

8 November 2006

Senator Marise Payne
Chair
Senate Legal and Constitutional Affairs Committee
Parliament House
Canberra ACT

By email: senator.payne@aph.gov.au
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Dear Senator Payne

Provisions of the Copyright Amendment Bill 2006

Thank you for the opportunity to attend the hearings yesterday. I am particularly grateful for the invitation from you on behalf of the Committee to write this short note, as a matter was raised yesterday by the Australian Vice-Chancellors' Committee ("AVCC") and schools Copyright Advisory Group ("CAG") to which I felt due to the inevitable time constraints we did not get a chance to properly respond: the question of the Copyright Tribunal's jurisdiction over a records system which is found in Schedule 11, sections 40, 41 and 42.

The Bill extends the jurisdiction of the Copyright Tribunal over all aspects of the operation of the statutory licence. This includes jurisdiction over what have previously been internal matters such as Screenrights' distribution scheme and internal rules. Similarly, the Bill gives jurisdiction to the Tribunal over a records system used to assess the amount of copying undertaken by an educational institution. (Transition provisions ensure that educational institutions which are, on enactment of the Bill, operating under the non-reviewable record keeping arrangements will be unaffected by this aspect of the reform.) Screenrights welcomes the scrutiny and transparency provided by all these Tribunal review provisions. The AVCC and CAG, however, oppose the Tribunal's jurisdiction over the records system.

Copyright owners don't have a choice in whether their works are used under the statutory licences. If copyright owners are to have confidence in the statutory licences, it is essential that they have confidence in the systems that measure use. If the Tribunal does not have oversight of these systems, then copyright owners cannot have confidence that the use of their property is being accurately and fairly reported.

The absence of Tribunal review over record keeping has been and remains an issue of critical importance to Screenrights' members. The creation of the jurisdiction as proposed in the Bill is crucial to ensure the fair and proper operation of the statutory licence in Part VA.

Part VA provides for three systems of participating in the statutory licence. Educational institutions elect under which system they will operate. A records system is one possible choice. All three systems provide that equitable remuneration (payment) is agreed between the collecting society and institution, or failing that jurisdiction is given to the Tribunal to determine remuneration. Two of the three also provide that the *system* itself is by agreement between the parties, or failing that is determined by the Tribunal. Uniquely, there is no requirement to agree a records system, and the Tribunal currently has no jurisdiction over a records system. The Bill will remedy this inequity and we welcome this change.

The basis for the educational institutions' objection was summarised by Ms Delia Browne from CAG at yesterday's hearing: "if it ain't broke, don't fix it." This reflects the written submission of the AVCC that "there is no need to impose this burden ... when there is no evidence that the current records option is not working."¹ Screenrights absolutely refutes this claim. Our written submission explains that during a sampling rates determination case the Copyright Tribunal was required to consider the universities' performance of their obligations under the records system. The Tribunal found that true and complete records of copying had not been kept by the universities.² Given that this finding was in relation to the present legislative system, Screenrights is most surprised that the AVCC and CAG would submit that there is no evidence that the current regime is not working in the face of this judicial finding.

Screenrights submits that the current regime is not working and is inequitable to copyright owners. The current legislative regime is an obstacle to a collecting society and an educational institution addressing this issue. Screenrights has repeatedly sought to negotiate and agree a system to comply with the statutory obligations institutions that have elected to keep full records. Screenrights has been repeatedly rebuffed on the basis that there is no obligation (as opposed to no need) to agree any system.

In the absence of an agreement as to the records system and given the history of failure to report copying under internally regulated records systems, Screenrights can have no confidence in the accuracy of reporting of records. The effect is that Screenrights and copyright owners are forced into attempting to externally monitor compliance. At the hearing yesterday (in the context of the liability provisions) Ms Browne stated that the schools do not want to be forced to act as copyright police.

¹ Submission 58, page 5.

² *University of Newcastle v Audio-Visual Copyright Society Ltd* [1999] ACopyT 2 (12 March 1999) at paras [11], [15] and [50].

This is exactly the effect of the current records system provisions: Screenrights is required to be the copyright police.

Finally, the AVCC submits that the creation of this jurisdiction will inevitably lead to costly litigation because "if having a matter determined by the Tribunal is an option the collecting society will not reach agreement... without first instituting and pursuing Tribunal proceedings."³ This ignores the Bill's creation of alternative dispute procedures which would apply in the event that agreement could not be reached. Furthermore, it is contrary to Screenrights' experience. In sixteen years of operation Screenrights has had only two Tribunal cases with educational institutions: once with schools and once with universities. Both were about equitable remuneration under a sampling system and the sampling system itself. In sixteen years, Screenrights has been able to agree the sampling system with the educational sector without ever invoking the jurisdiction of the Tribunal. Screenrights sees no reason why this would be different for a records system, assuming the Bill is enacted in its present form.

Again, we welcome the amendments to the Copyright Tribunal's jurisdiction. This Bill will create a more transparent statutory licence. We are confident that our distribution systems and other operations will withstand this scrutiny, and we welcome any assistance the Tribunal will give. Similarly, we welcome and commend the Government on the extension of the Tribunal's jurisdiction over a records system and are surprised that the educational sector is seeking to avoid such scrutiny of their obligations on the spurious basis put to the Committee.

I apologise for the length of this note, but I felt it was critical to place on the record our long held views on this matter. Thank you again for the opportunity to submit and appear at the hearing. I hope that our submissions are of assistance to the Committee in its difficult task.

Yours sincerely,

A handwritten signature in blue ink, appearing to read 'Simon Lake', enclosed within a large, loopy oval shape.

Simon Lake
Chief Executive

cc Committee Secretary, legcon.sen@aph.gov.au

³ Submission 58, page 5.