



# Australian Law Reform Commission Review of Copyright in the Digital Economy

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# Supplementary comments on voluntary licencing versus statutory licensing for educational copying

Universities Australia provides this supplementary submission to the ALRC to elaborate the case that voluntary licensing for educational copying would be successful and practical in Australia as it is in many other jurisdictions.

Voluntary licensing of content used by educational institutions is operating effectively and efficiently in many jurisdictions both in Australia and globally. A voluntary licensing regime would enable universities to take advantage of emerging models that allow teachers and researchers to access, use and distribute copyright materials for teaching and scholarship. It would also be more clearly aligned with a concept of copyright as a property right.

Examples of voluntary licensing models that are currently used in Australia and other jurisdictions are described in this supplementary submission.

## I. Expressly excluding works that are not included within the licence

This model suits collecting societies with a very broad repertoire, such as the Copyright Agency. The collecting society offers a licence in respect of all works except for works set out in a list of "excluded works". The Copyright Agency is familiar with this model as they use it for existing non-educational licences.

Currently the Copyright Agency offers a commercial licence that covers, for example, Australian and international journals, internet content, books, newspapers, magazines, reports and research.<sup>1</sup> Licensees are directed to a list of "excluded" works. Uses covered by the licence include:

- internal hardcopy use – photocopy, fax, distribute in hardcopy;
- internal digital use – email, post to intranet, scan store, use in presentations, training and internal reports; and
- external digital use – email externally, post to website, post to extranet/client portal.

The UK collecting society, Copyright Licensing Agency (CLA), offers a voluntary licence to commercial and education sector users that covers "all books, journals, magazines and other periodicals, (but not newspapers, which are covered by a separate licence) published in the UK" subject to a few exceptions that are expressly set out on the CLA website.

The licence also covers works published in countries where CLA has signed a repertoire exchange agreement. CLA claims to represent "the authors and publishers of most of the copyright publications published in the UK" as well as "the copyright owners of literary works published in many overseas countries", and has signed over 30 agreements with rights organisations around the world "to ensure that its licences cover a vast number of overseas publications".

In the UK and Canada, the collecting society grants an indemnity to educational licensees for use of works not included in the excluded list. In other words, the collecting society carries the risk that a university will use a work not included in the repertoire, provided that work is not set out in the "excluded works" list.

In Canada, the degree of risk for a collecting society is mitigated by the fact that the Copyright Act contains a provision that limits the damages available to a rights-holder to the amount of royalties they would have received under the relevant licence.

The same approach could be adopted in Australia.

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<sup>1</sup> <http://rightsportal.copyright.com.au/Pages/AnnualBusinessLicenseFormPage.aspx>

## **2. Setting out all works that are covered by the licence**

Under this model, a collecting society offers a licence with respect to works included in its repertoire, with licensees able to check the repertoire before using a work. This is how US collecting societies offer voluntary licences to universities. The Copyright Clearance Centre offers an annual licence to more than 1 000 universities and colleges. Institutions covered by the licence can quickly and easily ascertain whether a work is within the CCC repertoire by using a searchable online catalogue.

This is also how the existing voluntary licences between Universities Australia (on behalf of the 39 member universities who are party to the licence) and the music collecting societies operate.

The same approach could be applied to print and graphic works in Australia.

## **3. The “statutory extension” model**

Screenrights claims that broadcasts give rise to particular problems with respect to voluntary licences: i.e. that it is difficult, if not impossible, to secure rights to content contained in the broadcasts (the underlying rights).

There is a simple solution to this that is used in New Zealand and the UK: the relevant copyright act contains a provision (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. This licence applies to all rights comprised in the broadcast, thereby overcoming the “underlying rights” issue. On Screenrights’ own website, it describes the voluntary NZ educational licences as ‘versatile and flexible’, permitting copying of ‘any programme...anywhere...in any format’.

The same approach could be adopted in Australia for broadcasts.

## **4. The transactional licence model**

Under this model, a collecting society offers a pay-per-use, or transactional licence. The US Copyright Clearance Centre provides this option to universities who do not wish to take out an annual licence.

The same approach could be adopted in Australia.

In a competitive market, collecting societies would offer an option for educational institutions to take out a transactional licence in cases where they did not wish to take out an annual licence, as is the case in the US. Transactional licencing (as opposed to a blanket, annual licence) is likely to become increasingly attractive to educational institutions as more and more content is obtained pursuant to direct licences and/or via open access repositories. If the only option is for universities to take out a blanket licence this will become increasingly inefficient and inequitable.

Universities Australia would also like to outline the following points as additional to our November 2012 submission.

### **Voluntary licensing would not increase the risk of infringement**

There would be no increased risk of infringement if the statutory licences were replaced by voluntary licensing. Firstly, universities have a long history of copyright compliance. They are also generally risk averse institutions. This will not change in the event of the statutory licences being repealed.

Secondly, universities are well placed to determine whether a particular use amounts to fair use/fair dealing or requires a licence. As in comparable jurisdictions, universities would adopt guidelines or similar instructions to staff that assist in making such decisions. They already currently do this when determining what can and cannot be done in reliance on the statutory licences.

Thirdly, in jurisdictions throughout the world, universities copy in reliance on a combination of fair use/fair dealing and voluntary licences. There is no evidence that voluntary as opposed to statutory licensing increases the likelihood that a university will fail to comply with its copyright obligations.

## Statutory licensing leads to overbroad claims

The starting point under the statutory licences is that all uses are potentially remunerable. This has led to claims that caching and other technical uses of works should be taken into account when setting a copying rate. It is noteworthy that the US Register of Copyrights, Maria Pallante, recently called for reform of US copyright law to – amongst other things – provide greater guidance as to what does and does not belong under a copyright owner's control in the digital age. In a lecture given at the University of Columbia on 4 March 2013, Ms Pallante said:

...new technologies have made it increasingly apparent that not all reproductions are equal in the digital age. Some copies are merely incidental to an intended primary use of a work, including where primary uses are licensed, and these incidental copies should not necessarily be treated as infringing.

Universities should not be eligible to pay for such uses when no one else in the community pays for these uses. This is not because other users are blatant copyright infringers. Rather, under a competitive commercial licensing model, rights holders (or their representatives) do not generally seek payment for every technical use of their work, regardless of whether or not the use may fall within the scope of their copyright. While it is in theory open to rights holders to seek payment in this way, it is unlikely to be a successful or meaningful strategy in a competitive market, especially a digital market.

The statutory licence model locks rights holders and users into an artificial remuneration paradigm, and acts as a block to the emergence of more efficient business models.

## It is important not to conflate statutory licence submissions with flexible exception submissions

There have been suggestions that submissions from the education sector that seek a repeal of the statutory licences are motivated by a desire to avoid paying for all uses currently covered by the statutory licences, rather than a desire for a more efficient licensing paradigm. This is not correct. As set out in detail in our main submission, Universities Australia suggests that the statutory licences are inefficient, and ill-suited to a digital environment. There are many factors that have rendered the statutory licences less relevant, including the increase in direct licences with publishers, the increasing trend towards open access publishing, and increased emphasis on student-directed learning.<sup>2</sup> These developments will continue whether or not a flexible exception is adopted. Universities Australia submits that the statutory licences should be repealed whether or not a new flexible exception is introduced.

## Fairness

Some rights holders have suggested that, with respect to a fairness test, any new flexible exception should not apply if the use in question is allowed under a licence that is available on reasonable terms. Such an approach would be completely out of step with the way in which fairness is determined in comparable jurisdictions. As outlined in detail in our submission in response to the ALRC's Issues Paper, both US and Canadian courts have held that the availability of a licence is merely one factor to be taken into account when determining whether the exception is available and does *not* of itself rule out a finding that the use amounted to fair use/fair dealing.<sup>3</sup> As argued in UA's November submission Australia's copyright laws must be consonant with comparable jurisdictions if our education exports are to remain internationally competitive.

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<sup>2</sup> See in particular Part 3, paragraph 1.9 of our main submission

<sup>3</sup> See Part 2, section 9 of our main submission.