

ANNEXURE TWO TO SCREENRIGHTS SUBMISSION COMMENTS ON COPYRIGHT AMENDMENT BILL 2006

SCHEDULE 6

Private audio-visual copying exceptions: proposed 111, 109A and 110AA

- 6.1 Screenrights has made numerous submissions for over a decade that a remunerated exception for private copying through a levy system should be enacted. This has always been put on the basis of fairness and good policy. Australian life would be enriched by a flow of income back into those cultural industries valued highly by consumers, but which are not able to obtain reward from that value. It would have also enabled Australian industry to share in the private copying levy schemes abroad.
- 6.2 In 2002 a legislative scheme drafted by Denis Rose QC and Dr David Brennan was circulated by Screenrights in order to demonstrate that private copying levy reform could be enacted in such a way as to overcome legal characterisation as a tax. This month (October 2006) the 'Culture First' campaign of European filmmakers and musicians (and in which a sister society of Screenrights, EUROCOPYA, is involved) has demonstrated that the imposition of such levies in Europe has not held back the development of consumer home electronic devices such as MP3 players, or online sales of copyright content.
- 6.3 It is therefore deeply disappointing to Screenrights and its members that reform is proposed which creates free exceptions for recording broadcasts for replaying at a more convenient time, and for copying sound recordings and analogue videotape copies of film in a different format for private use. Such exceptions include within their operation the first digitisation of copyright subject matter. It is not clear to Screenrights that free exceptions of such scope comply with international copyright norms.

Inscription of the three-step test in proposed 200AB

- 6.4 Screenrights has serious reservations about the inscription of the TRIPS three-step test in the proposed 200AB:
- The three-step test, addressed in international law to legislatures in the formulation of copyright exceptions, is not suited to enactment into domestic law;
 - Enacting the abstract terms of the three-step test verges towards authorising judicial legislation because the task of fashioning exceptions is delegated to the courts;
 - It is not clear that merely enacting the three-step test would ensure compliance with the test in international law.

- 6.5 The first criterion of the three-step test – ‘certain special case’ – is particularly problematic in this regard. Leaving aside the parody and satire exception which is discussed below, the proposal suggests that wholly non-commercial designated activities done by particular users may qualify for consideration as a ‘certain special case’. That is, whatever is a certain special case must exist as a subset within the designated classes of users’ non-commercial activities.
- 6.6 It appears to Screenrights quite circular and ambiguous to attempt to create in domestic legislation a ‘certain special case’ simply by using those words. If courts were required to establish the parameters of a ‘certain special case’ the sole WTO panel decision on point suggests that this requires exceptions which are objectively narrow in both a quantitative and qualitative sense. The WTO jurisprudence establishes that an exception should be created having regard to, *inter alia*, the number of potential copyright users who will avail themselves of the exception, and the economic value of those excepted exploitations. It seems to Screenrights that these essentially economic assessments are for Parliament informed by public submission-making, parliamentary committee input and the information resources of bodies such as the Productivity Commission and the ACCC. In short, it appears to be a matter of public policy reflected in statutorily-defined language. It is doubtful that a court is the correct body to garner the resources and to make the assessments of public policy required to establish certain special cases.
- 6.7 Confinement of exceptions to certain special cases has a logical bearing upon compliance with the second and third criteria of the three-step test. In the WTO decision, an exception confined to a certain special case also met the requirements of absence of conflict with normal exploitation and absence of unreasonable prejudice to legitimate interests. An exception which was not confined to a certain special case was found by the WTO panel not to meet the other two steps of the test. In this regard, certain confinement to truly exceptional cases appears to be of central importance in meeting the test.
- 6.8 Screenrights appreciates that the three-step test has assumed heightened importance in international copyright law. However that should not lead to the direct enactment in domestic law of a test which is neither designed nor suited for that purpose. To enact the three-step test appears likely to create costly disputation and uncertainty for both copyright owners and users, and perhaps exceptions which do not satisfy that very test.
- 6.9 An understood legislative model exists in the five factors listed in section 40(2) of the Copyright Act 1968. These factors have been an aspect of the research and study fair dealing exception since 1980. Such factors appear to provide better guidance than the direct enactment of the three-step test for those needing to determine the scope of an exception.

A free exception for giving educational instruction in proposed 200AB

- 6.10 Proposed 200AB(3) designates wholly non-commercial uses by educational institutions for the purpose of giving educational instruction as eligible to be assessed under the three-step test for the free exception. The requirement that the use is 'not made partly for the purpose of the body obtaining a commercial advantage' provides some limitation to this designation. But it is quite limited comfort to Screenrights.
- 6.11 That is because, proposed 200AB(6) notwithstanding, if a free exception for a teaching purpose was introduced, the context in which the educational statutory licences (Part VA and Part VB of the Copyright Act) operated would dramatically change. The statement in the Explanatory Memorandum [6.62] relation to 200AB(6) is that the statutory licences 'continue to apply and are not overtaken by 200AB' does not protect the educational statutory licences from being potentially undermined by 200AB.
- 6.12 The scope of the Part VA statutory licence limits an educational institution to copying (for its educational purposes) from broadcast sources, subject to payment to the relevant copyright owners through Screenrights. Under the proposed change it is possible that the institution could borrow the film from a video library and copy the video for the purpose of giving educational instruction, and perhaps even supply copies to students on a cost-recovery basis.¹ An educational institution may argue that such an activity would be amenable to the proposed 200AB exception being outside the scope of the Part VA licence. If this argument were to be accepted, why would an educational institution choose to pay for a copy of a broadcast of a film, when it can obtain a copy of the film from an alternative source without paying?
- 6.13 If the proposed 200AB reflects a need for educational institutions to make format-shift copies from their legacy holdings of non-Part VA copies (an illustration given in an AVCC submission to the Fair Use Review) Screenrights is doubtful that such a move reflects good copyright policy. An educational institution purchasing a particular form of media containing copyright content is not paying to acquire a licence to copy that content for the copyright term into whatever format happens to be current for the entire term of copyright protection. Notwithstanding this objection, if it is Government policy to address this matter, the proper solution to this problem is to extend the Part VA statutory licence to cover such uses. This could be done for audio visual works by extending Part VA to non-broadcast audio-visual material from non-infringing copies owned by the educational institution in limited instances, for example, when play back systems are no longer commercially available.

¹ Explanatory Memorandum [6.56].

- 6.14 The educational statutory licensing has evolved in Australia successfully because the rights structure is so clear. There has been the dichotomy between teaching use by an institution being an excepted use under a statutory licence, and research and study by an individual being an excepted use under fair dealing. This dichotomy forms an integral aspect of the legal context of the statutory licence. If the dichotomy is abolished, a rights structure emerges in its place which over time will lead to the educational licences being diminished to a point where they may be unable to be properly administered. The effect of the inclusion of a teaching purpose as supporting a free exception is to implement radical change without any consideration given to the important policy issues which have constrained the operation of statutory licensing to date while at the same time undermining those statutory licences.

A free exception for parody and satire in proposed 200AB

- 6.15 In relation to the new parody and satire exception, it appears to Screenrights that a certain special case already exists into which these purposes may be assimilated; the criticism or review fair dealing exception.

SCHEDULE 8

Extension to the Part VA statutory licence in proposed 135C

- 8.1 Screenrights welcomes the logical extension to the Part VA statutory licence reflected in proposed 135C. This extension will permit broader educational uses of broadcast content made available online by the broadcaster. It properly addresses real issues of constraint that Screenrights has encountered in its dealing with both members and educational licensees, while ensuring copyright owners a fair payment for use.

Communication and caching exceptions in proposed 28A and 200AAA

- 8.2 Screenrights regards the breadth and drafting of proposed 28A and 200AAA as unsatisfactory. Proposed 28A as drafted potentially impinges upon currently remunerated uses under the Part VA statutory licence. Proposed 200AAA has a large potential scope impinges upon both the remunerated educational statutory licences, and represents an exception which would be unlikely to satisfy international copyright norms.
- 8.3 Screenrights and the Copyright Advisory Group to the Schools Resourcing Taskforce of the Ministerial Council on Employment, Education Training and Youth Affairs ('CAG') have collaborated to arrive at a joint position in relation to proposed 28A (replaced by the addition of the Screenrights-CAG proposed 28(5)) and in relation to proposed 200AAA (replaced by the addition of the Screenrights-CAG proposed 200AAA and 200AAB). This

drafting is contained in ANNEXURE ONE. The Screenrights-CAG drafting is intended to target the actual needs of the educational users, while preserving the continued clear operation of the statutory licences.

SCHEDULE 10

- 10.1 Screenrights welcomes the increased flexibility created in relation to the society declaration process proposed in the Schedule for the statutory licences contained in Part VA and Part VC of the Copyright Act. The possibility of referral to the Copyright Tribunal of Australia ('Tribunal'), as it is proposed to be renamed, appears to Screenrights to provide a sensible and transparent avenue for resolution of any controversy relating to a current declaration or any application under Part VC for another body to be a co-declared society.
- 10.2 Screenrights, however, notes that any Tribunal process imposes substantial cost burdens on any party before the Tribunal.

SCHEDULE 11

Expansion of Tribunal jurisdiction over distribution schemes under statutory licences

- 11.1 The expansion of Tribunal jurisdiction to include review of distribution arrangements under Part VA, Part VC and section 183A is a matter Screenrights generally welcomes in its role as collective administrator. Screenrights regards this as providing a greater layer of transparency and accountability in respect of its operations. Although it is necessary to again note that Tribunal processes impose substantial cost burdens on all parties before the Tribunal.
- 11.2 There is, however, a drafting matter of serious concern to Screenrights. Proposed 135SA (for Part VA), 135ZZWA (for Part VC) and 183F (for section 183A) confer jurisdiction on the Tribunal to make, potentially, retrospective adjustments of schemes of distribution. This could create unworkable situations where past distribution pools have been paid in whole or in part. This could create a costly and unworkable situation for Screenrights.
- 11.3 Screenrights therefore submits that this could be avoided by the insertion of the word 'future' before the word 'period' in proposed 135SA(1), 153BAD(1), 135ZZWA(1), 153R(1), 183F(1) and 153KA(1). In relation to the Part VB statutory licence consistency would dictate the same insertion into that provision if this submission was accepted – ie into proposed 135ZZEA(1) and 153DE(1).

Record keeping

- 11.4 Just as Screenrights' operations should be capable of being reviewed by the Tribunal, so too should the system of collecting copyright data under the statutory licenses. Screenrights welcomes the proposed creation of Tribunal review over record systems in Part VA. This has long been a gap in the legislative framework which has created a significant anomaly in the Tribunal's review of the statutory licence system..
- 11.5 While the current legislative regime (in sections 135K and 135H of the Act, and regulation 23C of the Copyright Regulations 1969) sets out the basic form which records are to take, it does not afford to the parties any mechanism directed to internal compliance with the obligation to keep records. There is no requirement under the current law for educational institutions to agree with Screenrights to a system by which accurate records are to be kept and institutions have refused to contract to any records systems.
- 11.6 The Tribunal has made findings that true and complete records were not kept by educational institutions under the current legislative regime.² In Screenrights' view, in the absence an agreed records system with Tribunal oversight, such failures are inevitable.
- 11.7 In this environment Screenrights' sole option in administering compliance in record-keeping institutions has been the unilateral use of direct surveillance to detect infringements. These 'self-help' measures are costly, inefficient and do not promote good relations with educational institutions.
- 11.8 Screenrights has for many years submitted to Government that educational institutions which elect the records system should agree to record keeping arrangements with Screenrights and that the Tribunal should be given a jurisdictional role to play in lieu of agreement. Educational institutions have over that period resisted this submission. It has been clear that educational institutions have wanted to preserve the option of record keeping, free from any agreed control and Copyright Tribunal review, as something to be used in negotiations. This unsatisfactory state of affairs has lasted for too long. Screenrights commends the decision to correct it.
- 11.9 Screenrights approaches all its negotiations with educational institutions in good faith. This is evidenced by the fact that in the last sixteen years Screenrights has only been involved in two Tribunal actions with the educational institutions. Screenrights fully expects that if the proposed reform was enacted, agreed records systems would be arrived at with educational institutions in the shadow of Tribunal jurisdiction, without

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

need to invoke that jurisdiction. In this regard the reform would entail no substantial additional legal cost to either Screenrights or educational institutions.

Other Tribunal matters

- 11.10 In light of the comments made above regarding cost, Screenrights welcomes the flexibility of the possibility of alternative dispute resolution ('ADR') within the Tribunal processes in proposed 169A-G.
- 11.11 While again noting the cost issue, Screenrights welcomes the new jurisdiction of the Tribunal in proposed 135JAA to determine miscellaneous questions affecting Screenrights in its compliance with its rules, administration of Part VA or which affect an administering body's compliance with Part VA. Screenrights perceives this Tribunal oversight role as positive, providing a valuable layer of review, accountability and transparency.