

screenrights

Position Paper on the expansion of the statutory education licence under the *Copyright Act 1968 (Cth)*

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About Us

Screenrights is a non-profit copyright management organisation representing the screen production sector, with more than 5,250 members in 72 countries worldwide. Our members are writers, visual artists, producers, directors, sales agents, broadcasters and distributors.

Screenrights is appointed by the Commonwealth and the Copyright Tribunal to administer several licensing schemes on behalf of filmmakers. The licences include educational use of broadcasts, retransmission of free-to-air broadcasts and government use of broadcasts. Screenrights collects the fees for the use and distributes them to the copyright owners of the programs used.

In the 2022/23 financial year, Screenrights made available a record \$49.7 million for distribution to copyright owners under all our statutory licence and other services, with \$45.9 million in royalties distributed to 1,709 owners.

Screenrights also administers a licensing scheme in New Zealand, which includes educational licences.

Supporting the integrity of copyright in a fast-changing digital environment and supporting rights holders' right to fair compensation for the usage of their programs remains a fundamental objective for Screenrights.

Overview

Screenrights is urgently advocating for a legislative amendment to s 113P of the *Copyright Act 1968* (Cth) (**Copyright Act**). The proposed amendment expands the statutory education licence to include audio-visual material which is not part of traditional broadcasts.

The policy rationale behind this change is discussed in detail in this paper. In summary, the evolution of technology and Australia's media sector, including the continuing shift towards online consumption, means that educational institutions do not have streamlined access to a large volume of audio-visual material for educational purposes. Screenrights considers that this situation will continue to worsen as traditional broadcasters move to online-only models for some of their content, which fall outside the scope of the statutory education licence. This is a trend driven by the increasing dominance of video on demand services, with 61.5% of Australian homes, or 6.12 million households, now subscribing to at least one streaming service.¹

Screenrights proposes amending the meaning of 'broadcast' for the purposes of the statutory education licence in s 113P(6) of the Copyright Act to include cinematograph films and sound recordings which are communicated to the public, including via the internet, rather than being restricted to traditional broadcasts and simulcasts.

Screenrights considers that its proposed amendment will benefit stakeholders by:

1. providing filmmakers and related content creators with a revenue stream for audio-visual material which is communicated to the public, regardless of the delivery mechanism; and
2. ensuring that educational institutions retain the ability to copy and communicate such audio-visual material for educational purposes without infringing copyright.

Reflecting the outcome of the 2023 copyright roundtables, Screenrights proposes that the extension of the licence should be limited at this time to films and sound recordings communicated by licensed broadcasters.

¹ Australian Financial Review, "Aussies added 189,000 streaming services despite cost-of-living crunch", 2 May 2023: <https://www.afr.com/companies/media-and-marketing/aussies-added-189-000-streaming-services-despite-cost-of-living-crunch-20230501-p5d4j2>

The approach taken by Screenrights would preserve and protect the ability of the education sector to access a meaningful breadth of content while the Commonwealth undertakes a broader reconsideration of the definition of a 'broadcast'. Screenrights is acutely aware that this complex piece of work needs to be undertaken.² Given any amendment to the scope of the definition of a 'broadcast' more generally will also impact the regulatory framework for the broadcasting industry, Screenrights understands that this is a matter which requires detailed analysis, which will take time and resources and will need comprehensive stakeholder input.³

It is critical to emphasise and make clear that this amendment is solely for the purposes of the statutory education licence, and would not set a precedent for the definition of a 'broadcast' in any other context, including in other provisions of the Copyright Act or in the *Broadcasting Services Act 1992* (Cth) (**BSA**). Screenrights' proposal provides a simple solution to the issue in the confined context of the statutory education licence, which can be easily implemented without delay.

There is now a fundamental and time-critical responsibility to ensure that current and future educators can continue to access screen content via the statutory education licence for educational purposes. Unless legislative changes are made to expand the licence to include audio-visual content made available via the internet, there is a real risk that the important social policy objective underpinning the statutory education licence may be rendered obsolete.

Statutory education licence

The statutory education licence, set out in s 113P the Copyright Act, allows educators to copy and share text, images, print, music and broadcasts in ways that usually require permission from the copyright owner, provided that fair compensation is made to the creators of the content.

Australian educators can copy and communicate text, images, print music and broadcasts without a copyright clearance if:

1. they work for an institution that is covered by a 'remuneration notice' (or fair compensation arrangements); and
2. their use is solely for educational purposes.

The Australian government has appointed two collecting societies to manage the education copying scheme in the Copyright Act:

1. Copyright Agency in respect of "works" (namely, literary, dramatic, musical or artistic work, as defined in s 10 of the Copyright Act); and
2. Screenrights in respect of "broadcasts" (as defined in s 10 of the Copyright Act).

There are also special licences available to educational institutions which cover their music use, which are managed by APRA AMCOS and PPCA.

However, there is no readily available, user-friendly licence available for educational institutions to copy and communicate audio-visual material which is not part of a broadcast. Screenrights considers this is an

² We note that reviews of broadcasting and internet regulation are currently being undertaken in other jurisdictions, see the United Kingdom's White Paper—[Up next - the government's vision for the broadcasting sector](#) and Canada's proposed [Online Streaming Act 2022](#) (also known as Bill C-11).

³ This has been acknowledged by the Minister for Communications, the Hon Michelle Rowland MP, when making the *Broadcasting Services ("Broadcasting Service" Definition – Exclusion) Determination 2022*. The Determination was registered and commenced on 14 September 2022. The Explanatory Statement states: "The Determination includes a provision to self-repeal after 60 months to allow time for the Government to develop and implement broader reform to the regulatory arrangements applicable to broadcasting services, in consultation with affected industries and the Australian community."

important gap that needs to be urgently addressed. Increasingly, educationally relevant content with important social value may be locked out of use by educational institutions due to this gap.

Demonstrated importance of the statutory education licence

The statutory education licence provides schools and universities with an easy and affordable licensing solution to access broadcast content for educational purposes. Around 97% of Australian schools are covered under the statutory education licence. Screenrights licenses all 39 Australian universities and a number of TAFEs and other tertiary institutions.

The COVID-19 pandemic shone a light on the importance and flexibility of the statutory education licence. The statutory education licence supports educators in distance learning, enabling the sharing of broadcast material in online classes and recorded lectures. Between 2020 and 2021, we saw a massive spike in the use of screen content in classrooms, as teachers set up remote learning modules. In the 2019/20 financial year, screen content usage in schools jumped 143%. In the 2020/21 financial year, that usage was up a further 48%.

Since the end of pandemic lockdowns and the return to in-person learning, usage records of the statutory education licence in 2021/22 have demonstrated continued growth with a 6.2% increase on the previous financial year and a further 23.2% increase in 2022/23. This confirms the continued importance of the statutory education licence to the Australian education sector.

The drivers for that growth include an increasing focus on media in the curriculum and improved access to content covered by the Screenrights Educational Licence. Examples of improved access include the evolution from DVDs to curriculum focused, educational Video-On-Demand services such as ClickView, TV4Education and InfoRMIT EduTV.

In addition to the importance of educators having easy and cost-effective access to broadcast content, it is vital that filmmakers receive a fair fee in return for use, as they reinvest royalties directly back into creating new screen content. The 2022/23 financial year saw Screenrights' membership grow 3.1%, to a total of 5,150 members from 72 countries as of June 2023. Screenrights' database now holds over 1.52 million active registrations of members' rights in programs.

Royalties from the statutory education licence play an important role in supporting content creators to continue to tell innovative Australian stories for the screen:

Darren Dale, Co-Director of Blackfella Films & Screenrights Member

Screenrights royalties can be transformative in terms of the sustainability of an independent production company. For Blackfella, it's been a significant amount of money over a significant amount of time.

Screenrights royalties are worth more to our business than any other royalty stream. They have allowed us to attract and retain good people, and those people sustain the development of ideas that in turn sustains production.

The payment is one of our regular reliable income streams. Independent film production in Australia is moving to become a fee-based business, that is, people work on a show and then they move on to the next one.

In its 2014 "Copyright and the Digital Economy" Report (ALRC Report 122), the Australian Law Reform Commission (**ALRC**) considered whether it would be appropriate to repeal the statutory licences, including the education licence. The ALRC decided not to recommend the repeal of the statutory licences, noting both the widespread opposition to their repeal and their important function as a mechanism to secure the many underlying rights in broadcasts, which would otherwise be difficult to license voluntarily.⁴

Meaning of 'broadcast'

Australia

In the Copyright Act, 'broadcast' is defined in s 10 to mean (relevantly):

"a communication to the public delivered by a broadcasting service within the meaning of the *Broadcasting Services Act 1992*."

In the BSA, s 6(1) defines a 'broadcasting service' as:

"a service that delivers television programs or radio programs to persons having equipment appropriate for receiving that service, whether the delivery uses the radiofrequency spectrum, cable, optical fibre, satellite or any other means or a combination of those means, but does not include:

- (a) a service (including a teletext service) that provides no more than data, or no more than text (with or without associated still images); or
- (b) a service that makes programs available on demand on a point-to-point basis, including a dial-up service; or
- (c) a service, or a class of services, that the Minister determines, under subsection (2), not to fall within this definition."

The BSA deliberately excludes from the definition of a 'broadcasting service' a service that makes available transmissions of television programs or radio programs using the internet, other than a service that delivers television and radio programs using the broadcasting services bands. When the BSA was enacted, it was considered that Australia should not seek to regulate the internet in its infancy. There were concerns that models for internet content providers might be significantly different from those of traditional broadcasters; and that licensing would lead to a competitive disadvantage for Australian content providers and might impede the growth of alternatives to traditional broadcasting.

In 2001, the exclusion of transmissions over the internet was clarified via a Ministerial determination made by then Communications Minister Richard Alston (known as the 'Alston Determination'). The determination operates to exclude online television simulcasts, online radio stations, and live-streaming on social media and other digital platforms from the definition of 'broadcasting service' in the BSA.

The determination was remade in 2019 by then Communications Minister Paul Fletcher⁵, and again in September 2022 by the current Communications Minister Michelle Rowland⁶. The determination is due to be repealed in 2027 and will sunset in 2032.

The purpose of extending the determination is to provide the broadcasting industry with stability and certainty while the Government progresses broader reforms to modernise Australia's media regulatory landscape.

⁴ See, in particular, [8.52]-[8.53] of the Report.

⁵ Broadcasting Services ("Broadcasting Service" Definition—Exclusion) Determination 2019.

⁶ Broadcasting Services ("Broadcasting Service" Definition—Exclusion) Determination 2022.

The exclusion of internet transmissions from the definition of 'broadcasting services' has a significant effect on the scope of the statutory licences under the Copyright Act. For the statutory education licence, it means that programs made available on the internet (whether by broadcasters or otherwise) which have not also been made available using the broadcasting services bands are not available to educational institutions through the licence. In practice, this arbitrary distinction is both inequitable and difficult to implement. Given that the media landscape is shifting away from a traditional broadcast model and toward streaming models (as discussed further below), this undermines the utility of the statutory education licence with detrimental consequences for educators, students, and copyright owners.

This position is at odds with that in comparable jurisdictions, including New Zealand and the United Kingdom, as discussed below.

New Zealand

New Zealand's copyright legislation is the *Copyright Act 1994* (the **NZ Copyright Act**).

In 2008, a new, technology-neutral category of 'communication works' was introduced into the NZ Copyright Act⁷, which had the effect of extending the copyright protection previously afforded only to signals that carried program content in broadcasts and cable programmes to the content itself.

Section 2(1) of the NZ Copyright Act defines a 'communication work' as:

"a transmission of sounds, visual images, or other information, or a combination of any of those, for reception by members of the public, and includes a broadcast or a cable programme."

A communication work includes, but is not limited to, a broadcast.

Section 48 of the NZ Copyright Act provides a statutory framework for a collective licence for the copying and communication of communication works for educational purposes. Screenrights administers this licence.

Currently, New Zealand is the only country to protect transmissions in general as a category of copyright subject matter in their own right. In Australia, with the exception of sound and television broadcasts, copyright subsists as a result of the fixation of the work or subject matter in a material form and not in a means of transmission.

Screenrights made a submission regarding the adoption of the new communication work definition, in 2007.⁸ Screenrights welcomed the modernisation of the NZ Copyright Act to reflect new technologies, in particular the creation of a technologically neutral communication to the public. Screenrights raised concerns about the definition of 'communication work' creating an extremely broad ranging category of copyright subject matter, which may be justifiable for technological but not economic reasons.

Despite these concerns, in practice Screenrights has found that the 'communication works' definition has enabled the New Zealand educational licensing scheme to be flexible and technology-neutral. The licence includes all forms of audio-visual content irrespective of the mode or delivery or original point of distribution.

Screenrights considers that these provisions represent a good example of a simple regulatory framework based on flexible, technology-neutral principles that can respond to technological change and adapt to new innovations. However, the options for law reform advanced by Screenrights do not go so far as the New Zealand position, given such a change would have broader ramifications for the Copyright Act by creating a new category of copyright subject matter to be protected. The implications for a broader reform need to be carefully reviewed by government and stakeholders to ensure that there are no unintended consequences of reform.

⁷ Copyright (New Technologies) Amendment Act 2008 (NZ).

⁸ *Final Report of the Digital Platforms Inquiry*, Submission by Screenrights, 12 September 2019.

Screenrights current proposal does not create such concerns as we are only dealing with the education statutory licence which would have no precedent outside that provision.

United Kingdom

UK copyright law is contained in the *Copyright, Designs and Patents Act 1988* (the **UK Copyright Act**). In that Act, s 6(1) provides that a 'broadcast' means:

"an electronic transmission of visual images, sounds or other information which—

- (a) is transmitted for simultaneous reception by members of the public and is capable of being lawfully received by them, or
- (b) is transmitted at a time determined solely by the person making the transmission for presentation to members of the public,

and which is not excepted by subsection (1A); and references to broadcasting shall be construed accordingly."

Section 6(1A) provides that any internet transmission is excepted from the definition of "broadcast" unless it is:

- (a) a transmission taking place simultaneously on the internet and by other means;
- (b) a concurrent transmission of a live event; or
- (c) a transmission of recorded moving images or sounds forming part of a programme service offered by the person responsible for making the transmission, being a service in which programmes are transmitted at scheduled times determined by that person.

The UK Copyright Act provides for statutory education licences for:

- s 34: the playing or showing of a sound recording, film or broadcast at an educational establishment without infringing copyright; and
- s 35: the recording of a broadcast, or a copy of such a recording, on behalf of an educational establishment for the educational purposes of that establishment without infringing copyright in the broadcast, or in any work included in it.

The statutory education licences in the UK are therefore broader than that in Australia due to the less restrictive definition of a broadcast, which extends beyond traditional broadcasts to other transmissions of audio-visual material, including internet transmissions (regardless of whether or not such material has also been broadcast in a traditional sense).

Government copying

Screenrights is also a declared society for the purposes of s 183 of the Copyright Act, which covers government use of copyright material. This is referred to as the statutory government copying licence, which Screenrights administers.

The statutory government copying licence includes works communicated online, in addition to broadcasts. The scope of the statutory government copying licence was expanded by the Copyright Tribunal in 2015 to include works copied online and the declaration is equivalent to the New Zealand education licence discussed above.

It is relevant to note that the confinement of the statutory education licence to broadcast content (to the exclusion of works communicated online) is at odds with the scope of the statutory government copying licence and the New Zealand education licence. Screenrights proposal would amend the s113P statutory

education licence to make it comparable in scope to the s183 statutory government copying licence and the New Zealand education licence.

Limitations on the Statutory Education Licence

Under the statutory education licence, Australian educators have access to drama, films, documentaries, and news and current affairs programs – however, the licence only applies where such content is 'broadcast'. As discussed above, the way this term is defined in the Copyright Act, which is tied to the definition in the BSA and the Alston Declaration, has significant limitations which are becoming more pronounced with recent technological developments. Such limitations now pose a threat to the utility of the statutory education licence going forward.

The fundamental issue is that the statutory education licence only applies where content has been broadcast via traditional means, and does not apply where audio-visual content is only transmitted electronically, including via the internet. While this lack of technological neutrality has become particularly problematic recently due to rapid and pronounced changes in delivery mechanisms being adopted by the broadcasting industry, it has been an issue of concern to Screenrights for some time. The legislature has responded to these concerns over the years by introducing amendments to the Copyright Act to ensure the statutory education licence covers certain online content.

In 2006⁹, a new s 135C ('Extended operation of this Part') was added to Part VA of the Copyright Act (which at that time provided for the statutory education licence), which provided that:

"This Part, and the rest of this Act so far as it relates to this Part or to a provision of this Part, apply in relation to a communication of the content of a free-to-air broadcast, by the broadcaster making the content available online at or after the time of the broadcast, in the same way as they apply in relation to the broadcast." The Explanatory Memorandum to the Bill¹⁰ stated:

"This item responds to the increasing trend of broadcasters making the content of their broadcast material available online, either simultaneously or at a later time (eg, through services commonly referred to as web-casting or podcasting).

New s 135C extends the statutory licence in Part VA to facilitate the use by educational institutions of free-to-air broadcast material from online sources made available by broadcasters in the same way that Part VA currently permits copying and communication of broadcasts. This will facilitate the use of broadcast material made available online by education institutions and ensure that copyright owners are appropriately compensated for the use of their material.

The amendment will apply only to the content of material provided in free-to-air broadcasts, as defined in the amendment to sub-s 10(1) inserted by item 2."

In 2012, Screenrights submitted to the ALRC's "Copyright and the Digital Economy Issues Paper"¹¹ that the exclusion of transmissions over the internet from the definition of 'broadcast' television creates an unnecessarily complicated distinction for educators relying on the statutory education licence. Screenrights submitted at that time that the Copyright Act should be amended by inserting an expanded definition of 'broadcast', solely for the purposes of the statutory education licence, to enable copying of linear television and radio transmissions over the internet.

In June 2017, Part VA of the Copyright Act was repealed and replaced with the current Part IVA ("Uses that do not infringe copyright"), including Division 4 ("Educational Institutions – Statutory Licence). The new

⁹ *Copyright Amendment Bill 2006* (Cth)

¹⁰ <https://www.legislation.gov.au/Details/C2006B00170/Explanatory%20Memorandum/Text>

¹¹ ALRC Submission 215: https://www.alrc.gov.au/wp-content/uploads/2019/08/215_org_screenrights.pdf.

provisions included a subsection to implement the expanded definition of 'broadcast' sought by Screenrights. Section 113P(6) provides that the licence applies to the content of broadcasts which was:

- a. electronically transmitted using the internet at the same time, or at substantially the same time, as the broadcast; or
- b. if the broadcast is a free-to-air broadcast - made available online by the broadcaster of the broadcast at the same time as, or after, the broadcast.

Screenrights also submitted that if the Commission was of the view that educational institutions must have a wider right to copy audio-visual material from the internet generally, then that copying must be subject to compensation via a remunerated exception.

The changes to the Copyright Act to deal with this issue to date show that having a specific meaning of a 'broadcast' for the limited purpose of the statutory education licence is not uncommon nor controversial, and has not upset the policy application or meaning of 'broadcast' in terms of the regulation of the industry more generally.

While the statutory education licence has continued to be effective in the years since those amendments were made, the rapid acceleration of technological changes in the broadcasting industry has created new challenges in the operation of the statutory education licence and the ability of students and teachers to access the content it covers. The history of amendment to widen the scope of the licence incrementally has been a patchwork approach requiring multiple parliamentary changes. It is clear that further amendment is now required.

Impact of technological change on broadcasting sector

Television and radio broadcasting services continue to play an essential role in Australian society and in the Australian economy. A 2022 study by Deloitte Access Economics, commissioned by FreeTV, *"Everybody gets it: Revaluating the economic and social benefits of commercial television"*¹², reported that commercial television contributed \$2.5 billion to GDP in 2021.

However, in recent years, there has been rapid technological change in the media industry and a transformation in viewing habits. Consumer take-up of digital streaming businesses is surging. According to market research firm Telsyte¹³:

- Subscription Video on Demand (**SVOD**) services in Australia reached 23.4 million at the end of June 2022, an increase of 22 % from 19.2 million in June 2021.
- More than 70 % of Australian households now have at least one SVOD service, up from 62 % a year ago. The number increases to 77 % among households on the nbn.
- Telsyte forecasts the total number of SVOD subscriptions could exceed 30 million by June 2026, driven by a content boom, growth in consumers having multiple subscriptions, new market entrants and the introduction of ad-supported plans.
- The study found Netflix (6.3 million) remained the top SVOD provider at the end of June 2022, followed by Amazon Prime Video (4.1 million), Disney+ (3.0 million), Stan (2.5 million), Kayo Sports (1.3 million), Binge (1.3 million), Paramount+ (1.1 million) and Optus Sport (1.0 million).
- SVOD market revenue was estimated at \$2.7 billion for the 2021/22 financial year, an annual increase of 27 %.

Local broadcasters are following the audience and moving towards streaming models. Foxtel Media CEO, Mark Frain recently stated that was "highly likely" the company could see itself as a streaming-only company

¹² <https://www.freetv.com.au/wp-content/uploads/2022/09/Everybody-gets-it-2022.pdf>

¹³ See <<https://www.telsyte.com.au/announcements/2022/8/29/subscription-entertainment-defies-rising-cost-of-living-pressures>>.

down the line.¹⁴ Of Foxtel's 4.4 million subscribers, three million are spread across its streaming services (Binge, Kayo and Flash), and the number of broadcaster customers has fallen by around 151,000 in recent years.

Similarly, BBC general director, Tim Davie, has stated that BBC is preparing to shut down its traditional television and radio broadcasts as it becomes an online-only service over the next decade.¹⁵ The Australian Broadcasting Corporation's five-year plan released in June 2023 revealed that the public broadcaster will divert resources away from traditional broadcasting (radio and television) towards improving its digital platforms (ABC iview, ABC Listen and ABC News) by 2028 in preparation for a "digital majority" audience.¹⁶

As this trend away from traditional broadcasting continues, the statutory education licence under the Copyright Act will become increasingly redundant unless legislative changes are made.

Copyright Roundtables

In 2023, the Attorney-General held a series of Copyright Roundtables with key stakeholders on copyright policy reform priorities and emerging issues. The purpose was to develop practical and achievable copyright reform proposals for the government to consider and potentially take forward with broad stakeholder support.

The Roundtables included considerations of the issue of whether the statutory education licence that currently covers broadcast content should be extended to include content streamed by licensed broadcasters through their online platforms that has not been broadcast. Two options for reform were canvassed: a wide ranging reform to cover all communicated audio-visual content (similar in scope to the New Zealand provisions) and a more incremental reform to expand the licence to cover audiovisual content communicated online by broadcasters.

Ultimately, the outcomes paper focussed on the second, incremental reform option.

Proposed solution

Screenrights' proposed solution reflects the incremental reform included in the outcomes paper from the Copyright Roundtables.

Screenrights proposes that s 113P of the Copyright Act be amended to provide that the term 'broadcast', as used in the context of the statutory education licence, captures other communications to the public of cinematograph films and sound recordings, regardless of whether the audio-visual material has also been broadcast in a traditional sense.

The proposed drafting would replace s 113P(6) of the Copyright Act with the following:

¹⁴ See < https://mumbrella.com.au/foxtel-highly-likely-to-be-a-streaming-only-business-in-the-future-mark-frain-784024?utm_campaign=Mumbrella%20Daily%20-%2019%2F04%2F23&utm_content=Foxtel%20%27highly%20likely%27%20to%20be%20a%20streaming%20only%20business%20in%20the%20future%3A%20Mark%20Frain&utm_term=&utm_medium=email&utm_source=Aestra>.

¹⁵ See for example, ' <https://www.theguardian.com/media/2022/dec/07/bbc-will-go-online-only-by-2030s-says-director-general#:~:text=4%20months%20old-,BBC%20preparing%20to%20go%20online%20only,next%20decade%2C%20says%20director%20general&text=The%20BBC%20is%20preparing%20to,the%20director%20general%2C%20Tim%20Davie.>>.

¹⁶ <https://about.abc.net.au/press-releases/abc-five-year-plan-2023-2028-an-essential-part-of-daily-life-for-all-australians/>

Meaning of broadcast for the purposes of this section

(6) For the purposes of this section:

broadcast includes a communication to the public by a licensed broadcaster of a cinematograph film or sound recording.

broadcast has the meaning given in section 10 and also includes a communication of a cinematograph film or sound recording by a licensed broadcaster.

licensed broadcaster means the provider of any of the following broadcasting services under the Broadcasting Services Act 1992:

1. national broadcasting services;
2. commercial broadcasting services;
3. community broadcasting services;
4. subscription broadcasting services;
5. subscription narrowcasting services;
6. open narrowcasting services;
7. international broadcasting services.

communication has a corresponding meaning to the definition of "communicate" in section 10.

Examples of use cases covered by the proposal

Three use case examples are set out below, showing that the proposed solution will simplify the administration of the statutory licence, improving access for education and ensuring compensation for copyright owners.

Audio-visual content made available online by broadcasters

Increasingly broadcasters are making content available online. Some of this content is broadcast, and some is not, including for example, television series, feature length films, extended interviews, web series, etc. Often it is difficult to distinguish which content has been broadcast and which has not. For example, the ABC does not indicate on its iView platform whether the content was broadcast. Nor does SBS on their platform, SBS OnDemand. Under the proposed solution, all this content will be covered. This expands the content available to the education sector and resolves the risk of potential infringement and loss of access.

Linear channels transmitted exclusively online

As discussed above, free to air channels are launching new online linear channels and moving existing multichannels online. As a result, this content will be excluded from the statutory licence: educators will lose access to the content, and copyright owners will not be compensated for any use. Screenrights proposal provides a solution that will resolve these problems.

FAST TV

FAST TV (Free to air, Ad supported, Streaming, Television) are linear online channels which include some broadcast content and some online exclusive content. Licensed broadcasters are increasingly launching niche FAST channels to widen their reach. The content includes high value productions as well as other content. For example, Channel Ten's FAST channels include all of Nickelodeon's channels (which previously were broadcast on Foxtel).

FAST channels are not currently covered by either ss113(P)(6)(a) because they are not simulcasts, or subsection (b) as they are linear and not on demand and because some content has not been broadcast. Educational institutions have no practicable means to access the television content for teaching purposes without infringing copyright.

Not included in the proposal

YouTube, Netflix and other SVOD services are not covered by Screenrights proposal and there is no impact on these services.

Impacts on stakeholders

Broadly, there are three classes of stakeholder impacted by the operation of the statutory education licence. Screenrights' view is that both of its proposals effect net benefits for, and appropriately balance the competing interests of, relevant stakeholders.

Copyright owners

First, for the rights holders, here the statutory education licence applies, it is a compulsory licence, meaning rights holders cannot opt out or choose not to license their material. Screenrights' proposed amendments would expand the application of the licence to persons not previously captured, who may not want their content to be licensed.

However, in the experience of Screenrights, rights holders generally support the statutory education licence and strongly oppose calls for its repeal. In 2012, a survey of rights holders showed that more than half regarded Screenrights' royalties as "important to the ongoing viability of their business", and close to 20 % said this money was "essential".

Copyright users

Second, the educational institutions and educators that gain access to audio-visual material through the scheme. Without the statutory education licence, these institutions would face the high transaction costs of licensing material voluntarily directly from rights holders. A voluntary collective licence for broadcasts will be impossible to secure without statutory support given the many underlying rights in programs.

These issues informed the Franki Committee's recommendation to introduce a statutory licence for educational establishments. The Report stated:¹⁷

"[T]he very considerable element of public interest in education, together with the special difficulties that teachers and others face in Australia in obtaining copies of works needed for educational instruction, justifies the institution of a system of statutory licences in non-profit educational establishments."

The Franki Committee made this recommendation despite concerns that a statutory licensing scheme for educational institutions "might seem to favour the interests of education as against the interests of copyright owners".¹⁸

As noted above, the utility of the Screenrights Educational Licence for all stakeholders is being undermined by its inability to capture audio-visual material transmitted electronically unless it is simulcasted. This means that schools and other educational institutions may not have access to material they need to deliver high quality and up to date lessons and content that incorporates relevant audio-visual resources.

Screenrights' proposals directly address this issue by expanding the statutory education licence to include audio-visual material transmitted or made available electronically by broadcasters, including on the internet.

¹⁷ Copyright Law Committee, Report on Reprographic Reproduction (1976) (**Franki Report**), [6.40].

¹⁸ Franki Report, [6.63].

Case study - High Ground

In 2022, the Victorian Curriculum and Assessment Authority added a feature film, *High Ground*, as a multi-modal text on the 2023 VCE English prescribed text list. It later became apparent, however, that because the film had not been broadcast it was only available for viewing through paid streaming services for private use. This meant that an educational use copy was not available. The VCAA approached Screenrights for assistance.

It was originally anticipated that the film would be broadcast on SBS which had acquired the rights and that the film would therefore be available to be copied under the statutory education licence and accessible to schools via streaming through online resource centres (for example, ClickView). SBS, however, did not broadcast the film and only offered it on its online service, *SBS On Demand*. As a consequence, there was no broadcast of the film, which meant there was no copy that could be made available to schools by resource centres. Victorian teachers and students were unable to access the prescribed text.

Screenrights was able to assist in facilitating a direct licence of the film to ClickView from the distributor, Madman Entertainment.

Note, however, that this is not a solution to the broader problem because it is unlikely to be able to be replicated in similar situations. The licence from Madman could be facilitated on a one-off basis due to the fact that Madman's CEO is a director on the Screenrights' Board and was able to assist in this instance. As well, the licence is for a limited time period and will terminate at the conclusion of its term. Moreover, it only applies to ClickView meaning that students and teachers at schools that do not have ClickView are excluded from and have no easy, non-infringing means of accessing this film.

This is a clear example of why the amendment to the statutory education licence is necessary.

Screenrights' proposal to expand the statutory education licence includes copies made from broadcasters' video on demand services. It would mean that, in this scenario, ClickView and the other resource centres could make a copy of the film from SBS On Demand (even though it was not broadcast). The film would then have been available on a reliable, ongoing basis to schools via the resource centres.

To the extent that there are concerns from licensees about the method used to calculate equitable remuneration for the use of broadcast content under the licence¹⁹, this is a separate issue to that of the scope of the licence and amending it to be technologically-neutral.

Screenrights' experience of its administration of the statutory education licence in New Zealand has been that there had not been a significant increase in fees payable following the introduction of a 'communication work' in 2008. Furthermore, Screenrights' administration of the government copying statutory licence in s183 of the Act was extended by the Copyright Tribunal to include internet content in 2015. Again, Screenrights' experience in administering the licence since then has not been that there was an increase in fees as a result of the extension.

Third, indirect benefits flow to Australian consumers of film and broadcast content through the statutory licensing scheme. As above, Screenrights royalties play an important role in the financial sustainability of

¹⁹ See, for example, Copyright and the Digital Economy (ALRC Report 122), [8.105]-[8.114].

the rights holders' businesses, which in turn makes viable and encourages further content creation. Any reinvestment by rights holders in the creation and production of local content helps to sustain the local production industry. As noted by Kimberlee Weatherall:²⁰

"Although Australian content is popular, it is also expensive, and Australia's relatively small population means it lacks the economies of scale that support local content production in other major English-speaking countries. Cheap high-quality imports are available, in English, from the United Kingdom and the United States in particular, and are attractive to Australian audiences."

These concerns are echoed in submissions from industry. For example, the ABC submitted to the ALRC "Copyright and the Digital Economy" (see [8.40]):

"A weakening of the independent production sector would reduce the quality and creative diversity of Australian television culture and would affect all broadcasters, including the ABC, as well as potentially undermining the growth of the digital economy."

Overall, the Australian film, television and radio industry makes a significant contribution to the local economy in various direct and indirect ways, including jobs, production, technology, advertising and taxation.

Alternative solutions to amending the scope of the statutory education licence

Direct licensing

It has always been possible for educational institutions to enter into a license for non-broadcast content directly with copyright owners, however this is often not feasible or practical.

Firstly, the nature of audiovisual content is that there are multiple (often dozens) of individual copyright works included in a film, and obtaining the permission of all relevant rights' owners can be prohibitively complex and expensive for users and administratively burdensome for rights holders. Secondly, it is generally not practicable to obtain consent from copyright owners prior to the transmission of the content (for example, online linear channels). Thirdly, copyright owners may not be willing or able to meet the administrative burden of providing bespoke direct licences to a high volume of users directly, particularly for the numerous and varied uses specific to the education sector, such as compilations of excerpts or other unusual uses. And finally, the nature of educational use is that it is not always practical for teachers to pre-determine the type and selection of content required in a classroom. This unpredictability means that content is best supplied by a licence with universal coverage which provides a degree of flexibility which is appropriate for and reflective of the users' context and needs.

It is for all of these compelling reasons that the statutory education licence in s113P was introduced thirty four years ago and still exists today. In the decades since the licence was first introduced, direct licensing has been possible and yet educational institutions have overwhelmingly preferred to rely on the statutory licence. An approach which assumes that direct licensing could replace the various efficacies of the statutory licence is therefore not sustainable.

Nevertheless some institutions have directly licensed content from time to time. This activity is specifically provided for within the scope of the statutory licence. Therefore, critically, the proposed solution would support both the vast majority of institutions that prefer to rely on the statutory licence and those few institutions that may choose to directly license content.

²⁰ 'Culture clash: The Australian Law Reform Commission's discussion of retransmission and the world of broadcast' (2014) 24(4) Australian Intellectual Property Journal 202, 211.

Section 200AB

One objection to the proposed amendment is that it would encroach on, and reduce the availability of, the exception in s 200AB of the Act. This exception was introduced in 2006 for the purpose of providing cultural and educational institutions with "a flexible exception to enable copyright material to be used for certain socially useful purposes while remaining consistent with Australia's obligations under international copyright treaties".²¹

Importantly, any use under the exception is subject to a three-step test implementing Australia's obligations under the TRIPS Agreement²²:

1. the circumstances of the use must amount to a "special case", which is intended to ensure the use is clearly defined and narrow in a quantitative and qualitative sense²³;
2. the use must not conflict with a normal exploitation of the copyright material; and
3. the use must not unreasonably prejudice the legitimate interests of the copyright owner.

Some education sector representatives have previously submitted that there should be a broad free use exception to copyright infringement for educational institutions, which has been rejected by legislators and law reform bodies.²⁴ The opposition to Screenrights' current proposal appears to have been taken for the purpose of advancing a campaign for a broad free use exception to copyright infringement.

Screenrights submits that this is both contrary to the intention of s200AB and would be an improper application of s200AB for reasons discussed in more detail below.

The exception in s 200AB does not apply

Screenrights considers that the additional content which would be covered by s 113P if amended is not content which currently falls within the scope of the exception in s 200AB because:

1. to the extent that educators or students play licensed broadcasters' online content in class directly from the originating website or application (such as the broadcasters' online catch up and streaming services), or provide links to such online content, this is covered by s 28 of the Act and neither s 113P nor s 200AB apply; and
2. in relation to any other use by educators of audio-visual content distributed by licensed broadcasters via their online channels, it is clear from the fact the content is being distributed by a licensed broadcaster that the copyright owner intends to commercially exploit it. Absent coverage by the statutory licence, such content should be the subject of a directly negotiated licence and payment of a licence fee, otherwise the use would conflict with the normal exploitation of the content and unreasonably prejudice the legitimate interests of the copyright owner by depriving them revenue for the use.²⁵

At its highest, if the objection to Screenrights' proposal on the basis of s 200AB is upheld, there is a real risk that the scope of the flexible fair dealing exception in s 200AB will be (either inadvertently or deliberately) expanded over time by virtue of changes in the technology of transmission to include all communicated audiovisual content. This would impermissibly expand the operation of the s 200AB exception beyond its clear and narrow scope and beyond the policy purposes underlying it. It would also arguably amount to a

²¹ *Explanatory Memorandum*, Copyright Amendment Bill 2006 (Cth), [6.53].

²² Article 13 of the *Agreement on Trade Related Aspects of Intellectual Property Rights* (TRIPS Agreement).

²³ *Explanatory Memorandum*, Copyright Amendment Bill 2006 (Cth), 110.

²⁴ In its 2014 "*Copyright and the Digital Economy*" Report (ALRC Report 122), the Australian Law Reform Commission (ALRC) decided not to recommend that any statutory licences be repealed and recognised that the statutory education licence was particularly needed to secure the many underlying rights in broadcasts: see [8.52]-[8.53].

²⁵ Australian Copyright Council Fact Sheet "*Section 200AB: the Special Case or Flexible Dealing Exception*", February 2022, expresses the view that s 200AB is unlikely to apply if a licence is available; the *Smartcopying Guide for Australian Schools and TAFE* states "if you can...obtain a licence for your proposed use on reasonable terms, then you must do that instead of relying on the flexible dealing exception".

breach of Article 13 of the TRIPS Agreement and the clearly confined bases on which any exception must be grounded.

The legislative policy purpose and effect of the statutory education licence should be upheld

The purpose of the statutory education licence is to balance the public interest in copyright material being readily available for use by educators with the public interest in compensating creators for their endeavours and incentivising the creation of new content. The licence fees payable under the statutory education licence are reasonable and by definition “equitable”. They also fundamentally provide vital revenue to filmmakers and related content creators which can be reinvested back into creating new screen content, thereby supporting the viability of the content sector in Australia.

The proposed amendment meets these important purposes by ensuring that all audio-visual content distributed by licensed broadcasters is covered by s 113P, rather than a situation where high quality and popular content is excluded from being accessible by educators under the statutory education licence due to a lack of technological neutrality.

The legislative amendment proposed by Screenrights should be made to ensure the legislative purpose and effect of the statutory education licence is upheld. The fact that closely comparable jurisdictions, including New Zealand and the United Kingdom, have educational licensing schemes for a broader category of audio-visual content than that provided for under the amendment proposed by Screenrights is further persuasive support for why this opposition on the basis of s200AB should be rejected.

Stakeholder discussions

Following the conclusion of the Copyright Roundtables in December 2023, Screenrights has continued discussions with stakeholders in regard to expanding the statutory education licence to copy and communicate broadcasts in s113P of the Copyright Act.

The discussions have been premised on the outcomes paper from the Roundtables which proposed a limited expansion of the licence to include audiovisual content communicated by broadcasters irrespective of the technology.

Creative sector interests

There is virtually universal support for the proposal from relevant stakeholders representing different interests in the creative sector.

Broadcasters support the proposal including

- The Australian Broadcasting Corporation
- The Special Broadcasting Service
- FreeTV (representing commercial free to air television broadcasters)

FreeTV notes that its stakeholders “are all broadly comfortable with what you [Screenrights] are proposing in substance, although some have issues with the idea that there would be different definitions for broadcasting in different pieces of legislation.” Screenrights notes that this is already the case in regard to s113P of the Copyright Act as for example it covers broadcast content made available online by free to air broadcasters but not other broadcasters.²⁶

Production sector representatives support the proposal including

- Screen Producers Australia

²⁶ See subsection 113P(6)(b) of the Act.

- The Australian Writers Guild
- The Australian Directors Guild
- The Media Entertainment and Arts Alliance

Collecting societies representing underlying copyright owners in the audiovisual content covered by the statutory licence support the proposal, including:

- APRA | AMCOS
- Copyright Agency
- ARIA | PPCA

Education sector interests

Resource centres are a particular class of educational institution that make copies of broadcasts on behalf of other institutions. Examples of resource centres include InfoRMIT and ClickView. These resource centres support the proposal in order to minimise the risk of inadvertent infringement of copyright.

Screenrights has engaged with the university sector and schools and TAFEs concerning the proposal. There has been detailed engagement with universities.

The position with universities is mixed. In a workshop with a sample of university copyright owners arranged by Universities Australia (UA) in June, one third of the attending universities supported the proposal, one third opposed and one third were undecided.

Following a meeting of all the universities, UA confirmed that while some were supportive and others were strongly opposed, the resulting position is that overall the sector supported the status quo. UA emphasised that they would be very willing to engage with the Government on further consideration of this issue.

Screenrights met with the Copyright Advisory Group (CAG) for schools and TAFEs in March. They subsequently advised that they do not support the proposal at this time but were happy to keep discussing it. There was a further discussion in June at which Screenrights outlined the High Ground case study (discussed above). The CAG representatives advised that they would discuss it further with CAG in September.

Next steps

Screenrights welcomes feedback on its proposal and looks forward to the opportunity to discuss the matter further with the Government with a view to working together to implement an urgent solution to the issues raised in this paper.