

# **SUBMISSION TO THE COPYRIGHT LAW REVIEW COMMITTEE**

## **Jurisdiction and Procedures of the Copyright Tribunal**

### **Submission by the Audio-Visual Copyright Society Ltd trading as Screenrights**

**July 1999**

## **INTRODUCTION**

### **1 Screenrights**

- 1.1 This submission is made by the Audio-Visual Copyright Society Ltd trading as Screenrights ("Screenrights") on behalf of its members.
- 1.2 Screenrights is a copyright collecting society representing the interests of copyright owners in audio-visual works including film producers, film distributors, script writers, visual artists and music copyright owners.
- 1.3 Screenrights was incorporated as a company limited by guarantee on 8 January 1990. It is a non-profit organisation that passes on all revenues collected to copyright owners after deduction of its administrative expenses.
- 1.4 Screenrights is the declared society under section 135P of the *Copyright Act 1968* ("the Act") to administer the scheme in Part VA of the Act ("the Part VA Scheme"). The Part VA Scheme creates a statutory licence for the copying of sound and television transmissions by educational institutions.
- 1.5 Since its declaration in 1990, Screenrights has collected in excess of AUD \$58 million for its members. In the financial year 1998/99, Screenrights distributed over AUD\$ 3.5 million to copyright owners.
- 1.6 Screenrights has over 1150 members in 37 countries. Over 550 of its members are based in Australia.
- 1.7 In addition to the Part VA Scheme, Screenrights operates an overseas royalty collection service for its members and also offers an educational copying scheme in New Zealand which came into operation on 1 July 1999.
- 1.8 Royalty collecting services other than the Part VA Scheme offered by Screenrights are voluntary in nature. Participation in any of these schemes is at the discretion of Screenrights' members. In this submission these schemes are collectively referred to as Voluntary Schemes.

## **2 The Part VA Scheme**

- 2.1 To participate in the Part VA Scheme educational institutions can elect to pay remuneration to Screenrights on behalf of copyright owners on the basis of a records system ("Record Keeping"), or a sampling system ("Sampling"). Educational Institutions indicate the system in which they elect to participate by giving a notice to Screenrights under section 135G of the Act.
- 2.2 Once an educational institution has indicated that it wishes to pay remuneration to Screenrights by means of Record Keeping or Sampling, Screenrights enters into an agreement with the institution to establish the amount of remuneration payable and the method by which the institutions report copying of transmissions to Screenrights.
- 2.3 The amount of remuneration payable to Screenrights under Record Keeping or Sampling is determined by agreement between the educational institution and Screenrights or, failing such agreement, by an application by either party to the Copyright Tribunal. Such applications are made under section 135H or section 135J of the Act for Record Keeping and Sampling respectively.

## **3 Voluntary Schemes**

- 3.1 Screenrights seeks to represent those members by entering into agreements with copyright collecting societies outside Australia. Members must appoint Screenrights to act on its behalf in dealings with these copyright collecting societies.
- 3.2 Screenrights also administers an educational copying scheme under the New Zealand Copyright Act under which it collects remuneration for Screenrights' members who appoint Screenrights as their agent for this purpose. This scheme came into operation on 1 July 1999.
- 3.3 As with remuneration collected under the Part VA Scheme, Screenrights pays all of the royalties collected from the Voluntary Schemes to copyright owners after deducting its administrative expenses.

## **COMMENTS ON THE REPORT**

### **4 Jurisdiction of the Copyright Tribunal**

- 4.1 Screenrights does not support proposals for a general expansion of the role of the Copyright Tribunal. Screenrights is of the view that the current scope of the jurisdiction of the Copyright Tribunal is appropriate.

- 4.2 Screenrights would specifically oppose the extension of the Tribunal's jurisdiction to its members or potential members. In addition to the safeguards provided to company shareholders under the common law and the Corporations Law, which allow members to change the Articles of Association and to commence proceedings against directors for misuse of their power, the members of Screenrights are protected by specific provisions in the Copyright Act ("the Act") and the Attorney-General's Guidelines For the Operation of Collecting Societies (1990), which together impose on its directors trustee obligations additional to and more onerous than those of a director of a public company.
- 4.4 Furthermore, in the case of Screenrights, Section 135Q of the Act provides that the Attorney-General may revoke the Part VA licence in circumstances where it is satisfied that Screenrights:
- "is not acting in accordance with its rules or in the best interests of those of its members who are relevant copyright owners or their agents..."*
- 4.5 Screenrights submits that the current role of the Copyright Tribunal to determine equitable rates of remuneration where no agreement can be reached between the collecting society administering a statutory licence and the bodies representing copyright licencees under the statutory licences is its proper purpose. It is entirely consistent with the spirit and intention of the legislation concerning the collective administration of copyright royalties that standing to make such an application be limited to those two parties.
- 4.6 However, Screenrights is of the view that a minor anomaly exists in relation to the jurisdiction of the Copyright Tribunal under Part VA of the Act as a result of the wording of Section 135H. Under section 135J, the Copyright Tribunal has the power to set the rate of remuneration payable under a sampling system and, in addition, to determine the sampling system itself in the absence of agreement between the parties. Under section 135H the Copyright Tribunal has the power to set the rate of remuneration payable under a record keeping system, but, for record keeping, there is no equivalent provision to s135J(3), with the consequence that the Tribunal has no power to determine a record keeping system in the absence of agreement between the parties.
- 4.7 Screenrights submits that a workable sampling system and a workable record keeping system are equally important to the operations of the Part VA scheme and consequently the Copyright Tribunal should have the power to determine the workings of both systems. Screenrights suggests that the wording of Section 135H be amended. Currently the jurisdiction of the Tribunal in respect of sampling is set out in Section 135J which states:

*"The extent of copying of transmissions and any other matters that are necessary or convenient to be assessed by use of a sampling system, shall be assessed by use of a sampling system determined by agreement between the administering body and the collecting society or, failing such agreement, by the Copyright Tribunal on application made by either of them."*

This is to be contrasted with the Section 135H relating to record keeping pursuant to which the Tribunal has jurisdiction only in relation to " *the amount of equitable remuneration payable*". It is submitted that the wording of section 135H (1) could be amended to read:

*"Where a records notice is given by, or on behalf of, an administering body, any matters that are necessary or convenient to be assessed by use of a record keeping system, and in particular, the amount of equitable remuneration payable to the collecting society by the administering body for each copy of a transmission made by, or on behalf of, the administering body while the notice is in force, should determined by agreement between the administering body and the collecting society or failing such agreement by the Copyright Tribunal on application made by either of them".*

## **5 Types of Licences over which the Copyright Tribunal should have jurisdiction**

- 5.1 Screenrights submits that the type of licence in respect of which the Copyright Tribunal currently has jurisdiction is appropriate. As a general proposition, the details of voluntary schemes are more properly the subject of contractual negotiation between the licensee and the collecting society offering the scheme, with any mediation or arbitration provisions included as a matter of contractual drafting.
- 5.2 Screenrights approves of the fact that the Tribunal currently has jurisdiction over narrowly defined subject matter. It is beneficial to the smooth administration and operation of statutory licences such as the Part VA licence that there is a quasi-judicial body like the Tribunal with some experience and knowledge of this highly specialised and very important area.

## **6 Structure and formality of the Copyright Tribunal**

- 6.1 Screenrights approves of the current constitution of the Copyright Tribunal with a Federal Court Judge presiding. Screenrights is of the view that it is essential, in cases where a long course of negotiation has failed to achieve agreement between the parties, that an authoritative and binding decision is made by a judicial umpire.
- 6.2 Screenrights has conducted two cases, both of which involved the determination by the Tribunal of an equitable rate of remuneration and

believes that the level of formality currently demanded of parties by the Tribunal is appropriate. Those two applications involved large representative bodies represented by legal counsel and concerned large sums of money. The hearings in both applications were conducted on a similar basis to Federal Court proceedings with close but not scrupulous adherence to the rules of evidence. Screenrights endorses such an approach and believes that, in order that a binding and authoritative determination can be made, a reasonable degree of formality is necessary.

- 6.3 Screenrights therefore endorses the current procedural practices of the Copyright Tribunal and does not regard them as overly legalistic. In the current environment in which Screenrights operates the issue of the intimidatory nature the Tribunal's practices and procedures is not particularly relevant. In any event, it would appear that the Tribunal currently has quite wide discretion as to how it conducts its business, as a result of the fact that it is not specifically bound by the rules of evidence.

## **7 Conclusion**

- 7.1 Thank you for the opportunity to make this submission. We would be pleased to provide any further information that you may require, or elaborate on our views and assertions.
- 7.2 Should you require any further information from Screenrights, please contact Lionel Docker, Screenrights' Legal Counsel, at the address provided.
- 7.3 We wish the Committee well in its deliberations and look forward to participating at public hearings should the Committee have any further questions.

Respectfully submitted.

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