

**COPYRIGHTAGENCY** | **viscopy**

**Supplementary submission to Australian  
Law Reform Commission Inquiry into  
Copyright and the Digital Economy  
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## INTRODUCTION

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Thank you for providing us with an opportunity to provide the Australian Law Reform Commission (ALRC) with some additional information about some issues raised by submissions to the Issues Paper. These issues principally relate to the operation of statutory and other collective licences in the digital environment, and to proposals for a new 'flexible' exception.

We acknowledge that there are ways in which the current copyright system – both the legislative framework and the way rights are managed in practice – could work better. A key question for the ALRC is the extent to which these issues should be addressed by legislative change, and the extent to which they will be addressed by evolving business and other practices that are influenced by, among other things, reasonable consumer demands. It is not our experience, however, that the copyright system is fundamentally broken or unfit for the digital environment. To the contrary, a well-functioning copyright system enables orderly and efficient dissemination of content in digital environments, including those operating globally.

While there are obvious differences in how digital content is created and disseminated compared to printed content, the principles of rights management are the same. Rights management organisations in Australia and abroad have evolved to manage digital uses of content, including under 'blanket' licences.

## STATUTORY LICENCES FOR THE DIGITAL ENVIRONMENT

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The ALRC's terms of reference require it to consider whether statutory licences are 'adequate and appropriate in the digital environment'.

Copyright Agency is appointed to manage statutory licences for the following:

- educational use of text and images under Part VB (including by for-profit as well as not-for-profit institutions);
- government copying of text and images; and
- assisting people with disabilities.<sup>1</sup>

### Application of education statutory licence to digital uses

The Part VB education statutory licence applies to all copies and communications of text and images, from any source.<sup>2</sup> There is one main limitation: in some cases, the licence does not allow the use of an entire work that is available for purchase.<sup>3</sup>

The Part VB statutory licence was extended to cover digital content in 2001. Those amendments were expressly intended to apply to content available on the internet.<sup>4</sup>

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<sup>1</sup> We were appointed ('declared') by the Attorney General to manage the statutory licences in Part VB of the Copyright Act for education and for people with disabilities in 1990, and by the Copyright Tribunal to manage the statutory licence for government copies in 1998. Copyright Agency's Board has decided not to seek payment of the equitable remuneration allowed for by the statutory licences for people with disabilities. Our role has principally been to assist with enabling access to content under the licence, for example through our establishment of an online catalogue of master copies made under the licence which are available to others covered by the licence.

<sup>2</sup> Including from infringing content, and content accessed by circumventing a technological protection measure.

<sup>3</sup> In some cases, an entire work can be used even if it is available for purchase. For example, any digital image, even if it can be purchased or licensed from, say, an image library; a poem from an anthology even if it is available for purchase from, say, the online Australian Poetry Library (<http://www.poetrylibrary.edu.au>). See further:

<http://www.copyright.com.au/get-information/educational-use-of-content/content-teachers-can-use>.

## **Not all copies and communications made under statutory licences involve payment**

The statutory licence legislation allows different rates, including a zero rate, for different types of uses. In particular, the legislation allows automated and transient copies and communications, but does not require payment for those uses.

Sections 135ZU to 135ZWA (dealing with remuneration notices) refer to equitable remuneration for licensed copies and communications. They do not require payment for each and every licensed communication and copy. Even if they did, the legislation allows for a determination that equitable remuneration for particular classes of use is zero.

This is reflected in our agreements with education sector bodies. Under these agreements, education bodies pay flat rates that do not vary with actual usage during the licence period.

When negotiating the rates with the education bodies, past usage recorded in surveys of usage is taken into account. The surveys focus on copies and communications that are consumed by students.<sup>5</sup>

The current mechanism for measuring digital usage (electronic use surveys, or EUSs) is imprecise, as acknowledged by both us and the education sector.<sup>6</sup> It provides an indication rather than a reliable measurement of the extent and types of electronic uses of content. The results inform the commercial negotiations for flat rates, but are just part of a complex negotiation.<sup>7</sup>

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.<sup>8</sup>

Some have raised concerns about digital technologies dramatically increasing the 'remunerable' copies and communications made under statutory licences. This has not been the experience to date. For the future, the relative proportions of hardcopy and digital content is likely to change, but there is a limit to the total amount of content a student can reasonably consume in the course of their studies.

## **Statutory licence for governments**

We note that there appears to be broad support in the submissions to the ALRC for the statutory licences for governments. There also appears to be broad support for amendments in two areas:

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<sup>4</sup> For example, the Explanatory Memorandum to the Digital Agenda Bill says, in the introductory comments at page 1: 'Users of copyright material, such as libraries, archives and educational institutions, are concerned about being able to obtain reasonable access to copyright material available on the Internet'.

<sup>5</sup> While the focus for 'hardcopy' uses is the number of copies made for educational purposes, in the digital environment there may be just one copy or, in principle, just a 'making available'. The value of a 'making available' communication made in reliance on the statutory licence is affected by the number of people who view the content made available.

<sup>6</sup> The surveys are conducted by an independent research company. The survey design, including the survey forms, result from consultations with us and the education sector. The independent research company provides a report of the survey results to us and the education sector bodies. The current Electronic Use Survey usage record form is included in the CAG schools submission at page 87. The forms are completed by teachers who periodically record their electronic use during the four week survey period, usually not contemporaneously with the use. The forms are designed to accord with teachers' understanding of their actions, rather than correlating in each case with a copyright use.

<sup>7</sup> The results are also used for distributing licence fees.

<sup>8</sup> As noted above, the value of a communication of content made in reliance on the statutory licence (e.g. by making the content available on a server) is affected by the level of consumption of that content.

- to make the statutory licence available to local governments; and
- to enable collecting societies to be 'declared' for government communications as well as government copies.

There appears to be some confusion, however, about which copies and communications made under the government statutory licence are 'remunerable' (as there is for the education licence). The submissions from surveyors make clear that their major concern is survey plans that are sold directly or indirectly by governments, and that they are not seeking payment in relation to copies and communications directly associated with the registration process.

In the recent Copyright Tribunal proceedings seeking a determination for the NSW government's sale of surveyors' plans, it was agreed between the parties that the following copying and communication of survey plans by NSW Land and Property Information, for the purposes of the State, are covered by the statutory licence for governments but do not result in payment:

- internal copying and communication, both for the purposes registration and other purposes; and
- copying and communication to third parties:
  - for purposes of registration; and
  - for purposes other than registration, for no fee.<sup>9</sup>

### Differences between statutory and voluntary licensing solutions

Statutory licences are generally regarded as beneficial for licensees, as they allow licensees to use any content. They do not have to check whether the content is covered by the licence, and rightsholders are not entitled to 'opt out'.

Internationally, statutory licences are sometimes frowned upon, because they are seen as an unjustifiable derogation from content creators' exclusive rights.

For example, in a 2011 report on mass digitisation, the US Copyright Office said the following:

*In some circumstances, the marketplace is unable to provide an effective or efficient mechanism for licensors and licensees to negotiate agreements on a voluntary basis.*

*Over the years, Congress has addressed some of these market failures by creating narrow statutory licenses that provide users with access to certain types of works, under certain circumstances, in exchange for a statutorily or administratively set fee. 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.*

...

*Any statutory license [for mass digitisation] would have to be narrowly tailored to address a specific failure in a specifically defined market without interfering with the rest of the digital book marketplace. In addition, any proposal for a statutory license would have to address 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.<sup>10</sup>*

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<sup>9</sup> These are listed in a table provided to the Tribunal.

<sup>10</sup> United States Copyright Office, Legal Issues in Mass Digitization: A Preliminary Analysis and Discussion Document (2011), at pages 38 to 39, available at [http://www.copyright.gov/docs/massdigitization/USCOMassDigitization\\_October2011.pdf](http://www.copyright.gov/docs/massdigitization/USCOMassDigitization_October2011.pdf).

In Australia, however, we have had a long tradition of statutory licences, and both content creators and licensees have adjusted their practices accordingly. 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.

Similar licensing arrangements can be offered if the collecting society has a sufficient mandate from rightsholders. APRA, for example, has been operating since the 1920s, and can effectively offer comprehensive coverage. Screenrights, on the other hand, does not have sufficient mandate from its members to offer, on a voluntary basis, the breadth of coverage available to the education sector under the statutory licence. Copyright Agency's mandate is extensive but not comprehensive, particularly in relation to digital content and uses.

The more limited scope of licences offered in other territories gives an indication of some of the content and uses that may be excluded under voluntary licensing arrangements. The following are some common examples:

- excluded content:
  - works expressly excluded by content creators (usually listed on collecting society's website);
  - foreign works with no mandate from foreign collecting society;
  - workbooks, worksheets ('consumables');
  - unpublished material;
  - standalone artistic works;
- content source:
  - infringing copy;
  - institution doesn't own an 'original';
  - 'born digital' content not 'opted in' by content creator;
- content uses:
  - repurposing; mashups;
  - uses without attribution.

In some other countries, collecting societies can effectively extend their mandate through extended collective licensing provisions. This requires authorisation (for example, from a government Minister or Tribunal), and rightsholders can opt out. Extended collective licensing has been operating for some time in Scandinavian countries, and is about to be introduced into the UK.

### **Statutory licences allow for new business models**

Statutory licences are, in a sense, a 'safety net' for uses that are not covered by direct licensing arrangements. A school can choose to acquire content through a direct licensing arrangement, but teachers remain entitled to use the content in ways not covered by the licence, such as 'offline' or 'downstream' uses of content acquired via online subscription.

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The Copyright Office was not (as is suggested in the CAG schools submission) discussing statutory licences for the education sector. On the contrary, the Register of Copyrights recently said:

*And in compelling circumstances, you may wish to reverse the general principle of copyright law that copyright owners should grant prior approval for the reproduction and dissemination of their works—for example, by requiring copyright owners to object or "opt out" in order to prevent certain uses, whether paid or unpaid, by educational institutions or libraries.*

This both suggests that the current environment for educational use of content in the US requires review, and that under an 'opt out' regime, some uses made without permission would be subject to payment. See: *The Register's Call for Updates to U.S. Copyright Law*, at <http://judiciary.house.gov/hearings/113th/03202013/Pallante%20032013.pdf>

## Statutory licences minimise compliance

Statutory licences necessarily involve less compliance than voluntary licensing solutions. There is no requirement to check whether content is covered or excluded by the licence. In the education sector, teachers can disseminate content legally without even being aware of the licence.<sup>11</sup> Even the teachers whose usage is surveyed do not have to identify whether or not their use is covered by the statutory licence. They record all uses, and we determine which uses are treated as ‘remunerable’ (following protocols agreed with schools’ representatives).

## Education sector submissions: new exception allowing extensive ‘unremunerated’ uses

The core of the submissions from the education sector is not that statutory licensing be replaced with voluntary licensing, but that uses currently covered by the statutory licences instead be allowed under a new broad ‘flexible’ exception. Put another way, the proposals would effectively deem equitable remuneration to be zero, rather than enabling the question of value to be determined by the Copyright Tribunal.

The submissions from the education sector indicate that the proposed new ‘flexible’ exception would not cover all educational uses, and that those not covered would be licensed under ‘voluntary’ arrangements, either directly by the content creator, or collectively through a collecting society.

We remain unclear about extent of reduction in licence fees for content creators that would result from the education sector proposal. Our understanding is that it is necessarily significant. The education sector submissions acknowledge that the proposed new exception would mean that some uses that currently result in fair payment would instead be non-remunerable.

Our understanding of the proposal is that *most* uses would become non-remunerable. The exception sought by the education sector is similar to section 40 (fair dealing for research or study), but different in two respects:

- there would be no provision deeming a quantified proportion of work to be ‘fair’;<sup>12</sup> and
- the factors for determining ‘fairness’ would not include the factor in section 40(2)(c): ‘the possibility of obtaining the work ...within a reasonable time at an ordinary commercial price’.

We have sought, but not received, an indication from the education sector about the likely reduction in licensing fees from their proposal.

## THE VALUE OF EDUCATIONAL USE OF CONTENT

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### The role and changing nature of education

We agree with the education sector that:

- education is key to a successful digital economy;
- technological and other developments are changing the ways in which teachers teach and students learn;

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<sup>11</sup> As noted below, in a recent survey we commissioned, a third of the teachers were not aware of the statutory licence.

<sup>12</sup> Broadly speaking, 10% or a chapter: see in more detail here: <http://www.copyright.com.au/get-information/educational-use-of-content/content-teachers-can-use>. As discussed below, we do not oppose the removal of the deeming provision. The education sector’s position is that, in principle, teachers can copy more than the deemed amount provided the amount is ‘reasonable’, but in practice they tend to regard the deemed amounts as a ‘ceiling’.

- governments have made significant investments in projects aimed at enabling the use of digital technology by teachers and students; and
- copyright policy is, and should be, influenced by ‘the public interest’.<sup>13</sup>

We are not aware, however, of any evidence that ‘copyright laws are stifling the potential of teaching and learning in the online environment’.

The current copyright framework allows teachers to copy and communicate almost all text and images, from any source. Except for the small number of teachers involved in surveys of usage from time to time, compliance requirements are negligible.

The real question the education sector has raised is not about copyright impediments to the use of content for teaching, but about the *value* of the uses the copyright framework allows. That value includes the pedagogical value of the uses of content allowed by the licence, the reduced compliance costs compared to other options for acquiring and disseminating the content, and the value of the uses to the creators of the content.

It may be that inadequate funding for the education sector to acquire the content needed for the best educational outcomes is an impediment to teachers using all the opportunities offered by the digital environment to the fullest extent. That is an issue relating to proper resourcing for the education sector, to be considered together with sufficient resourcing for the acquisition of content in other ways (such as purchase of textbooks or subscriptions), or, indeed, the resourcing needed to ensure delivery of content (such as laptops and the infrastructure to support them). It is not, however, a matter for copyright reform.

Below, we set out some further information about how the value of educational use is currently determined.

### **Licence fees under statutory licences**

In most cases, licence fees are negotiated with bodies representing licensees (for example, CAG for schools and TAFEs, and Universities Australia for universities). If the parties cannot reach agreement, the Copyright Tribunal can determine equitable remuneration.

The Copyright Tribunal (Procedure) Regulations set out matters to which the Tribunal may have regard. They include ‘the need to ensure adequate incentive for the production of educational works ... in Australia’ and ‘the effect of the copying on the market for, or value of, the material copied’.<sup>14</sup>

The most recent determinations are the 2002 determination for schools,<sup>15</sup> and the 1999 determination for universities.<sup>16</sup> The principal outcome of these determinations was recognition of a higher relative value for certain types of content (such as artistic works and short texts, such as poetry), and certain uses (such as permanent display copies and coursepacks). These determinations have informed commercial licence negotiations since. Although the Tribunal determinations set a rate per page, the commercial negotiations have resulted in a flat overall fee, or a flat fee per student.

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<sup>13</sup> The education statutory licence would appear to meet the ‘public interest’ as defined in the CAG schools submission at p 21, as it ensures that students do have online access to online content. See also the discussion of the public interest in ‘The Register’s Call for Updates to U.S. Copyright Law’, <http://judiciary.house.gov/hearings/113th/03202013/Pallante%20032013.pdf>

<sup>14</sup> Regulation 23J.

<sup>15</sup> [www.austlii.edu.au/au/cases/cth/ACopyT/2002/1.html](http://www.austlii.edu.au/au/cases/cth/ACopyT/2002/1.html)

<sup>16</sup> [www.austlii.edu.au/au/cases/cth/ACopyT/1999/1.html](http://www.austlii.edu.au/au/cases/cth/ACopyT/1999/1.html)



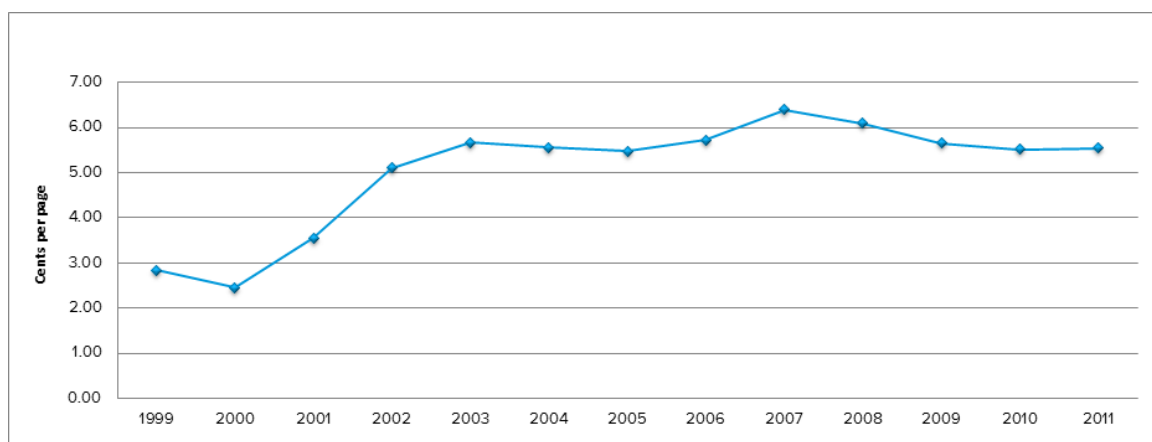
In the negotiations, the data from usage surveys, and the page rates determined by the Tribunal, are taken into account. The negotiations also take into account a range of discounts, such as those referred to in the schools' determination for copying of small portions,<sup>17</sup> 'blackline masters',<sup>18</sup> and print music.<sup>19</sup>

A number of issues raised by the education sector in submissions have been addressed by the Copyright Tribunal in its determinations. We would be happy to direct the ALRC to relevant passages if that would be helpful to the ALRC's review process.

### Changes in licence fees over time

When adjusted for student numbers, volume of copying and consumer price index, licence fees have remained stable over the last 10 years. Under the recently concluded agreement for 2013–15, the rate per student is fixed at the 2012 rate (\$16.93), but (unlike in previous agreements) without an annual increase for the Consumer Price Index (CPI). This means that, in real terms, the per-student rate will decrease over the next three years.

The following graph shows the present value of the effective per page rate since 1999.<sup>20</sup> The increases in fees between 1999 and 2002 reflect the implementation of the 2002 Copyright Tribunal determination, which included variable rates for different types of content and uses (for example, higher rates for artistic works, poems and short stories).



### Compliance requirements

Part of the value to the education sector of the statutory licence is limited compliance requirements. Reliance on 'free' exceptions necessarily requires closer attention to the requirements of the exception, with associated compliance costs.

<sup>17</sup> Under section 135ZG and 135ZMB, small portions (up to 2 pages or 1%) of a 'work' can be copied without payment, provided the institution has not copied from the same work in the previous 14 days.

<sup>18</sup> 'Blackline masters' (BLMs) are worksheets that the publisher has licensed the purchaser to copy in certain circumstances. The usage records from surveys indicate that a worksheet is a BLM, but not whether it was copied by the purchaser in reliance on the publisher's licence.

<sup>19</sup> Nearly all photocopying of print music is done by schools in reliance on the AMCOS schools licence which (unlike the statutory licence) allows the copying of whole works provided the schools buy a certain number of originals.

<sup>20</sup> The figures represent: the licence fees referable to the year (including back payments made in future years), divided by the student numbers for the year, divided by the pages copied for the year.

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.<sup>21</sup>

Schools provide information about all their usage. We process the usage data according to Data Processing Protocols agreed with schools' representatives.<sup>22</sup> These protocols involve the exclusion of records of usage made outside the statutory licence.

As noted in our submission and that of CAG schools, more than half the digital content recorded under the Electronic Use Survey (EUS) in 2011 was excluded under the EUS data processing protocol. The situation is different for photocopying survey, though: only about 13% of the copied content was excluded.

As noted above, the methods for measuring usage are changing, with a view to further reducing the compliance burden for schools.

### **How teachers and parents value the licence**

We recently engaged a market research company to conduct a survey of teachers and parents regarding their awareness of the education statutory licence and how they valued what it enables.

Key results were:

- Only two-thirds of teachers are aware of the statutory licence for schools;
- 9 out of 10 of those who are aware think the licence is a good idea (parents and teachers alike);
- The licence is regarded as extremely important (i.e. rated higher than 8 out of 10) in:
  - allowing teachers to access material they would not normally be able to afford;
  - allowing teachers to customise material for their classes; and
  - making it easy for teachers to use the material they think is best for teaching
- The acceptable price range is \$5.50 – \$44.59 (using the Van Westendorp methodology);<sup>23</sup>
- The Median Price Perception is \$20.01 (mid point of median prices for bargain and getting expensive);<sup>24</sup> and
- Parents who are more aware of retail prices (e.g. from booklist schools) value the licence more highly.

### **Licence provides choice about means of acquiring content**

The statutory licence is available for educational institutions to rely on if they choose. They have other options for acquiring content for their students, which include purchasing content and subscriptions and direct licensing arrangements.

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<sup>21</sup> A small proportion of Australia's 9,405 schools are surveyed each year for a limited period: 180 schools (2%) providing information for a term on their photocopying, and 100 schools (1%) providing information for four weeks on their use of digital content. In 2012 there will be two changes: a small number of schools for the hardcopy survey (120 instead of 180), and the hardcopy survey will capture printing and scanning as well as photocopying (printing and scanning were previously captured in the electronic use survey).

<sup>22</sup> They are available on our website at [www.copyright.com.au/about-us/collect-and-distribute-licence-fees/analyse-usage-data/data-processing-protocols](http://www.copyright.com.au/about-us/collect-and-distribute-licence-fees/analyse-usage-data/data-processing-protocols)

<sup>23</sup> Under this methodology, participants are asked to nominate the price at which a product is:

- Too expensive and should not be paid?
- So low that it would not be worth paying?
- Getting expensive, but should still be considered?
- A bargain, a good buy?

<sup>24</sup> Under the recently concluded agreement for 2013–15, the per-student rate is the 2012 rate (\$16.93) without increases reflecting the Consumer Price Index (CPI) during the period of the agreement.

## Licence fees paid overseas

Licence fees paid by schools and universities vary from country to country.

In some countries, the fees are much higher than in Australia. For example, the information we have indicates that the per-student rate for schools in Denmark is between AUD\$38 and \$58, and in Norway around AUD\$25. The basic page rate in the Scandinavian countries is similar to that in Australia (between 5 and 7 cents a page), but the levels of copying are higher (e.g. in Denmark, it was 667 pages per student in 2011, compared to 219 hardcopy and 127 digital equivalent in Australia).

In some countries, the per-student rate is lower. The reasons for this include:

- the scope of the licence is smaller than in Australia, including in relation to digital content, standalone artworks, workbooks and content from an infringing source;
- less content is copied;
- there are alternative means of supporting a local educational publishing industry, or the country does not have a commitment to supporting local content for education;<sup>25</sup> and
- there are variations in the ways in which schools acquire content for teaching (for example, textbook sales vary).

## SCHOOLS' USE OF INTERNET CONTENT

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In principle, the educational statutory licence remains adequate and appropriate for the content from the internet. It enables educational institutions to make uses of copyright material from the internet that they would otherwise need permission for. The statutory licence is available to them if they choose to rely on it.

The issue is complicated by widespread misunderstanding about how the statutory licence applies in practice to internet content, exemplified by statements such as 'schools pay millions just to use the internet', and by statements about the proportion of licence fees paid by schools that relates to use of internet content.<sup>26</sup>

We and the schools sector are agreed that schools should not pay for a use of internet content that the content creator intended to allow without permission or payment. We and the schools sector have agreed a data processing protocol for identifying content whose offline uses by schools are presumed to be allowed without payment.<sup>27</sup> These processes result in the exclusion of more than 50% of uses of content sourced from the internet. Those uses include printing, photocopying printouts, saving to a learning management system, altering and emailing.

The current processes are not perfect, but are reasonably efficient given current technologies. While one could debate the merits of any given application of the protocol (e.g. whether content covered by a Creative Commons licence, which is automatically excluded under the protocol, should be

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<sup>25</sup> In New Zealand, there appears to be a more collaborative relationship between the education department – Education New Zealand (ENZ) and educational publishers, in recognition of the publishers' role in supporting export of new Zealand education. For example, ENZ worked in partnership with the Publishers Association of New Zealand (PANZ) to support a trade stand at the 2012 Frankfurt Book Fair: <http://www.educationnz.govt.nz/news/ebd-are-the-business>.

<sup>26</sup> Under the current agreement, the school sector pays a flat per-student rate for all content and uses of text and images made under the Part VB statutory licence. While data on past usage is taken into account when negotiating the flat rate, it is an overall commercial rate resulting from a range of factors.

<sup>27</sup> The protocol is available on our website at <http://www.copyright.com.au/about-us/collect-and-distribute-licence-fees/data-processing-protocols>.

excluded if the CC licence conditions, such as attribution, are not met), the overall result is, we believe, equitable.

The issue for the uses that are not excluded, as with other aspects of the educational statutory licence, is the value of the use to both the user and the content creator. Schools do not pay to view content on the source website. The payments relate to offline or 'downstream' uses not covered by the website's terms of use.

The following are three scenarios in which content creators can currently be entitled to some payment under the statutory licence scheme.

- **Sample content:** Educational publishers commonly publish sample chapters for teachers to view, as a marketing device. They do not intend the chapter to be copied for classroom use. They could require prospective purchasers to login to view the sample content, but understandably prefer not to create a barrier that may deter prospective purchasers. The sample content is commonly from a resource that is available in both print and digital versions.
- **Self-publishing creators:** freelance creators such as photographers and writers set up websites to promote their services, often with examples of their work. Our experience in talking to these creators is that they do not intend (and cannot afford) widespread offline uses of their work.
- **Business benefits from access at source:** many content creators invest time and money in creating content to attract visitors to their website (for example, with a view to marketing other products and services).

As indicated in our initial submission, we remain open to discussing options for addressing the school sector's concerns about internet content, once the misunderstandings have been addressed.

Our members do not accept, however, that merely by publishing their material on the internet, they effectively waive their rights to specify how the content may be used. There is a widespread misconception that anything that is 'freely available' on the internet is not covered by copyright. Codifying that misunderstanding, however, risks inhibiting content creators' participation in the digital economy.

## PROPOSALS FOR A 'FLEXIBLE' EXCEPTION

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We note the many references to a 'flexible' exception in the submissions to the ALRC.

A principles-based flexible exception could, if properly formulated, enable small-scale, socially desirable uses of content, but not apply to the uses content that creators are most concerned about. These include uses that are allowed under reasonable licensing solutions, uses that deliver business benefits (whether 'commercial' or 'non-commercial'), and uses that are large-scale.

### Purposes

A flexible exception could both list privileged purposes (e.g. research, study, criticism, review, parody, satire), and enable uses for other purposes that meet criteria set out in the legislation. These 'purpose' criteria (relating to the social benefit of the purpose) would be different to the criteria for 'fairness' (which relate to the effect of the use on the creator of the work being used).

We note the extensive discussion of 'transformative' use, and the different views about what it entails. We query whether a mere format change (such as digitisation of a printed version of a work) should qualify as a privileged purpose (particularly given the format changes already allowed by the existing private use exceptions and other provisions). At the very least, the 'transformation' should

entail substantial creative input by the ‘transformer’ to create a new work in which the transformer’s contribution is a key component of the work.

### ‘Fairness’

We think that any new exception:

- should not apply if the use is allowed under a licence that is available on reasonable terms<sup>28</sup> (the licence may or may not be subject to payment);<sup>29</sup>
- should not apply to uses that deliver a business benefit;<sup>30</sup> and
- should not apply to uses that disseminate content on a large scale.

### Proportion of work whose use is deemed to ‘fair’

We agree with the education sector that there should not be a prescribed proportion of a work whose use is deemed to be ‘fair’.

Section 40(5) provides, in effect, that a reproduction for research or study of 10% of the pages, or a chapter, of a work in an edition (or 10% of the words of a work in electronic form) is deemed to be fair, irrespective of whether or not the use would be fair if the criteria in section 40(2) were applied.

The same deeming is effectively applied in the library provisions. Libraries are allowed to provide up to 10% or a chapter of works in editions to researchers and to other libraries.

In a report published in 2002, Professor Sam Ricketson argued that these ‘deeming’ provisions could contravene the three-step test in the international treaties, because they could conflict with a ‘normal exploitation’ of a work, or unreasonably prejudice the legitimate interests of the rightsholder.<sup>31</sup>

Similar proportions apply under the educational statutory licence. The licence allows the use of a ‘reasonable portion’ of a work that is commercially available. 10% or a chapter of a work is deemed to be a reasonable portion.<sup>32</sup> In practice, we do not monitor the proportion of a work used (the surveys record the number of pages of a work used, but not the proportion of the entire work). In effect, if the proportion used exceeds 10% or a chapter, it is presumed to be a ‘reasonable portion’ and covered by the statutory licence.

The deeming provision in the statutory licence is, of course, more likely to comply with the three-step test because it is tied to equitable remuneration.

### ‘Harm’ to content creators

Some have argued that the starting point for considering exceptions to copyright is whether or not the exception would ‘harm’ the content creator. What is meant by ‘harm’ will, like some other concepts in copyright policy, such as ‘fairness’, mean different things to different people. But an exception that allows a use that is licensed by the content creator would seem both unnecessary and potentially harmful. The licence need not be for payment, but subject to other conditions that are important to the content creator. The conditions associated with Creative Commons licences,

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<sup>28</sup> A licence approved by the Copyright Tribunal would be deemed to be ‘on reasonable terms’.

<sup>29</sup> For example, if a use is allowed under a Creative Commons licence, there is no reason for an exception to allow it.

<sup>30</sup> Including benefits such as advertising and data about subscribers.

<sup>31</sup> <http://www.copyright.com.au/assets/documents/centre-for-copyright-studies/CCS0202Ricketson.pdf>

<sup>32</sup> <http://www.copyright.com.au/get-information/educational-use-of-content/content-teachers-can-use>

such as attribution, 'non-commercial' use and 'share-alike' are examples of the sorts of conditions that matter to content creators.

But the question of 'harm' should be the second, not the first, consideration. The first must be the societal benefit of the use, and whether it is more important than the content creator being able to manage how their work is used. The creation of new content is presumed to be beneficial to society. A mere use of someone else's content is not. A person proposing an exception needs to articulate the societal benefit of the use, or at least why the use is a 'special case', before the question of 'harm' is considered.

## **FURTHER INFORMATION**

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Thank you again for the opportunity to participate in this important review. If the ALRC would like further information on any issue, please let us know.