



screenrights

The Audio-Visual Copyright Society

Screenrights' Further Submission in Response to the Intellectual Property Competition Review Committee Interim Report

Why is Screenrights offering a further submission?

In the course of various fora, a position was expressed by the IPCR Committee Chair that the Committee's Terms of Reference had not been adequately addressed by the earlier submissions of collecting societies. Of particular concern was that part of the Terms of Reference which requires "that legislation which restricts competition should only be retained if the benefits to the community as a whole outweigh the costs, and the objectives of the legislation can only be achieved by restricting competition".

Screenrights offers this submission in an attempt to address any perceived deficiencies with Screenrights' earlier submissions. In so doing, the submission will focus upon the issue of justifying the current legislative arrangements under Part VA on the benefits they bestow upon the community as a whole. It will consider this issue drawing upon the experience and insight it has in operating as the declared society under Part VA for over ten years.

What are the benefits to the community as a whole associated with Part VA of the Copyright Act?

Upon the introduction into Parliament of the *Copyright Amendment Act* 1989 which included the Part VA statutory scheme, the benefits to the community as a whole of Part VA were clearly expressed in the House of Representatives by the then Attorney-General and Deputy Prime Minister:

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

This statement contains the three key public benefit features of Part VA:

- (i) facilitation of efficient means of access to copyright subject matter for educational purposes ("access");
- (ii) facilitation of an efficient means of remunerating copyright owners for the educational use of copyright subject matter ("remuneration");
- and
- (iii) the provision of access and remuneration so as to comply with international copyright norms ("international obligations").

¹ Lionel Bowen, Second Reading Speech, *Copyright Amendment Act* 1989, no 32 of 1989.

Since coming into operation in 1990, is Part VA meeting these public benefit objectives?

Are these public benefit objectives being currently met? As general matters, much evidence would suggest so:

Access

In 1997, the Professor Mortley from the Australian Vice-Chancellors Committee ("AVCC") stated at a Copyright Law Review Committee ("CLRC") public forum:

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.²

Here there is no suggestion that the policy objective of efficiently facilitating access to copyright subject matter has in any way been not met by the current operation of Part VA.

An educational institution has over 350,000 hours of television programming (both broadcast and subscription) hours each year available to be copied under Part VA.³ Further, under Part VA an educational institution may copy from radio and may make further copies from existing of Part VA recordings made by it or another educational institution. The content available to the education sector by virtue of Part VA is immense. In 1997

² Transcript CLRC Forum, 28 April 1997 at 47.

³ These figures assume access to 5 broadcast channels and 35 subscription channels.

equitable remuneration was determined to be \$2.60 per school student per year. In 1999 equitable remuneration was determined to be \$5.50 per university student per year.

Remuneration

From the financial years 1990-1991 to 1998-1999, equitable remuneration for copyright owners collected under Part VA amount to \$71, 038, 990.⁴ Over that same period, expenses related to collections amount to \$10, 645, 668.⁵ This amounts to an expenses to collections ratio of almost 15%.⁶

This result was achieved notwithstanding the figures:

- (i) relate to the period of Part VA's infancy;
- (ii) encompass the expense of two Copyright Tribunal rate determinations;
- (iii) include the cost of Trustee determination by the Supreme Court in Equity as a consequence upon an unexpected law change effected by a High Court decision.

International Obligations

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.*

⁴ Audio-Visual Copyright Society Annual Reports 1990-1 to 1998-9. Interest income is excluded from this collections figure.

⁵ Audio-Visual Copyright Society Annual Reports 1990-1 to 1998-9.

⁶ The actual figure is 14.99%.

Further, 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 its administration) are avowedly non-discriminatory in character. Part VA mandates that the declared collecting society's rules must permit that all relevant copyright owners, or their agents, are entitled to become its members. No issue of nationality of rights holders ever arises, except with respect to the payment of withholding tax. Part VA funds have been distributed to copyright owners in 40 countries.

Screenrights notes the incorporation of Articles 5(3) and 9 of the Berne Convention as a TRIPS obligation. Australian Copyright law, including Part VA, must meet the obligations set out in those Articles to ensure Australia's participation in world trade is not damaged by TRIPS violation complaints leading to the imposition of WTO-supported trade sanctions.

Consistent with the view expressed on the introduction of Part VA to the Parliament in 1989, a Productivity Commission paper has recently reiterated the view that Australian copyright law meets the TRIPS standards.⁷

The continuation of statutory licences under Australian law meeting international copyright law by providing, in a non-discriminatory way, equitable remuneration to rights holders is of considerable public benefit. This public benefit arises in so far as the licence does not negatively affect Australia's international trade relations through rendering Australia in violation of its TRIPs obligations.

⁷ Productivity Commission, *Trade-Related Aspects of Intellectual Property Rights*, 1999 at 109.

In what ways are those Part VA public benefit objectives met by a single point of Part VA administration?

Meeting the three identified public benefits objectives arising from the Part VA statutory licence is related directly to its mode of administration. Having a single point of administration is an important feature of Part VA.

Access

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. The declared society 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 Act⁸ create non-remunerated exceptions to exclusive rights.

Thus, for the purpose of statutory licence administration it is plainly incorrect to variously characterise a declared society as "an administrative means through which creators can control copyright use".⁹

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 the declared society undertaking to pay equitable remuneration for copies of transmissions it makes. The educational institution has at its complete discretion to

⁸ See sections 40, 41, 42, 43(2), 103A, 103B and 103C.

⁹ IPCR, *Interim Report*, 2000 at 69.

nominate whether equitable remuneration will be assessed on a full record-keeping system or on a sampling system.¹⁰

Thus, under Part VA there is no issue of "refusal to deal"; hence such licences are sometimes referred to as "compulsory licences". The compulsion to licence is triggered by the nomination of the user; the statutory remunerated exception to copyright is available to any educational institution, subject to undertaking to pay equitable remuneration. Correctly understood, Part VA is an access regime. It facilitates access to copyright by educational institutions irrespective of whether relevant copyright owners wishes to in fact grant consent for such use.

In this light, what set of arrangements most efficiently promotes access from the perspective of educational institutions? Through an issues paper published in 1997, the CLRC sought to elicit from affected interests opinion on whether the scheme for educational copying found in section 35 and 36 of the UK *Copyright, Designs and Patents Act 1988* should be adopted in Australia to replace the existing statutory licence schemes. (The principle underlying the UK model is a free exception in the absence of a voluntary licensing scheme or schemes being instituted. The voluntary schemes will only provide a licence and royalty payments in respect of the repertoire covered by the licence; outside that scope, the free exception pertains.)

It appeared there was a willingness within the CLRC (as then constituted) to make a recommendation to replace the Australian statutory licences with the UK model. That fact the suggestion arose from the CLRC can be safely inferred from the fact that no entity made a submission to the CLRC in support of the proposal. The CLRC was, however, unable to recommend this replacement. There was a complete rejection of its suggestion by educational users who did not want to deal with multiple collecting societies in respect of one act of copying. The CLRC noted that their proposal was not considered "a satisfactory way to deal with educational copying in Australia".

¹⁰ *Copyright Act 1968*, section 135G(2).

This is unsurprising given a primary benefit to the community arising from Part VA is the facilitation of easy access to copyright subject matter. One of the most important aspects of this from a user's perspective is having to deal with only one point of administration.

This can be seen in Justice Burchett's approach to interpreting the Government copying statutory licence. In his determination, Justice Burchett considered that the expression "class of government copies" should be understood to mean that a type of copying activity should be subject to only one point of administration. The provisions should be given a meaning which renders the operation of the statutory licence as administratively simple as a possible.¹¹

The same philosophy in Part VA leads to the declaration of a single society to administer the licence. Any plurality of administering bodies, if done in such a way as to enable each to collect a share of remuneration, must act as an impediment to ease of access from the user's perspective, entailing with respect to one act of copying:

- multiple negotiations;
- multiple, overlapping sampling and/or record keeping obligations;
- multiple copyright tribunal determinations;
- multiple payments;
- incomplete licence coverage.

One declared society as a single point of Part VA administration is a crucial aspect to the promotion of easy educational access to copyright subject matter as a feature of Part VA which provides significant benefits to the community as a whole.

¹¹ *Application by Audio-Visual Copyright Society*, Copyright Tribunal, unreported, CT 1 of 1999, 20 January 2000.

Remuneration¹²

It is useful to consider the Part VA licence in terms of the value it adds. This may be simply done by considering:

Provision of educational services with the Part VA	LESS	Provision of educational services without Part VA
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The difference between these two scenarios represents is the value Part VA adds in so far as it relates to the users of the licence. This figure represents the educational institution's maximum willingness to pay.

It is rational for an educational institution, in negotiating with respect to equitable remuneration for a Part VA licence, to seek to pay as little as possible. It will attempt to not pay 100% of the value the Part VA licence adds. Indeed it will seek to pay an amount at or slightly above the opportunity cost of supply. In respect to copyright subject matter whose reproduction by educational institution is licensed under Part VA the opportunity cost of supply is zero.

In a negotiated solution, the actual amount arrived at will depend upon the negotiating positions of the two parties. If the educational institution is in a very strong position, payment will come close to the opportunity cost of supply; zero. If the declared society is in a strong position, payment will come close to a figure representing the full value added by Part VA.

New insights from management economics suggests that neither of these figures may represent an "equitable" position. These new insights, founded largely upon theories of value and game theory, suggest that in a two party negotiation between a buyer and a seller, an equitable solution is one in which the buyer's consumer surplus will equal the seller's supplier surplus. The consumer surplus in this transaction is the extent to which the

¹² This discussion draws upon the analysis in Nalebuff & Brandenburger, *Co-opetition* 1996 Harper Collins.

price is below the educational institution's maximum willingness to pay. The supplier's surplus is the extent to which the price is above zero - the opportunity cost of supply.

An equality of consumer and supplier surplus will only arise where the bargaining positions of the parties are equal. It is only when this condition is satisfied that an equitable price will be formulated in a buyer-seller exchange. Here, as the opportunity cost of supply equals zero, this will be a price which represents half of the value added by Part VA. Thus, an equitable price, or "equitable remuneration" could be considered to be:

$$\frac{\text{Maximum Willingness to Pay of Educational Institution LESS Opportunity cost of Supply}}{2}$$

2

As the opportunity cost of supply is zero, equitable remuneration equates to half of the educational institution's maximum willingness to pay for Part VA.

Part VA seeks to achieve this outcome through a single declared society model, creating an equality of bargaining position between the buyer (educational institution) and seller (copyright owner). Through this means Part VA ensures that a fair proportion of the value added by Part VA is appropriated to copyright owners.

The exchange is indeed highly analogous to a card game scenario described in recent writings in managerial economics.¹³ Imagine an educational institution is Adam and the declared society is Susan. Adam has a black card. Only if Adam holds a black card and a red card, may Adam redeem both cards for \$100. Susan holds the only red card. The value added by Susan's card is \$100. However, both Adam and Susan have an equality of bargaining positions. Adam's maximum willingness to pay is virtually \$100. Susan's opportunity cost of supply is zero. As there exists equality between their bargaining positions', exchange will be likely to occur at an equitable

¹³ Nalebuff & Brandenburger, *Co-opetition* 1996 Harper Collins, chapter 3.

price of \$50; a point at which Adam's consumer surplus equals Susan's supplier surplus. \$50 constitutes equitable remuneration for Susan.

Under Part VA price can only be arrived at by either negotiation, or failing that, Copyright Tribunal determination. Experience suggests the Copyright Tribunal determinations are informed by the point at which negotiations arrived. Thus, in the Schools Determination, the two persons negotiating with the authority of certain educational institutions on the one hand and Screenrights on the other, arrived at a provisional agreement of \$2.50 per student. In light of this the Copyright Tribunal determined a rate of \$2.60 per student. This would indicate that the Tribunal considered the all-but agreed price to be virtually an equitable one. These new managerial economics insights suggest that as the bargaining structure created by Part VA provides equality of bargaining positions, this has the consequence that negotiated solutions (or all-but negotiated solutions) are likely to yield an equitable price - or near-equitable price.

International Obligations

In the special educational context of Part VA there can be no question of conflict with the legitimate interests of copyright owners where equitable remuneration is provided for use. However, one way in which equitable remuneration is provided is through the structuring of an equal negotiation setting with a single society model. Thus, to the extent compliance within TRIPs obligations is a public interest objective, Part VA meets that objective in part through its single declared society model yielding equitable outcomes.

What would the effect be upon the Part VA public benefit objectives if multiple or competing points of administration were created?

Access

One possibility is that a multiple declared society model exists whereby each society operates with a full entitlement to collect all equitable remuneration accruing under Part VA. Such a structure for Part VA may promote access in so far as the price of Part VA may be reduced to a nominal amount, for the reasons discussed below.¹⁴ However, such a structure would lead to copyright owners removing their support for Part VA.

Another possibility is a multiple society model such that each society represents a particular class of rights holders in respect of the one act of copying. The division could occur in any way, including by nationality or category of copyright subject matter. The societies may compete between themselves in respect of relevant "share" of the user's dollar. The educational user must engage in multiple negotiations with each society as to payment of equitable remuneration. This may translate to multiple Copyright Tribunal determinations. Once one administering society obtains an outcome, others may lever off that outcome to seek to obtain a bigger relative slice of royalties. Competitive or political pressure may require this

In the context of the card game scenario presented earlier, it would be as if the rules now required Adam, still holding the black card, to only be able to redeem the card for \$100 if he has also obtained a red card from Susan, a yellow card from Brian and a blue card from Mark. Adam must now negotiate with all three, who will each realise that each is equally as important to Adam as Susan once was.

¹⁴ Pages 14-15 below.

In the real world, this is translated to the following scenario:

Part VA is amended to permit multiple declaration of administering societies, according to class of copyright subject matter. Five societies are now declared: one for film producers, one for music composers; one for sound recordings; one for visual artists; one for script writers.

By negotiation or determination, the sound recording society obtains \$Y per student for the educational copying of television broadcasts.

The composers' society might say:

" Well if Sound recordings are worth \$Y per student, the copying of the music must be worth 5 times \$Y per student." By negotiation or determination, it may seek to obtain this.

The visual artists society might say:

" In that case, the copying of works of visual art must also be worth 5 times \$Y per student," and may go about obtaining this.

Upon learning this, the scriptwriters' society could say:

" If the copying of music is worth 5 times \$Y per student, then the copying of the script is worth 10 times \$Y per student."

Upon seeing all these outcomes, the film society might claim 40 times \$Y per student.

Finally, the sound recording society, upon seeing its \$Y per student is now the smallest proportional payment, may claim that the copying of sound recordings is now worth \$Z per student.

The whole process may then start again.

Multiple societies under this scenario mean that collection and distribution infrastructure may be inefficiently replicated. Furthermore, educational institutions, as previously mentioned, may be subject to multiple, overlapping sampling and/or record keeping obligations. Given the rejection of the CLRC proposal which would have yielded the same result, it is unlikely any educational institutions in Australia would support this sort of reform.

Remuneration

As mentioned above, one possibility is that a multiple declared society model exists whereby each society operates with a full entitlement to negotiate and collect all equitable remuneration accruing under Part VA. Thus an educational institution may negotiate with, say, declared society A or declared society B as to what amounts to equitable remuneration for the copying activity in toto. This would overcome the complaint made in submissions by the educational institutions that a declared society under Part VA has a monopoly bargaining position.

Such a revised structure would ensure that equitable remuneration was not achievable. Under the original rules of card game Adam required a red card from Susan to obtain \$100. Under these reformed rules Adam could be confronted with both Susan and John each holding a red card. Whereas previously the bargaining structure ensured equality of both bargaining positions between Adam and Susan, this revised structure means that the value either Susan or John adds to the game could be zero. Knowing this, and assuming there can be no collusion, Susan and John could be forced down in negotiations to supply Adam a red card at a price close to the opportunity cost of supply; zero. In such a case, the supplier's surplus will be vastly less than the consumer's surplus. This is not an equitable division of the benefits of trade.

A multiple declared society model whereby two or more societies may negotiate and collect remuneration in respect of the Part VA licence in toto is a structure which, by its nature, will not deliver equitable remuneration for precisely the same reasons the bargain above will fail to yield a price for the red card which comes close to reflecting its value to Adam. As stated above, such a structure for Part VA may promote access in so far as the price of Part VA may be reduced to a nominal amount. However, this would lead to copyright owners removing their support for the Part VA legislation.

International Obligations

A multiple declared society model which leads to downwards pressure on copyright payments to the point of a nominal payment will be prejudicial to copyright owners, such that it may give rise to TRIPs violation. This may harm the public interest to the extent it might prevent Australia from fully participating in international trade.

In Light of the Discussion Above, what role should the economic aspects should be taken into account when considering declaration of a society under the Part VA?

In light of the discussion above, Part VA is crafted to achieve an equitable appropriation to the copyright owners of the value added by the statutory licence to educational institution. This may be understood by a proper economic analysis informed by insights from managerial economics in respect to added value and bilateral negotiations. There is no demonstrated need to fundamentally alter the nature of Part VA or its administration. If the declared society meets the existing criteria for declaration (“functioning adequately as the collecting society”), it will necessarily meet the economic objective of appropriating an equitable share of added value to copyright owners.

What further role is there for review by the Copyright Tribunal of “Licensing Arrangements” under Part VA?

With one notable exception discussed below, both price and means by which price is assessed under the system nominated by the educational institution are matters which may currently be determined by the Copyright Tribunal in the absence of agreement under Part VA. The licence itself is prescribed by statute (section 135E).

The exception referred to above relates to the lack of jurisdiction in the Copyright Tribunal to determine the means of full record-keeping in lieu of

agreement between an educational institution and Screenrights. This creates the possibility of deadlocks. It is also inconsistent with the jurisdiction given to the Copyright Tribunal in respect of determining a sampling system where there is no agreement. Screenrights wholly supports the recommendation contained in the CLRC Draft Report on the Jurisdiction of the Copyright Tribunal to correct this anomaly by creating comparable jurisdiction in the Copyright Tribunal with respect to means of full record-keeping.

Why is the recommendation for ACCC review of “Input Arrangements” not relevant to Part VA administration?

A proper understanding of Part VA reveals that there are no “input arrangements”, other than those minimal requirements of membership to the declared society and warranting ownership of the relevant right.

What aspects of Part VA administration lend themselves to ACCC authorisation?

Given the discussion above as to the benefits to the community as a whole conferred by the current set of arrangements under Part VA, there is no aspect of Part VA administration which is not currently regulated under copyright law which requires ACCC authorisation.

Does a single point of administration for Part VA amount to a “monopoly” requiring third party access arrangements?

The IPCR Interim Report suggests that declared societies hold “monopoly” positions, and that “inherently contestable” aspects of their activities ought be subject to an access regime similar to Part IIIA of the TPA.¹⁵

¹⁵ IPCR Interim Report 2000, 74.

In respect of Part VA this is paradoxical.

Part VA is an access regime itself. Thus section 135E provides in part that where an educational institution gives a remuneration notice to the declared society "copyright in a transmission, or in any work, sound recording or cinematograph film included in a transmission, is not infringed by the making, by or on behalf of an administering body, of a copy of the transmission". Copyright owner consent is not a feature of Part VA. No possibility exists for the statutory licence to be refused to the relevant class of users. Price is determined by negotiation with the declared society or by determination of the Copyright Tribunal.

In respect of distribution systems, a feature of administration under Part VA has been the making of lump sum distributions to other collecting societies to distribute on behalf of their members whose works have been copied under Part VA. This practice, addressed in the Attorney-General's Department's Guidelines for Declared Societies,¹⁶ creates efficiencies in so far as the administration of distributions under Part VA may rely upon existing copyright infrastructure. This is regularly done with respect to musical works and sound recordings through utilization of the existing music societies (APRA, AMCOS and the PPCA).

One feature of monopoly occurs when a monopolist refuses to supply except on exorbitant terms unilaterally determined by the monopolist. This is not possible with respect to the declared society's administration of Part VA.

Access to copyright subject matter for an educational institution is guaranteed by the Part VA provisions - section 135E discussed above. It is the educational institution which is the only party in a position to unilaterally

¹⁶ Guideline 11 reads in part: "Where another body (eg a collecting society, professional association, etc) which is a member of the society controls the right (as agent/assignee) to receive royalties in respect of the works of many copy copyright owners, the society need only concern itself with allocation of an aggregate amount due to that body (ie not with any further apportionment by the body)."

determine terms in so far as it may nominate assessment of equitable remuneration under a sampling or record keeping system. Under Part VA price can only be arrived at by either negotiation, or failing that, Copyright Tribunal determination.

In respect of the two Copyright Tribunal determined rates under Part VA, the Tribunal determined a rate which loosely equated to what the parties had "all but" agreed. Such an approach by the Tribunal reinforces the equitable result arrived at by the equal bargaining structure created by Part VA in its one society model discussed above.

Under Part VA, no refusal to supply can arise, critical terms are chosen by the user and price may be set by judicial arbitration. Delegation to other societies of the distribution function is not only possible, but frequently done with respect to musical works and sound recordings. In the context of Part VA, concern regarding the "monopoly position" of the declared society appears misconstrued and unjustified.

Is the Department of Communications Information Technology and the Arts submission relating to statutory licence administration accurate in so far as it encompasses Part VA administration?

On 16 March 2000, the Department of Communications Information Technology and the Arts made a submission to the IPCR Committee relating to statutory licence administration encompassing Part VA.

That submission contained what we believe to be a number of errors of fact and statements which we believe are refutable in relation to Part VA administration. In order to clarify the record, we have prepared table which seeks to address the issues raised by DoCITA on a point by point basis.. That table is attached to this submission.