6. Statutory Licences

Contents

Summary 109
What is a statutory licence? 110
Australian statutory licences 111
Fair remuneration for rights holders 113
Repeal of statutory licences 115
Derogation from rights holders' rights 116
Schools and universities seek repeal 118
Technical copying 118
Determining equitable remuneration 120
Complexity 123
Licensing fees 124
Availability of direct licensing 125
Anti-competitive 125
Licensing uses covered by exceptions 127
When licences cannot be obtained voluntarily 128
License it or lose it 128
Extended collective licensing 129

Summary

6.1 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.

6.2 This chapter proposes the repeal of the statutory licences for educational and other institutions in pts VA and VB of the *Copyright Act*, and the statutory licence for the Crown in pt VII div 2 of the *Copyright Act*.[1]

6.3 The digital environment appears to call for a new way for these licences to be negotiated and settled. Like most other licences for use of copyright material in Australia and abroad, these licences should be negotiated voluntarily. Voluntary licences—whether direct or collective—are less prescriptive, more efficient and better suited to a digital age.

---

1 The statutory licences for retransmission of free-to-air broadcasts and for radio broadcast of sound recordings are discussed separately in Chs 15 and 16 respectively.

6.4 This reform should help Australian educational institutions and governments take better advantage of digital technologies and services. New licensing models may also facilitate more efficient remuneration of rights holders.

What is a statutory licence?

6.5 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.[3] Professors Ricketson and Creswell write that compulsory or statutory licences represent 'a form of "forced taking" or compulsory acquisition from the copyright owner'.[4]

6.6 Copinger and Skone James note seven factors which seem to influence when the United Kingdom 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;
>
> (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;
>
> (iii) where the copyright owner has failed to supply the needs of the public and other producers and distributors are available;
>
> (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;
>
> (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.[5]

6.7 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 resulting licence'.[6] 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

---

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

3 Copyright Agency/Viscopy, *Submission 249*.

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

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

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

> 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.[7]

6.8 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'.[8] 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.[9]

6.9 Statutory licences are largely enacted for the benefit of certain licensees. 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

6.10 There are two statutory licensing schemes in the *Copyright Act* for the use of copyright material by educational institutions: 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.[10]

6.11 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'.[11]

6.12 The statutory licensing scheme for Crown or government use is contained in pt VII div 2 of the *Copyright Act*.[12] Under this scheme, copyright is not infringed by a government use of copyright material if that use is 'for the services of the Commonwealth or State'.[13]

6.13 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.

---

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

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

9 Ibid, 1926.

10 This chapter concerns the statutory licences for educational and other institutions and the licences for government. The statutory licence for retransmission of broadcasts is discussed in Ch 15.

11 Copyright Agency/Viscopy, *Submission 287*.

12 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 14.

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

6.14 For both the education and government schemes, 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.[14]

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

6.16 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.[15]

6.17 Two members of the Spicer Committee considered that the right to use the material without the rights holder's consent should be 'confined to use for defence purposes only'.[16]

6.18 The statutory licensing schemes for education were a response to widespread photocopying in educational institutions. In *University of New South Wales v Moorhouse*,[17] 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.[18]

6.19 Soon after *Moorhouse*, the Franki Committee recommended the introduction of a statutory licence for educational establishments, stating that it believed that:

> 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 needed for educational instruction, justifies the institution of a system of statutory licences in non-profit educational establishments.[19]

6.20 The Franki Committee made this recommendation despite concerns that a statutory licensing scheme for educational institutions 'might seem to favour the

---

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

15 Copyright Law Review Committee, *Report to Consider What Alterations are Desirable in the Copyright Law of the Commonwealth* (1959), 77.

16 Ibid, 77.

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

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

19 Copyright Law Committee, *Report on Reprographic Reproduction* (1976) (the Franki Report), [6.40].

interests of education as against the interests of copyright owners'.[20] It is therefore surprising that some thirty or so years later, educational institutions are calling for the repeal of these statutory licences.

6.21 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.[21]

Institutions assisting persons with disability

6.22 The schemes in pts VA and VB of the *Copyright Act* also apply to institutions assisting persons with disability.

6.23 Dr Matthew Rimmer submitted that Australia's laws in respect of copyright and disability rights are 'a disgrace'. The exceptions are 'messy ... technology-specific; copyright subject matter specific; disability specific; and sometimes limited to institutions'. Rimmer also submitted that the statutory licences are 'not a good means of providing access to cultural materials for those with disabilities'.[22]

6.24 The Terms of Reference instruct the ALRC not to duplicate work being undertaken on increased access to copyright works for persons with a print disability. However, many of the arguments in this chapter may also apply to the statutory licences as they relate to institutions assisting persons with disability.

6.25 Furthermore, many uses by institutions assisting persons with disability may well be fair, under the fair use exception proposed in Chapter 4. Such fair uses should not need to be licensed, and do not need to be covered by statutory licences. The freedom to format shift is particularly important for certain persons with disability. Blind Citizens Australia submitted that

> a fair usage provision which recognises the needs for individuals with a print disability to format shift from an inaccessible to accessible copy would dramatically enhance access for a significant portion of the population and also advantage copyright owners through increased sales of their works.[23]

Fair remuneration for rights holders

6.26 Some stakeholders submitted that the current statutory licences for educational institutions were working well. Many stressed the importance of educational institutions paying for their uses of copyright material.

---

20 Ibid, [6.63].
21 Australian Publishers Association, *Submission 225*.
22 M Rimmer, *Submission 161*.
23 Blind Citizens Australia, *Submission 157*.

6.27 The Australian Publishers Association submitted that its members consider the

> Part VB schemes—and particularly the '10%/1 chapter' rules of thumb as to what constitutes a 'reasonable portion'—are generally well understood in the education sectors, and are generally operating efficiently.[24]

6.28 The Australian Society of Authors said the scheme was 'a very effective balance' and 'works well for educational institutions and creators':

> There could be more transparency in the process—particularly how much money is paid to which publishers and authors—but all in all it operates quite well.[25]

6.29 Some submissions from governments, collecting societies and others supported the existence of the statutory licence for government,[26] on the basis that it would be impractical to seek permission of copyright owners before using the material[27] and that government use is for the public benefit, rather than private or commercial ends.[28]

6.30 Many justified the statutory licences by stressing the importance of fairly remunerating publishers, creators and other rights holders. This was perhaps the most common justification for the statutory licences in submissions to this Inquiry. 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'.[29]

6.31 Some stakeholders submitted that the pt VB licence scheme is efficient, cost effective and well understood and that, with sufficient education and transparency, it would receive wider support. The publisher Pearson Australia/Penguin submitted that despite the imperfections of the statutory licence for education,

> for consumers it has created an efficient and cost effective way for instructors and institutions to legally access and reproduce very significant amounts of print and digital content. At an average cost of $16 per student per year, in the context of the total education cost per annum (roughly $10k per student), this is a very small price.[30]

6.32 The Australian Copyright Council said that, based on its experience in conducting training for educational institutions, 'the Part VB statutory licence is generally well understood and operates efficiently'.[31]

---

24 Australian Publishers Association, *Submission 225*.
25 Australian Society of Authors, *Submission 169*.
26 Victorian Government, *Submission 282*; Department of Defence, *Submission 267*; Law Council of Australia, *Submission 263*; State Records South Australia, *Submission 255*; Copyright Agency/Viscopy, *Submission 249*; Screenrights, *Submission 215*; Tasmanian Government, *Submission 196*; SAI Global, *Submission 193*.
27 Victorian Government, *Submission 282*.
28 Ibid; Department of Defence, *Submission 267*; State Records South Australia, *Submission 255*; Tasmanian Government, *Submission 196*.
29 Screenrights, *Submission 215*.
30 Pearson Australia/Penguin, *Submission 220*.
31 Australian Copyright Council, *Submission 219*.

6.33 Firefly Education said that the 'strength of the education statutory licence is that it offers authors and publishers fair remuneration for their intellectual property'.[32] Oxford University Press Australia likewise submitted:

> 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. The statutory licensing scheme has meant that this aim has been achieved for print products without massive administrative burden on educational publishers and educational institutions.[33]

6.34 More fundamentally, Copyright Agency/Viscopy questioned the very distinction between statutory licences and free use exceptions. It stated that the dichotomy is misleading because statutory licences allow free uses, and there are costs associated with 'free exceptions' that are not associated with statutory licences.[34]

> In truth, this is not a discussion about whether a use should be covered by a free exception (with its attendant compliance costs), but about the value of the use allowed without permission, and who should bear the cost of equitable remuneration for that value. Should the cost be borne by the user, or, in effect by the content creator?[35]

6.35 Few stakeholders explicitly argued for the benefits of statutory licensing over voluntary licensing. Some of the benefits of statutory licensing arrangements may be replicated under a voluntary licence. The ALRC is interested in further comment on this matter.

6.36 Some submitted that the scope of the statutory licences for education should be broadened, so that licensees pay for a greater range of uses of copyright material.

6.37 A further benefit of statutory licences is that they can provide a safety net for users of copyright material, allowing uses that an organisation may not otherwise be able to license voluntarily. Copyright Agency/Viscopy submitted that with the statutory licences in place, schools can still

> 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.[36]

Repeal of statutory licences

6.38 The ALRC proposes the repeal of the statutory licences for government, educational institutions, and institutions assisting persons with a print disability. Voluntary licences would be more efficient and better suited to a digital age. The following section outlines some arguments for repeal of these statutory licences.

---

32 Firefly Education, *Submission 71*.
33 Oxford University Press Australia, *Submission 78*.
34 Copyright Agency/Viscopy, *Submission 249*.
35 Ibid.
36 Copyright Agency/Viscopy, *Submission 287*.

Derogation from rights holders' rights

6.39 Australia's statutory licences are a type of compulsory licence. Under a compulsory licence, rights holders are essentially compelled to license their material. A leading UK copyright textbook states, with respect to compulsory licensing:

> In general, if copyright owners choose not to allow others to exploit their rights then that is their prerogative. However, in certain exceptional circumstances, the law will intervene to force the copyright owner to license the work and require the 'licensee' to pay a fee.[37]

6.40 The copyright market 'comprises the right to exclude others from exploiting the work'.[38] Compulsory licensing, however, 'substitutes compensation for control over the copyrighted work'.[39] The Australian Film/TV Bodies submitted that the

> exclusive right to authorise the reproduction or communication of a copyrighted work is undermined by a compulsory licence and in some circumstances a compulsory licence may not be justifiable at all.[40]

6.41 International standards are said to be 'generally antipathetic' to non-voluntary licences.[41] Ginsburg has written that non-voluntary licences are 'administratively cumbersome, unlikely to arrive at a correct rate, and contrary to copyright's overall free market philosophy'.[42]

6.42 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 certain statutory licenses that are no longer necessary now that market transactions can be more easily accomplished using digital tools and platforms.[43]

6.43 The same report also noted the 'frequent complaint that statutory licences do not necessarily provide copyright owners with compensation commensurate with the actual use of their works or the value of those uses'.[44]

---

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

38 J Ginsburg, 'Creation and Commercial Value: Copyright Protection of Works of Information' (1990) 90 *Columbia Law Review* 1865, 1925.

39 Ibid, 1925.

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

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

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

43 United States Copyright Office, *Legal Issues in Mass Digitisation: A Preliminary Analysis and Discussion Document* (2011), 38.

44 Ibid, 39.

6.44 Some rights holders have suggested that statutory licensing schemes should not be available where access to the works is available on a commercial basis. This is similar to the argument that free use exceptions should never be available where material can be licensed for a fee. Statutory licences should only correct market failure, this argument implies, and should not prevent publishers and others from charging higher rates for the use of their material, perhaps using micro-licences or micro-payments.

6.45 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.[45]

6.46 ARIA submitted that statutory licences should not be expanded because

> with the rapid development of licensing models for the delivery and use of content by educational institutions an expansion of the statutory licence scheme is not justified ... 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.[46]

6.47 Changes to the statutory licensing schemes, ARIA submitted, 'should be carefully considered in order not to inadvertently undermine these licences'.[47]

6.48 The collecting society 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.[48]

6.49 Copyright Agency/Viscopy also noted that, internationally, statutory licences are sometimes seen as 'an unjustifiable derogation from content creators' exclusive rights', but submitted that Australia has 'a long tradition of statutory licences, and both content creators and licensees have adjusted their practices accordingly'.[49]

> 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.[50]

---

45 BSA, *Submission 248*

46 ARIA, *Submission 241*.

47 Ibid.

48 APRA/AMCOS, *Submission 247*.

49 Copyright Agency/Viscopy, *Submission 287*.

50 Ibid.

Schools and universities seek repeal

6.50 Submissions to the Inquiry from Australian schools, universities and TAFEs called for the statutory licences to be repealed.[51] Licences should instead be negotiated voluntarily, they submitted.

6.51 The Copyright Advisory Group—Schools (the 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.[52]

6.52 The Schools submitted that there are 'four fundamental problems with statutory licences that make them unsuited for Australia's digital economy goals':

> 1. the statutory licences are inherently unsuitable to the digital environment;
>
> 2. statutory licences were created in a 'data vacuum'. Efforts by the education sector to use better data access to better manage copyright expenditures are making the licences less efficient for copyright owners and licensees. These inefficiencies are becoming more pronounced with the increased use of new technologies;
>
> 3. statutory licences put Australian schools and students at a comparative disadvantage internationally and do not represent emerging international consensus regarding copyright in the digital environment;
>
> 4. statutory licensing is economically inefficient.[53]

6.53 Each of these points is discussed at some length in the Schools' submission. A few of the points are considered below. Some arguments for repeal of the statutory licences more closely concern the question of which uses should be held to infringe copyright, and are therefore discussed in Chapters 13 and 14.

Technical copying

6.54 One of the more persuasive arguments for repealing the statutory licences is that they were not built for, and may not be suited to, a digital age. 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.

6.55 Schools and universities submitted that there is a disincentive to use new digital technologies built into the statutory licensing schemes:

---

51 Copyright Advisory Group—Schools, *Submission 231*; Copyright Advisory Group—TAFE, *Submission 230*; Universities Australia, *Submission 246*; ADA and ALCC, *Submission 213*.

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

53 Ibid.

> 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... At the same time as schools are being encouraged to adopt the benefits of broadband and convergent technologies, the statutory licences provide a direct financial and administrative disincentive to do so.[54]

6.56 The statutory licences are not suitable for a digital age, the 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'.

> 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.[55]

6.57 The Schools argued that a model that 'links the volume of copies and communications either directly or indirectly to remuneration in all circumstances cannot be sustained indefinitely' and does not work in an internet age. Rather, it is better to 'consider the nature and purpose of the use involved (eg, providing content to students as part of a classroom activity) than the number of technical steps, copies and communications made as part of that use'.[56]

6.58 Universities Australia observed:

> 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/Viscopy] to seek a price hike for every technological advance that results in digital 'copies' being made.[57]

6.59 The Australian Digital Alliance and Australian Libraries Copyright Committee (ADA and ALCC) also criticised the statutory licences for including 'all reproductions and communications—no matter how essential to the use of new digital technologies'.[58] The licence, it said, 'deems many new forms of delivery to be remunerable, no matter how minor or technical the copying'.[59] The 'technological specificity of educational copying provisions and the statutory licences are impeding the development of new forms of delivery for educational content'.[60]

---

54 Ibid.
55 Ibid.
56 Ibid.
57 Universities Australia, *Submission 246*.
58 ADA and ALCC, *Submission 213*.
59 Ibid.
60 Ibid.

6.60 The ADA and ALCC also submitted that technology specificity has an impact on

> long-distance educational use of learning, internal use of content management systems, and may result in potential difficulties for assisting students with a disability, especially students with hearing difficulties.[61]

6.61 In the ALRC's view, more efficient methods of remunerating rights holders are available. Voluntary contracts for digital services appear to be more flexible and do not require such strict accounting of copies and communications. If indeed the statutory licences are discouraging educational institutions and governments from taking advantage of new digital technologies and services, the licences should be reviewed.

6.62 However, repealing the statutory licences is not the only option. This question of 'technical copying' is related to the questions discussed in Chapter 8 of this Discussion Paper, concerning 'non-consumptive' uses of copyright material, such as caching. The ALRC considers that such non-consumptive uses will sometimes be fair uses. If the statutory licences are not repealed, then the *Copyright Act* should be amended to clarify that fair uses of copyright material, or uses otherwise covered by a free use exception, such as non-consumptive uses, need not be licensed.

Determining equitable remuneration

6.63 Some submissions suggested that the statutory licences facilitate an overly strict accounting of usage that leads to unreasonably high fees.

6.64 Universities Australia submitted that the 'statutory licensing model for determining remuneration is firmly based in a "per-copy-per-view-per-payment" paradigm'.[62] Surveys are used to determine what material is copied and communicated. If collecting societies and the licensees cannot agree on a rate, the Copyright Tribunal of Australia can determine the 'equitable remuneration' that should be paid for the making of licensed copies or licensed communications.[63]

6.65 To many, it may seem unsurprising that the statutory licensing system is designed to measure the amount of copying and communication that occurs.[64] However, for Universities Australia, this 'model for determining remuneration takes no account of the realities of the modern educational environment'. The number of articles a lecturer uploads onto an e-reserve or otherwise makes available to students, for example, is 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

61 Ibid..
62 Universities Australia, *Submission 246*.
63 *Copyright Act 1968* (Cth) ss 135ZWA(1), 153C(2).
64 Universities Australia, *Submission 246*.

> very fact that universities are having to ask these questions underscores the unsuitability of the statutory licence to a digital educational environment.[65]

6.66 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'.[66]

6.67 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. 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'.[67] In the ALRC's view, 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. One would hardly 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).

6.68 The *Copyright Act* also specifies that the method of working out equitable remuneration under the government statutory licences must take into account the estimated number of copies made and specify the sampling system to be used for estimating the number of copies.[68]

6.69 Governments also find that the sampling required by s 183A of the *Copyright Act* is problematic.[69] 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'.[70]

> Designing a sampling survey is a complex task requiring specialist knowledge and skills in the areas of statistics, copyright law, Government systems and administrative and copying practices.[71]

6.70 The Tasmanian Government 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.[72]

---

65 Ibid.
66 Ibid.
67 Copyright Agency/Viscopy, *Submission 249*.
68 *Copyright Act 1968* (Cth) s 183A(3).
69 DSITIA (Qld), *Submission 277*; State Records South Australia, *Submission 255*; Tasmanian Government, *Submission 196*.
70 NSW Government, *Submission 294*.
71 Ibid.
72 Tasmanian Government, *Submission 196*.

6.71 The Queensland Government also raised concerns:

> The design of a national survey of copying in State and Territory Governments has been a particularly difficult issue. Governments are concerned that surveys should be as unobtrusive and inexpensive as possible and measure only remunerable copying.[73]

6.72 Governments and collecting societies have not been able to agree on a method for surveys. There is uncertainty about whether the free use exceptions are available to governments and whether governments can rely on implied licences from copyright owners, which has contributed to the disagreement and delay.[74] No survey has been conducted since 2002–03.[75] Despite this lack of agreement, neither side has asked the Copyright Tribunal to determine a method.[76] Instead, for the last ten years, payments have been made based on the results of the 2002–03 survey. However, governments point out that, since that time, there has been increased use of direct licences, for example for subscriptions to online journals.[77] 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.[78]

6.73 Copyright Agency/Viscopy agreed that sampling for the government statutory licence 'has not worked 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.[79]

6.74 Copyright Agency/Viscopy also submitted that, except for 'the small number of teachers involved in surveys of usage from time to time, compliance requirements are negligible'.[80]

> 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.
>
> Schools provide information about all their usage. We process the usage data according to Data Processing Protocols agreed with schools' representatives. These protocols involve the exclusion of records of usage made outside the statutory licence.[81]

6.75 However, the Schools also criticised the 'overly prescriptive and technical requirements of the statutory licence'.[82] Voluntary licences have proven 'more

---

73 DSITIA (Qld), *Submission 277*.

74 State Records South Australia, *Submission 255*.

75 DSITIA (Qld), *Submission 277*.

76 *Copyright Act 1968* (Cth) ss 183A(2)(b), 153K.

77 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*.

78 Victorian Government, *Submission 282*; DSITIA (Qld), *Submission 277*; State Records South Australia, *Submission 255*; Tasmanian Government, *Submission 196*.

79 Copyright Agency/Viscopy, *Submission 249*.

80 Copyright Agency/Viscopy, *Submission 287*.

81 Ibid.

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

efficient and simpler to negotiate'. For example, in the Schools' voluntary agreement with 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.[83]

6.76 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.[84]

Complexity

6.77 Ricketson and Creswell write of the 'complexity and prolixity' of the statutory licence schemes.[85] This complexity, particularly in pts VA and VB of the *Copyright Act*, was criticised in some submissions. 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.[86]

6.78 The Schools submitted examples of provisions of the *Copyright Act* that it called 'overly technically complex' and make the statutory licences ill-suited to the digital environment.

6.79 Section 135ZMD of the *Copyright Act* concerns the multiple reproduction and communication of works in electronic form by educational institutions, under the statutory licence. Section 135ZMD(3) limits what may be made available online: if a part of a work has already been made available online, for example on a school's learning management system, then another part of the same work cannot also be made available online. The Schools submitted that in 'an age of learning management systems, centralised content delivery systems and networked interactive whiteboards in

---

83 Ibid.
84 Copyright Agency/Viscopy, *Submission 287*.
85 Thomson Reuters, *The Law of Intellectual Property: Copyright, Designs and Confidential Information*, [12.280].
86 R Wright, *Submission 167*.

classrooms, provisions such as s 135ZMD(3) make compliance with the statutory licence using modern education tools increasingly difficult'.[87]

6.80 Section 135ZMB concerns the multiple reproduction and communication of *insubstantial* parts of works in electronic form, under the statutory licence. It features a similar restriction, in s 135ZMB(4), limiting what parts of a work may be made available online. However, the Schools submitted that s 135ZMB(5) makes the restriction even less reasonable, by providing that 'passages from the work that are not continuous are all different parts of the work'.[88] Using insubstantial parts of works generally does not infringe copyright so, in theory, schools must pay for some insubstantial parts because the parts are non-consecutive. The Schools noted, however, that it is unclear whether this is caught in survey data.

6.81 Sections 135KA and 135ZXA of the *Copyright Act* require licensees to provide notices in relation to 'each communication' made. The Schools submitted that this is difficult if not impossible to comply with. This, the Schools said, 'further illustrates how the technical requirements of the statutory licence are not suited to the modern teaching and learning environment'.[89]

6.82 Repealing the statutory licences for educational institutions will not only simplify the *Copyright Act*, but make it more flexible and adaptive to new and efficient digital technologies.

Licensing fees

6.83 The question of which uses by educational institutions and governments should be covered by free use exceptions is discussed in Chapters 13 and 14. A related concern is whether the statutory licences facilitate the payment for uses of copyright material that would otherwise not infringe copyright, and that do not infringe copyright in other countries.

6.84 The ADA submitted that under the statutory licensing regime,

> Australian schools pay significantly more per FTE [full time equivalent student] than schools in the UK, Canada and New Zealand. Additionally, under the statutory licences, a number of uses that are free in these jurisdictions are remunerable for Australian educational institutions.[90]

6.85 One reason Australian educational institutions may pay more is that the *Copyright Act* now provides that certain exceptions do not apply to uses that may be licensed.[91] Such provisions should be repealed.

6.86 Another reason that Australian educational institutions may pay more is that rights holders may charge more for the use of their work in Australia than they do in other countries. Price discrimination between countries is common, and though it has

---

87 Copyright Advisory Group—Schools, *Submission 231*.
88 *Copyright Act 1968* (Cth) s 135ZMB(5).
89 Copyright Advisory Group—Schools, *Submission 231*.
90 ADA and ALCC, *Submission 213*.
91 See eg, *Copyright Act 1968* (Cth) s 200AB(6).

been criticised, for example in relation to information technology pricing, this issue is not a concern of this Inquiry.

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

Availability of direct licensing

6.88 The NSW Government submitted that it should not be required under the *Copyright Act* to enter licensing arrangements with collecting societies. Governments should be able to make their own 'commercial decision on how to manage their copyright liabilities'.[92]

> Books, journals and similar material are increasingly delivered online under agreements that include copyright licences ... Digital technology and the 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. NSW Government Departments spend millions of dollars annually on such agreements.[93]

Anti-competitive

6.89 The statutory licences are economically inefficient, the Schools suggested, partly because statutory licences are monopolies 'administered by monopoly collecting societies declared under the Act'.[94]

6.90 However, repealing the statutory licence may be unlikely to create a competitive market in collective rights management. Educational institutions and governments are likely to continue to need to enter into collective licensing arrangements with collecting societies, even if the existing statutory licences are repealed. Direct licensing is unlikely to cover all the needs of educational institutions and governments, even if micro-licensing improves considerably and new business models emerge that offer broad, blanket licences.

6.91 Also, new collecting societies are perhaps unlikely to emerge to compete with the long established collecting societies. It is not even clear that rights holders or users would benefit from the existence of multiple and competing collecting societies, each representing different rights holders. Collecting societies have been said to have a 'de facto monopolistic nature'.[95] Although this can be grounds for criticism, it also has its benefits. Copinger and Skone James state that 'as a rule, 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':

---

92 NSW Government, *Submission 294*.
93 Ibid.
94 Copyright Advisory Group—Schools, *Submission 231*.
95 K Garnett, G Davies and G Harbottle, *Copinger and Skone James on Copyright* (16th ed, 2011), [27–15].

> 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.[96]

6.92 The Australian Competition and Consumer Commission (ACCC) discussed some of these benefits of collective licensing in its submission to this Inquiry, and then outlined some of the costs, particularly to competition. Without collecting societies, licensors 'might otherwise be in competition with one another'.

> 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.[97]

6.93 Various factors outlined in its submission may, the ACCC said, 'result in users having no genuine alternative means of acquiring a licence to use copyright materials and collecting societies will be able to set prices for access to copyright material without consideration as to what the efficient price of those rights would be'.[98]

6.94 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.[99]

6.95 If the market power of the existing collecting societies is problematic, then in the ALRC's view, repealing the statutory licences is unlikely to remedy this problem. In theory, the market power of a collecting society could be abused in the negotiation of both a voluntary and a compulsory licence, if no reasonable alternative method of licensing the material is available.

6.96 The question of whether further measures are necessary to control the market power of collecting societies is outside the Terms of Reference for this Inquiry, but some of these measures are discussed by the ACCC.[100] For example, the ACCC calls 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 from copyright licensing. The repeal of this provision has previously been recommended by the Ergas Committee. The ACCC submitted that 'a

---

96 Ibid, [27–12].
97 ACCC, *Submission 165*.
98 Ibid.
99 Ibid.
100 Ibid.

blanket exemption for conditions imposed in IP [intellectual property] licensing and assignment arrangements is not justified' and the licensing or assignment of IP rights 'should be subject to the same treatment under the CCA as any other property rights'.[101] 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.[102]

Licensing uses covered by exceptions

6.97 Like all other users of copyright material, educational institutions and governments should not need to pay for uses of copyright material that would otherwise not infringe copyright because they are covered by an exception. If governments and educational institutions were required to pay for licences for these uses, then they would be paying for uses that others, including commercial enterprises, do not have to pay for.

6.98 Screenrights submitted that voluntary licensing would add to the complexity of licensing arrangements. If the pt VA licence were replaced with fair use and voluntary licensing,

> it would be necessary to determine whether each new use fell within the free fair use provision or required a licence and payment. Resolving this threshold question may then lead to the even more complex question of who actually controls the rights.
>
> The difficulty in drawing a clear demarcation line between fair use and those uses that require permission would also impact on contract negotiations between each of the rightsholders in an audiovisual work. It would be difficult to determine which rights need to be acquired from underlying rightsholders and what their value (if any) would be.[103]

6.99 The NSW Government, on the other hand, submitted that the *Copyright Act* should clarify that governments may rely on the free use exceptions.[104]

6.100 If market failure were the only proper justification for a free use exception, then the availability of a collective licence may suggest that an exception should not apply. If it can be paid for, it should not be free. In the ALRC's view, the availability of a licence is an important, but not determinative, consideration in both crafting exceptions, and in the application of the fair use exception. Other matters, including questions of the public interest, are also relevant.

6.101 If fair use is enacted, then licences should be negotiated in the context of which uses are fair. If the parties agree, or a court determines, that a particular use is fair, then educational institutions and governments should not be required to buy a licence for that particular use. Licences negotiated on this more reasonable footing may also be more attractive to other licensees.

---

101 Ibid.
102 Ibid.
103 Screenrights, *Submission 289*.
104 NSW Government, *Submission 294*.

> **Proposal 6–1** The statutory licensing schemes in pts VA, VB and VII div 2 of the *Copyright Act* should be repealed. Licences for the use of copyright material by governments, educational institutions, and institutions assisting persons with a print disability, should instead be negotiated voluntarily.

When licences cannot be obtained voluntarily

License it or lose it

6.102 If the statutory licence for government and educational uses is repealed, then it may be necessary to amend the *Copyright Act* to provide that certain important uses of copyright material by these institutions do not infringe copyright if a licence for the use is not available. This policy, enacted in New Zealand and the UK, has been called 'license it or lose it'.

6.103 One concern with repealing a statutory licence is that voluntary licences may not be offered for certain rights. The underlying rights in broadcasts, for example, may not be offered to educational institutions to license. Collecting societies may not be able to secure those rights.

6.104 The scope of statutory licences is sufficiently broad to cover uses of copyright material, even when the rights cannot be obtained, and even when the rights holders are not members of the relevant collecting society, and therefore do not obtain royalties.

6.105 If a fair use exception is enacted in Australia, then the availability of a licence for certain rights will affect whether a use is fair. If a licence is not available for the underlying rights in a broadcast, for example, then it is more likely that an educational use of the underlying works in a broadcast will be held to be a fair use. But the use will not *necessarily* be fair. If the use is vital to governments and educational and other institutions, and there is a sufficient public interest in overriding the copyright owner's right not to license their material, then some legislative provision may be necessary.

6.106 In New Zealand, the *Copyright Act 1994* (NZ) provides for a free use exception for the copying and communication of 'communication works for educational purposes'—but the exception does not apply when licences authorising the copying and communication are available under a licensing scheme.[105]

6.107 The UK similarly provides that an education institution can record and communicate broadcasts (in certain circumstances) without infringing the copyright in the broadcast or in the works included in the broadcast, but that the exception does not apply if there is a certified licensing scheme in place.[106]

---

105 *Copyright Act 1994* (NZ) s 48. ('*communication work* means a transmission of sounds, visual images, or other information, or a combination of any of those, for reception by members of the public, and includes a broadcast or a cable programme': s 2.)

106 *Copyright, Designs and Patents Act 1988* (UK) s 35.

> The Act thus provides an incentive to owners to offer licences on reasonable terms. In this instance the Act benefits educational establishments not by conferring a limited privilege upon them, but rather by strengthening their bargaining position as against copyright owners.[107]

6.108 There is a similar exception for reprographic copying allowing educational institutions to make copies of passages from published literary, dramatic or musical works, provided a licence for this use is not available.[108]

Extended collective licensing

6.109 Extended collective licensing (ECL) is another way to deal with this problem of repertoire. As discussed in Chapter 11, the UK Government is considering allowing ECL for the first time. With ECL, 'collecting societies that meet the necessary standards for protecting rights holders' interests could seek permission to license on behalf of rights holders who are not members, with the exception of those who opt out of the scheme'.[109] The UK Government policy statement stated that ECL was 'particularly supported by institutions that hold large archives of copyrighted work' and that there was 'also significant support for the proposal from collecting societies and from licensees, including commercial and public sector use'.

6.110 In the context of educational and government licences, Australian collecting societies could, for example, seek to license on behalf of the underlying rights holders in broadcasts.

6.111 The scheme proposed in the UK allows rights holders to opt out of ECL. This means that collecting societies might offer blanket licences, but subject to exceptions. ECL thus gives the rights holders greater control over the exercise of their rights than the 'license it or lose it' option discussed above. Rights holders are free to refuse to license their works, should they wish to.

6.112 However, this also means that schools and other educational institutions may not have access to material they need. There would also be administrative costs in checking whether a rights holder had withheld his or her rights from the collecting society.

Question 6–1 If the statutory licences are repealed, should the *Copyright Act* be amended to provide for certain free use exceptions for governments and educational institutions that only operate where the use cannot be licensed, and if so, how?

---

107 K Garnett, G Davies and G Harbottle, *Copinger and Skone James on Copyright* (16th ed, 2011), [9–105].

108 *Copyright, Designs and Patents Act 1988* (UK) s 36. These UK provisions may be amended so that they cover distance learning and the use of interactive whiteboards.

109 UK Government, *Government Policy Statement: Consultation on Modernising Copyright* (2012), 10.