

**screenrights**

15 February 2007

Mr Gerry Brownlee  
Chairperson, Commerce Committee  
Parliament Buildings  
Molesworth Street  
Wellington 6160  
New Zealand

Dear Mr Brownlee

**Submissions on new provision for Copyright (New Technologies and Performers' Rights) Amendment Bill**

Thank you for the opportunity to provide the following two submissions.

We would welcome the opportunity to appear in support of these submissions at the appropriate hearings.

Respectfully submitted



Simon Lake  
Chief Executive

## **Screenrights submission on certain provisions of the Copyright (New Technologies and Performers' Rights) Amendment Bill**

### Submission A

#### **Introduction**

1. The Audio-Visual Copyright Society Limited trading as Screenrights is a copyright society representing rightsholders in film, television and radio programmes. Screenrights has over 200 New Zealand members and over 2,500 members in 52 countries world-wide covering the spectrum of copyright owners including broadcasters, producers, writers, music copyright owners and creators of artistic works.
2. Since 1998, Screenrights has licensed New Zealand educational establishments to copy television and radio broadcasts and cable programmes. Screenrights licences cover schools, universities, polytechnics, institutes of technology, wananga and other tertiary institutions.
3. Screenrights welcomes the introduction of the Bill. The modernisation of the Copyright Act to reflect new technologies such as the Internet is critical to both copyright owners and users, and Screenrights particularly welcomes the proposed creation of a technologically neutral communication to the public right.
4. We have attempted to keep this submission as concise as possible, focusing on four key points critical to our members' interests.

#### **Issue one: the creation of a new communication work**

5. The Bill proposes the creation of a new 'communication work' (in section 2(1)), defined to mean 'a transmission, or the making available by a communication technology, of sounds, visual images, or other information, or a combination of any of those, for reception by members of the public, and includes a broadcast or a cable programme'.
6. The communication work is intended to replace and expand upon the subject matters of 'broadcasts and cable programmes'.

7. Screenrights submits that the policy rationale for this amendment is uncertain, and that the enactment of the provision as currently drafted could have unintended consequences including undermining existing copyright protections even to the extent of providing copyright protection via the communication work to communications made by copyright pirates.
8. As to the policy reasons, the World Intellectual Property Organization ('WIPO') had been exploring the conferral of treaty protection on webcasters in the proposed *WIPO Treaty on the Protection of Broadcasting Organizations*, but this has been removed from the draft treaty altogether. At any rate, the communication work provision in the Bill goes far beyond the (now defunct) WIPO proposal by extending beyond audio-visual works to books and other literary works which presumably would fall within the catchall definition of "other information".
9. This new work would create an extremely broad ranging category of copyright subject matter which might be difficult to justify on any conventional policy rationale. The explanatory note combines the introduction of a communication right (replacing the traditional 'to broadcast'/'to include in cable programme service' language) with the concept of a 'communication work'. This connection is odd. The technological reasons for introducing a communication right are distinct from economic reasons which might justify communication work copyright subject matter.

#### Illustration of issue

A person unlawfully making the *Lord of the Rings* motion picture available on a peer-to-peer file sharing service will be the author of a communication work merely by this act of infringement.

#### Drafting suggestion

10. A drafting correction addressing this concern could be to define a communication work to exclude from its scope any such work the making of which was without authorisation of copyright owners whose works were included within the communication.
11. Furthermore, if the policy intention was to cover webcasts in addition to traditional broadcast technologies, then the definition should also be amended to limit the communication work to audio-visual material which is transmitted or made available.

## **Issue two: the effect of the new communication work upon existing section 48**

12. Moreover, the creation of a communication work may create unintended consequences – one of which is in relation to section 48. Section 48 is a free exception for the educational recording of broadcasts and cable programmes (and content therein) to the extent that there is no licensing scheme in place for such copying. The Bill proposes expanding section 48 to include within it educational exercises of the new communication right. Screenrights has previously sought such an amendment in conjunction with the New Zealand Vice-Chancellors' Committee and Screenrights welcomes this change.
13. However the drafting is quite loose; there is no attempt to confine recipients of the communication to students of the institution. It would be desirable to add to this provision a requirement similar to that communications be accessible only by 'authenticated users' ie only staff and students of the institution.
14. A particular consequence for Screenrights' members of the expansive 'communication work' subject matter addressed above is in the 'use it or lose it' operation of the relevant educational exception. The exception would attach to recordings and communications of a 'communication work' (including content therein). Under the reform as proposed, content unlawfully made available on websites such as, for example, YouTube (ie a 'communication work') and recorded and communicated by an educational establishment would fall within the free exception unless a licence scheme was in place for such a communication work. It is impossible that any legitimate licence scheme would be in place for these pirate communication works, given that such a communication work would be made without authorisation of the owners of much of the content included therein.
15. The potential for undermining the existing educational licence in NZ is obvious. YouTube, Bittorrent and whatever new (unauthorised) platforms emerge will all present communication works for free educational use unless Screenrights (or another body) could undertake the politically and logistically impossible task of offering a voluntary licence scheme for this content.
16. Screenrights respectfully submits that this is an irrational outcome which presumably was not the intention of either the drafter or Parliament.

### Illustration of issue

The educational establishment which copies *The Lord of the Rings* motion picture for educational purposes from an unauthorised peer-to-peer file sharing service will obtain the benefit of a free exception unless the copyright pirates are offering a licence!.

### Drafting suggestion

17. A drafting correction to address this concern (aside from the broader suggestion above relating to the definition of a communication work) could be to limit section 48's operation to recording and communicating broadcasts or cable programmes, and content therein.
18. (Note that if Screenrights' earlier suggestions in relation to the drafting of the communication work provision are adopted, then this may become redundant depending on how those changes are made.)

### **Issue three: The introduction of a new Internet-based free exception for educational use in proposed section 44A**

19. The educational Internet free exception found in proposed section 44A does not feature in the explanatory note. It is unclear precisely what educational needs it is intended to address. The proposed provision introduces an extremely broad free exception for educational 'storing' and student 'use' of all Internet and other 'electronic retrieval systems' content.
20. While the stored material can only be accessed by 'authenticated users' (ie students), one of the remarkable features of this proposed exception is the period of free educational use: the stored material can only be made available to such users after the content from which the copying has been made has been removed from the Internet; the stored material must be deleted 'within a reasonable time after the material becomes no longer relevant to the course of instruction for which it was stored'. This could be an indeterminate period of time.
21. This free exception undermines the existing educational exceptions. It creates such a broad free exception for the Internet that over time it would be difficult to conceive of any reason why an educational establishment would need to submit to a licensing scheme. It is also difficult to understand how it could meet International copyright standards.

#### Illustration of issue

An educational establishment can copy *The Lord of the Rings* motion picture from an unauthorised (pirate) peer-to-peer file sharing service and can use the copy for its educational purposes from the time the copy is no longer on the file sharing service until it is no longer relevant to the course for which it was copied – potentially indefinitely.

#### Drafting suggestion

22. No policy rationale has been given for such a dramatic revision of creators' property rights. Screenrights submits that the provision should be deleted from the Bill.
23. In the alternative, assuming there is some unspoken reason for such an archiving provision, then Screenrights respectfully submits that at the very least it should be subject to the availability of a licence for the works along the lines of other "use it or lose it" exceptions in the Act.
24. Finally, Screenrights notes that in discussion with other organisations the possibility has been raised that the intention may have been to create an educational caching exception as has recently been enacted in Australia. In that case, Screenrights submits that the current provision does not meet this outcome, and that the drafting should be substantially amended.

#### **Issue four: the on-line provision of library holdings in proposed section 56A**

25. The Bill proposes the creation of a new free exception for libraries to make available their lawfully acquired digital holdings on-line (the 'remote access' aspects of the provision). Screenrights notes the nature of the class of institutional users who may avail themselves of this exception, and the 'one copy-to-one user' condition imposed in sub-section (4).
26. However, the provision creates an undesirably wide free exception for on-line provision. If a library is acquiring items in digital form (such as a DVD), it should be seeking permission directly from the rights holders to make that material available on-line. There is no need for a copyright exception.
27. As it stands the provision creates the risk of libraries setting up video on-demand and other similar services in competition with authorised channels of distribution. There is an existing DVD rental market which would be undermined by such a service. Moreover, online video on demand is acknowledged as a key commercial and consumer driver for the expansion of high speed broadband services to the home. Such an outcome is an important economic objective which should not be undermined by a free exception along these lines.

#### Illustration of issue

A library could purchase twenty DVDs from the Warehouse (authorised copies) of *The Lord of the Rings* motion picture and make that film available on a video on-demand service for up to twenty users/households at any one time.

### Drafting suggestions

28. Drafting corrections addressing this concern could:

- a. Omit the remote access aspect of the provision; or, in the alternative,
- b. At least make the remote access exception the subject of a license scheme, similar to the operation of section 48;

### **Conclusion**

29. Screenrights is grateful for the opportunity to make this submission on the Bill. Please feel free to contact us if you would like any aspects clarified or amplified.

30. Screenrights would be most pleased to appear before the Committee in any Hearings that the Committee may choose to have on this matter.

Respectfully submitted

Simon Lake  
Chief Executive  
Screenrights

15 February 2007

## **Screenrights submission on a new provision for the Copyright (New Technologies and Performers' Rights) Amendment Bill**

### Submission B

#### **Introduction**

1. The Audio-Visual Copyright Society Limited trading as Screenrights is a copyright society representing rightsholders in film, television and radio programmes. Screenrights has over 200 New Zealand members and over 2,500 members in 52 countries world-wide covering the spectrum of copyright owners including broadcasters, producers, writers, music copyright owners and creators of artistic works.
2. Since 1998, Screenrights has licensed New Zealand educational establishments to copy television and radio broadcasts and cable programmes. Screenrights licences cover schools, universities, polytechnics, institutes of technology, wananga and other tertiary institutions.
3. In a separate submission, Screenrights has commented on provisions introduced in the Bill which we view as problematic. The purpose of this submission is to raise a related matter which, we submit, should be addressed in this Bill.

#### **Screenrights educational licences**

4. As outlined above, Screenrights licenses New Zealand educational establishments to copy television and radio broadcasts and cable programmes for their educational purposes. This licence is offered under the protection of section 48 of the Act.
5. Screenrights administers similar educational licences in Australia. Similar to New Zealand, the Australian licences rely on specific provisions in the Australian Copyright Act (Part VA).

#### **Educational resource centres**

6. A particular feature of the Australian educational licence system is that the Act provides for "Resource Centres". A Resource Centre is a type of educational institution whose role is to provide copies to other licensed educational institutions.

7. This allows for the creation of new services for the educational sector. For example, the South Australian Department of Education and Children's Services has created a unit within the Department called Tape Services. Tape Services is a Resource Centre with an agreement with Screenrights wherein it copies television broadcasts and supplies copies to schools and universities across the country. Tape Services has an extensive repertoire of programmes copied from television which can be supplied to educational institutions. The repertoire can be viewed online at [www.tapeservices.sa.edu.au](http://www.tapeservices.sa.edu.au)
8. The educational sector benefits greatly from this service as an institution which for some reason has missed copying a particular television program, can still obtain a copy from Tape Services or one of the other licensed Resource Centres.
9. Copyright owners also benefit from licensed Resource Centres. Because the copying occurs under a remunerated licensing scheme, the copyright owners receive distributions from Screenrights for the copies made in accordance with the Distribution Policy.
10. Importantly, the scheme is limited in scope in order to protect copyright owners. Firstly, Resource Centres can not make a profit on the supply of copies, although it does recover its costs. Secondly, Resource Centres can only supply copies to licensed educational institutions. This prevents any negative impact on the general video distribution market, and also ensures that the institutions are licensed.

### **A New Zealand resource centre**

11. Screenrights has been approached by organisations looking to establish a similar resource centre service in New Zealand.
12. However, because of the more narrow definition of "educational establishment" in the New Zealand Copyright Act, Screenrights is unable to provide such a licence.
13. Screenrights submits that the absence of a resource centre type provision in the New Zealand Copyright Act is limiting the operation of educational licensing schemes in New Zealand to the detriment of the educational sector in New Zealand. Screenrights submits that this is disadvantaging educational institutions in New Zealand relative to their Australian counterparts.

### **Proposed solution**

14. Screenrights respectfully submits that in the context of the current amendments to the Copyright Act, the educational provisions should be widened slightly to provide for the operation of non-profit resource centres. This will greatly benefit licensed schools and other institutions, while at the same time ensuring copyright owners are remunerated for the use of their property.

15. Screenrights understands that such a provision could very simply be created by amending the definition of "educational establishment" to provide for a type of institution being an organisation not conducted for profit whose educational purpose is the provision of copies of material to other educational establishments. This is essentially the same provision as has existed in the Australian Act since 1990 (see section 10 definition of *educational institution* paragraph (i)).
16. Screenrights is currently seeking advice on appropriate drafting for such a provision, and we will supply that as soon as it is available.

### **Conclusion**

17. Screenrights is grateful for the opportunity to make this submission on the Bill. Please feel free to contact us if you would like any aspects clarified or amplified.
18. Screenrights would be most pleased to appear before the Committee in any Hearings that the Committee may choose to have on this matter.

Respectfully submitted

Simon Lake  
Chief Executive  
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