

**SUBMISSION TO THE COPYRIGHT
LAW REVIEW COMMITTEE**

In response to the Draft Report on Jurisdiction
and Procedure of the Copyright Tribunal ("the Report")

Dated 20 March 2000

1 INTRODUCTION

- 1.1 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.
- 1.2 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 radio and television transmissions by educational institutions.
- 1.3 The Committee is referred to the submissions made by Screenrights in July 1999 ("the July Submission") and March 2000 ("the March submission").
- 1.4 This further submission has been prepared in response to a request at paragraph 12.20 of the CLRC's Draft of February 2000 on the issue of the jurisdiction of the Copyright Tribunal over input arrangements in respect of a class of copyright owners.

2 INPUT ARRANGEMENTS

- 2.1 With regards to input arrangements, Screenrights commented in the July submission that:

"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."

(Paragraph 4.1)

"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."
(Paragraph 4.2)

2.2 In paragraph 12.14 of the March Submission Screenrights submitted that:

"Screenrights approves of the recommendation that "the jurisdiction of the Copyright Tribunal not be amended to include a power to review input arrangements generally".

3. FURTHER SUBMISSIONS

3.1 Screenrights has been asked to respond to the proposition that the decision of the Screenrights Board with regards to an allocation to a class of copyright owner should be reviewable by the Copyright Tribunal. We believe that it would be inappropriate for an administrative decision of the Screenrights Board to be reviewed by the Copyright Tribunal. Screenrights response to this is four fold and consequently we submit that:

- Input arrangements are properly decided by the Board of Directors and this is one of the functions the Board duly elected to perform;
- Decisions of the Board of Directors are administrative decisions and are reviewable under the *Administrative Decisions (Judicial Review) Act 1977 (Cth)* ("the ADJR Act");
- Screenrights has a transparent process when making administrative decisions which actively seeks the involvement of all rightsholders; and
- Delays in making payments while awaiting the outcome of court proceedings severely effect the flow of royalties to all rightsholders.

4. THE SCHEME OF ALLOCATION SHOULD BE A DECISION MADE BY THE BOARD OF DIRECTORS

4.1 We submit that the power to make a decision about the appropriate allocation between rightsholders is one of the most important functions of the Board of a collecting society. We submit that the Screenrights Board is duly appointed by its members as per the articles of the company. Members 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. A copy of Screenrights' current Distribution Policy is attached to this submission as Appendix 1.

5 ADMINISTRATIVE DECISIONS OF THE SCREENRIGHTS BOARD ARE SUBJECT TO REVIEW UNDER THE ADJR ACT

5.1 It is not the case that the decisions of the Screenrights' Board in regards input arrangements are not subject to outside review. It is our belief, communicated to all parties at all times including Vi\$copy and the Phonographic Performance Company of Australia ("PPCA") that when making decisions with regards to the distribution policy, the Screenrights Board is making an administrative decision and must conform with the principles of the ADJR Act.

5.2 It may assist the committee for Screenrights to elaborate on our understanding of why a decision about the scheme of allocation is to be characterised as an administrative decision.

5.3 Screenrights is advised that a decision to establish or change the scheme of allocation is a decision of an administrative character made under an enactment and therefore a relevant copyright owner would be entitled to have the legality of the decision administratively reviewed.

5.4 To succeed in making an application for judicial review, a relevant copyright owner would need to establish that Screenrights had failed to take a relevant consideration into account.

5.5 The threshold questions of whether a relevant copyright owner can make an application for judicial

review are, has the decision maker (a) made a decision; (b) which is of an administrative character and (c) under an enactment.

5.6 "Administrative Character"

It is our advice that a decision by Screenrights to determine a scheme of allocation would be a decision of an administrative character as it is a decision made by Screenrights in its capacity as a body declared under a statute (and the decision is not judicial or legislative). *Evans v Frieman* (1981) 35 ALR 428 at 434.

5.7 "Under an enactment"

The definition of an enactment in the ADJR Act includes rules, regulations or by laws made under an Act or an Ordinance.

5.8 Screenrights articles could fall within the definition of an enactment as the articles were made in pursuance of or under the authority of the Copyright Act: per *Blurton v Minister for Aboriginal Affairs* (1991) 29 FCR 442.

6 SCREENRIGHTS HAS A TRANSPARENT ADMINISTRATIVE DECISION MAKING PROCESS INVOLVING ALL STAKEHOLDERS TO REVIEW ITS SCHEME OF ALLOCATION

6.1 Screenrights takes its duties as an administrative decision maker seriously. We have an extensive and completely transparent approach to reviewing our scheme of allocation as can be demonstrated with the valuation and distribution mechanism for artistic works and sound recordings. The approach of the Screenrights Board is to take all relevant considerations into account and to disregard irrelevant considerations. This is based on our understanding that the Screenrights Board is making an administrative decision.

6.2 Example 1- Valuation of Sound Recordings- an extensive consultation process was carried out and the decision was changed when new information was obtained.

Following the decision in May 1998 of the High Court in the case *PPCA v FACTS*, the Australian Record Industry Association (ARIA) wrote to Screenrights Board on 26 June 1998 claiming a proportionate share of the Part VA Distributable Amount attributable to the reproduction of sound recordings.

6.3 One month later, on 29 July the Board appointed a committee of three directors to make recommendations to the Board on this issue. The directors chosen were:

- Nick Collis George;
- Jock Given; and
- Allison Rowe.

6.4 These directors were selected because they had no material interest in the outcome of the recommendations. Subsequent to this meeting, Nick Collis George stood down because of his business interests.

6.5 This committee prepared a discussion paper and undertook the following steps:

- consulted with affected parties to obtain information from all sectors of the industry;
- utilised the experience and knowledge of the Screenrights' Board members
- appointed an independent music consultant to assist them with the identification of the rights owners of sound recordings and the valuation of sound recordings;
- conducted an extensive survey of the use of sound recordings in a representative sample of programs copied under the Screenrights licence;
- conducted an extensive budgetary analysis of the use of sound recordings; and
- conducted an extensive comparison of the valuation in overseas precedents of the value of the sound recording right.

6.6 Following the decision of the Board on 25 November 1998 further comment was sought by rightsholders. A copy of a letter sent to rightsholders inviting their comments is attached to this submission as Appendix 2.

6.7 Following this request, additional new information was obtained with regards to:

- additional information on overseas precedents;
- program production budgets;
- the nature of the decision made Screenrights Board in 1990 in dealing with the initial

scheme of allocation, particularly the nature of the original decision to musical works.

- 6.8 On 3 May 1999 the Screenrights Board considered this information afresh and in light of the new information it changed its original decision of 25 November 1998. The Board subsequently published its reasons. A copy of a letter sent to ARIA setting out the rationale for the decision is attached to this submission as Appendix 3.
- 6.9 It should be noted that the parties bore no cost in contributing to Screenrights' decision using this process. They did not have to be parties in any legal proceedings. They received full information at all times. The original paper was prepared by a committee of the Board who had no financial stake in the outcome. Rightsholders also had the opportunity to put additional information before the Board. In a relatively short time, all the information that was relevant to the decision was put before the Board.
- 6.10 We believe that this process should serve as a template for any future disputes that may arise in regards the allocation of funds between rightsholders.

6.11 Example 2 - Artistic Works

Similarly when the Screenrights Board considered its policy with regards to distribution to Artistic works we conducted an open process involving all stakeholders, and using the same principles of investigating the claim and taking into account all relevant information.

- 6.12 On 17 November 1998 Vi\$copy wrote to the Screenrights Board requesting the Board amend its Scheme of Allocation. On 25 November 1998 the Screenrights Board requested management to investigate and research the claims made by Vi\$copy.
- 6.13 A comprehensive process of analysis was then undertaken and the Board formed a preliminary view in April 1999 which it made available to all rightsholders.
- 6.14 In formulating its preliminary view the Board took the following factors into account:

- Additional information supplied by Vi\$copy;
- Screenrights canvassed the views of 49 separate organisations representing the views of various rightsholders;
- Screenrights met with 30 separate bodies;
- Screenrights engaged Michael Frankel and Co to provide legal opinions in relation to a number of specific legal points as they apply to certain assertions and to review the paper in its capacity as an independent industry expert in the licensing and use of visual arts in audio visual product; and
- Screenrights conducted an extensive survey of overseas precedents.

6.15 The Board's preliminary view which was published made a number of improvements to the qualifying program test and also put in place a clear procedure for rightsholders who could prove their works were used in a program copied under Part VA of the Act.

6.16 This preliminary view was published on 28 July 1999 for the purpose of receiving further comment.

6.17 In August 1999 members of the Board of Screenrights met with Vi\$copy's Chair, Executive Director and Legal Representatives to discuss the Board's preliminary view.

6.18 On 15 September 1999 the Screenrights Board met to discuss the Screenrights Board's preliminary view in the light of additional comments received since July. A copy of the briefing paper prepared for that meeting including a resolution that now forms part of Screenrights' Distribution Policy is attached to this submission as Appendix 4.

6.19 The Screenrights' Board arrived at the view that there was insufficient information available about the use of artistic works in audio visual material with which to alter their preliminary view. In order to remedy this the Screenrights Board established a visual artist working party to report to it by September of this year.

6.20 This working party is comprised of Michael Frankel (chair) independent solicitor, Anna Ward Vi\$copy chief executive, Mark Fitzgerald, Chair Australian Institute of Photography, Ali Edwards, Senior Copyright Officer Australian Broadcasting

Corporation, Suzanne Larson Policy Officer Screen Producers Association of Australia, Simon Lake Chief Executive of Screenrights. The committee's terms of reference are set out in Appendix 5 to this submission.

6.21 We submit that these two examples highlight the open and transparent nature of the decision making process. In the case of visual artistic works it also highlights an example where a more flexible approach enables the Board to be presented with relevant information from a number of sources upon which to make a decision. It also provides rightsholders with an opportunity to comment on that information. In the next section we will highlight the reality of the disruption of the flow of royalties to rightsholders which have resulted from court or Copyright Tribunal procedures.

7 Delays in legal proceedings could result in delaying royalty payments to rightsholders

7.1 It is our strong belief that getting a Court or the Copyright Tribunal involved in disputes over input arrangements will cause severe delay and disruption to the payment of rightsholders.

7.2 Screenrights is uniquely qualified to address this point. Although this is no criticism of the courts or the Copyright Tribunal it is a fact that any legal procedure takes considerable resources from an organisation and takes a considerable amount of time.

7.3 We will illustrate our point by way of two examples. In December 1998 following the decision of the High Court in *PPCA v FACTS*, Screenrights joined five other parties in an application before the Supreme Court's Equity Division. A copy of the judgement of Simos J in *The Audio Visual Copyright Society v Australian Record Industry Association Ltd & Ors* [1999] NSWSC 947 is attached as Appendix 6 to this submission. The other parties to the application were ARIA, AWG, SPAA, Vi\$copy, APRA and AMCOS. In order to hasten the procedures Screenrights agreed to pay party-party costs for all those that were joined to the action. The costs incurred in this matter were substantial.

7.4 All of the parties in this application agreed to the proposals put to the court that Screenrights

directors be absolved of liability as a result of their mistake in law with regards to not including sound recordings in the Screenrights distribution policy. All parties also agreed that artistic works could be paid out of a contingency fund. Finally all parties agreed that Screenrights should make retrospective payments to rightsholders in sound recordings of musical works from future allocations for the years 1998, 1999 and 2000. In short it was a case with no dispute between the parties.

7.5 Whilst the Supreme Court made orders absolving Screenrights directors of any liability and agreed that payments to artistic works could be made from the contingency fund, there has not been a decision with regards to the retrospective payments to owners of sound recordings. In March 2000 some 14 months after the expedited hearing was started, no decision has been made.

7.6 In anticipation of the court making a decision granting Screenrights the ability to make retrospective payments from future allocations Screenrights has withheld over \$1, 646, 953 in trust from the 1998 and 1999 distribution periods. We have had to hold back an amount equivalent to the full retrospective payment in the event that the court rules that retrospective payments must be made from one year and not from three years as proposed by the parties. If the court grants Screenrights the power to make the retrospective payments these royalties will go in part to the sound recording rightsholders otherwise they will go to the owners of the copyright in the cinematograph film, the literary and dramatic work and musical works. Unfortunately no rightsholder is being paid these royalties as a result of the delays in the court reaching its final decision.

7.7 There are two key points which arise from this experience. First, if there were constant applications in the Tribunal about altering the scheme of allocation, money would have to be held in trust pending the outcome of the application. Moreover the creation of this additional jurisdiction could also lead to the threat of litigation being used as a leverage against other rightsholders. Secondly, as raising these matters in an adversarial manner involves a high level of costs to the parties. It is also very expensive to be represented in proceedings before a court or for

that matter the Copyright Tribunal. In the open processes which Screenrights has used in making a decision with regards to sound recordings and artistic works, parties were able to put submissions to the Screenrights' Board without becoming parties to any legal proceedings. If organisations had to become parties to legal proceedings it would be unlikely that the breadth of views and interested parties would contribute to the decision making process.

- 7.8 Another example of the potential for delay of payments to rightsholders is the application by Screenrights under section 153F of the Act in regards off-air copying of transmissions by Government departments. The parliament passed legislation in July 1998 which gave the Tribunal the power to declare a collecting society to administer this scheme. Screenrights first submitted its application in December 1998. Subsequent to this ARIA and Screenrights jointly referred a legal point over whether multiple societies could be declared for the class of off air copying of broadcasts was heard by the Federal Court. The Federal Court decided in Screenrights favour that only one society could be declared for a class of copying.
- 7.9 The upshot is that nearly two years after the passing of the legislation and some 16 months after the first application for a hearing before the Copyright Tribunal, we have not been able to put our case forward as to why we should be the declared society. We submit that this timeframe is indicative of what could be expected if the Copyright Tribunal were to have jurisdiction over input arrangements in respect of a class of copyright owners.

8 CONCLUSION

- 8.1 It is our strong belief that the administrative decision making process such as that undertaken by the Screenrights Board which is open, transparent and cheap for parties to access, is preferable to the relatively expensive procedures of the Tribunal. Moreover the delays in the Tribunal process could lead to substantial amount of royalties having to be withheld from distribution while these issues are decided.

8.2 Thank you for the opportunity to make this submission. Screenrights would be pleased to provide any further information that you may require, or elaborate on any points raised in the submission.

8.3 Should you require any further information from Screenrights, please contact Simon Lake, Screenrights' Chief Executive, at the address provided.

Respectfully submitted.

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