

**House of Representatives Standing Committee
on Legal and Constitutional Affairs**

Digital Agenda Bill

Supplementary submission of Screenrights on Part VA

1 Summary

On 14 October 1999 before the House of Representatives Standing Committee on Legal and Constitutional Affairs, Screenrights and AVCC representatives indicated a joint position on the inclusion of the communication right within Part VA of the *Copyright Act 1968* was under discussion (Committee Hansard at 153). Upon full consideration of the AVCC position (and in particular, the AVCC submission to the Committee dated 11 October 1999), Screenrights finds itself unable to agree with the AVCC on a joint approach. Screenrights has taken note of the AVCC's submission and has incorporated their proposals where possible.

Screenrights and the AVCC agree in principle that a statutory licence covering communication of copies of broadcasts for educational purposes should be included in Part VA of the Act. Screenrights has incorporated two suggestions into its proposed model from the AVCC's submission: the communication of copies of broadcasts for preview purposes and the provision for prescribed matters in the regulations relating to Copyright Tribunal hearings on communications.

Screenrights does not support the model proposed by the AVCC. Screenrights submits that the model is based on a misconception of the right of communication by the AVCC and is unworkable in practice, as outlined below:

- the AVCC would seek to characterise as an exercise of the communication right the playing of a video in class by virtue of the transmission of the signal from the video player to the television screen – Screenrights submits that this is clearly not an exercise of the communication right;
- the AVCC's proposed drafting model is unworkable as it merely adds the communication right to the existing provisions which were drafted to provide for the administration of the reproduction of broadcasts and not the wide uses possible under communication.

2 The Context of AVCC Concerns as they Relate to Part VA

Screenrights is troubled by the approach taken by the AVCC in its description of the context of its concerns. At point 4 of Section B of the AVCC's submission, the AVCC make the assertion that:

*The **complexity** and **cost** of the existing system of statutory licences under the Copyright Act makes it **almost unworkable**. It is a sad irony that while commercial radio stations, ABC and others have the benefit of statutory licences under which fees are calculated as a simple percentage of advertising revenue, gross outgoings or the like, universities have a licence which **does not allow any such simple calculation**. (Emphasis added)*

These assertions in the context of Part VA cannot go unanswered.

(a) "Complexity"

This year, Justice Burchett handed down his determination involving Screenrights and the AVCC in *University of Newcastle v Audio Visual Copyright Society Ltd* [1999] A CopyT 2 on 12 March 1999. The AVCC tendered evidence as to the unworkability of existing preview provisions within Part VA. The evidence was to the effect of systemic failures to comply with the 14 day limitation period on the making of a free preview copies under the terms of the statutory licence. Justice Burchett made the following comments regarding this evidence:

Plainly enough, strong administrative practices could minimise the adverse affect of this kind of inertia. A head of department could simply require copying units to erase all copies on the fourteenth day after their making, unless they had been reviewed and were the subject of an instruction to keep them for which an appropriate member of staff had taken responsibility. (at para 39)

Justice Burchett considered that failure to comply with the terms of the statutory licence related more to a lack of administrative willpower on the side of the universities rather than any undue complexity within the licence itself.

(b) "Almost Unworkable"

Moreover, the Copyright Law Review Committee this year concluded its review into the simplification of the Copyright Act. If the AVCC believed that the current statutory licence presented unnecessary complexity which made it

“almost unworkable”, then presumably that review was the appropriate forum to air such views. The AVCC chose not to. In its final report, the Copyright Law Review Committee concluded:

Neither users nor owners, however, proposed a radical re-casting of the provisions of the Act that currently relate to educational copying. In particular, the majority of submissions from both users and owners recommended retention of the present statutory licensing schemes set out in Part VA and VB of the Act. (Part 1, page 174)

(c) “ Cost”

Before the Copyright Tribunal, the AVCC pleaded impecuniosity in aid of minimal copyright liability under Part VA. Justice Burchett noted:

The universities submitted that they have a limited and shrinking ability to pay. There are two difficulties with this argument. In the first place, no sort of financial analysis was advanced upon which it could be realistically weighed, and its validity and effect determined. In the second place, it seems to come down to a plea that copyright owners should be selected from the community to bear the burden of subsidising universities. (para 51)

Moreover, the AVCC’s current submission should be compared with the public comments of the AVCC’s then Intellectual Property Sub-Committee chairman in 1997 when he stated:

Licence fees. We are constantly concerned with this in the universities. We negotiate with the Copyright Agency Ltd. The Audio Visual Copyright Society [Screenrights] have arrangements. Figures that have been paid have been given here in the issues paper. It has always seemed to me ... 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 ... This is probably the kind of thing we should be doing in the universities and the way we should be spending our money. It is an important priority that licence fees be settled in order to produce the copies that will spread the knowledge to the students. As someone who is responsible for the way in which money is spent in universities, I have always taken the view that this activity is probably far more important than many others we indulge in - open slather promotions for example. (Transcript -of Professor Raoul Mortley’s

address, Copyright Law Review Committee's forum on Access to Copyright Material, May 1997)

(d) "Does not allow any such simple calculation"

Screenrights rejects the assertion by the AVCC that the universities do not have a licence which allows a simple calculation of licence fees. The result of the 1999 Copyright Tribunal case between Screenrights and the AVCC was a determination by the Copyright Tribunal that for a four year period, an annual CPI adjusted amount of \$5.50 per equivalent full-time student was payable by the universities on the basis of a sampling system. In light of the utmost simplicity of the methodology of payment involved in this determination, the yearning displayed in the AVCC's submission for a "simple calculation" could be questioned.

3 Characterisation of Communication Right

In light of the nature of the assertions made by the AVCC applicable to the existing Part VA licence, it is unsurprising that these assertions launch an argument in the AVCC submission which has one solitary objective: to persuade the Committee that a "conservative" approach be taken to the inclusion of the communication right within Part VA so that in most cases, "no extra fee will be attached to the exercise of that right". Screenrights submits that the whole basis of the AVCC submission and drafting proposal is incorrect.

(a) AVCC's view as to the effect of the new communication right

The AVCC's Part VA submissions appear premised upon an erroneous understanding of the effect of the new communication right.

The AVCC's submission (at B2) suggests that the new right of communication will be exercised when the contents of a VHS video tape are exhibited through a television connected to a video cassette recorder in a classroom. That is, the traditional use of Part VA copies. This is because the television "receives electronic signals from the video recorder". On the basis of this understanding, the AVCC raises the spectre that the non-extension of the Part VA licence to

take account of the new communication right may remove the ability of the universities to use broadcast content copies under the Part VA licence. Screenrights submits that this is an incorrect interpretation as outlined below.

(b) The communication right and the public performance right

The AVCC submission is incorrect and gives rise to absurd results.

The introduction of the communication right to the Copyright Act abolishes and subsumes within it two existing rights: the right to authorise the broadcast of works and the right to authorise the transmission of works to subscribers to a diffusion service. Critically, the exclusive right of authorising a public performance is not subsumed within the new communication right. In the Digital Agenda Bill's second reading speech, the Attorney-General states:

The right of communication will encompass the making available of copyright material on-line, so as to provide protection to material made available through on demand, interactive transmissions. An example of the exercise of this right would be the uploading of copyright material onto a server which was connected to the Internet.

The new communication right is exercised by video on demand, by web publishing, by pay television, by public dissemination through electronic mail systems, and any other one to many communication by electronic networks or broadcasting.

The rendering of copyright subject matter through a mechanical or electronic device to an audience physically proximate to the device may constitute an exercise of the exclusive right of public performance, but does not constitute an exercise of the communication to the public right. The AVCC has proceeded on the basis that the communication right subsumes the public performance right when it clearly does not. The whole history of the communication to the public right demonstrates that it covers activities more analogous to broadcasting and not public performance.

(If the AVCC were correct in its understanding as to the effect of the communication right, a milkbar proprietor with a transistor radio receiving broadcast music audible to customers in the milkbar would be said to be not only causing a public performance of the musical works, but also would be exercising the communication right. This is because, on the AVCC's reasoning, the electronic tuner within the radio would need to send "electronic signals" to an attached speaker for the music to be audible. Thus, according to the AVCC's reasoning, the milkbar proprietor must be said to have made the musical works available electronically such that it has infringed the communication right.

If this were the correct understanding of the operation of the new communication to the public right, then the proper and sensible remedy would be an amendment to the definition of communication and not a change to Part VA. The AVCC does not propose this course.)

(c) Consequences of the AVCC's misunderstandings

On the basis of its erroneous understanding of the effect of the communication right, the AVCC mounts the arguments that:

- any reform of Part VA ought be predicated on the assumption that most exercises of the communication right are incidental to the making of a copy (hence, the assertion that "nobody will wish to copy without some ability to communicate"); and,
- that while the communication right should be included within Part VA, its exercise should attract no separate payment.

Screenrights rejects these arguments mounted by the AVCC as premised upon the AVCC's flawed understanding of the nature of the communication right.

(d) Correct conceptualisation of activities under Part VA

Correctly understood, educational institutions may continue to copy broadcast content under Part VA and make certain uses of those copies notwithstanding the introduction of the new communication right. The playing of a video cassette through a video cassette recorder to a television in a class or lecture setting does not give rise in itself to the exercise of the communication right. Educational institutions have a free public performance exception by virtue of the operation of Section 28 of the *Copyright Act* 1968. Part VA copies will continue to form an important aspect of library holdings. The introduction of the new communication right will not effect such traditional uses of Part VA copies; these may continue in much the same way as they do currently.

It is powerful new uses which generally will entail the exercise of the communication right. Educational institutions may, as technology and bandwidth increases, wish to make new and different and increasingly valuable uses of audio visual material.

Imagine, for example, a university course of study on the Australian national identity. A lecturer may wish to utilise the Australian documentary "The Last ANZACs" which the university library holds as a copy made under the Part VA scheme. A lecturer may wish to utilise approximately 15 minutes of audio visual material from the documentary interspersed within written material in an interactive educational multimedia course package. The multimedia package will be uploaded on the university's computer server and accessible to students through the school's intranet. It is these types of uses to which the communication right is addressed. For such uses, it is wrong to say that the "university is doing digitally no more than it does in the analogue world." (AVCC's submission, page 8)

A statutory licence must take account of and remunerate these types of communications.

4 The Need for a Separate Communication Remuneration Notice

Screenrights' proposed drafting to incorporate the communication right within the Part VA licence contemplates an educational institution giving a separate remuneration notice for exercising the communication right in respect of Part VA copies. The reason for this has much to do with affording flexibility to educational institutions. Under the Screenrights' proposal, a communication remuneration notice need only be given by those educational institutions which intend to exercise the communication right in respect of Part VA copies.

Screenrights does not expect that every educational institution will wish to give such a communication remuneration notice. For example, a small primary school which currently makes copies of broadcasts under Part VA may have no need or desire to communicate those copies to its students.

The initial proposals of the AVCC did not give educational institutions this flexibility. Each educational institution would have to, if it wished to avail itself of the Part VA licence, opt to give a remuneration notice in respect of copying and communication. The AVCC then sought to overcome this by revised drafting which inserted a "communication option" to the remuneration notice. This simply does not work within the AVCC's drafting; throughout the remainder of their proposals the term "remuneration notice" is used bluntly without acknowledging the possibility of the different forms it may take.

The inflexibility of the AVCC approach is the consequence of the AVCC's flawed understanding of the communication right, reflected in its assertion that "nobody will wish to copy without some ability to communicate."

5 Assessing nature and quantum of communications

Screenrights rejects the drafting proposal presented by the AVCC which seeks to perpetuate prescribed sampling and record keeping systems.

As a general matter, Screenrights endorses the government's approach in Part VB and in particular, clause 135ZWA(2) in respect of the electronic use notices there described. Screenrights believes that it is important in an environment where technology is evolving at such a pace that full flexibility should be given to the parties to assess the nature and quantum of communications made pursuant to Part VA. Any *a priori* assumptions as to sampling or record keeping are completely inappropriate in this environment. Accordingly, Screenrights' drafting permits malleable assessment methods to be determined by agreement, and failing that, by the Copyright Tribunal.

6 Valuing equitable remuneration

Screenrights notes that the AVCC has proposed that there be prescribed matters which the Copyright Tribunal may have regard to in assessing the value of communications. Screenrights agrees with this suggestion in principle and submits that the existing criteria for assessing equitable remuneration for copies made under Part VA could be applied (with necessary modifications) to any communications made pursuant to an amended Part VA. Screenrights' suggested drafting provides that the copyright regulations could be amended in due course to provide this.

7 Preview copies

Screenrights notes that the AVCC propose that the existing preview provisions in Part VA be extended to include communications for the purpose of previewing copies. Screenrights agrees that if Part VA is amended to incorporate the communication right as a separate remunerable activity, some account could be taken within the amended provisions to provide for preview communications of preview copies. To this extent, Screenrights agrees with the position of the AVCC and has incorporated "preview communication" provisions into our drafting modeled upon exist preview copying provisions.

8 Conclusions on Part VA

Screenrights strongly urges the Committee not to accept the characterisation of the communication right made by the AVCC and the conclusions drawn from it. The description by the AVCC of the inclusion of the communication right within Part VA as suggested by Screenrights as creating “radical change” which creates “fresh property rights” is inaccurate. Part VA of the *Copyright Act* creates no new property rights for any copyright owners. It is a compulsory licence created at the request of educational institutions.

The *Digital Agenda Bill* does create a fresh property right; the right of communication to the public. This new exclusive right is attached to copyright to take account of new and powerful uses of copyright subject matter in a digital age. It strikes Screenrights that the effect of the AVCC’s submission regarding Part VA is to render the communication right nugatory in Part VA by attributing a zero value to it (see in particular proposed sections 135H(1B) and 135J(1B) in the AVCC draft). In other words, the AVCC seek to turn Part VA from being a remunerated exception into a free exception. Screenrights urges the Committee to reject this position absolutely.

Screenrights submits that the drafting proposal put by Screenrights is a balanced and fair model giving educational institutions choice and flexibility, while carrying over an existing remunerated exception to apply to the new communication right.

The value of this new right under Screenrights’ proposal will ultimately be determined by the uses made by the educational institutions of the right. It is likely that some of these uses are not yet known due to the rapidly changing technological environment.