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Business Law Branch  
Attorney-General's Department  
3-5 National Circuit  
Barton ACT 2600

*By email: [copyright@ag.gov.au](mailto:copyright@ag.gov.au)  
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Dear Sir/Madam

**CONSULTATION PAPER: REVISING THE SCOPE OF THE COPYRIGHT 'SAFE HARBOUR' SCHEME**

Screenrights is a non-profit copyright society representing rightsholders in film, television and radio. Screenrights has over 3,300 members in 59 countries.

Screenrights administers a range of collective licences relating to use of audiovisual material, including educational use of broadcasts, government copying of broadcasts and retransmission of free to air broadcasts.

**Screenrights supports referring this matter to the ALRC**

Screenrights considers that the matters raised in the Consultation Paper are extremely complex and require very careful consideration. This is particularly the case at the current time when the operation of the existing provisions are the subject of litigation. Screenrights is aware of the submissions by APRA, AFACT and others that the question should be the subject of a further review by a body such as the Australian Law Reform Commission. Screenrights supports this submission.

**Screenrights urges caution about a more broadly-based definition**

In any event, Screenrights submits that any expansion of categories of entities eligible for the remedial limitation scheme provided for under Part V, Div 2AA (the Australian Safe Harbour Scheme) of the Copyright Act 1968 (CA) needs to be very carefully and cautiously considered.

It is Screenrights' submission that any such expansion should be sensitive to the logic of the Australian Safe Harbour Scheme as set out in the treaty obligation to which it gives effect to; chapter 17.29 of the Australia-US Free Trade Agreement (FTA). That logic is to provide legal incentives for service providers to cooperate with copyright owners in deterring the unauthorised storage and transmission of copyrighted materials, by creating conditional remedial limitations for copyright infringements that service providers do not control, initiate, or direct, and that take place through systems or networks controlled or operated by service providers: FTA article 17.29(a)(b). An important overarching condition placed upon those limitations is that service providers must adopt and reasonably implement policies that provide for termination, in appropriate circumstances, of the accounts of repeat infringers: FTA article 17.29(b)(vi)(A).

Consistent with FTA chapter 17 the Australian Safe Harbour Scheme provides for conditional remedial limitations in relation to four discrete functions: Category A - routing /transmission; Category B - automated caching; Category C - directed storage; Category D - referral to online locations: FTA article 17.29(b)(i) and CA sections 116AC-116AF. While the Australian Safe Harbour Scheme requires an eligible entity to be a 'carriage service provider' under the Telecommunications Act 1997, FTA chapter 17 is more expansive in its treatment of eligible entities.

FTA article 17.29(b)(xii) provides that for the purposes of Category A functions, service provider means 'a provider of transmission, routing, or connections for digital online communications without modification of their content between or among points specified by the user of material of the user's choosing'. For the purposes of Categories B, C and D functions a service provider is expanded to mean 'a provider or operator of facilities for online services or network access'.

Screenrights submits that taken as a whole FTA chapter 17 presents a broad but clear picture of the attributes of an eligible service provider:

- A provider of services entailing the Category A-D defined functions;
- Where the provision of those services may entail copyright infringement that the service provider does not control, initiate or direct; and
- Where the provision of those services is to arms-length account holders, whose access to the services may be terminated by the service provider in cases of repeat infringement.

As such, a broadly drawn definition of what entities might be an eligible service provider might be more desirable than the present confinement to carriage service provider. It is Screenrights' contention, however, that any revised definition should be informed by a careful consideration of FTA chapter 17 as it operates in Australia. That should lead to eligibility being based on what someone does rather than who someone is.

The corollary of this proposition is that eligibility should not be predicated upon being identified within a list of particular defined categories, such as 'carriage service provider', 'broadcasting service', 'key cultural institution' or 'educational institution'. The undesirability of the specific inclusion of latter is the focus of the balance of this submission.

### **Screenrights opposes the specific inclusion of educational institutions**

Screenrights is aware of a push to specifically list an 'educational institution' (and/or their administering bodies) as a class of entity eligible for the Australian Safe Harbour Scheme. Subject to reading any submissions which offer principled policy reasons, Screenrights is unaware of any good reason that would justify such specific treatment if eligibility was more broadly defined as supported above. As concluded above, eligibility should be based on what someone does rather than who someone is. No reason has been previously expressed by educational institutions to Screenrights which would justify such exceptional treatment, and Screenrights has not observed current problems that could justify it. Moreover Screenrights submits that such a move would be highly anomalous in view of how Australian copyright law currently applies.

As noted above, the logic of the Australian Safe Harbour Scheme is to offer remedial limitations to service providers to induce them to cooperate with copyright owners to deter infringement by their account holders. A key aspect of that is a requirement of an account termination policy. It is highly problematic exactly how that would apply in mainstream educational settings. Do those advocating this special treatment conceive of enrolled students as the relevant "account holders"? If so, the mandatory account termination policy would presumably involve student expulsion or suspension from the institution, or perhaps student exclusion from networks that support internet access, email and library databases. This strikes Screenrights to be quite at odds with the Australian tradition of catering for teaching, research and study through facilitative copyright exceptions.

The whole policy drive of the array of free and remunerated exceptions for educational institutions in the CA is to facilitate access to material in the digital environment. This is well-evidenced by the reforms in 2006: amending the section 28 free exception (including within it the class-room performance exception the communication to the public right); the creation of a free exception in section 200AAA (for proxy caching by educational institutions), and the creation of a free exception in section 200AB (for giving educational instruction). This can also be seen in the reforms in 2000 inserting digital usages (including the communication to the public right) within the long standing remunerated exceptions of the Part VA and VB regimes, and the amendments to the section 40 fair dealing free exception for the purposes of research or study to provide greater certainty for the

researcher's or studier's own usage of material in electronic form. Screenrights is not aware that any of these provisions are failing to essentially achieve their aims.

To be clear, Screenrights is not opposed to educational institutions (or technology-suppliers to educational institutions) whose service provision satisfies any revised eligibility criteria, from availing themselves of the Australian Safe Harbour Scheme. It strikes Screenrights, however, that is most likely to occur in the case of educational institutions which are supplying more than merely educational services to students. (For example, an educational institution supplying separate cloud computing storage to account holders for a fee.) However Screenrights questions whether the mainstream provision of educational services to students by an educational institution which utilizes online technologies or a network is an appropriate fit for the Australian Safe Harbour Scheme.

Yours sincerely

A handwritten signature in blue ink, appearing to read 'Simon Lake', with a stylized, cursive script.

Simon Lake  
Chief Executive