



screenrights

The Audio-Visual Copyright Society

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Screenrights is the trading name of
The Audio-Visual Copyright Society
Limited ACN 003 912 310

The Secretary
House of Representatives Legal and
Constitutional Affairs Committee
House of Representatives
CANBERRA ACT 2600

By Email: laca.reps@apg.gov.au

Dear Sir or Madam

Inquiry into Harmonisation of Legal Systems

Thank you for granting us an extension of time to deliver our submission to the above Inquiry.

Screenrights respectfully submits the attached document for your consideration.

Please do not hesitate to contact me if you require any further information or clarification.

Yours faithfully

Simon Lake
Chief Executive

House of Representatives Legal and Constitutional Committee

Harmonisation of Legal Systems Relating to Trade and Commerce

SCREENRIGHTS' SUBMISSION

Introduction

1. The Audio-Visual Copyright Society Ltd, trading as Screenrights, was established in 1990 and operates on a non-profit basis as a copyright collecting society for copyright holders in audio and audio-visual works including film producers, film distributors, script writers, visual artists and music publishers and composers.
2. In Australia, Screenrights has administered for some time the statutory licences established under the Copyright Act 1968 (Cth) (the "Australian Act"), for educational copying of broadcasts and is in the process of implementing the more recent statutory licences for government copying of broadcasts and retransmission of free to air broadcasts.
3. Screenrights also operates in New Zealand and has since 1998 offered licences to educational institutions for the copying of broadcasts in accordance with the Copyright Act, 1994 (the "New Zealand Act") .
4. The licensing of audiovisual material through collecting societies such as Screenrights is a small but significant part of the trade in audiovisual works. In 2003/2004 Screenrights' income from licences in Australia exceeded \$17M and in New Zealand \$1M. It is likely that without the collective management of these rights – in some instances supported by statutory provisions - individual copyright owners would not be in a position to exercise these rights. Collective management of rights has created efficiencies and lowered cost to all parties through the economies of scale it offers.

Harmonisation of Copyright Laws

5. Both Australia and New Zealand are signatories to international copyright treaties.¹ These treaties establish minimum standards for copyright protection and ensure that copyright material from Australia and New Zealand receives international protection. To a large extent the process of harmonisation of Australian and New Zealand copyright laws is appropriately viewed in the context of our shared international treaty obligations.
6. To the extent that the laws of either country fall short of our international obligations there is a compelling logic for the harmonisation of laws in a way that meets these obligations. The proper protection of copyright owners' interests is most likely to guarantee future production of copyright works. Any exceptions in national laws to the authors' exclusive copyright rights should be limited in accordance with the three-step test contained in Article 9 of the Berne Convention so that they are limited to certain special cases, which do not conflict with normal exploitation of the work or the author's legitimate interests in the work.
7. In this submission we do not attempt to address copyright issues generally but rather we seek to highlight several key areas of Screenrights operations which are impacted on by current differences in the copyright laws between the two countries.

(a) Educational Copying of Radio and Television Broadcasts

8. Both the Australian and New Zealand copyright laws include provisions which are designed to facilitate educational copying of radio and television broadcasts. In both countries the law envisages a licence scheme to ensure that the copying may take place for the educational purposes of the institutions but with fair payment to the relevant copyright owners. Although this basic policy is present in both the

¹ Both Australia and New Zealand are signatories to the Berne Convention for the Protection of Literary and Artistic Works and the WTO TRIPS agreement. Neither country is yet a signatory to the WIPO Copyright Treaty or the WIPO Performances and Phonograms Treaty

Australian and New Zealand contexts there are some significant differences in the statutory mechanisms between the two jurisdictions.

9. Screenrights administers educational copying licences in both jurisdictions. Due to the differences in the copyright laws between the two countries the form of the licences and the negotiation of those licences are quite different.
10. Part VA of the Australian Act creates a statutory licence which enables educational institutions to copy radio and television broadcasts and communicate such copies for their educational purposes upon payment of equitable remuneration to Screenrights. The structure of this scheme means that both Screenrights and the educational institutions that copy under the statutory licence have certainty as to the coverage of the licence to copy. The rate of equitable remuneration paid by the educational institutions is set by negotiation between the parties or, in the absence of agreement, may be referred to the Copyright Tribunal for determination. Currently approximately 99% of schools, universities and TAFE colleges are covered by a licence and benefit from the operation of this scheme.
11. Section 48 of the New Zealand Act creates a broad exception which allows educational establishments to copy broadcasts and cable programs for their educational purposes. This is then subject to a limitation to the effect that the provision does not apply if, or to the extent, that a licensing scheme is available to cover this copying and the educational establishment knew of the scheme.
12. Various aspects of the statutory provisions of the NZ Act have meant that Screenrights has experienced significant additional costs in establishing and maintaining licensing schemes to cover the NZ educational sector.

- **Uncertainty as to status of licence schemes**

Unlike the Australian Act, the NZ Act does not contain provisions for the declaration of a collecting society. In 1999 when

Screenrights first attempted to establish a scheme with the NZ Universities Screenrights applied to the Copyright Tribunal for a determination of a licensing rate. The NZ Universities sector challenged the very existence of the proposed licence scheme. This challenge was successful on the grounds that as Screenrights had continued to negotiate rates after the reference to the Tribunal it was uncertain whether the proposed licence scheme was in existence. Screenrights appealed this decision to the NZ High Court and was unsuccessful. Screenrights subsequently successfully appealed to the Full Bench of the NZ High Court. The Full Bench of the NZ High Court confirmed that the licence offered by Screenrights was a licence scheme within the meaning of the Act and referred the matter back to the Tribunal for a determination of the rates payable. Prior to the Tribunal hearing the matter Screenrights and the University sector negotiated an agreed rate. This whole process was very expensive and time consuming for both Screenrights and the Universities. Ultimately, the process achieved little more in practice than is achieved in Australia by the declaration process for the collecting society which is a straightforward administrative matter.

Although Screenrights now licenses virtually all NZ universities and polytechnics, the percentage of NZ Schools which have copying licences in place stands at only 25%. In part this low figure for schools is due to the structure of the administration of schools in NZ. However, the lack of statutory recognition of the status of Screenrights as a collecting society for educational licences also, in our view, plays a significant part in the difficulties in securing broader coverage of our licence arrangements and means that greater resources must be applied to simply implementing licensing of schools.

- **Uncertainty as to repertoire**

The NZ scheme operates as an exemption to infringement to the extent that a licensing scheme does not exist. In establishing

licence schemes this meant that Screenrights was asked to prove the extent of its repertoire before institutions would enter into a licence agreement. This process was lengthy and cumbersome and was simply not required under the Australian scheme. This issue becomes less significant after a licence scheme is actually operating but would again become highly relevant if foreshadowed changes to the NZ Act to introduce a communication right do not address the issue properly in the educational copying provisions. (see further below)

- **Uncertainty as to rate payable**

In the NZ scheme there is no statutory requirement that the educational institutions shall pay equitable remuneration for the recording and copying of broadcasts. The terms of a licence scheme may be referred to the Copyright Tribunal for determination of what charges **if any** should be paid for a licence. (Section 163)

13. The New Zealand government is currently considering substantial amendments to the New Zealand Act to address issues of clarification and application of existing rights and exceptions in the digital environment.² Under discussion is a proposal to introduce a technology neutral right of communication to replace the existing technology specific rights in the Act including the “broadcast” right and the “cable programme” right. This proposed amendment will impact on the way in which the existing Section 48 operates and Screenrights, jointly with the New Zealand Vice Chancellor’s Committee has made a submission to the New Zealand Ministry of Economic Development in relation to possible redrafting of Section 48 to accommodate a new communication right within the existing statutory approach. Unless the educational copying provisions are amended to include a right to copy **and communicate** broadcasts Screenrights will be unable to offer licences to educational institutions which extend beyond copying.

² See Cabinet Economic Development Committee, Digital Technology and the Copyright Act 1994: Policy Recommendations available at http://www.med.govt.nz/buslit/int_prop/digital/cabinet/index.html

Educational institutions would then need to negotiate individual clearance to communicate broadcasts which they copy or face possible infringement proceedings. The transaction costs for copyright owners and the institutions of such arrangements would mean that such licences would be unlikely to eventuate.

14. To the extent that the NZ legislation provides the possibility of educational copying for no payment in circumstances where a licensing scheme is not in place or even after a licensing scheme had been put in place where the Copyright Tribunal has decided that no royalty should be payable it may not be fully compliant with its Berne obligations – particularly the three step test of Article 9(2).
15. The individual educational institutions are located in one jurisdiction and so the difference in the law between the jurisdictions is not apparent to our licensees. The differences do impact on Screenrights and cause additional costs for us when administering what is essentially the same educational product in the two markets. In our view the statutory provisions in Australia do work more smoothly and more effectively to deliver the policy objectives of the legislation.

(b) Retransmission

16. The Part VC Scheme of the Australian Act creates a statutory licence which enables pay TV operators to retransmit free-to-air broadcasts upon payment of equitable remuneration to the declared collecting society (the “Part VC Scheme”).
17. Screenrights has been declared the collecting society for the purposes of the Part VC Scheme and is to distribute equitable remuneration collected to copyright holders in works, sound recordings and cinematograph films included in free-to air broadcasts. Proceedings are currently before the Copyright Tribunal for the purpose of the determination of equitable remuneration in accordance with the statutory scheme.

18. Section 88 of the New Zealand Act allows **cable** programme services to re-transmit free-to air television broadcasts without the permission of the broadcaster or the owners of any works included in a broadcast. As with the structure of the educational provisions this exception is limited if, and to the extent that, there is a licensing scheme in place.
19. The New Zealand government is currently considering the abolition of this section, which would mean that cable re-transmitters would be required to obtain licences to cover retransmission. There is no provision in the NZ Act which deals with retransmission on satellite based pay TV services although most pay TV in New Zealand is delivered by satellite.
20. Screenrights is able to license the retransmission of free to air programs in Australia because of the existence of the statutory scheme. The legislation itself provides certainty as to the validity of the licence scheme and the extent of the repertoire. The Act requires the payment of equitable remuneration to copyright owners and provides a mechanism for the determination of that amount in the absence of agreement. Screenrights would be in a position to offer a similar scheme in New Zealand if appropriate legislative mechanisms were in place.

(c) Government copying

21. Screenrights is the declared collecting society under Division 2 of Part VII of the Australian Act in relation to government copies of television and sound broadcasts and works included in television and sound broadcast. Screenrights is currently finalising negotiations with the Federal government and the state governments to implement this scheme. This process has been time consuming and these delays have meant that copyright owners have not been remunerated for copying which has occurred during these negotiations.
22. Section 63 of the New Zealand Act allows the Crown to make use of copyright material for the purposes of national security, during a period of emergency or as required in the interests of public health and safety. There is a requirement that equitable remuneration be paid for such use.

Outside these provisions the Crown is liable to copyright owners for infringement of copyright by crown employees.³

23. Although the NZ provisions actually allow the government less scope to use copyright material the absence of a statutory mechanism for the collection and distribution of payment to copyright owners has meant that Screenrights has not been in a position to commence negotiations with the NZ government. Screenrights would be in a position to offer a similar scheme to that established in Australia for government copying in New Zealand if appropriate legislative mechanisms were in place.

Thank you for the opportunity to make this submission. We would be pleased to provide any further information that you may require, or elaborate on our views and assertions.

Should you require any further information from Screenrights, please contact **Simon Lake**, Screenrights' Chief Executive, at the address provided.

We wish the Committee well in its deliberations and look forward to participating further in the review process.

Respectfully submitted.

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³ Section 65