

# Review of the “Alston Determination”

**screenrights**

## Submission by Screenrights

8 August 2019

## About Screenrights

The Audio-Visual Copyright Society Ltd trading as Screenrights is a non-profit copyright society representing rightsholders in the audio-visual sector including film, television and radio. Screenrights has 4,438 members in 66 countries.

Screenrights is the declared collecting society under the Copyright Act 1968 (the “Act”) that administers statutory licences for educational copying and communication of broadcasts under Part IVA Division 4 of the Act, retransmission of free to air broadcasts under Part VC of the Act and government copying in respect of television, radio and internet broadcasts under s183 of the Act.

The statutory licences operate as remunerated exceptions to copyright. Screenrights’ experience in administering statutory licences for almost thirty years gives us a unique perspective on the operation of such remunerated exceptions in the Act, including how changes in the law would affect the scope of such exceptions.

In New Zealand, Screenrights also supplies an educational copyright licensing scheme for “communication works” under New Zealand copyright law, which includes broadcasts and transmissions over the Internet.

## General Comments

This submission responds to the questions raised in the Review of the “Alston Determination” Consultation Paper of 5 July 2019 prepared by the Department of Communications and the Arts.

Screenrights is grateful for the opportunity to contribute to the review and make this submission. This review is of particular interest to Screenrights in our role of administering statutory licences under the Copyright Act 1968 (the “Act”) for the copying and communication of broadcasts.

“Broadcast” is defined under the Act to mean “a communication to the public delivered by a *broadcasting service* within the meaning of the Broadcasting Services Act 1992.”

Accordingly, any change in the scope of the definition of “broadcasting service” under the Broadcasting Services Act (BSA) may impact the scope of the statutory licences administered by Screenrights.

**Question 1:** *How would your organisation be impacted if this determination was to sunset on 1 October 2019?*

### Educational Statutory Licence

If the Alston Determination was to sunset, there would be an impact for Screenrights in relation to the scope of s113P of the Act. Section 113P of the Act gives educators a remunerated exception to copyright infringement, provided that the requirements of that section are met. If the instrument sunsets, the scope of the remunerated exception would expand slightly.

Screenrights anticipates that the expansion of the scope of s113P would be minor. This is because the content of a broadcast that has been simulcast on the Internet via live streaming is already covered by the educational statutory licence by virtue of s113P(6)(a) of the Act. Therefore, sunseting of the instrument would only expand the scope of the remunerated exception to include the copying of live streams on the Internet other than simulcasts of broadcasts.

Examples may include live streams on streaming video platforms like YouTube or twitch.tv or live streams on social media platforms such as Facebook and Twitter. Screenrights is not aware of whether copying of such material by educational institutions is a common practice.

Against that background, Screenrights would like to clarify a matter raised in the Consultation Paper. The Consultation Paper considered that removing the Alston Determination could result in *“significant impost on universities and schools with costs imposed for persons who copy or distribute online broadcasts...”*

It is unclear to Screenrights how such significant imposts would occur in practice. We query whether there may be confusion about the scope of the instrument amongst some educational institutions, who may either assume that the reference to the “Internet” in the instrument means that it extends beyond live streamed programs to content available online on demand; or who may be unaware of the impact of s113P(6)(a) of the Act pursuant to which simulcasts of broadcasts are already covered by the statutory licence.

If there is no confusion, then the concern must relate to live streamed content that is currently excluded from the statutory licence, examples of which were provided above.

To the extent (if any) that educational institutions are currently copying and communicating live streamed content that is excluded from the statutory licence, then there are only three ways this could be done:

- (i) A direct licence. This would be necessary if it as a significant activity;
- (ii) Under s200AB of the Act which covers uses that could be described as a “special case” ie. in very occasional circumstances; or
- (iii) In the absence of a licence or exception. We don’t expect that the educational institutions would be engaging in copyright infringement, so we assume it must be one of the first two circumstances.

If educational institutions are already entering into direct licences to copy and communicate relevant live streamed content, removing the Alston Determination would have no impact because they could either continue to maintain those direct licences or choose to rely on the statutory licence. If the latter, payment would be the same as the direct licences, so there would be no additional cost impact for schools or universities.

If educational institutions are copying and communicating the relevant live streamed content under s200AB of the Act, then by definition it can’t be a significant use given the limitations of s200AB.

Section 200AB requires amongst other things that the circumstances of the use amount to a “special case” and that the use does not conflict with a normal

exploitation of the work or other subject matter and does not unreasonably prejudice the legitimate interests of the owner of copyright.

So, if the statutory licence were to cover such special cases following the sunseting of the instrument, it's unclear how that could result in significant cost impacts for schools or universities.

#### Government Statutory Licence

There would be no impact for the government copying scheme as s183 of the Act already covers such content and Screenrights' declaration allows Screenrights to collect for copies of such content.

#### Retransmission

There would be no impact on Part VC of the Act as it is limited to the retransmission of "free to air broadcasts" which is separately narrowly defined.

**Question 2:** *How would your organisation be impacted if this determination was remade (without significant amendment) for 3 years?*

Screenrights would not be impacted if the determination was remade for three years.

However, Screenrights notes that the debate about the ongoing utility of the determination traverses both communications law and copyright law. This creates a tension between two separate policy objectives, which likely complicates the position for many stakeholders, including members of Screenrights. For this reason, Screenrights supports the remaking of the determination in the short term as this allows the issues to be canvassed more thoroughly by Government, including in the context of the wider response to the ACCC's Digital Platforms Inquiry and the Australian and Children's Screen Content Review, in which case the three year time frame may be appropriate.

**Question 3:** *Does the existing instrument impose any regulatory burdens or compliance costs on your organisation? If so, can you identify any relevant items and costings (and please note if any of this information is commercially sensitive)?*

The instrument does not impose any regulatory burdens or compliance costs on Screenrights.

**Question 4:** *Is the language of the current instrument clear and easy to read and understand? Please identify any parts that you consider should be changed and why the change is required.*

If, as discussed above, there is confusion about the scope of the instrument amongst some educational institutions as a result of the reference to "Internet", which has in turn led to the erroneous belief that removing the instrument would result in significant imposts on universities and schools, then Screenrights can see value in clarifying the instrument. If the instrument was in fact intended to only cover live streaming of TV and radio programming, then it could be expressed to be so limited.

Screenrights also observes that there is no statutory definition of “Internet” so there may be value in distinguishing between OTT (over the top) TV and radio which is delivered over an unmanaged network such as broadband internet and IPTV where the content is delivered to a display device via IP over an operator-managed network. We expect the latter would be considered a “broadcasting service” but there is arguably room for different interpretation.

Nevertheless, Screenrights’ view is that there is no pressing need to adapt the language of the instrument as it is now generally well understood by the market and any confusion could be clarified without changes to the instrument itself.

**Question 5:** *Do you have any other comments or information you wish to provide in relation to the sunseting of the current determination and the proposal to make a new one?*

Screenrights also operates the New Zealand educational licensing scheme. Under the New Zealand provisions the educational exception to copyright infringement is not limited to broadcasting. Rather, it includes audio-visual content delivered over the Internet.

Accordingly, Screenrights has considerable experience in administering such technology neutral provisions and would welcome providing further input to government in formulating future policy in this area.

### **More information**

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