# COPYRIGHT AND THE DIGITAL ECONOMY ISSUES PAPER


**Submission by Screenrights**

**30 November 2012**

## EXECUTIVE SUMMARY

***Screenrights and its licences***
Screenrights is a non-profit copyright society representing rightsholders in film, television and radio. We administer a range of statutory licences enabling access to audiovisual material and providing payment to copyright owners, giving us a unique perspective on the operations of the exceptions in the Copyright Act (the "Act").

The exceptions we administer have adapted to changes in technology, ensuring simple access to broadcast material in the digital age and providing payment to the creators of this material. In the case of the retransmission and educational licences, the exceptions have encouraged participation in the digital economy – with educators able to use new technologies to teach with broadcast material, and with new retransmission services able to operate under the Part VC statutory licence.

***Guiding principles***
Screenrights largely supports the guiding principles stated by the ALRC, however we express reservations about Principle 6 and stress that all free exceptions must be viewed from within the prism of our international treaty obligations. Screenrights submits that a useful principle that the Commission should apply is that any consideration of the commerciality or otherwise of a particular use of copyright should take into account the commerciality of the use from the perspective of the user, the service providers and intermediaries, and the copyright owners.

***Cloud computing***
Screenrights submits that Australian copyright law is not impeding the development or delivery of licensed cloud computing services, nor does the Act need specific exceptions to account for new cloud computing services.

***Copying for private use – format shifting and time shifting***
Screenrights submits that there should be no extension of the private copying exceptions in the Copyright Act, unless these are remunerated. In particular, if a new exception to allow time shifting by means of cloud based personal video recorders was proposed by government, it would be vital that it be a remunerated exception. Broader exceptions without payment risk contravening the three-step test as embodied in Australia's international obligations.

***Libraries, archives and digitisation***
Screenrights notes that s183 of the Act provides government institutions with a mechanism to digitise their collections. However, none have availed themselves of this exception. We therefore submit that any case for a new exception is tenuous.

***Educational institutions***
Screenrights has included a comparative table in Appendix A demonstrating that the current copyright regime provides Australian educational institutions with at least equal, and in most cases better, access to copyright audiovisual material than their counterparts in equivalent jurisdictions.

The Part VA statutory licence continues to be effective in the digital age by virtue of the fact that the provision is largely technology neutral. This has enabled Part VA to keep up with the extraordinary changes in the broadcast media and education sector over the past twenty years. It has given Australian educational institutions unparalleled access to broadcast material compared to the access of educators overseas. It has also provided an important source of income for educational program makers, encouraging further production of teaching resources.

Screenrights submits that the exclusion of transmissions over the internet from the definition of 'broadcast' television creates an unnecessarily complicated distinction for educators relying on the Part VA licence. We submit that Part VA should therefore be amended – for example, by inserting an expanded definition of 'broadcast' into s135A (which would apply only in respect of Part VA) or by amending s135C (which gives Part VA an extended operation). This should enable copying of linear television and radio transmissions over the internet.

Screenrights submits that there is no reason for any of the uses covered by the Part VA licence to be free. We further submit that if the Commission is of the view that educational institutions must have a wider right to copy audiovisual material from the internet generally, then that copying must be subject to compensation via a remunerated exception.

***Crown use of copyright material***
Screenrights submits that section 183A should be amended to provide for declared collecting societies to collect for uses other than copying by government. Screenrights notes that this is not an extension of the statutory licence as the licence already exists in section 183. Screenrights' submission relates merely to the collective administration of the existing licence.

Screenrights submits that section 182B should be amended so that local government is deemed to be 'government' for the purposes of Division 2 of Part VII of the Act. Such an amendment would enable local governments to rely on section 183 to the same extent as federal, state and territory governments.

***Retransmission of free to air broadcasts***
Screenrights submits that a 'must carry' regime is not necessary in Australia and that such a regime would be both unworkable and anti-competitive.

Screenrights acknowledges that the exclusion of the broadcast signal copyright from Part VC is anomalous. If Part VC were amended to include broadcasts within the statutory licence, we foresee no difficulties with administering this.

Screenrights submits that excluding the internet from the retransmission scheme is no longer the best means of controlling the reach of retransmission and that the conditions precedent in US Australia Free Trade Agreement side letter have been met. We further submit the Commission should recommend that the Australian Government write to the US Government to initiate negotiations to amend the FTA by replacing the internet exception with a strict requirement to limit retransmitted signals to their intended geographic markets.

***Statutory licences in the digital environment***
While the Act continues to provide fair compensation within technologically neutral frameworks, the statutory licences will offer improved access to content and ease of administration as a consequence of the changes brought about by the digital economy.

Screenrights submits that the current balance between free use exceptions and statutory licences generating payment to rightsholders is fair and working well. Aside from our in-principle support for an orphan works statutory licence and our comments concerning cloud-based services, we do not believe a case has been made for additional statutory licences under the Act. We also do not believe any of the uses covered by a statutory licence should be covered by a free use exception.

***Fair dealing exceptions***
Screenrights submits that any free use provisions must be viewed from within the prism of our international obligations. Our current fair dealing provisions comply with these obligations, they operate effectively and they are well understood by users of copyright material. We submit that the introduction of a broad fair use provision not only runs the risk of contravening our international obligations, it would also create uncertainty for users of copyright material. Further, we submit that our comparison of allowed educational uses of broadcast material in Australia and the US demonstrate that Australian educators have greater access to broadcast programs and more certainty in what they are allowed to do, than their counterparts in the States.

## ABOUT SCREENRIGHTS

1. Screenrights is a non-profit copyright society representing rightsholders in film, television and radio. We have 3,464 members in 60 countries.

2. Screenrights administers a range of collective licences that enable access to audiovisual material, including educational use of broadcasts, government copying of broadcasts and retransmission of free to air broadcasts. These licences operate as remunerated exceptions to copyright, and our experience in administering these licences gives us a unique perspective on the operations of the exceptions in the Act.

3. In broad terms, Screenrights has found that the exceptions in the Act which we administer have functioned well to the benefit of copyright owners, copyright users and society as a whole. Screenrights believes that the exceptions have operated best when they have been framed in a technologically neutral way, as this has allowed them to adapt to the rapid change inherent in the digital economy. Some exceptions have opportunities for improvement to allow them to operate better in this environment, and we discuss these in the relevant sections of this submission.

4. Briefly, the educational licence in Part VA of the Copyright Act allows educational institutions to copy from television and radio and to communicate the copies they make to staff and students by email or by making them available online. Currently Screenrights licenses nearly all public and independent schools (more than 10,000), all Australian universities and most TAFEs.

5. The retransmission licence in Part VC of the Copyright Act allows media providers to include free to air broadcasts within their service by retransmitting those free to air broadcasts. For example, Foxtel includes the free to air channels with its package of subscription channels – enabling the consumer to watch all channels through the Foxtel set top box, using the Foxtel remote control, and with the guaranteed signal quality of the Foxtel service. Screenrights' retransmission licences cover the retransmission of free to air broadcasts to homes via pay television, across mobile phone networks, through hospitals, and to greenfield developments and remote communities.

6. The government copying licence in s183 of the Copyright Act allows state and federal government departments to copy television and radio broadcasts for the services of the Crown without having to deal with individual copyright owners.

7. Screenrights has been operating since 1990. Our licences have evolved considerably over this time, but always with the fundamental two-fold aim of ensuring ease of access to copyright material while providing payment to rightsholders for the use of their work.

8. We believe our licences and the current regime are achieving these aims, providing access to educators, students, government, ordinary households, and more. In addition, our licences have enabled the development of new services, particularly retransmission services and online digital services in the education sector. Importantly, they also provide remuneration to the many filmmakers and rightsholders we represent, enabling them to keep making the programs audiences enjoy.

9. We have focussed our responses to the questions in the Issues Paper on those areas that impact on the use of audiovisual material, particularly the use of television and radio under the licences we administer.

## THE INQUIRY

***Question 1:***

10. We understand the ALRC is interested in evidence of how Australia's copyright law is affecting participation in the digital economy.

11. As the Australian Copyright Council notes in its submission to this inquiry, copyright industries made a significant contribution to Australia's economy from 1996/97 to 2010/11. This included:
    - 6.6% GDP
    - 8% of the Australian workforce
    - almost 3% of total exports.[1]

12. We also note the figures cited in the joint submission to this inquiry from AFACT, AHEDA, MPDAA and NACO and others concerning the importance of the Australian film industry to Australia's cultural, social and economic prosperity. In 2010, Australia's film and television industries employed 48,667 Australians on a full-time basis and contributed approximately $6.1 billion to the Australian economy.[2] The digital contribution of the film and television industry is estimated to be about $4.1 billion.[3]

13. This joint submission also notes the increasing consumer demand for online access to content, and the innovative business models being developed by the industry to encourage authorised online access. These models are outlined in Annexure A to their submission, and demonstrate a thriving digital economy.

14. In terms of our own specific experience in administering statutory licences for the use of audiovisual material, Screenrights has seen these licences grow and adapt with technological change, contributing to the vibrant digital economy enjoyed by content creators and users of their work.

*The broadcast copying licence for educational institutions (Part VA)*

15. Since we were established in 1990, the Part VA provisions that allow for educational use of television and radio have encouraged engagement with the digital economy in the learning environment, opening up new ways of teaching with television. They have also helped filmmakers improve their reach into today's digital classrooms, benefitting them by ensuring payment for their work as teachers use their material.

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[1] Citing the PwC Report *Economic Contribution of Australia's Copyright Industries 1996-7 to 2010-11*

[2] Citing Access Economics, *Economic Contribution of the Film and Television Industry (2011)*

[3] Ibid

16. The licence is technology neutral, and has been flexible enough to develop from simply enabling VHS copying to allow educators across the country to:

    - copy from television and radio in any format
    - download podcasts and vodcasts of programs put online by the broadcaster
    - upload copied broadcast material onto online learning management systems such as Blackboard and Moodle
    - store, play and share copied programs using the latest digital technologies such as ClickView, Digital Video Commander and electronic whiteboards.

17. In addition, the licence has enabled the development of new "resource centres" that copy broadcast material for supply to licensed educational institutions. These include innovative services such as Informit TV News that copies and streams indexed clips from news and current affairs programs to tertiary institutions and Clickview Exchange that allows schools to share programs copied by other educational institutions on a peer-to-peer basis.

**Case study: Clickview and the Part VA licence**

Clickview is an Australian company that has grown into an international business selling products designed to manage audiovisual collections. The following information is supplied by them and describes their business.

***ClickView – the leading digital video solution for schools***

*ClickView is a software company established in Australia in 2003 to provide digital video solutions, predominantly to the education sector. The products are designed around the Part VA Licence in the Copyright Act.*

*Part VA of the Copyright Act enable schools and other licensed educational institutions to create, build and manage digital video libraries – and ClickView gives them the tools to do this.*

*Institutions with a Screenrights licence can use ClickView to transmit copies of programs to any computer in their school. They can also download, store and make the content available over the school network, building a digital library of teaching resources.*

*Licensed schools, TAFEs and universities can also share programs with other institutions using the ClickView Exchange. ClickView has recently started offering a solution called ClickView Online, enabling teachers and students to watch stored programs via any internet connected computer.*

*Educational institutions can also use ClickView to record programs on their behalf. ClickView 24-7 records up to 8 free to air channels simultaneously, 24 hours a day, 7 days a week and schools can then search for the programs they want to watch.*

*ClickView is the leading digital video content solutions provider in Australia and is currently in over 1900 secondary schools.*

*In 1998, Screenrights began offering broadcast copying licences in New Zealand following changes to copyright legislation. ClickView's success in Australia saw its expansion into New Zealand with over 120 schools currently having the ClickView solution.*

*Clickview has also expanded into the UK and Canada utilising the educational statutory licences in those jurisdictions.*

18. Screenrights has itself established a resource centre for educators under the licence, EnhanceTV (www.enhancetv.com.au). More than 17,000 educators are members of this site, which allows them to download resources to help them teach, and obtain programs they forgot to copy. We are currently offering a new service to educators through EnhanceTV. This is called EnhanceTV Direct – and it gives educators who subscribe to the service instant streamed access to a growing archive of more than 12,000 programs searchable by learning area. This lets teachers and students access the programs at school or at home via any internet connected computer. Teachers can also upload and share lesson plans using this service – and there is no need for the institution to host any content.

19. Importantly, these services not only ensure that our educators have convenient and immediate access to a vast range of broadcast content for teaching using the latest digital technologies, and the equitable remuneration paid under the exception also provides important payment to filmmakers for use of their work in the digital age (see paragraphs 22-23).

*Retransmission of free to air broadcasts (Part VC)*

20. The retransmission licence has also benefited both consumers and creators. We make further, more detailed comments on this under *Retransmission of free-to-air broadcasts (Questions 35 – 39),* but essentially, these provisions have enabled the retransmission of free to air broadcasts in ways not imagined when the exception was created in 2001. The exception covers retransmission to homes by pay TV operators but also includes retransmission on mobile phones, over fibre optic networks to new housing developments and, in some cases, by IPTV.

21. Again, this licence increases access to content and provides payment to the rightsholders who make this work.

*The perspective of Screenrights' members*

22. Our members frequently testify to us as to the importance of Screenrights' royalties in helping them to continue to produce programs. A recent member survey told us that more than half of them felt Screenrights' royalties played an important role in the financial sustainability of their business, with close to 20% saying these royalties are "extremely important". As secondary rights revenue streams become increasingly important within a more fragmented distribution environment, and the digital economy continues to grow, we anticipate that the significance of Screenrights' royalties will increase.

**Case study: Essential Media and Entertainment, and Screenrights' royalties.**

Essential Media and Entertainment is an independent Australian production company producing compelling drama and documentary programming, including 'Rake', 'The Making of Modern Australia' and the recently screened 'Jack Irish'. They discuss how Screenrights' royalties play a role in their business:

ESSENTIAL
MEDIA AND ENTERTAINMENT

*Screenrights income is important to Essential, especially for our documentary and factual titles.*

*Our best earners (in order of income) are:*

*Whatever! the Science of Teens*
*The Making of Modern Australia*
*Voyage to the Planets*
*Miracles*
*Indonesia: a Reporter's Journey*
*The Last Confession of Alexander Pearce*
*How Kevin Bacon Cured Cancer*

*Because Screenrights income now comes entirely to the producers and after all bills for the productions have been paid, it has a large influence on the company's ability to invest in its future. Screenrights are a major contributor to development of future projects and therefore the growth of the company.*

*Essential began as an almost exclusively factual company. It has expanded successfully into TV drama and is expanding into Kids TV. Screenrights income wasn't the only money that has made this growth possible but it has helped significantly.*

*When deciding what non-fiction projects to pursue Essential still thinks mostly about TV presales. They are the cornerstones of financing. Australia's public service broadcasters have, over the last five years at least, tended to commission big subjects and grand approaches. They have emphasised family viewing. These trends have helped Essential earn Screenrights' royalties as these types of TV translate well to the classrooms of the nation. For example, this year Essential will share in Screenrights income from 'Australia on Trial' and 'Australia: the Time Traveller's Guide' - both high quality, seminal, Big Australia series that rated well and are highly relevant across curricula and for a broad spectrum of age groups.*

*In the future, as audiences continue to fragment, we foresee opportunities for less expensive, more focused specialist factual TV for broad niche audiences. The Screenrights income as a proportion of budget for these kinds of shows should be relatively high.*

*Screenrights is an important element in Essential's strategy for growth.*

23. Tom Zrna, National Sales Manager for Palace Enterprises sums up the sentiment of many of our members with the following words:

> *Royalties for secondary uses of films, such as retransmission and educational copying, are becoming increasingly important to the industry. Technology has opened up so many ways of using audiovisual material and Screenrights ensures we get paid for the use of our work. This is vital to the ongoing success of the business.*

Screenrights submits that the exceptions it administers have adapted to changes in technology, ensuring simple access to broadcast material in the digital age and providing payment to the creators of this material. In the case of the retransmission and educational licences, the exceptions have encouraged participation in the digital economy – with educators able to use new technologies to teach with broadcast material, and with new retransmission services able to operate under the Part VC statutory licence.

## GUIDING PRINCIPLES FOR REFORM

***Question 2:***

24. Screenrights largely supports the guiding principles stated by the ALRC. We note the reservations expressed by the Australian Copyright Council in relation to principles 4 to 8 and agree with these.

25. We also support the Council's submission that all free exceptions must be viewed within the framework of our international obligations. Both Berne and TRIPs state that any free exceptions must comply with a three step test: they must be confined to certain special cases, they must not conflict with the normal exploitation of the work, and they must not unreasonably prejudice the legitimate interests of the rights owner.

26. In addition, we make the following comments:

- With respect to Principle 6, although the digital age has made it increasingly easy for consumers to use copyright material without permission or payment, we do not believe this necessitates a shift in the balance that copyright attempts to strike between protecting creators' rights and ensuring access. If anything, we believe this ease of use makes it increasingly important to protect the rights of copyright owners to try and establish business models to ensure that they are remunerated for widespread use.

- We would like to acknowledge the importance of educating consumers about copyright and the work done by groups such as the Australian Copyright Council, and by the Intellectual Property Awareness Foundation with educational campaigns in schools. In light of the digital ease with which consumers can use copyright material, this work has an increasingly important role to play in ensuring that Australia continues to encourage its creators.

*A further principle to guide the Review*

27. The Terms of Reference refer to "non-commercial" uses. Commerciality is a very complex issue, and the commercial implications of a particular use of copyright can operate at many levels. For example, an individual may use a piece of copyright material for their own purposes by posting something to their social media website. The individual's use may be "non-commercial" but that use has other potentially commercial effects. The operator of the social media service may be a commercial organisation; the provider of intermediary services may be commercial; and the use of the material may ultimately have a commercial impact on the copyright owners of the works.

Screenrights largely supports the guiding principles stated by the ALRC, however we express reservations about Principle 6 and stress that all free exceptions must be viewed from within the prism of our international treaty obligations.

Screenrights submits that a useful principle that the Commission should apply is that any consideration of the commerciality or otherwise of a particular use of copyright should be considered from the perspective of the user, the service providers and intermediaries, and the copyright owners: rather than one group in isolation.

## CACHING, INDEXING AND OTHER INTERNET FUNCTIONS

***Questions 3-4:***

28. We address these questions together.

29. Screenrights notes that the caching provision in s200AAA of the Act has assisted the education sector in accessing audiovisual material on the internet. For example, Screenrights' experience in the development of the EnhanceTV Direct service, which provides online streamed content to educational institutions, is that the operation of s200AAA facilitates proxy caching so as to make the service more technically viable for participating institutions.

30. Screenrights is not aware of any instances where the education sector has been inhibited in its use of audiovisual material by the existing caching provisions and does not support any amendment to the Act to provide for exceptions for caching, indexing and other uses related to the functioning of the internet.

## CLOUD COMPUTING

***Questions 5-6:***

31. We address these questions together.

32. We understand there have been suggestions that the Optus TV Now case highlighted supposed inadequacies in copyright law in adapting to new cloud computing services. We make further comments in relation to this case at *Time Shifting (Question 9).* Rightsholders do not necessarily wish to impede the delivery of their work via new services however they do wish to be able to license these uses. Optus TV Now was unlicensed and devalued rights sold by the AFL and the NRL to Telstra to stream certain sporting events live on the internet.

33. Licensed cloud based services such as Spotify and Apple's iTunes Match operate effectively within our current copyright framework. Consumers pay an annual fee to subscribe to these services, with a payment generated to the rightsholder each time the subscriber streams content to one of his or her devices. Such services have launched relatively recently and are developing rapidly.

34. At a time when rightsholders and service providers are developing new business models, it is important not to undermine this by the enactment of free exceptions which remove their capacity to provide access through commercial licences that operate effectively in the market place.[4]

Screenrights submits that Australian copyright law is not impeding the development or delivery of licensed cloud computing services, nor does the Act need specific exceptions to account for new cloud computing services.

[4] Evidence of the rapid development of these models can be seen in Annexure A of the AFACT joint submission, and in Appendix 2 or the Australian Copyright Council submission.

## COPYING FOR PRIVATE USE – FORMAT SHIFTING AND TIME SHIFTING

***Question 7:***

35. Screenrights does not believe that private and domestic copying of legally acquired copyright material should be more freely permitted.

36. Consumers are currently able to copy broadcast material under the fair dealing provisions (and we discuss further the operation of these provisions below at *Fair dealing exceptions Questions 45-47)*; the format shifting provision (s110AA), which allows for analogue to digital copying of audiovisual material; and the time shifting provision (s111), which allows for the copying of a broadcast to watch at a later time.

37. As a general comment we believe the current exceptions in the Act adequately provide for free private copying and any further extension of these provisions without remuneration would risk non compliance with Australia's international treaty obligations in the Berne Convention, and in TRIPS and the US-Australia Free Trade Agreement (FTA). These obligations require: (1) confinement of special exceptions to 'certain special cases' – ie the exception should be clearly defined and narrow in its reach; (2) exceptions 'do not conflict with the normal exploitation of the work'; and (3) exceptions 'do not unreasonably prejudice the legitimate interests of the author'.

38. Other countries that do allow for broader private copying provisions do so under remunerated schemes. Some of these countries pay Australian rightsholders.[5] Other countries' schemes do not pay our rightsholders[6] as we do not reciprocate with a similar scheme here. As the Australian private copying exceptions are not remunerated, they are necessarily narrower in scope than in other jurisdictions. Any extensions to private copying provisions in Australia to cater for more general personal use would need to be remunerated in order not to contravene our international obligations.

39. We do not intend to reiterate previous arguments put forward in relation to private copying here, however we are happy to supply the ALRC with any additional information relating to this issue on request. [7]

***Questions 8-9:***

40. We address questions of time shifting and format shifting together.

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[5] Countries such as Austria, Germany, Switzerland and Spain pay Australian rightsholders.

[6] Countries such as Belgium only pay European rightsholders.

[7] We also refer the ALRC to our previous submission on private copying at www.screenrights.org/sites/default/files/Screenrights_sub_No43403.pdf

41. Again, Screenrights stresses that any free use exceptions need to fall within the three step test as embodied in Australia's international obligations, with any extensions to these exceptions requiring remuneration. We also believe the commercial development of licensed cloud based services, online video on demand and catch up television are enabling consumers to watch copyright material on a variety of devices at a time that suits them, making time shifting and format shifting provisions increasingly less relevant in the digital economy.[8]

42. The current time shifting exception states that any recording should be made 'solely for private and domestic use by watching or listening to the material at a time more convenient' (s111). A recording that is made as part of a commercial service enabling consumers to watch recordings virtually live on another device, as was done by the Optus TV Now service, does not, and should not, fall within s111.

43. In its decision in National Rugby League Investments Pty Ltd & Ors V Singtel Optus Pty Limited and Ors [2012] FCAFC 59 the Full Court of the Federal Court of Australia stated at paragraph 89 of the judgment:

> *There is nothing in the language, or the provenance, of s111 to suggest that it was intended to cover commercial copying on behalf of individuals. Moreover, the natural meaning of the section is that the person who makes the copy is the person whose purpose is to use it as prescribed by s111(1). Optus may well be said to have copied programmes so that others can use the recorded programme for the purpose envisaged by s111. Optus, though, makes no use itself of the copies as it frankly concedes. It merely stores them for 30 days. And its purpose in providing its service – and, hence in making copies of programmes for subscribers – is to derive such market advantage in the digital TV industry as its commercial exploitation can provide. Optus cannot invoke the s111 exception.*

44. As the Full Court of the Federal Court stated in its decision, if the Parliament wants to allow these types of commercial services it requires a legislative amendment, rather than a judicial decision.

> *In the present matter such are the conflicting interests and values, such are the possible consequential considerations of which account might need to be taken that, if a choice is to be made to extend or otherwise modify an exception such as s111, this requires a legislative choice to be made, not a judicial one.*

45. In Screenrights' view, if a new exception to allow time shifting by means of cloud based personal video recorders (PVRs) of the kind offered by the

[8] See the discussion of new business models in Annexure A of the AFACT joint submission and Appendix 2 of the Australian Copyright Council submission.

Optus TV Now service was proposed by government, it would be vital that it be a remunerated exception. To implement a free exception to allow for such services would be inequitable and potentially in breach of Australia's international obligations as outlined above without fair compensation to the copyright owners.

46. Screenrights intervened in the appeal case to protect the interests of our members who benefit from the existing remunerated statutory licence for retransmission under Part VC of the Act. In Screenrights' submission to the Federal Court, the service offered by Optus (Optus TV Now) with its near live functionality in being able to watch free-to-air broadcasts on certain devices almost simultaneously was sufficiently similar to a retransmission service to potentially undermine the operation of the Part VC scheme.

47. In that case, Screenrights submitted that:

> *"The statutory exception in s111 should not be construed so as to cut down the statutory exception in Part VC. Those two different exceptions reflect an important legislative distinction: between a free exception for non-commercial and private use (by time-shifting), and a remunerated exception for commercial use (by retransmission). The construction for which Optus contends elides that distinction."*

*Content delivered over the internet*

48. The current definition of "broadcast " under the Act excludes transmissions over the internet. This has created an anomaly with some IPTV services falling within the definition of "broadcast" and others falling outside the definition. Screenrights discusses this issue at *Educational institutions (Questions 28-31) and Retransmission of free to air broadcasts (Questions 35 to 39)* with respect to the impact this anomaly has on the administration of the Part VA and Part VC licences respectively.

Screenrights submits that there should be no extension of the private copying exceptions in the Copyright Act, unless these are remunerated. In particular, if a new exception to allow time shifting by means of cloud based personal video recorders (PVRs) of the kind offered by the Optus TV Now service was proposed by government, it would be vital that it be a remunerated exception. Broader exceptions without payment risk contravening the three-step test as embodied in the Berne Convention and TRIPS and the US-Australia Free Trade Agreement (FTA).

## ONLINE USE FOR SOCIAL, PRIVATE AND DOMESTIC PURPOSES

### *Questions 11-13*

49. Screenrights supports the comments made by AFACT, AHEDA, MPDAA and NACO in their joint submission on this issue. In particular we note that an exception defined by a mere "non-commercial", "social", "personal" or "private" use would contravene the three-step test embodied in the Berne Convention. We also support the contention of these organisations in their joint submission that there is a contradiction between an exception being for "personal" use and enabling the sharing of content online via social networks such as Facebook and YouTube. Enabling online sharing of audiovisual material has the potential to seriously undermine digital markets for this content.

## TRANSFORMATIVE USE

### *Questions 14-15*

50. Screenrights supports the comments made by AFACT, AHEDA, MPDAA and NACO in their joint submission on this issue. In particular we note that the term "transformative use" is too broad and vague, and that such an exception could have a significant impact on the copyright owner's market for derivative works, such as translations and adaptions (from a film to a game for example).

## LIBRARIES, ARCHIVES AND DIGITISATION

***Questions 19-22:***

51. We have dealt with the questions under this section as a group.

52. Libraries and archives have an essential role to play in preserving and providing access to our cultural heritage and we understand that digitising collections is an important part of fulfilling this role. State and Federal libraries and archives are able, if they so choose, to rely on s183 of the Act (use of copyright material for the services of the Crown) to digitise material.

53. Depending on the nature of the material, the digitisation may be subject to a collectively administered scheme, or individual notifications. Screenrights understands the impracticality of notifying individual copyright owners and negotiating individual payments for large-scale digitisation projects. However, section 183 of the Act provides a mechanism for state, territory and commonwealth libraries and archives to digitise their collections without obtaining permission from copyright owners. Furthermore, the collecting society provisions in sections 183A and following provide for the means to deal with such a use collectively and efficiently. In Screenrights' experience of administering such a provision since 2002, no archive or library has used s183 for this purpose.

54. We believe that s183 enables our state and federal cultural institutions to digitise their collections, preserving and providing access to our cultural heritage, while also ensuring that copyright owners are compensated for this use of their work.

55. We note that Screenrights' current declaration enables us to license copying of broadcast material only. We would like to see an amendment to section 183A of the Act to enable declarations that would allow collecting societies to administer licences that also allow for state and federal departments and agencies to communicate (or put online) and perform (play) digitised collections. This is discussed further at *Crown use of copyright material (Questions 32-34)*.

Screenrights submits that s183 provides government institutions with a mechanism to digitise their collections. However, none have availed themselves of this exception. We therefore submit that any case for a new exception is tenuous.

## ORPHAN WORKS

***Questions 23-24:***

56. We are addressing the questions under this heading as a group.

57. As the ALRC is aware, last year Screenrights commissioned a research paper from Australian copyright academics Associate Professor David Brennan and Professor Michael Fraser into the issue of orphan works. The paper did not inquire into the extent of the problem in Australia, rather it flagged possible reform measures to address the issue. Although this paper was funded by Screenrights, the views expressed are the authors' own.

58. Screenrights supports in principle further exploration of the views expressed in this paper, including the establishment of an exception relating to the non-commercial use of unpublished material, and the proposed broader exception for published material.

## EDUCATIONAL INSTITUTIONS

59. Screenrights has been administering the educational copying licence in Part VA of the Copyright Act since 1990. The way in which television and radio is used in teaching has changed dramatically since the licence was first established, and we have worked closely with educators and with sectoral peak bodies such as the schools and TAFE Copyright Advisory Group and Universities Australia to ensure that educators' evolving needs in relation to using broadcast material in teaching are being met.

60. We would like to preface our comments on the questions raised in this section with the inclusion of a Table. This Table summarises the ways in which educational institutions use broadcast material and it looks at whether or not a statutory exception applies to cover the use, both here in Australia and in overseas jurisdictions.

61. In the Table, where the legislation in the jurisdiction gives guaranteed access to the relevant use, the symbol is green; where licensing is facilitated (but not guaranteed), the symbol is amber; and where there is no exception to copyright, the symbol is red. [9]

***NB The following tables relate to films, sound recordings & broadcasts***

**LEGEND:**

| | |
|---|---|
| Permitted under statute | 🟢 |
| Statute facilitates licence, use is subject to licence | 🟠 |
| No specific provision allowing use | 🔴 |

[9] A more detailed version of the Table is at Appendix A. It gives some specific detail on the provisions in the jurisdictions and also covers libraries and collecting institutions (many of which are in educational institutions).

| *Use* | Australia | NZ | Permitted under the EU Directive? | UK: current | UK: proposed [10] | US Code |
|---|---|---|---|---|---|---|
| *Copy TV & radio broadcasts for educational purposes* | 🟢 | 🟠 | 🟠 | 🟠 | 🟠 | 🟠 |
| *Copy TV & radio broadcasts for exam questions & answers* | 🟢 | 🟢 | 🟠 | 🟢 | 🟢 | 🟠 |
| *Copy TV & radio broadcasts to include in an institution's library of resources* | 🟢 | 🟠 | 🟠 | 🟠 | 🟠 | 🟠 |
| *Make a preview copy of a TV or radio broadcast to decide whether to retain a copy for teaching* | 🟢 | 🟠 | 🟠 | 🟠 | 🟠 | 🟠 |
| *Use content management systems (such as Clickview, Moodle and Blackboard) to store copied TV & radio broadcasts* | 🟢 | 🟠 | 🟠 | 🟠 | 🟠 | 🟠 |
| *Use content management systems to communicate copied TV & radio broadcasts to students within the institution* | 🟢 | 🟠 | 🔴 | 🟠 | 🟠 | 🟠 |
| *Use content management systems to communicate copied TV & radio broadcasts to students outside the institution* | 🟢 | 🟠 | 🔴 | 🔴 | 🟠 | 🟠 |
| *Make compilations of extracts of material copied from TV & radio* | 🟢 | 🟠 | 🟠 | 🟠 | 🟠 | 🟠 |

[10] That is, by Gowers or Hargreaves or by government announcement. Note that the UK government is still in the process of acting on the Hargreaves recommendations. For example, in June 2012, it published a Summary of Responses on its *Consultation on Copyright*: see http://www.ipo.gov.uk/hargreaves-copyright.htm.

| *Use* | Australia | NZ | Permitted under the EU Directive? | UK: current | UK: proposed [10] | US Code |
|---|---|---|---|---|---|---|
| *Format shift copies made of TV & radio broadcasts* | 🟢 | 🟠 | 🟠 | 🟠 | 🟠 | 🟠 |
| *Make copies of TV & radio broadcasts for other educational institutions* | 🟢 | 🟠 | 🟠 | 🟠 | 🟠 | 🟠 |
| *Play copies of TV & radio broadcasts in class* | 🟢 | 🟢 | 🟠 | 🟢 | 🟢 | 🟢 |
| *Play TV & radio in class* | 🟢 | 🟢 | 🟠 | 🟢 | 🟢 | 🟢 |
| *Stream TV & radio broadcasts from the internet to classes* | 🟢 | 🟢 | 🟠 | 🟠 | 🟠 | 🟢 |
| *Copy podcasts & vodcasts of TV and radio programs from the internet* | 🟢 | 🟠 | 🟠 | 🔴 | 🔴 | 🟠 |
| *Copy material other than podcasts and vodcasts of TV and radio programs from the internet* | 🟠 | 🟠 | 🟠 | 🔴 | 🔴 | 🟠 |
| *Email copies of TV and radio broadcasts to staff & students* | 🟢 | 🟠 | 🟠 | 🔴 | 🟠 | 🟠 |
| *Captioning material copied from TV for deaf students* | 🟢 | 🟠 | 🟠 | 🟠 | 🟠 | 🟠 |
| *Flexibility to deal with situations not specifically addressed in the relevant legislation*[11] | 🟢 | 🔴 | 🔴 | 🔴 | 🔴 | 🟢 |

62. The Table clearly shows that current Australian copyright legislation provides educators with certain and unparalleled access to television and radio. A wide range of free exceptions allow for limited uses, and the statutory licence in Part VA enables educational institutions to build up teaching resources while ensuring that copyright owners (many of whom rely on this sector) are paid for this use of their work.

63. The table also demonstrates that many of the exceptions and other provisions relating to educational use overseas do not provide such certainty of access for educators.

> Screenrights submits that the current copyright regime provides Australian educational institutions with at least equal, and in most cases better, access to copyright audiovisual material than their counterparts in equivalent jurisdictions.

***Question 28:***

64. Part VA of the Copyright Act provides a flexible, technology-neutral licence that allows for a wide range of uses of broadcast material, meeting the needs of educators and students in the 21st century learning environment.

65. When the licence was first enacted in 1990, it was intended to allow for VHS copying from television – ensuring teachers and academics had access to documentaries, educational programming, news, current affairs and drama, while providing payment to rightsholders. Educational copying had an adverse impact on sales of programs to institutions through educational distributors, and Screenrights' royalties compensated for these lost sales.

66. Since then, the principles have remained the same – access and payment – but Screenrights and our partners in the education sector have worked together to ensure that the licence has evolved to meet the changing needs of educators in the digital economy.

*Flexible access in the digital age*

67. The Part VA licence allows educators to:
    - copy from pay and free to air television in any format
    - copy podcasts and vodcasts of programs put online by a free to air broadcaster
    - copy at home or at the institution
    - keep copies as an ongoing resource
    - email copies to staff and students
    - put copies on internal computer networks such as Blackboard and Moodle or closed Facebook pages
    - use learning management systems, such as Clickview, to store and play copies

- purchase copies either as DVDs or as downloads from licensed resource centres.

68. In addition, the free exceptions in the Copyright Act allow educators to:

    - show programs in class
    - stream programs directly from the internet.

69. Screenrights has supported educational access to this content through the establishment of an online resource hub – www.enhancetv.com.au. EnhanceTV has more than 17,000 members. Educators receive a weekly guide letting them know about upcoming programs relevant to their learning areas. They can also download free study guides and articles to help them teach.

70. EnhanceTV is also a licensed resource centre. Australian educators can request EnhanceTV to copy a broadcast on their behalf.

71. EnhanceTV is not the only resource centre of its kind. There are a number of downloading and streaming services for educational institutions relying on a Part VA Screenrights resource centre licence to operate. For example, Functional Solutions allows schools to download programs from a central repository; many universities obtain news programs from the RMIT University's broadcast news streaming service, Informit TV News.

72. We've also seen the commercial development of catch-up television via streaming (ABC iView for example), giving teachers another way of obtaining audiovisual content. It is important to note that these services, which simply stream a program into a classroom, do not fall within the Part VA licence and do not generate a royalty for filmmakers. The educational sector does not pay copyright owners when it views content on freely available websites such as iView or SBS On Demand.

73. There are however limits to the usefulness of broadcast catch up television services for teachers, including the following factors:

    - the content may include advertising
    - the content is generally only available for a short period
    - these sites do not provide a comprehensive archive of the programs broadcast by the broadcaster
    - available programs haven't been curated for the education sector and may not be safe and age appropriate content for students
    - there is generally no supplementary material provided with the programs to assist teachers with their lesson planning such as study guides, which are provided free via the Enhance TV service.

74. In response to these issues and the appetite for streamed content (which provides instant access from any internet connected computer or tablet

device) EnhanceTV has recently undergone another incarnation to provide a service designed to meet this next change in the education sector's needs.

75. This service, which is called EnhanceTV Direct, was trialled to 21 educational institutions across the country in 2011. Institutions that took part in the trial had streamed access to EnhanceTV's enormous archive of educational programs. Programs are readily searchable by a number of criteria, including learning areas and can be viewed at home or at school. Links to programs can be sent to students giving them access to selected content from any internet connect device.

76. In addition, the service allows teachers to create video lessons using all of a program or short extracts. Again, these lessons can be viewed from any internet connected computer or tablet. They can also be shared with other educators.

77. The pilot was evaluated by the Australian Council for Educational Research confirming the technical and educational potential of the service. The response to the pilot from the educational institutions was very positive and the service is now being rolled out to schools across the country, providing the following:
    - access to over 12,000 educational programs, with this archive growing by up to 100 programs a week
    - access to content from any internet connected computer or viewed on a tablet device
    - age appropriate and advertisement free content
    - captioning is available
    - content can be searched by learning area
    - content can also be searched using the captions option to find a spoken word
    - lesson plans can be created and shared with students and other teachers
    - study guides can be downloaded
    - the system is accessed via a secure login
    - the system requires no copyright clearances.

78. EnhanceTV Direct can only be supplied to educational institutions with a Screenrights licence, and copyright owners are paid for the copying of a program streamed to an institution under a resource centre licence. The institution does not need to keep any records of the programs that it is using – this is done by the system itself.

79. The continuing evolution of the educational licence in Part VA has ensured that it directly meets the changing needs of today's educators. As Natasha Georgiou, the librarian at St Michael's Grammar School in Melbourne told us:

> *Without Screenrights' licence a significant resource would be missing from our teaching and learning.*

*Payment to filmmakers encouraging further content creation*

80. Importantly, the licence also meets the needs of Screenrights' members – the many filmmakers who are making the programs teachers and academics use in teaching. It ensures they are paid for this significant use of their work.

81. Each year, we find that close to one third of the copied programs in educational institutions are documentaries and educational programs. Obviously the education sector is an important market for these filmmakers and the royalties generated under the scheme provide an essential part of their returns.

82. By ensuring they receive a royalty for the use of their work a fundamental tenet of copyright law is being observed – the encouragement of further creative work.

**Case study: Cordell Jigsaw Zapruder** is one of Australia's largest independent producers, producing prime-time television series. They discuss the importance of Screenrights' royalties to the growth of their business:

Cordell jigsaw Zapruder

*The CJZ Group is a result of the merger of Cordell Jigsaw Productions Pty Ltd (principals Michael Cordell and Nick Murray) and Andrew Denton's Zapruder's Other Films Pty Ltd.*

*CJZ is one of the largest independent producers in Australia and unlike our competitors, remains 100% Australian owned.*

*Our core business is the production of prime-time television series. In 2012, the group has 14 shows on television including the drama 'Great Mint Swindle' (Nine), factual series 'Go Back to Where You Came From' (SBS), documentary series 'Great Southern Land' and 'Two on the Great Divide' (both ABC1), factual series 'Dumb Drunk and Racist' (ABC2), kids sketch comedy series 'You're Skitting Me' (ABC3), topical discussion show 'Can of Worms' (Ten), ob doc series 'Bondi Rescue' (Ten), and studio based 'Gruen Planet' and 'Gruen Sweat' (ABC1).*

*We have a core staff including development and admin personnel of about 20. We usually have around 50 staff at any given time increasing to over 100 at peak production periods. Over the course of a year, we employ approximately 150 – 200 different staff and contractors (excluding very short contractors such as cast extras etc).*

*An important part of the business is the "back-end" revenue trails available from the local and international market from already made productions. These revenue streams include:*

- *international distribution of finished programs to broadcasters outside Australia,*
- *sales to Australian pay TV networks and net based broadcasters and aggregators,*
- *DVD and online Download to Own sales (ie iTunes etc),*
- *Ancillary sales such as tie-in books, merchandise, games,*
- *royalties from educational use of selected titles.*

*Revenue streams from the back-end are extremely useful in funding the ongoing development activities of the group, which in turn is the life-blood of any production company. For 2012 financial year, CJZ received approximately $2,000,000 in total back-end exploitation revenue from programs with approximately $400,000 from Screenrights directly. This money has been extremely valuable for developing new programs and to engage additional staff to explore and research new digital opportunities for content (including in the education sector).*

*We recently established a new division to explore the opportunities in the education sector. Due to the success of programs such as 'Go Back to Where You Came From', it became clear that if we were to plan for educational exploitation from the outset, we could expand the potential revenue streams from educational copying. Our programs have gained an excellent reputation amongst educators and if copying royalties are maintained, then it remains an important part of our business mix.*

*We have been exploring this idea in multiple strategic ways;*

1. *Do we create our own web portal whereby children, educators and parents can access additional clips, resourced such as study guides, program content and are linked to such partners as Screenrights?*
2. *Do we license program material to education platforms, thereby forgoing Screenrights revenue in favour of an upfront licence fee?*
3. *Do we provide our existing educational providers (such as ACTF, Screenrights, ATOM) with additional materials to drive educators and children to those platforms and thereby increasing the earning potential via Screenrights?*

*It appears that option 2 presents very little value to CJZ, as the licence fees are not reflective of the value of the programs. Further, the recent technological changes such as the availability of the streaming services, reduce the capturing of data about use for the purposes of Screenrights' royalties. We do not fully understand the nuance of the uses, but it is clear that the introduction of anything that reduces Screenrights royalty streams will hurt the sustainability of our business. Until such time as we may be in a position to build our own education platform that provides complementary materials to support and drive to Screenrights, we will continue to do whatever we can to support Screenrights and protect this valuable revenue stream.*

*When developing new programs, the potential value of Screenrights is certainly a consideration. Is this a program that naturally fits within the educational sphere? Are there opportunities during production to create additional resources and materials for that purpose? Are we confident that any distribution or licence agreements we enter into, do not risk diminishing the value of potential Screenrights returns?*

*Since the success of 'Go Back to Where You Came From', we have been much more proactive and forward thinking about Screenrights. On recently produced programs such as 'Great Southern Land', 'Jabbed' and 'Two on the Great Divide' we have protected the educational rights, created additional content for educational use and ensured we have kept Screenrights informed of the programs well in advance of the broadcast.*

*Screenrights plays an important part in the ongoing growth of our business by providing content creators with revenue to develop new programs and providing us with a way to engage students, teachers and care givers with our program content beyond the broadcast.*

*Nick Murray*
*5 November 2012*

83. As we mentioned earlier, a recent survey of our members showed us that more than half of them regard Screenrights' royalties as important to the ongoing viability of their business, and close to 20 per cent said this money was essential.

Screenrights submits that Part VA continues to be effective in the digital age by virtue of the fact that the provision is largely technology neutral. This has enabled Part VA to keep up with the extraordinary technological changes in the broadcast media and education sector over the past twenty years. It has given Australian educational institutions unparalleled access to broadcast material compared to the access of educators overseas. It has also provided an important source of income for educational program makers, encouraging further production of teaching resources.

***Question 29:***

84. Screenrights notes and supports the comments of Copyright Agency and the Australian Copyright Council on the Part VB licence scheme.

***Question 30:***

85. Screenrights believes there is no reason for any of the uses covered by the Part VA licence to be free. As we have stated above, the licence is operating exceptionally well – providing broad and flexible access to broadcast material for teaching, with payment to filmmakers encouraging the further production of educational material.

*Audiovisual material freely available online*

86. Screenrights is aware that some within the education sector have called for a new free exception to allow educational institutions to copy material that is freely available on the internet. The Commission refers to this proposal at paragraph 186 of the Issues Paper. Although we understand that the proposal does not seek to amend Part VA, Screenrights is very concerned about this proposal for two reasons:

    - firstly, the proposal completely misunderstands the basis upon which most copyright owners agree to make material 'freely' available online; and,

    - secondly, the proposal would create a free exception for the same content covered by Part VA and so would undermine Part VA of the Act.

87. The misunderstanding inherent in this proposal is that the material 'freely' available on the internet is not valued by the copyright owner. The proposal presumes that the content is given away by being made available online without a direct payment. This is completely incorrect. Copyright owners like Screenrights' professional filmmaker members make material available online for very clear commercial reasons. They may choose to make it available for a fee, such as with commercial video on demand services or they may choose to license a website to stream the content for a period of time without charging the consumer directly (such as ABC iView). In the latter case, the consumer still pays for the content, either by watching associated advertising, or through brand attachment to the website and there are clear cross promotional benefits to other platforms where the content is available for a fee, such as via DVD or Blu-ray discs. In neither case is the viewing 'free' in the sense implied by this proposal from the education sector.

88. This misconstruction is particularly stark for Screenrights as material 'freely' available on the internet is very like material broadcast 'freely' on television. When an educational institution copies a free to air broadcast, it is required to compensate the copyright owners via the Part VA scheme that Screenrights administers. Fundamentally, Screenrights can see no difference with content made available online for free. There may very well be a debate about the value of the content and the price of the compensation, but the principle is the same.

89. The relevance of Screenrights' second concern is clearly apparent. Although the proposal does not seek to amend Part VA, it seeks in effect to undermine its operation by creating an uncompensated exception for essentially the same material.

90. Finally, Screenrights notes that educational institutions have the same right as any other part of society to view the content online and not pay a fee for that viewing. This is quite proper, as this is the use which the copyright owner has

authorised, and it is compensated in the manner the copyright owner has agreed with the website publisher.

Screenrights submits that there is no reason for any of the uses covered by the Part VA licence to be free.

Screenrights further submits that if the Commission is of the view that educational institutions must have a general right to copy audiovisual material from the internet, then that copying must be subject to compensation via a remunerated exception.

*Television and radio transmissions over the internet*

91. At present, only very limited copying of broadcast material from the internet is allowed under Part VA – only broadcast material put online by the broadcaster may be copied and communicated by an institution. This would cover, downloading a podcast of, say, 'The Science Show' and making it available on a Moodle or Clickview system.

92. In this section, Screenrights is not commenting on such copying. This section is focussed on the complexity of what sorts of television and radio transmissions may be copied under Part VA. This complexity has arisen from changes in transmission technologies combined with an anachronism in the definition of a 'broadcast' incorporated into the Copyright Act from the Broadcasting Services Act (BSA).

93. The current definition of 'broadcast' excludes transmissions over the internet. This is because broadcast is defined as a 'communication to the public delivered by a broadcasting service within the meaning of the Broadcasting Services Act 1992 – s10(1)'.

94. Section 6 of the BSA provides that:

> ***broadcasting service*** *means a service that delivers television programs or radio programs to persons having equipment appropriate for receiving that service, whether the delivery uses the radiofrequency spectrum, cable, optical fibre, satellite or any other means or a combination of those means, but does not include:*
>
> *(a) a service (including a teletext service) that provides no more than data, or no more than text (with or without associated still images); or*
>
> *(b) a service that makes programs available on demand on a point-to-point basis, including a dial-up service; or*
>
> *(c) a service, or a class of services, that the Minister determines, by notice in the Gazette, not to fall within this definition.*

95. In September 2000, the then Minister for Communications (Mr Alston) determined that a 'service that makes available television and radio programs using the internet' was not a broadcasting service.[12]

96. This creates an anomaly for educational institutions wishing to copy IPTV services under the Part VA licence. Screenrights understands that some IPTV services are not transmitted over the internet (such as FetchTV) and others are (such as Telstra TBox). The effect of the definition is that the FetchTV service is a 'broadcast' and so may be copied under Part VA, whereas TBox is not and may not. [13]

97. We believe this distinction is unnecessarily complicated and would not be understood by most teachers or by other people copying on behalf of educational institutions under Part VA.

Screenrights submits that the exclusion of transmissions over the internet from the definition of 'broadcast' television creates an unnecessarily complicated distinction for educators relying on the Part VA licence. We submit that Part VA should therefore be amended – for example, by inserting an expanded definition of 'broadcast' into s135A (which would apply only in respect of Part VA) or by amending s135C (which gives Part VA an extended operation). This should enable the copying of linear television and radio transmissions over the internet.

***Question 31:***

98. As we have noted in our responses to the above questions, we see no reason to amend the licence or the free use exceptions, other than by rectifying the situation in relation to copying from IPTV. We believe the current Australian legislation in relation to educational use of broadcast material is achieving desirable policy outcomes, working effectively for users in the digital environment and fairly compensating creators. Our comparative table at Appendix A also shows that Australia provides more generous – and certain – educational access to broadcast material than legislative schemes in other jurisdictions.

[12] Alston, Richard. "Determination under paragraph (c) of the definition of 'broadcasting service' (No 1 of 2000)", *Commonwealth of Australia Gazette No GN 38,* 27 September 2000

[13] This anomaly also impacts the Part VC retransmission licence and we comment on this at *Retransmission of free to air broadcasts (Questions 36 – 37)*.

## CROWN USE OF COPYRIGHT MATERIAL

***Questions 32 and 34:***

99. We have confined our comments to issues raised in questions 32 and 34.

100. Section 183 allows the government to make any use of broadcast material, films and the underlying works contained within. However, section s183A only enables Screenrights to obtain a declaration for the copying of copyright material; in Screenrights' case, the copying of television and radio broadcasts (and underlying rights).

101. As a result of this declaration, Screenrights has entered into agreements with state and federal government departments to cover copying from television and radio. Any further use (such as playing the copies, putting copies online or emailing copies) requires the Crown to notify the copyright owners and negotiate payment directly with the copyright owners.

*Crown copyright uses other than copying*

102. Various jurisdictions have commented to Screenrights over the absurdity of the current provisions. When the government copies a broadcast they pay Screenrights through the collective declaration, but when they show the copy, or as is increasingly the case, email the copy, or make it available online, they are covered by the individual notification provisions.

103. In Screenrights' view, the current provisions are merely an oversight in drafting. At the time that the provisions were enacted in 1998, Screenrights is aware that the particular concern was the burden of individual photocopying notifications. Screenrights suspects that thought was not given at that time to the possibility of performing works (eg playing audiovisual copies for government purposes) much less the then exotic possibility of email and computer network access. This is a historical anomaly that the Commission can readily correct.

104. As we mentioned above at *Libraries, archives and digitisation (Questions 19-22)*, Screenrights submits that this section should be amended so that there can be a declared collecting society for any copyright use of government copies including communicating copies and performing copies.

105. We also mentioned that an extension of the declaration to cover communication of this material would enable cultural institutions to play and make their collections available online, without the need for notifying each individual rightsholder. This would potentially improve access to culturally significant material while compensating rightsholders for this use of their work.

Screenrights submits that section 183A should be amended to provide for declared collecting societies to collect for uses other than copying by government. Screenrights notes that this is not an extension of the statutory licence as the licence already exists in section 183. Screenrights' submission relates merely to the collective administration of the existing licence.

*Local government and section 183*

106. As the Commission notes, there is some doubt as to whether the statutory licence is available to local government.

107. Local governments are statutory bodies, and while Division 2 of Part VII can extend to statutory bodies, whether or not a statutory body may rely on section 183 depends on the relevant body's enabling legislation. Where the legislation is silent as to whether or not a statutory body is an emanation of the relevant government, a careful analysis of the legislation is required.[14]

108. We are not aware that local governments regard themselves as 'government' for the purposes of the Copyright Act, or that the Acts under which local governments are established would currently entitle them to regard themselves as government.

Screenrights submits that section 182B should be amended so that local government is deemed to be 'government' for the purposes of Division 2 of Part VII of the Act. Such an amendment would enable local governments to rely on section 183 to the same extent as Federal, State and Territory governments.

[14] see chapter 8 of the Copyright Law Review Committee's report, *Crown Copyright*.

## RETRANSMISSION OF FREE TO AIR BROADCASTS

***Question 35:***

109. Screenrights believes that the current retransmission provisions are working effectively, other than the internet exception. We do not feel that the existing regime should be amended to include any 'must carry' requirement. If a call is made for amendments to allow broadcasters to receive remuneration for the retransmission of the broadcast signal, we foresee no difficulties with administering this.

*The current retransmission scheme*

110. Retransmission is the practice of media providers to include free to air broadcasts within their service. For example, Foxtel includes the free to air channels with its package of subscription channels. This provides a benefit of convenience to the consumer, enabling them to watch all channels using the one remote control and ensuring that the free to air signal quality is as good as the quality of the other Foxtel channels.

111. There are two elements to the regulation of retransmission in Australia:

    - section 212 of the Broadcasting Services Act 1992 (BSA) provides a defence for persons that retransmit free to air broadcasts, subject to the retransmission being within the licence area of the broadcasts in the case of commercial channels. The BSA also provides that the defence doesn't apply to the rights of underlying copyright owners, ie the rights owners of the film, script, musical works and artistic works and sound recordings.

    - Part VC of the Copyright Act provides a parallel statutory licence covering these retransmitted underlying works. Part VC is a defence from copyright infringement for retransmitters, provided the retransmission is simultaneous with and unaltered from the original broadcast, and provided that a fair fee is paid to the relevant copyright owners.

112. Screenrights is the declared collecting society administering the licence in Part VC. We negotiate remuneration with retransmitters, collect fees and distribute these fees to copyright owners after the deduction of operating costs.

113. From a commercial perspective, access to the free to air broadcast channels is very important for a new entrant into the television market in Australia. Free to air television represents the overwhelming bulk of television consumption in Australia.

114. From a public policy perspective, the most important aspect of retransmission is that it fosters competition in the broadcast television

market. By allowing access to the free to air channels, a significant potential barrier to entry is removed. The copyright policy follows the communications and competition policy: to ensure the desired communications outcome, an exception to copyright is created; to ensure that the provision is equitable, and meets international obligations, it is a remunerated exception.

115. Subject to our comments below concerning retransmission over the internet, the BSA and the Copyright Act create an open and technologically neutral access regime for the retransmission of free to air broadcasts. The scheme has promoted competition in the broadcast market – in particular the technological neutrality of the regulations has encouraged new and diverse services, that probably were not considered at the time the scheme was created. Services include satellite and cable residential subscription television, mobile television, fibre to the premises services, hospital communication systems and IPTV. In 2010/11 more than 2.25 million households received retransmission. At the same time, the remunerated exception has ensured that the copyright owners of the underlying rights in the broadcasts have been fairly compensated.

*Must carry*

116. 'Must carry' is a legislative requirement that in certain prescribed circumstances, television suppliers must include all the relevant free to air signals, or negotiate with free to air broadcasters if they wish to receive a subset of these signals.

117. Screenrights does not believe that a 'must carry' regime is necessary in Australia and that such a scheme would be both anti-competitive and contrary to the interests of underlying copyright owners. Screenrights has made submissions to the Convergence Review Committee to this effect.[15]

118. 'Must carry' regimes do operate in some overseas territories, however where they have been enacted they are implemented for particular domestic circumstances and in the most limited way possible to meet the domestic policy objective.

119. In the USA for example, 'must carry' applies to the retransmission of free to air broadcasts by cable operators to protect local broadcasts from distant signal retransmission. It is common for cable operators to retransmit the New York signal of free to air channels – a 'must carry' regime requires them to carry the local affiliate of the network. This protects the local affiliate's advertising revenue.

120. In Europe, 'must carry' laws exist in some territories – to protect local language channels from being overwhelmed by distant signals which are being retransmitted.

[15] See: screenrights.org/about-us/corporate/submissions

121. The Australian situation is different. Our retransmission regime effectively limits retransmission to local signals only for commercial channels. Without the retransmission of distant commercial broadcast signals, Australia lacks conditions that may justify the institution of a local signal 'must carry' policy.

122. Further, a 'must carry' regime could be anti-competitive. It places an additional obligation upon other service providers, amounting to a regulatory barrier for entry for potential market entrants.

123. A comprehensive 'must carry' regime would also be unworkable in Australia. For it to be universally applied, it would have to include existing satellite based television service providers such as Foxtel and Austar. However, it isn't commercially viable to retransmit local signals via satellite due to the large number of small licence areas – the cost would be prohibitive. If the regime were not universally applied but excluded these services, it would create an unfair and anti-competitive outcome.

124. Finally, Screenrights believes that 'must carry' is unnecessary in Australia. Since the retransmission scheme was enacted, television service providers have chosen to retransmit the free to air broadcasts to the widest extent practicable under the current retransmission regime. The scheme has also resulted in a an array of services bringing benefits to consumers – including fibre to premises, hospital services, IPTV and mobile TV.

125. As we mentioned above, we would not, however, be against amendments to the Part VC regime that would allow broadcast copyright to be remunerated. In fact, Screenrights currently pays broadcasters for retransmission in their capacity as rights owners of underlying works and it would be a minor matter to include the broadcast signaly copyright within Part VC.

Screenrights submits that there is no basis for introducing a 'must carry' regime in Australia, and that such a regime would be both unworkable and anti-competitive.

Screenrights acknowledges that the exclusion of the broadcast signal copyright from Part VC is anomalous. If Part VC were amended to include broadcasts within the statutory licence, we foresee no difficulties with administering this.

***Question 36 and 37:***

126. We are addressing both these questions together.

127. Section 135ZZJA of the Copyright Act provides that the retransmission regime does not apply in relation to a retransmission of a free to air broadcast if the retransmission takes place over the internet.

128. This exclusion has become increasingly absurd from a consumer's perspective, as television services over the internet are often indistinguishable from those not over the internet. For example, Screenrights understands that Foxtel is not provided over the internet to a

Foxtel set top box but it is provided over the internet to the Foxtel Xbox service. But to a consumer, they are more or less the same. Similarly, IPTV services such as Fetch TV and Telstra TBox are also impossible to distinguish but one happens to be over the internet, while the other is not.

129. The policy reason for excluding the internet from the retransmission regime in 2000 was to avoid the possibility of retransmitted content intended for Australian consumers being sent over the internet around the world, undermining broadcast markets internationally.

130. This issue was of particular concern to American copyright owners, and as a result the Australia USA Free Trade Agreement (FTA) specifically refers to it. Article 17.3(10)(b) states:

> *neither Party may permit the retransmission of television signals (whether terrestrial, cable or satellite) on the internet without the authorisation of the right holder or right holders, if any, of the content of the signal and of the signal;*

131. However, anticipating that this issue would over time be better addressed by other means, the governments agreed to a mechanism to review the internet exclusion. By mutual letters dated 18 May 2004 between the Australian Trade Minister and US Trade Ambassador, the parties agreed in effect that if either party formed the considered opinion that there was a significant improvement in the "reliability, robustness, implementability and practical availability…" of technology to limit the reach of an internet retransmitted signal, that the parties would negotiate in good faith to amend the agreement.

132. Geoblocking technologies have advanced significantly since 2004, to the extent that television-like services are routinely made available over the internet in reliance on these technologies including ABC's iView service, Hulu, iTunes and Netflix.

133. Screenrights believes that maintaining geographical control of retransmission remains an important objective of regulation, but this can still be achieved if the internet exception is removed from the retransmission licence. This could be done by requiring retransmitters to ensure that any retransmission is appropriately geoblocked to the original broadcast territory as a condition of relying on the Part VC licence.

134. Screenrights also recognises that allowing internet retransmission under the Part VC licence in order to ensure that all IPTV services can rely on the retransmission regime, may give rise to other issues that will need further consideration. These issues relate to retransmissions that are of a different nature to an ongoing retransmission of all free to air channels by a service such as IPTV, and that have a different market value.

135. Examples include broadcasters through related entities seeking to rely on the Part VC licence to simulcast their free to air channels over the web. We understand that this is currently managed effectively through voluntary licence arrangements, with broadcasters acquiring additional rights from underlying rightsholders to enable web transmission of their broadcasts. We do not feel any amended statutory licence should undermine any effective market for voluntary licensing arrangements.

136. We also recognise that it is important an amended Part VC does not enable cherry picking of certain programs (such as sporting programs) or 'pop-up' stations that just retransmit certain events over the web (such as the Olympics) and then cease to operate. The current legislation arguably enables retransmitters to retransmit certain selected programs, such as for example sporting events, for a limited time. Again, such retransmission could be (and should be) the subject of voluntary arrangements. There would be no practical impediments to retransmitters negotiating with the more limited number of rightsholders in these circumstances, and the exercise of these rights are clearly of a different value to an ongoing retransmission of all free to air channels by an IPTV service.

137. These examples raise issues that will need to be considered even if the current retransmission regime is not amended to include retransmission over the internet.

138. This is because, in our understanding, once the NBN is rolled out, companies will be able to retransmit using multicasting over the NBN in reliance on the Part VC licence as this will not be over the internet. Our advice has been that this is similar to certain IPTV services (such as FetchTV) which do not occur over the internet as such. It may therefore be necessary to consider ways in which these uses could remain the subject of voluntary licensing arrangements and not fall within the retransmission licence. This may include, for example, clarifying that the simultaneous and unaltered provision means that individual programs can not be cherry picked, and that broadcasters' related entities may not rely on Part VC to retransmit the broadcasters' own signals.

Screenrights therefore submits that the condition in the side letter between the Australian and US Governments (referred to in paragraph 130) has been met and that the ALRC should recommend that the Australian Government seek to negotiate an amendment to remove Article 17.3(10)(b) from the USFTA.

Screenrights further submits that, following this, section 135ZZJA of the Copyright Act could be deleted, subject to ensuring any retransmission is appropriately geoblocked, and subject to the exclusion of retransmissions that can and should fall within voluntary licensing regimes, as they involve a different exercise of rights.

***Question 38 & 39:***

139. Screenrights believes the ALRC is the appropriate forum for considering the copyright issues we have discussed above. Screenrights submits that 'must carry' is not a copyright issue, but is a communications issue. However, Screenrights submits that the exclusion of the broadcast copyright from Part VC is a copyright issue, which could be resolved in the manner proposed above without needing to deal with the difficult communications and competition questions relating to 'must carry' regimes.

140. Screenrights submits that the internet exception from Part VC is a copyright issue, as the complex nature of the question whether a particular transmission service is over the internet or not and thereby amenable to retransmission or not, undermines the proper administration of the statutory licence.

141. Resolving these issues would ensure that the retransmission regime is truly technology neutral, enabling internet television services to carry all free to air signals, providing maximum convenience to the consumer, while ensuring the geographic broadcast markets are not undermined.

## STATUTORY LICENCES IN THE DIGITAL ENVIRONMENT

***Question 40:***

142. The digital economy has enabled Screenrights to greatly improve the operation of its statutory licences, both for the rightsholders who are our members and for the people who are accessing their work under the schemes we administer.

*Improved efficiencies for content creators*

143. As the number of schemes Screenrights administers has grown, we have seen a dramatic increase in the number of rights we administer. In 2010/11 alone Screenrights paid more than 3 million individual royalties and dealt with over a million active records. In the face of this our distribution record has remained excellent – we pay out more than 80 per cent of a year's collections within 12 months of distribution being declared, and in the six years in which we have to distribute royalties (under our Articles of Association) we now have less than 1 per cent of the total left to be paid at the end of this period.

144. The digital economy has enabled us to put into place systems to ensure our efficiency continues – the most recent of these being MyScreenrights, our online registration service for members. This lets members register their own titles, update details and program information and also track payment history, giving them important business information.

*Improved efficiencies for content users*

145. The digital economy has also led to improved efficiencies for our licensees who are using AV material under their agreements with Screenrights. Records of use under survey systems can now be kept online, greatly reducing the administrative burden for busy staff at educational institutions. Similar efficiencies are being developed for government departments using our members' copyright material under s183 of the Act.

146. We have also seen our licensees embracing new digital technologies to use AV material, unhindered by the need to obtain individual copyright clearances. The educational licence, for example, allows for the use of online learning management systems and lets teachers purchase digital copies of television programmes from a range of innovative resource centres.

147. As we mentioned above, Screenrights has also embraced digital technology to offer a new service to our licensed educators, designed to meet their needs in the 21st century learning environment. EnhanceTV Direct gives educators access to a vast and easily searchable archive of programs via streaming to any internet connected computer. It is fast, efficient, removes

the need for expensive onsite storage and lets teachers work from home or at school.

Screenrights submits that while the Copyright Act continues to provide fair compensation within technologically neutral frameworks, the statutory licences will offer improved access to content and ease of administration as a consequence of the changes brought about by the digital economy.

***Question 41:***

148. Apart from the specific comments we have made above in relation to details of our licences, we believe the current schemes we are administering are operating exceptionally well – and are sufficiently technology neutral to adapt to the new ways in which people are using audiovisual material.

149. Summarised below are the specific recommendations Screenrights has made to improve the operation of the statutory licensing schemes in the digital environment.

- *Educational licence*: Part VA should be amended to enable copying of linear TV and radio transmissions over the internet
- *Government copying licence*: s183A should be amended to provide for declared collecting societies to collect for uses other than copying by government. S182B should be amended so that local government is deemed to be government for the purposes of Division 2 of Part VII of the Act.
- *Retransmission licence:* The Commission should also recommend to the Government that it initiate negotiations to amend the FTA so that retransmission over the internet can be included in Part VC subject to geoblocking.

Screenrights submits the current statutory licences are working well, and the specific changes we have recommended would ensure that they continue to maintain the relevance and flexibility of operation in the digital economy providing ease of access for copyright users without undermining the economic rights of the copyright owners.

***Question 42:***

150. Neither Screenrights' members nor our licensees have identified any need for new statutory licensing schemes to enable access to AV material. We have, however, stated that we are prepared to give in-principle support to the development of a licence for certain limited uses of orphan works (see *Orphan Works, Questions 23 – 24*). We have also stated that any exception relating to cloud-based services should operate as a statutory licence in the event of the ALRC considering such an exception to be necessary –

although our first preference is for commercial services to continue to be established.

***Question 43:***

151. Ownership of rights for broadcast material can be particularly complex as there are invariably many rightsholders involved. It is far simpler for users under our licence to deal with us, as a one-stop shop, than to attempt to deal with many different rightsholders directly. Screenrights believes the licences it administers are simple and effective, enabling a wide use of AV material in the digital age. Again, we have made various specific comments in relation to our individual licences above. We see no need for changes to the schemes we administer, other than those we have already mentioned.

***Question 44:***

152. Screenrights believes the current balance between free use exceptions and statutory licences generating payment to rightsholders is fair and working well. In particular, the balance between more limited individual student copying under the free fair dealing provisions, and the broader copying for teaching purposes under the statutory licence works for both rightsholders (who are not losing income from this important market for their work) and users who have access to this resource and understand the demarcation between the two types of use.

153. We see no need for any of the uses under our licence to be covered by a free use exception.

154. Per paragraphs 86 - 90 above, Screenrights is aware that there has been a call from parts of the education sector for a free exception to copy material made available online for free for educational purposes. As discussed, Screenrights submits that this proposal would have severe long term negative consequences upon copyright owners that currently rely on the compensation they are receiving from the educational statutory licence. Screenrights submits that the proposal is fundamentally misconstrued as it completely misunderstands the commercial basis upon which copyright owners license websites to make their material available “for free”. Screenrights submits that such an exception is akin to the exception to copy free to air broadcasts, and that copyright owners are entitled to compensation for such a use, were such an exception to be contemplated.

Screenrights submits that the current balance between free use exceptions and statutory licences generating payment to rightsholders is fair and working well. Aside from our in-principle support for an orphan works statutory licence and our comments concerning cloud-based services, we do not believe there is any need for additional statutory licences under the Act. We also do not believe any of the uses covered by a statutory licence should be covered by a free use exception.

## FAIR DEALING EXCEPTIONS

***Questions 45 to 47:***

155. We are addressing these questions as a group.

156. Any fair dealing or fair use exceptions must operate within the framework of the three-step test in Berne and in TRIPS. In other words they must be confined to certain special cases, they must not conflict with the normal exploitation of the work, and they must not unreasonably prejudice the legitimate interests of the rights owner.

157. Screenrights believes the current fair dealing provisions comply with our treaty obligations and operate effectively in the digital environment.

158. The fair dealing exceptions refer to a "dealing", a term which is technology neutral and covers all uses of works and other subject matter.

159. This dealing must be tied to a specific purpose – with these purposes, and their relationship to the statutory licences, well understood in light of case law.

160. Works may be quoted under the fair dealing provisions, provided the quote falls within one of the specified purposes. To allow for quotation outside these purposes, for example to sample one work in another or to use a work for the purpose of transforming it, can be, and is, adequately dealt with under a commercial licence obtained from the rightsholder. Filmmakers and publishers are used to obtaining permission to quote from other works and have well-established procedures to do this.

## FAIR USE

***Questions 52 to 53:***

161. We address these questions together.

162. As the ALRC notes, there have been a number of reviews that have considered fair use, both here in Australia, and recently in the UK with the Hargreaves Review.

163. None of the Australian reviews have recommended an open US-style fair use exception. The Hargreaves Review also didn't recommend a fair use exception, in fact most submissions were strongly opposed to this.

164. As we have stated above, the current fair dealing exceptions are technology neutral and are tied to specific purposes that are well understood in case law. In our experience dealing with access to audiovisual material, the combination of these fair dealing provisions and other free exceptions, along with the statutory licences, provide for a fair and balanced regime that allows considerable access to audiovisual material compared to legislation in other territories.

165. A broad fair use exception would arguably contravene the three-step test in our international obligations. It would also be uncertain in its operation and runs the risk of deterring use of copyright material due to fear of expensive litigation and the need to obtain legal advice. This would discourage the start up of businesses that need certainty in copyright laws before they take advantage of new technologies for the use of copyright material.

166. In the educational context, there is a clear understanding of the demarcation between the fair dealing provisions and the statutory licences. From our experience talking to teachers who regularly use the licence, they know that students can use material for their own research or study, and that institutional use for teaching falls within the licence. Any amendments would need to be clear in terms of their relationship to the licence in order to avoid uncertainty on behalf of educators who regularly use film and television and don't have time to consider the copyright implications of their use, or whether they need permission.

167. We also believe there are fundamental difficulties with trying to transpose a doctrine from the US system into Australian law. The US fair use provisions can only be understood within a legal culture of high-volume litigation and a body of Constitutional law developed around the requirement that "Congress shall make no law abridging the freedom of speech, or of the press" (the First Amendment). Australia has neither feature in its legal system – and a US style fair use provision would be alien to our Act and to the legal system into which it would be imported.

168. We refer the ALRC to the table of exceptions at Appendix A. We believe this table demonstrates that the Australian education sector has comprehensive access to broadcast material with clear lines of certainty as to what they are allowed to do. This should be compared to the column relating to educational use under the US Fair Use provision – educational use is more limited in the United States and it is often unclear as to whether a use does or does not require permission.

Screenrights submits that any fair use provisions must be viewed from within the prism of our international obligations. Our current fair dealing provisions comply with these obligations, they operate effectively and they are well understood by users of copyright material. We submit that the introduction of a broad fair use provision not only runs the risk of contravening our international obligations, it would also create uncertainty. Further, we submit that a comparison of allowed educational uses of broadcast material in Australia and the US demonstrate that Australian educators have greater access to broadcast programs and more certainty in what they are allowed to do that their counterparts in the US.

# ANNEXURE A: INTERNATIONAL COMPARISON OF STATUTORY EXCEPTIONS AND OTHER PROVISIONS FOR EDUCATIONAL USE OF AUDIO VISUAL WORKS

**The following tables relate to films, sound recordings & broadcasts**

| ***Use*** | **Australia** | **NZ** | **Permitted under the EU Directive?** | **UK: current** | **UK: proposed[16]** | **US Code** | **US: examples of practical application[17]** |
|---|---|---|---|---|---|---|---|
| *Copy TV & radio broadcasts for educational purposes* | Permitted under statute: Part VA statutory licence is available to "educational institutions" (whether commercial or non-commercial); broad & non-exclusive definition of "educational purposes"; no limits on amount; no limits on period of time for which copy may be retained.<br><br>(s200(2) also provides a free | Exception subject to licence: s48 of the Copyright Act ("NZCA") permits this for non-profit "educational establishments" but limited to situations where a licensing scheme is not available.[18]<br>Screenrights has in place a licensing scheme under section 48 of | Sometimes: "specific acts of reproduction made by publicly accessible libraries, educational establishments ... which are not for direct or indirect economic or commercial advantage": Article 5, 2(c). | Exception subject to licence: s35 CDPA permits this for "educational purposes" but limited to situations where a certified licensing scheme is not available & where the use is non-commercial[19]<br><br>Also: s32 CDPA provides a free exception to use recordings, films & broadcasts for teaching/receiving instruction in | No proposed change | Sometimes: "fair use" may apply, depending on the circumstances. | "non-profit educational institution" only;[20]<br><br>"may only keep the copy for 45 days … may be used once by individual teachers in the course of relevant teaching activities, and repeated once only when re-inforcement is necessary in classrooms and similar places |

[16] That is, by Gowers or Hargreaves or by government announcement. Note that the UK government is still in the process of acting on the Hargreaves recommendations. For example, in June 2012, it published a Summary of Responses on its *Consultation on Copyright*: see http://www.ipo.gov.uk/hargreaves-copyright.htm.

[17] The information in this column sets out how fair use is apparently being applied now within educational institutions in the United States. The information may well represent applications of fair use that are either too cautious or too optimistic, but as far as we are aware, this information does represent current

| *Use* | Australia | NZ | Permitted under the EU Directive? | UK: current | UK: proposed[16] | US Code | US: examples of practical application[17] |
|---|---|---|---|---|---|---|---|
| | exception to educational institutions to copy radio broadcasts intended for educational purposes to use "in the course of [non-profit] instruction".) | the NZCA which allows educational establishments to copy 'communicatio n works' for their educational purposes. | | making films & film sound-tracks | | | within a single building, cluster or campus … during the first ten consecutive school days in the 45-calendar-day retention period".[21] |
| *Copy TV & radio broadcasts for exam questions & answers* | Permitted under statute: Part VA licence statutory & (in relation to certain radio programs) the free exception in 200(2) are available. | Permitted under statute: s49 NZCA (free exception) | Sometimes: "specific acts of reproduction made by publicly accessible libraries, educational establishments ... which are not for direct or indirect economic or commercial advantage": Article 5, 2(c). | Permitted under statute: s32(3) CDPA (free exception) | No change required | Sometimes: "fair use" may apply, depending on the circumstances. | |
| *Copy TV & radio broadcasts to include in an institution's library of resources* | Permitted under statute: the statutory licence in Part VA and the narrower free exception in s200(2) would permit this.<br><br>(s200(2) also | Exception subject to licence: s48 of the Copyright Act ("NZCA") permits this for non-profit "educational establishments | Sometimes: "specific acts of reproduction made by publicly accessible libraries, educational establishments ... which are not for | Exception subject to licence: s35 CDPA permits this for "educational purposes" but limited to situations where a certified licensing scheme is not available & | No proposed change | Sometimes: "fair use" may apply, depending on the circumstances. | No: "may only keep the copy for 45 days … may be used once by individual teachers in the course of relevant |

[21] Pasco County Schools: www.pasco.k12.fl.us/media/copyright; Oregon State University: printmail.oregonstate.edu/guidelines-air-broadcast-programming-educational-purposes.

| *Use* | Australia | NZ | Permitted under the EU Directive? | UK: current | UK: proposed[16] | US Code | US: examples of practical application[17] |
|---|---|---|---|---|---|---|---|
| | provides a free exception to educational institutions to copy radio broadcasts intended for educational purposes to use "in the course of [non-profit] instruction".) | " but limited to situations where a licensing scheme is not available.<br>As above, Screenrights makes available such a licence. | direct or indirect economic or commercial advantage": Article 5, 2(c). | where the use is non-commercial[22]<br><br>Also: s32(2) CDPA provides a free exception to use recordings, films & broadcasts for teaching/receiving instruction in making films & film sound-tracks | | | teaching activities, and repeated once only when re-inforcement is necessary".[23] |
| *Make a preview copy of a TV or radio broadcast to decide whether to retain a copy for teaching* | Permitted under statute: s135F is a free exception that allows educational institutions to copy a broadcast in order to preview it before making a decision as to whether to use it for "educational purposes". | Exception subject to licence: s48 of the Copyright Act ("NZCA") permits this for non-profit "educational establishments " but limited to situations where a licensing scheme is not available.<br>The available Screenrights | Sometimes: "specific acts of reproduction made by publicly accessible libraries, educational establishments ... which are not for direct or indirect economic or commercial advantage": Article 5, 2(c). | Exception subject to licence: s35 CDPA: extends to "educational purposes" but limited to situations where a certified licensing scheme is not available & where the use is non-commercial | No proposed change | Sometimes: "fair use" may apply, depending on the circumstances. | "After the first ten consecutive school days, off-air recordings may be used up to the end of the 45-ccalndar-day retention period only for teacher evaluation purposes, i.e., to determine whether or not to include the broadcast program in the teaching |

[22] A licence scheme certified under section 143 CDPA is available, and is operated by ERA.

[23] Pasco County Schools: www.pasco.k12.fl.us/media/copyright; Oregon State University: printmail.oregonstate.edu/guidelines-air-broadcast-programming-educational-purposes.

| *Use* | Australia | NZ | Permitted under the EU Directive? | UK: current | UK: proposed[16] | US Code | US: examples of practical application[17] |
|---|---|---|---|---|---|---|---|
| | | licence includes a preview provision. | | | | | curriculum, and the recording may bot be used in instruction, for student exhibition, or any other non-evaluation purposes without authorization".[24] |
| *Use content management systems (such as Clickview, Moodle and Blackboard) to store copied TV & radio broadcasts* | Permitted under statute: statutory licence in Part VA allows for copied programs to be stored both in digital and analogue forms | Exception subject to licence: s48 of the Copyright Act ("NZCA") permits this for non-profit "educational establishments " but limited to situations where a licensing scheme is not available.<br>The Screenrights licensing | Sometimes: "specific acts of reproduction made by publicly accessible libraries, educational establishments ... which are not for direct or indirect economic or commercial advantage": Article 5, 2(c). | Exception subject to licence: s35 CDPA: extends to "educational purposes" but limited to situations where a certified licensing scheme is not available & where the use is non-commercial. | Gowers proposed extending to distance learning students accessing via a virtual learning environment; not specifically mentioned by Hargreaves;[25] no proposals yet announced by government. | Sometimes: "fair use" may apply, depending on the circumstances. | Guidelines and policies we consulted were silent on this issue, so presumably this is not commonly done as a fair use. |

[24] Pasco County Schools: www.pasco.k12.fl.us/media/copyright; Oregon State University: printmail.oregonstate.edu/guidelines-air-broadcast-programming-educational-purposes.

[25] Note, however, Hargreaves' comments: "In copyright, Gowers made nine recommendations aimed at allowing specific activities to be performed with a copyrighted work without the need for a licence .... After two consultations the only concrete action has been the abandonment of efforts to bring in a private copying exception or an exception to cover parody. Other exceptions were not ruled out by the previous Government, but nor have they actually been taken forward."

| ***Use*** | **Australia** | **NZ** | **Permitted under the EU Directive?** | **UK: current** | **UK: proposed[16]** | **US Code** | **US: examples of practical application[17]** |
|---|---|---|---|---|---|---|---|
| | | scheme covers this use. | | | | | |
| *Use content management systems to communicate copied TV & radio broadcasts to students within the institution* | Permitted under statute: Part VA statutory licence allows for the communication of copied broadcasts. | Exception subject to licence: s48 of the Copyright Act ("NZCA") permits this for non-profit "educational establishments" but limited to situations where a licensing scheme is not available.<br>The Screenrights licensing scheme covers this use. | No | Exception subject to licence: s35 CDPA: extends to "educational purposes" but limited to situations where a certified licensing scheme is not available & where the use is non-commercial | Gowers proposed extending s35CDPA to enable educational institutions to make copied broadcasts available to distance learning students accessing via a virtual learning environment & via electronic whiteboards; no changes yet announced by government | Sometimes: "fair use" may apply, depending on the circumstances. | Guidelines and policies we consulted were silent on this issue, so presumably this is not done as a fair use (at least in the relevant organisations) – in any case, in many institutions, it would appear that the evaluation that the use of material copied off-air is only a "fair use" in face-to-face teaching may indicate that this use is outside what is generally perceived to be "fair". |
| *Use content management systems to communicate* | Permitted under statute: statutory licence in Part VA allows for the | Exception subject to licence: s48 of the Copyright | No | No: s35(1A) CDPA extends to some communication of broadcasts copied | Gowers proposed extending s35CDPA to | Sometimes: "fair use" may apply, depending on | No: "they must be shown either in a classroom or other location |

| ***Use*** | **Australia** | **NZ** | **Permitted under the EU Directive?** | **UK: current** | **UK: proposed[16]** | **US Code** | **US: examples of practical application[17]** |
|---|---|---|---|---|---|---|---|
| *copied TV & radio broadcasts to students outside the institution* | communication of copied broadcasts, whether the students are within the institution or obtaining access from outside the institution's premises | Act ("NZCA") permits this for non-profit "educational establishments" but limited to situations where a licensing scheme is not available.<br>The Screenrights licensing scheme covers this use. | | under the section, but limits this to communication on the premises, where the communication may only be accessed by other people on the premises. | enable educational institutions to make copied broadcasts available to distance learning students accessing via a virtual learning environment & via electronic whiteboards; no changes yet announced by government | the circumstances. | devoted to instruction such as a studio, library, or auditorium if it is used for instruction".[26] |
| *Make compilations of extracts of material copied from TV & radio* | Permitted under statute: Part VA statutory licence imposes no limitations on how material is used, other than it be used for the relevant institution's "educational purposes" | Exception subject to licence: s48 of the Copyright Act ("NZCA") permits this for non-profit "educational establishments" but limited to situations where a licensing scheme is not available. | Sometimes: "specific acts of reproduction made by publicly accessible libraries, educational establishments ... which are not for direct or indirect economic or commercial advantage": Article 5, 2(c). | Exception subject to licence: s35 CDPA: extends to "educational purposes" but limited to situations where a certified licensing scheme is not available & where the use is non-commercial | No change proposed. | Sometimes: "fair use" may apply, depending on the circumstances. , though availability of the relevant program or material from a commercial source may militate against a fair use. | No: "… recorded programs may not be altered from their original content. Off-air recordings may not be physically or electronically combined or merged to constitute teaching anthologies or compilations".[27] |

[26] Brown University: www.brown.edu/Administration/Copyright/media.html.

[27] Pasco County Schools: www.pasco.k12.fl.us/media/copyright; Oregon State University: printmail.oregonstate.edu/guidelines-air-broadcast-programming-educational-purposes.

| *Use* | Australia | NZ | Permitted under the EU Directive? | UK: current | UK: proposed[16] | US Code | US: examples of practical application[17] |
|---|---|---|---|---|---|---|---|
| | | The Screenrights licensing scheme covers this use. | | | | | |
| *Format shift copies made of TV & radio broadcasts* | Permitted under statute: Part VA statutory licence does not impose any technological or format restrictions (so a video may be transferred to disc, and a copy on a disc may be copied onto a server or USB) | Exception subject to licence: s48 of the Copyright Act ("NZCA") permits this for non-profit "educational establishments " but limited to situations where a licensing scheme is not available.<br>The Screenrights licensing scheme covers this use. | Sometimes: "specific acts of reproduction made by publicly accessible libraries, educational establishments ... which are not for direct or indirect economic or commercial advantage": Article 5, 2(c). | Exception subject to licence: s35 CDPA: extends to "educational purposes" but limited to situations where a certified licensing scheme is not available & where the use is non-commercial | No change proposed. | Sometimes: "fair use" may apply, depending on the circumstances, though availability of the relevant program or material from a commercial source may militate against a fair use. | No: "may only keep the copy for 45 days … may be used once by individual teachers in the course of relevant teaching activities, and repeated once only" |
| *Make copies of TV & radio broadcasts for other educational institutions* | Permitted under statute: statutory licence in Part VA allows for copying on behalf of an educational | Exception subject to licence: s48 of the Copyright Act ("NZCA") permits this for | Sometimes: "specific acts of reproduction made by publicly accessible libraries, | Exception subject to licence: to the extent that s35 CPDA extends to recording broadcasts & | No change proposed. | Sometimes: "fair use" may apply, depending on the circumstances. | No: "Off-air recordings may only be made at the request of and used by individual |

| *Use* | **Australia** | **NZ** | **Permitted under the EU Directive?** | **UK: current** | **UK: proposed[16]** | **US Code** | **US: examples of practical application[17]** |
|---|---|---|---|---|---|---|---|
| | institution & for educational institutions (& licensed resource centres) to provide copies to participating educational institutions | non-profit "educational establishments " but limited to situations where a licensing scheme is not available.<br>The Screenrights licensing scheme covers this use where the copy is made for another institution which also has a current Screenrights licence. | educational establishments ... which are not for direct or indirect economic or commercial advantage": Article 5, 2(c). | making copies of recordings "by or on behalf of" relevant institutions, in situations where a certified licence scheme is not available. | | | teachers and may not be regularly recorded in anticipation of requests. No broadcast program may be recorded off air more than once at the request of the same teacher regardless of the number of times the program may be broadcast".[28] |
| *Play copies of TV & radio broadcasts in class* | Permitted under statute: s28 allows educational institutions to show programs in class without payment | Permitted under statute: s47 NZCA | Not clear: exceptions are, however, permitted where the sole purpose is "illustration for | Permitted under statute: s34 CPDA | No change required. | Permitted under statute: s110(1) of US Copyright Law provides a free exception, | Sometimes: unless the copy were authorised by the relevant rights holder(s), the guidelines |

[28] Pasco County Schools: www.pasco.k12.fl.us/media/copyright; Oregon State University: printmail.oregonstate.edu/guidelines-air-broadcast-programming-educational-purposes.

| *Use* | Australia | NZ | Permitted under the EU Directive? | UK: current | UK: proposed[16] | US Code | US: examples of practical application[17] |
|---|---|---|---|---|---|---|---|
| | | | teaching or scientific research … to the extent justified by non-commercial purpose to be achieved": Article 5, 3(a). | | | provided the relevant copy was lawfully made. | and policies we consulted indicate that many institutions would only play that copy once for instructional purposes and a second time for reinforcement. To play it more often would require a further analysis of the "fair use" criteria. |
| *Play TV & radio in class* | Permitted under statute: the free exception in s199 allows anyone (including educational institutions) to receive broadcasts anywhere without infringing copyrights in, for example, any film or recording included in the broadcast; the free exception in s28 then deems the playing of the music and other works not covered by s199 not to be a public performance | Permitted under statute: s47 NZCA | Not clear: exceptions are, however, permitted where the sole purpose is "illustration for teaching or scientific research … to the extent justified by non-commercial purpose to be achieved": Article 5, 3(a). | Permitted under statute: s34 CPDA | No change required. | Permitted under statute: s110(1) of US Copyright Law provides a free exception. | – |

| *Use* | Australia | NZ | Permitted under the EU Directive? | UK: current | UK: proposed[16] | US Code | US: examples of practical application[17] |
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| *Stream TV & radio broadcasts from the internet to classes* | Permitted under statute– section 28 allows educational institutions to show programs in class – this covers streaming | Permitted under statute: s47 NZCA | Not clear: exceptions are, however, permitted where the sole purpose is "illustration for teaching or scientific research … to the extent justified by non-commercial purpose to be achieved": Article 5, 3(a). | Subject to licence: s35(1A) CDPA extends to some communication of broadcasts copied under the section, but only where a certified license scheme is not in place. | Gowers proposed extending s35CDPA to distance learning students accessing via a virtual learning environment, but no proposals yet announced by government. | Permitted under statute: s110(1) of US Copyright Law provides a free exception. | – |
| *Copy podcasts & vodcasts of TV and radio programs from the internet* | Permitted under statute: statutory licence in Part VA allows for the copying of broadcast material put online by the broadcaster | Exception subject to licence: s48 of the Copyright Act ("NZCA") permits this for non-profit "educational establishments " but limited to situations where a licensing scheme is not available.<br>The Screenrights | Sometimes: "specific acts of reproduction made by publicly accessible libraries, educational establishments ... which are not for direct or indirect economic or commercial advantage": Article 5, 2(c). | No:[29] educational institutions rely instead on the terms and conditions of websites from which they wish to download. | No proposed changes. | Sometimes: "fair use" may apply, depending on the circumstances. | "Brevity and spontaneity must be considered when determining how much … can be copied and/or digitized for classroom use. repeated or recurring use of the material requires the copyright holder's permission".[30] |

[29] The broadcast copying provisions in s35 CDPA relate only to "broadcasts". Under s6 CDPA, this does not include copies of broadcasts that have been "archived" online for download or streaming. Educational institutions wanting to download podcasts and vodcasts therefore need to rely on the terms and conditions of websites hosting those materials.

[30] University of Maine, Farmington: http://umf.maine.libguides.com/content.php?pid=97274&sid=729101.

| *Use* | Australia | NZ | Permitted under the EU Directive? | UK: current | UK: proposed[16] | US Code | US: examples of practical application[17] |
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| | | licensing scheme covers this use. | | | | | "Spontaneity means there isn't reasonable time to get permission before using the item for maximum educational effect. This means you can use it once. If you wish to use it again you would presumably have time to gain permission."[31] |
| *Copy material other than podcasts and vodcasts of TV and radio programs from the internet* | Sometimes: the free exception in s200AB may plug gaps between what is permitted under other exceptions in the Act (including those referred to above) & how copyright owners normally exploit their material | Exception subject to licence: s48 of the Copyright Act ("NZCA") permits this for non-profit "educational establishments " but limited to situations where a licensing scheme is not available.<br>The | Sometimes: "specific acts of reproduction made by publicly accessible libraries, educational establishments ... which are not for direct or indirect economic or commercial advantage": Article 5, 2(c). | No: educational institutions rely instead on the terms and conditions of websites from which they wish to copy material. | No proposed changes. | Sometimes: "fair use" may apply, depending on the circumstances. | |

[31] University of Hawaii: http://www2.honolulu.hawaii.edu/facdev/guidebk/policies/copyrite.htm

| *Use* | Australia | NZ | Permitted under the EU Directive? | UK: current | UK: proposed[16] | US Code | US: examples of practical application[17] |
|---|---|---|---|---|---|---|---|
| | | Screenrights licensing scheme covers copying all non-infringing audio-visual material available on the Internet, subject to TPMs. | | | | | |
| *Email copies of TV and radio broadcasts to staff & students* | Permitted under statute: statutory licence in Part VA allows for copied programs to be communicated to staff & students, including by email | Exception subject to licence: s48 of the Copyright Act ("NZCA") permits this for non-profit "educational establishments" but limited to situations where a licensing scheme is not available.<br>The Screenrights licensing scheme covers this use. | Not clear: exceptions are, however, permitted where the sole purpose is "illustration for teaching or scientific research … to the extent justified by non-commercial purpose to be achieved": Article 5, 3(a). | No: s35(1A) CDPA extends to some communication of broadcasts copied under the section, but limits this to communication on the premises, where the communication may only be accessed by other people on the premises. | Gowers proposed a broadening of s35 CPDA, but no changes yet announced by government. | Sometimes: "fair use" may apply, depending on the circumstances. | Not raised as permissible fair use in relation to copying in footnoted guidelines.[32]<br>Note also that s110(2) amendments to the US Copyright Law impose obligations to apply technological means to prevent people retaining or distributing material they receive during an online class |

[32] Pasco County Schools: www.pasco.k12.fl.us/media/copyright; Oregon State University: printmail.oregonstate.edu/guidelines-air-broadcast-programming-educational-purposes.

| *Use* | Australia | NZ | Permitted under the EU Directive? | UK: current | UK: proposed[16] | US Code | US: examples of practical application[17] |
|---|---|---|---|---|---|---|---|
| *Captioning material copied from TV for deaf students* | Permitted under statute: statutory licence in Part VA imposes no limitations on altering or adding to copied material. | Exception subject to licence: s48 of the Copyright Act ("NZCA") permits this for non-profit "educational establishments" but limited to situations where a licensing scheme is not available.<br>The Screenrights licensing scheme covers this use. | Sometimes: exceptions are permitted where the use is "for the benefit of people with a disability, which are directly related to the disability and of a non-commercial nature, to the extent required by the specific disability": Article 5, 3(b). | Exception subject to licence: s35 CDPA: extends to "educational purposes" but limited to situations where a certified licensing scheme is not available & where the use is non-commercial | No proposals for change. | Sometimes: "fair use" may apply, depending on the circumstances. | In 1976, the House Committee on the Judiciary formulated guidelines, stating (inter alia) that fair use was available provided off-air copying only to produce one master and one working copy; that captioned version only played on institution's premises; and both copies to be kept "in the hands of a limited number of authorized personnel".[33] |
| *Flexibility to deal with situations not specifically addressed in the* | Permitted under statute: section 200AB (free exception) may plug | No | No: the EU Directive sets out a closed list of permissible | No | No.[35] | Yes: "fair use" provides for uses not otherwise | |

[33] In G. Handman, *Video Collection Development in Multi-type Libraries* (Greenwood Press, Westport, 2002), no indication is given that institutions adopt any wider practices.

| *Use* | Australia | NZ | Permitted under the EU Directive? | UK: current | UK: proposed[16] | US Code | US: examples of practical application[17] |
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| *relevant legislation*[34] | gaps between what is permitted under other exceptions in the Act (including those referred to above) & how copyright owners normally exploit their material | | exceptions | | | specifically dealt with, provided the four relevant factors are met. | |

[35] Gowers recommended a number of changes that should be made to address specific copyright issues, but did not recommend any broad "fair use" exception; Hargreaves rejected the introduction of a broad fair use exception on the basis of the legal framework within which the UK operates as a result of its membership of the EU. However, Hargreaves also noted (at 45) that "the success of high technology companies in Silicon Valley owes more to attitudes to business risk and investor culture, not to mention other complex issues of economic geography, than it does to the shape of IP law". The current consultation in relation to the implementation of Hargreaves focuses on whether or not specific situations should be addressed by introducing new or amended exceptions, and not on whether a broad and flexible exception should be introduced.

[34] The situations listed above do not exhaustively cover the situations that may be covered by statutory provisions – these are merely examples of the most common situations. In particular, in Australia, Part VA does not adopt the approach of listing specific activities that are covered, but generally permits the copying and communication of material from radio and TV "by or on behalf of" an educational institution.

**Libraries & collecting institutions**

| *Use* | Australia | NZ | EU Directive | UK: current | UK: proposed | US |
|---|---|---|---|---|---|---|
| *Copying AV material for preservation purposes* | Sometimes: free exception in s110B to copy "first records" and "first copies" of AV material; broader exception for "key cultural institutions" in 110BA. | Exception subject to licence: free exception in s55 only applies where it is not reasonably practicable to purchase a replacement copy. Does not apply to broadcasts as not items in the collection. | Sometimes: "specific acts of reproduction made by publicly accessible libraries, educational establishments ... which are not for direct or indirect economic or commercial advantage": Article 5, 2(c). | No: s42 CDPA relates to "works" & editions only, & then only if in the collection (therefore not broadcasts) | Recommendations 10a & 10b of Gowers & Hargreaves at 5.32 recommended extending exception to cover all types of copyright material.[36] Gowers also proposed a format shifting exception. In its response to Hargreaves, the government flagged that it would widen the existing archiving exceptions. | Sometimes: s108(b) provides a free exception in relation to unpublished materials, although limits the use of digital copies to the premises of the library or archive. |
| *Copying AV material to replace an item* | Sometimes: free exception in s110B to make replacement copies of AV material where the item is no longer commercially available in a reasonable time. | Exception subject to licence: free exception in s55 only applies where it is not reasonably practicable to purchase a replacement copy. Does not apply to | Sometimes: "specific acts of reproduction made by publicly accessible libraries, educational establishments ... which are not for direct or indirect economic or commercial advantage": | Exception subject to licence: s42 CDPA, provided not reasonably practicable to purchase a copy | No change required. | Sometimes: s108(c) provides a free exception in relation to published materials where the item is "cannot be obtained at a fair price", although any digital copy may only be used on the premises of the library or archive. |

[36] The Review noted at 5.32 that: "Supporting the potential of new technologies for archiving will prevent the loss of works, & could open the way to new services based on digital use of those archives. We may well find that this public digital archive turns out to have considerable economic as well as social & cultural value, but this will not happen if our cultural institutions are prevented from securing it through digitisation." The Review did not, however, state who would be the beneficiary of that economic value – and the extent to which downstream uses of that material may be subject to either copyright owner control or payments to copyright owners (including via collective licensing).

| *Use* | Australia | NZ | EU Directive | UK: current | UK: proposed | US |
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| | | broadcasts as not items in the collection. | Article 5, 2(c). | | | |
| *Copying AV material for a client's research or study* | Sometimes: section 200AB (free exception) may permit this in cases where s110B(a)(a) does not. | No. Possibly sometimes.<br>This is not covered under the fair dealing provision in section 43. But there may be very limited circumstances where this could apply- copying a film for educational purposes under section 45-where the lesson is on how to make films or film soundtracks- copying must be done by or on behalf of the person giving or receiving the lesson- and only where a licensing scheme covering that use is not in place.<br>[ | Sometimes: "specific acts of reproduction made by publicly accessible libraries, educational establishments ... which are not for direct or indirect economic or commercial advantage": Article 5, 2(c). | No: current provision relates to "works" & editions only, & then only if a charge is made that includes a charge to the general expenses of the library. | No changes proposed. | Sometimes: s108(d) provides a free exception for providing a library client with "a small part" of audiovisual material "dealing with news" for "private study, scholarship or research, and for more than "a small part" only if the material "cannot be obtained at a fair price". |

| *Use* | Australia | NZ | EU Directive | UK: current | UK: proposed | US |
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| *Copying AV material to supply to another collecting institution* | Sometimes: s200AB (free exception) may permit this in cases where the replacement and research provisions do not (ss110B & 110BA). | No. No. section 54 only applies to literary, dramatic , musical or artistic works | Sometimes: "specific acts of reproduction made by publicly accessible libraries, educational establishments ...which are not for direct or indirect economic or commercial advantage": Article 5, 2(c). | No: s41 CDPA only applies to works, & in relation to published works other than articles, only applies where name & address of person entitled to authorise copying is not known | No changes proposed | Sometimes: s108(b) & (c) provide free exceptions to supply copies of unpublished material to other libraries for research use and to replace published items, provided replacements are not available "at a fair price". |
| *Flexibility to deal with situations not specifically addressed in the relevant legislation* | Permitted under statute: section 200AB (free exception) may plug gaps between what is permitted under other exceptions in the Act (including those referred to above) & how copyright owners normally exploit their material | No | No: the EU Directive sets out a closed list of permissible exceptions | No | No.[37] | Yes: "fair use" provides for uses not otherwise specifically dealt with, provided the four relevant factors are met. |

[37] Gowers recommended a number of changes that should be made to address specific copyright issues, but did not recommend any broad "fair use" exception; Hargreaves rejected the introduction of a broad fair use exception on the basis of the legal framework within which the UK operates as a result of its membership of the EU. However, Hargreaves also noted (at 45) that "the success of high technology companies in Silicon Valley owes more to attitudes to business risk and investor culture, not to mention other complex issues of economic geography, than it does to the shape of IP law". The current consultation in relation to the implementation of Hargreaves focuses on whether or not specific situations should be addressed by introducing new or amended exceptions, and not on whether a broad and flexible exception should be introduced.

**Miscellaneous uses (including personal uses)**

| ***Use*** | **Australia** | **NZ** | **EU Directive** | **UK: current** | **UK: proposed** | **US** |
|---|---|---|---|---|---|---|
| *Make temporary reproductions* | Permitted under statute: free exceptions are available in ss111A & 111B | Yes: free exception in NZCA s43A | Yes: mandatory exception for temporary acts of reproduction which are integral to a technological process, the purpose of which is to enable the lawful use in a network between third parties by an intermediary & which has no separate economic significance | Yes: s28A CDPA, which relates to all copyright material other than computer programs and databases (with s50D covering databases). | No changes proposed | Sometimes: s117(a)(1) applies in respect of temporary reproductions in RAM of a computer program; in other cases, "fair use" may apply, depending on the circumstances. |
| *Copy broadcasts for research & study* | Permitted under statute: s103C provides a free exception that allows fair dealing for research or study | Subject to licence: NZCA s43 provides a free fair dealing exception for research or private study. | Sometimes: several category of exception may apply here: Article 5, 2(b) relating to "reproductions on any medium made by a natural person for private use" (subject to compensation); Article 5, 3(a) relating to "use for the sole purpose of illustration for teaching or scientific research"; and Article 5, 3(o), relating to "use in | No: current s29 CDPA applies only to "works", & then only for private study & non-commercial research | Yes: proposed by Hargreaves Review at 5.32 (likely to maintain current parameters of private & non-commercial application only) | Sometimes: "fair use" may apply, depending on the circumstances. |

| *Use* | Australia | NZ | EU Directive | UK: current | UK: proposed | US |
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| | | | certain other cases of minor importance". | | | |
| *Making multiple accessible copies of AV material for people with disabilities* | Sometimes: to the extent this is by educational institutions or institutions assisting people with an intellectual disability, Parts VA & VB apply; in other cases, the service may be done as part of services of the Crown under s183; in other cases, s200AB may be available. | Subject to licence: NZCA s48 provides an exception for "educational establishments" subject to the availability of a licence. Educational establishments includes a variety of institutions such as "special" schools, clinics, etc. [ | Yes: exceptions are permitted where the use is "for the benefit of people with a disability, which are directly related to the disability and of a non-commercial nature, to the extent required by the specific disability": Article 5, 3(b). | No: s31B & 31C CDPA (free provisions) only available for works & only where a licensing scheme in place | No changes proposed. | Sometimes: "fair use" may apply, depending on the circumstances. |
| *Captioning for people with hearing difficulties* | Sometimes: subject to the usual provisos, s200AB is likely to provide a free exception where Part VA and s183 are not available. | Subject to licence: NZCA s48 again may apply for a deaf school. | Yes: for the benefit of people with a disability, directly related to the disability & of a non-commercial nature, to the extent required by the specific disability: Article 5, 3(b). | No: current s31A CDPA applies only to "works". | No changes proposed. | Sometimes: "fair use" may apply, depending on the circumstances. |
| *Criticism or review* | Permitted under statute: s103A provides a free exception. | Yes: free exception in NZCA s42. | Yes: provided the material has been published, use is in accordance | No: current s30 CDPA applies only to "works". | No changes proposed | Sometimes: "fair use" may apply, depending on the circumstances. |

| *Use* | Australia | NZ | EU Directive | UK: current | UK: proposed | US |
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| | | | with fair practice & to the extent required by the purpose, & provided the source & author are indicated: Article 5, 3(d). | | | |