



screenrights

The Audio-Visual Copyright Society

SCREENRIGHTS SUBMISSION TO THE HOUSE OF REPRESENTATIVES STANDING COMMITTEE ON LEGAL AND CONSTITUTIONAL AFFAIRS

PART VA SUBMISSION

A INTRODUCTION TO SCREENRIGHTS

The Audio-Visual Copyright Society Ltd ("Screenrights") is a non-profit copyright collecting society representing copyright owners in television and radio transmissions including producers, writers, broadcasters, music copyright owners and artistic works copyright owners. Since 1990 Screenrights has been the society declared by the Attorney-General for the purposes of Part VA of the Copyright Act ("the Act").

Screenrights' activities primarily relate to collecting remuneration from educational institutions from the copying of transmissions under Part VA of the Act. This remuneration is distributed by Screenrights to all the relevant copyright owners less Screenrights' administrative expenses only. In addition, Screenrights provides licences for copying of television broadcasts by educational institutions in New Zealand and collects remuneration for copyright owners on behalf of its members for schemes administered by other societies in other territories.

A more detailed description of Screenrights' activities is included in Appendix A.

Screenrights currently has 1146 members, located in over 40 countries. A list of members is annexed to this submission as Appendix B.

This submission covers matters in the Digital Agenda Bill relating to the operation of Part VA. Screenrights understands that the Ministerial Council on Employment Training and Youth Affairs and the Australian Vice-Chancellors' Committee are also each making submissions on this matter.

Screenrights is making a separate submission in regard to retransmission and another submission in regard to other important matters in the Bill.

B THE PART VA STATUTORY LICENCE

PARTS VA AND VB: CONSISTENCY OF TREATMENT BETWEEN THE STATUTORY LICENCES

A striking feature of the Digital Agenda Bill is that the attempts to take account of the new communication to the public right within Part VB ("Reproducing and Communicating Works etc. by Educational and Other Institutions"), are not replicated within Part VA ("Copying of Broadcasts by Educational and Other Institutions").

This inconsistency creates peculiar outcomes. Whilst educational institutions may copy broadcast material under Part VA, upon the enactment of the Digital Agenda Bill in its present form, they will not be able to communicate those copies to students. The effect of the Bill is to limit the ability of educational institutions to use material copied under Part VA.

Screenrights submits that there should be no major distinction between the Part VA and Part VB statutory licences in this regard. If government policy is that educational institutions should have the ability to communicate copies of published works for educational purposes under Part VB, then educational institutions should also have the ability to communicate copies of broadcasts for educational purposes under Part VA. In both cases, this should be subject to obligations to pay equitable remuneration for this additional use.

PART VA: A PROPOSED REVISION

Screenrights offers the following suggested approach, derived partially from the existing provisions within Part VA and partially from the proposed amendments in the Digital Agenda Bill to Part VB. Screenrights submits that this proposal imports into Part VA the new communication right in a manner consistent with that currently proposed for Part VB.

135A Interpretation

Add:

communication remuneration notice means a notice referred to in subsection 135NB(1).

Division 2A - Communication of Copies of Broadcasts

135NA Communication of copies of broadcasts by educational institutions etc.

- (1) The copyright in a broadcast, or in any work, sound recording or cinematograph film included in a broadcast, is not infringed by the communication of a copy made under this Part, by or on behalf of an administering body if:
 - (a) a communication remuneration notice, given by or on behalf of the administering body to the collecting society, is in force;
 - (b) where the communication is made by, or on behalf of, a body administering an educational institution:
 - (i) the copy the subject of the communication has been made solely for the educational purposes of the institution; and
 - (ii) the communication is made solely for the educational purposes of the institution such that the communication is made only to persons pursuant to this purpose;
 - (c) where the communication is made by, or on behalf of, a body administering an institution assisting persons with an intellectual disability:
 - (i) the copy the subject of the communication has been made solely for the purposes of use in the provision of assistance to persons with an intellectual disability by the institution; and
 - (ii) the communication is made solely for the purpose of provision of assistance to persons with an intellectual disability by the institution such that the communication is made only to persons pursuant to this purpose;

- (d) the administering body complies with subsection 135NC.
- (2) Where the communication referred to in subsection (1):
- (a) is made for a purpose other than a purpose referred to in paragraph (1)(b) or (c); or
 - (b) is made for a financial profit;

subsection (1) does not apply, and shall be taken never to have applied.

135NB Communication remuneration notices

- (1) An administering body may, by notice in writing given to the collecting society by it or on its behalf, undertake to pay equitable remuneration to the society for the communications made by it, or on its behalf, being communications made while the notice is in force.
- (2) A communication remuneration notice comes into force on the day on which it is given to the collecting society, or on such later day as is specified in the notice, and remains in force until it is revoked.
- (3) The amount of equitable remuneration payable to the collecting society by the administering body for communications made by it, or on its behalf, while the notice is in force is an amount (whether an amount per year or otherwise) determined by agreement between the administering body and the collecting society or, failing such agreement, by the Copyright Tribunal on application made by either of them.
- (4) Any matters that are necessary or convenient to be assessed or taken into account for the purposes of assessing equitable remuneration under the communication remuneration notice, must be determined by agreement between the administering body and the relevant collecting society or, failing such agreement, by the Copyright Tribunal on application made by either of them.

135NC Notice requirements in respect of communications

In respect of communications made pursuant to section 135NA, the administering body must:

- (a) give a notice to the person to whom the communication is made, in accordance with the regulations, in relation to each such communication made by it, or on its behalf, containing:
 - (i) statements to the effect that the communication has been made under this Part and that any work or other subject-matter contained in the communication is subject to copyright protection under this Act; and
 - (ii) such other information or particulars (if any) as are prescribed; and
- (b) comply with such other requirements (if any) as are prescribed in relation to each such communication made by it, or on its behalf, while the communication remuneration notice is in force.

135ND Revocation of remuneration notice

A communication remuneration notice may be revoked at any time by the relevant administering body by notice in writing given to the collecting society, and the revocation takes effect at the end of 3 months after the date of the notice or on such later day as is specified in the notice.

135NE Request for payment of equitable remuneration

- (1) Subject to this section, where a communication remuneration notice is or has been in force, the collecting society may, by notice in writing given to the administering body which gave the notice, request the body to pay to the society, within a reasonable time after the date of the notice, the amount of equitable remuneration specified in the notice, being an amount payable

under section 135NB for communications made by, or on behalf of, the body while the remuneration notice is or was in force.

- (2) If an amount specified in a request under subsection (1) is not paid in accordance with the request, it may be recovered from the relevant administering body by the collecting society in the Federal Court of Australia or any other court of competent jurisdiction as a debt due to the society.
- (3) Jurisdiction is conferred on the Federal Court of Australia with respect to actions under subsection (2).

ADVANTAGES OF THE PROPOSED APPROACH TO PART VA

Screenrights submits the importing of the proposed "Division 2A" into Part VA presents the following advantages:

- As Part VA already countenances copying in electronic form, the proposed amendments need only provide for the exercise of the communication right in respect of Part VA copies;
- The proposed amendments would, as a matter of practice, provide for similar copying and communication rights between Parts VA and VB;
- The terms of the statutory licence for educational institutions to communicate Part VA copies are strictly circumscribed-only communications made to persons for "educational purposes" will fall within the licence;
- The addition of the right to communicate to the Part VA scheme will enable new and more powerful educational uses of audio-visual material;
- The coverage of the communication right in Part VA saves transaction costs for educational institutions who wish to communicate Part VA for their educational purposes, providing a framework for dealing with copyright which minimizes risks of infringement;
- Payment for these additional, powerful uses of audio-visual materials ensure equity for copyright holders and encourages further production of educationally relevant documentaries, films and television programming; and
- Similar to the Part VB provisions contained in the Digital Agenda Bill, maximum scope is given to the declared society and administering bodies to determine appropriate bases for remuneration, assessment and enforcement mechanisms.

Screenrights welcomes an opportunity to discuss further with the Committee how Screenrights sees its proposal working in practice.

PART VA AND CIRCUMVENTION DEVICES (SCHEDULE 1, ITEMS 97-103)

Screenrights notes that circumvention devices and services may be lawfully supplied under the Digital Agenda Bill for a variety of "permitted purposes".

Screenrights agrees with the submission of the Australian Copyright Council that where a copyright owner places an effective technological protection measure upon a work or other subject matter, there should be no exceptions to the proscription upon the supply of circumvention devices or services.

However, if as a matter of policy, such excepted "permitted purposes" are enacted, and if such purposes are to include the Crown copying and Part VB statutory licences, Screenrights submits that as a matter of consistency Part VA ought be included as such a purpose.

APPENDIX A

The Background of Screenrights

1 History of Part VA and Screenrights

History of Part VA

- 1.1 In 1981 the Attorney-General, Senator Durack, initiated a departmental review of the audio-visual provisions of the Act, including educational copying. The departmental review resulted in the publication of an Issues Paper in 1982.
- 1.2 In 1985 the Attorney-General's Department put forward detailed proposals for a statutory licensing scheme to enable educational institutions to copy audio-visual material which was not available commercially.
- 1.3 These proposals were supported by tertiary institutions and copyright owners but opposed by school representatives. In these circumstances, the Government decided not to proceed with any reforms in the area of educational copying at that time.
- 1.4 In 1986, Senator Durack moved an amendment to the Copyright Amendment Bill 1986, which proposed that copyright in television and sound broadcasts in which copyright subsists in the Australian Broadcasting Corporation or the Special Broadcasting Service would not be infringed by the making of copies by educational institutions for educational purposes. This was referred to the Senate Standing Committee on Education and the Arts which invited submissions and heard evidence from interested parties.
- 1.5 Based upon the Standing Committees recommendations, the Attorney-General's Department put forward another proposal for statutory licence for the copying of all broadcast programs for educational purposes in return for equitable remuneration. This received broad endorsement from both the tertiary and schools sectors. Thus, upon the introduction into Parliament of the Copyright Amendment Act 1989 which included the Part VA statutory scheme the Second Reading Speech of Lionel Bowen (then Attorney-General and Deputy Prime Minister) included the following passage:

Access to the literary, musical and artistic heritage is fundamental to the role of the educator and that means access to a wide range of copyright material. The Government is therefore concerned that teachers have available to them any material of educational value circulating in both the print and audio-visual media. However, this should be achieved in a manner which ensures that relevant copyright owners are justly remunerated for use of their material.

It has been a great challenge to educators and copyright owners alike to reach agreement on this issue of educational copying. The proposed statutory licences for educational copying recognise the need for educators to have easy access to copyright material for teaching purposes. They also recognise

the need for copyright owners to be remunerated for the use of that material. While copyright owners should not be called on to subsidise the educational needs of the public, there should be as few obstacles as possible to access to educational materials. The statutory licensing schemes will provide the appropriate mechanisms whereby the interests of copyright owners will be balanced against the interests of educators in the most efficient manner possible. These statutory licence schemes are also consistent with the requirements of the international copyright conventions.

- 1.6 The Copyright Amendment Act 1989 (and thus the Part VA statutory scheme) came into operation on 24 May 1989. Since enactment, the only substantive amendment took place in 1998 when copying from subscription television (and radio) was included within the Part VA scheme.

History of Screenrights

- 1.7 Audio-Visual Copyright Society Ltd ACN 003 912 310 is a company limited by guarantee, incorporated in January 1990. Formerly known by its full name or the acronym AVCS, it adopted the trading name "Screenrights" in 1997.
- 1.8 Screenrights was established by the Australian Copyright Council, which coordinated early meetings commencing in the mid-1980's of an informal committee of interest groups ("Copyright Interests Committee") which supported the introduction of the Scheme and the establishment of Screenrights.
- 1.9 The organisations comprising the Copyright Interests Committee included representatives from:
- Audio Visual Distributors Association of Australia;
 - Australasian Mechanical Copyright Owners Society;
 - Australian Broadcasting Corporation;
 - Australian Film Commission;
 - Australian Record Industry Association;
 - Australian Writers Guild;
 - Federation of Australian Commercial Television Stations;
 - Federation of Australian Radio Broadcasters;
 - Film/Video Coalition;
 - Special Broadcasting Service;
 - Producers and Directors Guild of Australia; and
 - Screen Producers Association of Australia.

1.10 Screenrights' incorporation expenses were met by loans from the Copyright Interests of \$1,000 each. The other establishment costs were met by way of gifts and loans in kind from the Australian Copyright Council and further financial loans from the Copyright Interest organisations. The loans were repaid from first collections in 1990 without interest.

1.11 The Memorandum and Articles of Association of Screenrights were formulated in consultation with the Attorney-General's Department. The mission of Screenrights is as follows:

The Society's purpose is to facilitate the equitable return of funds to audio-visual copyright owners.

The Society promotes and defends the copyright system as the means of providing an incentive to creativity and investment in film and television. In pursuit of this goal, the Society acts on behalf of copyright owners in the collective administration of rights.

1.12 Screenrights was declared by the Attorney-General on 13 June 1990 to be the collecting society for the purposes of Part VA of the Copyright Act.

2 Nature of Part VA from Screenrights Perspective

2.1 Important to any understanding of Part VA of the Copyright Act is correct characterisation. Part VA does not create a "copyright licence" as that term is understood commercially. Screenrights does not grant licences in respect of members' rights. Rather Part VA is a remunerated exception to an exclusive right attached to copyright; the reproduction right. In much the same way the Fair Dealing provisions of the Copyright Act¹ create non-remunerated exceptions to exclusive rights.

2.2 Part VA provides that educational institutions may, for their educational (ie "teaching") purposes, copy transmissions (being radio, free-to-air television or subscription television) without infringing the copyright in the transmission itself, or the copyright in any work, sound recording or cinematograph film included in the transmission. However, for an educational institution to take advantage of this exception to copyright:

- a notice in writing on its behalf must be given to Screenrights undertaking to pay equitable remuneration to Screenrights for copies of transmissions it makes. The notice must specify whether equitable remuneration will be assessed on a full record-keeping system or on a sampling system; and
- a payment of equitable remuneration to Screenrights must be made, as determined by agreement with Screenrights or, in lieu of agreement, as determined by the Copyright Tribunal. The basis of payment is determined by whether the institution elects full record-keeping or sampling;

¹ See sections 40, 41, 42, 43(2), 103A, 103B and 103C.

- for full record-keeping the amount of equitable remuneration payable to Screenrights is an amount for each copy of a transmission made;
- for sampling, the amount of equitable remuneration payable to Screenrights is an annual amount per student of the institution determined under a sampling system.

2.3 Importantly, under Part VA there is no issue of "refusal to licence". The exception to copyright is available to any educational institution, subject to the remuneration requirement.

2.4 Screenrights, upon collecting these funds distributes them to relevant the rights holders. A rights holder, to receive a distribution, is required to:

- become a member of Screenrights - there is no restriction or fee placed on membership and,
- provide a warranty as to their ownership of the relevant right.

2.5 In respect of (say) a copy of a single television program, a plurality of discrete copyright subject matter is reproduced. Screenrights scheme of allocation, which is determined by Screenrights Board, mandates the following distribution across the different subject matter:

- Cinematograph film 68.5%
- Literary & dramatic works 22.1%
- Musical works & lyrics 7.4%
- Sound recordings 2%

Screenrights does not include the rights holders of artistic works in its scheme of allocation, but makes specific annual allocations from a reserve fund to the rights holders of artistic works in respect of copied television programs in which an artistic work is the principal subject matter.

2.6 Only underlying rights are remunerated. No distribution is made in respect of the transmission itself to the owner of the copyright subsisting in the television broadcast signal or the sound broadcast signal. This, however, is not a matter determined by the Screenrights Board. It is a result required by Part VA itself which defines "relevant copyright owner" for Part VA to be the "owner of copyright in a work, a sound recording or a cinematograph film".² This excludes the owner of copyright subsisting in the broadcast per se.

2.7 Screenrights is the administrator of the Part VA scheme by reason of declaration by the Attorney-General. As such, Screenrights has stringent reporting and prudential requirements. Screenrights' Constitution documents require approval by the Attorney-General. Its audited Annual Report is remitted each year to the Attorney-General to be laid before each House of Parliament. The Attorney-

² Section 135A.

General may revoke the declaration if, (among other things) Screenrights is “not functioning adequately as the collecting society”. To assist Screenrights in discharging its obligations in respect of Part VA, the Attorney-General’s Department issued Screenrights with a set of guidelines shortly after its declaration. Screenrights has found these guidelines to be of great assistance. Similarly, Screenrights has received a binding determination by the Australian Taxation Office in respect of the taxation treatment of Part VA collections and expenses.

- 2.8 Screenrights dealings with the education sector are also under the frequent scrutiny of the Copyright Tribunal. In two recent determinations (1997 and 1999 respectively) the Copyright Tribunal has set rates under sampling systems of \$2.60 per full-time equivalent school student and \$5.50 per full-time equivalent university student. Both rates are automatically adjusted with the Consumer Price Index. In one determination, the Tribunal gave the following guidelines as to a reasonable quantum of equitable remuneration payable under Part VA:

I could fix a figure that I thought was fair and reasonable but which would bring the whole of this arrangement to an end. Frankly, that is what, in my opinion, the effect of the AVCS [Screenrights] claim will be if it is met in full. Nobody would pay it and the whole scheme will collapse. That is the last thing that anybody wants ... However, difficult the task, I must fix equitable remuneration. And I must fix it, so it seems to me, not in a vacuum but in the setting and context of all the surrounding circumstances. In my opinion, it is relevant and appropriate for the Tribunal to take into account realities such as the capacity and willingness of the schools to pay.³

The reality of Copyright Tribunal supervision over the determination of equitable remuneration under Part VA creates an additional layer of prudential control over Screenrights’ activities which would not exist in an ordinary commercial setting.

- 2.9 Screenrights is also a trustee of funds collected by it in the administration of Part VA.⁴ These funds are held on behalf of relevant classes of rights holders on a discretionary trust, the terms of which are found in Part VA itself, the relevant Copyright Regulations and Screenrights Constitution. A recent High Court decision has held that the broadcast of a cinematograph film may give rise to the exercise of the broadcast right in a sound recording.⁵ This came as a somewhat unexpected outcome in light of an express provision in the Copyright Act which provides “sounds embodied in a sound-track associated with visual images forming part of cinematograph film shall be deemed not to be a sound recording”.⁶ In reliance on that provision, Screenrights had not included sound recordings as a genre of subject matter for which an allocation was

³ Audio-Visual Copyright Society Ltd v New South Wales Department of School Education & Ors (1997) 37 IPR 495 at 517-518.

⁴ Simpson, Review of Australian Copyright Collecting Societies, paragraph 7.1.3.

⁵ Phonographic Performance Company Of Australia Limited & Ors v Federation Of Australian Commercial Television Stations (1998) 154 ALR 211.

⁶ Section 23(1).

made in respect of off-air television copying. As a consequence of the High Court's decision, Screenrights has amended its distribution policy (see paragraph 3.5) and sought declarations from the Equity Division of the NSW Supreme Court. These include declaration that Screenrights was not in breach of trust for failure to include (prior to the High Court's decision) sound recordings within its scheme of distribution. That Supreme Court application remains pending.

3. Part VA from the Education Sector's Perspective

3.1 Screenrights' dealings with the education section over almost a decade has indicated a prevailing view that the remunerated exception to copyright created by Part VA is extremely valuable to schools and universities. The sums paid by way of equitable remuneration seem to be regarded as commensurate with benefit of the exception.

3.2 Thus, in 1997 before the Copyright Law Review Committee's Forum on Access to Copyright Materials, Professor Raoul Mortley, Chair of the Australian Vice-Chancellor's Committee on Intellectual Property made the following statements:

Licence fees. We are constantly concerned with this in the universities. We negotiate with the Copyright Agency Limited. The Audio-Visual Copyright Society [Screenrights] have arrangements. The figures that have been paid have been given here in the issues paper. It has always seemed to me, and here I will slip out of my role as the negotiating opponent of the collecting societies, and say that the paying of licence fees has some good effects. If this has been the means of settling the balance between the ownership of the material and the need to disseminate it then we have seen it work. The universities are paying more. This means students are getting more copies. More is being read and circulated.

So in a sense this commercial solution has opened up a lot of movement which has been to the benefit of everybody and I have always taken the view that if we see through our sampling processes the copying behaviour multiplying greatly in the universities and we are paying more - well this is probably the kind of thing we should be doing in the universities and the way we should be spending our money. It is an important priority that licence fees be settled in order to produce the copies that will spread the knowledge to the students. As someone who is responsible for the way in which money is spent in universities I have always taken the view that this activity is probably far more important than many others that we indulge in - open slather promotions for example.

3.3 Part VA may, indeed, give Australian educational institutions a competitive advantage over educational institutions in other countries. Increasingly, educational institutions (both schools and universities) within Australia seek to attract students from other countries and thereby "export" their education services. Although the UK, New Zealand, Switzerland, Canada and France all have (or shortly will have) comparable schemes, none are as comprehensive

as Part VA. The UK and New Zealand schemes are discussed at length at paragraphs 5.3 to 5.8 (below).

- 3.4 In a recent Copyright Tribunal determination, Screenrights tendered unopposed evidence from a international expert on the educational use of audio-visual material, Richard Cornell. He is the Professor of Instructional Technology in the College of Education at the University of Central Florida and the United States member of the International Council for Educational Media. His evidence included the following observation:

In the United States, interactive learning has been greatly restricted because of the lack of flexibility resulting from the absence of a statutory licensing scheme which tracks programmes recorded from television. This can be contrasted in the Australian setting.

Interactive learning in schools in the United States occurs primarily within the confines of computing, foreign language instruction or laboratory-based classes. An exception would be in schools where there is a television studio and students create their own productions which involve extremely high levels of interactivity.

This can be contrasted with the Australian setting where, under the statutory scheme, anything can be recorded off television, including a commercial, audio track, footage of news events, or other audio-visual broadcast material. In the United States this is not possible without written permission of the copyright holder.

One of the benefits of the copyright licensing scheme, such as the scheme administered in Australia by Screenrights, is that the individual professor in higher education has control over what can be brought into a class from a video source.

This suggests that the existence of Part VA may give Australian educational institutions a competitive advantage in a global market for education services.

- 4 Nature of Screenrights from Rights Holders Perspective
- 4.1 Between 1990 and 1998 Screenrights has collected approximately \$70 million dollars. Over this period of time Screenrights expenses have amounted to approximately \$10 million dollars - about 14% of collections.
- 4.2 Part VA is, however, a statutory exception to the exclusive right of reproduction attached to copyright. It effectively removes from rights holders the ability to deny authorisation. In its place requires the grant of access to educational institutions in return for the payment of equitable remuneration. In an ideal world, rights holders could control their own rights directly.⁷ As the state of technology

⁷ Note that an express stipulation is made in Part VA that: " Nothing in this Part affects the right of the owner of the copyright in a transmission, or in a work, sound recording or cinematograph film included in a transmission, to grant a licence authorising an administering body to make, or cause to be made, a copy of the transmission, work,

currently stands, Part VA is an effective solution to the failure of the market to facilitate remuneration for rights holders' works.

- 4.3 Notwithstanding the observations made at 4.2, Screenrights regards Part VA as a necessary scheme for the creation of a "market" for access to broadcast copyright subject matter for educational purposes. Given the current state of technology, user copyright mores and the questionable efficacy of ad hoc copyright infringement proceedings, Part VA seems a fair and pragmatic balancing of interests.
- 4.4 Rights holders generally, but in particular Australian documentary film makers, rely upon Screenrights distributions to recoup production expenses and to reinvest in further productions. This underscores the philosophy for copyright; incentive for creativity.
- 4.5 In a recent Copyright Tribunal determination, evidence tendered by the Australian documentary film-maker James Gerrand (accepted and relied on by the Tribunal) explained:

Screenrights royalties, with other potential revenue sources, act as an incentive to produce documentaries of educational value. In the early years of the operation of the Screenrights scheme, I regarded Screenrights royalties as an unexpected bonus. Now I have come to expect returns from this source and the potential for Screenrights royalties influences production decisions.

The film maker gave evidence that a documentary produced by him (The Last God King which traces Cambodian History from the time King Sihanouk was placed on the throne by the Vichy French at the age of 19 until the present day) earned approximately \$23,000 in distributions under Part VA. The production cost of the documentary was approximately \$350,000 and was financed by him without any investment from the Australian Film Finance Corporation or other government funding bodies.

- 4.6 Similarly, evidence tendered to the Copyright Tribunal by another Australian documentary film maker, Chris Hilton (co-producer of Year of the Dogs), the importance of Part VA to the market for Australian documentaries was put in a wider commercial perspective:

Within the potential non-theatrical market, the single most important source of potential returns is royalties from copying in the educational institutions market. Before the introduction of the scheme administered by Screenrights under the Copyright Act, this market was solely comprised of videocassette sales. However, now educational institutions may copy from television broadcasts. This has the potential to decrease videocassette sales and so the level of remuneration received through Screenrights is crucial to maximising the returns to investors. Furthermore, the royalties from

sound recording or film without infringing that copyright": section 135Z. This "source licensing" provision is little utilized by rights holders for all the reasons rights holders were unable to derive effective remuneration from educational off-air copying prior to Part VA. It has, however, been utilized by the TAFE sector in WA to facilitate delivery of TAFE classes to students in remote areas.

Screenrights offset, at least to some extent any reduction in revenue from video sales.

- 4.7 Similarly, David Noakes, documentary producer and previously Investment Manager at the Australian Film Finance Corporation, gave evidence before the Copyright Tribunal that:

Generally, it is difficult to procure any overseas distribution interest for documentaries. This is especially so if the material that is contained within a documentary is strongly culturally relevant to Australia.

The FFC is required to take into account the company's recoupment position in making investment decisions and to strike a balance between maximising the value of the production slate returns on the Governments' investment. One of the objectives of the FFC is to support projects that can potentially realise returns and to secure an appropriate return on each of its investments.

As it is difficult to secure overseas distribution interest in documentaries, the only real returns will come from:

- (a) broadcast fees for free-to-air television from a local broadcaster and fees for the right to exploit pay television rights and satellite television rights;
- (b) the sale of video cassettes to the educational sector;
- (c) royalties from the educational sector through the off-air copying scheme administered by Screenrights; and
- (d) the sale of video cassettes to the general public.

An FFC invested documentary generally recoups approximately 10% of the FFC's investment. The off-air copying royalties actually received by the FFC under the Screenrights scheme averages approximately 29% of the FFC total recoupment. Although this does not represent the majority of the recoupment of the FFC's investment, it is nevertheless a significant contribution towards the recoupment achieved by the FFC for these projects.

- 4.8 If it is considered that financial incentive to Australian documentary film-makers to produce more documentaries gives rise to public benefits, Part VA can be seen to benefit the public to this extent.

5 Part VA and Restrictions on Competition

- 5.1 The characterisation of Part VA put in this submission is one of Part VA as a remunerated exception to an exclusive right of copyright owners.

- 5.2 Put another way, Part VA is an answer to the question:

"How do we enable educational institutions to easily record broadcast programming for their teaching purposes, and overcome the 'copyright problem'?"

Ease of access to copyright material for educational purposes is at the heart of Part VA. Whilst payment to rights holders is central to the operation of Part VA, ease of access is possibly paramount. It is the desire for ease which explains why section 135P(2) of Part VA provides:

The Attorney-General shall not name more than one body in a declaration and shall not make a declaration while an earlier declaration is in force.

For such a remunerated exception to overcome the very problem for which it was created - users having to deal with a multiplicity of rights holders and risking infringement when clearances can not be obtained - simplicity is required. This calls for a single reference point for both users and owners to administer the exception. Screenrights is that single reference point, under the scrutiny of its members, the Commonwealth Parliament, the Copyright Tribunal and Courts of Equity. The Part VA model is one of quasi public administration of copyright to facilitate a remunerated exception for educational purposes.

- 5.3 In 1997 the Copyright Law Review Committee requested comments from interested parties regarding possible adoption in Australia of the "voluntary" educational broadcast licensing scheme currently extant under English and New Zealand legislation (section 35 of the UK Copyright Designs and Patents Act 1988 and section 48 of the NZ Copyright Act 1994). Screenrights submitted its view that this statutory model is deficient when compared to Part VA. The Copyright Law Review Committee's recommendation rejected this alternative:

Neither users nor owners, however, proposed a radical recasting of the provisions of the Act that currently relate to educational copying. In particular, the majority of submissions from both users and owners recommended retention of the present statutory licensing schemes set out in Parts VA and VB of the Act.

The Committee had invited comment on adoption of the scheme for educational copying found in ss. 35 and 36 of the UK Copyright, Designs and Patents Act 1988, under which a free compulsory licence permits the copying of a limited amount of copyright material in the absence of an agreed voluntary licence. The principle underlying the scheme is to encourage the parties to reach agreement on permissible copying. For various reasons the parties affected in Australia do not consider this a satisfactory way to deal with educational copying. The Committee considers that the position in Australia is now well established and well known to all parties and no case has been made for a change in the general approach.⁸

⁸ Copyright Law Review Committee, Simplification of the Copyright Act, Part 1 - Exceptions to the Exclusive Rights of Copyright Owners, 174.

In the event that the Intellectual Property and Competition Review Committee is interested in this alternative to the Part VA model, Screenrights comments as follows.

- 5.4 The English and New Zealand provisions are not voluntary licence schemes as one would normally understand that expression. They operate so that in the absence of a contractual licence, legislation in effect provides a compulsory free licence to educational users in the form of a complete defence to infringement. The rights of copyright owners are exercisable by educational users with neither permission nor remuneration. Screenrights regards these provisions as an extreme incursion upon the rights of copyright owners.
- 5.5 The English and New Zealand provisions provide for collective administration of copyright without statutory machinery. In the absence of a statutory mechanism providing for collective administration, the transaction costs in obtaining licences from all the relevant copyright owners is high. The copying of a single off-air television program could entail licences for:
- copyright in the broadcast
 - copyright in the cinematograph film
 - copyright in the script
 - copyright in the music
 - copyright in any works of visual arts therein contained
 - copyright in the sound recording
- 5.6 The English and New Zealand legislation confront educational users with the possibility of a multiplicity of licensing schemes from each of these categories of rights holders, each scheme covering different repertoire and containing different terms. Uncertainty is created as to whether a licence is required and if so from whom it should be sought and on what terms. However, whatever those terms are they will be likely to reflect a duplication of administration costs.
- 5.7 Further, schemes may be created which (say) exclude certain parties from membership on the basis of nationality. Screenrights experience of an administration of under the English scheme suggests this. Such conduct is contrary to international copyright norms (see below at paragraphs 6.2 and 7.3).
- 5.8 All this may be contrasted with the present position in Australia where an educational user need approach only one body in respect of a scheme set out in legislation. It is the loss of this simplicity which lies at the heart of the findings of the Copyright Law Review Committee that "neither users nor owners, however, proposed a radical recasting of the provisions of the Act that currently relate to educational copying".
- 6 Part VA, Screenrights and Balance of Trade
- 6.1 One aspect of Part VA which the Committee may wish to consider is its effects on Australia's balance of trade position.
- 6.2 An important international norm of copyright law is that of Art 5(3) of the Berne Convention which in part provides "when the author is not a national of the country of origin of the work for which he is protected under this Convention, he shall enjoy in that country the

same rights as national authors." Discrimination against the works of foreign nationals, where those works fall under the protection of the Berne Convention, amounts to a violation of both Berne and TRIPS. Part VA contains no such discrimination (see paragraph 7.3).

6.3 The majority of funds collected by Screenrights under Part VA are remitted to Australian-based rights holders. This is a function of the nature of programming copied by the Australian educational sector. Thus, for the years 1991 to 1997 only 26% of the total distributable amount has been distributed overseas. At paragraphs 4.3 to 4.6 (above) accounts as to the effect of Screenrights distributions upon Australian rights holders has been outlined.

6.4 Further, Screenrights activities outside Part VA involve both collecting for predominately Australian rights holders in foreign markets and administering an off-air copying schemes for rights holders in a foreign market. These are discussed below in section 8.

7 Part VA and International Obligations

7.1 Article 9 of the Berne Convention provides:

- (1) Authors of literary and artistic works protected by this Convention shall have the exclusive right of authorizing the reproduction of these works, in any manner or form.
- (2) It shall be a matter for legislation in the countries of the Union to permit the reproduction of such works in certain special cases, provided that such reproduction does not conflict with a normal exploitation of the work and does not unreasonably prejudice the legitimate interests of the author.
- (3) Any sound or visual recording shall be considered as a reproduction for the purposes of this Convention.

7.2 Screenrights regards Part VA, and in particular the requirement that rights holders receive "equitable remuneration", as meeting the obligation that copies made in reliance on Part VA do not "not unreasonably prejudice the legitimate interests" of rights holders. This view was shared by the Attorney-General on the introduction of the Part VA scheme to Parliament: "These statutory licence schemes are also consistent with the requirements of the international copyright conventions" (see paragraph 1.5 above).

7.3 As noted above at paragraph at paragraph 6.2, Article 5(3) of the Berne Convention provides "when the author is not a national of the country of origin of the work for which he is protected under this Convention, he shall enjoy in that country the same rights as national authors." Part VA, and Screenrights administration of Part VA, are avowedly non-discriminatory in character. Part VA mandates that to be the declared collecting society, Screenrights rules must permit that all relevant copyright owners, or their agents, are entitled to become its members. Screenrights distribution policies, in turn, rest entirely on the type of subject matter (see paragraph 2.5 above). No issue of nationality of rights holders arise. Screenrights' membership is presently derived from 40 countries.

7.4 Screenrights notes the incorporation of Articles 5(3) and 9 of the Berne Convention as a TRIPS obligation.

8 Other Activities of Screenrights

International Collection Service

8.1 Since 1997 Screenrights has commenced offering services in collecting overseas royalties on behalf of members who voluntarily delegate Screenrights that function. Under voluntary membership agreements, rights holders may delegate Screenrights to be their non-exclusive agent in the collection of royalties from a variety of overseas cable retransmission, blank tape and rental schemes. This service is relatively new. Predominately Australian rights holders have availed themselves of it. Over \$500,000 has been collected to date.

New Zealand Educational Copying

8.2 Since 1998 Screenrights has operated an educational off-air copying licensing scheme in New Zealand. This scheme, operated under legislation the limitations of which are described above at paragraphs 5.4 to 5.8, has collected over \$200,000 in the past financial year.

Government Copying

8.3 In 1998 amendments were passed to the Copyright Act to provide for a statutory licence in respect of government copying (Commonwealth, State and Territory). The licence may be administered by one or more collecting society declared by the Copyright Tribunal. Where there is more than one society the declaration is in respect of a "specified class of government copies"⁹. Screenrights has sought a declaration from the Copyright Tribunal in respect of the following classes of copyright material :

- (i) a sound recording; or
- (ii) a cinematograph film; or
- (iii) a television or sound broadcast; or
- (iv) a work that is included in a sound recording, a cinematograph film or a television or sound transmission

in respect of the application of the copyright to the making of a copy of a transmission of a sound broadcast or a television broadcast including (to avoid doubt) a sound broadcast transmitted for a fee and a television transmission to subscribers to a diffusion service.

This application is pending before the Copyright Tribunal. Screenrights expects it to be dealt with this year.

⁹ Section 153F(5)(b).