accomplished using digital tools and platforms.[30]

8.32 The same report also noted the 'frequent complaint that statutory licenses do not necessarily provide copyright owners with compensation commensurate with the actual use of their works or the value of those uses'.[31]

8.33 Discussing the Australian statutory licence for retransmission of broadcasts, the Motion Picture Association of America submitted:

> No matter how fairly or efficiently they are administered, statutory licenses inevitably harm copyright owners by limiting their control over their works and denying them the market level of compensation for their exploitation. As such, even when applicable international norms would permit governments to cut back on exclusive rights and substitute a system of equitable remuneration, sound policy dictates that they be avoided or strictly limited to situations in which there is a demonstrable market failure.[32]

8.34 However many stakeholders submitted that in Australia, rights holders support the statutory licences and do not object to losing some of their rights. Submissions from the Australian Society of Authors, the National Association of the Visual Arts, the Arts Law Centre of Australia and the Australian Directors Guild, among others, all supported the statutory licences. The Australian Copyright Council said the licences were 'well-established in Australia, and have achieved a high level of acceptance amongst rights holders'.[33] Copyright Agency/Viscopy said Australia has 'a long tradition of statutory licences, and both content creators and licensees have adjusted their practices accordingly'.[34]

> While there are uses allowed by statutory licences that some content owners would like to prevent, or license on their own terms, content creators by and large accept that the statutory licences enable efficient use of content by the education sector on terms that are generally fair.[35]

8.35 The ABC said that, as a rights holder, it was 'more than satisfied with the way the licences are administered and the remuneration it receives':

> Such licences provide ease, flexibility, economies of scale, certainty, guaranteed repertoire and lower compliance costs. They are an effective way of licensing content which might not otherwise be available to the education and other sectors. Further, the Corporation understands that the independent television production sector is of the same view.[36]

8.36 The Association of Learned and Professional Society Publishers emphasised that 'the benefits of statutory licensing to small, independent authors, creators, societies and

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30 United States Copyright Office, *Legal Issues in Mass Digitization: A Preliminary Analysis and Discussion Document* (2011), 38.
31 Ibid, 39.
32 Motion Picture Association of America Inc, *Submission 573*.
33 Australian Copyright Council, *Submission 654*.
34 Copyright Agency/Viscopy, *Submission 287*.
35 Ibid.
36 ABC, *Submission 775*.

publishers cannot be underestimated'.[37] Income from collective licensing was said to underpin these businesses: 'taking this away will put those creators and publishers in jeopardy and remove a thriving portion of the digital economy'.[38]

8.37 Although there was support for the existing statutory licences, there was little call for new or extended statutory licences. For example, BSA—The Software Alliance submitted that statutory licensing and Crown use provisions

> should not apply to computer programs, because there is no market failure of access and availability to address with respect to software. Commercial licensing and distribution of computer programs is already widely available and accessible. This should continue to be a market-based commercial arrangement between vendors and Government customers.[39]

8.38 ARIA stated that statutory licences should not be expanded: 'increasingly, as content is moved into the digital environment, innovative licensing models are being used which more and more obviate the need for statutory licences'.[40]

8.39 Perhaps the most common justification for the statutory licences in submissions was the importance of providing fair remuneration to publishers, creators and other rights holders. For example, Screenrights submitted that a recent survey of its members showed that more than half regard the Screenrights royalties as 'important to the ongoing viability of their business, and close to 20 per cent said this money was essential'.[41]

8.40 Television producers rely on Screenrights revenue to fund program production, it was submitted.[42] If this revenue were reduced, there would be a noticeable effect on the quality and quantity of television programs. The ABC submitted:

> A weakening of the independent production sector would reduce the quality and creative diversity of Australian television culture and would affect all broadcasters, including the ABC, as well as potentially undermining the growth of the digital economy.[43]

8.41 Firefly Education said that the 'strength of the education statutory licence is that it offers authors and publishers fair remuneration for their intellectual property'.[44] Oxford University Press Australia likewise submitted:

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37 ALPSP, *Submission 562*.
38 Ibid.
39 BSA, *Submission 248*
40 ARIA, *Submission 241*. See also APRA/AMCOS, *Submission 247*: APRA/AMCOS also expressed some concern about extending statutory licences, noting that 'voluntary licensing arrangements between APRA/AMCOS and educational institutions demonstrate that there is an existing market for licensing beyond the limits of the statutory licences'.
41 Screenrights, *Submission 215*.
42 See, eg, ABC, *Submission 775*; Screen Australia, *Submission 767*.
43 Ibid. See also M Green, *Submission 618*: 'The removal of the statutory licence schemes would likely skew availability of repertoire to those well-resourced providers of material and exclude small and medium niche creators. It would also interrupt valuable revenue streams which have led to the creation of Australian and international content of unique value to Australian educators.'
44 Firefly Education, *Submission 71*.

> The statutory licensing scheme has served the education community, and educational authors and publishers well in the print environment; it has compensated creators of intellectual property adequately so that we have been motivated and supported to continue to invest time, money and energy into the creation of materials that support teaching and learning in educational environments.[45]

8.42 The statutory licences are also considered an important way to ensure educational institutions and governments disclose their use of copyright material. It was submitted that, without the licences, there would be widespread infringement.[46]

8.43 The statutory licences provide a mechanism to monitor usage and so prevent infringement, it was submitted, and repealing the licences would 'shift the burden of enforcement squarely onto rights holders'.[47] Thomson Reuters submitted that if the statutory licences were repealed, educational users were unlikely to enter into licences voluntarily, and it would then be 'extremely difficult for owners to identify infringing activity'.[48] Thomson Reuters said this had been their experience in America.[49]

8.44 APRA/AMCOS submitted that educational institutions and governments 'conduct their activities within relatively closed communities such that it is certainly not open to APRA/AMCOS to observe use of copyright materials'.[50] Without the statutory licences, the collecting society said it might be 'forced to resort to legal remedies to compel disclosure of the use of copyright materials'.[51]

8.45 However, similar concerns might also be expressed about corporate and personal uses of copyright material. It is not clear to the ALRC why the use of copyright material by educational institutions and governments should be placed under greater scrutiny.

8.46 Some stakeholders also submitted that teachers and other users valued the statutory licences. Educators were said to 'favour the certainty of the statutory licences over having to examine whether what they want to do is covered by a particular licence or by exceptions such as s 200AB or what would otherwise be considered fair'.[52] The licences were called a 'safety net' for users.[53] The ALPSP stated:

> Repealing statutory licences will also introduce considerably more uncertainty for teachers as to whether they are now appropriately licensed for a particular use and for using a particularly work.[54]

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45 Oxford University Press Australia, *Submission 78*.

46 See, eg, Screenrights, *Submission 646*: 'The other impetus for the introduction of the licence was the fact that in the absence of a licence, educational copying was an infringement, and was occurring routinely as evidenced by the indemnity payments Screenrights received when it first entered agreements with the education sector... Rightsholders are aware that one reason for the introduction of the statutory licences was to correct the infringing copying by educational institutions that was occurring.'

47 ABC, *Submission 775*. See also Screenrights, *Submission 646*.

48 Thomson Reuters, *Submission 592*

49 Ibid

50 APRA/AMCOS, *Submission 664*.

51 Ibid.

52 Australian Copyright Council, *Submission 654*.

53 Copyright Agency/Viscopy, *Submission 287*.

54 ALPSP, *Submission 562*.

8.47 Over 400 teachers wrote to the ALRC, many using a form letter prepared by a collecting society. These teachers said that the educational statutory licences make their jobs easy. They said they relied on the licence, they valued it highly, and strongly opposed 'any change to the current system that will create any further burden on my time' and create 'uncertainty about what I can and cannot share with my students'. In these letters, many teachers also said that they found it 'reassuring to know that the people who create the educational content I use receive payment for their skill, time and effort'.[55]

8.48 Others submitted that the statutory licences were 'an efficient and cost effective way for instructors and institutions to legally access and reproduce very significant amounts of print and digital content'.[56] It was submitted that complying with the terms of the licences is administratively easy for users, while voluntary licences are more administratively burdensome for both users and rights holders.[57]

8.49 Conversely, the education sector submitted that voluntary licensing and fair use would in fact be 'easier for teachers'.[58] The sector expressed confidence in the effectiveness of codes and guidelines for teachers and other educators. For example, CAG Schools submitted:

> Experience in Australia and internationally suggests that significant certainty can be achieved in practice when principles-based regulation is supported by the development of guidelines and industry codes. ... CAG, through the [National Copyright Unit], has a strong history of providing reliable, comprehensive and fair guidance to teachers, to make certain their obligations under the *Copyright Act*.[59]

8.50 Some also expressed concern about the effect of repealing the statutory licences on government timeframes and administrative costs.[60] The NSW Government submitted that, if the statutory licence for government were repealed, this might 'limit the ability of governments to carry out important projects, in particular related to providing public access to important information'. It might be difficult or impossible to obtain permission for a government use.[61]

8.51 Another argument was that, without the statutory licences, collecting societies would not have sufficient repertoire to offer a comprehensive blanket licence. Licences would then have to be negotiated with multiple collecting societies and rights holders,

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55 See, eg, L Frawley, *Submission 462*. There are many similar letters on the ALRC website.

56 Pearson Australia/Penguin, *Submission 220*.

57 For example, ABC, *Submission 775*. ARIA submitted that a voluntary licence for the use of sound recordings 'would put users in a more complex and onerous situation, given that they are unlikely to have advance knowledge of the recordings contained in such broadcasts in order to secure the licences as and when they need them. It would also result in the requirement for multiple licensing arrangements with different classes of creators, in place of the single statutory licence currently available from Screenrights': ARIA, *Submission 731*.

58 Copyright Advisory Group—Schools, *Submission 707*.

59 Ibid. See also Universities Australia, *Submission 754*, and the discussion of the role of guidelines in Ch 5.

60 Australian Copyright Council, *Submission 654*.

61 NSW Government and Art Gallery of NSW, *Submission 740*.

which would be administratively less efficient.[62] It was submitted that if such voluntary licences could not be obtained, education and the digital economy would suffer.[63]

8.52 It was particularly stressed that the statutory licence in pt VA was needed to secure the many underlying rights in broadcasts—rights that would otherwise be difficult to secure voluntarily. Screenrights described the current statutory licence for broadcasts in pt VA as 'simple, flexible, innovative and certainly not broken'.[64]

8.53 As discussed above, the ALRC has decided not to recommend the statutory licences be repealed. Instead, a number of reforms are recommended that are intended to address criticisms of the statutory licences. These criticisms and reforms are discussed below.

Licensing uses permitted by exceptions

8.54 Like all other users of copyright material, educational institutions, institutions assisting people with disability, and governments should not need to obtain a licence for a use of copyright material that is permitted under an unremunerated exception. This should be clarified in the *Copyright Act*, particularly if fair use or the new fair dealing exceptions recommended in this Report are enacted.

8.55 The *Copyright Act* now explicitly provides that certain exceptions do not apply to uses that may be licensed. The exception in s 200AB does not apply if, 'because of another provision of this Act: (a) the use is not an infringement of copyright; or (b) the use would not be an infringement of copyright assuming the conditions or requirements of that other provision were met'.[65]

8.56 It may be rare for some exceptions, as currently framed, to apply to educational institutions and governments. For example, it should not be surprising that governments cannot rely on the current time-shifting exceptions, because that exception was only intended to be for private and domestic use.[66]

8.57 Some stakeholders submitted that the *Copyright Act* should clarify that educational institutions and governments may rely on unremunerated exceptions. For example, CAG Schools submitted that if the statutory licences were not repealed, 'the *Copyright Act* should be amended to make clear that schools do not require a licence for any use that would otherwise be subject to an exception, including any new fair dealing exceptions'. CAG Schools said it should be 'made abundantly clear that the

62 Eg, ABC, *Submission 775*: 'the replacement of statutory licences with a voluntary regime would give rise to the administrative burden and cost of the ABC having to negotiate agreements with numerous licensing bodies and/or reduced access by educational institutions to essential educational content.'

63 Ibid: 'the repertoire available for ... cultural and educational activities under a voluntary licence would be much narrower than under a statutory licence'.

64 Screenrights, *Submission 646*.

65 *Copyright Act 1968* (Cth) s 200AB(6).

66 Ibid s 111(1). Whether educational institutions and governments could rely on fair use to time-shift broadcasts is another question.

mere existence of a licence—whether statutory or voluntary—will not be determinative of whether a use can be covered by a fair dealing provision'.[67]

8.58 Likewise, the NSW Government submitted that the Act should 'clarify that Governments can rely on fair dealing and other free licences where applicable, and the statutory licence in s 183 is relevant only where no other exception is applicable'.[68]

8.59 It is sometimes argued that where a licence is available, unremunerated exceptions should not apply. If market failure were the only proper justification for unremunerated exceptions, then the availability of a collective licence might suggest that unremunerated exceptions should necessarily not be available. In the ALRC's view, the availability of a licence is an important consideration, both in crafting exceptions and in the application of fair use—but it is not determinative. Other matters, including questions of the public interest, are also relevant.

8.60 The ALRC considers that it would be unjustified and inequitable if educational institutions, institutions assisting people with disability, and governments could not rely on unremunerated exceptions such as fair use. Statutory licences should be negotiated in the context of which uses are permitted under unremunerated exceptions, including fair use and the new fair dealing exception. If the parties agree, or a court determines, that a particular use is fair, for example, then educational institutions and governments should not be required to buy a licence for that particular use. Licences negotiated on this more reasonable footing may also be more attractive to other licensees.

8.61 This reform, combined with the ALRC's recommendations for the enactment of fair use and other exceptions, does not imply that the ALRC considers that all uses now licensed under the statutory licences would instead be free under new unremunerated exceptions. There are many uses of copyright material under the statutory licences that would clearly not be fair use or permitted under other exceptions, and for which users will need to continue to obtain a licence.

8.62 It should also be noted that although it is not necessary to obtain a licence for uses that do not infringe copyright, this does not necessarily mean that parties to a licence must agree on the scope of fair use and other copyright exceptions. As Professor Daniel Gervais has written, in a collective licence, 'rights holders and users could *agree to disagree* on the exact scope of fair use, yet include some of the marginal uses in the scope of the license and reflect that fact in the price'.[69]

8.63 The *Copyright Act* provides that if the parties cannot agree on the amount of equitable remuneration, then this can be determined by the Copyright Tribunal. The Act should be amended to provide that, when determining equitable remuneration, the Copyright Tribunal should have regard to uses made in reliance on unremunerated exceptions, including fair use.

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67 Copyright Advisory Group—Schools, *Submission 707*.

68 NSW Government, *Submission 294*.

69 D Gervais, *The Landscape of Collective Management Schemes*, 34 Colum J L & Arts 591 2010–2011, 614 (emphasis in original).

Recommendation 8–1 The *Copyright Act* should be amended to clarify that the statutory licences in pts VA, VB and VII div 2 do not apply to a use of copyright material which, because of another provision of the Act, would not infringe copyright. This means that governments, educational institutions and institutions assisting people with disability, will be able to rely on unremunerated exceptions, including fair use or the new fair dealing exception, to the extent that they apply.

Market power of collecting societies

8.64 Calls for reform or repeal of the statutory licences stem in part from the market power of collecting societies. Collecting societies have been said to have a 'de facto monopolistic nature'.[70] Although this can be grounds for criticism, it also has its benefits. As a rule, it has been written, 'there should be only one organisation for any one category of rights owner open for membership to all rights owners of that category on reasonable terms'.[71]

8.65 The ACCC stated that while collective licensing can improve efficiency in licensing, it also has costs, particularly in relation to competition.[72] Without collecting societies, rights holders might compete with one another. Without competition, users may have no alternative means of obtaining a licence for the copyright material they need. This gives collecting societies market power, which could be used to set excessive fees or to impose 'otherwise restrictive terms and conditions in the blanket licensing of their repertoire'.[73] The ACCC submitted that there may be

> a trade-off between the efficiency benefits that collecting societies offer by lowering licensing transaction costs and the possible lessening of competition in the licensing of material arising from the collecting society's market power.[74]

8.66 As discussed in Chapter 3, the ACCC has considered measures to control the market power of collecting societies and called for the repeal of s 51(3) of the *Competition and Consumer Act* (Cth), which provides a limited exemption from some of that Act's prohibitions on restrictive trade practices for contraventions resulting

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70 K Garnett, G Davies and G Harbottle, *Copinger and Skone James on Copyright* (16th ed, 2011), [27–15].

71 Ibid, [27–12]: 'The existence of two or more organisations in the same field may diminish the advantages of collective administration for both rights owners and users. For the rights owners, competing societies lead to duplication of function and reduction in economies of scale in operation and thus are unlikely to bring benefits to their members. For the user, a multiplicity of societies representing a single category of rights owner would also cause uncertainty, duplication of effort and extra expense. The user would have to check, for each work he wished to use, which society controlled it and whether he had the appropriate licence. For both parties, administration costs would be greater, reducing the revenue available for distribution to rights owners and increasing the overall cost of obtaining licences for the user.'

72 ACCC, *Submission 658*.

73 Ibid. See also ACCC, *Submission 165*: 'This may raise concerns about the potential creation and exercise of market power. Competition concerns may arise from collecting societies' market power and the likelihood that a collecting society would have both the ability and incentive to exercise that market power (leading to higher licence fees) in its dealings with both its members and potential licensees.'

74 ACCC, *Submission 165*.

from copyright licensing.[75] The repeal of this provision has previously been recommended by the Ergas Committee.[76] The ACCC submitted that 'a blanket exemption for conditions imposed in IP licensing and assignment arrangements is not justified' and the licensing or assignment of intellectual property IP rights 'should be subject to the same treatment under the CCA as any other property rights'.[77] Repeal of s 51(3) would

> prevent copyright owners imposing conditions in relation to the licence or assignment of their IP rights for an anticompetitive purpose or where the conditions had an anticompetitive effect. All other uses would be unaffected.[78]

8.67 The focus of this Inquiry has been on exceptions and statutory licences, rather than the related question of the adequacy of measures to regulate the market power of collecting societies. But the ALRC agrees that s 51(3) of the *Competition and Consumer Act* should be repealed.[79]

8.68 The *Copyright Act* also requires the Copyright Tribunal, if asked to do so by a party to a proceeding, to have regard to any relevant guidelines issued by the ACCC.[80] The Copyright Tribunal may also make the ACCC party to proceedings, if the ACCC applies.[81]

8.69 The ACCC has been a party to proceedings before the Tribunal and is currently drafting guidelines for consultation. The guidelines will relate to matters the ACCC considers relevant to the determination of reasonable remuneration and other conditions of licences which are the subject of determination by the Copyright Tribunal. The ACCC may play a greater role in Copyright Tribunal proceedings in the future.

8.70 Another way to reduce the market power of collecting societies may be to ensure that users may choose to obtain licences directly from rights holders, rather than through collecting societies under a statutory licence. This is discussed in the following section.

Statutory licences not compulsory for users

8.71 Educational institutions and governments should not be required to rely on the statutory licences. Statutory licences were intended to be compulsory for rights holders, not for licensees. The *Copyright Act* should be amended to make this clear.

8.72 Arguably, the statutory licences are already, as a matter of law, 'voluntary for users'. Some stakeholders pointed out that educational institutions and governments can choose not to rely on the licences by not using copyright material when such uses

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75 Ibid.
76 Intellectual Property and Competition Review Committee, *Review of Intellectual Property Legislation under the Competition Principles Agreement* (2000).
77 ACCC, *Submission 165*.
78 Ibid.
79 See further in Ch 3.
80 *Copyright Act 1968* (Cth) s 157A.
81 Ibid s 157B.

are covered by a licence.[82] Screenrights submitted that the education sector has the option 'simply not to take out a licence'.[83]

8.73 However, others suggested that, in practice, educational institutions and governments have no choice about whether to use certain copyright material, and therefore must rely on the statutory licences. Some also submitted that collecting societies have not offered educational institutions and governments any other type of collective licence, and so the only licences these users have available to them are the statutory licences.

8.74 Some stakeholders submitted that the statutory licences were becoming 'increasingly irrelevant', and could therefore be repealed. Although the ALRC does not recommend the licences be repealed at this time, it should be made clear in the Act that educational institutions and governments are not required to rely on the statutory licences, if they choose not to. They should instead be free to seek to obtain a licence for the use directly from rights holders, or to negotiate alternative licences with collecting societies outside the terms of the statute.[84]

8.75 Some have suggested that direct licences are meeting almost all the needs of some licensees, removing much of the need for the statutory licences. Most of the copyright material that is licensed to educational institutions and governments is licensed directly, rather than through a collecting society. Often, these licences include certain limited rights to copy and otherwise use the material. Digital technologies are making such licences more comprehensive and flexible, for example, by better monitoring usage.

8.76 CAG Schools submitted that in 2012, the Australian school sector spent over $665 million buying educational resources, in addition to over $80 million in licensing fees to collecting societies.[85] Universities Australia submitted that the 'vast majority of educational content used for teaching purposes in Australian universities is purchased directly via commercial licences'.[86] NSW Government departments spend millions of dollars annually on licences obtained directly from publishers, and the range of material covered by the government statutory licence is diminishing:

> Books, journals and similar material are increasingly delivered online under agreements that include copyright licences, as noted above. Digital technology and the

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82 ARIA, *Submission 731*: 'As it is our understanding that the statutory arrangements are not compulsory for users, and co-exist with any other commercial arrangements the educational institution wishes to negotiate.'

83 Screenrights, *Submission 646*.

84 As discussed above, they should also be able to rely on unremunerated exceptions, if the exceptions apply.

85 Copyright Advisory Group—Schools, *Submission 707*: 'To put this in context, the amount spent by schools and others on purchasing educational content is more than seven times the amount Screen Australia received from the government in 2012 and more than three times the amount the Australia Council for the Arts received from the government in 2012.'

86 Universities Australia, *Submission 754*. For example, in 2011, 'university libraries spent $256.7 million, the majority of which was on electronic resources (ie, journals and ebooks). It can be expected that this direct spending will increase over time, especially as a result of the increasing penetration of e-books and their associated add-ons.'

> advance of ebooks have changed the shape of the publishing industry, and major publishers have incorporated many of the smaller publishing houses. The combined effect is that Governments increasingly deal directly with publishers, and those agreements now cover most of the External Material used by Government staff.[87]

8.77 If a government or educational institution does not need a blanket licence—if they can obtain licences for what they need directly from publishers—then they should not be compelled to rely on a statutory licence.[88]

8.78 Educational institutions and governments should also seek, and collecting societies should offer, licensing solutions outside the terms of the statutory licence, if voluntary licences are indeed more flexible and useful than statutory licences. Later in this chapter the ALRC recommends the statutory licences be made less prescriptive and more flexible. But some of these benefits may not need to wait for legislative change. Collecting societies should be able to offer flexible commercial licences to educational institutions and governments. Such licences may not need to have onerous survey requirements, or seek payment for purely incidental copying. The ACCC might encourage collecting societies to offer such alternative licences.

8.79 Although the ALRC recommends legislative amendment to ensure the Act is clear that collecting societies can offer licences to educational institutions and governments outside the terms of the statute, the ALRC encourages the parties to seek to make such agreements now. It is clear from submissions to this Inquiry that the educational institutions and governments are unhappy with the current terms of the statutory licences.

8.80 In some limited circumstances, it may also be appropriate for educational institutions and governments to 'risk manage' their copyright responsibilities. This would involve using copyright material without permission, while setting aside funds should a rights owner seek payment. Such an approach may be appropriate where:

- information about the use is open and public;
- the use is not one for which rights holders traditionally seek remuneration;
- obtaining permission from all rights holders (for example, for a mass digitisation project) is impossible or impractical; and
- if a rights holder does seek remuneration, the means for obtaining remuneration are readily available.

8.81 These may be government uses that are in the margins of fair use, or otherwise not clearly covered by an unremunerated exception, and not traditionally offered for licence. The existence of the statutory licences should not preclude educational

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87 NSW Government, *Submission 294*.

88 ABC, *Submission 775*: 'Availability of direct licensing: If it is the case that government users must only licence through the statutory licensing scheme in Part VII of Division 2, then the ABC supports such users being given the freedom to licence outside that scheme, as it understands is the case for educational users.'

institutions and governments from managing their copyright liabilities in such ways.[89] The downside to this approach for educational institutions and governments will be that they do not avail themselves of the protection of the statutory licence, and therefore expose themselves to potential liability for copyright infringement.

Recommendation 8–2 The *Copyright Act* should be amended to clarify that the statutory licences in pts VA, VB and VII div 2 do not apply to a use of copyright material where a government, educational institution, or an institution assisting people with disability, instead relies on an alternative licence, whether obtained directly from rights holders or from a collecting society.

Notifying rights holders directly

8.82 The statutory licences should also be amended to allow governments to deal directly with rights holders, rather than with collecting societies, where they choose to and where this is possible. Collective rights administration can offer many advantages and efficiencies, but in some cases, it may be more appropriate for users and rights holders to negotiate directly.

8.83 Under the statutory licence for governments, governments must inform the owner of the copyright, as prescribed, of the use of the copyright material, 'furnish him or her with such information as to the doing of the act as he or she from time to time reasonably requires'.[90] The terms of the use, such as the amount of remuneration, are then to be agreed upon by the rights holder and the government.[91]

8.84 However, following amendments made in 1998, the *Copyright Act* provides that if there is a declared collecting society, the government does not need to notify or make an agreement with the rights holder. Instead, it must pay a declared collecting society 'equitable remuneration' worked out using a method agreed upon by the government and collecting society, or the Copyright Tribunal.[92] This means that governments cannot choose whether to deal directly with a collecting society or with the rights holder. The collecting societies also have automatic powers to carry out sampling, subject to certain limitations and objections from government.[93]

8.85 The NSW Government submitted that governments should not be 'compelled to make agreements with collecting societies'.[94]

> Unlike other copyright users, Government agencies are not entitled to make a commercial decision on how to manage their copyright liabilities, but must enter

89 The NSW Government submitted that it should not be required under the *Copyright Act* to enter licensing arrangements with collecting societies, but rather, governments should be able to make a 'commercial decision on how to manage their copyright liabilities': NSW Government, *Submission 294*.
90 *Copyright Act 1968* (Cth) s 183(4).
91 Ibid s 183(5).
92 Ibid s 183A(1).
93 Ibid s 183C.
94 NSW Government, *Submission 294*.

> agreements with the collecting societies in accordance with s 183A or face litigation. The legal obligation remains even if a Government does no copying under s 183.[95]

8.86 In the ALRC's view, governments should be able to choose to deal directly with rights holders, even if in most cases it will be more efficient to deal with the relevant collecting society. Governments now rely more heavily on direct licences. If they rely less on statutory licences—perhaps only for a relatively few additional uses for which they are unable to obtain a direct licence, that is, simply to 'fill the gaps'—then governments should not automatically be required to make an agreement with a collecting society. In such circumstances, collecting societies should also not be given automatic powers, such as the power to conduct surveys of government uses.

8.87 Like companies and other organisations, educational institutions and governments should be able to manage their own licensing arrangements, without the additional oversight of collecting societies.

Recommendation 8–3 The *Copyright Act* should be amended to remove any requirement that, to rely on the statutory licence in pt VII div 2, governments must notify or pay equitable remuneration to a declared collecting society. Governments should have the option to notify and pay equitable remuneration directly to rights holders, where this is possible.

Making the statutory licences more flexible

8.88 While the ALRC does not recommend the statutory licences be repealed, the statutory licences should be amended so that they are more flexible and less prescriptive. For example, determining equitable remuneration should not necessarily require surveys to be conducted, particularly considering new electronic monitoring technologies and other less intrusive methods for determining equitable remuneration are available. If surveys are conducted, the methodology need not be set out in the *Copyright Act*. Other detailed requirements, such as for record keeping and providing notices, should also be removed from the Act. This detail should not be moved to regulations, but rather the terms of the licences should be agreed upon by the parties to the licence, and failing agreement, by the Copyright Tribunal.

8.89 In its draft report on the jurisdiction and procedures of the Copyright Tribunal, the Copyright Law Review Committee recommended repeal of some of 'the prescriptive nature of aspects of the statutory licences', including details of terms and conditions of those licences. The CLRC also made a draft recommendation that the detailed requirements for record keeping in pts VA and VB and s 47A be repealed 'in favour of a provision that those details should be left to the agreement of the parties, or, failing agreement, determination by the Copyright Tribunal'. The CLRC said that:

> the Tribunal's jurisdiction in respect of particular statutory licences could usefully be extended as part of a simplification of aspects of the Act. Greater emphasis should be

95 Ibid.

> placed on agreement being reached between the parties, with recourse to the Copyright Tribunal failing that agreement.[96]

8.90 The CLRC also made a draft recommendation that the detailed provisions with respect to remuneration notices, survey notices and related provisions for record keeping should be repealed and substituted with a single provision, which would provide that the parties should agree both on the level of equitable remuneration and the method for assessing it, and failing agreement, these things should be determined by the Copyright Tribunal.[97]

8.91 In its final report, the CLRC said that submissions supported the 'general approach of seeking to simplify the statutory schemes and encourage broader agreement between the parties through an expansion of the Tribunal's jurisdiction'.[98] But the Committee decided not to recommend that the detailed requirements for marking, record keeping and inspection of records be removed from pts VA and VB of the Act, noting that the collecting societies and the university peak body did not support the changes. The provisions of the statutory licence were said to be 'a matter of some sensitivity between the parties that rely on them' and 'despite their complexity, the provisions are at least well known to the parties'.[99]

8.92 The ALRC considers that this question should be revisited, and the detail in the Act removed. The statutory licences are clearly too complex and rigid. They should be amended so that more commercial and efficient agreements can be made between the parties. The following section outlines a few of the many criticisms made of the statutory licences. These criticisms may be partly addressed by making the licences considerably less prescriptive.

8.93 In the face of disagreements between the collecting societies and licensees, it is tempting to recommend that the Act resolve the disagreements. If the parties cannot agree on a method of conducting a survey, then the Act should set out a method. If the parties cannot agree on equitable remuneration, then the Act should set out how this should be settled. However, the ALRC does not favour this approach. These are not matters that Parliament should be expected to settle. There does not seem to be a case here for greater regulation.

8.94 Instead, the parties should agree on these matters. They should agree on whether a survey of use needs to be conducted, and if it does, how often and what methodology should be used. The parties should also agree on the amount of equitable remuneration. If the parties cannot agree, then the parties may seek to have the Copyright Tribunal settle the dispute. The ALRC does not recommend that more detail on these matters be set out in the Act.

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96 Copyright Law Review Committee, *Jurisdiction and Procedures of the Copyright Tribunal—Draft Report* (2000), [11.17].

97 Ibid, 71.

98 Copyright Law Review Committee, *Jurisdiction and Procedures of the Copyright Tribunal—Final Report* (2000), [11.25].

99 Ibid, [11.27].

8.95 The arguments for less prescription in the statutory licences have parallels with the arguments for less prescription in defining the scope of unremunerated exceptions. Less prescriptive statutory licences allows for greater flexibility, as does fair use. The criticism will be that this reduced prescription comes at a cost—namely, uncertainty and litigation. However, as discussed below, the excessive prescription and complexity of the existing statutory licences also come at a cost.

8.96 If the Act is less prescriptive about the terms of the statutory licence, then there may indeed be a greater role for the Copyright Tribunal in settling disputes between licensees and collecting societies. The jurisdiction of the Copyright Tribunal to determine equitable remuneration under statutory licensing schemes was referred to approvingly by a number of stakeholders.[100] Michael Green submitted that the fact that voluntary schemes have never flourished in Australia where there are statutory licences in place 'indicates that the work of the Copyright Tribunal in setting levels of equitable remuneration has been effective and efficient'.[101] APRA/AMCOS also submitted that not only is the Tribunal an effective price regulator, but that the Tribunal can act as a 'constraint against the setting of unreasonable prices by reason of the expense, time and risk of proceedings'.[102]

8.97 However, others submitted that proceedings before the Tribunal can be unnecessarily protracted, and that statutory provisions should be amended to streamline proceedings.[103] There may also be a case for amending the *Copyright Act* to provide that mediation must be undertaken before initiating proceedings in the Copyright Tribunal.

Complexity

8.98 The statutory licences, particularly pt VB, have been called complex and prolix.[104] This complexity was criticised by stakeholders. Robin Wright said that the scheme in pt VB of the *Copyright Act* 'consists of highly complex media and format specific rules which are increasingly difficult to administer in the digital environment'.

> The complex drafting style and structure of the provisions makes the section almost impossible to understand, even for regular users, without an external interpretive layer. The different rules applicable to hard copy works and works in electronic form are increasingly difficult to apply or explain in a convergent world.[105]

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100 Copyright Agency, *Submission 727*; Macmillan Education, *Submission 711*; Arts Law Centre of Australia, *Submission 706*; Australian Copyright Council, *Submission 654*; Association of Consulting Surveyors Victoria, *Submission 643*; M Green, *Submission 618*; SIBA, *Submission 612*; Allen & Unwin, *Submission 582*; RIC Publications Pty Ltd, *Submission 456*; Nightlife, *Submission 657*; Australian Publishers Association, *Submission 225*; Federation Press Pty Ltd, *Submission 177*; PPCA, *Submission 240*.

101 M Green, *Submission 618*.

102 APRA/AMCOS, *Submission 247*.

103 For example, Pandora Media Inc, *Submission 329*; Commercial Radio Australia, *Submission 132*; Tasmanian Government, *Submission 196*.

104 Thomson Reuters, *The Law of Intellectual Property: Copyright, Designs and Confidential Information*, [12.280].

105 R Wright, *Submission 167*.

8.99 CAG Schools submitted examples of provisions of the *Copyright Act* that it called 'overly technically complex' and that make the statutory licences unsuited to the digital environment.[106]

8.100 However, it was also submitted that copyright licensing is generally complex and that freedom of contract has led to 'a diverse universe of licensing practices'.[107] The fact that the statutory licences are also complex should not therefore be surprising, considering 'the legislature's intent to strike a balance in relation to facilitating lawful use by educational institutions of otherwise foreclosed copyright works'.[108]

8.101 Copyright Agency/Viscopy submitted that it was 'open to exploring whether some of the detail regarding requirements under statutory licences could be covered in regulations rather than in the legislation', which would allow for more flexibility to respond to technological and other developments.[109]

What gets counted and paid for under the licences

8.102 Many of the criticisms of statutory licences essentially concern what gets counted and paid for under the licences. One of the main advantages of a statutory licence, namely that it allows licensees considerable freedom to use a large range of copyright material without permission, in practice may also mean that far more of what a licensee does will be counted and paid for.[110]

8.103 The statutory licences may therefore provide a mechanism for educational institutions and governments to pay for uses that no one else pays for. So called 'technical copies' and freely available content on the internet are perhaps the two most commonly cited examples of content that gets counted under the statutory licences, but is ignored in most other organisations.

8.104 Digital technologies allow for new, innovative, and efficient uses of copyright material. Many of these uses rely on multiple acts of copying and communication—with copies being stored and effortlessly moved between multiple computers and devices, some local, some stored remotely in the cloud. To the extent that the *Copyright Act* requires these acts of copying and communication to be strictly accounted for and paid for, then it may prevent licensees from taking full advantage of the efficiencies of new digital technologies.

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106 Some examples, including *Copyright Act 1968* (Cth) ss 135ZMD, 135KA and 135ZXA, are set out in the ALRC Discussion Paper and in Copyright Advisory Group—Schools, *Submission 231*.

107 M Green, *Submission 618*.

108 Ibid.

109 Copyright Agency/Viscopy, *Submission 249*.

110 The objection that some uses are 'zero-rated' and that institutions pay a flat fee per student or per employee does not seem to undermine the key objections, that the uses are nevertheless counted and that payment for the uses can be sought and negotiated and may go to the final per person flat rate.

8.105 Schools and universities submitted that while they are being encouraged to use new digital technologies, there is a 'direct financial and administrative disincentive to do so':

> The simple act of using more modern teaching methods potentially adds up to four remunerable activities under the statutory licence in addition to the potential costs incurred by more traditional 'print and distribute' teaching methods ... The requirements of the statutory licence to record in a survey (and potentially pay for) every technological copy and communication involved in teaching simply do not reflect the realities of modern education in a digital age.[111]

8.106 The statutory licences are not suitable for a digital age, CAG Schools submitted, in part because rates, even when set on a per student basis, are largely derived by reference to the volume of past and anticipated copying and communication. That is, 'volume is still a critical element of rate negotiations'.[112] Universities Australia likewise submitted:

> This 'per copy' method of determining remuneration may well have made sense in a print environment, but it has become highly artificial in a digital environment. In a digital environment, copying is ubiquitous. The existence of the statutory licence provides an opportunity for CAL [Copyright Agency] to seek a price hike for every technological advance that results in digital 'copies' being made.[113]

8.107 CAG Schools criticised the 'overly prescriptive and technical requirements of the statutory licence',[114] and said that voluntary licences have proven 'more efficient and simpler to negotiate'.[115]

8.108 However, a more direct approach to this problem may be to ensure that the Act provides for suitable unremunerated exceptions, such as fair use, and that those who rely on the statutory licences can also rely on the unremunerated exceptions. Fair uses of copyright material, or uses otherwise covered by an unremunerated exception, such as certain technical copying, should not need to be licensed.

8.109 Voluntary contracts for digital services appear to be more flexible and do not require such strict accounting of copies and communications. This is one of the reasons why the ALRC recommends earlier in this chapter that the Act be clarified to ensure educational institutions and governments can obtain alternative voluntary collective licences (that is, licences not under the terms set out in the Act).

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111 Copyright Advisory Group—Schools, *Submission 231*.

112 Ibid: 'While a 'cost per use' model may have made sense in the age of the photocopier and the VHS recorder, it makes much less sense in an internet age. It is a reality of modern technology that many copies and transmissions are made during the use of distributed technologies.'

113 Universities Australia, *Submission 246*. See also ADA and ALCC, *Submission 213*.

114 Copyright Advisory Group—Schools, *Submission 231*.

115 Ibid. For example, in the voluntary agreements between schools and music collecting societies, 'it was possible to negotiate a commercial rate for a licence that allows schools to store musical works and sound recordings on a school intranet server, without entering into technical discussions and survey/record keeping requirements about the number of copies and communications that might entail on a practical basis when a variety of technologies are used to access that stored music by teachers and students. This is in stark contrast to the highly complex and burdensome administrative and technical issues required to be taken into account in similar negotiations under statutory licences': Copyright Advisory Group—Schools, *Submission 231*.

8.110 Some stakeholders suggested that the statutory licences facilitate an overly strict accounting of usage that leads to unreasonably high fees. For example, Universities Australia submitted that the 'statutory licensing model for determining remuneration is firmly based in a "per-copy-per-view-per-payment" paradigm'.[116] This 'takes no account of the realities of the modern educational environment'.[117] The number of articles a lecturer uploads onto an e-reserve or otherwise makes available to students was called a 'highly artificial measure' and a poor proxy for student use:

> The dilemma that universities face is: do we take full advantage of digital technology to provide our students with access to the widest possible array of content (knowing that [Copyright Agency/Viscopy] will seek payment based on the number of articles etc made available multiplied by the number of students who could have accessed that article) or do we revert to the old print model of selecting a small range of articles etc for each class because this will inevitably cost less under the statutory licence? The very fact that universities are having to ask these questions underscores the unsuitability of the statutory licence to a digital educational environment.[118]

8.111 Universities Australia would instead prefer that remuneration be determined on a 'commercial basis' and 'without direct reference to the amount of copying and communication that has actually occurred'.[119]

8.112 Screenrights submitted that the statutory licence for broadcasts in pt VA are not based on 'one-copy-one-view-one-payment',[120] but rather, 'Screenrights and the schools have agreed fixed per student amounts every year since the statutory licence was created in 1990'.[121]

8.113 In the ALRC's view, a good collective licence must allow for some flexibility and should not be a disincentive to the use of new and efficient digital technologies. Nor are licensees likely to be attracted to licensing models that equate the availability of material with the use of the material. Few would wish that the fee for using a new music service like Spotify were set by reference to the amount of music the service makes available to customers (many millions of songs). As Copyright Agency/Viscopy submitted, 'there is a limit to the total amount of content a student can reasonably consume in the course of their studies'.[122]

8.114 The *Copyright Act* should not prescribe a method of settling equitable remuneration that results in an overemphasis on the volume of material made available to—as opposed to actually used by—students, educational institutions, and government. As discussed below, this may mean reconsidering the role of surveys in setting the amount of remuneration.

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116 Universities Australia, *Submission 246*.
117 Ibid.
118 Ibid.
119 Ibid.
120 Screenrights, *Submission 646*.
121 Ibid.
122 Copyright Agency/Viscopy, *Submission 249*.

Surveys

8.115 Governments, educational institutions, and some collecting societies reportedly often fail to agree on a methodology for conducting surveys of usage. Such surveys are used to determine the amount of equitable remuneration to be paid and to whom collected funds should be distributed. There are mechanisms in the Act for seeking a ruling from the Copyright Tribunal on the operation of a sampling system,[123] but this is rarely sought by either party. In the ALRC's view, the solution to this problem is *not* to set out a survey methodology in the Act.

8.116 A number of state governments submitted that the sampling required by s 183A of the *Copyright Act* is problematic.[124] The NSW Government submitted that, in practice, 'the scheme established by s 183A has proved to be cumbersome, burdensome and costly, and insufficiently flexible to adapt to technological advances'.[125] The Queensland Government said that surveys 'should be as unobtrusive and inexpensive as possible and measure only remunerable copying'.[126] The Tasmanian Government likewise submitted that:

> The requirement to develop, negotiate and administer a survey has imposed a substantial burden, created an ongoing source of tension in dealings between governments and declared collecting societies, and increased the cost and resources required by governments to discharge their copyright liabilities.[127]

8.117 Governments and collecting societies have not been able to agree on a method for conducting surveys, and therefore a survey has not been conducted since 2002–03.[128] Neither side has asked the Copyright Tribunal to determine a method of conducting a survey. Instead, payments are made based on survey results from 2002–03. However, governments point out that, since that time, there has been increased use of direct licences, for example for subscriptions to online journals.[129] Because the material that is now directly licensed was included in the 2002–03 survey, governments say that it is likely that they are now paying twice for a range of materials.[130]

> Because of the difficulty of designing a practicable sampling survey for copyright works, the fees paid by NSW in recent years have not been based on estimates of the number of Government copies made. It is likely that some of the amounts Governments have paid under s 183A are attributable to licensed material for which they have already paid under direct licence agreements with the publishers.[131]

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123 For example, *Copyright Act 1968* (Cth) s 135ZW(3).
124 DSITIA (Qld), *Submission 277*; State Records South Australia, *Submission 255*; Tasmanian Government, *Submission 196*.
125 NSW Government, *Submission 294*.
126 DSITIA (Qld), *Submission 277*.
127 Tasmanian Government, *Submission 196*.
128 DSITIA (Qld), *Submission 277*.
129 Victorian Government, *Submission 282*; DSITIA (Qld), *Submission 277*; State Records South Australia, *Submission 255* (who suggest remunerable copying is about 3% of all government copying); Tasmanian Government, *Submission 196*.
130 Victorian Government, *Submission 282*; DSITIA (Qld), *Submission 277*; State Records South Australia, *Submission 255*; Tasmanian Government, *Submission 196*.
131 NSW Government, *Submission 294*.

8.118 Copyright Agency/Viscopy agreed that sampling for the government statutory licence 'has not operated as intended' and suggested that the *Copyright Act* specify a method to be used where no method has been agreed upon or determined. Copyright Agency/Viscopy proposed that the method should be the same as that for the education statutory licence.[132]

8.119 Universities Australia submitted that one shortcoming of the statutory licence is that 'there is no option for educational institutions to operate under a record-keeping scheme with respect to electronic copying and communication':[133]

> This significantly limits the opportunity for universities to seek to ensure that they are not paying under the statutory licence for content that is not strictly remunerable. It also deprives universities of an administratively simple solution to measuring the amount of copying and communication that must be paid for under the statutory licence.[134]

8.120 However, surveys of educational use, collecting societies submitted, were not overly burdensome. Copyright Agency/Viscopy submitted that, except for 'the small number of teachers involved in surveys of usage from time to time, compliance requirements are negligible'.[135]

> For most teachers and students, the statutory licence is practically invisible. A very small proportion of teachers participate in annual surveys of usage, for a limited period of time.[136]

8.121 Schools provide information about their usage and the collecting society processes the data according to agreed protocols.[137] Copyright Agency/Viscopy acknowledged that the current mechanism for measuring digital usage (electronic use surveys) is imprecise, but 'technological advances are enabling new methods of measuring usage':

> Two important initiatives are automated data capture from multi-function devices (machines that print, scan, photocopy, fax and email), and tools for reporting content made available from learning management systems. As with current measurement methods, the objective is to estimate the extent to which content is consumed by students.[138]

8.122 Screenrights submitted that data management under its licence is 'exceptionally simple'. Many educational institutions have zero reporting requirements, while others are only surveyed for a short time.

> Universities conduct a very easy online survey where they simply record details of the program and whether it was copied, put online or emailed. Schools take part in a similar survey to universities, only it is paper-based. Each sector pays on a per-head basis. The system is efficient for both licensees and for Screenrights' distribution

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132 Copyright Agency/Viscopy, *Submission 249*.
133 Universities Australia, *Submission 246*.
134 Ibid.
135 Copyright Agency/Viscopy, *Submission 287*.
136 Ibid.
137 Ibid.
138 Ibid. See also Copyright Agency, *Submission 727*.

> purposes. The sample system means that universities are surveyed every three to four years and schools are surveyed on average once every 100 years. Moreover, Screenrights has moved in recent years to obtaining records of usage from intermediary bodies and this is increasingly replacing the need for surveys.[139]

8.123 The ALRC considers that, while surveys can be a useful method of measuring usage for the purpose of setting the rate of equitable remuneration and for distributing royalties to rights holders, such surveys may not always be necessary. To make the statutory licences less prescriptive and more flexible, the *Copyright Act* should not provide that surveys must be conducted, although this may in practice often be necessary. The ALRC considers that methods of conducting surveys should not be set out in the *Copyright Act* or in regulations.

Recommendation 8–4 The statutory licences in pts VA, VB and VII div 2 of the *Copyright Act* should be made less prescriptive. Detailed provisions concerning the setting of equitable remuneration, remuneration notices, records notices, sampling notices, and record keeping should be removed. The Act should not require sampling surveys to be conducted. Instead, the Act should simply provide that the amount of equitable remuneration and other terms of the licences should be agreed between the relevant parties, or failing agreement, determined by the Copyright Tribunal.

139 Screenrights, *Submission 646*.