screenrights
The Audio–Visual Copyright Society

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

SUBMISSION ON OTHER MATTERS OF IMPORTANCE

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.

This submission covers matters in the Digital Agenda Bill other than retransmission and the operation of Part VA. Screenrights is making a separate submission in regard to retransmission and another submission in regard to Part VA.

Included in the Part VA submission is a more detailed explanation of Screenrights' activities and a list of Screenrights' members.

B LIBRARIES AND ARCHIVES

Under section 110B of the Act, libraries and archives may make copies from original copies of sound recordings and cinematograph films in their collections for certain purposes including:

- preservation,
- replacing deteriorated copies,
- replacing lost or stolen copies, and
- for the purpose of research carried out at the library or archive or at another library or archive.

The Digital Agenda Bill extends the operation of 110B to allow libraries and archives to communicate copies of sound recordings and cinematograph films for the same purposes: schedule 1, Item 92, clauses 110B(2A),(2B).

The effect of Item 92 is to allow communications of all films and sound recordings for these very broad range of purposes. Item 92 does not provide for equitable remuneration be paid to the copyright owner for this communication.

Of particular concern, the proposed insertion of subsection 110B(2B) allows for the communication of a copy of a sound recording or cinematograph film to another library or archive for the purpose of research conducted on the premises of that other library or archive. There is no provision in the subsection for the payment of equitable remuneration.

Screenrights submits that the proposed subsection 110B(2B) in Item 92 could allow a group of libraries and archives to each copy their collections of sound recordings and cinematograph films into a digital form and then make them available on-line to each other. This is an extremely valuable use of copyright for which the Bill makes no provision for remuneration.

The Explanatory Memorandum states at paragraph 132 that the proposed subsection 110B(2B) "does not extend to communication to the general public". However, libraries and archives will be able to communicate copies of sound recordings and cinematograph films to the general public constrained only by:

(i) being within the premises of the libraries and archives, and

(ii) the loose purposes, in particular that of "research".

Screenrights submits:

- that the conversion of a sound recording or cinematograph film from analogue to digital form should not be the province of an unremunerated exception from infringement;

- that the communication of copies of sound recordings and cinematograph films within libraries and archives is a further valuable use which greatly extends the encroachment on copyright;

- that the communication between libraries and archives of copies is an even greater and more valuable use which has the potential to undermine developing new media industries; and

- that these are very valuable uses that, if they are to be the subject of a statutory licence at all, should be permitted only in return for equitable remuneration.

C AUTHORISATION PROVISIONS

Screenrights welcomes the attempt to codify the *Moorhouse* principles (from the High Court decision the *University of NSW v Moorhouse* (1975) 133 CLR 1) relating to when a person will be taken to have authorised the infringement of another. Screenrights notes that the Exposure Draft of the Digital Agenda Bill proposed this codification through the following factors:

(a) the extent (if any) of the person's power to prevent the doing of the act concerned;
(b) the nature of any relationship existing between the person and the person who did the act concerned;
(c) whether the person took any reasonable steps to prevent or avoid the doing of the act.

(Schedule 1, items 31 and 70)

However, in the Bill as introduced on 2 September 1999, the following words have appeared at the conclusion of factor (c): "including whether the person complied with any relevant industry codes of practice" (schedule 1, items 39 and 87).

Screenrights submits the inclusion of this additional qualification upon the concept of "reasonable steps", which goes beyond the *Moorhouse* principles, gives rise to absurdities and potential injustice to copyright owners.

An industry code in an industry of copyright users (for example, the education sector) may contain self-serving articles which facilitate authorisations of infringement, and created without the agreement of copyright owners. Such industry codes may not adequately recognise the need to ensure that copyright is not infringed.

Indeed, by virtue of the code itself, a peak industry body which formulated the code could be liable under *Moorhouse* principles for authorising infingement. However, under the Bill's revised formulation, the code itself forms the basis for deciding what amounts to "reasonable steps". This is circular, absurd and unjust to copyright owners.

Screenrights submits that the words "including whether the person complied with any relevant industry codes of practice" should be removed from schedule 1, items 39 and 87 of the Digital Agenda Bill.

D CARRIERS AND CARRIAGE SERVICE PROVIDERS

Excepted from the authorisation provisions are carriers (such as telecommunications service providers) and carriage service providers (such as internet service providers or "ISPs"). Schedule 1, item 42 provides:

> A carrier or carriage service provider is not taken to have authorised any infringement of copyright in a work merely because the carrier or carriage service provider provides facilities used by a person to do something the right to do which is included in the copyright.

Screenrights submits that the operation of this specific exception would apply to activities such as the hosting of copyright infringing material by a carriage service provider. This specific exception would apply completely in that situation rather than the general authorisation codification. This would clearly serve to hamper copyright owners efforts to effectively enforce their rights in seeking the removal of copyright infringements from servers.

Screenrights submits that this problem can be overcome by the inclusion of a proviso that the specific exception (in schedule 1, item 42) applies except where the carrier or carriage service provider is on notice from a copyright owner or licensee that it may be hosting infringing material. Receipt of such notice should trigger the operation of the general *Moorhouse* authorisation provisions.

E FAILURE TO PROSCRIBE THE ACT OF CIRCUMVENTION

Screenrights notes that both the Exposure Draft and the Bill do not proscribe the act of circumvention. While the Explanatory Memorandum to the Bill pithily states "the actual use of circumvention devices is not proscribed", the Commentary to the Exposure Draft provided a substantive justification:

> The Government is of the view that adequate legal protection against the circumvention of effective technological protection measures can only be afforded if the manufacture and commercial dealings in circumvention devices are banned. As the proposed EC Directive notes (see above), it would be more effective for owners of copyright to be able to seek remedies against the manufacture and commercial dealings with devices rather than seek remedies against individual users of those devices. The actual use of a circumvention device has therefore not been proscribed in the draft Bill.

However, the proposed European Commission Directive referred to in the Commentary was amended by the European Parliament after the preparation of the Exposure Draft and prior to the introduction of the Bill into Parliament.[1] The relevant provision, Article 6(1) now provides:

> Member States shall provide adequate legal protection against the circumvention without authority of any effective technological measures designed to protect any copyright or any rights related to copyright as provided by law or the sui generis right provided for in Chapter III of European Parliament and Council Directive 96/9/EC, which the person concerned carries out in the knowledge, or with reasonable grounds to know that he or she pursues that objective.

This revision, which represents a significant shift on the previous European position, is not referred to within the Explanatory Memorandum to the Bill.

The US approach introduced by the *Digital Millennium Copyright Act* 1998 in §1201(a)(1)(A) provides:

> No person shall circumvent a technological measure that effectively controls access to a work protected under this title.

The provision goes on to explain that this will only apply after a period 2 years from the date of enactment. Excluded from its ambit are classes of works in respect of which the Librarian of Congress determines that the ability of person to make "noninfringing" uses will be adversely affected. The Librarian of Congress will make such a determination every 3 years.[2] The determination is, essentially, implementation of the recommendation contained in a rule-making by the Copyright Office.[3]

Both §1201(a)1(A) in the US and Article 6(1) in the EU proscribe an activity wholly absent from mention within the *Digital Agenda Bill*. The Bill's Explanatory Memorandum is particularly coy on what policy imperatives have led to Australia proposing to legislate inconsistently with Europe and the US in this area.

Screenrights submits that it is unjust to copyright owners to enact the Digital Agenda Bill without proscribing the actual act of circumvention. For example, without an actual circumvention proscription, imagine the following scenario:

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[1] The proposed European Commission Directive on the harmonisation of certain aspects of copyright and related rights in the Information Society (COM(97)628 final of 10.12.1997) referred to in the Commentary to the Exposure Draft was supplanted by an Amended proposal for a European Parliament and Council Directive on the harmonisation of certain aspects of copyright and related rights in the Information Society (Brussels, 21.05.1999 COM(1999) 250)

[2] §1201(a)(1)(B)-(E).

[3] §1201(a)(1)(C).

> An Australian film producer/distributor makes its film available on-line, access subject to payment and an access code. A vendor may sell a device which enables the circumvention of the technological protection measure adopted by the film producer/distributor. Through use of the device, access to the films may be obtained freely. Under the current Bill, the vendor may be subject to criminal liability, and the film producer/distributor may restrain the further sales of the device, seek damages or an account of profits from the vendor. However, no injunctive or other civil relief could be sought against the persons who have acquired the device. As the "actual use of circumvention devices is not proscribed", under the *Digital Agenda Bill* the devices may be legally used until the film producer/distributor introduces a further measure to overcome the devices.

Screenrights submits that this seems to be an odd and unjust outcome.

F TRANSITIONAL PROVISIONS

Screenrights questions the effect of schedule 2, item 3(2). On our reading, it provides that copyright material in respect of which broadcasting rights or cable transmission rights have been assigned, fail to attract the new communication to the public right.

Presumably this is an unintended outcome. Screenrights notes that schedule 2, item 3(1) could include reference to assignments relating to the broadcasting or cable rights. Screenrights notes in this respect that section 196(2)(a) of the Copyright Act provides:

> An assignment of copyright may be limited in any way, including any one or more of the following ways:
>
> (a) so as to apply to one or more of the classes of acts that, by virtue of this Act, the owner of the copyright has the exclusive right to do (including a class of acts that is not separately specified in this Act as being comprised in the copyright but falls within a class of acts that is so specified)

This provision countenances and permits partial assignments of rights, such that assignments could be subsumed within schedule 2, item 3(1). So subsumed, item 3(2) could be omitted.