

# Copyright and the Digital Economy Discussion Paper

## *Annexure A: Response from Screenrights to Proposals and Questions*

In this section of our response to the Discussion Paper we comment on the framing principles for reform, policy context for the enquiry, and the specific proposals and questions.

### **Framing principles for reform**

#### **Principles 1 and 2**

Screenrights believes the Discussion Paper suffers from a lack of weight given to principles 1 and 2 – respecting authorship and maintaining incentives for creation of works and other subject matter. Both these principles are an essential component of the digital economy.

The Paper makes few references to these fundamental principles (five in total and most are simply a passing acknowledgement of the need to respect authorship and maintain incentives for creation, or a statement that the principles have little application). We make a particular note of par 6.42, in which the ALRC states that the statutory licences run counter to these principles. The statutory licences ensure rightsholders are paid for widespread institutional use of their work. In Screenrights view, and as we discuss below, replacing the statutory licences with fair use and voluntary licensing is far more detrimental to respecting authorship and maintaining incentives for creation. Such an approach is likely to lead to use without permission or payment.

We also note at paragraph 2.11 that Universities Australia state there should not be an over regulation of activities that don't prejudice incentives to creators. Screenrights believes the ALRC has gone too far in favour of lack of regulation, with the proposed abolition of the statutory licences and a fair use regime making it very difficult for creators to license their work. This lack of regulation would result in many educators simply using broadcast material in the hope that this would amount to a fair use – rather than undertaking the task of determining whether a licence is needed and obtaining one.

#### **Principle 3**

With respect to principle 3, promoting fair access to and wide dissemination of content, Screenrights believes the uncertainty of the ALRC's proposed broad fair use regime and its impact on a nascent commercial licensing environment will be detrimental to fair access. In our view, smaller creators will be prey to large-scale commercial and institutional use of their work, done under the guise of fair

use. These creators will have neither the wealth nor the time needed to pursue their rights in court should they know their work has been used. In addition, our members – filmmakers – will have to operate in an environment of uncertainty in licensing underlying rights. This will add new costs to their business model. Finally, the difficulties of comprehensive voluntary licensing of broadcast content will mean that independent Australian producers will be less able to license their works, leading to a reduction in Australian content available for educational use.

#### **Principle 4**

With respect to Principle 4 - providing rules that are flexible and adaptive to new technologies – Screenrights recognises the importance of technological neutrality but a fair use regime simply defers issues of what needs to be licensed and what doesn't to the courts. This creates an unfair situation for those in the copyright system who cannot afford to enforce their rights through litigation (usually creators). We would also like to note the Schools' statement as paraphrased in par 2.41 (remunerable activities under the statutory licence being technology specific) is incorrect with respect to the broadcast licence. The broadcast licence is technology neutral, aside from the definition of "broadcast" – a definition that the schools seek to maintain, inconsistent with their call for neutrality.

#### **Principle 5**

With respect to Principle 5 – providing rules consistent with Australia's international obligations – Screenrights reiterates its concerns about a broad fair use regime contravening the three-step test in Berne. The ALRC dismisses the possibility of its proposals contravening this test by stating that no action has ever been taken against the US for its fair use regime. We note that the US holds significant power in international political fora. We also note that the proposed regime advocated by the ALRC goes much further than the US regime (it does not allow contract to override a number of fair uses and it proposes replacing statutory licences with "use it or lose it" style provisions, enabling further free use unless the use is licensed). We believe there are serious concerns that legislation to this effect would contravene our international obligations.

## **Policy Context of the Inquiry**

### **Concept of the digital economy**

Content is fundamental to a thriving digital economy, and although the terms of reference relate to how content is consumed and repurposed, Screenrights' concern is that the ALRC proposals will stifle rather than foster the environment for creating and disseminating content.

In particular, Screenrights disagrees with the emphasis placed on the importance of the education sector as a stakeholder in the digital economy (par 3.10) and

believes this has occurred at the expense of the importance attached to the role of creators. In particular we would like to comment on par 3.27 and 3.28. The TAFE sector's criticism of the statutory licence as summarised in par 3.27 must be corrected. Part VA is flexible, simple, efficient and technology neutral. It also places minimum burden on TAFEs with the current agreements no longer even requiring licensed TAFEs to have their broadcast use surveyed. Par 3.28 refers to the education sector's argument that the statutory licences are not suited to the digital age and should be repealed. Again, we refute this claim. As we state at pars 51 to 80 in the main body of this submission, the broadcast licence is technology neutral, has enabled a new array of educational uses of broadcasts (including digital learning management systems) and has had an important role to play in enabling educational use of television and radio, and in the development of new ways of teaching with this material. In fact, the Australian system of statutory licences has enabled much greater digital innovation in the uses of broadcast material than the US fair use system, where online audiovisual Learning Management Systems such as Clickview are unable to operate.

### **Trends in consumer use**

Screenrights disputes that enabling free use is the most effective way to meet trends in consumer use. Meeting trends in consumer use in this way is at the expense of copyright owners having the opportunity to develop new business models to meet consumer needs. Copyright owners are developing new models at a rapid rate and slicing through this with very broad free use exceptions cannot be seen as anything other than detrimental to the digital economy.

### **Complexity of copyright law**

Attempting to reduce the complexity of copyright law by simply deferring difficult and complex questions to the courts is not a workable approach. Individual creators who cannot afford litigation will not benefit from this "simplification". Furthermore, there is no guarantee that having to interpret and apply court decisions in determining whether a use is "fair" will provide any simplification for content users or content owners seeking to license uses. Users themselves refer to their difficulties with s200AB (pars 11.19 and 11.20 of the Discussion Paper) citing uncertainty in applying broad principles to determine whether a use would be allowed under the section.

### **Implications of cultural policy**

Screenrights recognises the importance of libraries and galleries as cultural custodians. Our concern is that the ALRC proposals are weighted too heavily in favour of institutional users of material, with little recognition given to the fundamental role of copyright in protecting creators' works. As we stated in our 2012 response to the Issues Paper, Screenrights is willing to enter licensing agreements with government institutions enabling digitisation of their collections, however no institution has taken up this offer. As per our discussion on fair use in relation to educational institutions, a broad fair use provision creates an environment of uncertainty that operates to the benefit of large institutions over less wealthy creators who may not be able to test the bounds of

these provisions in court. Further, voluntary licensing is more viable for global production companies than it is for smaller independent Australian companies whose productions generally do not have the global audiences which would make obtaining all the necessary underlying rights commercially viable. It is these very programs that would suffer the greatest disadvantage under fair use and voluntary licensing which are most important to Australian cultural policy outcomes.

### Current regulatory models

The ALRC proposal to introduce principles-based legislation over rules-based legislation is an academic approach that fails to acknowledge the value of the forty-five years of investment by copyright owners and copyright users in the interpretation and operation of the current regime.

The proposal effectively junks that investment and replaces it with fair use in the hope that imported US jurisprudence and guidelines may alleviate the uncertainty necessarily created. As the authors of the Kernochan Centre report<sup>1</sup> state, Australia cannot simply replicate the laws of the US. Many fair use decisions in the States have been close and could have gone either way, and the legal, economic and social aspects of the two countries differ. In addition, the Kernochan Centre report discusses the difficulties with guidelines. These do not have status in a court of law, and are frequently published without all relevant players coming to the table. The US guidelines on off-air copying were negotiated in 1981 without two major players representing copyright owners.

In par 3.86 the ALRC notes that the Standing Council on School Education and Early Childhood refer to the time taken in dealing with the “inefficiencies of the current educational copyright licensing environment”. Screenrights disputes that there are inefficiencies with the broadcast licence. As we state in pars 51 to 80 of the main body of this response, the broadcast licence is flexible, has adapted to new technologies and the survey requirements are minimal.

In par 3.88, the ALRC queries whether the risks of uncertainty from a broad principles-based regime are outweighed by the advantages of the reforms. In our view, any advantages of the proposed reforms are weighted in favour of institutional users who will rely on rightsholders not knowing their work has been used and if they do know, being unwilling or unable to litigate.

In Screenrights’ view, a principles-based approach to changing our copyright laws may seem, on the surface, a pleasing solution, but it is riddled with commercial uncertainties that will have a very real impact on players in the digital economy.

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<sup>1</sup> The Kernochan Centre for Law, Media and the Arts, Columbia University School of Law, “Copyright Exceptions in the United States for Educational Uses of Copyright Works, submitted to the ALRC by Screenrights.

## Case for Fair Use in Australia

Screenrights discusses fair use in the main body of this submission from pars 12 to 50. We make the following comments in relation to the ALRC's specific proposals:

### Proposal 4-1 A broad flexible exception for fair use

Screenrights strongly opposes a broad fair use provision for the following reasons:

- A broad fair use provision would introduce considerable uncertainty into our law. Expecting issues to be resolved by courts is not a viable option for many creators who could not afford to litigate to protect their rights. Relying on US jurisprudence to resolve this uncertainty is also unrealistic – the laws of each country differ as do the economic, social and cultural framework for these laws. Similarly, guidelines will not provide certainty – they have no status in law and are very difficult to negotiate.
- This uncertainty will have a detrimental commercial impact on Screenrights' members – filmmakers – who will be in the position of having to determine which underlying rights they need to license in this new environment. Many of Screenrights' members are small independent production companies who cannot afford the time and cost of litigation to resolve this uncertainty.
- The education sector's dismissal of uncertainty must be seen through the framework of their extensive resources compared to those of creators. It is therefore unsurprising they are not concerned – but this is not true of copyright creators.
- There is no concrete evidence that such an exception would create a more vibrant digital economy, and no evidence to this effect is presented in the Discussion Paper. There are many factors at play in the health of a digital economy, including government and private investment, and certainty in the licensing environment.
- The ALRC proposed fair use model goes much further than any similar model in other jurisdictions. It also proposes that contract will not override many fair uses, and it abolishes the statutory licensing scheme, suggesting a possible "use it or lose it" licence scheme or extended collective licensing to counter difficulties with voluntary licensing. This puts copyright owners in an even worse position than other jurisdictions, as the onus is on rightsholders to license their rights – otherwise the use is free.
- The proposal possibly contravenes Australia's international obligations. Advocates of fair use frequently dismiss any concerns about contravening international treaties by arguing that the US has fair use, and the US has

not been prosecuted under WIPO. This defence ignores the vast position of strength which the US enjoys in international fora. Of even greater concern, the model proposed by the ALRC greatly exceeds the US approach, with its extensive list of illustrative purposes, the suggested addition of a “use it or lose it” licensing approach instead of the current statutory licences, and the suggestion that contract should not be able to override certain fair uses. Even if it’s accepted that a US fair use system would scrape through the three-step test, it is much more difficult to accept that the radical approach recommended in the Discussion Paper would do so.

#### **Proposal 4-2 Fair use – non-exhaustive list of factors and non-exhaustive list of illustrative purposes**

Screenrights objects to the proposed list of illustrative purposes as being more extensive than in any other jurisdiction, extending the bounds of this exception beyond any other fair use regime. We discuss the illustrative purposes further below in relation to proposal 4-4.

#### **Proposal 4-3 Fair use – fairness factors**

Screenrights supports the submission of the Australian Copyright Council in response to this proposal.

#### **Proposal 4-4 Fair use – illustrative purposes**

Screenrights strongly objects to the non-exhaustive list of illustrative purposes. The list is exceptionally broad and is not always tied to any notion of social benefit. In particular we note that “private and domestic” cuts into new business models such as purchase licences enabling certain numbers of copies to be made from purchased material and catch-up viewing services. In Screenrights’ view, these new markets have been operating effectively and will continue to expand – we do not see any need for them to be undercut by fair use. Similarly, we do not see any need for “quotation” to be listed. Rightsholders and users have well established permission practices for quotations that fall outside the existing allowances under the fair dealing provisions. This new exception would throw this into uncertainty.

We are particularly concerned about “education” and “public administration” and how such an exception would interact with licensing (whether statutory or voluntary) for these uses. Screenrights foresees considerable and expensive litigation to establish these boundaries. In our view, there is already a well-developed understanding of the line between fair dealing for research and study and the statutory licences – a boundary that is understood by both creators and users of copyright material.

#### **Question 4-1 What additional purposes should be included in the list of illustrative purposes?**

As stated above, Screenrights feels the listed uses or purposes are already too extensive, and no additional purposes should be included.

## **Question 4-2 What other exceptions should be repealed if fair use is enacted?**

Our response is as above – we do not feel that replacing existing exceptions with broad fair use is the right approach.

We are particularly concerned about the repeal of the statutory licences, discussed below.

### **Third parties**

There are no proposals or questions in this section. We make the following comment:

Screenrights does not think copyright law should enable businesses to free ride on the considerable investment made by creators and distributors of their work under the guise of either fair use or fair dealing. Uses such as the Optus TV Now service erode the value of commercial licences for the programs and should not be allowed under the Copyright Act without a licence. To do so would have a detrimental effect on new business models within the digital economy.

## **Statutory licences**

Screenrights discusses statutory licences from pars 51 to 80 in the main body of our response. We make the following comments in relation to the specific proposals in the ALRC discussion paper.

### **Proposal 6-1 Statutory licences should be repealed and licences should be negotiated voluntarily**

Screenrights strongly opposes the repeal of the statutory licences. We reject the arguments put forward for the repeal of the education licence, and we are surprised at the proposal to also repeal the government licence when no submission voiced problems with broadcast copying under section 183.

As we have stated on numerous occasions, the broadcast licence for education is technology neutral, flexible and efficient. It provides simple and comprehensive access to broadcast material with very little administrative burden. It has also enabled the use of innovative Learning Management Systems for digital storage, sharing and use of broadcast material in teaching. The licence is not “broken”, and no claim to this effect has ever been made to us prior to the ALRC inquiry.

Abolishing the licence and implementing a fair use provision would lead to a situation where teachers and academics would frequently use broadcast material without permission or payment in the hope that the use was “fair”.

We make the following points in relation to the arguments put forward for the repeal of the licences:

### *Statutory licences are a derogation from rightsholders' rights.*

They are a derogation, but they are a necessary derogation intended to correct a market failure. Comprehensive use of broadcast material cannot be licensed voluntarily (a point acknowledged by the ALRC in par 15.82 of the Discussion Paper), and prior to the introduction of the statutory licence, educators were either not copying broadcasts or doing so without permission or payment to rightsholders. The vast majority of Screenrights' members have no objection to this derogation from their rights as it ensures they are paid for a use of their material that they may not be paid for otherwise. In addition, the licence does not prevent rightsholders from entering voluntary agreements with educational institutions. Part VA specifically provides for voluntary licensing and such licences are commonplace. It should also be noted that under the current system, licensees are not compelled to take out a licence with Screenrights.

### *Schools and universities seek repeal*

Screenrights refutes the education sector's claim that the licence is broken. As we have stated, this claim has never been made to us and we believe the timing of this claim is opportunistic. The claim also ignores the education sector's option simply not to take out a licence.

Further, the licence is not solely for the benefit of licensees. It is also for the benefit of rightsholders who cannot voluntarily license their work and who in the absence of the statutory licence suffered the use of their copyright material without permission or payment. In our submission in response to the Issues Paper, we noted how important Screenrights royalties are to our members, and to the independent documentary sector in particular.

### *The education sector says the statutory licences are inherently unsuitable to the digital environment.*

This is incorrect. The broadcast licence in Part VA has adapted to new technology, enabling copying in all formats and online communication. The licence has enabled new ways of storing, sharing and playing broadcast material on Learning Management Systems that let teachers and students access programs anywhere, at anytime. These innovative systems have been exported to other jurisdictions, although notably not to countries with a fair use regime.

If the licence were abolished, vast repositories of copied material kept on these online systems could no longer be used. This is because it is difficult to imagine the use would fall within "fair use", and obtaining voluntary licences for this material would be impossible.

### *The education sector complains of inefficiencies in data management*

This is incorrect. The data management requirements under the Part VA licence could not be called onerous under any stretch of the imagination. Institutions are only surveyed on their use for a short period of time, if at all. Universities conduct a very easy online survey where they simply record details of the program and whether it was copied, put online or emailed. Schools take part in a



similar survey to universities, only it is paper-based. The sample system means that universities are surveyed every three to four years and schools are surveyed on average once every 100 years. Moreover, Screenrights has moved in recent years to obtaining records of usage from intermediary bodies (“resource centres”) and this is increasingly replacing the need for surveys. Screenrights no longer conducts a survey in the TAFE sectors nor does it survey ELICOS institutions or private VET providers. Indeed, the system is efficient for both licensees and for Screenrights’ distribution purposes.

*The schools state that the licences are based on a “one-copy-one-view-one-payment” although they acknowledge that “in recent years” commercial deals have been struck on a per student basis.*

This is incorrect. Screenrights and the schools have agreed fixed per student amounts every year since the statutory licence was created in 1990.

*The schools state that the statutory licence puts schools at a comparative disadvantage internationally.*

This is incorrect. Australian schools enjoy far greater access to broadcast material than their counterparts overseas. Research from the Kernochan Centre<sup>2</sup> demonstrated how limited the fair use exceptions are in the United States and highlighted that little or no data was available on the cost of obtaining commercial licences for audiovisual content. It is therefore not possible to make a comparison with access in other jurisdictions that use content under commercial arrangements.

Secondly, the claim seems to hinge on payments made by educational institutions for some licences. However, the tables of payments presented by the schools are selective and incomplete. They include no data from voluntary licences at all, and no data from the United States which is the model for the system the education sector is seeking.

Screenrights fails to understand how it is possible to conclude that the fees paid in Australia are higher when the totality of payments is unknown. What is certain is that Australian educational institutions are at a comparative advantage in terms of access to broadcast content compared with institutions overseas.

*The education sector states that it would prefer to obtain content through voluntary licensing arrangements as this would be more efficient.*

If educational institutions wish to obtain content through voluntary licensing, they are free to do so and, in fact, many do. However, voluntary licensing cannot deliver comprehensive access to broadcast content. A purely voluntary licensing system would only give schools access to certain content through entering separate agreements with a number of commercial suppliers. The costs in negotiating these licences and the lack of comprehensive coverage delivered

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<sup>2</sup> The Kernochan Centre op cit

under these agreements, make it difficult to see how voluntary licensing would be more efficient.

If a New Zealand style provision or extended collective licensing were introduced to enable comprehensive licensing of broadcasts, the result would be a less efficient version of our current scheme – again, we discuss this below in response to Question 6-1.

*The education sector states that it has to pay for uses that the rest of the community enjoys for free.*

This is incorrect. It fundamentally misunderstands the difference between a single copy made for a purpose such as private time shifting (which the community can enjoy in their home) and a copy made for the institutional purpose of teaching – one that can be kept, re-used, played to a large audience and put online. This is an important market for filmmakers, particularly those that make documentaries and educational programming. It is a use that should properly be paid for and – as we discuss below – one that is difficult to license voluntarily.

#### **In conclusion:**

Screenrights refutes all arguments put forward for the abolition of the statutory licences. They are simply not applicable to the broadcast copying scheme in Part VA and Screenrights is extremely concerned that specific objections the sector may have with one section of the Act have been put forward as general objections to all licences. This is misleading, at best. As we discuss further below, replacing this scheme with a fair use provision, voluntary licences and a possible patchwork of solutions (extended collective licensing, or “use it or lose it” provisions) would be detrimental for copyright owners, whose works would be frequently used for free under the guise of fair use, and for teachers who would no longer enjoy simple, comprehensive and legal access to this wealth of material.

#### **Question 6-1 Fair use and free use exceptions that operate when a use cannot be licensed**

Screenrights opposes the introduction of a fair use regime that also incorporates “certain free use exceptions .... that only operate where the use cannot be licensed.”

Such a scheme is much broader than any other fair use regime as it not only provides for a broad fair use, it also puts the onus on rightsholders to license their work or lose the right to do so. This is a much wider derogation of rightsholders’ rights than in any other comparable jurisdiction.

In terms of replacing the current statutory schemes with New Zealand style “use it or lose it” provisions or an extended collective licensing, we make the following comments:

*Comprehensive voluntary licensing for broadcasts is not possible without statutory facilitation in some form*

Practical difficulties with clearing rights mean individual licensing is not possible for all broadcast material. There is simply not the time to negotiate all the relevant clearances. This is acknowledged by the ALRC itself in Par 15.82 of the Discussion Paper, in reference to the retransmission licence.

*Smaller independent programs would fall through the gaps*

A system of purely voluntary licensing would probably mean that a few large suppliers of content would license this content to educational institutions either directly or collectively, as the scale of their business would make it viable to clear the rights and to market product packages to educators. Smaller, less commercial programs would not be licensed, as it would not be commercially viable for producers to clear all the necessary rights (it is difficult to predict which programs within this genre will be used by educators and therefore the commerciality of obtaining such broad clearances). This is particularly detrimental to the Australian production industry and it means teachers won't have access to the broadcast resources they rely on most.

*New Zealand style licensing a less efficient version of what we have*

“Use it or lose it” or extended collective licensing could be used to fill the gaps (although as we have stated, we have serious concerns about this operating in conjunction with fair use). Either of these “solutions” may work to enable voluntary licensing of broadcasts, and each has advantages and disadvantages.

From our experience administering licences in Australia and New Zealand, the Australian system is more efficient. Repertoire does not need to be established. Teachers know they can copy everything they need under the one licence from us. There will never be any need to check that they are covered or negotiate additional licences unless they wish to obtain an additional voluntary licence to use material that falls outside the provisions. Both systems ultimately depend upon Parliament to create the enabling provisions allowing the licences to function, and so both systems from time to time require legislative amendment to update the licences.

We do not have direct experience administering extended collective licensing, although we would have concerns about the costs and time taken to establish repertoire and it is unclear whether the threshold would be feasible for broadcast licensing.

## **Conclusion**

The case that voluntary licensing of broadcast content is preferable to the existing statutory licence in Part VA is not made and cannot be sustained. If the aim is to ensure that teachers have simple and comprehensive access to broadcast material, why not stick with the system we have? Why create a patchy system of voluntary licensing and other statutory measures to provide this access? It would not be more efficient, for either rightsholders or the people who want to use their work. It would turn a simple and effective means of accessing material into an unnecessarily complex and less efficient system for both educators and rightsholders.

## **Fair dealing**

### **Proposals 7-1 and 7-2 Replacing fair dealing with fair use**

Subject to our comments on proposals 7-3 and 7-4, Screenrights believes the fair dealing provisions should be retained in their current form and strongly opposes replacing them with a broad fair use provision as outlined in our comments in response to the proposals and questions in section 4.

### **Proposals 7-3 and 7-4 Remedying inconsistencies in fair dealing if it is retained**

Screenrights has no objection to either of these proposals and believes they would remedy inconsistencies in the current provisions.

## **Non-consumptive use**

We support the comments of the Australian Copyright Council in relation to Proposals 8-1, 8-2 and 8-3.

## **Private and domestic use**

### **Proposal 9-1, 9-2 and 9-3 Exceptions for private and domestic use either as fair use or as part of fair dealing**

Screenrights is opposed to a broad fair use exception. If one were enacted, we would be particularly concerned about including such a broad purpose as “private and domestic use”.

Screenrights believes that private and domestic use of material (viewers wanting to watch material on different devices and at different times) is rapidly being catered for by new market models, such as catch-up TV and licences for the

purchase of music and films that enable the work to be enjoyed on a number of screens. Enacting a broad fair use provision that specifically mentions private and domestic use, or a specific fair dealing exception for this purpose, has the potential to undercut these innovative business models to the detriment of the digital economy.

Such a broad exception cannot be justified by saying that private and domestic use is “widespread” and “commonly thought to be harmless” (par 9.33) and therefore should be allowed. Many consumers do not question their “right” to illegally download a television series before it is available in Australia, and yet such a use is not harmless and undercuts the local broadcast market for the work.

As we mentioned above, under the heading “Third Parties”, Screenrights is also concerned that third party use of copyright material for a profit purpose (such as Optus TV Now) would not fall within the broad scope of an exception for private and domestic use.

#### **Proposal 9-4 and 9-5 Back-up and data recovery part of fair use**

Screenrights has no additional specific comments to make in relation to back-up and data recovery.

### **Transformative use and quotation**

#### **Proposal 10-1 Transformative use part of fair use**

Screenrights has no comments to make in addition to our comments above in relation to fair use.

#### **Proposal 10-2 and 10-3 Quotation in fair use or as part of fair dealing**

Screenrights does not believe an exception is needed for quotation, either as part of fair use or as a fair dealing exception. Users can already quote for the purpose of reporting the news, research or study or criticism or review. Quotations outside these purposes are licensed without difficulty and industries have well-established practices in this regard.

### **Libraries, archives and digitisation**

#### **Proposals 11-1 to 11-3 Library and archive use covered by fair use or as part of fair dealing**

Screenrights refers the ALRC to its comments in relation to fair use and an expansion of fair dealing. In particular, we note that it is difficult to see why a fair use provision would provide any more certainty for libraries and archives than

s200AB. If cultural institutions have been reluctant to rely on this exception, pointing to its uncertainty and lack of case law defining its limits, surely fair use would result in a similar or greater reluctance.

### **Question 11-1 Extended collective licensing for mass digitisation**

As Screenrights noted in its submission to the ALRC Issues Paper, cultural institutions can license mass digitisation projects under s183 (subject to our comments concerning the need to enable collecting societies to administer communication and other uses as well as reproduction). None has availed itself of this opportunity.

As we have pointed out in our comments above in response to Question 6-1, voluntary licensing always involves the difficulty of establishing repertoire. Statutory licensing does not involve this problem. In addition, as stated earlier in regard to the educational provisions, Screenrights is concerned about the viability of Extended Collective Licensing for comprehensive broadcast licensing as it is unclear that the repertoire threshold could be achieved efficiently. Screenrights notes that the discussion paper makes no comment on the threshold.

### **Proposals 11-4 to 11-7 Copying for preservation**

Screenrights makes no comment in relation to these proposals.

## **Orphan works**

### **Proposal 12-1 to 12-3 Fair use to cover use of orphan works, limited remedies for infringement**

Screenrights has no comments to make in relation to orphan works, other than those made in its response to the ALRC Issues Paper.

## **Educational use**

### **Proposals 13-1 to 13-3 Educational use covered by fair use or an extended fair dealing**

Screenrights is opposed to proposal 13-1 and reiterates its comments above in relation to proposals 4-1 to 4-4.

In relation to proposal 13-2, Screenrights opposes extending the fair dealing exception to include fair dealing for education, should a fair use exception not be enacted.

As we have stated, the current system of statutory licensing coupled with fair dealing for research or study is, in relation to the use of broadcast material, well

understood and works efficiently and fairly. Under this system, individual student use of programs for the purpose of research or study is covered by the fair dealing provision and does not require permission or payment. However, if a program is copied by an institution for educational purposes (such as teaching, or to be kept as a resource, or put on an online learning management system), the use is not covered by fair dealing and nor should it be. Such a use has an impact on the copyright owners' market for the work, and should be paid for. The schools sector itself recognises that nearly all of the uses covered by the statutory licence should continue to be paid for should the licence be abolished and replaced with extended fair use or fair dealing exceptions and voluntary licences.

However, extending fair dealing to include fair dealing for education will blur well-understood boundaries and lead to a situation where our members' work is more frequently used without payment. In a situation where educators are no longer sure about the boundaries between fair dealing and licensed use, teachers and academics may simply copy or communicate broadcast material without permission in the hope that the use is a fair dealing for the purposes of education. In most circumstances, our members wouldn't know their work had been used in this manner, and if they did, the cost of litigating may deter them from defending their rights.

It is also unclear what impact the existence of a licence (whether statutory or voluntary) would have on whether a use fell within this new fair dealing provision. The ALRC proposes that the existence of a licence would be a factor to consider in whether the use is fair, but it would not be determinative. Again, these issues would have to be resolved by litigation – an option too costly for many of our members.

Screenrights' is also concerned about how this proposed new fair dealing exception would operate in conjunction with the discussed "use it or lose it" provisions. Operating together, the two proposals seriously erode copyright owners' rights, with educators either able to use work for free if a licence has not been established (under "use it or lose it"), or to try and argue fair dealing even if a licence is established.

## **Government use**

### **Proposal 14-1 and 14-2 Public administration covered by fair use or an extended fair dealing**

Screenrights is opposed to proposal 14-1 and reiterates its comments above in relation to proposals 4-1 to 4-4.

In relation to proposal 14-2, Screenrights opposes extending the fair dealing exception to include fair dealing for public administration should a fair use exception not be enacted. Our reasons are the same as those stated above in

relation to proposal 13-2. Enacting this new fair dealing provision will lead to unclear boundaries between those uses that should be the subject of a licence (whether statutory or voluntary) and those uses that fall within the free fair dealing exception. This can only be resolved by litigation. As we have stated, this is not a cost our members and other creators should have to bear.

It is also unclear what impact the existence of a licence (whether statutory or voluntary) would have on whether a use fell within this new fair dealing provision.

Screenrights' is also concerned about how this proposed new fair dealing exception would operate in conjunction with the proposed "use it or lose it" provisions. Operating together, the two proposals seriously erode copyright owners' rights, with educators either able to use work for free if a licence has not been established, or to try and argue fair dealing even if a licence is established.

### **Proposal 14-3 Repeal of exceptions for judicial proceedings and copying for members of Parliament**

We have no additional comments to make.

## **Retransmission of free to air broadcasts**

### **Proposal 15-1 Repeal or retention of the retransmission statutory licence**

The retransmission licence has facilitated a diverse range of new services in the television market by ensuring access to free to air broadcasts. It is impractical to expect retransmitters to negotiate voluntary licences with all underlying rightsholders in broadcasts. Nor is it practical for broadcasters to clear these secondary rights. This impracticality is, as the ALRC states, due to the very limited time between notice of the broadcast content and the retransmission. (It is an extraordinary inconsistency in the Discussion Paper that while this impracticality is acknowledged as the reason for the statutory licence for retransmission, the same logic is not applied for government copying or educational use of broadcasts, which are assumed to be amenable to voluntary licensing.<sup>3</sup>)

Screenrights is therefore strongly opposed to Option 1 – the repeal of the remunerated exception. Screenrights notes that no stakeholders called for the abolition of the statutory licence for retransmission. Removing the statutory licence for retransmission would mean that retransmission would cease.

With respect to Option 2, the retention of the retransmission scheme, Screenrights has no objection to the broadcast signal being treated like any other copyright subject matter within the Part VC statutory licence. Broadcast signal

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<sup>3</sup> ALRC Discussion Paper Copyright and the Digital Economy at par 15.82



copyright is already included in Screenrights' collections and distributions under the government copying statutory licence (s183).

### **Proposal 15-2, 15-3 and Question 15-1, 15-2 Internet exclusion from retransmission licence**

Screenrights submits that no change should be made to the internet exclusion in Part VC.

As we have stated, we are concerned that including internet retransmissions in Part VC may fix some anomalies in the scheme for service providers (the exclusion of some IPTV services from the scheme and the inclusion of others), while potentially causing very significant new problems for rightsholders.

Simply removing the internet exclusion, even if subject to geoblocking, would undermine the commercial interests of content providers selling their content on internet platforms. That is because it would open up retransmission to internet services generally, not merely the television like services which are the basis of the anomaly described above.

Screenrights has previously also expressed concern about the potential for cherry picking of content, where there is retransmission of a specific program or class of programs. Screenrights is concerned about the potential for this to occur under the current regime, a potential that would be exacerbated if the scheme was extended to the internet. The Discussion Paper states that cherry picking is prevented by the requirement that retransmission of a broadcast be simultaneous with and unaltered from the broadcast.<sup>4</sup> Screenrights does not agree that this is clear cut, noting that the Panel case found that "broadcast" means a program as opposed to the whole broadcast schedule. Accordingly, on one view, a simultaneous and unaltered retransmission of a broadcast could be a retransmission of a single program.

## **Broadcasting**

### **Proposal 16-1 and Question 16-1 Amending the broadcast exceptions to apply to the transmission of television or radio programs using the internet**

As a general comment, Screenrights submits that a separate definition of broadcast for the purpose of the Copyright Act should be enacted. This would ensure that the definition is no longer dependent on the Broadcasting Services Act. To minimise disruption, the definition should reflect the current definition borrowed from the Broadcasting Services Act. Such a definition should include the effect of the Ministerial declaration which excludes services delivered over the internet.

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<sup>4</sup> Discussion Paper para 15.114

Screenrights also recognises that the application of the definition of “broadcast” within the Copyright Act is complex and there are circumstances where section specific definitions are appropriate.

Screenrights confines its further comments to proposal 16-1 (i) – amendments to definition of broadcast for the purpose of Part VA. Screenrights submits that the convergence of media technology is making it difficult for teachers relying on the statutory licence to be able to determine what they can and cannot copy under the licence. Depending on the transmission mechanism, the program may or may not be part of a broadcast, and therefore amenable to copying under Part VA. This is illustrated for example by IPTV services offered by FetchTV: if you receive FetchTV through iiNet or internode it is a broadcast, whereas if you receive FetchTV through Optus it is not a broadcast, and a copy would not be protected by the statutory licence.

Accordingly, Screenrights recommends that the definition of broadcast in Part VA be amended to deem linear television and radio services to be broadcasts for the purposes of the Part. This can be achieved simply and readily through amendment to section 135C which already deems certain communications to be broadcasts for the purposes of Part VA.

### **Questions 16-2 and 16-3**

Screenrights makes no comment in relation to these questions.

## **Contracting out**

### **Proposal 17-1 Limitations on contracting out should apply to various fair use and other exceptions**

As we have stated, the proposed fair use regime is far broader than in any other comparable jurisdiction. Limiting the capacity of copyright owners to contract out of certain of these exceptions means that our Act would curtail copyright owners rights even further than the regime in the US, where contract is paramount.<sup>5</sup> This proposed limitation, coupled with the proposed extensive list of illustrative purposes, abolition of the statutory licences and proposed free use unless licensing is established, establishes a regime that is seriously detrimental to the fundamental role of copyright – encouraging and rewarding creativity. We are therefore opposed to the proposed limitations on contracting out when seen as a component of the entire package of amendments put forward by the ALRC.

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<sup>5</sup> The Kernochan Centre for Law, Media and the Arts, Columbia University School of Law, “Copyright Exceptions in the United States for Educational Uses of Copyright Works, submitted to the ALRC by Screenrights.

## Conclusion

Screenrights rejects the ALRC's proposals to introduce a broad fair use regime, to replace statutory licensing with voluntary licensing and to introduce "use it or lose it" provisions. This radical reworking of the Copyright Act is done in the name of flexibility and technology neutrality, but it ignores the commercial need for certainty and radically undermines copyright owners' rights. It will have a negative effect on the Australian film and TV industry.

By creating a far broader fair use regime than in any other similar jurisdiction, the ALRC proposals run counter to the framing principles for reform in the Discussion Paper. The proposals do not:

- Acknowledge and respect authorship and creation (Principle 1) - rather, they undermine creators' rights;
- Maintain incentives for creation of works and other subject matter (Principle 2) - rather, they undermine a creator's capacity to license the use of their work;
- Promote fair access to and wide dissemination of content (Principle 3) - rather they swing the balance too far in favour of free (not fair) access and undermine new licensing models for access;
- Provide rules that are flexible and adaptive to new technologies - rather, they simply defer the difficult questions to the courts, a process that places an unfair burden on creators wishing to defend their rights; and
- Provide rules consistent with Australia's international obligations - rather they create a fair use regime broader than in any other jurisdiction (including the US), and one that raise serious questions about our compliance with the Berne Convention.