COPYRIGHTAGENCY

Supplementary submission on Australian Law Reform Commission Discussion Paper: Copyright and the Digital Economy

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1 SUMMARY

We appreciate the opportunity to provide some additional information and observations on issues raised by submissions on the Discussion Paper.

We recognise that the ALRC is seeking to reconcile what appear to be conflicting accounts or views on a number of issues. Broadly speaking, these relate to:

1. descriptions of how things operate in practice now;
2. predictions about the consequences of the proposals in the ALRC's Discussion paper; and
3. views about what government policy should be.

We appreciate that it is difficult for the ALRC to make recommendations for change without a clear grasp of how things operate in practice now. We think that the descriptions of how things operate now, in some of the submissions to the ALRC, are based on misunderstandings of the law and/or practice. Some of those misunderstandings have arisen from misinterpretation of information or data provided by us (in our submissions or elsewhere), such as information about voluntary licensing, and usage data.

We have sought to address the main areas of confusion in this submission.

1.1 Matters that are uncontested

We note that the following matters are uncontested:

- the ALRC's proposals to repeal the statutory licence for education and introduce a new 'free' exception for education (fair use or fair dealing) would each result in a reduction in the equitable remuneration (fair compensation) currently paid to content creators
- similarly, the ALRC's proposals to repeal the statutory licence for government and introduce a new 'free' exception for government (fair use or fair dealing) would each result in a reduction in the equitable remuneration (fair compensation) currently paid to content creators
- the ALRC's proposals would each require the current beneficiaries of statutory licences (e.g. teachers) to learn new guidelines and change their current practices
- the recommendations advocated by Copyright Advisory Group (CAG) were not reached through consultation with teachers or associations representing their interests, such as unions and professional teacher associations[1]
- those currently affected by the statutory licences who advocate their repeal have elected to seek legislative change to address their concerns, rather than use existing mechanisms (such as determination of equitable remuneration and survey design by the Copyright Tribunal)

[1] See, for example, submissions from Australian Education Union, Shore Grammar, Professional Teaching Council of Western Australia, Mathematical Association of New South Wales Incorporated, Science Teachers Association of NSW, Legal Studies Association of NSW, Victorian Association for the Teaching of English, Australian Association for the Teaching of English, The Australian Literacy Educators' Association, Society and Culture Association of NSW, Science Teachers Association of Victoria, Victorian Commercial Teachers Association.

- the most recent Tribunal determinations on equitable remuneration for the education sector were in 2002 (for schools) and 1999 (for universities): since then, fair compensation has been set, at flat rates, through commercial agreements between Copyright Agency and CAG and Universities Australia (UA) respectively
- the design of surveys of usage (including the recording of uses that may not be made in reliance on the statutory licence), the appointment of the independent research company to do the surveys, and the protocols for the processing of that usage data (including which uses are excluded from 'volume estimates') are agreed between Copyright Agency and CAG and UA respectively
- Copyright Agency offers 'voluntary' licences to a range of licensees, which are based on the 'mandates' given by members and international affiliates (and thus do not cover all the content and uses allowed by statutory licences, and are subject to conditions that are not applicable to the statutory licences)
- Recent legislative changes in Canada have resulted in:
    - The launching of legal proceedings by the rights management organisation, Access Copyright, seeking clarification by the courts about the application of the new law;[2]
    - A view by some educational institutions that they need no longer pay licence fees to content creators via Access Copyright;[3]
    - A view by others that they will renew their licences with Access Copyright, but at a reduced rate; and
    - Development of a range of guidelines on the new law by the education sector (which are unilateral, rather than agreed with Access Copyright).[4]

1.2 Other observations

We also make the following observations:

- It is difficult to see how the ALRC's recommendations would benefit creators;
- It is also difficult to see how the ALRC's recommendations would benefit teachers;
- There seems to be a high degree of misunderstanding about a number of issues, such as:
    - The power of the Copyright Tribunal to determine 'equitable remuneration' for different types of content and uses (including to determine equitable remuneration at zero for uses such as 'technical copies')
    - The application of the educational statutory licences to Massive Open Online Courses (MOOCs)

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[2] http://www.barrysookman.com/2013/04/08/access-copyright-moves-to-collect-royalties; http://www.quillandquire.com/google/article.cfm?article_id=12480; http://www.cbc.ca/news/canada/story/2013/04/14/copyright-universities.html

[3] http://thevarsity.ca/2013/06/10/university-seeks-new-agreement-with-access-copyright/; http://www.accesscopyright.ca/educators/access-copyright%E2%80%99s-executive-director-on-recent-dispute-with-canadian-universities-and-colleges/

[4] See, for example: http://excesscopyright.blogspot.com.au/2013/09/the-aucc-finally-provides-fair-dealing.html; http://samtrosow.wordpress.com/2013/08/31/its-the-labour-day-weekend-do-you-know-where-your-schools-fair-dealing-guidelines-are/

- The 'examples' given by CAG in support of the ALRC's proposals are minor, and not typical of the uses made in reliance on the licence
- The consequences of the ALRC's proposals are unknown: they depend largely on the reactions of content creators, those who negotiate fair compensation, and those who currently rely on the statutory licence (e.g. teachers and academics). They may also depend on how the amended legislation is interpreted by the courts.

1.3 Outline of this submission

In this submission, we have sought to focus on additional information about issues raised in the initial submissions on the Discussion Paper. These include:

- differences between the content and uses covered by voluntary licences in other countries (principally the UK and New Zealand) and the Australian statutory licences;
- features of voluntary licences, including licence fees;
- how surveys of usage work;
- some specific issues raised by the Copyright Advisory Group and Universities Australia;
- amendments to 'streamline' the statutory licences; and
- how the Copyright Tribunal has approached equitable remuneration and usage information.

2 KEY DIFFERENCES BETWEEN VOLUNTARY AND STATUTORY LICENCES

In our earlier submissions, we listed important differences between voluntary and statutory licences. These include:

- excluded content (e.g. workbooks, standalone artworks) and uses (e.g. alterations and 'mashups');
- licensee obligations to check repertoire (particularly for digital content);
- conditions (e.g. to buy originals before copying; to attribute the source of the content and the licence); and
- indemnities from rights management organisations

2.1 Consequences of exclusion: workbooks

The licences for schools offered in the UK, Canada and New Zealand exclude 'workbooks' (sometimes referred to as 'consumables'), because the publishers prefer students to buy originals. By contrast, copying of workbooks is allowed by the Australian statutory licence.

We analysed 2012 usage data from two typical schools: one primary and one secondary.

The analysis showed that workbooks comprised 73% of the copying in the primary school, and 23% of the copying in the secondary school. Through comparing features of the survey data from these schools with those of all the schools surveyed, we believe these proportions are indicative of all the surveyed schools.

We do not know if publishers of workbooks would seek to exclude them from voluntary licences in Australia (as they do in the UK, Canada and New Zealand). They may not, given that Australian teachers have been copying workbooks for 30 years under the statutory licence, and it could be difficult to change this behaviour after so long. If workbooks were excluded, the school sector would need to find the budget to purchase original workbooks each year for students. The cost of a single workbook for a single student is on a par with the annual licence fee per student.

The ALRC has said that it prefers not to base its recommendations on price. There are, however, numerous references in the ALRC report to uses that the ALRC appears to think 'should not be paid for', and it seems that the amount of fair compensation payable under the statutory licences was a factor in the ALRC's thinking. Price 'comparisons' also formed part of some of the submissions to the ALRC, and we think it important to note that they are not 'apples with apples' comparisons, given the breadth of the statutory licence and the limitations of voluntary licences in other countries.

3 HOW FAIR COMPENSATION IS NEGOTIATED WITH THE EDUCATION SECTOR

There seems to be misunderstanding about how fair compensation is negotiated and calculated in practice. We have therefore sought to describe here the process for a recent negotiation.

In early 2013, Copyright Agency entered into a new three-year agreement with CAG for the school sector. The agreement sets a flat rate per student for the period (approximately $17 per year). The rate is effectively less than that under the previous three-year agreement, as there is no increase for consumer price index (CPI).

In agreeing on this rate, Copyright Agency and CAG took into account:

- Estimates of the extent of usage made in reliance on the previous four-year period (two years for digital), based on surveys (conducted by independent research company AMR) of usage in statistical samples of schools
- Estimates of the extent of usage *not* made in reliance on the statutory licence (e.g. made in reliance on Creative Commons licences, subscription agreements, free exceptions, 'insubstantial portions')
- Aspects of the Copyright Tribunal's determinations on equitable remuneration such as:
    - the relative valuations for different types of content and uses (e.g. higher relative values for music and poetry, and use of content in university coursepacks)
    - the 'page rates' determined by the Tribunal
    - overall discounts for certain classes of content and use (such as 'small portions': see below)
- Overall discounts for:
    - Usage made in reliance on sections 135ZG and 135ZME (copying of up to two pages or 1%);
    - 'Blackline masters' (books sold with a licence to the purchaser to make certain copies);[5]
    - Print music;[6]
    - 'Non-original' material, following the High Court decision in the IceTV case.[7]

As in any commercial negotiation, each party forms a view about an acceptable range of outcomes based on assessments of the factors relevant to price, risk and practicality, and negotiations proceed on that basis. In common with negotiations in other areas, our negotiations commonly end with a range of legal and practical issues that are left unresolved in order to reach a commercial solution.

[5] The usage data from surveys does not indicate whether or the copying from a 'blackline master' was covered by the publisher's licence (e.g. whether the copy was made by the purchaser of the book or someone else).
[6] Schools have a voluntary licence with AMCOS that allows certain levels of photocopying from music books purchased by the school.
[7] This is a new discount.

It is worth noting that the rate agreed covers both 'hardcopy' and digital content and uses. Uses of internet content, both in reliance on the statutory licence and otherwise (e.g. under a Creative Commons licence), was taken into account in the negotiations but was a negligible factor.

The process does not involve anything like a mathematical formula for determining a rate based on data. The-per student price ($16.934) suggests precision, but in fact results from the historical application of the CPI increases, carried over from the previous agreements. The third decimal point prevents unfair rounding when the per-student rate is multiplied by 3.5 million students.

If a new exception for education were introduced (e.g. fair use or a new fair dealing exception), this would likely be used by those negotiating for the education sector to argue for a further overall discount.[8] This is likely to be the case whether the negotiations are about fair compensation under the statutory licence, or a licence fee under a voluntary licence.

The extent of the discount that would be sought is unknown. The experience in Canada suggests it would be substantial.

[8] It is unlikely that the application of the exception would be assessed on a case-by-case basis, because there would be insufficient information in the survey data to enable this assessment to be done efficiently. That is why reliance on the 'small portions' exceptions, for eample, is taken into account as a global discount rather than a case-by-case assessment.

4 FEATURES OF VOLUNTARY LICENCE SCHEMES

4.1 Copyright Agency's voluntary licences

As outlined in previous submissions to the ALRC, Copyright Agency offers a range of voluntary licences for a range of uses not covered by statutory licences. These include licences for the corporate sector, quasi-government bodies and local councils.

Voluntary licences are less efficient than statutory licences, because they require ongoing management of the mandate from content creators, which can change over time. They also involve higher risk for Copyright Agency, partly because of the indemnities we offer to make the licences attractive to licensees.

Submissions to the ALRC indicated some misunderstandings of the way the voluntary licences operate, and the licence fees.

4.2 Licences for the corporate sector

We have a 'standard' licence for the corporate sector, as well as specific licences tailored for pharmaceutical companies and public relations firms.

The licences require careful, ongoing management of the mandate from members, particularly from the publishers of scientific, medical and technical journals, and newspaper publishers.

The licence fees are based on a per-employee (full-time equivalent – FTE) rate. The rates reflect research into comparative pricing, and consultations with members.

The rates vary from licensee to licensee, depending upon a range of factors, but even the lowest rate is higher than the effective government rate.[9]

Similarly, the arrangements for 'downstream' use of press clippings obtained from press clipping services sets reduced rates for government.[10]

4.3 Licences for quasi-government bodies

The voluntary licences for quasi-government bodies are not as broad as the statutory licence. In particular, they do not allow the copying of an entire work that is available for purchase.

4.4 Availability of voluntary licences to the education and government sectors

Educational institutions and governments can choose to rely on a licence granted by a copyright owner or their agent (e.g. a collecting society) rather than rely on the immunity and breadth of the statutory licences.

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[9] In State and Territory governments, the current rate is about $11 per FTE. For the Commonwealth, there is a lower rate for large departments and a higher rate for small departments, but the overall average rate is about $11 per FTE.

[10] http://www.copyright.com.au/assets/documents/licences/downstream-terms-and-conditions-june-2012

The entitlement of a copyright owner to grant a licence to an educational institution is confirmed by section 135ZZF.

There is no equivalent confirming provision for the government statutory licence, but there is nothing to prevent a government choosing to rely on a licence granted by a copyright owner rather than the immunity provided by section 183. If a government does choose to rely on the immunity granted by section 183, it must negotiate with Copyright Agency in relation to copies of text and music; section 183A does not allow a government to rely on the immunity and negotiate terms directly with the copyright owner.

4.5 AMCOS print music licence for schools

The school sector has a voluntary licence with AMCOS for the photocopying of printed sheet music, because it allows them to copy entire works that are available for purchase. The agreement has some conditions not applicable to the statutory licence:

- the number of copies a school can make is limited by the number of originals it owns; and
- the school must stamp or 'mark' the originals and copies with specific wording.[11]

We understand that AMCOS has sought to make a similar arrangement with CAG for digital music, but CAG has elected to continue to rely on the statutory licence. We do not how CAG's position in this regard fits with its stated preference for voluntary over statutory licence arrangements.

The use of digital music recorded in school surveys is proportionally very small compared to other types of material, but is nevertheless taken into account in compensation negotiations and distributions.[12]

Copyright Agency has no objection to AMCOS making direct arrangements with licensees for the use of music, and is happy to assist with coordination of these arrangements with those for the statutory licence.

By agreement with CAG, the surveys of school teachers include their use of print music. We provide the records of use of print music to AMCOS to identify those that relate to their repertoire and uses covered by the AMCOS voluntary licence, and AMCOS uses those records to distribute the licence fees they receive under the voluntary licence negotiated directly with CAG. AMCOS returns to us any records that do not relate to their licence, and we include those records in our distributions of statutory licence fees.

There are some 'hardcopy' uses of music that schools make in reliance on the statutory licence, as they are not covered by the AMCOS voluntary licence. These include the use of lyrics without music, the use of music from an infringing source, and the use of music outside the AMCOS repertoire.

We note that the AMCOS print music licence only applies to schools. It does not apply to the university sector, nor to the 1,000 or so independent educational institutions that we license individually.

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[11] http://www.apra-amcos.com.au/musicconsumers/musicineducation/schools.aspx

[12] The Copyright Tribunal has powers to review a collecting society's distribution arrangement: see section 153DE (for part 153DE) and 153KE (for Part VII), although no applications have been made to date.

5 SURVEYS OF USAGE

Licensees participate in surveys of usage for two quite distinct reasons:

1. To provide an indication of the overall levels of usage ('volume'); and
2. To provide information about content used, to assist with distribution of fair compensation and licence fees.

Some survey 'records' are useful for the first purpose but not for the second (because they do not contain sufficient information to identify a rightsholder). In identifying survey records for distribution purposes, we exclude those that do not contain sufficient identifying information.[13]

Conversely, some information gathered in surveys is relevant to distribution, but does not affect compensation negotiations.

The 'design' of surveys is agreed with licensee representatives. This includes which licensees will participate in the survey, how long the survey will last, what information participants will be asked to provide, how they will provide it (e.g. by writing on a form; attaching a copy of the content used; completing an online form), and how often the surveys will occur.

5.1 Surveys in the education sector

For the education sector, surveys are conducted by an independent research company (currently AMR). AMR also provides expert advice about the survey design and validates and audits the survey data.

By agreement with CAG, the surveys cover some uses which are outside the statutory licence. This is principally to reduce the administrative burden on survey participants, and reduce error associated with survey participants wrongly categorising a use as 'in' or 'out'. There are similar arrangements with UA. The consequences of survey participants making uninformed decisions about whether or not the statutory licence applies in a given instance was recognised by Burchett J in the Copyright Tribunal determination relating to universities:

> *If it is to be left to individual lecturers (and in practice, probably, not even lecturers, but office assistants) to choose whether to rely on the statutory licence or on a layman's understanding of various statutory exceptions, there will inevitably be great numbers of infringements.*[14]
>
> ...
>
> *I do not accept that Parliament intended the records provisions to be capable of being rendered futile by uninformed decisions not to rely on the statutory licence and therefore not to make a record.*[15]
>
> ...
>
> *In a case, such as the present, where the remuneration notice is a sampling notice, the sampling process is intended to measure what actually happens in the university, day*

[13] This does not necessarily mean that the work used is a 'orphan work': it means that insufficient information has been provided to enable us to identify its copyright owner.
[14] Copyright Agency Ltd v University of Adelaide [1999] ACopyT 3 (27 August 1999) at [9]
[15] Ibid at [9]

in and day out, over the whole period of the notice. Over that period, lecturers and their office assistants will not be thinking about statutory loopholes when they make copies; knowing their university has given a remuneration notice, but not a records notice, they will simply be making copies on the understanding that it is lawful to do so. A sampling procedure which measures the objective facts in order to assess the numbers of copies in truth falling within the statutory licence, while excluding those in truth justified on some other basis, will accord with the reality. But to insert in the survey questions about the reliance of those copiers surveyed upon particular statutory provisions, questions they would not otherwise ask and that are not asked elsewhere during the bulk of the copying the sample is intended to represent, would be artificial and distorting. What is to be "assessed" under s 135ZW(3) is a practice of copying which, I am satisfied, takes place because the universities rely on the statutory licence, and, if it is relevant, individual lecturers do so also. Only if the sampling documents force them to, would they generally be likely to look past the scheme to which their university has adhered. That this is so is demonstrated by the consensus over a number of years on sampling procedures that tested objective facts rather than subjective intentions.[16]

It must be accepted that the objective data recovered by the surveys to date cannot yield a certain answer in each individual instance of copying. Neither would the subjective approach which is suggested, if only for the reason I have already given, that it would require an answer about reliance from persons generally not skilled in copyright law. However, sampling, in its nature, does not yield, and is not intended to yield, an exact figure, but an approximate one. On all the evidence, I see no reason to doubt that any over-counting through the inclusion of copying which could have been justified apart from the statutory licence is counterbalanced by under-counting, particularly through recording lapses. The very fact that the method (improved from time to time as defects have been discovered) has been accepted by consent over a lengthy period is strong evidence that, in practice, it has achieved results that were seen as appropriate by those in the best position to judge. The universities have not sought to prove otherwise; the attacks on the sampling procedures have suggested weak points and possible openings for error, and have identified isolated problems, but there has been no attempt to show that, on balance, the results have been skewed against the universities. Indeed, the evidence is that the Nielsen surveys have tolerated a measure of under-reporting (up to 10%), and an absence of checking of copying done outside university premises.[17]

The 'burden' of recording uses that may subsequently be assessed as outside the statutory licence is outweighed by the burden associated with training to make an expert determination, and the risks of erroneous categorisation.[18]

The categorisation is done by Copyright Agency researchers, following processing protocols agreed with CAG and UA, and subject to both internal and external audit. The data is available to CAG and UA in accordance with agreed data access protocols.

[16] Ibid at [11]
[17] Ibid at [12]
[18] In universities, some identification of uses that are 'excluded' because they are allowed under direct licence arrangements is done by university information managers, who have some training in how to do this. Individual universities are surveyed more often than schools, because there are fewer of them (8 out of 37, or 20%, each year).

As noted above, the school surveys include use of print music, which largely occurs under a voluntary licence with AMCOS. We provide the records to AMCOS to assist it with distribution of the licence fees it receives directly from the school sector.

Survey participants undergo training, provided jointly by Copyright Agency, Screenrights and CAG.

5.2 New agreement on reduced sample size for survey

In August 2012, Copyright Agency proposed to CAG a revised sample design for the Schools Hardcopy Survey, involving a plan to reduce the number of schools that would have to take part in the annual survey. The primary objective of the proposal was to reduce the administrative burden of the survey for the school sector.

Copyright Agency's proposal resulted from analysis of past survey data that showed that surveying larger schools in metropolitan and inner regional areas would produce usage data of similar reliability to that provided by a larger sample that includes smaller and rural schools.

In September 2013, CAG and Copyright Agency agreed to a reduced sample size for the survey (from 180 schools a year to 125).

The change will be implemented from 2014 and will result in significant cost savings to Copyright Agency, the school sector, Screenrights and AMCOS.

6 ISSUES RAISED BY CAG SCHOOLS

6.1 Matters on which Copyright Agency and CAG agree

There are a number of issues on which Copyright Agency and CAG agree. In particular, we agree that the ALRC proposals would result in a reduction in the compensation paid to content creators for the copying and communication of content in schools.[19]

It is also worth noting that Copyright Agency and CAG have agreed:

- the design for surveys of use in schools (which are done by an independent research company), including:
  - the survey questions, and
  - that teachers some uses that may be outside the statutory licence (as it is difficult for them to determine whether a use is covered by the statutory licence or not); and
- the protocols for processing the survey data, including the rules for excluding uses that are presumed to have been made outside the statutory licence (such as content covered by a Creative Commons licence).[20]

The following are other matters on which we agree in relation to current arrangements:

- individual schools, and their copyright representatives, have successfully negotiated 'voluntary' licences, including collective licences, in parallel with the operation of the statutory licences;[21]
- not all uses recorded in school surveys are 'remunerable';[22]
- equitable remuneration should relate to the level of 'consumption, irrespective of the delivery mechanism; [23]
- the statutory licences 'cover virtually all uses of copyright materials';[24] and

[19] See, for example, at page 22: "CAG does not resile from the fact … that some uses of copyright materials that currently attract remuneration would be considered to be a 'fair' use under the exception proposed by the ALRC". As discussed below, the extent of that reduction is unclear.
[20] This means that the filtering of 'excluded' and 'remunerable' uses can be done using Copyright Agency's automated processes, that consistently apply the agreed processing protocols. The protocols are available at www.copyright.com.au/about-us/collect-and-distribute-licence-fees/data-processing-protocols.
[21] See, for example, page 51.
[22] The survey design agreed between CAG and Copyright Agency captures both 'remunerable' and 'non-remunerable' uses. CAG and Copyright Agency have agreed data processing protocols that, amongst other things, distinguish 'remunerable' from 'non-remunerable' uses. Examples of non-remunerable uses include content covered by Creative Commons licences and directly licensed content.
[23] See the example on page 53: we agree that equitable remuneration for the 'consumption' of the scene from the play should, in principle, be similar for the ultimate viewing of the play by the 25 students as it is for the supply of 25 copies to the students. How best to estimate usage, given current technological and other factors, is a separate issue.
[24] See page 54. Not every use is 'paid for', however.

- it would be useful to review the protocol agreed between CAG and Copyright Agency for identifying uses of internet content that are presumed to have been made outside the statutory licence, and those presumed to have been made inside the statutory licence.[25]

The following are other matters on which we agree in relation to the ALRC proposals:

- teachers would need to be educated about the application of the 'fair use' exception and voluntary licensing arrangements;[26]
- some content that is currently available would no longer be available;[27]
- teachers may need to check if content is available;[28] and
- guidelines can be successful if they reflect the agreement of all affected stakeholders.[29]

Other matters on which we agree include:

- educational materials for students about copyright are commendable;[30]
- teaching practices are changing;[31]
- access to education in rural and remote areas is important;[32] and
- the education sector makes a significant investment in educational resources.[33]

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[25] The protocol is available from www.copyright.com.au/data-processing-protocols. Under this protocol, more than 50% of internet content used in schools is excluded.

[26] See page 55. CAG envisages 'developing guidelines to educate teachers on the copying permitted under fair use and the rules agreed under a voluntary licence.'

[27] See page 60. See for example: exclusions from Copyright Agency's voluntary commercial licences at www.copyright.com.au/licences/excluded-works; exclusions from Copyright Licensing Agency's licences at www.cla.co.uk/licences/excluded_works/excluded_categories_works; exclusions from Access Copyright's licences at www.accesscopyright.ca/exclusions-list; and limitations in Copyright Licensing New Zealand's licences at http://www.copyright.co.nz/FAQs/1187

[28] See page 60. See, for example, Access Canada's lookup tool at http://www.accesscopyright.ca/repertoire-look-up-tool, and Copyright Licensing Agency's Title Search at http://www.cla.co.uk/licences/titlesearch. We understand that schools almost never check repertoire under the music licences, though they sometimes make enquiries about whether certain uses are covered by the licences.

[29] But unilateral guidelines or codes cannot, in our view, be useful to users, particularly if there are different views about how a law applies in practice. For example, *Copyright Agency Limited v Haines* concerned guidelines from the NSW Education Department based on advice with which the Federal Court disagreed (see https://jade.barnet.com.au/Jade.html#article=148690 for confirmation on appeal.)

[30] See the list of resources on page 35.

[31] The disagreement about the applicability of the statutory licence and other exceptions to these uses is not mostly not about whether the uses are prevented by copyright (i.e. the need to get permission), but about when fair compensation should be zero.

[32] See page 48.

[33] But the amount of spending on purchased resources does not affect the value of the content the sector acquires by choosing to copy in reliance on the statutory licence. The Book Industry Strategy Group (BISG) Market Research Report, *Cover to cover: A market analysis of the Australian book industry* (Department of Innovation, Industry, Science and Research, May 2011) estimated that in 2010, an estimated $820 million worth of educational books (primary, secondary and tertiary texts, as well as professional and reference works) were sold in Australia. See http://www.innovation.gov.au/industry/booksandprinting/BookIndustryStrategyGroup/Documents/PwCCovertoCover.pdf.

6.2 Matters that are unclear from the ALRC proposals

The main matter that is unclear is the extent to which content creators and users of their content would be able to agree on how fair use applies. This will affect:

- the extent to which any guidelines can provide 'certainty' to users;
- the processes for resolving the lack of agreement (e.g. litigation);[34]
- the extent of potential liability for users should a court ultimately determine a more limited application of fair use than has been advised by the education sector's advisers; and
- the effect of risk assessment on teachers' willingness to use content.[35]

Other matters that are unclear from the ALRC proposals are:

- the extent of reduction in income to content creators;
- how content creators will respond to the new environment (e.g. the extent, if any, to which they will continue to participate in collective licensing arrangements);
- the implications of the new arrangements for smaller content creators (e.g. small publishers and self-published authors);[36]
- the viability, or at least efficiency, of collective licences which do not include the large content creators; and
- how educational institutions will respond to the new arrangements (e.g. will those that currently negotiate collectively through CAG continue to do so).

6.3 Some matters that CAG has misunderstood

CAG misunderstanding	**In fact**
'Copyright Agency's voluntary commercial licences permit corporate uses of copyright content that are not as prescriptive as the terms of the statutory licences for education'[37]	Some content is excluded from the voluntary licences,[38] some uses allowed by the educational statutory licence are not allowed by the voluntary licences, and there are additional compliance requirements such as marking of copies. Nevertheless, we are very willing to offer a commercial licence to any educational institution that may want one.
Fees are payable for uses of 'orphan works'[39]	The estimate of the overall 'volume' of usage made in reliance on the statutory licence is based on survey data. The 'volume' is taken into account, together with other factors, in negotiations for the fixed price fees (currently a bit less than $17 per student per year for 2013–15). At the moment, the same survey data is used for distribution of licence fees. Some survey records suitable for volume

[34] In Canada, the lack of agreement has led to several court actions to resolve the proper application of the law, a process that will take years.
[35] The statutory licence provides immunity from infringement even if 'equitable remuneration' has not been agreed or determined.
[36] For example, the new arrangements may result in schools entering exclusive arrangements with one or a small number of large publishers.
[37] Page 54; see also page 59.
[38] See www.copyright.com.au/licences/excluded-works
[39] See page 23

CAG misunderstanding	In fact
	estimates are not suitable for distribution because they do not contain enough information to identify a rightsholder. This is does not necessarily mean that the work used is an 'orphan work': it just means the person completing the survey form provided limited information. We do not have information about each and every use made in reliance on the statutory licence. The aim is to enable use of all text and images available to schools in return for 'equitable remuneration for the overall usage, and to distribute that remuneration as equitably as possible given the available data.
In Copyright Tribunal proceedings in 2006, Copyright Agency argued that 'reading from, and browsing, the internet was remunerable under the statutory licence, and that students should pay whenever a teacher directed a student to view a website.[40]	The proceedings related to *recording* the activities of teachers, not remuneration for those activities. As is clear from the Tribunal's determination,[41] Copyright Agency was seeking to obtain information about teachers referring students to copyright material because of its understanding that it was common for students to subsequently *copy* the material they were referred to. Copyright Agency was not arguing that the viewing itself was remunerable.
'Copyright Agency … claimed that Part VB operates so that caching by educational institutions for efficiency purposes should attract payment under the statutory licence.'[42]	Apart from the fact that term 'caching' is used in different ways (and is not confined to 'efficiency purposes'), Copyright Agency has never sought payment for caching by schools.
Implementation of the new treaty for the visually impaired: the statutory licence is not an appropriate mechanism because it does not apply to individuals[43]	Individuals with a print disability can create accessible-format materials in reliance on the exceptions for format-shifting, research or study, and 'special cases' (section 200AB).[44]
'The United States Copyright Office… has recently rejected statutory licences as a useful model for educational copying, describing them to be "mechanisms of last resort that must be narrowly tailored to address a specific failure in a specifically defined market"'[45]	The quote is from a 2011 Copyright Office report on mass digitisation (which did not address educational use): *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.*

[40] Page 42
[41] www.judgments.fedcourt.gov.au/judgments/Judgments/tribunals/acopyt/2006/2006acopyt01
[42] Page 42.
[43] See page 63ff.
[44] http://www.copyright.com.au/get-information/access-by-people-with-a-disability/print-disability-copyright-guidelines/individuals-with-a-print-disability
[45] Page 101

CAG misunderstanding	In fact
	... *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.*[46] On educational use, 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.[47]
The statutory licence requires payment for material that 'the general law of copyright would most likely view ... as insubstantial and therefore non-infringing.'[48]	The statutory licence only applies to uses that would otherwise require copyright permission. Our processes exclude small extracts that are presumed to be less than 'substantial' for the purposes of section 14 of the Copyright Act and thus non-infringing.[49] The 'small portions' exceptions for 2 pages or 1% (sections 135ZG and 135ZME) are only relevant where the part of the work used is more than a 'substantial part' under section 14, and thus otherwise infringing.[50]

6.4 CAG examples in support of ALRC recommendations

In submissions and other communications, CAG has provided examples of copyright uses that it says would, and should, be covered by a new 'fair use' exception. Our understanding is that none of them require copyright permission under the current system. We note that section 200AB was introduced in 2006 specifically to enable educational uses not covered by other exceptions and statutory licences.

In some cases, the uses are allowed by the statutory licence but not included in 'volume estimates': the estimates of the overall extent of uses made in reliance on the statutory

[46] 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.
[47] See: *The Register's Call for Updates to U.S. Copyright Law*, at http://judiciary.house.gov/hearings/113th/03202013/Pallante%20032013.pdf
[48] Page 104
[49] As that term is used in section 14 of the Act.
[50] There is also a discount for content that may not be 'original' following the High Court decision in Ice TV.

licence that are taken into account (together with other factors) in negotiations for the fixed amounts of compensation.

example	comments
Printing fact sheet on head lice from Department of Health website to hand to students[51]	• excluded from 'volume estimates' if terms of use allow free use by schools • if terms of use do not allow free use by schools, Department can nevertheless instruct us not to allocate payment • if we have not received such an instruction, and a payment is allocated in accordance with the processing protocols agreed with CAG, Department can refuse payment, and instruct exclusion for all future uses[52] • the proportion of compensation from schools paid to governments is very small[53]
Printing copies of a free tourism map from a website for students to use in class[54]	• excluded from 'volume estimates' if terms of use allow free use by schools • if terms of use do not allow free use by schools, copyright owner can refuse payment, and instruct exclusion for all future uses
Reading a poem out loud to distance education students[55]	• allowed by section 28 and/or section 200AB
Reciting a poem to a virtual class using Skype or a Google hangout[56]	• allowed by section 28 and/or section 200AB
Writing a poem on a digital whiteboard[57]	• allowed by the statutory licence, but not recorded in surveys and Copyright Agency seeks no payment
A teacher printing out a copy of a map of Australia from Google Maps to use in a geography lesson[58]	• content from Google Maps is generally excluded from volume estimates[59]

[51] Pages 5 and 22

[52] Following instructions from the Commonwealth Attorney General's Department, we treat all material published by Commonwealth government bodies as excluded from statutory licences unless the body instructs us to the contrary.

[53] In 2012 and 2013, the total payments to Commonwealth, State and local government bodies was less than one per cent

[54] Page 5

[55] Pages 5 and 22

[56] Page 34

[57] Page 5

[58] Page 22

[59] The copyright in most maps on maps.google.com.au is attributed on the website to Google and MapData Sciences Pty Ltd. Where there is a photographic image, there is an additional copyright notice for that, attributed to the copyright owner of the image. There are no terms of use on the Google Maps website apart from the copyright notice. Under the processing protocol agreed between CAG and Copyright Agency, educational use of content from websites with a copyright notice but no other terms of use is presumed to be made under the statutory licence. Copyright Agency has now be notified by Google and Map Data Sciences that maps in which they own copyright is effectively directly licensed by them for use by schools.
Notified exclusion

example	comments
A teacher displaying the text of a book on an interactive whiteboard for a student to read out loud in class[60]	• the statutory licence allows the reproduction of the text onto, and the 'making available' of the text from, the storage device connected to the interactive whiteboard • 'display' is measured in surveys because it is related to communication by 'making available', and for distribution of compensation[61]
Displaying or projecting material to the classroom via an interactive whiteboard or projector (e.g., showing a PowerPoint presentation in a classroom or viewing material displayed on an interactive whiteboard)[62]	• the statutory licence allows the reproduction of the text onto, and the 'making available' of the text from, the storage device connected to the interactive whiteboard • 'display' is measured in surveys to assist with volume estimates for communication by 'making available'[63] • a PowerPoint presentation may be excluded on a number of bases, including if it was all the teacher's own work or made available under terms of use that allow free use by schools
Streaming a recording of a classroom lesson using virtual classroom software[64]	• allowed by section 200AB
Reproducing thumbnail images of book covers on a school intranet to show students what books are available in the school library	• allowed by statutory licence

6.5 Websites listed in Appendix G

Records of use of content from websites are processed in accordance with protocols agreed between CAG and Copyright Agency. The protocols are intended to distinguish uses made in reliance on the statutory licence from other uses, based on the terms of use on the website.

All the uses of content from the 49 websites listed in Attachment G to the CAG submission were processed in accordance with the protocols agreed between CAG and Copyright Agency. The terms of use for the 49 websites were categorised as follows:

- 15 were restricted to personal use;
- 7 expressly excluded uses covered by statutory licences;
- 16 were classified as 'copying not permitted';
- 7 had a copyright notice but no other terms of use; and
- 4 had no terms of use.

As we have noted elsewhere, there is much confusion about the extent to which the use of content from the internet is currently 'paid for' by the education sector, and the extent to which users other than the education sector can legally use content from the internet without

[60] Page 22
[61] There is no agreement on value
[62] Page 34
[63] There is no agreement on value
[64] Page 34

copyright permission. There is also a policy debate about the extent, if any, to which a content creator should be able to direct how their content is used once it is available on the internet, and whether they should be compensated if content is used contrary to their direction.[65]

6.6 Matters on which we disagree

We disagree on the following matters:

CAG view	Copyright Agency view
'The statutory licences require collecting societies to collect payment for every copy or communication made by schools, irrespective of the circumstances'.[66]	Statutory licences only require compensation for uses made in reliance on the licences that have value. The agreements negotiated between CAG and Copyright set a fixed per student rate, not a per-use rate.[67]
'Copyright Agency has acknowledged that the statutory licences cover some categories of content for which remuneration should not be paid.'[68]	Statutory licences are intended to allow, and do allow, some uses that are not taken into account for remuneration negotiations. In practice, uses that are 'zero-rated' have been agreed rather than put to the Tribunal to determine. But there is no impediment in the legislation or accompanying regulations to the Tribunal making such a determination.
The ALRC proposals would 'remove inefficiencies that currently prevent Australian students from fully enjoying the information benefits created by the internet and digital technologies';[69]	The inefficiencies of the ALRC proposals, as compared to current arrangements, include users having to ascertain if a use is covered by 'fair use', a direct licence or a collective licence, and ensuring they meet any associated conditions.
The proposals would 'remove the obstacles to the development and delivery of educational content to educational institutions'[70]	Any obstacles are not from copyright (i.e. the need to get a copyright clearance), but an unwillingness to pay fair compensation for valuable uses.
'Significant certainty will exist from day one'[71]	This will be dependent upon the school sector's copyright representatives and content creator representatives reaching sufficient agreement about the application of the fair use exception and about the arrangements for uses not covered by

[65] We address this issue further in Section 8 'Improvements to the statutory licences' below.
[66] See CAG submission at page 42. Our view is that statutory licences allow uses that have no value and are therefore not 'remunerable'. In practice, many uses are not 'remunerated' because the payment arrangements are not 'pay per use' but flat fees (that are influenced by levels of past usage as measured through surveys, but do not directly correlate to levels of usage during the licence agreement period).
[67] This is influenced by estimates usage during the agreement period, based on estimates of past usage, but not determined by actual usage during the period. Examples of uses made under the statutory licence which are processed as 'unremunerable' are uses of advertisements and logos. In addition, there are a range of processes for excluding uses presumed to be made outside the statutory licence, such as uses of content from websites with terms of use that appear to allow 'free' use by schools.
[68] Page 53
[69] See page 48.
[70] See page 48.
[71] Page 33.

CAG view	Copyright Agency view
	the exception. The experience in Canada suggests that this may be unlikely.[72] Even if there is agreement, it will be a more complex environment than the current one for teachers to navigate.
The statutory licences 'prevent any reliance on public interest exceptions such as fair dealing. Schools pay for everything, while commercial users such as broadcasters can rely on fair dealing'[73]	The only exception that is 'excluded' for uses covered by the statutory licence is section 200AB, which is only available to educational institutions, libraries and people with a disability. All exceptions that are 'available to everyone', such as the exceptions for reporting news, criticism or parody, are available to schools provided the purpose requirement and any other criteria are met. Students may rely on the exception of fair dealing for research or study.
'Collecting societies have relied on [statutory licences] to seek payment for incidental acts of copying and communication'[74]	We do not seek payment for 'incidental acts of copying and communication'. Fair compensation should be related to the level of consumption. The mechanisms for measuring consumption are affected by the technology available and the desire to minimise the administrative burden for teachers. They aim to get as good an overall estimate as possible. Surveys of usage are done by an independent research company. The surveys are designed in consultation with CAG. The processing of survey data follows protocols agreed with CAG. Equitable remuneration is usually agreed between CAG and Copyright Agency, but can be determined by the Copyright Tribunal if agreement cannot be reached. We think the Copyright Tribunal would ascribe no value to incidental acts.
'[Statutory licences] operate as a strong disincentive for publishers to offer efficient, innovative services'[75] and (conversely) 'voluntary licensing would create incentives for publishers to offer efficient, innovative services'[76] being	Publishers have to innovate to survive, particularly in an education market which is in rapid transition from print to digital.[77] Publishers already offer innovative services, anticipating and responding to consumer

[72] CAG acknowledges, at page 43, that the there may, in fact, be litigation, but in its view that 'is still better than our current system'. On Canada, see John Degen, 'Why college and university instructors should be worried – very worried' at http://johndegen.blogspot.ca/2013/08/why-college-and-university-instructors.html.
[73] See page 49.
[74] Page 49.
[75] Page 50.
[76] Page 52.
[77] For example, together with Copyright Agency, publishers have recently announced an online platform called LearningField (www.copyright.com.au/learningfield). It provides online access to works produced by all the publishers involved – by chapter or whole text – mapped to the Australian curriculum, State curriculums and the NSW syllabus. It is accessible from a range of devices, include PCs, iPads and Android devices.

CAG view	Copyright Agency view
'innovative distribution and pricing models to schools'.	demand. These are developed in parallel with the statutory licence. But there are some uses that are more efficiently managed under the statutory licence, both from the teachers' and content creators' perspectives.
'The statutory licences have permitted educational publishers in Australia to engage in a form of statutory supported 'double dipping' to obtain a payment for schools for a licence to access a product, and then receive additional revenue from the statutory licence if a school subsequently uses the resource in a school.'[78]	Statutory licences only apply to uses that are not covered in the terms of use for a resource. The processing protocols agreed between CAG and Copyright Agency are designed to distinguish uses made in reliance on the statutory licence from others.
'Australian educational institutions are … prevented from making non-harmful public interest uses of materials that would properly be regarded as "fair"'[79]	Section 200AB was introduced in 2006 with the express objective of enabling 'socially useful' purposes, including 'giving educational instruction', not already allowed by other provisions.[80] It is not clear what uses CAG thinks would be 'fair' that are not already allowed.
CAG's concerns about 'inappropriate' applications of the statutory licence justify its repeal.	All the 'examples' given by CAG are atypical uses of content. In any event, all would seem to be allowed under current arrangements where 'fair'.

[78] Page 57
[79] Page 23
[80] See Copyright Amendment Bill 2006 Explanatory Memorandum at [6.53]: 'The intention is that s 200AB provide a flexible exception to enable copyright material to be used for certain socially useful purposes while remaining consistent with Australia's obligations under international copyright treaties'.

7 ISSUES RAISED BY UNIVERSITIES AUSTRALIA

Many of the issues raised by Universities Australia (UA) were also raised by schools, and we have not addressed them again here.

We have, however, sought to address some misunderstandings that we think may have given rise to some confusion, and that impede identification of real issues and solutions.

But we also question UA's position that Australian universities should be in *same* position as those in other countries. We are not clear why Australian university academics and student should not be in a *better* position than their foreign counterparts? The statutory licence provides *better* access to content than arrangements in any other country. The *value* of that level of access needs to be carefully assessed.

Issue/statement	**Copyright Agency comments**
Effects of ALRC proposals on payments to content creators	• UA and ALRC acknowledge that the ALRC proposals (repeal of the statutory licence, and introduction of a new fair use or fair dealing exception for education) would result in a reduction to the fair compensation currently paid under the statutory licence[81] • The amount spent on purchased resources does not seem relevant: universities can choose to acquire their resources by those means, or by copying and communicating in reliance on the licence
Effects of the ALRC proposals on collective licensing	• The effects will depend on how content creators and users of content react to the changed environment[82] • UA envisages that universities would make direct arrangements with large publishers 'for the vast bulk of educational copying and communication', and that it could rely on collective licensing arrangements for the 'smaller rights holders', but it is not clear whether collective licensing just for these rightsholders would be efficient, or even viable • The proposals could result in a favouring of larger publishers because the 'level playing field' of the statutory licence no longer assists the smaller publishers' content to be equally accessible
'Fair use would remove roadblocks to Australian universities competing with North American universities for the best and brightest researchers and students'	We are not sure what these 'roadblocks' are perceived to be, or how they are perceived to impede competition, given the breadth of the statutory licence.
Fair use 'would facilitate our academics using copyright content in ways that their peers in the US and other fair use jurisdictions can'	We are not sure what these uses are perceived to be, given the breadth of the statutory licence.

[81] See UA response to Discussion Paper, page 22: 'We do not resile from the fact that some of what is currently paid for under the statutory licences would most likely come within a fair use exception if enacted.'

[82] See UA response to Discussion Paper, page 22. Currently, a large proportion of the copying in reliance on the statutory licence is, in fact, of large commercial publishers' content.

'This includes using innovative technologies such as data mining and text mining that in many cases would currently infringe copyright in Australia'	Our understanding is that data and text mining for educational purposes are allowed by the statutory licence
'Freely available' internet content and 'orphan works'	• Universities pay a flat rate for all content they use in reliance on the licence • It is not a 'pay per use' arrangement • The rate is reached through commercial negotiation • Estimates of the extent of usage made in reliance on the statutory licence (and usage made without reliance on the statutory licence) are taken into account, but so are a range of other factors • When negotiating the flat rate, internet content used outside the statutory licence (e.g. in reliance on a Creative Commons licence) is not taken into account[83] • Content from the internet used in reliance on the statutory licence (e.g. content that the creator has said is for personal use only) is taken into account, but is a minor factor • Estimates of overall usage are based on usage data from samples of licensees • The compensation received (the flat, commercially agreed fee) is distributed to rightsholders using information from surveys of usage: we do not have information about each and every use • UA's comments display misunderstandings about the ways that compensation is negotiated, and distributed
MOOCS	As explained in our response to the Discussion Paper, our understanding is that dissemination of content via MOOCS is covered by the statutory licence, and much more comprehensively than arrangements in any other country
'Educational institutions have to pay for uses that commercial enterprises do not have to pay for'	• We do not know what these uses are. • Fair dealing exceptions, such as those for criticism and review, are available to educational institutions. • If the terms of use for internet content allow business use, or non-commercial use by organisations, then it is excluded from consideration in compensation negotiations
Surveys of usage	• The design of surveys of usage, and processing of survey data, are agreed between Copyright Agency

[83] We do not know on what basis UA asserts, at page 26, that a Tasmanian Health Department brochure had a copyright notice that 'would have stated that the material could be used for non-commercial purposes and that both Departments are part of the Tasmanian Government'. If, as asserted, a payment was allocated to the use of this brochure, it suggests that there were no such terms of use; if there had been, the copying of the brochure would have been excluded, in accordance with the processing protocols agreed with CAG and UA.

	and UA • By agreement, universities do not record content used outside the statutory licence under other arrangements (e.g. site licences)[84] • University surveys do not record 'technical' copies and communications, only those that result from a human act
Transactional licences[85]	• Copyright Agency's transactional licensing is not yet as developed as CCC's in the US, but has been significantly advanced by our online licensing facility[86] • There is, however, no impediment to educational institutions using the transactional licensing service • The statutory licence entitles licensees to report all uses ('full records'), and to negotiate payment on a per-use basis • In practice, licensees find this level of reporting burdensome, and it is highly prone to significant under-reporting of reliance on the licence • As a result, no licensee is currently reporting full records

[84] The arrangements for universities and schools differ, because the university surveys involve staff with a level of copyright expertise, whereas schools do not have staff with this expertise.
[85] See UA response to Discussion Paper at page 26.
[86] http://www.rightsportal.com.au. Information on CCC (Copyright Clearance Center) licences at http://www.copyright.com.

8 IMPROVEMENTS TO THE STATUTORY LICENCES

8.1 Government statutory licences

In our earlier submissions, we outlined improvements to the government statutory licence. These principally related to:

- enabling the Copyright Tribunal to 'declare' collecting societies for communications as well as copies; and
- facilitating the provision of usage data.

8.2 Educational statutory licence

The provisions of the statutory licence are detailed, but most of the detail is relevant only to those who manage the scheme for the content creators and education sector respectively. The detail does not need to be understood by the teachers who benefit from the licence. The main things they need to know are:

- They are not entitled to copy an entire work that is available for purchase (only a reasonable portion, and 10% or chapter is treated as reasonable); and
- There is a prescribed form of words to accompany communications.

While most of the perceived inadequacies of the statutory licence are based on misunderstandings, the education sector has raised concerns about the practical application of one provision that were not anticipated at the time it was introduced. This provision, section 135ZMD(3), provides that an educational institution may not make several parts of the same work available online at the same time. We think that a practical solution to these concerns could be reached in consultation with our members.

Educational institutions have also raised concerns about the application of the statutory licence to content available on the internet.

As noted above, internet content was a negligible factor in the recent negotiations that resulted in a new three-year agreement. Having said that, we do not think it is correct, in principle, to say that content has no value merely because it is available from the internet. That seems to confuse the value with the mode of dissemination, and to produce arbitrary outcomes.

We remain open to reviewing the principles and processes for identifying uses of internet content that are excluded altogether as a factor in compensation negotiations, and assessing the value of those that are not excluded. If necessary, this can be assisted by the Copyright Tribunal.

9 ISSUES RAISED BY CULTURAL INSTITUTIONS

We think that some of the concerns raised by cultural institutions may be based on misunderstandings of the current law.

As indicated in earlier submissions, we think there is scope for finding practical solutions to most of the issues raised by cultural institutions through clarification of content owners' understanding of the application of the current law to matters such as preservation, and publication of old unpublished works. We think that legislative intervention is not required, but acknowledge that resolution of the issues requires a more considered approach to the various issues and their consequences than has occurred to date. Our understanding is that there is willingness on the part of both content creators and cultural institutions to engage in the necessary process.

10 APPROACH BY COPYRIGHT TRIBUNAL TO OPERATION OF STATUTORY LICENCE

We strongly encourage the ALRC to approach the operation of the statutory licences through the determinations of the Copyright Tribunal.[87] Trying to understand how the statutory licences operate solely through reading the legislation can give a distorted impression. The determinations are well summarised in *The Law of Intellectual Property: Copyright, Designs and Confidential Information*.[88] We have set out below some statements from Tribunal decisions to give a sense of how the Tribunal has approached various issues.

10.1 Basis of Rate

> *... Sheppard P...rejected both the "most common charge" approach and also the approach which would have assessed a rate per page for copying by extrapolation from the primary royalty paid to the author by the publisher.*[89]
>
> ...
>
> *It also provides a further riposte to the argument put for the universities, which Sheppard P discussed in a passage I have cited, comparing the amounts earned by copyright owners for copying under the statutory scheme with their primary royalties. The contention was that the primary royalties related to the whole book of, say, one thousand pages; that they could be reduced to a royalty rate per page; and that this royalty rate would then provide a guide to the rate which should be paid for copying, say, fifty of those pages. Such a mechanical comparison ignores any higher value the fifty pages copied might have had compared with much of the rest of the work. It assumes that the value of the work is evenly distributed through all its pages. That is an assumption which cannot be accepted without qualification, and is unlikely to be true in respect of many instances where chapters or parts of them are selected for copying for coursepacks.*[90]

10.2 Viability of rate

> *A matter which Sheppard P made it clear (at 33) he did take into account was "the circumstance that copying may be discouraged if the figure awarded is excessive", which "would work to the disadvantage, not only of both authors and the educational institutions, but also of the public, because lecturers and teachers may not be able to make use of much material that desirably should be freely available to students and pupils." Taking that aspect into account, however, did not involve any assumption that the owners of copyright should subsidise universities. It was taken into account because "if the parties in question were negotiating, they themselves would take it into account". On this issue, the subsequent march of events has certainly cast light. We now know that Sheppard P successfully avoided the danger to which he drew*

[87] In Appendix A, we have listed the Copyright Tribunal and associated Federal Court decisions on the operation of the Part VB statutory licence for the education sector.
[88] Ricketson and Creswell, Law Book Company, looseleaf service, from [12.100] and particularly [12.150]–[12.157]
[89] Copyright Agency Limited v. University of Adelaide & Ors (1999)151 FLR 142 at [14]
[90] Copyright Agency Limited v. University of Adelaide & Ors (1999)151 FLR 142 at [28]

attention. Far from discouraging copying, the implementation of his decision has seen a growth of the practice which has been vast. Over the nine years to 1998, the total number of pages copied in universities rose year by year, with one very large regression in 1997 which has not been explained, from 50 million, in round figures, in 1989 to 268 million, in round figures, in 1998. This represents an increase of the order of 20 per cent per annum compounded, and is far greater than any increases in student numbers. Indeed, the total EFTSUs in the universities increased over the same period by a fraction under 57 per cent, from 327,725 to 513,258. Just as parties negotiating would take account of a risk such as that mentioned by Sheppard P, so also would they take account of a demonstration of the viability of a charge at a particular rate. Additionally, the applicant and the universities, if bargaining, would today take account of the fact that much copying is now substantially self-funded - by the sales through university bookshops to which I shall refer when examining more particularly the practice with regard to the distribution of the compilations of copies known as coursepacks.[91]

10.3 Reliance

...If it is to be left to individual lecturers (and in practice, probably, not even lecturers, but office assistants) to choose whether to rely on the statutory licence or on a layman's understanding of various statutory exceptions, there will inevitably be great numbers of infringements...I do not accept that Parliament intended the records provisions to be capable of being rendered futile by uninformed decisions not to rely on the statutory licence and therefore not to make a record.[92]

...

Having regard to the history, the context and the purposes of the Copyright Act, I think Part VB contemplates that an administering body which has given a remuneration notice will, while it is in force, be relying on the statutory licence to justify, to the extent it is open to it to do so, all copying not otherwise justified...[93]

10.4 Capacity to pay

...I should also have regard to the ability of schools to pay equitable remuneration. While the respondents acknowledge that they have not led evidence of schools' budgets and the like, nevertheless, common experience suggests, as the respondents say, that on the whole schools operate on relatively tight budgets and there are limited funds available for photocopying. I propose to act on that basis.[94]

10.5 Non-commercial rate

...I should also say that if the parties were commercial organisations conducting their activities for profit, I would have arrived at a higher figure, much closer to the figure suggested by CAL. But this is not such a commercial case. The policy considerations to which I have referred, and which I indicated I would take into account, prevent me from

[91] Copyright Agency Limited v. University of Adelaide & Ors (1999)151 FLR 142 at [22]
[92] Copyright Agency Limited v University of Adelaide & Ors (1999) 45 IPR 383. See also [8] and [10]–[13]
[93] Copyright Agency Limited v University of Adelaide & Ors (1999) 45 IPR 383 at [10]
[94] Copyright Agency Limited v Department of Education Qld (2002) 54 IPR 19 at [86]

arriving at a "commercial" rate of remuneration because, to my mind, that would not be fair remuneration in the circumstances.[95]

10.6 Overseas Comparisons

...

The applicant relied on rates for copying charged under the schemes applicable to universities overseas, especially in Great Britain and Canada, although, of course, differences between those schemes and Part VB reduce the value of the comparisons drawn...[96]

...

Some purely general assistance, by way of comparison, may be obtained from the coursepack rates in England and Canada, converted to Australian currency, which approximate 13c and 5c respectively per copied page. But the very disparity between these figures limits their usefulness.[97]

10.7 Unremunerated contribution by universities

...Finally, on this point, I am not at all satisfied that any contribution made by the universities to academic journals, of the kind that is suggested, can properly be regarded as "unremunerated" within the meaning of regulation 25B(1)(h). If a university made a grant to enable a journal to be published, this might, in some circumstances, be a contribution which could be seen to be unremunerated. But where a university, being an institution created for teaching and research, encourages its academics to publish the results of their research in journals, thereby promoting the research which is one of the objects of its existence and enhancing its own reputation, it is difficult to see why such a generalised contribution is not fully remunerated by the generalised advantages achieved. Indeed, the better view may be that the regulation is not speaking of this sort of situation at all, but rather of direct financial contributions in respect of which one can see that remuneration either is or is not received.[98]

[95] Copyright Agency Limited v Department of Education Qld (2002) 54 IPR 19 at [87]
[96] Copyright Agency Limited v. University of Adelaide & Ors (1999)151 FLR 142 at [15]
[97] Copyright Agency Limited v. University of Adelaide & Ors (1999)151 FLR 142 at [27]
[98] Copyright Agency Limited v. University of Adelaide & Ors (1999)151 FLR 142 at [18]