



**screenrights**

The Audio-Visual Copyright Society

## **Senate Select Committee on the Free Trade Agreement between Australia and the United States of America**

### **SCREENRIGHTS' SUBMISSION**

#### **SCREENRIGHTS – THE AUDIO VISUAL COPYRIGHT SOCIETY**

##### **SCREENRIGHTS**

The Audio-Visual Copyright Society Ltd, trading as Screenrights, was established in 1990 and operates on a non-profit basis as a copyright collecting society for copyright holders in audio and audio-visual works including film producers, film distributors, script writers, visual artists and music publishers and composers.

Screenrights, as the declared collecting society for the purposes of section 135P of the *Copyright Act 1968* ("the Act"), administers the educational copying scheme under Part VA of the Act ("the Part VA Scheme"). The Part VA Scheme creates a statutory licence which enables educational institutions to copy radio and television broadcasts and communicate such copies for their educational purposes upon payment of equitable remuneration to Screenrights.

Screenrights has been declared the collecting society for the purposes of Division 4 of Part VC of the Act ("the Part VC Scheme"). The Part VC Scheme creates a statutory licence which enables cable operators to retransmit free-to-air broadcasts upon payment of equitable remuneration to the declared collecting society.

Screenrights is the declared collecting society under the Part VC Scheme under Section 135 ZZT of the Act for categories of copyright holders in works, sound recordings and cinematograph films included in free-to air broadcasts.

Screenrights is also the declared collecting society under Division 2 of Part VII of the Act in relation to government copies of television and sound broadcasts and works included in television and sound broadcasts.

## **BACKGROUND TO THIS SUBMISSION**

Certain evidence given before the Senate Select Committee on the Free Trade Agreement Between Australian and the United States of America ('Senate FTA Committee') has sparked Screenrights to make this submission. That evidence related to the issue of private (or 'home') copying. For example, at the request of the Committee by Dr Matthew Rimmer of the ANU offered this evidence:

I talked about time shifting before and the case of Sony against Universal Studios in which the Supreme Court of the United States held that it was a fair use to engage in time shifting. That would essentially mean that a consumer in the United States could make a copy of a show while they were out and then watch that when they came home, and they would not be breaching copyright. It seems ludicrous to me that in Australia engaging in that activity, such as copying *Queer Eye for the Straight Guy* and then coming back later in the day and watching that, would amount to copyright infringement in Australia.<sup>1</sup>

Screenrights would like to take this opportunity place the issue of private copying into some context in the Senate FTA Committee's deliberations,

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<sup>1</sup> Senate FTA Committee Hansard, Monday 17 May 2004, 13. Also the discussion transcribed at Senate FTA Committee Hansard, Tuesday 18 May 2004, 85-101.

given the recent work that has been undertaken by copyright interests in this area.

The primary submission of Screenrights is that the issue of private copying is too broad to be dealt with at this juncture. The Copyright Law Review Committee should be given the brief to conduct an inquiry into the area and to make recommendations to Government.

## **EXISTING TREATY OBLIGATIONS**

While much of the focus of recent submission-making has been centered on the terms of the FTA, it is useful to place the issue of private copying into its existing legal context.

Article 9 of the Berne Convention for the Protection of Literary and Artistic Works ("Berne Convention") provides:

- (1) Authors of literary and artistic works protected by this Convention shall have the exclusive right of authorizing the reproduction of these works, in any manner or form.
- (2) It shall be a matter for legislation in the countries of the Union to permit the reproduction of such works in certain special cases, provided that such reproduction does not conflict with a normal exploitation of the work and does not unreasonably prejudice the legitimate interests of the author.
- (3) Any sound or visual recording shall be considered as a reproduction for the purposes of this Convention.

The main committee report accompanying the final drafting of article 9 explained how the article 9(2) exception to the reproduction right should be implemented in national law:

If it is considered that reproduction conflicts with the normal exploitation of the work, reproduction is not permitted at all. If it is considered that reproduction does not conflict with the normal

exploitation of the work, the next step would be to consider whether it does not unreasonably prejudice the legitimate interests of the author. Only if such is not the case would it be possible in certain special cases to introduce a compulsory licence, or to provide for use without payment.<sup>2</sup>

This represents one of the earliest explanations of what is known today as the “three-step test” in international intellectual property law.

Since 1994 article 9 of the Berne Convention has operated as an obligation within TRIPS<sup>3</sup>, being incorporated (along with most other Berne articles) within that WTO agreement by reference.<sup>4</sup> TRIPS also provides its own overarching three-step test worded in similar terms to Berne article 9(2).<sup>5</sup>

Australian law has confined exceptions to the right of reproduction to quite specifically. In relation to the broadest exceptions of those exceptions, fair dealing, Australia has settled upon four exhaustive purposes: research and study, criticism and review, reporting the news and professional legal advice. Even within these existing provisions Professor Sam Ricketson, a leading international copyright expert, has concluded that the exception for research and study exception fails in certain respects to comply with the three-step test.<sup>6</sup>

The general equivalent to Australia’s fair dealing provision in US law is the fair use exception. Fair use in US copyright law is influenced somewhat by First Amendment Constitutional protections, and is not confined to an exhaustive list of purposes. Broadly speaking, courts in the US enter into a ‘balancing of interests’ exercise in many copyright infringement actions in which fair use is pleaded as a defense.

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<sup>2</sup> *Records of the Intellectual Property Conference of Stockholm* (1967) volume II, 1145.

<sup>3</sup> ‘TRIPS’ is well-known acronym for the Agreement on Trade-Related Aspects of Intellectual Property Rights, 15 April 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C.

<sup>4</sup> TRIPS article 9(1).

<sup>5</sup> TRIPS article 13.

<sup>6</sup> Sam Ricketson, *The three-step test, deemed quantities, libraries and closed exceptions*, chapter 4 (Centre for Copyright Studies, 2002).

There is nothing in chapters 16 or 17 of the FTA which suggests that any of the primary international copyright norms pertaining to the reproduction right are to be modified. On the contrary, those existing norms are positively affirmed.<sup>7</sup>

## **SONY V UNIVERSAL**

Dr Rimmer in his evidence referred to the 1984 US Supreme Court decision of *Sony Corp v Universal City Studios Inc* ('*Sony*')<sup>8</sup>. The action was brought by two film studios, Universal and Disney, against Sony. The claim, in essence, was that Sony's manufacture and sale of video cassette recorders constituted contributory infringement of the film studios' copyright. The opinion of the majority in *Sony* can be summarised by these three related propositions:

- 1 Recording without permission a broadcast program for the purpose of 'time-shifting' so that it is watched only once at a later time constitutes fair use;
- 2 Evidence was tendered at trial that VCRs are often used for time-shifting; and
- 3 Because Sony's VCRs were capable of this commercially significant non-infringing use, the manufacturer of those VCRs could not constitute contributory copyright infringement.<sup>9</sup>

Thus, the key aspect of the case on which all else rests was that copying broadcast audio visual works for time-shifting constituted fair use.

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<sup>7</sup> Article 17.1. The FTA relevantly extends existing international norms in relation to technological protection measures; in particular the imposition of liability for actual circumvention: article 17.4.

<sup>8</sup> 464 US 417 (1984).

<sup>9</sup> See generally William Fisher III, "Reconstructing the Fair Use Doctrine" (1988) 101 *Harvard Law Review* 1661. See also *Copyright, Designs and Patents Act* 1988 (UK), section 70. Note that section 111 of the *Copyright Act* 1968 (Cth) pertains to broadcast signal copyright only.

The expressions 'time-shifting' and 'library building' were deployed extensively in the *Sony* litigation. 'Time-shifting' was understood in the case to be where a user records a program in order to watch it at a later time, and then records over it, and thereby erases the program, after a single viewing. 'Library building' was understood to be where the user records a program in order to keep it for repeated viewing over a longer term.

In *Sony* evidence tendered was that on average Sony VCR users had between 25 to 32 blank tapes, of which 40% of users had more than ten tapes in a "library".<sup>10</sup> In 1995, Screenrights engaged the survey firm A C Nielsen to conduct a similar survey within Australia.<sup>11</sup> The A C Nielsen survey of over 2,000 households revealed that 82% of Australian households owned VCRs. Of those households, the average number of recordable tapes in a household's possession was 29, 25 of which contained television broadcast recordings. Of those 25 tapes, applying the definitions used in the *Sony* litigation, 19 would be library holdings and 6 would be as time-shift holdings.

This increased tendency to library build in Australia in 1995 compared to the data from the *Sony* litigation for the US in the early 1980s might be explained in part by enhanced copy quality afforded by advanced technology. For example, between the early 1980s and the mid 1990s, stereo hi fi was added to television broadcast signals and VCRs correspondingly evolved to copy this hi fi signal. The ability of consumers to make more perfect copies might help explain the increased desirability of library building.

As digital broadcasting becomes more popular, and digital broadcast recording devices and media become better and cheaper, with vastly increased capacity, it is possible to deduce that the tendency to 'library build' will grow. It may be noted that the trial judge in *Sony*, whose findings were ultimately upheld by the Supreme Court majority, dismissed the possibility that library building would cause undue harm to copyright owners for the reason that because a blank video tape then cost 'approximately \$20, an extensive library will be very expensive and it has not been proven that many

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<sup>10</sup> *Universal City Studios Inc v Sony Corp* 480 F. Supp. 429 (1979).

<sup>11</sup> Survey Report *Private Copying On Videotape*, 26 October 1995.

persons will library to any significant extent.<sup>12</sup> There is obvious policy danger in applying a decision so premised, in an environment where some digital recording media is approaching an almost nominal price.

## **PRIVATE COPYING LEVY SCHEMES**

At least twelve EU Member States have instituted some form of private royalty scheme or similar fiscal measure.<sup>13</sup> Notably the solutions arrived at in these countries transcend merely 'time shifting' exceptions, but provide a remunerated exception to other acts of private copying such as the recording of pre-recorded music for domestic use. The three typical features of such schemes (first enacted in Germany in 1965) are (i) a copyright exception for acts of private copying; (ii) an obligation on the manufacturers of equipment suitable for private copying to pay a levy to a copyright collecting society; (iii) distribution of those funds to copyright owners by the collecting society on the basis of sampling data.

In Belgium, for example, the private copying scheme permits reproduction of sound and audiovisual works made within the family circle and intended for that circle. A levy is applied upon mediums that may be used to reproduce sound and audiovisual works and appliances permitting such reproduction. The levy is paid by the manufacturer or importer. The actual levy comprises: 3% of selling price of appliances; 2 francs per hour for analog mediums and 5 francs per hour for digital mediums. Private copying schemes are also in place in Japan, and a Canadian scheme was introduced in 1997.

This State practice suggests the three-step test requirements set down by Article 9(2) of the Berne Convention is translating into an international norm of effective remuneration for the reproduction right in the private copying context.

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<sup>12</sup> *Universal City Studios Inc v Sony Corp* 480 F. Supp. 429 at 467 (1979).

<sup>13</sup> Austria, Belgium, Denmark, Finland, France, Germany, Greece, Italy, Netherlands, Portugal, Spain and Sweden.

## TECHNICAL MEASURES AND PRIVATE COPYING

An issue in this area has been the impact of technological protection measures used by copyright owners, or as part of technical standards.

The approach taken to private copying and digitization in the US has had a technical focus. There, the Copy Protection Technical Working Group has been in existence for several years. It is a non-government consortium comprising content providers (including the Motion Picture Association of America), consumer electronics manufacturers and representatives from the information technology industry ('MPAA/5C').<sup>14</sup>

The consortium's aim has been to develop workable standards to protect digitised audio-visual works from widespread unauthorised dissemination. It was this group which devised and continues to revise the copy protection standards for digital versatile discs ('DVDs').

A sub-group of this working group was formed to deal exclusively with digital broadcasting. This MPAA/5C proposal was adopted in the US Federal Communication Commission's *Digital Broadcast Content Protection 2003* Rulemaking which mandates this proposal, coined the 'broadcast flag' standard.<sup>15</sup> This technological standard is primarily directed to limiting the ability to communicate digitally broadcast content to the public using the digital networks, in particular the Internet. The standard does not affect the ability to make digital private copies on compliant devices.

In the EU, after a lengthy deliberative process involving the Council of the European Union, the European Parliament and the European Commission, a

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<sup>14</sup> '5C' are five companies: Hitachi Ltd., Intel Corporation, Matsushita Electric Industrial Co. Ltd., Sony Corporation, and Toshiba Corporation.

<sup>15</sup> FCC 03-273, 4 November 2003.

common position was arrived at in 2001 the European Directive harmonising 'certain aspects of copyright and related rights in the information society'.<sup>16</sup>

Article 5(2)(b) allows Member States to provide for an exception to the reproduction right 'in respect of reproductions on any medium made by a natural person for private use and for ends that are neither directly nor indirectly commercial, *on condition that the rightholders receive fair compensation*'.<sup>17</sup> A recital to the Directive indicates that as digital copying is likely to be more widespread and have greater economic effect upon copyright owners, remuneration schemes that provide fair compensation should take "due account of the differences between digital and analogue private copying".<sup>18</sup> Further, any exception under the Directive must comply with the three-step test.<sup>19</sup>

Under the Directive, fair compensation for private copying should take account of "the application or non-application of technological measures".<sup>20</sup> A recital to the proposed Directive provides that:

When applying the exception or limitation on private copying, Member States should take due account of technological and economic developments, in particular with respect to digital private copying and remuneration schemes, when effective technological protection measures are available. Such exceptions or limitations should not inhibit the use of technological measures or their enforcement against circumvention.<sup>21</sup>

This is reflected in article 6(4). That article provides that:

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<sup>16</sup> Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society.

<sup>17</sup> Emphasis added.

<sup>18</sup> Recital 38.

<sup>19</sup> Article 5(5).

<sup>20</sup> Article 5(2)(b).

<sup>21</sup> Recital 39.

A Member State may also take such measures in respect of a beneficiary of [the private copying exception], unless reproduction for private use has already been made possible by rightholders to the extent necessary to benefit from the exception or limitation concerned and in accordance with the provisions [the private copying exception], without preventing rightholders from adopting adequate measures regarding the number of reproductions in accordance with these provisions.

The effect of this is to permit the joint existence in national law of laws protecting technological measures and a home copying statutory licence. When enacting laws that protect technological measures, a national legislature may ensure that private copying can occur on the payment of fair compensation. Such a private copying exception should not, however, inhibit the law's general protection of technological measures.

Significantly, in all cases of private copying, the Directive provides as a minimum for the possibility of copyright owners receiving fair compensation for the use.

## **AUSTRALIAN LAW REFORM**

Australia once attempted to introduce a private copying scheme into Australian law in the context of home audio copying. This came out of a recommendation from a 1986 Commonwealth inquiry into the Arts.<sup>22</sup> The levy was to apply to audio tapes with playing times in excess of 30 minutes and was calculated by reference to the length of the playing tape. Consumers were to be able to home-tape either directly from pre-recorded media or from broadcasts so long as the copy was for their private and domestic use without infringing copyright.

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<sup>22</sup> *Patronage, Power and the Muse: Inquiry into Commonwealth Assistance to the Arts*, House of Representatives Standing Committee on Expenditure, September 1986 (Recommendation 24).

The blank tape levy was characterised by the High Court as a tax and ruled unconstitutional.<sup>23</sup> Alternatively, if not a tax the High Court would have found the levy to be an acquisition of property not on just terms and therefore unconstitutional on that basis. In both respects this was because the drafting of the scheme failed to link the levy as a payment for the statutory licence to make private copies. This was a mere drafting flaw; a statutory copyright licence could be drafted in Australia without any likelihood of characterisation as a tax.

In 2002 to argue the case for further public debate on the issue of private copying, the Australian Performing Right Association, the Australasian Music Publishers Association, Screenrights, the Screen Producers Association of Australia, the Australian Screen Directors Association and the Australian Writers Guild made to the Attorney-General and the Minister for Communications, Information Technology and the Arts an extensive written submission dedicated exclusively to the issue of private copying. That submission is here annexed.

An aspect of that submission was a proposed private copying scheme jointly drafted (in legislative form) by Mr Denis Rose QC (Special Counsel, Blake Dawson Waldron) and Dr David Brennan (Faculty of Law, University of Melbourne). Key features of the proposed scheme are:

- A licence to purchasers (that is, consumers) of levied recordable media to reproduce works on that media for private use without infringing copyright.
- Private use is defined as reproduction or copying by a person for that person's own private and non-commercial use, or such use within that person's domestic circle. Accordingly, the exception to infringement of copyright does not apply where the reproduction or copy is: (a) sold or

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<sup>23</sup> *Australian Tape Manufacturers Association Ltd v Commonwealth of Australia* (1993) 176 CLR 480 which declared Part VC invalid by reason of non-compliance with section 55 of the Constitution. See Johnston, 'Taxing Time: The High Court & the Tax Provisions of the Constitution' (1993) 23 *University of Western Australia Law Review* 362. Part VC was formally repealed by Act 107 of 1993, section 13.

let for hire; (b) used so as to cause a work to be performed, seen or heard in public (whichever is applicable); (c) used so as to communicate to the public the work; or (d) used otherwise than for a private use.

- The royalty is imposed on recordable media, a term defined to mean 'any removable and portable item of electronic storage (such as a blank audio or video cassette containing magnetic tape, recordable compact disc or recordable DVD) of a kind ordinarily supplied for private use or uses that include private use'.
- The licence allows for both on-line and off-line copying. However, the exception to copyright infringement will not apply where the reproduction or copying is made using a circumvention device or service.
- It is possible for a purchaser of recordable media to 'opt-out' from the payment of the royalty by providing a declaration to the Collecting Society that the item will not be used to infringe copyright.
- The purpose of the royalty is to provide equitable remuneration to copyright owners for the reproduction and/or copying of their works by consumers for private use. The Copyright Tribunal determines the appropriate amount of equitable remuneration for private copying.

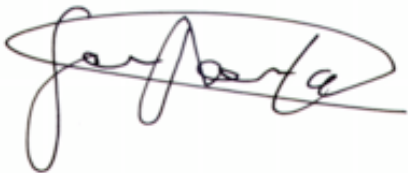
Mr Dennis Rose QC provided an opinion (which formed part of the submission) that an enactment in accordance with the proposal would comprise a valid exercise of Commonwealth powers.

The essential request to Government in the submission was for a public inquiry (such as one conducted by the Copyright Law Review Committee) into the issue of private copying. No response to the submission was made by either Department.

## CONCLUSION

By this submission it is hoped that Screenrights has been able to put into better context the issue of private copying. In particular, it is hoped that this Senate FTA Committee is persuaded that:

- (a) The issue is too broad to properly fall within the scope of FTA considerations, given that agreement barely affects the *status quo* in any relevant respect;
- (b) The issue of remuneration for private copying is an important one to Australia's cultural industries;
- (c) The existing law is brought into disrepute by the millions of breaches of copyright law committed in Australia every year through private copying;
- (d) The treatment of private copying in the law, and in particular the role of technology protection measures and the role of a private copying levy scheme, should be referred to the specialist advisory body, the Copyright Law Review Committee.

A handwritten signature in black ink, appearing to read 'Simon Lake', enclosed within a thin, hand-drawn oval border.

Simon Lake  
Chief Executive

22 June 2004