

# **SENATE STANDING COMMITTEE ON ENVIRONMENT, COMMUNICATIONS AND THE ARTS INQUIRY INTO PROVISIONS OF THE BROADCASTING LEGISLATION AMENDMENT (DIGITAL TELEVISION BILL) 2010**

## **SCREENRIGHTS SUBMISSION**

Screenrights is a non-profit copyright collecting society representing rightsholders in film, television and radio. Screenrights administers the statutory licences relating to broadcasts in Parts VA and VC and section 183 of the Copyright Act, 1968.

## **BROADCASTING LEGISLATION AMENDMENT BILL IN GENERAL**

Screenrights offers no general copyright policy view on the proposed reforms. The creation of section 38C satellite licensees is a novel aspect of the Broadcasting Services Act 1992 (BSA), and Screenrights understands that the proposed Part VD of the Copyright Act 1968 (CA) is directed largely to facilitating the operation of the 38C satellite BSA licences. It is clear enough that the imperatives driving the proposed reforms are tied mostly to broadcasting policy objectives.

Screenrights will therefore here confine its comments to: (i) two general drafting matters that it might be useful to flag and, (ii) operational matters that may arise in the administration and operation of the proposed Part VD statutory licences.

## **SUMMARY OF SUBMISSIONS**

On general matters related to these reforms, Screenrights submits that:

- I. The relationship between broadcasts of the 38C satellite BSA licensees and the copyright (Part VC, CA) and broadcasting (sections 211-212B, BSA) retransmission regimes should be clarified by removing the 38C satellite broadcasts from the operation of both retransmission regimes.
- II. The relationship between broadcasts of the 38C satellite BSA licensees and the proscriptions contained in Part VAA of the CA and more general circumvention liability relating to access control technological protection measures of the CA should be clarified.

On the administration and operation of Part VD Screenrights submits that:

- III. Proposed section 135ZZZJ(3)(b) be amended so that it is not possible for a remuneration notice to come into force on a date earlier than the date on which it is given the collecting society.
- IV. Proposed section 135ZZZL(2) be amended so that the licensee keep a record of such information that will reasonably permit Screenrights to identify the program including title, time of original broadcast, time of re-broadcast (if different), channel of original broadcast and duration of the program and that the licensee be required to supply to the collecting society a copy of such a record.
- V. Proposed section 153RA jurisdictional provision be amended so that it specifically refers to proposed section 135ZZZI(2), the statutory licence provision upon which the jurisdiction is based.
- VI. A provision similar to section 135JAA in Part VA is inserted into the proposed Part VD regime.

**ABOUT SCREENRIGHTS**

1. Screenrights is a non-profit copyright collecting society for producers, distributors, script writers, music copyright owners, rights owners in artistic works and sound recordings and other rightsholders in film, television and radio programs. Screenrights administers licences for the use of film, television and radio under provisions in the Australian and New Zealand Copyright Acts, collecting royalties and distributing this money to the relevant rightsholders.
2. Screenrights has over 2,800 rightsholder members in fifty-four countries worldwide.
3. The licences that Screenrights administers include the educational copying and communication of broadcasts provisions in Part VA; the retransmission of broadcasts under Part VC; and, the copy of broadcasts for the services of the Crown under section 183 of the CA.
4. Screenrights administers these provisions under declaration from the Attorney-General (and the Copyright Tribunal for government copying). As a declared society, our operations are overseen by the Attorney-General who tables our Annual Report before Parliament. Screenrights also adheres to the voluntary Code of Conduct for Collecting Societies.

**GENERAL DRAFTING MATTERS**

5. The precise reasons for the proposed change to the definition of "broadcast" in the CA are not made clear in the reform package. Screenrights is concerned that it may give rise to statutory consequences and have impacts upon commercial arrangements that are difficult to foresee. Below, Screenrights points out two uncertainties created by the proposed change to the definition which relate to provisions of direct concern to Screenrights and its members.

The Relationship with the Retransmission Provisions of the CA and the BSA

6. The reform proposes that for the purposes of the definition of 'broadcast' in section 10(1) of the CA that communications of the 38C satellite BSA licensees are assumed to not have a conditional access system applied. The reasons for this legislative assumption are not set out in the Explanatory Memorandum. In light of that legislative assumption, Screenrights is unclear whether communications made under the 38C satellite BSA licences could be subject to the Part VC statutory licence of the CA.
7. On one reading the legislative assumption means that communications made under the 38C satellite BSA licences should be regarded as equivalent to a 'free-to-air broadcast' (defined separately in section 10(1) of the CA) and therefore amenable to retransmission under Part VC of the CA statutory licence. That is to say, a person could possibly rely on Part VC to retransmit across the vast new 38C licence areas the "free to air broadcasts" transmitted in reliance on Part VD.

8. Related to this issue is whether the retransmission of the 38C satellite BSA licensees' broadcasts within their expansive licence areas, will fall with the exclusions contained in sections 212-212B of the BSA.
9. In respect to both the CA and BSA retransmission regimes Screenrights submits that the extent of the geographic licence areas of the 38C satellite BSA licences and the detailed set of regulatory and commercial arrangements underpinning the current licence area limitations, that all ambiguity should be resolved in favour of removing broadcasts made by 38C satellite BSA licensees from Part VC of the CA and sections 212-212B of the BSA.

**Screenrights submits that the relationship between broadcasts of the 38C satellite BSA licensees and the copyright (Part VC, CA) and broadcasting (sections 211-212B, BSA) retransmission regimes should be clarified by removing the 38C satellite broadcasts from the operation of both retransmission regimes.**

The Relationship with Part VAA and the Circumvention Provisions of the CA

10. Another uncertainty that may be created by the legislative assumption described above is whether liability under Part VAA of the CA arises for the unauthorised supply (etc) of broadcast decoding devices to access the broadcasts of 38C satellite BSA licensees. The legislative assumption might be read as removing the satellite BSA licensees' broadcasts from the operation of Part VAA of the CA. That, in turn, may open the door to the possibility of more general circumvention liability in the CA relating to access control technological protection measures found at Part V, Division 2A and Division 5, sub-division E by operation of sections 116AL and 132APB.

**Screenrights submits that the relationship between broadcasts of the 38C satellite BSA licensees and the proscriptions contained in Part VAA of the CA and more general circumvention liability relating to access control technological protection measures of the CA should be clarified.**

### **ADMINISTRATION AND OPERATION OF PART VD**

11. There are several aspects of the proposed drafting that Screenrights submits should be reconsidered in light of Screenrights' experience in administering other statutory licences. Although these are administrative matters, they are of particular concern to Screenrights from the perspective of a collecting society charged with administering similar provisions in the CA.

Backdating of Remuneration Notices – section 135ZZZJ(3)(b)

12. Similar to its counterpart provision in Part VC, proposed section 135ZZZJ(3)(b) permits the backdating of remuneration notices. This is neither desirable nor necessary. It is not desirable because it permits infringing conduct to be made the subject of a statutory licence retrospectively, at the whim of the infringer. It is not necessary because –

consistent with Part VC – interim arrangements are to be enacted in Part VD, Division 4.

13. (It is Screenrights understanding that the backdating provision in Part VC had its origins in an early draft Bill which lacked provision for interim arrangements and that once interim arrangements were inserted, the deletion of the backdating provision was overlooked.)

**Screenrights submits that proposed section 135ZZZJ(3)(b) be amended so that it is not possible for a remuneration notice to come into force on a date earlier than the date on which it is given the collecting society.**

Records System Provisions – section 135ZZZL(2)

14. Screenrights' experience with administering Part VC leads it to suggest that the records provisions here proposed in section 135ZZZL(2) – which again seem to have been largely derived from Part VC – should require that the licensee keep a record of such information that will reasonably permit Screenrights to identify the program including title, time of original broadcast, time of re-broadcast (if different) and duration of the program. At present the provision requires title information alone, and this has proved to be insufficient for efficient royalty distributions in Part VC.
15. Also on the basis of its experience as administrator of Part VC, Screenrights suggests that the provision should be amended to require that the collecting society 'is supplied a copy of such a record'. The current requirement of providing 'access to such a record' could be subjected to a narrow (albeit contested) reading by licensees which could lead to unnecessary cost of administration for the statutory licence.

**Screenrights submits that proposed section 135ZZZL(2) be amended so that the licensee keep a record of such information that will reasonably permit Screenrights to identify the program including title, time of original broadcast, time of re-broadcast (if different) and duration of the program and that the licensee be required to supply to the collecting society a copy of such a record.**

Copyright Tribunal Jurisdiction – section 153RA

16. The creation of jurisdiction in the Copyright Tribunal of Australia to make a determination in the event of the absence of agreement between the 38C satellite BSA licensee and the owner of the copyright in the broadcast of the program rebroadcast in proposed section 153RA of the CA might be assisted in its drafting if that jurisdiction is explicitly based in the proposed provision creating the statutory licence on which it is based; section 135ZZZI(2). This would achieve consistency with many similar provisions – such as the proposed section 153S – and would assist in understanding how each of the two statutory licences within Part VD respectively operates.

**Screenrights submits that proposed section 153RA jurisdictional provision be amended so that it specifically refers to proposed section 135ZZZI(2), the statutory licence provision upon which the jurisdiction is based.**

Oversight Jurisdiction in the Copyright Tribunal

17. In 2006, Part VA of the CA had added to it section 135JAA which conferred upon the Copyright Tribunal jurisdiction to determine, where necessary or convenient, matters that arise under the workings of Part VA. Such a matter could be raised by either the collecting society or the licensee. Screenrights submits that it would be desirable to include within Part VD a provision similar to section 135JAA.

**Screenrights submits that a provision similar to section 135JAA is inserted into the proposed Part VD regime.**

For more information please contact:

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