
COPYRIGHT AND THE DIGITAL ECONOMY DISCUSSION PAPER



screenrights

Supplementary submission by Screenrights

13 September 2013

SUPPLEMENTARY SUBMISSION IN RESPONSE TO COPYRIGHT ADVISORY GROUP – SCHOOLS (SEPTEMBER 2013)

Thank you for the opportunity to provide a brief response to the September 2013 supplementary submission from the Copyright Advisory Group – Schools (CAG).

CAG makes several points about voluntary licensing of broadcasts and fair use that we would like to address:

Comprehensive access to broadcasts requires legislation

Firstly, as we stated in our previous submissions and in our discussions with the ALRC, some form of statutory intervention is necessary to enable comprehensive educational access to broadcast material. This point is acknowledged by CAG on page 6 of its submission.

Legislative voluntary licences are not necessarily more “nimble”

However, we fail to see what advantage any of the suggested voluntary mechanisms have over the current statutory licence. As we have stated, in our experience administering both voluntary and statutory licences, voluntary licences are no more “nimble” than the Part VA licence in the Australian Copyright Act.

CAG refers to the UK Box of Broadcasts service as an example of the flexibility of the UK voluntary licence. Similar services have flourished under the Australian statutory licence (Clickview, EnhanceTV Direct, RMIT Informit and Functional Solutions are a few examples). Our understanding is that these services (which were developed in Australia) were actually the inspiration for Box of Broadcasts. In fact, the Australian statutory licence is a worldwide innovator for such services. In comparison, statutory amendment was required in New Zealand to enable resource centre copying of this kind.

Further, both New Zealand and British voluntary licences also require the cumbersome process of repertoire establishment before a licence offers broad access. To allow free access in the absence of an established voluntary licence may be an appealing solution to education, but it is not fair to rightsholders, who will have to set up another licence should they wish to receive payment for the use of their work. As we have an effective and exceptionally flexible licence already operating, why dismantle it, simply to set up another version that does not promise to be any more efficient?

Statutory licences do have scope for non-remunerable uses

CAG states that the statutory licence allows no scope for non-remunerable use. We are not sure what they mean by this. Certain free uses are possible within the framework of the statutory licence – such as viewing or streaming programs in

class under s28, video reticulation into a number of classrooms, preview copying and copies made by students for research or study under fair dealing.

More fundamentally, Part VA requires payment of “equitable remuneration” for uses under the part, but it does not necessarily follow that every use under Part VA is remunerable. It has long been acknowledged that depending on the circumstances, equitable remuneration under the statutory licence may be zero. An example of this is Screenrights records system agreements with resource centres. Provided the copies are supplied to other educational institutions that have a current Screenrights licence, equitable remuneration for the resource centre is zero.

CAG refers to a teacher recording news to show to students, seeming to indicate that this use should be regarded as a free use. This example is not nearly as clear-cut as CAG suggests – and in fact highlights many areas of uncertainty that could arise should Part VA be abolished and replaced with a new licence and a fair use/fair dealing provision for education.

First, the point should be made that under the current Act, teachers can show students the news the next day outside the scope of the licence. News and current affairs can be streamed from a catch up service under s28, a free exception. This clearly demonstrates the scope for non-remunerable uses under the current system.

However, a teacher may choose to record the news – perhaps to use as an ongoing resource to discuss a social issue, or the role of the media. The Part VA licence enables a teacher to do this, and also to put the recording onto an intranet system and keep for use in teaching as long as he or she likes – providing utmost flexibility and ease of use. The network and other rightsholders that invest considerable resources into the production are properly paid when their program is used outside the period in which it is broadcast. Teachers are able to use the broadcast without having to pre-determine how long they want to keep it, whether they want to put it online or whether they want to make it accessible to distance students.

Under the proposed fair use/fair dealing for education model, Screenrights foresees considerable uncertainty about which of these uses would be regarded as free and which should be licensed. In many cases, teachers would not know how they intend to use the program at the time of recording, creating further confusion.

It seems that CAG wants to quarantine off a greater number of free uses from the paid licensing system, and states that legislation should be entirely clear that any use which is free under a proposed fair use provision should not be licensed.

As we have stated, whether you have a statutory or voluntary licence, it will always be a matter of interpretation as to whether a particular use falls under a free exception or should be the subject of a licence. We are sceptical about guidelines

resolving this uncertainty, particularly when these guidelines are negotiated by user groups without rightsholder input as suggested by CAG on page 10 of its submission. Guidelines of this type provide neither fairness nor certainty.

Finally, as we have stated, it will be rightsholders that bear the cost of this uncertainty. They will either have no knowledge that their work has been used in education under the guise of fair use, or if they do know and object, they will have to bear the considerable costs of litigation to defend their rights.

Conclusion

As recognised by CAG, comprehensive access to broadcast material will only be provided with some form of legislation to enable the establishment of licensing. The current Part VA licence already achieves it with flexibility, efficiency and fairness. It also has scope for non-remunerable uses. Why replace it with a new system that offers no advantages?