

screenrights

17 April 2013

Professor Jill McKeough
Lead Commissioner, Copyright
Australian Law Reform Commission
GPO Box 3708
SYDNEY NSW 2000

Via email: copyright@alrc.gov.au

Dear Commissioner

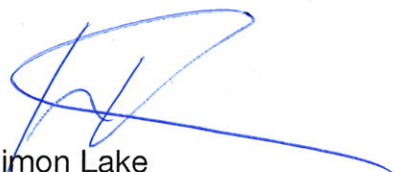
Screenrights' submission in response to the Issues Paper

I have attached a further supplementary submission to the ALRC concerning voluntary licensing of broadcast content for educational use.

Screenrights appreciates the opportunity to make this additional submission and the opportunity for ongoing consultation with the ALRC as part of its review process.

Please do not hesitate to get in touch if you would like further information or have any questions.

Yours sincerely



Simon Lake
Chief Executive

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**COPYRIGHT AND THE DIGITAL ECONOMY ISSUES
PAPER**

screenrights

Supplementary submission by Screenrights

17 April 2013

PART VA AND VOLUNTARY LICENCES

Thank you for an opportunity to provide the ALRC with additional information concerning voluntary licensing of broadcasts by educational institutions.

In its 2012 submission, Screenrights provided detailed information about Part VA of the Copyright Act (the statutory licence that allows for educational use of broadcasts), and how it benefits educators and filmmakers. As we stated, the licence is exceptionally flexible in its operation, allowing educators to copy anything from television, to store and play copies on digital content management systems, to use electronic whiteboards and to obtain and share copies through innovative resource centres. We also included statements from filmmakers concerning the importance of these provisions in providing a revenue stream for the further production of educational content.

We were therefore surprised that the education sector in its submissions to the ALRC regarded Part VA as broken, and argued it should be replaced with a fair use provision to allow for educational use of broadcasts, coupled with voluntary licences.

Aside from the fact that we do not feel there is any evidence necessitating such an approach, a system of fair use and voluntary licensing is not workable for the educational use of broadcasts for the reasons outlined in this supplementary submission.

The threshold question: what is fair use and which uses should be licensed?

The initial difficulty with the approach advocated by the educational sector is the fundamental threshold question of determining which uses would fall within the proposed 'free' fair use provision and which would need to be licensed.

As we stated in our 2012 submission, Australia does not have a body of case law to assist in this and an assumption that we could simply rely on US jurisprudence fails to recognise the many differences between the laws of each jurisdiction.

Ultimately, the only way in which the demarcation line will be determined is through litigation. This creates uncertainty for teachers wanting to use educational content, and may, in many cases, make them reluctant to use a program.

It will also place an unnecessary burden on the film industry. Many creators and filmmakers will be unable to meet the costs of litigation. As the Screen Producers' Association of Australia (SPAA) noted in their submission, the inevitable litigation required to establish the boundaries of fair use is an unacceptable burden upon producers and creators, both from a cost perspective and from the considerable time taken for these issues to be resolved through the courts.

As we are in an era of rapid technological change, this threshold question is likely to arise frequently. In the last decade, we have seen enormous changes in the way

in which educators use broadcasts. The days of simply playing a VHS tape in class have been replaced with digital storage and communication of copied material on systems such as Clickview, Moodle, Blackboard and Screenrights' own EnhanceTV Direct service, with students and teachers able to access content anywhere, anytime. Teachers can also exchange audiovisual content through licensed peer to peer systems, giving them ready access to a constantly growing library of AV content to use in teaching,

The Part VA licence is technology-neutral and has accommodated each of these new uses within its scope. If it were replaced with fair use and voluntary licensing, it would be necessary to determine whether each new use fell within the free fair use provision or required a licence and payment. Resolving this threshold question may then lead to the even more complex question of who actually controls these rights.

The difficulty in drawing a clear demarcation line between fair use and those uses that require permission would also impact on contract negotiations between each of the rightsholders in an audiovisual work. It would be difficult to determine which rights need to be acquired from underlying rightsholders and what their value (if any) would be.

Voluntary licences

Assuming that a use requires a licence (and the education sector itself acknowledges that the majority of uses currently licensed under Part VA would not fall within fair use but would need to be the subject of a voluntary licence), voluntary licensing of broadcasts does not work in a practical sense.

Legally, a licence would need to be obtained prior to a program going to air. This makes it virtually impossible for educators to license the copying of programs on an individual basis. Educators frequently decide to copy a program when they become aware that it is being broadcast (often on the day it goes to air), giving them a very short window in which to identify and locate rights owners (many of whom may be overseas). These rightsholders would then to check contracts to determine whether they do in fact control the relevant rights – an exercise that may require them to obtain independent legal advice.

Given the difficulties with this, any system of voluntary licensing would need to be administered by a centralised body, such as Screenrights, acting on behalf of rightsholders. However, this supposed solution is also riddled with obstacles, severely limiting content available to educators. These obstacles are:

The time pressure of clearing rights pre-broadcast

A central agency would not automatically control all relevant rights in programs prior to them going to air and would have similar time pressures in clearing rights prior to the broadcast date.

Lack of comprehensive coverage from centralised licensing bodies

These time pressures would mean that an organisation such as Screenrights could only offer limited voluntary licences on behalf of certain members who have appointed us as their agent in advance. Coverage would not be comprehensive. Certain rightsholders would fall between the gaps – likely examples include programs that originate overseas, and smaller independent productions in which all the relevant underlying rights may not have been cleared. Educators would not have the security of comprehensive coverage by a single organisation, and would need to regularly check databases within a very short timeframe, a task that could be both time consuming and costly.

Underlying footage in which rights have not been cleared

Certain programs, such as news and current affairs as well as review programs, which are popular in teaching, often incorporate footage from other sources under fair dealing provisions, such as reporting the news, or criticism or review. Rights for footage used for these purposes are generally not cleared and an education licence could not be made available through a central body such as Screenrights.

Obtaining a licence for new uses of broadcast material

Under Part VA, teachers can now use programs in ways that often were not envisaged until very recently, sometimes not even at the time of production. Educators can obtain programs online from licensed resource centres, they can use segments in digital lesson plans that can then be shared with students and other teachers at home, or in the classroom. They can store programs on online content management systems to be used as ongoing resources, and they can deliver programs to remote students. As we have stated, these uses have been accommodated by the flexibility of the statutory licence.

New uses will continue to develop. Aside from the fact that the threshold question may need to be fought over each time, if it is determined that this is a use that should be licensed, it may not be clear who controls the relevant rights and can offer therefore appoint a central body to license on their behalf. There may need to be lengthy negotiations between rightsholders prior to granting permission and determining a fee – making it impractical to obtain a licence in time.

Voluntary licences and fair use: what it would mean in practice

All of the factors we have outlined above – time constraints, complexity of rights ownership and multiple rightsholders – have always made it difficult, if not impossible, for educators to use broadcasts in the absence of a statutory licence.

Should the licence be abolished and replaced with a system of fair use and voluntary licences, it is likely that educators would source content outside the fair use provisions from a small number of large commercial content providers that have cleared all rights, including educational use. This is the kind of content that has always been available to educators to use outside the broadcast licence, with

particular commercial titles made available to institutions for certain uses. These providers will certainly charge a commercial fee for their licences.

Under such a system, the diversity of content available to our educators and students would be limited. Content other than mainstream entertainment material, such as feature films, is less likely to be available. Smaller independent production houses may not be able to clear educational use rights in underlying works and offer educational use licences in their titles. Aside from the difficulties we have already highlighted concerning valuing these rights, the returns that they would receive from educational uses would be unpredictable, making it difficult to establish a clear business model and case for acquiring these rights.

The end result is that teachers and students would miss out on the truly comprehensive range of content currently available under the statutory licence.

Conclusion

Screenrights believes the existing educational statutory licence under Part VA of the Act is working effectively and efficiently for educators and content owners. A system of fair use and voluntary licences is impractical for the use of broadcasts. Indeed the difficulties in voluntary licensing for educational use of television and radio programs led to the introduction of the statutory licence in the first place. Replacing Part VA with fair use and voluntary licensing would therefore leave educators and filmmakers in an environment of uncertainty, with a much less diverse range of content available for teaching.

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