

Screenrights is a non-profit company which administers copyright licences in Australia and New Zealand and collects similar royalties from Europe and North America for its 2,200 members from 51 countries.

December 2005

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02

## Registration for Suissimage

The next round of program registrations for Screenrights International will be with Suissimage in February.

04

## Retransmission royalties for film directors

Following the passage of the Copyright Amendment (Film Directors' Rights) Act, directors can register their entitlement to a share of retransmission royalties in certain circumstances.

04

## Towards a green industry

In a bid to encourage the film industry to improve its environmental performance, New Zealand's Screen Production and Development Association (SPADA) and South Pacific Pictures have launched a Greening the Screen Environmental Toolkit.

04

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### Fair use

One of the overarching themes of the Symposium this year was the need to strike a balance between the interests of copyright owners and users. In the words of the Attorney-General, the purpose of copyright laws are "to reward creativity and innovation", and the law needs to keep pace with advances in technology.

This year the Attorney General's Department has undertaken a fair use review to consider whether changes are needed to the current provisions in the Act allowing for the use of copyright material without payment. One of the approaches being considered is the introduction of a broad based US style 'fair use' provision which differs from the current Australian approach allowing for various fair dealings with material provided the purpose of the use falls within either criticism or review, study, legal advice, or reporting the news. The US approach (which simply provides for a fair use exception regardless of the purpose) would significantly increase the uses to which films, sound recordings and other works could be put without payment.

In his speech to the Symposium, the Attorney-General stated that ordinary Australians using copyright material shouldn't be treated as infringers when they are just using technology for their private and domestic use.

The Attorney indicated that there was general public support for retaining the existing system of exceptions and statutory licences, however user groups think that the exceptions need updating.

The Attorney foreshadowed that the Government plans to supplement the existing fair dealing exemptions as follows:

- Introduction of an extended dealings exception, with a wider range of permitted uses;
- Introduction of a time shifting exception (to be able to watch a program at a later time) and
- A format shifting exception (eg to be able to transfer CDs to your I-Pod).

We await the results of that review.

### Creative Commons movement

There was also discussion at the Symposium about the Creative Commons movement. This movement advocates open content, or public rights created by voluntary licensing by copyright owners, and is based on recognising the co-existence of public and private rights. It developed out of the need to encourage collaborative software development by making computer programs freely available under the terms of an agreed 'creative commons' user licence. The movement seeks to extend its range to other copyright material, such as sound recordings and films. There has been debate, however, as to how this would work in existing economic markets for this material.

### Globalisation of copyright laws

Lord Justice Jacobs, of the English Court of Appeal, spoke of technology being the major driving force for copyright reform. Whilst copyright laws often lag behind technology, he foreshadowed that copyright law itself may drive technology to find ways to prevent infringement. Examples he gave were the "shoot the messenger" liability of ISP's in the Grokster and Kazaa cases.



Gillian Clyde, Screenrights Corporate Counsel

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There is increasing harmonisation of intellectual property laws on a global level, largely driven by technological advances and pressure from international trade agreements. Lord Justice Jacobs speculated that international laws will soon be more important than national laws. It will therefore be more difficult for countries like Australia to enact their own laws to suit their own needs, and he queried whether it made sense for Australia to do so in such a global environment.

Justice Jacobs commented that globalisation of intellectual property exploitation does raise issues of enforcement. Intellectual property disputes can run across borders and also exist in parallel in other jurisdictions. There are different means of enforcing rights, either country by country, or by one country against another or by an international tribunal. Where there are differences in the protection of rights in different jurisdictions, this may lead to 'forum shopping'.

Successful conclusion of free trade agreements, often depend on a commitment to stamping out piracy in the particular region. Free trade agreements are currently being negotiated between Australia and various countries in the region including China, Malaysia, and ASEAN/NZ. An agreement is also being negotiated with the United Arab Emirates. Australia also recently signed an agreement with the US, and others with New Zealand, Singapore and Thailand.

As a result of these free trade agreements there is inevitably a harmonisation of intellectual property and copyright laws. For instance, Australia recently extended its term of copyright to life plus 70 years as a result of the US Free Trade Agreement, and it is that agreement which has in part given rise to the current fair use review of the Copyright Act.

## Technological Challenges in the Digital Age

Picking up the point made by Lord Justice Jacobs that often technology influences the development of the law, lawyer Michael Williams noted that the software design has been influenced by court decisions on copyright infringement.

For instance in relation to peer to peer systems, Williams stated that the 2003 thinking (around the time of the KAZAA case) was to either build a system that allows for thorough monitoring and control over user activities or to build one that makes such monitoring and control completely impossible. This followed a line of cases, such as Kazaa, that dealt with authorisation of infringement. The Kazaa case found Sharman Networks liable for 'authorisation infringement' ie it had failed to take reasonable steps to prevent or avoid infringements of copyright. Amongst the factors the court was influenced by were the fact that there were ineffective warnings on the site/software, there were no technical measures implemented to prevent infringements, and the company's advertising encouraged file sharing.

The development of successive file sharing systems, from Napster to Kazaa to Bit Torrent can be tracked to the developments in the law in this area.

There was also discussion about the economics of the Internet continuing to drive system development, in that a large Internet footprint can be covered for relatively low investment. Following the Grokster case (in which the company was held liable for contributory infringement - the company distributed software allowing users to share files peer to peer) many companies and venture capital funds have been willing to discuss licensing arrangements.

Equally the Creative Commons movement, referred to above, has had a role to play in software development by freeing up access to computer programs under the creative commons licensing scheme. This led to a global collaboration on over tens of millions of computer programs via the Internet.

## Conclusion

Screenrights members, who own copyright in films, sound recordings and underlying works, are, like all copyright owners, in a time of considerable change. Current copyright law is being challenged on several fronts: technological changes have increased the uses that can be made of material, they have also brought about solutions to infringement; and running alongside this, increased harmonisation of copyright laws has become a greater driving force in domestic reform. In the immediate future, Australia is looking at possible changes to the balance between the rights of owners and users with the Government's fair use review. Screenrights' submission in relation to this can be found on our website: [www.screen.org](http://www.screen.org)

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## Registration for Suissimage

The next round of program registrations for Screenrights International will be with Suissimage in February.

If you have new programs that you have not yet registered, or if you would like to update details on your current registrations, email [maha@screenrights.org](mailto:maha@screenrights.org)

Screenrights International registers programs with societies in Europe, Canada and the United States for members who have appointed us to collect international royalties on their behalf. The administration fee for this service is capped at 12% until 1 July 2007, making it one of the competitive in international collections. If you have not yet registered for this service and would like more information, email [maha@screenrights.org](mailto:maha@screenrights.org)

## Retransmission royalties for film directors

Following the passage of the Copyright Amendment (Film Directors' Rights) Act, directors can register their entitlement to a share of retransmission royalties in certain circumstances.

The amendments to the Act dealing with film directors' rights prescribe the circumstances in which directors will be paid a share of this money. Briefly, the provisions will only apply to film made after 8 May 2006. The following limitations also apply:

- The amendments have no effect where they are inconsistent with contractual rights entered into prior to 8 May 2006.
- The amendments do not apply to commissioned films.
- Where the director is an employee, his or her rights will usually be held by the employer, unless there is an agreement to the contrary.

Under the Copyright Act, pay television operators can retransmit free to air broadcasts provided they pay a royalty to the copyright owners in the broadcast programs. Screenrights has been appointed by the Government to administer these provisions. The royalty rate is being determined by the Copyright Tribunal. Screenrights has been advised by the Tribunal that judgement should be delivered in the retransmission case in the first half of 2006.

To find out more about registering for the directors' entitlement to retransmission royalties, email: [memberservices@screenrights.org](mailto:memberservices@screenrights.org)

## Towards a green industry

In a bid to encourage the film industry to improve its environmental performance, New Zealand's Screen Production and Development Association (SPADA) and South Pacific Pictures have launched a Greening the Screen Environmental Toolkit.

The toolkit contains practical tips for better practice, case studies from companies that have combined environmental and business benefits into their productions and information on corporate social responsibility.

The toolkit can be accessed at [www.greeningthescreen.co.nz](http://www.greeningthescreen.co.nz)