



UNIVERSITIES  
AUSTRALIA

DISCOVER LEARN LEAD

Submission in response to the Australian Law  
Reform Commission discussion paper on  
Copyright and the Digital Economy  
July 2013



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# Contents

Introduction.....	2
Summary.....	3
1. Fair use.....	5
1.1 Why we support fair use.....	5
Providing much needed flexibility for universities to take advantage of new technologies...5	
Facilitating academic engagement.....	6
Restoring balance to copyright.....	7
Helping ensure that Australian universities remain internationally competitive.....	8
1.2 Our response to fair use "sceptics".....	8
Fair use would not create undue uncertainty.....	8
Fair use would not cause undue harm to rights holders.....	12
Fair use would not be in breach of the three step test.....	13
Commercial use.....	14
1.3 Fair use and the existing educational exceptions.....	15
1.4 Third parties.....	15
1.5 Expanding fair dealing would be very much a second best reform option.....	16
2. Replacing statutory licences with voluntary licensing.....	19
2.1 The "everything would be free" claim.....	19
2.2 The "voluntary licensing would be inefficient" claim.....	21
2.3 Why we support repeal of the statutory licences.....	24
The statutory licences are highly inefficient.....	24
No scope for transactional licences.....	26
Changes that are rendering the statutory licence increasingly irrelevant.....	27
2.4 Universities will act in good faith.....	30
3. Copyright and contract.....	31
3.1 The ALRC's proposed model.....	31
3.2 Concerns with the proposed model.....	31
Education must be recognised as a core public interest.....	32
Potential for legal uncertainty.....	33
Potential to undermine flexibility of fair use.....	34
3.3 A proposed solution.....	35
4. Broadcasting.....	36
Paying to use freely available internet content.....	36
No easy way to distinguish between "TV like" content and other kinds of video content.....	37
5. Orphan Works.....	37
Annexure A.....	38

## Introduction

Universities Australia is pleased to have this opportunity to respond to the proposals for reform outlined in the ALRC's Discussion Paper.

In our response to the Issues Paper, Universities Australia submitted that Australia's inflexible copyright exceptions, together with the educational statutory licences, were affecting the ability of Australian universities to create and disseminate knowledge, and placing the Australian higher education sector at an international competitive disadvantage.

The principles-based regime outlined in the Discussion Paper would go a long way towards addressing the problems highlighted in our earlier submission. If enacted, it would deliver the flexibility that is so urgently needed to encourage research and innovation, while still protecting the rights of copyright owners. It would remove obstacles that currently stand in the way of Australian universities fully utilising digital technology, and would bring Australian copyright law in line with comparable jurisdictions with more adaptive copyright regimes. The proposed reforms would put Australian universities on a level playing field as they seek to attract the best and brightest students in an increasingly globalised and competitive higher education market.

Since the ALRC Discussion Paper was released in May 2013, some rights holder groups have embarked on a misleading public campaign claiming that the reforms proposed by the ALRC would be harmful for authors. The campaign being waged by these groups contains misinformation and aims to spread unnecessary fear among authors about the proposed abolition of the statutory licences. We respond to these claims in detail in this submission. We think it is instructive, however, that at the very time that these groups are claiming that fair use is inherently uncertain, and harmful to rights holders, the US Department of Commerce has released a report *Copyright, Policy, Creativity and Innovation in the Digital Economy*<sup>1</sup> that highlights the central role that fair use plays in striking a balance between the rights of copyright owners and users, and in ensuring that copyright does not operate as a roadblock to technological development:

The fair use doctrine, developed by the courts and codified in the 1976 Copyright Act, is a fundamental linchpin of the U.S. copyright system.

...the fair use doctrine is a critical means of balancing "the interests of authors and inventors in the control and exploitation of their writings and discoveries on the one hand, and society's competing interest in the free flow of ideas, information, and commerce on the other hand."

...the doctrine is highly adaptable to new technologies and has already played an important role in the online environment. Fair use has been applied by the courts to enable, among other things, the use of thumbnail images in Internet search results, caching of web pages by a search engine, and a digital plagiarism detection service.

[User communities] have undertaken efforts to develop fair use guidelines for various user communities. American University's Centre for Social Media, in conjunction with the University's Washington College of Law, has created a set of tools for creators, teachers, and researchers to better understand the application of fair use to their particular disciplines. The Copyright Advisory Office established at Columbia University in 2008 has collected and developed resources on the relationship between copyright law and the work of the university community, including a fair use checklist. And the College Art Association recently announced a major grant to develop a code of best practices for fair use "in the creation and curation of artworks and scholarly publishing in the visual arts."

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<sup>1</sup> Copyright policy, creativity, and innovation in the digital economy, the Department of Commerce, Internet Policy Task Force, July 2013 <http://www.uspto.gov/news/publications/copyrightgreenpaper.pdf>

The Task Force supports private efforts to explore the parameters of fair use, and notes that best practices produced with input from both user groups and right holders can offer the greatest certainty.

Non-profit and educational organizations too are increasingly focusing on copyright education, including the benefits of fair use, working with a variety of audiences.  
(Our emphasis)<sup>2</sup>

The reforms that have been proposed by the ALRC would mean that Australians could make the same claims about our copyright system as the US Department of Commerce has made in its long-awaited report. Presently, we cannot.

Universities Australia strongly supports the regime that that is outlined in the Discussion Paper.

## Summary

- Universities Australia strongly supports the proposal to replace the current purpose-based fair dealing exceptions with a broad and flexible fair use exception. The proposed fair use exception, and in particular the proposed inclusion of education as an illustrative purpose, would restore balance to copyright by reflecting the special status given to education in international treaties.
- Universities Australia supports fair use not so that universities can avoid having to pay rights holders - as has been suggested by some rights holder groups - but because fair use would result in a fairer and more flexible copyright regime. Fair use would remove roadblocks to Australian universities competing with North American universities for the best and brightest researchers and students, and would facilitate our academics using copyright content in ways that their peers in the US and other fair use jurisdictions can. This includes using innovative technologies such as data mining and text mining that in many cases would currently infringe copyright in Australia.
- Fair use would not mean that universities could copy everything for free. It would place Australian universities in the same position as their peers in the USA, Canada, Singapore and other fair use jurisdictions who can copy for educational purposes in ways that are "fair" and do not cause undue harm to rights holders. This is imperative if Australian universities are to remain competitive in an increasingly globalised higher education market.
- Fair use would not create undue uncertainty for rights holders, users or courts. On the contrary, Universities Australia believes that the proposed fair use exception could result in greater certainty than currently exists with respect to the purpose-based fair dealing exceptions. The proposed list of illustrative purposes would provide guidance to rights holders and users regarding the purposes or uses that would be likely to come within a fair use exception; but the open-endedness of the exception would greatly reduce the uncertainty that has resulted from having to pigeonhole a particular use into one of the purposes set out in the Act.
- Expanding the existing fair dealing exceptions would address some of the shortcomings highlighted in the Discussion Paper, but it would be very much a second-best option to replacing these exceptions with fair use.
- Universities Australia strongly supports the proposal to replace the educational statutory licences with voluntary licensing. We agree with the ALRC that voluntary licensing would

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<sup>2</sup> Ibid p 21 and 75

be “less prescriptive, more efficient and better suited to a digital age” than the statutory licences.

- Replacing statutory licensing with voluntary licensing would not result in universities “getting away with having to pay fees to authors”, as has been suggested by some rights holder groups. Nor would it mean that universities would have the choice of volunteering whether or not to pay for uses that exceeded what was permitted under fair use. Universities Australia unequivocally rejects the suggestion that the university sector cannot be trusted to act in good faith when it comes to use of copyright content. The sector has a long history of dealing in good faith with rights holders and collecting societies.
- In 2011, university libraries spent \$256.7 million on library resources. This amount is over and above the amount spent on the statutory licences. Repeal of the statutory licences would have no impact on this spending. These licence fees flow directly from the universities to the rights holders and will continue to do so, regardless of whether or not the ALRC’s proposed reforms are enacted.
- Repeal of the statutory licences would not mean the end of collective licensing. There would still be a role for collective licensing, as there is in most other jurisdictions in the world and it would be more efficient and flexible than the existing statutory licences.
- Some of the content that universities currently pay for under the statutory licences, and which is likely to fall within a fair use exception, includes freely available internet content, (including content uploaded onto blogs and freely available wikis that no one ever expected to be paid for) and orphan works. Currently, the money paid by universities for this content is eventually paid to Copyright Agency members who have no connection to the works that were copied. That is because Copyright Agency has no one else to distribute it to. In other words, these members benefit from a windfall payment - at the expense of publicly funded education institutions - due to the inefficiencies of the statutory licence. The loss of this windfall payment if the statutory licences were repealed could not in any way be said to cause them unreasonable prejudice.
- Universities Australia agrees with the ALRC that the benefits of any new fair use (or fair dealing) exception may be seriously compromised if copyright licensing agreements include terms that exclude fair uses. However, we are concerned that the framework that the ALRC has proposed for preventing “contracting out” of exceptions would have serious unintended consequences that would undermine the objectives that the ALRC has sought to achieve through its proposed reform of copyright exceptions. We have put forward a proposed alternative model for dealing with contracting out.
- Universities Australia strongly supports repeal of the Part VA statutory licence. In the event that the statutory licence is retained, we would oppose any expansion of Part VA.
- Universities Australia strongly supports the ALRC’s proposal for addressing the orphan works problem. The proposed orphan works regime strikes an appropriate balance between facilitating greater use of the vast trove of content that is currently effectively “locked up”, while at the same time protecting the interests of rights holders who are subsequently identified.

## I. Fair use

Universities Australia strongly supports the proposal to replace the existing purpose-based fair dealing exceptions with a flexible and open-ended fair use exception.

### I.1 Why we support fair use

The ALRC has received submissions from rights holder groups that suggest that the education sector favours fair use because it wants to avoid having to pay to use third party content. It is true that Universities Australia has highlighted how existing educational copying regime results in Australian universities paying for uses that do not attract payment in other jurisdictions. Our support for fair use has much less to do with the cost of using content than it does with ensuring that inflexible copyright exceptions do not stand in the way of research and innovation in this country. Universities support a fair use exception not so that they can avoid having to pay rights holders, but because fair use would result in a fairer and more flexible copyright regime. It would remove roadblocks to competing with North American universities for the best and brightest students, and would facilitate our academics using innovative technologies to engage in internationally competitive research. This is imperative if Australian universities are to remain competitive in an increasingly globalised higher education market.

We think it is worth setting out in some detail the very significant benefits that would flow to the digital economy generally, and the Australian higher education sector in particular, from the proposed fair use exception outlined in the Discussion Paper.

### Providing much needed flexibility for universities to take advantage of new technologies

#### MOOCs

Higher education is undergoing a major transition as a result of digital technologies. The most recent illustration of this is massive open online courses (MOOCs). MOOCs were unheard of before 2011, when Harvard University and MIT first began running free, open, online courses. Less than two years later, new MOOCs are emerging almost daily. This disruptive technology is rapidly changing the way that universities throughout the world engage with their students, and is creating new opportunities for Australian universities to operate on a world stage.

While it is still very early days in the MOOC phenomenon, copyright has already emerged as an issue that is limiting the way in which Australian universities - as opposed to their counterparts in fair use jurisdictions - can deliver course content via MOOCs. That is because universities operating MOOCs in fair use jurisdictions - such as the US - can rely on fair use when incorporating third party content into MOOC courses. As outlined in our submission in response to the ALRC's Issues Paper, the existing purpose-based fair dealing exceptions are insufficiently flexible to allow this kind of use<sup>3</sup>. Nor does the existing Part VB statutory licence apply to content that is publicly accessible, regardless of whether it has been made available for educational purposes.

The ALRC's proposed fair use exception would mean that Australian academics - like their US counterparts - could make "fair" uses of content that did not unreasonably harm the interests of rights holders, when putting a MOOC together.

It is important to stress that fair use is not a "free for all" for US universities operating MOOCs, and nor would it be if this exception were enacted in Australia. Some US copyright experts have suggested that the open nature of MOOCs will mean that fair use will operate in a more limited way than it does with password protected university e-reserves. For example, Lauren Schoenthaler, senior University Counsel for Stanford University, has advised academics that they can rely on fair use when

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<sup>3</sup> [http://www.alrc.gov.au/sites/default/files/subs/246\\_0rg\\_universitiesaustralia.pdf](http://www.alrc.gov.au/sites/default/files/subs/246_0rg_universitiesaustralia.pdf) p 16

incorporating images and limited portions of text “that demonstrate or illustrate the educational concept at issue”, but these must be used “sparingly and appropriately”.

Importantly, however, Ms Schoenthaler adds:

...In the end though, copyright concerns are definitely surmountable and should never present a barrier. ...If we have good ideas and material that we think is useful for our students or we want to make available publicly, there are ways to do that that use the law to protect us and allow us to do the things that we want to do.<sup>4</sup>

In other words, copyright enables, rather than blocks, appropriate use of limited portions of text and other content in teaching and learning, including in the creation of MOOCs. Universities Australia welcomes the proposal to put Australian universities in the same position as their US counterparts to use third party content “sparingly and appropriately” when engaging in their core mission of creating and distributing knowledge using new and innovative digital technologies.

### **Text and data mining**

As outlined in our response to the Issues Paper, the existing exceptions regime stands in the way of Australian universities taking advantage of new text and data mining technologies to undertake socially valuable research in the sciences and humanities. The Discussion Paper highlights the uncertainty that currently surrounds the application of any of the existing copyright exceptions to much text and data mining.

The proposed fair use exception will put Australian universities on a level playing field with their counterparts in the US (who rely on fair use to engage in non-consumptive uses such as data mining and text mining for socially useful purposes<sup>5</sup>) as well as the UK (who will soon have the benefit of a stand-alone exception for non-commercial data mining and text mining).<sup>6</sup>

Universities Australia welcomes the proposal not to confine the availability of the exception to non-commercial data mining and text mining. We agree with the Commonwealth Scientific and Industrial Research Organisation (CSIRO) that a commercial/non-commercial distinction is not useful. As the CSIRO noted in its submission in response to the Issues Paper:

such a limitation would seem to mean that ‘commercial research’ must duplicate effort and would be at odds with a goal of making information (as opposed to illegal copies of journal articles, for example) efficiently available to researchers ...

[M]uch research is conducted through international collaboration. If the laws in Australia are more restrictive than elsewhere or if the administration of any rights system is cumbersome or onerous and creates excessive cost for research, then that might be expected to impact on the desirability of Australia as a research destination.<sup>7</sup>

### **Facilitating academic engagement**

The proposed fair use exception would enable Australian academics to more freely engage with their peers and the wider community in ways that do not undermine the interests of rights holders. It would help bridge the gap that currently exists between the ways in which Australian academics, and

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<sup>4</sup> <http://www.stanforddaily.com/2012/11/01/intellectual-property-concerns-for-moocs-persist/>

<sup>5</sup> In *The Authors Guild v HathiTrust*, the trial judge found that non-expressive uses such as text searching and computational analysis are fair use and therefore do not infringe the copyright in the underlying material. *Authors Guild v HathiTrust* No 11-CV-6351 2012 (SDNY 10 October 2012)

<sup>6</sup> The UK Government has proposed to amend the Copyright, Designs and Patents Act 1988 (UK) so that ‘it is not an infringement of copyright for a person who already has a right to access the work (whether under a licence or otherwise) to copy the work as part of a technical process of analysis and synthesis of the content of the work for the sole purpose of non-commercial research’. UK Government, *Modernising Copyright: A Modern, Robust and Flexible Framework* (2012), 37

<sup>7</sup> CSIRO submission in response to the Issues Paper



their US counterparts, can engage with each other and the wider public for socially beneficial purposes.

As set out in our response to the Issues Paper, while our academics and students can rely on the existing research and study fair dealing exception to incorporate third party content into their own work, they risk infringing copyright if they present that same work at conferences, group presentations, peer symposia etc., or share the work to seek input from a group of colleagues:

In a submission to Government in 1999, Copyright Agency submitted that that "the transmission of copyright works for discussion with colleagues could not be a fair dealing for research or study purposes".<sup>8</sup>

This is due to the very narrow way in which the purpose-based exceptions operate.<sup>9</sup> One university copyright officer has commented:

Very often researchers are faced with a difficult decision: use the material most relevant to their research and risk litigation, or replace it with something less appropriate.

In our submission in response to the Issues Paper we gave the example of a higher degree student from the US who wanted to use some extracts from a state Hansard and state government media releases in her play. Coming from the US, she had assumed that this would be permissible, and was surprised to be advised by the university officer that there was no exception that applied, and that she would need to seek permission or cut the content from her play.<sup>10</sup>

Another example is student theses. Universities require higher degree students to publish their theses in an online repository, but in order to avoid a risk of infringement, they generally require students to obtain permission for use of third party content (which can be highly costly, and in many cases impossible) or, alternatively, to remove this content from their thesis. The result is that the integrity of the thesis is compromised, and the academic community is denied the opportunity to engage fully with the work.

Universities Australia submits that the existing limitations on academic research and engagement are unacceptable in a knowledge economy. The proposed fair use exception would facilitate vital early stages in research, such as collaboration between colleagues, and allow for the wide dissemination of knowledge that is a central part of the university mission.

## Restoring balance to copyright

The Discussion Paper has highlighted how Australian universities are not only in a worse position compared with their counterparts in comparable jurisdictions; they are also in a worse position compared with large commercial enterprises when it comes to using third party content for socially beneficial purposes.

For example, commercial news organisations can rely on a specific exception to make fair uses of third party content if their use is for the purpose of, or associated with, reporting news. We do not at all suggest that this is not a socially beneficial purpose that should be the subject of an exception. It clearly is. What we do say, however, is that the existing regime is flawed to the extent that it does not permit universities and other educational institutions to make fair uses of content for educational purposes. There is currently no exception that permits this. As the ALRC notes in the Discussion

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<sup>8</sup> CAL submission to the Department of Attorney General in relation to Copyright Amendment (Digital Agenda) Bill 1999, 19 March 1999, para 33

<sup>9</sup> This is discussed detail in our submission in response to the Issues Paper:  
[http://www.alrc.gov.au/sites/default/files/subs/246\\_org\\_universitiesaustralia.pdf](http://www.alrc.gov.au/sites/default/files/subs/246_org_universitiesaustralia.pdf) p 17

<sup>10</sup> [http://www.alrc.gov.au/sites/default/files/subs/246\\_org\\_universitiesaustralia.pdf](http://www.alrc.gov.au/sites/default/files/subs/246_org_universitiesaustralia.pdf) p 18

Paper, this results in educational institutions being required to pay licences for “uses that others, including commercial enterprises, do not have to pay”.<sup>11</sup>

From a policy perspective, this makes little sense. As was noted by the Intellectual Property and Competition Review Committee (Ergas Committee):

The principle that society reaps benefits from knowledge and learning which in many cases outweigh limitations on the rights of owners to earn income from educational uses has long been recognised in copyright law. It is reflected in the special status given to education in the Berne Treaty. It is also reflected in the Preamble to the WIPO Copyright Treaty that we have referred to above.<sup>12</sup>

The proposed fair use exception, and in particular the proposed inclusion of education as an illustrative purpose, would restore balance to copyright by reflecting the special status given to education in international treaties.

## Helping ensure that Australian universities remain internationally competitive

Universities Australia agrees with the view expressed by JISC in a recent submission to the UK Intellectual Property Office in response to the recommendations of the Hargreaves Review. Commenting on the impact of copyright law on the international competitiveness of UK universities, JISC said:

[Inflexible exceptions] may tend to give a competitive advantage to those countries that have a more liberal or flexible approach to copyright (such as those with a fair use approach such as the USA), which could enable text mining usage in non-commercial research to take place under a fair use defence rather than needing explicit permissions.<sup>13</sup>

This comment is equally applicable to Australia.

Today, copyright law is standing in the way of our students taking full advantage of text and data mining technologies. It is impacting on the kinds of content that can be used in MOOCs. Who knows what new technologies will emerge in the years and decades to come that would be blocked by inflexible copyright exceptions?

The proposed fair use exception would help ensure that Australian universities are able to attract the best and brightest research students. These students will be drawn to an environment where innovation can flourish, and in the digital age, copyright plays a very big part in that.

## 1.2 Our response to fair use “sceptics”

The ALRC has received many submissions from parties who are concerned that a fair use exception would cause harm to rights holders and create uncertainty for users. Universities Australia considers that many of these objections are based on a misunderstanding of how a fair use exception would operate.

### Fair use would not create undue uncertainty

An argument that is often raised by those who object to the introduction of fair use in Australia is that it would be much more uncertain than the existing fair dealing exceptions. For the reasons we discuss below, we think these concerns are without foundation.

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<sup>11</sup> DP para 6.97

<sup>12</sup> Ergas Committee Report, September 2000

[http://www.ag.gov.au/Documents/Review%20of%20intellectual%20property%20legislation%20under%20the%20Competition%20Principles%20Agreement%20\(September%202000\).pdf](http://www.ag.gov.au/Documents/Review%20of%20intellectual%20property%20legislation%20under%20the%20Competition%20Principles%20Agreement%20(September%202000).pdf)

<sup>13</sup> <http://www.jisc.ac.uk/media/documents/publications/reports/2012/text-mining-appendix-a2.pdf>

## A two-step test would become a one-step test

Under the existing purpose-based exceptions regime, a user must ask two questions:

1. Is my intended use for one of the fair dealing purposes set out in the Act? If so,
2. Is my intended use "fair"?

While the first step may sound relatively straightforward, it has proved in practice to be anything but straightforward. For example, In *TCN Channel Nine v Network Ten* (the Panel case),<sup>14</sup> the judge at first instance, and three appeal court judges, reached different views as to whether particular excerpts from television programs could be said to come within the purpose of either "reporting news" or "criticism or review".

In our submission, the ALRC's proposed approach - ie setting out a list of non-exclusive illustrative purposes or uses - would have the great advantage of simplifying the process for determining whether an exception applies. The proposed list of illustrative purposes would provide guidance to rights holders and users as to the kinds of purposes or uses that would be likely to come within a fair use exception, but the open-endedness of the exception would greatly reduce the uncertainty that has resulted from having to pigeonhole a particular use into one of the purposes set out in the Act.

The practical result of this change would be to shift the main focus of the inquiry to whether or not the use is fair.

### There is nothing new or novel about the proposed fairness factors

Some rights holder groups have suggested that a fair use exception would be essentially US-centric, and thus give rise to uncertainty for owners and users who are not familiar with US fair use jurisprudence.

This is based on a misunderstanding of the very great similarity between the US fair use exception and the existing fair dealing exceptions. The ALRC's proposed "fairness factors" - which largely mirror the US fairness factors - are already an entrenched part of Australian copyright law. They are substantially the same as the factors that were incorporated into s 40(2) of the Act as a result of a recommendation by the Copyright Law Committee on Reprographic Reproduction (the Franki Committee).<sup>15</sup>

The absence of an express reference to these factors in the sections of the Act that addresses fair dealings for other purposes has never meant that those same factors do not also apply when determining whether dealings for these other purposes are fair. Copyright expert Professor Sam Ricketson has noted that "by and large, [the factors in s 40(2)] are similar to the types of factors taken into account in the case law dealing with fair dealing prior to this amendment".<sup>16</sup>

See also the Copyright Law Review Committee's 1998 Simplification Report. The CLRC considered the fairness factors set out in s 40(2) of the Act and said that these factors apply - as a matter of common law - to all fair dealings, not just dealings for the purpose of research and study.<sup>17</sup>

The upshot of this is that the only substantive difference between fair use and fair dealing is that fair use is open-ended and fair dealing is not. Apart from that, the factors that are relied on to determine whether a use is "fair" in the US are essentially the same factors that have always been relied on to determine whether a dealing is "fair" in Australia.

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<sup>14</sup> *TCN Channel Nine v Network Ten* (2002) 118 FCR 417, *TCN Channel Nine Pty Ltd v Network Ten Pty Limited* [2002] FCAFC 146

<sup>15</sup> The Franki Committee said while it would be "quite impracticable" to attempt to seek to precisely define fair dealing, it would be "useful" to set out a list of factors that could provide assistance to users when determining whether a reproduction for the purpose of research or study was fair.

<sup>16</sup> S Ricketson, *The Law of Intellectual Property: Copyright, Designs and Confidential Information*, Lawbook Co para 11.35

<sup>17</sup> CLRC Simplification Report para 6.36

## There is nothing new or novel about courts construing open-ended standards such as fairness

Courts are very well used to construing open-ended standards such as "fairness". Examples of such open-ended standards in existing law include the concept of "reasonable care" in the law of negligence, and the concepts of "unfair contract" and "unconscionable conduct" in consumer law.

The Australian Competition and Consumer Commission provides the following guidance on its website: "Unconscionable conduct does not have a precise legal definition as it is a concept that has been developed on a case-by-case basis by courts over time." The ACCC also sets out a non-exhaustive list of factors that it says a court will consider when assessing whether conduct is unconscionable. This sounds a lot like the concept of fairness in copyright law: ie a concept that does not have a precise legal definition, and that has been developed on a case-by-case basis by courts over time having regard to a non-exhaustive list of factors.

## Guidelines and protocols will be developed

As the ALRC notes, it is likely that guidelines and industry protocols developed by peak bodies, as well as internal procedures etc., would greatly assist in providing certainty to those relying on fair use.<sup>18</sup>

The potential for industry guidelines and codes of practice as an appropriate policy tool in Australia, including in relation to copyright law, has been recognised for many years. An example is s 101(1A)(c) of the Act which provides that one factor in determining whether a person has authorised another to infringe copyright is "whether the person took any reasonable steps to prevent or avoid the doing of the act, including whether the person complied with any relevant industry codes of practice".

Commercial entities who rely on fair dealing on a regular basis have also developed guidelines that assist in determining whether a particular use is "fair". See for example the News Limited supplementary submission in response to the Issues Paper, where News Limited discusses the code of practice for sports news reporting that emerged from discussions between news and sports organisations, with the assistance of the ACCC, and which is relied on by media companies when deciding how much sporting footage they can use in reliance on the fair dealing exception for reporting news. These companies, and those advising them, routinely rely on these guidelines to make decisions about how close they are to the line between infringement and fair dealing.

In the US, industry-specific fair use codes of practice have greatly enhanced certainty and reduced the risk of litigation.

A good example is the Documentary Filmmakers' Statement of Best Practice in Fair Use.<sup>19</sup> This document, which was developed in 2005 by documentary filmmakers with the assistance of legal advisors, contains a clearly understandable set of guidelines that are easy for filmmakers to apply. Prior to the development of the Statement of Best Practice, filmmakers who included third party content in their films in reliance on fair use often found it difficult and expensive to obtain "errors and omissions" insurance. Media/Professional Insurance, the largest insurer of media risks in the US, now recognises this document as an effective guide to fair use principles, and offers errors and omissions insurance to filmmakers who comply with it when using unlicensed copyright content in films.<sup>20</sup> Filmmakers say that this has had a major impact on their ability to use small amounts of archival footage etc. in ways that are fair.<sup>21</sup>

Other examples of industry specific guidelines are the Code of Best Practices in Fair Use for Online Video<sup>22</sup>; the Code of Best Practices in Fair Use for Media Literacy Education<sup>23</sup>; and the Association of

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<sup>18</sup> DP para 4.129

<sup>19</sup> <http://www.centerforsocialmedia.org/fair-use/best-practices/documentary/documentary-filmmakers-statement-best-practices-fair-use>

<sup>20</sup> <http://cyberlaw.stanford.edu/projects/documentary-film-program/faq>

<sup>21</sup> <http://nofilmschool.com/2013/03/fair-use-fbi-our-nixon-white-house-super-8-movies/>

<sup>22</sup> <http://www.centerforsocialmedia.org/fair-use/related-materials/codes/code-best-practices-fair-use-online-video>

<sup>23</sup> <http://www.centerforsocialmedia.org/fair-use/best-practices/code-best-practices-fair-use-media-literacy-education>

Research Libraries' Code of Best Practice for Fair Use.<sup>24</sup> These codes of practice have been used by user communities to "educate themselves, bring together disparate sources of information and state a common position"<sup>25</sup> in order to enhance certainty within a particular community. They contain real-world examples that assist members of the relevant community (i.e. academics, teachers, librarians) to answer the question: "what is fair use?" US copyright experts familiar with these codes of practice have suggested that they "appear to function as a prophylactic against unnecessary litigation".<sup>26</sup>

These guidelines, and others like them, have been lauded by the US Department of Commerce in its recent Copyright, Policy, Creativity and Innovation in the Digital Economy<sup>27</sup> report:

[User communities] have undertaken efforts to develop fair use guidelines for various user communities. American University's Centre for Social Media, in conjunction with the University's Washington College of Law, has created a set of tools for creators, teachers, and researchers to better understand the application of fair use to their particular disciplines. The Copyright Advisory Office established at Columbia University in 2008 has collected and developed resources on the relationship between copyright law and the work of the university community, including a fair use checklist. And the College Art Association recently announced a major grant to develop a code of best practices for fair use "in the creation and curation of artworks and scholarly publishing in the visual arts."

The Task Force supports private efforts to explore the parameters of fair use, and notes that best practices produced with input from both user groups and right holders can offer the greatest certainty.

Nonprofit and educational organizations too are increasingly focusing on copyright education, including the benefits of fair use, working with a variety of audiences.  
(Our emphasis)<sup>28</sup>

In the US, rights holders themselves have also developed Codes of Practice to guide users - including educational users - as to what practices they consider to be fair when it comes to use of their works. The Code of Best Practice for Poetry<sup>29</sup> was created by poets themselves. It includes the following:

Members of the poetry community recognize that whether or not it qualifies as "criticism," the teaching of poetry at every level of the educational system benefits the field. They recognize that whether teachers accomplish it through the use of anthologies and textbooks, photocopied materials, or online course sites, giving students' meaningful access to the texts under discussion is critical to the educational enterprise...

Under fair use, instructors at all levels who devote class time to teaching examples of published poetry may reproduce those poems fully or partially in their teaching materials and make them available to students using the conventional educational technologies most appropriate for their instructional purposes...

Teachers' selections of poems should not substantially duplicate those of existing, commercially available anthologies or textbooks. Teachers should avoid reproducing all or most of the contents of a volume of poetry that is reasonably available for purchase by students.

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<sup>24</sup> <http://www.arl.org/focus-areas/copyright-ip/fair-use/code-of-best-practices>

<sup>25</sup> The Fair Use Doctrine in the United States - A Response to the Kemochan Report, Gwen Hinze, Peter Jaszi & Matthew Sag, July 26, 2013 p 10

<sup>26</sup> Ibid

<sup>27</sup> COPYRIGHT POLICY, CREATIVITY, AND INNOVATION IN THE DIGITAL ECONOMY, THE DEPARTMENT OF COMMERCE, INTERNET POLICY TASK FORCE, July 2013 <http://http://www.uspto.gov/news/publications/copyrightgreenpaper.pdf>

<sup>28</sup> Ibid p 21 and 75

<sup>29</sup> [http://www.poetryfoundation.org/downloads/FairUsePoetryBooklet\\_singlepg\\_2.pdf](http://www.poetryfoundation.org/downloads/FairUsePoetryBooklet_singlepg_2.pdf)

In summary, we think that rights holders, users and courts would be well placed to make decisions about what uses are “fair” in the event that a fair use exception is introduced, and that claims that fair use would give rise to undue uncertainty do not withstand scrutiny.

## Fair use would not cause undue harm to rights holders

The ALRC has received submissions from commercial publishers and industry groups warning that the introduction of fair use in Australia would unreasonably harm the interests of rights holders. Universities Australia submits that those submissions should be considered in the context of what has actually occurred in fair use jurisdictions such as the US.

As we outlined in our response to the Issues Paper, universities and other users of copyright material in the US have for many years routinely relied on fair use for socially beneficial purposes such as facilitating data mining and text mining and using small excerpts of works in teaching. Fair use has “enabled a wide range of time-honoured educational practices to flourish, and facilitated others to emerge”.<sup>30</sup> And yet, the availability of this exception in the US has not adversely affected the publishing industry, nor has it limited the opportunities available to US authors.

In fact, a recent article on the website for the American Society of Journalists and Authors highlighted the growing opportunities for authors and freelance writers to create content for a booming online education sector:

The incredible growth of online education represents the largest financial opportunity for freelance writers in history. Online education in the U.S. is a \$60 billion industry and analysts predict it will double in size over the next two years and globally it is a \$4.4 trillion industry. Once relegated to for-profit distance education, online learning is now used in corporations, high schools, traditional four-year institutions, and graduate schools. Many of these institutions previously relied solely on PhDs and Subject Matter Experts (SMEs) for content, now they are abandoning that model and outsourcing to professional writers.<sup>31</sup>

There is no doubt that academic publishers are coming under commercial pressure as a result of the global move towards open access publishing<sup>32</sup>, which we discuss further below, but there is no evidence to suggest that the existence of a fair use exception has caused these publishers, or their authors, undue harm. Educational fair use has not, for example, displaced the market for sale and licensing of textbooks in the US. US scholars familiar with the way in which fair use operates in the US education sector say that this is because it is clear from the US fair use case law that the exception allows

“a relatively narrow scope for unlicensed illustrative quotations in teaching materials...educational fair use in the US provides some room for innovation in teaching but none for wholesale appropriation of copyrighted content”.<sup>33</sup>

In a lecture delivered earlier this year, the US Register of Copyrights, Maria Pallante, said:

“It is a point of pride for the United States that our past great copyright laws have served the Nation so well. American experts are fond of pointing out that we have the most balanced

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<sup>30</sup> The Fair Use Doctrine in the United States - A Response to the Kemochan Report, Gwen Hinze, Peter Jaszi & Matthew Sag, July 26, 2013 p 11

<sup>31</sup> Laura Town, Freelance Writing Meets Online Education: How to get Involved, American Society of Journalists and Authors website, July 17 2013 <http://www.asja.org/theword/2013/07/17/freelance-writing-meets-online-education-how-to-get-involved/#more-834>

<sup>32</sup> See Universities Australia submission in response to Issues Paper, p 50

<sup>33</sup> The Fair Use Doctrine in the United States - A Response to the Kemochan Report, Gwen Hinze, Peter Jaszi & Matthew Sag, July 26, 2013, p 11

copyright law in the world, as well as a robust environment of free expression and an equally robust copyright economy".<sup>34</sup>

That statement certainly suggests that the US Register of Copyrights considers that fair use - which is an essential aspect of the "balance" in US copyright law - has not undermined a "robust copyright economy".

It is also instructive, in our view, that many of the same publishers who have raised concerns about fair use in Australia are themselves the beneficiaries of fair use in their own commercial activities here and in the US.

For example, the International Publishers Association (IPA), an industry body that includes amongst its members the global publishing conglomerate Reed Elsevier (Reed), submitted to the ALRC that a fair use exception would create legal uncertainty and operate as an obstacle to both use and creation. That submission is somewhat in conflict with the position adopted by Reed in litigation that is currently taking place in the US. LexisNexis, a division of Reed, recently relied on the US fair use exception to defend its use of legal briefs and motions filed with US courts in a commercial database which it markets to lawyers. The product can be used by LexisNexis customers to "research how other litigators have framed similar, successful arguments" and to "gain a better understanding of emerging issues or unfamiliar areas of law". Reed submitted to the court that its use of the works was transformative (and therefore more likely to be fair) because it had made the works searchable by adding links to and from related opinions, expert testimony and other relevant materials. Reed also submitted that the mere fact that the rights holder in this case was prepared to grant them a licence did not mean that it was unfair for them to use the work without payment:

...it is a given in every fair use case that plaintiff suffers a loss of a potential market if that potential is defined as the theoretical market for licensing the very use at bar. To avoid this "danger of circularity," courts have held that market harm for purposes of a fair use analysis does not take into account any market created by the transformative use.<sup>35</sup>

Reed could not have created this useful research tool in Australia: it needed a fair use exception to do so. Universities Australia submits that the arguments relied on by Reed to support its use of third party materials are a very good illustration of the way in which the ALRC's proposed fair use exception could be expected to permit socially beneficial uses of works that did not unreasonably harm rights holders. Fair use would also ensure that Australian based publishers had the same scope of business opportunity as their US counterparts.

### **Fair use would not be in breach of the three step test**

We agree with the ALRC - for the reasons that are set out at paragraph 4.138 of the Discussion Paper, that its proposed fair use exception would be not be incompatible with the three-step test.

We note that the ALRC received submissions from some rights holder groups to the effect that advances in digital technology, which have facilitated the licensing of small parts of works in ways that previously would have been economically unviable, have meant that a fair use exception "conflicts with a normal exploitation of the work" and "unreasonably prejudices the legitimate interests of the rights holder". Taken to its logical conclusion, this is an entirely circular argument: any use which a rights holder is prepared to licence would be per se "unfair" if done without permission.

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<sup>34</sup> Maria Pallante, The Next Great Copyright Act, Twenty-Sixth Horace S. Manges Lecture, extended version of a lecture delivered at Columbia University March 4, 2013, 37 COLUM.J.L. & Arts (forthcoming Spring 2013), p29

<sup>35</sup> Reed's Memorandum of Law in Opposition to Motion for Summary Judgement, p 4

We agree with the ALRC that international copyright agreements do not mandate such a principle, and that the three-step test provides only that free use exceptions should not unreasonably prejudice the legitimate interests of an author.<sup>36</sup>

A similar approach has recently been adopted in the United Kingdom. In its response to the 2011 Intellectual Property Office Consultation on Copyright, the Government stated:

[T]he existence or otherwise of a licence may be an important factor in deciding whether a particular act of copying would constitute 'fair dealing' and hence be permitted. However, the Government believes that other factors are important: the terms on which the licence is available, including the ease with which it may be obtained, the value of the permitted acts to society as a whole, and the likelihood and extent of any harm to right holders. For this reason, the Government rejects the argument that the mere availability of a licence should automatically require licensing a permitted act.

US Courts have also stressed the importance of avoiding the circularity that would arise if any use that could potentially be licensed was for that reason alone incapable of amounting to a fair use. A recent example involved a claim by publishers, including John Wiley & Sons Inc, that a law firm had infringed copyright in scientific journal articles when the firm made copies of entire articles for the purpose of making patent applications to the US Patent and Trademark Office on behalf of its clients. The publishers claimed that the use was not capable of coming within the fair use exception because they were prepared to grant a licence for the use. The court rejected this argument. The court acknowledged that there was, of course, some impact on the market for scientific articles if law firms did not pay fees that the publisher was seeking, but added:

...this is not the sort of negative effect on the market that weighs heavily against a finding of fair use. If it were, then the market factor would always weigh in favor of the copyright holder and render the analysis of this factor meaningless.

Therefore, the fact that the Publishers may have lost licensing revenue from Schwegman's copying is not determinative and does not create a fact issue for trial. The fact that the Publishers made licenses to copy works from their journals available to law firms, and that some patent law firms paid for licenses, does not transform patent law firms into a traditional, reasonable, or likely to be developed market.<sup>37</sup>

Universities Australia submits that it may be appropriate to make it clear on the face of the Act that the mere availability of a licence is not determinative of whether a fair use (or fair dealing) exception applies. We suggest the following words in any new fair use or fair dealing exception:

The fact that a license is available for the contested use shall not itself bar a finding of fair use [fair dealing] if such finding is made upon consideration of all relevant factors.

## Commercial use

Universities Australia notes that the proposed fair use exception would be capable of applying to commercial uses.

This is in our view particularly important in the digital environment, where universities - in line with the Government's innovation policy - are forging closer relationships with industry to drive research and innovation. The knowledge transfer that will increasingly drive the digital economy encompasses interaction between academia and wider society, including industry.

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<sup>36</sup> DP para 13.56

<sup>37</sup> American Institute of Physics & Ors v Schwegman Lundberg & Woessner, P.A & Ors US District Court, District of Minnesota, Case 0:12-cv-00528-RHK-JJK Document 250 Filed 07/30/13  
<http://www.aipla.org/resources2/reports/2013/Documents/Schwegman.pdf>



### 1.3 Fair use and the existing educational exceptions

The ALRC has proposed replacing the existing educational exceptions with fair use.

This is a different approach to that adopted in other jurisdictions, including fair use jurisdictions such as the US. In the US, educational uses are covered by a range of specific purpose based exceptions, with fair use operating as a backup exception for uses that while fair, do not fall squarely within any of the purpose based exceptions. By way of example, the US Copyright Act contains purpose based teaching exceptions in s 110 of the Act. Universities can rely on these exceptions, which apply to face to face teaching and distance education, provided that they comply with obligations that are set out in the relevant provisions. Only if their use falls outside of the literal terms of these exceptions do they need to rely on fair use. We note that US copyright academics have submitted that the complementary relationship between specific exceptions and fair use has "sustained the usefulness of specific exceptions in United States law in times of rapid technological change".<sup>38</sup>

While we acknowledge the importance of flexibility, and agree with the ALRC that confined and specific exceptions should generally only be necessary to remove any doubt with respect to uses that have a particularly important public interest,<sup>39</sup> we would be concerned if a shift from specific educational exceptions to fair use resulted in a narrowing of the scope that currently exists for unremunerated educational uses of copyright content. As the ALRC has itself noted, education has been called "one of the clearest examples of a strong public interest in limiting copyright protection".<sup>40</sup>

Universities Australia notes and welcomes the ALRC's acknowledgement that most educational uses that are currently covered by an exception would continue to be covered by a fair use exception.<sup>41</sup>

We also welcome the ALRC's statement to the effect that the Act should not provide that free use exceptions automatically do not apply to copyright material that can be licensed.<sup>42</sup> This is in line with the position in the US and Canada where the mere availability of a licence is a relevant but not determinative factor in deciding whether an educational institution can rely on fair use or fair dealing.<sup>43</sup> A fair use or fair dealing exception would mean nothing if it applied only to those uses for which publishers have not yet developed a market to charge fees for the use of a given portion, however small.

On this basis, we support the proposal to replace existing educational exceptions with fair use.

### 1.4 Third parties

In Chapter 5 of the Discussion Paper, the ALRC discusses the way in which the existing fair dealing exceptions have been construed by the Federal Court in *De Garis v Neville Jeffress Pidler Pty Ltd* as applying only when the person doing the copying etc. has the relevant purpose.<sup>44</sup>

In the education context, this aspect of fair dealing law has given rise to the rather absurd result that a university student can copy for his or her own research purposes in reliance on the research and study fair dealing exception, but no exception applies if the university - for reasons of convenience - copies the very same work on behalf of the student, regardless of how "fair" this might otherwise be.

Replacing purpose based fair dealing exceptions with fair use would remove what is in our submission an artificial distinction between dealings by a person for their own research or study and dealings by a person undertaking the very same copying on their behalf. From the perspective of the rights holder,

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<sup>38</sup> The Fair Use Doctrine in the United States - A Response to the Kemochan Report, Gwen Hinze, Peter Jaszi & Matthew Sag, July 26, 2013

<sup>39</sup> DP para 13.70

<sup>40</sup> DP para 13.6

<sup>41</sup> DP para 13.69

<sup>42</sup> DP para 13.57

<sup>43</sup> See our submission in response to the Issues Paper, pp 30-31, for a discussion of the relevant Canadian and US case law.

<sup>44</sup> (1990) 95 ALR 625

the only relevant question should be "is the copying fair?" The proposed fair use exception would bring about this result.

## 1.5 Expanding fair dealing would be very much a second best reform option

Universities Australia agrees with the ALRC that retaining and expanding the existing fair dealing exceptions would address some of the shortcomings highlighted in the Discussion Paper, but that it would be very much a second-best option to replacing these exceptions with fair use.

In our response to the Issues Paper we outlined the ways in which purpose-based exceptions had proved to be insufficiently nuanced to deal with changing uses of content in a rapidly changing technological environment. We referred to the comments made by Professor Antony Dnes on the UK fair dealing regime (which is in many respects the same as the Australian regime) to the effect that while fair dealing adopts a "rule of reason" to the question of what is fair, "the scope for applying that rule of reason is very limited because of the careful specification of permitted purposes."<sup>45</sup>

The need for greater flexibility in copyright law was recognised by the Copyright Law Review Committee in 1998. In its Simplification Report, the CLRC said that a flexible exception would:

- strike a fair balance between the competing interests of copyright owners and users and describe the limits to copyright owners' rights in a manner that maximises the public interest;
- simplify the Act;
- offer greater flexibility in allowing courts to determine new circumstances to which the exception can apply in response to changing technology; and
- provide greater certainty in the determination of 'fairness' through the general application of a non-exclusive set of considerations applicable to all uses.<sup>46</sup>

Since the CLRC made its recommendations, the need for flexibility has only become more urgent. We strongly agree with the ALRC that:

...copyright law that is conducive to new and innovative services and technologies should at least ask for the question of fairness to be asked.<sup>47</sup>

However, in the event that the Government does not enact a fair use exception, Universities Australia submits that it would be imperative to expand the fair dealing exceptions in the way proposed in chapter seven of the Discussion Paper, and in particular to enact fair dealing exceptions for education, non-consumptive use and quotation.

### Fair dealing for education

We have already discussed the way in which the existing fair dealing exceptions have been interpreted so as to prevent universities and other educational institutions from relying on them.<sup>48</sup> This continues to put Australian universities at a real disadvantage to comparable jurisdictions such as Canada, the US and Singapore, where universities can rely on fair dealing or fair use to undertake copying for educational purposes - including for the purpose of distribution to students - provided only that the copying is "fair".<sup>49</sup> For that reason, we consider it is imperative that if fair use is not

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<sup>45</sup> Antony Dnes, A Law and Economics Analysis of Fair Use Differences Comparing the US and UK, Report for the Review of IP and Growth, 2011 p 15-16 <http://www.ipa.gov.uk/ipreview-doc-j.pdf>

<sup>46</sup> Copyright Law Review Committee Simplification of the Copyright Act 1968 Part 1 Exceptions to the Exclusive Rights of Copyright Owners, paragraph 6.12

<sup>47</sup> Discussion Paper para 5.46

<sup>48</sup> This is also discussed in the Discussion Paper at para 13.63

<sup>49</sup> See Universities Australia submission in response to the Issues Paper at pp 42 - 46 for a discussion of the relevant case law

enacted, the Act be amended to include a new fair dealing exception that can be relied on by universities and other educational institutions for educational purposes.

It should also be made clear that there is no per se restriction on third parties such as universities relying on fair dealing to undertake uses on behalf of persons who were themselves entitled to rely on the exception. This is the position in Canada, where universities can rely on their students' research and study fair dealing exception to undertake copying that is intended to facilitate the students' research and study. In *Alberta (Education) v Canadian Copyright Licensing Agency*,<sup>50</sup> the Canadian Supreme Court considered the English case law on which the decision in the *De Garis* case was based, and found - contrary to what had been argued - that these cases did not stand for the proposition that research and study was inconsistent with instructional purposes, but rather the more limited principle that "copiers cannot camouflage their own distinct purpose by purporting to conflate it with the research or study purpose of the ultimate user".<sup>51</sup> While the inclusion of "education" as an illustrative purpose would most likely achieve the same result in the education context, we submit that it would also be appropriate to expressly "overrule" the principle in the *De Garis* case, with the effect that it was made clear on the face of the Act that there was no per se restriction on a third party relying on fair dealing to undertake uses on behalf of persons who were themselves entitled to rely on the exception.

#### **Fair dealing by universities**

As set out in our submission in response to the Issues Paper, in 1976, the Franki Committee recommended dropping the word "private" from what was at that time the "research and private study" fair dealing exception. The Committee's stated rationale was to ensure that the exception would be broad enough to cover fair dealings for "classroom instruction" and "educational purposes". The Franki Committee said that the entitlement of an educational institution to make multiple copies in reliance on a statutory licence should be "in addition to whatever might be done under the fair dealing provision".<sup>52</sup>

In other words, the Franki Committee had in mind that educational institutions would be in the same position as are Canadian educational institutions following the decision of the Canadian Supreme Court in *Alberta (Education) v Canadian Copyright Licensing Agency*.<sup>53</sup>

The Franki Committee's recommendations were implemented by Parliament in 1980, when the word "private" was dropped from the research and study fair dealing exception and the statutory licence was introduced.

Australian copyright scholars have queried the correctness of the Federal Court's decision in the *De Garis* case, noting that the distinction the Federal Court drew in that case between acts by a researcher and acts by the facilitator "is not required by the Act and is unnecessarily restrictive".<sup>54</sup>

Looked at in this light, the proposed expansion of fair dealing to include education would merely bring the law back in line with what appears to have been intended at the time that Parliament implemented the Franki Committee recommendations.

Finally, Universities Australia submits that it should be made clear that the mere existence of a licence - whether statutory or voluntary - is not determinative of whether or not a use that fell within the scope of the licence was nevertheless fair. While such clarification may be considered unnecessary, we

<sup>50</sup> 2012 SCC 37

<sup>51</sup> *Ibid* para 21

<sup>52</sup> Copyright Law Committee on Reprographic Reproduction, October 1976 (Franki Report) para 2.64

<http://www.ag.gov.au/Copyright/CopyrightLawReviewCommittee/Reports/Pages/CopyrightLawCommitteeonReprographicReproduction.aspx>

<sup>53</sup> 2012 SCC 37

<sup>54</sup> Submission in response to the Issues Paper by Robert Burrell, Michael Handler, Emily Hudson and Kimberlee Weatherall, p 14

note that in its Supplementary Submission to the Issues paper, the Copyright Agency submitted that any new exception should not apply if a licence was available "on reasonable terms".<sup>55</sup>

Fair dealing for the purpose of non-consumptive uses

Universities Australia also submits that in the event that fair use is not enacted, it would be imperative to introduce a new fair dealing exception for the purpose of non-consumptive use. As outlined in our submission in response to the Issues Paper, under the current educational copying regime, all copies and communications, no matter how incidental or necessary to the use of technology, are treated as remunerable.<sup>56</sup> We also outlined the way in which the lack of an available exception was standing in the way of universities making full use of new technologies such as data mining and text mining.<sup>57</sup>

While it is likely that an exception that permitted fair dealing for the purpose of education would cover non-consumptive uses by universities, Universities Australia submits that there is a strong public interest argument in favour of a general exception that applied to non-consumptive uses of works by any user, subject only to a fairness test. In our submission, if fair use is not enacted, a failure to expand fair dealing to include non-consumptive uses would amount to a missed opportunity to ensure that Australian copyright law was fit for purpose in a digital environment, where almost every use of a work involves making copies. Universities are increasingly engaged with the private sector in collaborative research and development projects that involve the use of copy reliant technologies - such as data mining and text mining - which copy works for non-expressive aims. As has been noted by Professor Ian Hargreaves, the author of the UK Review of Intellectual Property and Growth (the Hargreaves Report), the fact that these new technical uses happen to fall within the scope of copyright under UK law is "essentially a side effect of how copyright has been defined rather than being directly relevant to what copyright is supposed to protect".<sup>58</sup> We consider it of great importance to ensure that not only the education sector, but also the wider community, is in a position to use works in ways that do not trade on the underlying creative and expressive purpose of the material without risking infringing copyright.

Again, it would be desirable and appropriate for it to be made abundantly clear that the mere existence of a licence purporting to permit a non-consumptive use was not determinative of whether or not such use was nevertheless fair.

### Quotation

Universities Australia agrees with the ALRC that there are strong arguments in favour of Australian copyright law providing more scope for quotation of copyright material, particularly where there is little or no effect on the potential market for, or value of, the copyright material.<sup>59</sup>

In the event that fair use is not enacted, we support the introduction of a new fair dealing exception for the purpose of quotation. As the ALRC notes, fair uses of copyright content for the purpose of quotation have been permitted under US copyright law long before the codification of fair use in s 107 of the US Copyright Act.

The ALRC has sought comment on whether referring to quotation without reference to a particular purpose (such as criticism or review) may lack meaning. Universities Australia submits that unshackling the purpose of quotation from the purpose of either criticism or review, or research or study, would inject much needed flexibility for academic users in particular. In our submission in response to the Issues Paper, we noted that under the existing exceptions regime, a commercial news program is permitted to use third party content for the purposes of criticism and review (in reliance on s 41 or

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<sup>55</sup> Copyright Agency Supplementary Submission in response to Issues Paper, p 13

<sup>56</sup> Universities Australia submission in response to Issues Paper, p 40

<sup>57</sup> Ibid p 13

<sup>58</sup> Ian Hargreaves, Digital Opportunity: A Review of Intellectual Property and Growth (the Hargreaves Review) para 5.24

<http://www.ipa.gov.uk/ipreview-finalreport.pdf>

<sup>59</sup> DP para 10.111

103 A of the Act), but an academic may well be prevented from using the same content in a conference paper or journal article unless the use can truly be said to amount to "criticism and review". Universities Australia submits that this limitation is highly problematic. In the absence of a fair use exception, enacting a fair dealing exception for the purpose of quotation would go some way to addressing this anomaly.

## 2. Replacing statutory licences with voluntary licensing

Universities Australia strongly supports the proposal to repeal the educational statutory licences.

We agree with the ALRC that voluntary licensing would be "less prescriptive, more efficient and better suited to a digital age" than the statutory licences.<sup>60</sup>

The statutory licence operates as an insurance policy against possible use of copyright material, as opposed to a fair and efficient means of paying for actual use. In our submission, this approach to the use of copyright content in universities can no longer be justified.

Since the release of the Issues Paper, there has been a largely negative response from Copyright Agency and Screenrights, as well as some of their members, to the proposal to repeal the statutory licences. The concerns expressed by these groups appear to fall into two categories. Firstly, rights holder groups have suggested that the education sector seeks repeal of the statutory licences in order to be able to copy everything for free. Secondly, the claim is made that even if voluntary licences replace the statutory licences, they will be less efficient than statutory licensing.

As we set out below, each of these criticisms is unfounded.

### 2.1 The "everything would be free" claim

There has been a great deal of misinformation circulated by some rights holder groups about how the educational copying landscape would operate in the event that the statutory licences were repealed.

Unfortunately, this has generated misunderstanding - and misplaced fear - among the members and constituents of these groups.

The Australian Society of Authors (ASA) has warned its members that:

The [Discussion] Paper argues that statutory licensing could be replaced with 'voluntary' licensing – but consider how much 'voluntary' [educational institutions] are going to enter into if they can get away with not having to pay fees to authors ... One practical consequence of removal of these statutes will be a radical diminution if not complete destruction of the Copyright Agency as our major collecting society.<sup>61</sup>

Copyright Agency has warned its members:

Your rights and income are being seriously challenged by a proposal that suggests, amongst other things, the repeal of the Statutory Licence.

The Law Reform Commission has produced a discussion paper that is heavily influenced by those who argue that free and cheap distribution of content is a characteristic of the digital age and the future and therefore should be enshrined in law.

...they are making recommendations that would reduce the incomes of writers and publishers and have the potential to create chaos and litigation in the industry and education sector.

The new recommendations would ...put the onus on creators to protect their rights and prove abuse. ...The Statutory Licence means there is neither misunderstanding nor illegal

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<sup>60</sup> DP para 6.3

<sup>61</sup> <http://us6.campaign-archive2.com/?u=c26dc641565f5d18273cad4dd&id=c057ec0659&e=a466c5e84d>

usage. It is a system worth maintaining and a system that fairly compensates our members each year for the content they create.

...we need you to raise your voices now and write to the ALRC before 31 July.<sup>62</sup>

Many authors appear to have taken Copyright Agency's statements at face value, and have been persuaded by Copyright Agency that the proposed reforms will take away their right to rely on collective licensing to earn an income from educational use of their content. One submission to the ALRC suggested that the proposed reforms would mean that content would be "there for the taking" by educational institutions because "authors would have little or no chance of licensing the material..."<sup>63</sup>

Universities Australia is greatly concerned by what we see as mischievous and misleading information being circulated by Copyright Agency and other rights holder groups. We have set out some of this correspondence at Annexure A to this submission.

These groups have advised their members and constituents - wrongly - that their livelihoods are at stake if the statutory licences are repealed. They have suggested - wrongly - that repeal of the statutory licences would mean the end of collective licensing for educational content, and the end of educational institutions paying to use such content.

Repeal of the statutory licences would not result in universities "getting away with having to pay fees to authors", nor would it mean that universities would have the choice of "volunteering" whether or not to pay for uses that exceeded what was permitted under fair use. Nor would this proposed reform "have the potential to create chaos and litigation in the industry and education sector". It certainly would not mean that authors would be forced to licence their material directly with universities.

The university sector is and will remain a major contributor to the copyright industries.

These are the facts:

- In 2011, university libraries spent \$256.7 million on library resources. Nearly 80 per cent of this was on e-resources such as electronic journal subscriptions. Repeal of the statutory licences would have no impact on this spending. These licence fees flow directly from universities to the rights holders and will continue to do so.
- Universities also pay to use content under the educational statutory licences. In 2012, universities paid more than \$30 million to Copyright Agency and Screenrights for copying and communication under these licences. 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. However, we note that the ALRC has proposed that even if the statutory licences are not repealed, the Act should be amended to clarify that "fair uses of copyright material, or uses otherwise covered by a free use exception", need not be licenced. In other words, the ALRC has acknowledged that the unfair position in which the Australian education sector now finds itself should be addressed regardless of whether or not the statutory licences are repealed. The result would be Universities would no longer be required to pay for minor, non-harmful uses of copyright materials that are recognised around the world as being free and fair uses of copyright materials. This would not be a case of universities "getting away with not having to pay authors". Rather, it would be a case of rights holders no longer being able to rely on the existence of a statutory licence to seek to be remunerated for uses that are otherwise "fair".

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<sup>62</sup> Letter to Copyright Agency members from Chairman, Sandy Grant

<sup>63</sup> Submission in response to Discussion Paper from Naher Agency

- Repeal of the statutory licences would not mean the end of collective licensing, and it would certainly not result in the “complete destruction of the Copyright Agency” as suggested by the ASA. We discuss this further below.

### The “voluntary” in voluntary licensing

In addressing the misinformation that has been circulated by some rights holder groups, it is important to clarify what Universities Australia means when we refer to voluntary licensing.

The ASA appears to be suggesting to its members that a “voluntary licence” equates to a licence where educational institutions would have the choice of “volunteering” - or not - to pay for use of copyright works. In other words, the suggestion is that a university could use a copyright work and then decide whether or not it wished to “volunteer” to pay the rights holder for use of the work.

It is hardly surprising that some ASA members have expressed concern about this. We think they will be greatly relieved to learn that the “voluntary” in voluntary licensing refers to their right to choose whether or not to grant a licence (whether directly or through Copyright Agency), not a university's right to choose whether or not to pay.

We are confident that once this is made clear to authors and other rights holders they will view the proposal to replace statutory licensing with voluntary licensing in a different light.

## 2.2 The “voluntary licensing would be inefficient” claim

The other major criticism that some rights holder groups have made is that replacing the statutory licences with voluntary licensing would be less efficient for both rights holders and users.

This criticism is due to a misunderstanding as to how voluntary licensing would operate in the event that the statutory licences were repealed. We address rights holder concerns below.

There would still be an important role for collective licensing

Authors and small publishers in particular have expressed great concern that repeal of the statutory licences would impose an undue burden on them in having to deal directly with education sector users of their content. They have also expressed concern that this might lead to them not being paid at all for uses of their works.

The confusion seems to have arisen as a result of statements made by the collecting societies themselves following the release of the ALRC's Discussion Paper.

### Screenrights

Screenrights has informed its members that:

Screenrights will strongly oppose the introduction of a vague fair use provision in favour of effective statutory licences, which currently allow easy and flexible access to broadcast material. ...The broad ranging fair use proposal will create great pressure on copyright owners to try and identify uses of their work and confirm through the courts their right to protect this use. This could result in an unequal bargaining position, between copyright owners and large institutional users, leading to unfair outcomes and ultimately economic harm.<sup>64</sup>

This statement could be taken to suggest that fair use would “replace” the Part VA statutory licence, and that there would be no role for Screenrights in dealing with education sector users on a collective basis. It is not surprising that this has generated concern on the part of some Screenrights members who have taken the claims at face value.

<sup>64</sup> <http://www.screenrights.org/news/2013/06/fair-does-not-equal-the-abolishment-of-rights>

Universities Australia has never suggested that fair use should "replace" the statutory licence, nor that there should be no role for collective licensing of broadcasts. We have, however, submitted that universities should only need to obtain a licence for uses that would exceed what was permitted under fair use (or fair dealing for education in the event that fair use is not enacted). This would put universities in the same position as other users of copyright content.

It is also quite misleading to suggest that there would be "great pressure on copyright owners to try and identify uses of their work and confirm through the courts their right to protect this use". It is true that licensing of broadcasts - which typically contain underlying rights - gives rise to practical difficulties that do not arise when it comes to licensing other kinds of works. There is, however, a simple solution to this that has been adopted in Canada, New Zealand and the UK. In each case, the relevant copyright act contains a provision (s 29.7 Canadian Copyright Act, s 48 of the NZ Copyright Act and s 35 of the UK Act) that provides for a collecting society to be appointed to manage relevant rights (including underlying rights) and to grant a voluntary licence to educational users.

In New Zealand, where there is no statutory licence, Screenrights is the relevant collecting society for educational use of broadcasts. On its own website, it describes the New Zealand voluntary licences as 'versatile and flexible', permitting copying of 'any programme ... anywhere ... in any format'. There is no basis to suggest that it would not be the same in Australia.

This kind of "statutory extension" model could be adopted to put Screenrights in a position to offer a voluntary licence for uses of broadcasts (and underlying works) that exceeded what would be permitted under fair use. Universities Australia submits that the following provision, which is a modified version of the UK educational copying exception, would address the concerns raised in the Discussion Paper:

- (1) The copyright in a broadcast, or in any work, sound recording or cinematographic film in a broadcast, is not infringed by the making or communication, by or on behalf of an educational institution, of a copy of the broadcast if the copy or communication is made solely for the purposes of the educational institution or another educational institution.
- (2) Section (1) does not apply to any use that exceeds fair use if or to the extent that there is a licensing scheme certified for the purposes of this section under section [xx] providing for the grant of licences.

We say more about use of broadcasts in section 4 below.

### **Copyright Agency**

Copyright Agency has also suggested that voluntary licensing would inevitably result in rights holders having to deal with education sector users on an individual basis.<sup>65</sup> Not surprisingly, this has generated concern on the part of authors and small publishers. For example, small publisher Cengage Learning Australia Pty Ltd has submitted that under the reforms proposed by the ALRC:

there will ...need to be hundreds of separate voluntary licences negotiated by each and every education institution.<sup>66</sup>

Again, however, this is not true.

While universities would continue to enter into direct licences with large commercial publishers for the vast bulk of educational copying and communication, there would be a continuing role for Copyright Agency with respect to smaller rights holders in the event that the statutory licence was repealed.

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<sup>65</sup> <http://copyrightagency.wordpress.com/2013/06/10/repealing-statutory-licences-some-unintended-consequences/>

<sup>66</sup> Cengage Learning Australia Pty Ltd Submission No 320



Universities Australia is really at a loss to understand why Copyright Agency has informed its members that they would be forced to deal directly with the education sector in the event that the statutory licences were repealed. The publishers and authors who have raised their concerns with the ALRC are already members of Copyright Agency. There would be nothing at all to prevent them directing Copyright Agency to act as their agent for claiming payment for uses of their works by universities. This kind of voluntary collective licensing operates very well in other jurisdictions, and there is no reason why it would not also work well in Australia. In fact, Copyright Agency already plays such a role in commercial licensing in Australia. On its website, Copyright Agency says:

Copyright Agency sells a range of licences to cover the use of copyright material at businesses. The licences are easy to use and administer, and aim to assist businesses to minimise their risk of copyright infringement.<sup>67</sup>

#### Example of a voluntary collective licence in education

Voluntary collective licensing operates effectively and efficiently in the US, despite the fact that the US has a fair use exception. Universities and other educational institutions rely on a collective licence offered by the Copyright Clearance Centre (CCC) for uses that exceed what would be permissible under fair use, or where they do not wish to undertake a fair use analysis.

The Copyright Clearance Centre (CCC) website contains these testimonials from satisfied users of the licence:<sup>68</sup>

"With the Annual Copyright License, faculty and staff can focus on the business of teaching, while demonstrating the importance of respecting intellectual and creative property of others."

Georgia Harper, Scholarly Communications Advisor, University of Texas at Austin Libraries

"With the license, faculty and staff can go online and quickly determine if they have permission to use the content. It's a much easier process and the license is giving me peace of mind which I didn't have before."

Lorraine Martorana, Director of Library Services, Cecil College

"The Annual Copyright License has given us several advantages. It provides institution-wide coverage while supporting multiple uses, including coursepack creation, e-reserves development and course management system postings. The license provides real efficiencies for our library staff."

Jeffrey R. Rehbach, Policy Advisor for Library & Information Services, Middlebury College

The ALRC has asked whether there would be the need for a "statutory extension" provision of the kind we have proposed for broadcasts.<sup>69</sup> Universities Australia submits that this is neither necessary nor desirable. Unlike broadcasts, there is no "underlying rights" issue with print and graphic works. Copyright Agency has, over many years, built up an extensive repertoire, and would be well placed to administer a collective licence for education sector users wishing to use print and graphic works in ways that were not permitted by fair use (or fair dealing for education). In the absence of a clear need for regulatory intervention, Universities Australia submits that there is no justification for a legislative provision to facilitate collective licensing of works. This is line with the views expressed by the ACCC and the Productivity Commission regarding the benefits of a principles-based regulatory framework.<sup>70</sup>

Copyright Agency has submitted that the scope of rights it would be able to licence would inevitably be more limited under a voluntary licence regime than under a statutory licence regime, and that this

<sup>67</sup> <http://www.copyright.com.au/licences/business>

<sup>68</sup> <http://www.copyright.com/content/cc3/en/toolbar/aboutUs/testimonials.html>

<sup>69</sup> DP Question 6-1

<sup>70</sup> DP paras 3.89 - 3.90

is evidence of the “inefficiency” of voluntary licensing. Universities Australia is well aware that one upshot of replacing statutory licensing with voluntary licensing is the possibility that some content may not be available under a licence. We have given this a great deal of consideration, and are confident that this would not prove to be a widespread problem. This is due largely to the extensive scope of Copyright Agency’s repertoire.

We also see some advantages in a “less extensive” repertoire: under a voluntary licensing regime, Copyright Agency’s repertoire would not extend to freely available internet content (for which no one is seeking payment) and orphan works, which are currently paid for by universities in Australia but used without the need for a licence by universities in comparable jurisdictions.

Copyright Agency has also submitted that it would be impractical for education sector users to have to check its repertoire in order to determine whether a particular work was covered by the licence. We do not anticipate this being a problem. Firstly, universities already direct their staff to check whether content is covered by a direct licence with the publisher before recording it as having been copied under the Part VB statutory licence. Secondly, Universities are quite used to operating under a voluntary licence with the music collecting societies that does not provide comprehensive coverage. There is nothing new, therefore, for universities in having to check for included or excluded content and uses before relying on a licence. Universities are well placed to manage this requirement.

#### **Voluntary music licence with music collecting societies**

Universities have been parties to a voluntary licence with music collecting societies APRA/AMCOS, PPCA and ARIA since 2005.

The licence permits use of sound recordings, which are not covered by either of the statutory licences.

This licence has operated successfully for nine years. The universities and the music collecting societies have worked cooperatively to make changes to the agreement to accommodate changed usage practices.

### **2.3 Why we support repeal of the statutory licences**

We think it is important to stress that our support for repeal of the statutory licences is not in any way contingent upon a fair use exception being enacted. Whether or not fair use is introduced, Universities Australia strongly supports the ALRC proposal to repeal the statutory licences.

#### **The statutory licences are highly inefficient**

The theory behind a statutory licence is that it provides an efficient mechanism for rights holders and users to transact by lowering the transaction costs.

In practice, however, the educational statutory licences have created a market in works where none would otherwise exist. They have allowed Copyright Agency to collect money from universities for activities that, absent the statutory licence, would have no market value:

- Australian universities are paying to use freely available internet material, including content uploaded onto blogs and freely available wikis. This content is copied freely by people in homes and businesses throughout Australia as well as by universities in other jurisdictions. No one is seeking to be paid for it.

#### **Blogs and wikis**

Content of this kind is taking on an increasing importance in the university sector. A study on scholarly communications published in the UK earlier this year found that the “sociology” of scholarly

communication is changing. The authors of the study said that while 'formal' communication through journal articles and monographs remained important, there was an increasing use of 'informal' channels of scholarly communication via blogs, wikis, Twitter etc.<sup>71</sup>

- Australian universities are paying to use orphan works for educational purposes. By definition, there is no one wanting to be paid for these works. But for the statutory licence, universities would be able to rely on the flexible exception in s 200AB of the Act to use print and graphic orphan works for educational purposes. However, as a result of the statutory licence, the free exception in s 200AB does not apply and the copying has to be paid for. The money ends up in the hands of rights holders who have no connection whatsoever with the work that was copied.<sup>72</sup>
- As new technological developments result in new ways of using works, Copyright Agency has relied on the statutory licences to seek greater payment from universities. As set out in our response to the Issues Paper, Copyright Agency even sought to be paid for caching and student viewing online.<sup>73</sup> It was necessary for the education sector to seek legislative intervention to clarify that this was not a remunerable activity, and that the sector was not required to pay under the statutory licence when a teacher or lecturer directed a student to view material online.<sup>74</sup> It seems inevitable that for so long as the statutory licence continues to operate, Australian universities will continue to face claims from Copyright Agency for increased payments based on an argument that technological advances have led to new ways of using works that warrant an increase in payment.

Copyright Agency would not be in a position to make these claims but for the statutory licence.

### Windfall gains

It is important to note that the millions of dollars collected each year from educational institutions for copying of freely available internet content and orphan works is likely to be paid to Copyright Agency members who have no connection to the works that were copied.

This is because if Copyright Agency cannot identify the rights holder for a particular website, work, or if the amount payable for an overseas website falls short of \$200, the money collected from educational institutions goes to an Undistributed Funds pool where it remains in trust for four years, after which time it is distributed that year as a windfall to Copyright Agency members whose textbooks, journal articles or other works were copied that year.

These members are benefiting - at the expense of publicly funded educational institutions - from the inefficiencies of the statutory licence. Many of them have expressed concern that repeal of the statutory licence would result in a loss of income. The loss of this windfall income could not in any way be said to cause them unreasonable prejudice.

Repeal of the statutory licences would create an efficient way to ensure that licences do not apply to uses that are likely to be fair uses, and which are not the subject of licences in any other sector or jurisdiction.

<sup>71</sup> [http://repository.jisc.ac.uk/5209/1/UK\\_Survey\\_of\\_Academics\\_2012\\_FINAL.pdf](http://repository.jisc.ac.uk/5209/1/UK_Survey_of_Academics_2012_FINAL.pdf)

<sup>72</sup> As we discuss below, in the section headed "Windfall gains".

<sup>73</sup> Universities Australia submission in response to Issues Paper, p 40

<sup>74</sup> Copyright Agency raised this argument in Copyright Tribunal proceedings with the schools sector, and was seeking to persuade the Tribunal that teachers who directed students to view material online were authorising those students to exercise the communication right. Educational institutions were forced to seek a legislative amendment to ensure that the statutory licence could not be used in this way. At the request of the education sector, the Copyright Amendment Act 2006, which came into force on 1 January 2007, contained a new s 22(6A) which makes clear that a person is not taken to be exercising the right of communication merely because the person takes one or more steps for the purpose of gaining access to what is made available online by someone else in the communication or by receiving the electronic transmission of which the communication consists.

Recently, Copyright Agency has suggested that there is scope to set a "zero" rate for some copying and communication under the statutory licence.<sup>75</sup> In our submission, this concession very clearly highlights the highly inefficient nature of the statutory licence. Under a voluntary licence regime, the parties to the licence reach agreement as to what uses are covered by the licence and therefore remunerable. There is no need for either party to direct resources to monitoring and measuring uses that do not attract remuneration. Under the statutory licence, on the other hand, each and every copy and communication that occurs during a period that a university is surveyed is required to be reported to Copyright Agency, regardless of whether or not Copyright Agency intends to seek remuneration.

Universities Australia submits that it is highly inefficient to impose substantial compliance costs on universities (and Copyright Agency itself) for the purpose of collecting data on copying and communication that Copyright Agency now says is not necessarily even remunerable.

The unnecessary costs associated with collecting and processing data on uses that either fall outside of the scope of the licence, or for which Copyright Agency does not otherwise intend to seek remuneration, represents a significant waste of public resources.

#### **Widespread concern regarding the inefficiencies of statutory licensing**

It is not just the education sector that has raised concerns about the inefficiencies of the statutory licences.

In its submission in response to the Issues Paper, the Tasmanian Government said that Copyright Agency had treated copying by Tasmanian schools of brochures from the Tasmanian Department of Health in relation to control of head lice as remunerable. This was despite the fact that the relevant copyright notice would have stated that the material could be used for non-commercial purposes and that both Departments are part of the Tasmanian Government.

It said that this did not appear to be an isolated incident.

#### **No scope for transactional licences**

The statutory licence does not accommodate a university that wishes to undertake only minimal electronic copying and communication of content not already covered by a direct commercial licence.

The most efficient way to facilitate licensing of minimal amounts of content that exceed what would be permitted under fair use would be for Copyright Agency to offer a transactional licence of the kind that universities in the US can obtain from the Copyright Clearance Centre (CCC) if they do not wish to enter into a full repertoire licence with CCC.<sup>76</sup> Some of the uses that CCC purports to licence may well be permitted under fair use, but the availability of a transactional licensing option means that universities have the option of taking out a licence in the event that they wish to use content in excess of fair use limits or if they do not wish to undertake a fair use analysis before using the work. The CCC licence is a fully voluntary licence. It has no statutory underpinning.

Compare this with the educational statutory licence. There is no practical scope for a university to transact with Copyright Agency on a work by work basis for electronic copying and communication. Universities wanting to make electronic copies and communications under the statutory licence must issue Copyright Agency with a remuneration notice that signals their agreement to operate under an "electronic use system".<sup>77</sup> This is a system that is used for determining how much universities will pay for copying and communication for so long as the remuneration notice is in force.<sup>78</sup> If the universities

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<sup>75</sup> Copyright Agency Supplementary Submission in response to Issues Paper, p 4

<sup>76</sup> <http://www.copyright.com/content/cc3/en/toolbar/productsAndSolutions/payPerUsePermissionServices.html>

<sup>77</sup> s 135ZU of the Act

<sup>78</sup> s 135ZWA of the Act

cannot reach agreement with Copyright Agency as to the processes for the electronic use system, the Copyright Tribunal must decide what form the electronic use system will take.<sup>79</sup> All of this is a long way from the US CCC model, where a university can contact CCC directly and easily and obtain a licence on a transactional basis.

### Changes that are rendering the statutory licence increasingly irrelevant

We have addressed rights holders' concerns that they will no longer be in a position to licence use of their works via collective licences. As we have set out above, we expect that there will be a continuing role for collective licensing for some time.

Nevertheless, three changes are having - and will continue to have - a significant impact on the relevance of collective licensing in general and the statutory licence in particular. The first of these is that universities are increasingly purchasing content direct from the publishers on terms that allow them to do the same, or more, than would be permitted under the Part VB statutory licence. This does not mean that universities are not paying to use the content – just that they are paying publishers directly rather than via Copyright Agency. The second major change is that academics are increasingly looking to open access content when deciding what content to use in courses and teaching materials. The third paradigm change is that there has been a move away from a “push” teaching and learning model to a model of student-directed learning.

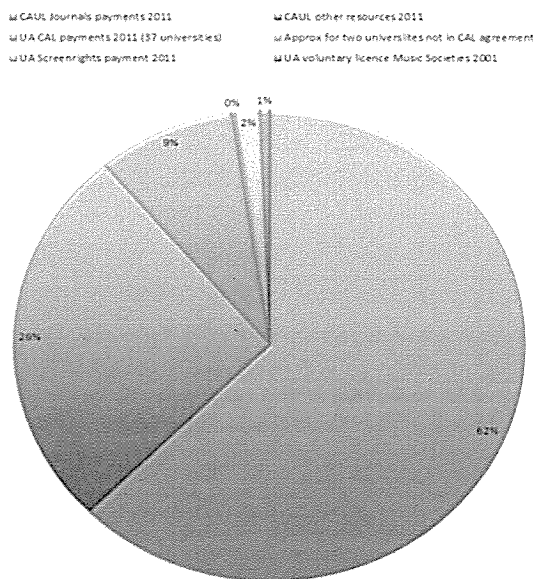
#### Content purchased direct from publishers

The vast majority of educational content used for teaching purposes in Australian universities is purchased directly via commercial licences. This is a very different situation compared with when the statutory licence was first introduced.

As we've already noted above, in 2011 university libraries spent \$256.7 million, the majority of which was on electronic resources (i.e. journals and e-books). It can be expected that this direct spending will increase over time, especially as a result of the increasing penetration of e-books and their associated add-ons.

The chart below shows the breakdown between money spent by the Australian university sector on direct licences, voluntary licences and the statutory licences in 2011.<sup>80</sup>

**Direct payment vs VA, VB and Voluntary licence payments 2011**



<sup>79</sup> s 135ZWA(2) of the Act

<sup>80</sup> CAUL refers to the Council of Australian University Librarians. The figure for "other resources" includes e-books.

## Open access publishing

In our submission in response to the Issues Paper, we discussed the global move towards making high quality educational content freely available.<sup>81</sup> Since making this submission, a study on scholarly communications has been released in the UK.<sup>82</sup> The study, which had the backing of JISC and Research Libraries UK, included the following findings that are highly relevant for this review:

- The university library remains an important starting point for academics putting teaching materials together, but “following closely in second place are freely available materials online”.
- When an item is not held in the library collection, “the highest share of respondents report that they look for a freely available version online, while the second highest share gives up, both of which outrank using the library’s interlending or document supply service”.

Rachel Bruce, JISC’s innovation director for digital infrastructure, commented on the findings:

...this survey confirms that the open web is the first port of call for academics starting research. If an article is not available through the library the majority of academics will go straight to the web to look for a free copy, suggesting that open access is becoming a critical component of the research process.

It also confirms our expectation that libraries have an important role to play in both surfacing open content on the web and ensuring open content is accessible through library systems.”<sup>83</sup>

In just a few short years, open access publishing has dramatically changed the scholarly communications landscape. More than 50 funding agencies around the world require open access to peer-reviewed articles arising from the research they fund.<sup>84</sup> According to Dr Peter Suber, Director of the Office for Scholarly Communication at Harvard University, this number is not only growing, but the growth is accelerating.<sup>85</sup> Dr Suber says:

Funders are charities or philanthropies, and that explains why they grasp the logic of open access. If a research project is worth funding, then its results are worth sharing. Funders have no reason to hold research back, in order to generate a revenue stream or meter it out to paying customers. On the contrary, they have every reason to make it available to everyone who could make use of it.

Dr Suber notes that some commercial publishers - fearful of how open access will affect their business models - have lobbied against open access mandates at public funding agencies. He is quite critical of the position that these publishers have adopted:

...[It’s] equivalent to arguing that public agencies should put the private interests of publishers ahead of the public interest in research, or that the public should compromise and publishers should not compromise. Governments and policy-makers see the need for public agencies to put the public interest first and provide OA to publicly-funded research.

Over the past decade we’ve seen steady growth in (1) peer-reviewed OA journals, (2) OA repositories, (3) OA policies at funding agencies, (4) OA policies at universities, (5) experiments with OA by traditionally non-OA publishers, and (6) understanding of OA by researchers, librarians, university administrators, funders, and policy-makers. All six of these trends will continue. There’s no single “finish line” for OA, and we may never see OA for all new research literature. But within five years we should reach a tipping point at which OA is the default for new research literature.<sup>86</sup>

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<sup>81</sup> Universities Australia submission in response to Issues Paper, p 50

<sup>82</sup> [http://repository.jisc.ac.uk/5209/1/UK\\_Survey\\_of\\_Academics\\_2012\\_FINAL.pdf](http://repository.jisc.ac.uk/5209/1/UK_Survey_of_Academics_2012_FINAL.pdf)

<sup>83</sup> <http://www.jisc.ac.uk/news/uk-wide-survey-of-academics-spotlights-researchers-reliance-on-open-access-16-may-2013>

<sup>84</sup> <http://www.springer.com/authors/author+zone?SGWID=0-168002-12-925304-0>

<sup>85</sup> Ibid

<sup>86</sup> Ibid

Universities Australia submits that the rapidly accelerating move towards use of open access content in university teaching and research is a very strong argument in support of repeal of the statutory licences.

Not only is no licence required to use this content, but, as we noted in our earlier submission, the existence of the statutory licence has meant that Australian universities are very often paying under the statutory licence to use this freely available content.<sup>87</sup> This happens because academics often inadvertently report this copying during a survey of university copying, and it is record by Copyright Agency as having been made in reliance on the statutory licence despite the fact that it could have been done for free. In the words of one university copyright officer:

"Copying of these publications should not be caught in a [Copyright Agency] survey and treated as remunerable, but there is no effective way of filtering them out in the current system."

Any loss of statutory licences fees for this copying is perfectly reasonable: these fees should never have been payable, and reflect the inefficiencies of the statutory licence.

### Copyright and scholarly publications

The growth of open access publishing is significant for this review for another reason: it highlights the fact that academic authors do not typically engage in scholarly communications for the purpose of receiving copyright royalties on their writings.

Academic authors have traditionally assigned copyright to commercial publishers, but they have done so without any payment or right to royalties.<sup>88</sup> Their main concern was ensuring that their work would be published, read and cited widely. Until fairly recently, assigning copyright to a commercial publisher - who locked the work away behind a paywall - was the only effective way of achieving this.

The willingness of these academics to make their work available via open access repositories underscores the falsity in claims by commercial publishers that repeal of the statutory licences would lead a dramatic decline in the availability of high quality academic content.

### Increased emphasis on student-directed learning

Changes in teaching methods have also rendered the statutory licence increasingly less relevant. When the statutory licence was introduced in 1980, the dominant teaching model was as follows: lecturers would provide students with a course outline that directed them to various resources (some of which they were required to read and others which they may choose to read if they were writing an essay or an assessment task on a particular topic) as well as a printed set of photocopied readings that was paid for under the statutory licence.

That model is rapidly disappearing. There are major cultural changes taking place in the university teaching and learning environment. There has been a move away from a "push" teaching and learning model - where lecturers recommend a set text and provide a set package of unit course materials, whether in paper format or e-copy - towards a model where student initiative, and exchanges among peers, drive the learning process, and where academics are much less providers of set course materials and more the providers of expert guidance.

Under this "community of learners" model, the role of academic staff is that of moderator and mentor, directing and assessing student efforts, helping students to find, analyse and evaluate content, and providing learning challenges in relation to the content students find for themselves and their peers.

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<sup>87</sup> Universities Australia submission in response to Issues Paper p 51

<sup>88</sup> See Universities Australia submission in response to Issues Paper pp 46-49 and 50-51

Universities Australia submits that the increasing trend towards student directed learning is one more reason why the statutory licence is rapidly becoming redundant. Increasingly, there is less need for universities to engage in multiple copying, and less reliance on any particular resource.

## 2.4 Universities will act in good faith

Some rights holder groups have suggested that universities and other educational institutions will not act in good faith when it comes to use of copyright content, and that they may "seek to get away with having to pay fees to authors" if the ALRC's proposed reforms were enacted.

Universities Australia unequivocally rejects the suggestion that the university sector cannot be trusted to act in good faith when it comes to use of copyright content. It would be nonsensical for universities to compromise the very creative industries on which they rely for learning materials in delivering world-class teaching, education and research.

Universities, academics and students are both users and creators of copyright content. The sector has a long history of compliance with copyright obligations, and takes these obligations very seriously. Universities have worked cooperatively with collecting societies such as Copyright Agency, Screenrights, Australian Performing Right Association (APRA), Australian Mechanical Copyright Owners Society (AMCOS), the Phonographic Performance Company of Australia (PPCA) and the Australian Record Industry Association (ARIA) over many years. None of this would change under the regime that is proposed by the ALRC.

Some rights holders have also suggested that uncertainty about the proper scope of fair use may inadvertently lead to academics exceeding fair use limits and therefore infringing copyright.

Again, we submit that this concern is misplaced. Universities in the US and Canada have developed guidelines to assist their academics in determining what kinds of uses are permissible under fair use (or fair dealing for education in Canada).<sup>89</sup> This would happen in Australia as well. As in these other jurisdictions, there would no doubt be circumstances where the position was not clear-cut, and where it would be necessary to seek advice from the university lawyer, copyright officer or other expert. That is no different to the position in Australian universities today: i.e. there are some activities that are clearly covered by one of the statutory licences or exceptions, and other uses where the position is not clear-cut.

In summary, the claims that universities will seek to avoid copyright obligations, and that academics cannot be trusted to determine when a particular use will be fair, do not withstand scrutiny. Universities Australia devotes significant resources to providing advice and assistance to universities when it comes to copyright compliance, and each university employs staff charged with managing copyright obligations.

The sector is very well placed to meet its obligations under the regime proposed in the Discussion Paper.

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<sup>89</sup> Columbia University Fair Use Checklist: <http://copyright.columbia.edu/copyright/files/2009/10/fairusechecklist.pdf>, York University Fair Dealing Guidelines: <http://copyright.info.yorku.ca/fair-dealing-requirements-for-york-faculty-and-staff/>



### 3. Copyright and contract

Universities Australia agrees with the ALRC that the benefits of any new fair use (or fair dealing) exception may be seriously compromised if copyright licensing agreements include terms that exclude fair uses.<sup>90</sup> As we noted in our submission in response to the Issues Paper, publishers are seeking to rely on contracts to restrict acts - including use of content for data mining and text mining, and copying by students - that would potentially be permissible in reliance on fair use.

The importance of ensuring that contractual mechanisms cannot be used to exclude the effect of provisions enacted in the public interest was recently recognised by the House of Representatives Standing Committee on Infrastructure and Communications in its *At What Cost?* report.<sup>91</sup>

In our submission, however, the framework for preventing "contracting out" of exceptions that is set out in the Discussion Paper would have serious unintended consequences which would undermine the objectives that the ALRC has sought to achieve through its proposed reform of copyright exceptions.

#### 3.1 The ALRC's proposed model

The Discussion Paper sets out a proposed model for limiting contractual override of exceptions that would expressly apply only to what the ALRC has described as "core" exceptions: the library and archive exceptions, and fair use or fair dealing to the extent these exceptions apply to use of material for research or study, criticism or review, parody or satire, reporting news, or quotation.

The proposed limitation would not expressly apply to fair use or fair dealing to the extent these exceptions applied to use of material for education, non-consumptive use, private domestic use or public administration.

The ALRC nevertheless proposes that explanatory materials record that Parliament does not intend the existence of an express provision against contracting out of some exceptions to imply that exceptions elsewhere in the Act can necessarily be overridden by contract.<sup>92</sup>

In a nutshell, the ALRC has put forward a model that it says is intended to put beyond doubt the question of whether its proposed core uses can be contracted out of, while leaving for the general law the question of whether contracts are capable of overriding its proposed non-core uses.

#### 3.2 Concerns with the proposed model

Universities Australia has at least the following concerns with this proposed model for preventing contracting out of exceptions:

- Firstly, the ALRC has split exceptions into what it describes as "core" exceptions and (implicitly) non-core exceptions. The relegation of education to a "non-core" exception is at odds with the universal acknowledgement given to the role played by education in advancing the public interest. As the ALRC has acknowledged, education has been called "one of the clearest examples of a strong public interest in limiting copyright protection".<sup>93</sup>
- Secondly, we consider that the proposed "hierarchy of uses" model may have significant unintended consequences, and give rise to legal uncertainty.
- Thirdly, we are concerned that the proposed model would undermine the flexibility that the ALRC has sought to achieve through its proposed reform of exceptions.

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<sup>90</sup> DP para 17.118

<sup>91</sup> [http://www.aph.gov.au/Parliamentary\\_Business/Committees/House\\_of\\_Representatives\\_Committees?url=ic/itpricing/report.htm](http://www.aph.gov.au/Parliamentary_Business/Committees/House_of_Representatives_Committees?url=ic/itpricing/report.htm)

<sup>92</sup> DP para 17.121

<sup>93</sup> DP para 13.6

## Education must be recognised as a core public interest

Universities Australia submits that the implicit relegation of education to a non-core use is completely at odds with the special status given to education in international treaties and in copyright law in comparable jurisdictions.

We have already referred to the comments made by the Ergas Committee to the effect that while limitations placed on the rights of owners may seem to affect their income stream in the short term, in the longer term it is in the interests of rights holders as a group to have a population and an economy capable of making productive use of ideas and information. The Ergas Committee said that:

The principle that society reaps benefits from knowledge and learning which in many cases outweigh limitations on the rights of owners to earn income from educational uses has long been recognised in copyright law. It is reflected in the special status given to education in the Berne Treaty. It is also reflected in the Preamble to the WIPO Copyright Treaty...<sup>94</sup>

This special treatment is reflected in the law of comparable jurisdictions:

- In the US, education is given express recognition in the fair use exception in s 107 of the US Copyright Act that is open ended but refers expressly to "teaching (including multiple copies for classroom use)"
- In Israel, the fair use exception in s 19 of the Copyright Act 2007 refers expressly to "instruction and examination by an educational institution".
- In the Philippines, the fair use exception in s 185 of the Intellectual Property Code refers expressly to "teaching including multiple copies for classroom use".
- In South Korea, the fair use exception refers expressly to "education and research".
- The Canadian Parliament has also recently recognized the special status of education by introducing a new exception: fair dealing for the purpose of education.

In each of these jurisdictions, the public interest importance of teaching and education is recognised in copyright law.

As the ALRC itself notes, "education has been called 'one of the clearest examples of a strong public interest in limiting copyright protection'.<sup>95</sup> The ALRC also notes that "the use of copyright material for teaching, when fair, has long been recognised as a legitimate type of exception in international law", including in Article 10(2) of the Berne Convention which provides:

It shall be a matter for legislation in the countries of the Union, and for special agreements existing or to be concluded between them, to permit the utilization, to the extent justified by the purpose, of literary or artistic works by way of illustration in publications, broadcasts or sound or visual recordings for teaching, provided such utilization is compatible with fair practice.<sup>96</sup>

Universities Australia has welcomed the proposal to expressly include education as an illustrative purpose for fair use, or as a fair dealing purpose, but we are concerned that the proposal to treat education as a non-core use for the purpose of express limitations on contracting out of exceptions would put the Australian education sector on an unfair footing compared not only with comparable jurisdictions, but also with commercial organisations. Under the model set out at proposal 17-1, commercial news organisations would have their fair use rights protected from contractual override,

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<sup>94</sup> Ergas Committee Report, September 2000

[http://www.ag.gov.au/Documents/Review%20of%20Intellectual%20Property%20Legislation%20under%20the%20Competition%20Principles%20Agreement,%20\(September%202000\).pdf](http://www.ag.gov.au/Documents/Review%20of%20Intellectual%20Property%20Legislation%20under%20the%20Competition%20Principles%20Agreement,%20(September%202000).pdf) p 96

<sup>95</sup> DP para 13.6

<sup>96</sup> DP para 13.8

but universities would not. While we acknowledge that there is a strong public interest in retaining an exception that permits fair uses of works for the purpose of reporting news, we question whether a use which is most likely to benefit commercial organisations should be treated as being of a higher order public interest than a use that would benefit universities and their students.

A copyright regime that safeguards the rights of copyright owners and encourages research and innovation is not inconsistent with a regime that acknowledges the special position of education sector users. A flourishing digital economy is one based not only on the production and distribution of knowledge, but also on its use.

## Potential for legal uncertainty

Universities Australia is concerned that the model proposed by the ALRC would create a great deal of legal uncertainty and lead to unintended consequences.

### Statutory construction

The ALRC says that in proposing limitations applicable to only some exceptions, it is "not indicating that contractual terms excluding other exceptions should necessarily be enforceable". It acknowledges that this question is unsettled, and that this uncertainty is due in part to the existence of s 47H of the Act (which contains an express provision against contracting out in relation to computer programs) and the possibility that a court would apply the legal maxim *expressio unius exclusio alterius* - i.e. an express reference to one matter indicates that other matters are excluded - to conclude that Parliament intended that other exceptions could be overridden by contract.<sup>97</sup>

Universities Australia is concerned that the enactment of further express limitations on contractual override may have the effect of giving rise to an even stronger presumption that in singling out certain exceptions for protection from contractual override, Parliament was indicating a clear intention that other exceptions could be overridden by contract.

We note that the ALRC has proposed that explanatory materials should record that Parliament does not intend this presumption to arise.<sup>98</sup> We are concerned that this may not achieve the outcome the ALRC appears to intend. We refer the ALRC to a recent paper by on statutory interpretation by Justice Spigelman, in which his Honour identifies a recent trend in the High Court towards a more literal approach to statutory interpretation.<sup>99</sup>

In our submission, there is a real likelihood that the model proposed by the ALRC could have the unintended effect of settling the question of whether exceptions can be overridden by contract in the absence of an express provision preventing contracting out. At the very least, we think the proposed model would give rise to even greater uncertainty than currently exists.

### Legal interpretative difficulties

Universities Australia submits that the ALRC's proposed approach to contractual override may also give rise to several legal interpretative difficulties.

Firstly, the ALRC has stated that the availability of a licence should be "an important, but not determinative" factor when considering whether any use is "fair".<sup>100</sup> The ALRC says that "other matters, including questions of the public interest, are also relevant" to a fairness analysis.<sup>101</sup> A question arises, however, as to whether a court may find that the availability of a licence was "less relevant" when the use in question fell within one of the ALRC's proposed core uses than it would

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<sup>97</sup> DP para 17.26

<sup>98</sup> DP para 17.121

<sup>99</sup> [The Intolerable Wrestle: Developments In Statutory Interpretation Address By The Honourable J J Spigelman Ac Chief Justice Of New South Wales Keynote Address To The Australasian Conference Of Planning And Environment Courts And Tribunals](#)

<sup>100</sup> DP para 6.100

<sup>101</sup> *Ibid*

have been had the use been a non-core use such as education. While the ALRC does not appear to have intended such a result, its proposed model for contracting out may lead a court to find that Parliament intended to signal that some uses were per se of greater public interest than others, leading to a finding that these kinds of uses were more likely than others to be "fair", notwithstanding the availability of a licence. Such an outcome would be quite at odds with the flexibility that the ALRC has sought to achieve with its proposal for fair use.

Secondly, legal interpretive difficulties are likely to arise when a user (or court) is required to determine in any case whether a use applied to education, or to research or study, for the purpose of determining whether the use was protected from contractual override. The potential difficulty is highlighted by the way in which the ALRC has referred to education and research throughout the Discussion Paper. For example, in its discussion of the potential application of fair use to data mining and text mining, the ALRC says:

...the availability of licensing solutions would be one factor in determining whether a data or text mining use is fair. The fairness factors are intended to provide a framework within which a number of competing interests can be balanced. In respect of data and text mining, these can include but are not limited to:

- the amount of copyright material that was copied;
- whether the data or text mining will be used for a non-commercial purpose;
- whether the use is to facilitate education and research;
- the existence of any agreed industry guidelines...<sup>102</sup>

The concepts of education and research are inextricably linked. Notwithstanding this, Universities Australia is concerned that the ALRC's proposed model will lead to rights holders seeking to draw arbitrary and artificial distinctions between "education" and "research" for the purpose of avoiding the express prohibition on contractual override of core uses. A rights holder seeking to contract to prevent universities from engaging in data mining and text mining in reliance on fair use may well seek to argue that the purpose is "education", rather than "research", and thus not expressly protected from contractual override.

Thirdly, interpretive difficulties are likely to arise in cases where a user is found to have more than one use with respect to any particular act of copying etc. In its discussion of the illustrative purposes, and their relevance in determining whether a fair use exception would be available in any particular case, the ALRC notes:

The fact that a particular use falls into, or partly falls into, one of the categories of illustrative purpose, does not necessarily mean the use is fair. In fact, it does not even create a presumption that the use is fair. A consideration of the fairness factors is crucial.<sup>103</sup>

In the case of a user who has more than one use - one of which is a core use and another a "non-core use" - how would a user or court determine whether the use was expressly protected from contractual override? Would a use that was found to be partly for the purpose of education and partly for the purpose of research or study be protected from contractual override?

### Potential to undermine flexibility of fair use

The last point above highlights another unintended consequence of the ALRC's proposed model: it inevitably directs the inquiry back to the question of "who made the copy and what was their purpose"?

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<sup>102</sup> DP para 8.79

<sup>103</sup> DP para 13.61

For example, under the ALRC's proposed fair use exception, the question of whether a university could rely on fair use to undertake copying on behalf of its students would turn not on the question of whether the university had the relevant purpose, but rather on the question of whether the copying in all the circumstances was fair. But what if a contract purported to prevent the university from permitting students to make copies in reliance on fair use? In determining whether this term was enforceable, a court may find itself having to make artificial distinctions as to whose illustrative purpose was behind the copying, based on who actually made the copy. This would be completely at odds with the proposed shift away from purpose-based exceptions to a flexible fair use exception.

### 3.3 A proposed solution

Universities Australia has given a great deal of consideration as to how best to ensure that the benefits of the exceptions outlined in the Discussion Paper are not able to be automatically overridden by licensing arrangements that purported to restrict or exclude uses that would otherwise be permitted.

Both the Irish Copyright Review Committee and the UK Intellectual Property Office have also recently considered the question of how best to ensure that contracts cannot be relied on to undermine the operation of exceptions. In its recent Copyright and Innovation Consultation Paper, the Irish Copyright Review Committee said:

The rights provided to consumers or users by the exceptions to copyright could very easily be set at naught by means of terms and conditions in contracts between rights holders and users.<sup>104</sup>

The proposed solutions put forward by these two bodies are broadly similar:

#### Irish proposal

The Irish Copyright Review Committee has proposed that the Irish Copyright Act be amended to include the following provision:

Where an act which would otherwise infringe any of the rights conferred by this Act is permitted under this Act, any term or condition in an agreement which purports to prohibit or restrict that act shall be void.

#### UK proposal

The UK Government has released draft legislation for a range of new and amended exceptions. Some of these exceptions are absolute, or per se exceptions (for example the proposed new exception for non-commercial data mining and text mining<sup>105</sup>) that are not subject to a fairness test, and others (for example the proposed new fair dealing for the purpose of instruction exception<sup>106</sup> and the proposed quotation exception<sup>107</sup>) will only apply if the use is fair. In each case, however, the UK Government has proposed the following provision to prevent rights holders from relying on contracts to override the exception:

To the extent that the term of a contract purports to restrict or prevent the doing of any act which would otherwise be permitted by this section, that term is unenforceable.

In our submission, each of these proposed provisions would operate effectively to ensure that contracts could not be used to automatically rule out reliance on fair use (or fair dealing) in a way that avoided the interpretive difficulties and likely unintended consequences that we have outlined above.

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<sup>104</sup> [http://www.djei.ie/science/ipr/crc\\_consultation\\_paper.pdf](http://www.djei.ie/science/ipr/crc_consultation_paper.pdf) p 85

<sup>105</sup> <http://www.ipso.gov.uk/techreview-data-analysis.pdf>

<sup>106</sup> <http://www.ipso.gov.uk/techreview-education.pdf>

<sup>107</sup> <http://www.ipso.gov.uk/techreview-quotation>

Importantly, neither provision would mean that contractual terms that purport to restrict or prevent certain uses would be of no relevance to a fairness analysis. While the term would not be enforceable as a matter of contract law, the existence of the term would still be a matter (amongst other matters) to be taken into account by a court in determining whether a use was fair. If the term was required in return for other rights and benefits granted under the contract, then this might be a relevant factor as to whether or not the doing of the relevant act was fair. If it is not fair, then the contractual term purporting to prevent it may not be void or unenforceable. In every case, the question of whether or not a use was fair would be a matter for a court to determine having regard to a fairness analysis.

Universities Australia considers that this feature of both the Irish and UK proposed models addresses the concern outlined at paragraph 17.119 of the Discussion Paper; i.e. that prescriptive limits on contracting out may unreasonably interfere with future developments in emerging markets and technologies. This approach would not render such clauses per se void or unenforceable, but rather takes an "act by act" approach which allows room for a flexible and full fair use analysis that has due regard to the contractual setting.

We also submit that this model - which does not seek to distinguish between certain kinds of uses - would avoid the interpretive difficulties and likely unintended consequences that we have discussed above.

Universities Australia would support such a model for preventing contractual override of exceptions. However, if the ALRC does not recommend a model that makes no distinction between uses, then Universities Australia submits that the question of whether or not a contractual term is capable of overriding a copyright exception in any particular case should be left as a matter to be determined according to the general law.

## 4. Broadcasting

The ALRC has asked whether - in the event that the Part VA statutory licence is not repealed - the scope of Part VA should be expanded to apply to the transmission of television and radio programs using the Internet, or perhaps to an even broader range of online content.<sup>108</sup>

As already stated, Universities Australia strongly supports repeal of the Part VA statutory licence. However, in the event that the statutory licence is retained, we would oppose any expansion of Part VA. There are two reasons for this. Firstly, expanding the Part VA licence to include freely available internet content may result in Australian universities paying for content that no one ever expected to be paid for and that can currently be used in reliance on s 200AB. Secondly, even if the intention were to confine an expanded Part VA to "the online equivalent of television or radio programs", we are concerned that the practical effect would be for Part VA to potentially apply to a much broader range of content than the ALRC appears to anticipate, as the line between "TV like" and "other" kinds of video content increasingly blurs.

### Paying to use freely available internet content

In our submission in response to the Issues Paper, we outlined the way in which the statutory licences have resulted in Australian educational institutions paying for uses that are not paid for by universities or schools (or other users) anywhere else in the world.

To date, that anomaly has been most obvious with respect to the Part VB statutory licence, as universities have been required to pay to use orphan works and freely available internet content that no one ever wanted or expected to be paid for.

At present, the Part VA statutory licence does not extend to non-broadcast audio-visual content that has been made freely available online on websites, video sharing platforms or other technologies. If

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<sup>108</sup> DP para 16.97

this content is used in a university, it is generally done so in reliance on the free exception in s 200AB of the Act. Universities take great care to ensure that they comply with the requirements of s 200AB when they do so. From a policy perspective, using this content in reliance on a free exception is completely appropriate: the content has been made freely available online by the rights holder in the knowledge that it will be used without payment.

Universities Australia is concerned that any expansion of Part VA to include non-broadcast content that has been made available online would have the potential to result in Australian educational institutions becoming the only bodies in the world paying to use this freely available content. In our submission, there is no policy rationale for extending the Part VA statutory licence in this way, and in fact a strong policy rationale against doing so, particularly at a time when we are witnessing an explosion of freely available, innovative content created with the intention that it be used in educational institutions throughout the world without payment.

### **No easy way to distinguish between “TV like” content and other kinds of video content**

Universities Australia notes that the proposed expansion of Part VA set out in Proposal 16-1 (i) refers only to “the transmission of television or radio programming using the internet”. The intention appears to be to expand Part VA to “the online equivalent of television or radio programs”.<sup>109</sup>

It appears that the ALRC intends that the concepts of “television program” and “radio program” would apply only to content that has traditionally been consumed offline. In our submission, however, this distinction may become increasingly meaningless. As more made-for-internet content is created, concepts such as “television program” and “radio program” are likely to become more contested, with the result that the ALRC’s proposed expansion of Part VA may end up including a much broader range of content than was intended.

## **5. Orphan Works**

Universities Australia strongly supports the ALRC’s proposed approach to orphan works.

As we set out in response to the Issues Paper, there are two kinds of orphan works “problem” in the university environment. In the case of print and graphic works used for teaching, universities can use the works, but they are required to pay for this under the Part VB statutory licence notwithstanding that the owners of the works are by definition difficult, if not impossible, to identify and/or locate. In other words, the problem is not the usual one of not being able to use the works, but rather a case of being unfairly “taxed” to use works. In the case of works - and uses of these works in, for example, text mining - not covered by the statutory licence, universities are in the same position as other users; i.e. they are prevented from making use of the works.

Together with the proposed repeal of the Part VB statutory licence, the orphan works regime set out at Chapter 12 of the Discussion Paper would address each of these concerns. In our submission the proposed regime strikes an appropriate balance between facilitating greater use of the vast trove of content that is currently effectively “locked up”, while at the same time protecting the interests of rights holders who are subsequently identified.

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<sup>109</sup> DP para 16.97

## Annexure A

### Letter from the Chair of Copyright Agency, Sandy Grant, to Copyright Agency members

Dear members

It is rare for me to write to you all directly but this is an occasion that more than warrants it.

I am writing to appeal urgently to Copyright Agency Members, and, in fact, to all content creators and publishers, to get involved in the Australian Law Reform Commission's review of copyright. Your rights and income are being seriously challenged by a proposal that suggests, amongst other things, the repeal of the Statutory Licence.

The Law Reform Commission has produced a discussion paper that is heavily influenced by those who argue that free and cheap distribution of content is a characteristic of the digital age and the future and therefore should be enshrined in law. They have set the evidentiary bar incredibly low for the proponents of change. At the same time, they are making recommendations that would reduce the incomes of writers and publishers and have the potential to create chaos and litigation in the industry and education sector.

Our argument is that out of the \$10,000-\$13,600\* it takes to educate a school student every year, less than \$17 is spent on copied and shared content (and similar numbers apply to universities and TAFE). The new recommendations would reduce this and put the onus on creators to protect their rights and prove abuse. The Statutory Licence is supported by teachers who find its invisibility and ease of use beneficial in their working day, and by our members. The Statutory Licence means there is neither misunderstanding nor illegal usage.

It is a system worth maintaining and a system that fairly compensates our members each year for the content they create.

The final recommendations of the ALRC inquiry into Copyright and the Digital Economy can still be influenced. But we need you to raise your voices now and write to the ALRC before 31 July.

Australia has a fair and efficient system in place already, one that benefits both the user and the creator.

Changes in technology have already been taken into account by this system. The ALRC is trying to use technological change as an excuse to erode or remove the rights of those who invest time, money and skills into creating material that others wish to use.

It is time for writers, artists and publishers to stand together to make clear to the ALRC Review that we value our work and that we want the same rights as any other group looking to offer intellectual property to the education community. Follow the links below to make a submission by Wednesday 31 July, 2013.

Sincerely yours

Sandy Grant,  
Chair



## Letter from UQP CEO & Digital Publisher, Greg Bain, to UQP authors, at the prompting of Copyright Agency

Dear UQP author:

As you may have heard through organisations such as Copyright Agency and the Australian Society of Authors, there have recently been troubling changes proposed to the Statutory Rights legislation with regard to copyrighted material in Australia. The Australian Law Reform Commission (ALRC) has released a discussion paper (5 June 2013) proposing sweeping changes to the existing statutory license model.

Currently, "statutory licenses":

- allow use without permission provided fair payment
- allow use of content in the education and government sectors
- allow uses of content for particular purposes (research, critique, reporting news, private use)
- see license revenues collected by Copyright Agency and Screenrights, which are distributed to creators and publishers
- sanction permission provided conditions including attribution and only part usage if work is commercially available

The ALRC's proposals are very concerning. One of the most problematic recommendations is that the statutory licence, which was introduced in response to photocopying with a key objective of ensuring teachers, had access to copyright content, and at the same time that authors and publishers were fairly remunerated, should be repealed. The suggestion is that this would be replaced with voluntary licensing. It is important the ALRC understand the implications of what they are suggesting from evidence of affected people on the ground – there appears to be a chasm between legal theory and actual practice.

Feedback to the ALRC that express your thoughts on the day-to-day implications of removing the statutory licence for you as author / illustrator / content creator will be valuable.

To assist you, the following link from Copyright Agency will guide you further on ways to make a difference.

<http://www.copyright.com.au/get-information/alrc-inquiry/alrc-have-your-say>

If you wish to make a written submission to the ALRC, the following suggested text is put forward by Copyright Agency to assist:

CONTENT CREATOR SUBMISSION LETTER TO THE ALRC REVIEW OF COPYRIGHT AND THE DIGITAL ECONOMY – Education Statutory Licence Focus

I am an author/journalist/photographer/illustrator/artist who creates content for a living.

I develop something from nothing using my time, creative skills and knowledge and my material is my intellectual property. I own the copyright in my material and I expect people who use it pay for the time and effort I have expended on my creation. Not only do I expect to be paid but I rely on that payment for my income.

The statutory licences that the ALRC is recommending be repealed are very important to me. If my work is copied and shared by teachers in the classroom, I receive a copyright payment from the Copyright Agency.

These payments are recognition of the value of the material I have created, using my time, skill and experience. Just as a supplier sells paper to a school for use in a photocopier – or a retailer sells laptops to a school, my work facilitates education.

The system works very efficiently and quietly with very little administrative requirement from me. However, should the change proposed be made, how will I develop licensing arrangements myself? How will I track down copyright breaches? How will I prosecute breaches? How will I afford to mount a legal case? What compensation will I get for loss of income; to mount legal challenges or for the time it takes me to administer licensing arrangements?

I am a specialist in my field, I have little expertise in the intricacies of copyright law, nor the time to pursue breaches – no matter how concerned I am.

I completely reject the repeal of the very effective and fair Australian educational statutory licence system. Such a recommendation is a personal attack on my rights.

(Name, date, contact details).

The timeline for this inquiry is:

- July 24: online discussion board on fair use
- July 31: deadline for submissions on discussion paper
- November 30: final report

I thank you in anticipation of your support.

Regards,

Greg  
Greg Bain  
CEO & Digital Publisher  
UQP  
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