Submission in response to *Copyright Amendment (Access Reform) Exposure Draft Bill* 2021

Submission by Screenrights
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ABOUT US

Audio-Visual Copyright Society Limited trading as Screenrights is a not for profit copyright collecting society representing rightsholders in the audio-visual sector, including film, television and radio. Screenrights has over 4,925 members in 69 countries world-wide.

Screenrights is the declared collecting society under the *Copyright Act* 1968 (Cth) (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 over 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.

EXECUTIVE SUMMARY

Screenrights is largely supportive of the policy behind these reforms. However, we are concerned that the drafting of the Bill:

- Goes well beyond the Government's stated policy and has the potential to seriously undermine the statutory licensing regime and other licensing arrangements.
- In so doing, has the potential to breach Australia's international treaty obligations.
- Adds further complexity and uncertainty to an already complex piece of legislation.

Screenrights' main concerns relate to:

- the new education exception in s.113MA (p. 5);
- changes to the government statutory licence (p. 9); and
- the new library exception for making material available online in s.113KC (p. 12).

We also have concerns about:

- the new fair dealing for quotation exception (p.15) and
- the proposed orphan works regime (p.19).

We also briefly address the review of exceptions to technological protection measures ("TPMs") (p.22).

INTRODUCTION

Screenrights welcomes the opportunity to comment on this *Copyright Amendment (Access Reform) Exposure Draft Bill* 2021 ("the Bill") and remains committed to sensible reforms which improve access to copyright material for Australians without undermining the rightsholder's rights to receive equitable remuneration.

We understand that it is the Government's intention to ensure that there is appropriate access to copyright material for certain purposes, made particularly important during the pandemic, but also to support contemporary teaching methods more generally.

We also understand that it is not the Government's intention that this should decrease licence fees to copyright owners.

Screenrights supports these goals in principle. However, we make the observation that we do not think there is a problem to solve. Prior to the pandemic contemporary teaching practices like remote teaching and online access to pre-recorded lessons were already being adopted, especially in the tertiary sector, and these practices were well supported by access to copyright material under the statutory licences and exceptions under the Act.

Policy intentions aside, the Bill potentially shifts uses that are currently covered by the statutory licence into to new free exceptions for which Screenrights members will not be remunerated at all. In that context, it is worth noting that the film and television production sector was hit hard financially by delays caused by the pandemic, and it would be a particularly inequitable outcome if the Bill reduced the income they receive from statutory licensing when there has been no concomitant reduction in access to their content for the duration of the pandemic. In fact, our records show that educational usage of Screenrights licensed content more than tripled in the past two years with no increase in licence fees.

While Screenrights is open to providing further clarity to the education sector if needed, we have serious concerns about the drafting of the Bill. Our primary concern is that the drafting of the Bill goes beyond the Government's stated policy intention. As currently drafted, the Bill will not only undermine the statutory licensing schemes administered by Screenrights, but licensing arrangements in general. In so doing, we believe that the Bill runs the risk of having a detrimental impact on rightsholders in a way that is likely to breach Australia's international treaty obligations.

Furthermore, Screenrights is concerned that the current drafting is complex and difficult to understand. In our view, the Bill has the potential to make an already complex piece of legislation more difficult for stakeholders to interpret and apply. This may lead to increased litigation to the detriment of copyright owners and users.

We recommend that new drafting instructions be issued which more accurately reflect the Government's policy and take into account the issues raised in this

submission. Following that process, we recommend that a fresh draft of the Bill should be prepared for consultation with key stakeholders before the Bill progresses further.

The new drafting instructions need to make clear that the purpose of the reforms is limited to the Government's stated policy intention, and that it is not to interfere with statutory or voluntary licensing of copyright material.

Our specific comments on the Bill are set out in order of priority. Namely amendments to:

1. the education exception in s.113MA which far from being merely technical in nature, go to the heart of educational licensing;
2. changes to the government statutory licence;
3. the library and archives exceptions;
4. the proposed new fair dealing for quotation; and
5. the proposed orphan works regime.

We also address the specific questions raised in the Discussion Paper and the TPM Review. We have not proposed alternative drafting, but would be happy to do so, should the Department consider that helpful.

In preparing this submission we have consulted with our members, other copyright collecting societies, and stakeholders. We support the submissions of Copyright Agency, the Australian Film and TV Bodies, Copyright Council, Screen Producers Australia and APRA AMCOS whose submissions we have read in draft form.

THE THREE-STEP TEST

It is convenient at the outset to insert some brief contextual remarks about the three-step test.

The three-step test provides the parameters for expectations or limitations to the exclusive rights of copyright owners. While it originally only applied to the exclusive right of reproduction in works, it now extends to the exclusive rights in all copyright material.

The three-step test has its origins in the *Berne Convention for the Protection of Literary and Artistic Works* ("Berne Convention")[1] and has been extended to the digital environment through the *WIPO Copyright Treaty* ("WCT")[2] and the WIPO Performances and Phonograms Treaty ("WPPT").

[1] *Berne Convention for the Protection of Literary and Artistic Works*, opened for signature 9 September 1886, 1161 UNTS 30 (entered into force 5 December 1887) ('Berne Convention').
[2] *World Intellectual Property Organisation Copyright Treaty*, open for signature 20 December 1996, 36 ILM 65 (entered into force 6 March 2002) ('WCT').

The three-step test has also been incorporated into the *Trade-Related Aspects of Intellectual Property Rights Agreement* ('TRIPS').[3] This is significant because it applies to copyright material protected under TRIPS (not just literary and artistic works protected under the Berne Convention) and to the exclusive rights therein (as opposed to the right of reproduction only).

Article 13 of TRIPS states:

> *Members shall confine limitations or exceptions to exclusive rights to certain special cases which do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the right holder.*

Breaking it down into its constituent parts, the three steps require that exceptions are confined to:

1. certain special cases;
2. that do not conflict with the normal exploitation of the work; and
3. do not unreasonably prejudice the legitimate interests of the right holder.

Screenrights is concerned that the Bill is drafted so broadly that a number of the proposed exceptions would not satisfy the test. This is because:

- there is an insufficient policy justification to amount to "special case";
- they undermine existing licensing practices, i.e. "normal exploitations"; and
- they do not provide for the remuneration of the right holder, thereby prejudicing their legitimate interests.

These concerns mainly relate to the education exception in proposed s.113 MA, the library and archives exception in proposed ss.113KC and D, the quotation exception in proposed s.113FA and the orphan works exception in proposed ss.116AJA and B.

1. EDUCATION

1.1 Schedule 4: Update and restore education exceptions

The Discussion Paper states that the policy for these amendments is as follows:

> "*The Bill will update and streamline the exceptions in the Act relating to educational institutions so that they are material and technology neutral, support contemporary teaching methods, and facilitate remote and online learning.*" (p.30)

[3] *Agreement on Trade Related Aspects of Intellectual Property*, Annex 1C of the Marrakesh Agreement establishing the World Trade Organisation, opened for signature 15 May 1994, 1869 UNTS 299 (entered into force 1 January 1995) ('TRIPS').

Screenrights is comfortable with this as a policy objective. However, we are concerned that the Bill as drafted goes way beyond this policy and has the potential to encroach on licensing arrangements in a way that could severely undermine the interests of Screenrights' members and rightsholders more generally.

Our major concern relates to proposed new s.113MA. By way of explanation, s.28 which it proposes to replace is a limited, free exception in the Act intended to facilitate education by permitting public performance and communication to the public of copyright material in the classroom, which includes amongst other things showing television broadcasts (and the works or subject matter other than works, such as cinematograph films, included in them) in class or otherwise in the presence of an audience in the course of educational instruction.

Screenrights is comfortable clarifying that the s.28 exception applies to remote learning as we believe that to already be the case under s.28.

We understand there is some confusion around the operation of s.28(3) of the Act in relation to the position of parents and guardians, so we also have no objection to extending the exception to situations where people who are not members of a class may be present as part of that educational instruction, such as parents and guest lecturers.

However, Screenrights has concerns with how the proposed s.113MA could extend the ambit of the existing exception under s.28 to other acts which are currently covered by Screenrights' educational statutory licence and which are properly subject to payment of a fair licence fee. We detail our specific concerns in reaction to the drafting below.

1.2 Drafting goes beyond existing "free uses" to cover licensed uses

The exception in s.28 is currently limited to ephemeral uses of copyright material in the course of educational instruction. We support the policy intent to allow temporary recordings of lessons (which may contain copyright material) to make them available to those taking part in the lesson to view or hear later, though we believe such acts should be covered by the educational statutory licence. However, the drafting of proposed s.113MA is so broad that it could also permit the free copying and communication of all copyright material generally in the course of giving or receiving educational instruction.

The educational statutory licence administered by Screenrights enables educational institutions to copy material from radio and television and to communicate those copies, for example, by showing them in class, storing them on a network for staff and students or keeping them in a library as an ongoing resource. Proposed s.113MA therefore covers acts already covered by the educational statutory licence. For example, proposed s.113MA(2)(b) covers copying as well as communication of copyright material and s.113MA(2)(c) purports to allow audio visual recordings to be made available to teachers and students on a temporary basis. This would clearly

"conflict with the normal exploitation" of the material in a way that would be inconsistent with the second limb of the three-step test.

It is unclear from a policy perspective why a distinction is being made between lessons that are recorded and put on servers for reuse and temporary recordings of lessons. In Screenrights' submission, both should be covered by the educational statutory licence, not by an exception.

Furthermore, of particular concern is that the Bill may exclude the operation of the statutory licence by virtue of s.113MA(3) which states that a "provision of this Act (other than this section) does not, by implication, limit this section". The true purpose of this provision is unclear. However, the effect of this drafting has the potential to severely undermine the educational statutory licence administered by Screenrights, and in turn, the royalties distributed to our members to invest in the creation of new content. We understand from our discussions with the Department that this was not the intention of s.113MA(3).

1.3 Scope of educational institution

Screenrights notes that proposed s.113MA(2)(e) refers to the use being "not wholly or partly for the purpose of the educational institution obtaining a commercial advantage or profit." Section 28 on the other hand does not cover instruction given for profit. We wish to clarify whether there is an intention to extend s.113MA to educational institutions that operate "for profit". If so, we query whether this would meet the "special case" requirement of the first limb of the three-step test.

This unexplained extension to for profit institutions is a further reason why the drafting of any new education exception needs to be confined and specific.

1.4 Implied licence

Screenrights notes that the Discussion Paper makes no mention of the policy intent behind the proposed s.113TA which reads: "*In determining whether there is an implied licence to do an act comprised in a copyright, disregard sections 113P and 113S*…", such sections relating to the educational statutory licence.

If the policy intention is not to reduce statutory licence fees it is unclear why the existence of a remunerated exception under an educational statutory licence is to be disregarded in determining whether an implied licence exists. Such an approach is inconsistent with the fundamental nature of an implied licence under law, which involves implying a licence in circumstances where it is necessary to protect accrued rights. There is no such necessity when a remunerated exception already exists.

Implied licences are necessarily uncertain and difficult to interpret. By comparison, the educational statutory licence gives licensees certainty that their activities do not infringe copyright. We are concerned that the inclusion of the reference to implied licences in s.113TA will add unnecessary complexity to the legislation without

increasing access to copyright material by educational institutions. We therefore recommend that this provision be removed from the Bill.

1.5 Suggested changes

As noted above, in Screenrights' view, s.28 already covers remote learning and situations where non-class members may be present during the educational instruction, though s.28(3) has caused confusion in relation to the latter. For the sake of clarity, this could be made explicit in an explanatory note (which occur frequently in the Act. See, for example, this Bill and the *Copyright Amendment (Disability Access and Other Measures) Act* 2017).

Alternatively, if the use of notes no longer reflects modern drafting practice as the Department has suggested to Screenrights, the Bill could instead clarify the scope of the educational statutory licences is broad enough to capture what is required for contemporary teaching methods as noted above, rather than creating unnecessary exceptions.

It is Screenrights' strong view that any new education exception needs to be drafted narrowly and that activities covered by the educational statutory licences such as copying (including temporary reproductions) should be excluded from the proposed exception. We also recommend that s.113MA(3) which suggests that the educational statutory licences do not apply should be deleted. If, as we understand to be the case, s.113MA(3) was intended to be confined to other specific provisions in the Act we would appreciate the opportunity to comment further on the proposal once revised drafting is available.

Question 4.1: Education: Online access – 'Reasonable steps'
For the purposes of new paragraph 113MA(2)(d), what measures do you consider should be undertaken by an educational institution to seek to limit access to copyright material, when made available online in the course of a lesson, to persons taking part in giving or receiving of the lesson, and ensure it is used only for the purposes of the lesson?

As discussed above, Screenrights does not support s.113MA as currently drafted. However, for the sake of completeness, we refer to the notice requirements for communications of copies of broadcasts under former s.135KA. Section 135KA (b) required educational institutions "*to take all reasonable steps to ensure that the communication can only be received or accessed by persons entitled to receive or access it (for example, teachers or persons receiving educational instruction or other assistance provided by the relevant institution)*".

One possible approach of ensuring this is set out in the Smartcopying Guidelines of 13 September 2021 and may be a sensible way of addressing the issue. The Guidelines, which are produced on behalf of schools and TAFEs, provide:

> "*If you are teaching remotely and need to use copyright material in your lessons (either held via a video conferencing platform such as Zoom or recorded for students to watch later), there is no clear permission in the Copyright Act that*

allows you to do so. However, you can take the following steps which may lower (if not in some cases eliminate) the risk of copyright infringement:

1. *ensure that you only use copyright material where it is for the educational purposes of the school or for the purposes of educational instruction*
2. *only use a small amount of copyright material (i.e. extracts) not the whole of a work, video or song etc*
3. *ensure the lesson or any recording is only made available to those students who need it as part of their studies (e.g. via a username and password in a closed environment not on an open internet page) rather than making it available to the whole school*
4. *instruct students, where possible, to only watch the lesson or recording when physically located in their homes, not in a community space or their parent's workplace*
5. *make the lesson or recording "view only", so that no further copies can be made or downloaded*
6. *only make recordings available for the period of time for which they are needed*
7. *archive or disable access by students to recordings once they are no longer needed (e.g. when normal teaching resumes)."*[4]

2. GOVERNMENT

2.1 Schedule 5 Streamlining the Government statutory licensing regime

According to the Discussion Paper, the policy objective of these amendments is "*to update and streamline*" the government statutory licensing regime and to "*clarify the interaction of the statutory licence with other licences and exceptions or limitations in the Act.*" (p. 36)

Screenrights is generally supportive of these objectives, in particular, the extension of the regime to cover communications of copyright material. However, we do not support aspects of the Bill that have the potential to undermine the statutory licensing regime. We set out our specific concerns below.

2.2 Definition of relevant collecting society in s.182C

While we appreciate that the definition needs to be amended to cover "communications", the proposed new definition of "relevant collecting society" in s.182C is complex and confusing. It seems to contemplate that more than one society can be declared in respect of the copying and communication of the same classes of copyright material.

[4] Smartcopying, *COVID-19 School Lockdown – Copyright Guidance,* updated 13 September 2021 https://smartcopying.edu.au/covid-19-school-lockdown-copyright-guidance/.

We note that the Copyright Tribunal considered whether more than one collecting society could be declared for the making of government copies of broadcasts in 2001 and concluded that it could not.[5] In his reasons, President Burchett noted:

> s 182C reinforces the idea that there will be one relevant collecting society, either in relation to "*all government copies*", or in relation to a particular "*class of government copies that includes* [a particular] *government copy*". That is why s 182C refers to "*the relevant collecting society*", whereas s 183A(3), speaking generally, refers to "*a collecting society*".[6]

From a policy and operational perspective, there are strong efficiencies in a single collecting society administering a licence scheme for a particular class of copyright material. This much is recognised by the Attorney-General's Department Guidelines for the Declaration of a Collecting Society.[7] We therefore query the rationale for the drafting.

2.3 Amendments to facilitate direct licensing

Screenrights appreciates that in some instances governments may want to directly license material from a copyright owner. In practice, this has been routine in Screenrights' dealings with the Commonwealth and State governments since 2001. The proposed amendment in s.183(1)(b) now makes this explicit.

Screenrights supports the inclusion of proposed s.183(1)(b) in the Bill, however, we note that whether an act infringes copyright will need to be judged on a case-by-case basis.

2.4 Special Arrangements

We are concerned that the special arrangements set out in proposed s.183B(1)(f) effectively gives a government the ability to *choose* not to deal with a declared collecting society. In our submission, this provision is unnecessary as licensees already have the ability to apply to the Copyright Tribunal of Australia to settle a broad range of matters including:

- the fixing of terms (s.153E);
- the method for working out payment for government copies (s.153K); and
- making or revoking a declaration (s.153 F and G).

The proposed amendment is inconsistent with our understanding that government is supportive of the government statutory licensing regime which provides equitable remuneration to rightsholders for uses of copyright material by governments.

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[5] *Audio-Visual Copyright Society Limited v Australian Record Industry Association Limited* CT 1 of 1999.

[6] At [7].

[7] As revised April 2001 https://www.screenrights.org/wp-content/uploads/2018/03/RightsAndProtections_Documents_Guidelines_for_declaring_Collecting_Societies.pdf.

In addition, the proposed amendment presents practical difficulties in terms of transparency and the obligation of governments to pay equitable remuneration to copyright holders for the use of their material. In the case of audiovisual material, there is no established practice of governments notifying copyright owners of uses of their material where there is no declared collecting society. In fact, we are unaware of this ever having happened, even though it is a requirement under s.183 and has been since the Act was first introduced in 1968.

Beyond direct licensing arrangements, there are many ad hoc uses of copyright material that are done for the services of the government which ought to be captured by the statutory licence. If a government is able to opt out of dealing with a declared collecting society as envisaged by the Bill, it will be difficult for rightsholders to know whether their material is being used by governments and it is likely that many uses of copyright material for the services of the government will go unremunerated. This is particularly concerning in relation the copying and communication of broadcasts where there can be multiple rightsholders of copyright material comprised within the broadcast, including writers, directors and producers who rely on Screenrights income to continue creating content.

This outcome is far from best practice and, irrespective of the policy intent, gives rise to the risk of public perception that the drafting was crafted specifically to allow governments to avoid their obligation to remunerate rightsholders fairly by *choosing* not to deal with the collecting society declared by the Copyright Tribunal to represent rightsholders.

2.5 Reference to implied licence problematic

Proposed new s.183C purports to allow governments to rely on implied licences to avoid liability for paying rightsholders of copyright material equitable remuneration under the Screenrights statutory licence. Screenrights objects to this amendment for the same reasons outlined in relation to the proposed s.113T in relation to educational institutions and otherwise refers to the submission of Copyright Agency in this regard.

Question 5.1: Government: Use of incoming material
Does proposed new section 183G contain effective safeguards to avoid unwarranted harm to copyright owners' commercial markets? If not, what other safeguards would assist?

There are many reasons for which copyright material is provided to governments. For example, making submissions, responding to information requests by regulatory bodies, and library deposits. In Screenrights' view, the government statutory licence is already sufficiently broad to cover uses of such material and the insertion of s.183G is unnecessary and has the potential to harm a copyright owner's market. This proposed provision does not increase access to the content for the services of the government, and merely acts as a discount against copyright owners contrary to the stated intention of the Bill.

3. LIBRARIES AND ARCHIVES

Australia has an extensive regime of library and archives exceptions which have been regularly reviewed and updated. According to the Discussion Paper, the purpose of the reforms is to "*simplify, consolidate and update the exceptions in the Act relating to libraries and archives, including galleries, museums and other key cultural institutions, to allow them to operate more efficiently and effectively in the digital environment.*" (p.21)

Screenrights supports sensible reforms to ensure that the library and archive provisions are fit for purpose, however we are concerned that the proposed amendments have been drafted so broadly as to undermine existing and potential business models and to breach Australia's international treaty obligations.

3.1 Scope of copyright material covered by the exceptions

The Discussion Paper suggests that the policy intention for this exception includes "*[s]implifying and updating the exceptions to apply equally to all types of copyright material*." (p. 23)

In Screenrights' view, simplification is an inadequate justification for extending the library and archive exceptions to audiovisual material as required by the first limb of the three-step test.

This approach fails to take into account the different circumstances for different types of copyright material. For example, while there is a long tradition of libraries lending books and authors are compensated for lost sales via a public lending right, for the most part, access to audiovisual material has occurred via commercial business models such as video libraries, video on demand services or for educational institutions through "resource centres" such Clickview and InfoRMIT. There appears to have been no consideration of what the proposed amendments would mean for the market of copyright owners of audiovisual material as required under the three-step test.

3.2 Making material available online

Screenrights' primary concern relates to proposed s.113KC which purports to enable an authorised officer of a library to make material available online. This covers material acquired in electronic form, material acquired in hard copy and converted as well as preservation and research copies and orphan works.

The reference to "electronic copy" (s.113KC(1)) and "hard copy" (s.113KC(2)) format is a clear example of where the extension of the exception to audiovisual material is misconceived. That is because (with the exception of celluloid) all audiovisual material (including tapes and discs) is in electronic format. By contrast, this issue is carefully avoided in the film format shifting exception in s.110AA of the

Act which refers to “videotape embodying a cinematograph film in analog form” and a “film in electronic form”.

We are concerned that this provision has the potential to severely undermine the market for such material in a way that will prejudice the rights of rightsholders in contravention of the third limb of the three-step test.

This exception has a direct relationship with the statutory licences administered by Screenrights. For example, can a library that is part of an educational institution rely on this exception to make copies of broadcasts available to staff and students instead of relying on the statutory licence? The impact of this would not be to increase access to copyright material consistent with the policy behind the amendments, but simply to provide a discount on the equitable remuneration payable under the licence.

Furthermore, while the Discussion Paper makes the assertion that the Bill is not intended to allow libraries and archives to become quasi e-book or streaming services, we are concerned that this intent is not reflected in the drafting.

In particular, we note that proposed s.113KC(1):

- applies to the whole of copyright material acquired in electronic form;
- is not subject to a commercial availability test; and
- there is no restriction on a library or archive’s ability to make this material available (other than it not being an infringement of copyright).

It is therefore conceivable that a video library could be established under this regime and videos made available online without any remuneration of the rightsholders of the copyright material.

Proposed s.113KC(2) is similarly problematic in allowing the first digitisation of copyright material and its communication to the public.

Proposed s.113KD contains stronger safeguards than s.113KC in that the exception for the supply of copies:

- does not apply to the whole of copyright material;
- is subject to a commercial availability test; and
- does not permit the copy to be supplied on a for profit basis.

However, it is not apparent from the drafting that that a subscription-based model would be excluded from operating under that exception.

In our view, this exception is likely to offend each limb of the three-step test.

3.3 Commercial Availability Test

Screenrights has two concerns in relation to the way that the commercial availability test is applied in proposed s.113KC.

(i) No commercial availability test is applied to making copyright material acquired in electronic form available online (s.113KC(1)). As explained above, this could conceivably apply to all audiovisual material in a library's collection.

(ii) Only where material was acquired in hard copy form and a library wishes to make an electronic copy of that material and make it available online does a commercial availability test apply (s.113KC(2)). Even then, the test in s.113KC(2)(d) is qualified by the term "reasonable investigation" and falls short of what is required to protect the interests of rightsholders.

By way of background, the commercial availability test first appeared in the fair dealing for research and study exception in s.40(2)(c) following the recommendations of the Copyright Law Committee ("Franki Committee") in its Report on Reprographic Reproduction.[8] It, together with s.40(2)(d) which looks at the effect of the dealing upon the potential market for or value of the material, is how Australian law makers have sought to apply their obligations under the second limb of the three-step test. In our view, commercial availability needs to be applied in that context.

Proposed s.113KC erroneously applies the commercial availability test only to the format shifting component of the provision. However, properly understood, the entire exception should be subject to a commercial availability test. Without this safeguard, a library would be able to make any audiovisual material it acquired available online, regardless of whether it was commercially available.

In our view, all material that is made available online should be subject to a rigorous commercial availability test and best practice TPMs must be used by the libraries if they wish to rely on such an exception.

3.4 Expansion of scope of exception for supply of copies to persons in s.113D

Under the existing exceptions, libraries and archives can supply copies of text and image based material to library users for the purposes of research or study provided certain prerequisites are met. The proposed new s.113D would not only expand this exception to all copyright material, including audiovisual material, it would expand the purpose for which a user could request a copy to private or domestic use.

We query the basis of extending this exception to private or domestic and whether it would amount to a "special case" as required by the first limb of the three-step test. We support the submission of the Australian Film and TV Bodies on this point.

3.5 What is a library under the exception?

It is our understanding that some libraries that are conducted "for profit" purport to make use of the existing libraries exceptions in their activities. In light of the

[8] October 1976, https://static-copyright-com-au.s3.amazonaws.com/uploads/2015/05/R00507-Franki-Report.pdf.

proposed broad expansion of exceptions applicable to libraries, it is timely that the Act is clarified so the libraries exceptions do not apply to libraries that are conducted "for profit" such as reference libraries held by professional advisers like legal and accounting firms to conduct their "for profit" advisory services.

Question 3.1: Libraries and archives: Online access - 'Reasonable steps'
For the purposes of new paragraph 113KC(1)(b), what measures do you consider should be undertaken by a library or an archives to seek to limit wider access to copyright material when made available online?

Screenrights is concerned about the ability of a library or archive to prevent infringement of copyright when making material available online. Key tools in the distribution of copyright material online are contractual terms and the use of technological protection measures. In our view, the proposed exception exposes copyright owners to risk of infringement of their material, and libraries and archives to liability for those infringements.

Question 3.2: Libraries and archives: Illustrations
Does proposed new section 113KK, which replaces and simplifies current section 53 but is not intended to make any substantive changes to that section, adequately cover all of the matters set out in current section 53 or are there some potential gaps in coverage?

Screenrights refers to and supports Copyright Agency's submission in response to this question.

4. QUOTATION

According to the Discussion Paper, the intention of this reform is to "*introduce a new, stand-alone fair dealing exception to permit the quotation of copyright material by certain public bodies, organisations and individuals for non-commercial purposes or if the quotation is of immaterial commercial value. Cultural institutions, educational institutions and governments can use this exception for their own purposes, however, individuals and organisations can only use it for research purposes*." (p.14)

In Screenrights' view there appears to be a gap between the policy intention and the drafting of the quotation exception in s.113FA of the Bill as the drafting is far broader than what is needed to achieve the stated policy intention.

At the outset it should be acknowledged that a 'quotation' as that term is commonly understood often does not amount to an infringement of copyright as it is not done in relation to a 'substantial part' of a work or other subject matter.[9] Even if a

[9] Section 14 of the Act.

substantial part is used the quotation may be covered in any case by existing fair dealing exceptions for criticism or review, parody or satire, or news reporting.

Screenrights is comfortable with the policy intention to address specific situations where it is suggested that there may be a lack of clarity under current Act, such as those of PhD students and academics set out in the case studies on page 15 of the Discussion Paper. In our view, those situations are already covered by the existing fair dealing exception for research or study or the flexible dealing exception in s.200AB.

However, if the Government still wishes to pursue a standalone fair dealing for quotation exception, it needs to be drafted narrowly and with precision.

Our main concern is that the scope of the proposed exception in s.113FA is unnecessarily broad with no definition of quotation, with no defined purpose and with a large set of potential users. It is particularly problematic in its application to broadcasts and cinematograph films in that it has the potential to impact existing commercial licensing arrangements entered into by our members as well as Screenrights' statutory licences themselves.

In terms of potential users, it is particularly unclear why educational institutions and governments have been included in the entities able to rely on the exception in s.113FA(1). We note that both already enjoy broad access to copyright material under the statutory licences. We therefore query how this amendment accords with the Government's objective of improving access to copyright material without reducing licence fees under the statutory licences.

Other concerns related to proposed s.113FA include that it appears inconsistent with Article 10 of the Berne Convention which provides for a quotation exception for published works only for specific purposes, its handling of the issue of attribution, and more generally that the drafting is complex and difficult to apply, particularly in relation to how "commercial purpose" is dealt with in subsection (b).

The specific drafting issues we have identified are set out below.

4.1. Defining quotation

The Discussion Paper suggests that 'quotation' is to have "*its ordinary meaning, that is 'to repeat' or 'cite' all or some part of copyright material*." (p. 16)

However, there is no definition in the Bill.

Proposed s.113FA(1) explicitly refers to "a quotation of the whole or a part of the copyright material" and the inclusion of the words "if only part of the material is used" in the proposed s.113FA(2) fairness factors also suggests that there can be a quotation of a whole work.

This is contrary to the ordinary meaning of “quotation”. “Quotation” is defined in the *Macquarie Dictionary* as “that which is quoted; a passage quoted from a book, speech, etc.”

Adopting this definition, it is Screenrights’ view that quotation should be defined in the Bill to only cover reproduction of extracts of copyright material, not the whole of copyright material.

Further, the amount that can be reproduced should be limited to no more than is required by the specific purpose for which it is intended to be used.

4.2 Purpose

Proposed s.113FA should be drafted as a conventional fair dealing exception with a defined purpose.

Instead, it is drafted as an open exception and limited by the classes of people who can use the exception. In this way it is more akin to the flexible dealing provision in s.200AB rather than specific fair dealing provision. The ambit of the provision is too broad.

4.3 Relevant copyright material

Copyright material to which the quotation exception applies should exclude broadcasts and cinematograph films to avoid disrupting the statutory licence and existing and potential markets for clips.

4.4 Users

The scope of entities able to take advantage of the exception in s.113FA(1)(a) is too broad.

As noted above, given the breadth of the government and education statutory licences, we do not believe that there is a case for government or educational institutions to be included in subsections (iii)-(vi).

With respect to the inclusion of libraries in subsections (i) and (ii), we strongly object to the exception applying to libraries that are conducted “for profit” such as reference libraries held by professional advisers like legal and accounting firms to conduct their “for profit” advisory services.

Further, we are of the view that the reference to “research” for persons or organisations in subsection (vii) is not necessary given the separate fair dealing exception for research or study. If as appears to be the case the policy intention is to clarify that publication and presentation of research is covered, then this could be achieved with an explanatory note in the existing fair dealing section.

And finally, in another demonstration of the repeated dissonance between policy intention and drafting, it is unclear how documentary film makers are covered as users despite their inclusion as one of the case studies in the Discussion Paper.

4.5 Compliance with Article 10 of the Berne Convention

Article 10 of the Berne Convention provides as follows (*emphasis added*):

> *(1) It shall be permissible to make quotations from a work which has **already been lawfully made available to the public**, provided that their making is compatible with fair practice, and their extent does not exceed that justified by the purpose, including quotations from newspaper articles and periodicals in the form of press summaries.*
> *(2) It shall be a matter for legislation in the countries of the Union, and for special agreements existing or to be concluded between them, to **permit the utilization, to the extent justified by the purpose**, of literary or artistic works by way of illustration in publications, broadcasts or sound or visual recordings **for teaching**, provided such utilization is compatible with fair practice.*
> *(3) Where use is made of works in accordance with the preceding paragraphs of this Article, mention shall be made of the source, and of the name of the author, if it appears thereon.*

Proposed s.113FA does not appear to comply with Article 10.

Article 10(1) makes it clear that the quotation exception only applies to published material. Proposed s.113FA does not make it clear that it only applies to published material.

Article 10(2) indicates that the quotation exception requires a purpose and is only allowed to the extent justified by that purpose, referring to teaching as a purpose. Proposed s.113FA does not for example require an educational institution to have a specific purpose like teaching in order to make use of the exception.

4.6 Attribution

We are also concerned that the attribution requirements in s.113FA(1) (d) and (e) are qualified by the term “reasonably practical”. In our view this has the potential to contribute to the proliferation of orphan works and to undermine the ability of copyright owners to license their material. We also query whether this satisfies Article 10(3) of the Berne Convention.

4.7 Commercial purpose

In proposed s.113FA(b) if “the quotation is for a commercial purpose in relation to a product or service, but the quotation is immaterial to the value of the product or service” it is an acceptable purpose.

The way that "commercial purpose" is dealt with is difficult to apply and lends itself to exploitation. While the Discussion Paper suggests that quoting material on social media would not be covered (p.15), this is not apparent from the drafting. For example, how do you determine whether a commercial purpose is immaterial to the value of the product or service as contemplated in proposed s.113FA (1)(b)? It seems to us that this exception is ripe for gaming and would necessitate enforcement action by copyright holders to clarify the parameters of the exception.

Question 2.1: Quotation: Unpublished material
Should the proposed new quotation fair dealing exception in section 113FA extend to the quotation of unpublished material or categories of unpublished material?

We do not agree that the fair dealing exception for quotation should extend to unpublished material. This goes beyond Article 10 of the Berne Convention and has the potential to undermine one of the fundamental rights of copyright owners: to decide whether or not to make their material public.

We note that making unpublished material public can trigger the term of copyright protection, which in turn could undermine the rights of a copyright owner to exercise its right to control the timing and platforms of release of their copyright material. This is particularly problematic for audiovisual works with contractually pre-agreed release windows.

5. ORPHAN WORKS

The Discussion Paper states that the "*Bill will introduce a scheme to allow for the use of copyright material if the copyright owner cannot be found, commonly known as an 'orphan work', after a reasonably diligent search is done. This measure implements the Government's response to the PC inquiry's recommendation 6.2 in a way which is simple and efficient. It provides clear safeguards to copyright owners and does not introduce unnecessary red tape for creators or users.*"(p.10)

Screenrights acknowledges that this issue of orphan works has been the subject of discussion over many years. Screenrights looks forward to working constructively with other stakeholders towards the development of industry codes in relation to what is a reasonably diligent search to ensure that the exception does not encroach on uses appropriately covered by the statutory licences.

While we are generally in favour of amendments in relation to orphan works, we have three concerns in relation to the proposed amendments and have also set out drafting suggestions.

5.1 Application to uses covered by the statutory licences

The Discussion Paper states that *"[e]ducational institutions and governments (and other statutory licensees) will not need to pay remuneration under the statutory licences in the Act for the use of orphan works if they choose to rely on the orphan works scheme and have met the requirements.*" (p.13)

We note the Government's stated intention that the reforms are not intended to be a discount on licensing. In light of that, Screenrights understands that these provisions (s.113P(7) for educational institutions and s.183(12) for government) would mean that if an educational institution or government entity undertakes a reasonably diligent search in advance of a use and meets the other requirements of the proposed new exception, then the statutory licence would not apply.

If our understanding is correct, Screenrights does not object to these provisions in principal, subject to two provisos.

Firstly, we do not agree that the scheme should apply to educational and government institutions where a copyright owner is known but "cannot be contacted" as such uses properly sit under the Screenrights statutory licence. A copyright owner may not be contactable for any number of personal reasons, including health issues, but it could also be due to a lack of expertise in the searcher. It is notable in this context that Screenrights has the experience, resources and systems to find copyright owners that may not be readily available to an educational institution or government entity. Further, the inclusion of known copyright owners is inconsistent with the approach to orphan works in territories with comparable laws, such as the UK, European Union and Canada.

Secondly, under the Screenrights statutory licences rightsholders other than the copyright owner/s of an audiovisual work (e.g. screenwriters and visual artists) may receive equitable remuneration for uses of broadcasts of the audiovisual work by educational institutions and government, but under the proposed orphan works scheme only a copyright owner can apply to the Copyright Tribunal to fix the terms of use where such terms can't be agreed. Considering this issue along with the application of the scheme to copyright owners who "cannot be contacted", the outcome here would be a discount on licensing as rightsholders who are not the copyright owner will not receive equitable remuneration that they would have otherwise received under the statutory licences.

5.2 Excluding of remedies for retrospective uses

Proposed s.116AJA is titled "Limitation on remedies relating to orphan works". However, the effect of the section is to exclude all liability in relation to retrospective uses of the material, rather than to simply limit liability for the use of former orphan works. This is likely to have both practical and legal implications.

From a practical perspective, we are concerned that this provision will incentivise users to claim that material is orphaned in order to reduce their obligation to pay royalties.

From a legal perspective, we query whether excluding (rather than placing a cap on) remuneration for retrospective uses amounts to an acquisition of property within the meaning of s.51(xxxi) of the Constitution and would otherwise comply with the third limb of the three-step test. We note that under proposed s.4 that if an acquisition of property occurs then the Commonwealth is potentially liable to pay compensation if the acquisition was on other than just terms.

5.3 Role of the Copyright Tribunal

We note that proposed s.116AJB(1)(e)(ii) purports to confer jurisdiction on the Copyright Tribunal to set terms for the use of former orphan works where an agreement can't be reached between the person and the owner/s of copyright. However, whether the requirements for a "limitation on remedies" to be applicable as set out in s.116AJA are met would be a question of evidence in each case.

Therefore, under the proposed drafting, the jurisdiction of the Copyright Tribunal to set terms seems open to question if an owner of copyright does not accept that the requirements of s.116AJA have been satisfied, such as a "reasonably diligent" search or where the user claims that the owner "cannot be contacted" although they are known. There does not appear to be a mechanism available to resolve that jurisdiction question.

In any case, even if the Copyright Tribunal's jurisdiction were accepted by a copyright owner, the Copyright Tribunal is likely to require additional resources to take on this new role.

5.4 Suggested changes

As discussed above, Screenrights suggests in relation to the orphan works scheme:

- that it should not extend to copyright owners who "cannot be contacted";
- that it takes into consideration the potential loss of equitable remuneration of rightsholders who are not copyright owners;
- that the exclusion of remuneration for retrospective uses of copyright material for former orphan works be adapted to a limitation on liability;
- more generally, that the extent of the limitation under the scheme has greater specificity in order to comply with Australia's international treaty obligations; and
- that the role of the Copyright Tribunal be reconsidered.

Question 1.1: Orphan works: Application to Copyright Tribunal to fix reasonable terms
Part 11, Division 3 of the Copyright Regulations 2017 sets out the matters to be included in particular kinds of applications and references to the Copyright Tribunal. What matters do you consider should be included in an application to the Tribunal to fix reasonable terms for ongoing use of a former orphan work?

Screenrights refers to and supports the Australian Film and TV Bodies' submission in this regard.

6. TPM REVIEW

As a general observation, we note that TPMs have become increasingly crucial to business models for the online distribution of copyright material. This is illustrated by our remarks in relation to the proposed new library exception in s.113KC and D above. Screenrights does not propose any new TPM exceptions and we reserve our right to respond to any proposals for new exceptions made as a result of this process.

We generally support the comments of the Australian Film and TV Bodies on this issue.

CONCLUSION

While Screenrights remains supportive of the stated policy intention of the proposed access reforms, we are concerned that the Bill as drafted does not accurately reflect that policy. Instead, we believe that the Bill will negatively impact the interests of rightsholders to either enter into direct licences or to receive equitable remuneration under the Screenrights statutory licences, create difficulties for interpretation of the legislation, and breach Australia's international treaty obligations. In doing so, it will not substantially increase access to content, but will only serve to undermine the economic rights of creators.

In our view, the appropriate way forward is for the Department to revise and reissue drafting instructions that accurately reflect the Government's policy, to amend the Bill and to release it for limited consultation with affected stakeholders before publicly releasing another version of the Bill.

Screenrights looks forward to working productively with the Department and other stakeholders as part of this process.

James Dickinson
Chief Executive