

## COPYRIGHT AND CONTRACT

### SUBMISSION TO THE COPYRIGHT LAW REVIEW COMMITTEE ("the Committee")

Screenrights is pleased to respond to the Committee's Issues Paper (June 2001) concerning its reference on "Copyright and Contract".

#### 1 SCREENRIGHTS

- 1.1 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.
- 1.2 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.
- 1.3 Screenrights has been appointed the interim notice holder 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.
- 1.4 Screenrights has applied to be the declared collecting society under the Part VC Scheme. Screenrights anticipates that a declaration will be made shortly by the Attorney-General under Section 135 ZZT of the Act for some or all categories of copyright holders in works, sound recordings and cinematograph films included in free-to air broadcasts.
- 1.5 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.

## 2 THE TERMS OF REFERENCE

- 2.1 Screenrights endorses the Government's decision to commence this enquiry into copyright and contract and the terms of reference set out in the Issues Paper.
- 2.2 Screenrights regards the increased use of electronic commerce as an important factor in facilitating and enhancing trade in copyright material.
- 2.3 In particular, electronic commerce promotes efficiencies and extends existing markets and opens up new markets for copyright holders.
- 2.4 Electronic commerce is contractual in nature. As such, Screenrights submits that the general rules regarding contract construction are equally applicable in the on-line, as well as off-line, environment.
- 2.5 As the licensing of copyright material is, fundamentally, a matter of contract between copyright holder, on the one hand, and copyright user, on the other, Screenrights further submits that insofar as those contracts (whether made on-line or off-line) purport by their terms to exclude or modify a statutory exception for acts which would otherwise constitute copyright infringement the preferable approach is to treat those exclusion clauses in the same way as other types of contractual provision. This is because, ultimately, the application of exclusion clauses, as with all contractual clauses, depends on the intention of the parties as expressed in the contract.
- 2.6 Furthermore, general contract law, the law of equity and consumer protection law (whether aimed directly at exclusion clauses or 'unjust', 'unconscionable' or 'unfair' contractual terms) are available to protect contracting parties in weak bargaining positions. Accordingly, it was against this legal background, that the High Court said in *Darlington Futures Ltd v Delco Australia Pty Ltd*:
- ... the interpretation of an exclusion clause is to be determined by construing the clause according to its natural and ordinary meaning, read in the light of the contract as a whole, thereby giving due weight to the context in which the clause appears including the nature and object of the contract, and, where appropriate, construing the clause *contra proferentem* in case of ambiguity.<sup>1</sup>
- 2.7 Of course, a notable feature of contract law in recent years has been legislative intervention aimed at limiting or prohibiting certain exclusionary clauses. For example, section 68 of the *Trade Practices Act 1974* (Cth) prohibits the use of clauses which exclude, restrict or modify, among other things, the application of any of the provisions of Division 2 of Part V of the *Trade Practices Act*.

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<sup>1</sup> (1986) 161 CLR 500 at 510

- 2.8 It is arguable that this legislative intervention is aimed at protecting consumers in circumstances where public policy demands an outright prohibition against a corporation's use of exclusion clauses to limit or exclude liability. The demand arises because unless and until the consumer enters into the contract, the consumer will not have access to the corporation's goods or services.
- 2.9 This can be contrasted with the situation in which a copyright holder wishes to exclude or restrict, by contract, the application of an exception for copyright infringement of his/her work.
- 2.10 First, if the exception to copyright infringement is available to the copyright user as of right the copyright user is not required to enter into the contract in order to use or access the copyright material. Secondly, the defence to or exception for copyright infringement will always exist. In other words, where a contractual term prohibits an act which is otherwise permitted under the *Copyright Act*, the doing of that act may breach the contract but will not otherwise infringe copyright.

### **3 STATUTORY LICENCES**

- 3.1 Screenrights notes that the Issues Paper makes specific reference to statutory licences. Statutory licences, such as those under Parts VA, VB and VC of the Act, have been created to address certain market failures, notably, the inability of copyright holders and copyright users to enter into licence agreements for the use of copyright material and the inability of copyright holders to prevent unauthorised use of their copyright material.
- 3.2 On the one hand, statutory licences create a mechanism which permit the use of copyright material in otherwise prohibited circumstances. On the other hand, statutory licences ensure that copyright holders are equitably remunerated for the use of their copyright material.
- 3.3 In this regard, Screenrights submits that statutory licences are a cost effective, convenient and equitable mechanism which operate to further the cause of striking an appropriate balance between the use of copyright material and the incentive to create copyright material.
- 3.4 Screenrights notes that the current statutory licences contained in Parts VA, VB and VC of the Act do not prohibit copyright holders and copyright users from otherwise entering into individual licensing arrangements. Screenrights refers, in particular, to sections 135Z, 135ZZF and 135ZZZC of the Act.
- 3.5 Screenrights submits that further legislative intervention may be warranted in the context of private/domestic copying of audio and audio-visual copyright material owing to a market failure with regard to the use by private and domestic copyright users of copyright material.

- 3.6 Such legislative intervention may take the form of a new statutory copying scheme which provides a further exception to copyright infringement for the private/domestic copying of audio and audio-visual copyright material where payment of equitable remuneration is made.
- 3.7 However, even in this context and notwithstanding any legislative exception to copyright infringement, Screenrights submits that the relevant copyright holders and copyright users should be entitled, if they choose, to enter into individual licensing arrangements which operate to exclude or modify, on a contractual basis, the operation of the exception under the relevant copying scheme.

#### **4. ISSUES RAISED IN THE REPORT**

Screenrights makes the following comments in response to the specific issues raised in the Committee's Issues Paper.

##### *4.1 Issue 1*

*To what extent is electronic trade in copyright material subject to agreements that try to exclude or modify limitations to the exclusive rights of copyright owners provided in the Act*

Screenrights submits that, as with off-line transactions, the electronic trade in copyright material would be subject to agreements that try, on a contractual basis, to exclude or modify limitations to the exclusive rights of copyright owners provided in the Act.

##### *4.2 Issue 2 –*

*To what extent is the situation different in relation to offline transactions involving trade in copyright material?*

Screenrights submits that in both the on-line and off-line environment any contractual term which operates as an exclusionary term should be construed in accordance with general legal principles and the rules relating to contract construction.

Contract provides a level of certainty to copyright holders and copyright users. A differentiation in the application of rules of contract construction in the on-line and off-line environment may operate to undermine this level of certainty. As well, legislative intervention which reduces the benefits of electronic trade in copyright material may unduly restrict access to copyright material, to the detriment of copyright holders and copyright users alike.

4.3 *Issue 3 –*

*What is the nature of any such difference?*

Screenrights submits that general differences may exist between the on-line and off-line trade of copyright material.

Notably, the on-line trade of copyright material may transcend jurisdictional boundaries. Moreover, copyright material which is delivered on-line may be encrypted or subject to certain security devices which operate to prevent or restrict the use of that copyright material in a manner which is inconsistent with the terms of the contract.

4.4 *Issue 4 –*

*Does the express prohibition on contracting out in section 47H of the Act suggest that provisions elsewhere in the Act can be overridden by contract?*

Screenrights submits that contracting parties should continue to have the freedom to agree upon terms and enter into contracts, subject to the general rules of contract construction and the laws relating to consumer protection.

4.5 *Issue 5 –*

*(a) Are there available legal remedies to protect against the use of agreements to override copyright exceptions granted under the Act?*

The application of exclusion clauses at common law depends upon the intention of the parties, as expressed in the contract. The issue is therefore one of contract construction to which the usual rules of contract law apply. In this regard, the contract is viewed as a whole and a consideration of consumer protection laws and the general law relating to unfair contracts and unconscionability may be required.

*(b) Do the existing legal remedies provide adequate protection against the use of agreements to override copyright exceptions granted under the Act?*

The use of exclusionary contractual terms will not override the copyright exceptions granted under the Act. Whilst a contractual term may operate to prohibit an act which is otherwise permitted under the Act, the doing of that act will constitute a breach of contract but will not otherwise infringe copyright in the copyright material.

4.6 *Issue 6 –*

*Should there be any limitations to the enforceability of mass-market agreements?*

Screenrights submits that mass-market agreements provide a number of benefits to copyright holders and copyright users by promoting, among other things, greater market efficiency and equity in the trade of copyright material. Screenrights submits that the question of whether and to what extent the enforceability of mass-market agreements should be limited should be addressed by application of the usual rules of contract construction.

4.7 *Issue 7 –*

*Will jurisdictional issues result in copyright exceptions being overridden?*

Screenrights submits that the copyright exceptions will not be overridden by contract. The exceptions to copyright infringement will always exist, notwithstanding the existence of any exclusionary contractual term. This will be the position in both the on-line and off-line trade of copyright material.

4.8 *Issue 8 –*

*Our views on the lessons, if any, that can be learned from the overseas experiences*

Screenrights notes that the EU Copyright Harmonisation Directive is without prejudice to, among others, the law of contract.

Moreover, pursuant to the EC Directive on Copyright and Related Rights in the Information Society, member states can elect to apply a number of optional exceptions to copyright infringement including, by way of example, an exception for copying for private use (Article 5.2(b)). However, any such exception is conditional upon the copyright holder receiving "fair compensation".

4.9 *Issue 9 –*

*Our recommendations as to any specific action, legislative or otherwise, in relation to issues raised in this submission*

Screenrights submits that copyright holders and copyright users should be free to contract for the use of copyright material, subject to the usual rules of contract construction and, notably, subject to instances of apparent market failure.

Screenrights submits that in the context of private/domestic copying of audio and audio-visual copyright material such market failure does exist and, to this end, legislative intervention may be warranted.

Such legislative intervention may take the form of a new statutory copying scheme which permits the private/domestic copying of audio and audio-visual copyright material in return for the payment of equitable remuneration.

## 5. CONCLUSION

5.1 Thank you for the opportunity to make this submission.

5.2 Should you require any further information, please contact

Simon Lake  
Chief Executive Officer  
Screenrights  
Level 3  
156 Military Road  
Neutral Bay NSW 2089

Tel: 02 9904 0133  
Fax: 02 9904 0498

Email: [simon.lake@screen.org](mailto:simon.lake@screen.org)

Screenrights

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