

screenrights

**Submission in response to:
Remaking the Broadcasting Service Exclusion
Determination**

Submission by Screenrights

7 September 2022

Screenrights is the trading name of Audio-Visual Copyright Society Limited ACN 003 912 310
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About Us

1. Screenrights is a non-profit copyright management organisation representing the screen production sector. We have 4,925 members in 69 countries worldwide. Our members are writers, visual artists, producers, directors, sales agents, broadcasters and distributors.
2. Screenrights is appointed by the Commonwealth and the Copyright Tribunal to administer several statutory licensing schemes on behalf of content creators. We collect fees for the use of screen content and distribute royalty payments to the copyright owners of the programs used.
3. The definition of '*broadcasting service*' is critical to Screenrights' core business – that is, the administration of Screenrights' statutory licence schemes. The statutory licences we administer cover the educational use of broadcasts, retransmission of free-to-air broadcasts and government use of audiovisual material including broadcasts.

Introduction

4. Screenrights welcomes the opportunity to comment on the proposal to remake the *Broadcasting Services (Broadcasting Service Definition – Exclusion) Determination 2019 (the Determination)*.
5. We endorse the Government's proposal to remake the instrument for a time-limited period, in order to provide certainty and stability to the media industry against the backdrop of broader media regulation reform.
6. Screenrights supports remaking the instrument in its current form for a period of three years.
7. We believe three years is an appropriate timeframe within which to conduct close consultation with industry stakeholders on any new definition of 'broadcasting service' in the *Broadcasting Services Act 1992 (the BSA)*, in particular the potential inclusion of live-streamed and on-demand content.
8. Remaking the current Determination for 3 – 5 years would allow Government to develop a considered regulatory response to rapid technological change and new ways of consuming media content, which we expect to see continue over the next decade and beyond, in Australia and globally.

How the Screenrights' statutory licence operates

9. Screenrights is a 'declared collecting society' under the *Copyright Act 1968 (Cth) (the Copyright Act)*.
10. The Screenrights' educational licence for 'copying and communication' of free-to-air and subscription (pay TV) broadcast content is provided for under Part IVA Division 4 of the Copyright Act. We enable retransmission of free-to-air television broadcasts on pay TV channels and other services, under the

exceptions to copyright infringement set out in Part VC of the Copyright Act. We also license governments to make copies of television and radio broadcasts and internet content under s183 of the Copyright Act.

11. A key aspect of our work is administering the Screenrights' educational licence. This licence provides educational institutions – including schools and universities – with copyright clearance to provide students with access to films, documentaries, news and current affairs and drama series.
12. The Screenrights' educational licence operates in around 97 percent of Australian schools, all 39 Australian universities and a number of TAFEs and other tertiary institutions.
13. All content accessed under the Screenrights' educational licence must first be broadcast on free-to-air or pay TV. The licence also covers broadcast programs simulcast over the internet, and broadcast programs subsequently made available on catch-up TV platforms such as iView, SBS On Demand and Ten Play.
14. In 2020-21, we made available a record \$47.6 million in royalties, payable to our members under all our statutory licences. We successfully distributed a total of \$45.3 million to 1,437 members.

Impact of the Determination on Screenrights

15. The term 'broadcast' is defined in the Copyright Act to mean 'a communication to the public delivered by a broadcasting service within the meaning of the Broadcasting Services Act 1992'.
16. Accordingly, any change in the scope of the definition of 'broadcasting service' under the BSA may impact the scope of the statutory licences administered by Screenrights. This is acknowledged in the Discussion Paper at page 12.
17. Specifically, this impact relates to s113P of the Copyright Act. The section allows educators to 'copy and communicate' television and radio broadcasts for educational purposes, provided a remuneration notice is in place. This is a remunerated exception to the infringement of copyright in broadcasts that allows educators to download, save, store and share content with students.
18. Uniquely, ss113P(6) operates to extend the application of the educational statutory licence to programs which are transmitted or made available over the internet at the same time, or at substantially the same time, as the broadcast, or (in the case of free-to-air broadcasts) made available online by the broadcaster at the same time as, or after the broadcast.

The relevant section is set out below:

s113P Copying and communicating works and broadcasts

Content of certain broadcasts

(6) This section applies to the content of a broadcast in the same way as this section applies to a broadcast if the content of the broadcast 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.

19. Screenrights anticipates that if the Determination was to expire without being remade, the scope of s113P would expand slightly. It would then include copying of live streams on the internet, for example live streams on platforms such as YouTube and Facebook. It would not automatically include subscription video on demand (SVOD) services such as Netflix, Disney+ and Amazon Prime (which would require a direct licence), nor would it include the on-demand video of YouTube (as opposed to live-streamed YouTube content) which is the predominant content on that platform.

No additional cost to schools and universities

20. Against that background, Screenrights would like to clarify a matter raised in the 2019 ‘Alston Determination’ Consultation Paper. That Consultation Paper considered that allowing the Determination to expire at that time could result in “significant impost on universities and schools with costs imposed for persons who copy or distribute online broadcasts...”
21. It is Screenrights’ position that in the event that the Determination expired and media services delivered over the internet were (as a consequence) included in the definition of ‘broadcasting service’, there would in fact be no additional cost implications to the education sector.
22. Screenrights considers there may be some misunderstanding about how the Screenrights educational licence operates. As we have pointed out above, educators can already copy and communicate online broadcasts – that is, simulcast and catch-up TV services – under the statutory licence. Additional usage does not incur an additional charge to schools, because the statutory licence is negotiated on a cost per head basis. On this basis, and with respect, we do not agree with the contention that the inclusion of live streams under the statutory licence would result in any additional costs to the education sector.
23. The Screenrights educational licence – along with the relevant provisions in the Copyright Act – remain flexible, adaptable and fit-for-purpose. As such, we support the proposal to remake the Determination in its current form for another three years.

Growth in demand for broadcast content in the education sector

24. The current Consultation Paper notes the dramatic change in media consumption patterns over the past five years – from traditional broadcast television and radio services to streamed and on-demand media content delivered over the internet. Screenrights is also watching these trends closely.
25. However, we wish to draw attention to the fact that, alongside these trends, there has been huge growth in demand for broadcast television content across the education sector. Put simply, this means the amount of broadcast television content viewed in classrooms has increased massively over the past five years. This trend has occurred both concurrently and conversely to other market trends in media distribution and consumption, and notably accelerated during the COVID-19 pandemic.
26. Most significantly, in 2019-20, screen content usage in schools and universities jumped 143 percent, as teachers set up remote learning modules in response to the pandemic lockdowns. In 2020-21, that usage was up a further 48 per cent. It continues to grow strongly, with another increase in 2021-22, despite the return to face-to-face teaching. Since 2019, there has been an estimated total increase of 277 per cent in the use of screen content in the education sector. We believe that the pandemic accelerated a trend that was already underway, namely a move towards using video content as an essential teaching resource in classrooms and in online learning.
27. We note again that the increased usage in classrooms has not led to any additional charge to schools, because there is no limit on the volume of use under the licence. Universities have a different fee structure which factors in usage but is capped, and therefore largely limits increased usage costs while ensuring a fair fee for creators.
28. Our reporting shows that the free-to-air broadcasters and their digital catch-up platforms are a rich source of trusted educational content for students and educators.
29. Over the last three years, the most popular Australian programs shown in schools included ABCTV's *Australian Story* (1995 –), *War on Waste* (2017 – 2018), *Back in Time For Dinner* (2018) and *You Can't Ask That* (2016 –); ABC Me's *My Place* (2009 – 2011); SBS's *Insight* (1995 –), *Go Back to Where You Came From* (2011 – 2015), and *First Australians* (2008); and Network Ten's children science program *Scope* (2012-2020). Feature documentary *That Sugar Film* (2014) broadcast on SBS Viceland, and feature film *Rabbit Proof Fence* (2002) broadcast on SBS NITV, are also perennial favourites.
30. Figure 1, below, shows the growth in the number of records collected for the use of broadcast programs under the Screenrights educational licence between 2019 and 2022.
31. Figure 2, below, gives a breakdown of the types of content accessed by the education sector in 2020-21.

FIGURE 1

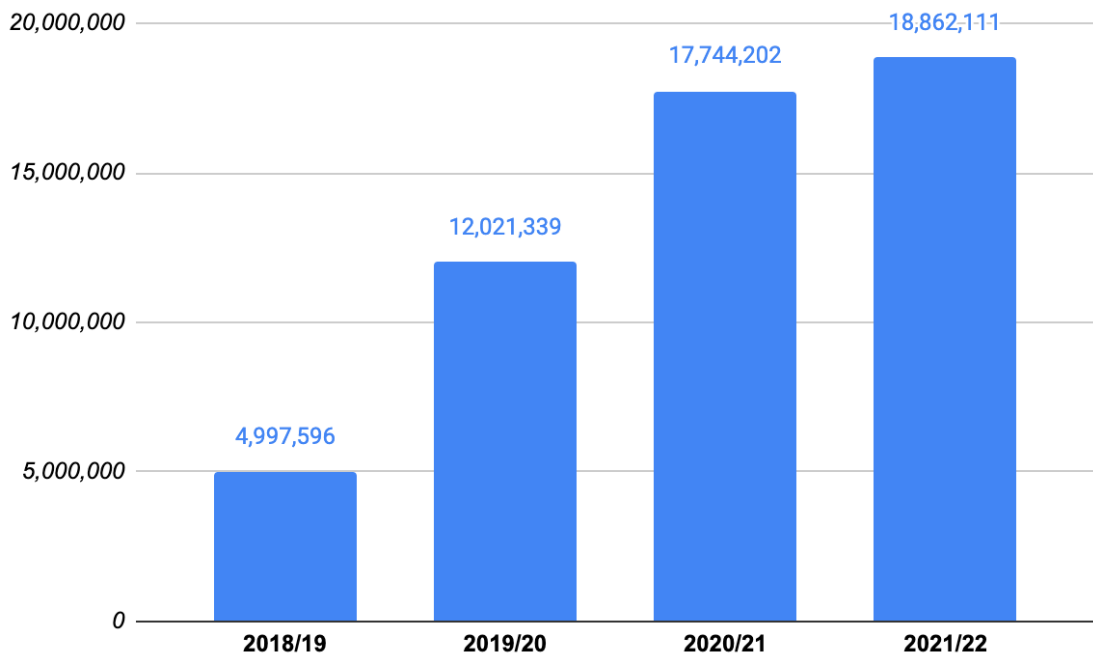


Figure 1: Growth in screen content usage in the education sector under the Screenrights educational licence between 2019 and 2022.

Source: Screenrights

FIGURE 2

Share of copies made for different types of content at Australian Educational Institutions

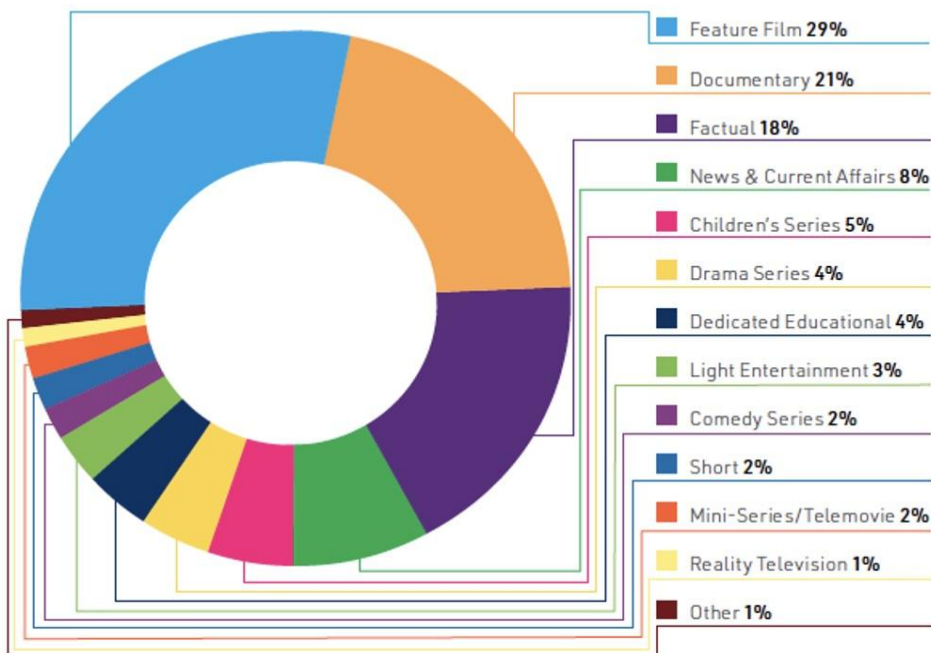


Figure 2: Content, by type, accessed in 2020-21

Source: Screenrights 2020-2021 Year In Review

The New Zealand experience

32. Screenrights also operates the educational licensing scheme in New Zealand. Under the New Zealand provisions, educational copying is not limited to broadcast content. Rather, it includes screen content delivered over the internet.
33. Screenrights has considerable experience in administering such technology neutral provisions and would welcome the opportunity to provide further input to Government in formulating future policy in this area.

Screenrights' response to the consultation questions

Question 1

Should government make an instrument under subsection 6(2) of the BSA in effectively the same terms as the Broadcasting Services ("Broadcasting Service" Definition – Exclusion) Determination 2019, which excludes services that provide live-streamed content online from being considered a 'broadcasting service'?

34. Screenrights supports this proposal.

Question 2

If the instrument is made, in an effort to provide certainty and stability to industry while broader regulatory reforms are developed and progressed, should it be remade for a duration of 3 years, 5 years, or alternative period of time?

35. We consider 3 – 5 years to be an appropriate timeframe. While we would welcome clarity on a new definition sooner rather than later, we respect and endorse the Government's broader media regulatory reform agenda.

Question 3

If the instrument is made for a duration of 3 to 5 years, what would be the regulatory and financial impact on your business?

36. No impact.

Question 4

If the Determination expires on 18 September 2022, with no interim solution in place, how would this impact your business or area of industry? What regulatory and financial costs do you estimate your business would incur in this scenario?

Education Statutory Licence

37. Limited impact, as s113P of the Copyright Act already covers simulcast and catch-up TV services. We anticipate the copying of live streaming on services such as YouTube and Facebook would also be covered under the licence in this scenario.

Government Statutory Licence

38. No impact, as s183 of the Copyright Act already covers content available on the internet.

Retransmission

39. No impact, as Part VC of the Copyright Act is limited to the retransmission of “free-to-air broadcasts” which is separately narrowly defined.

Question 5

What are your views on the alternatives to remaking the Determination?

40. We endorse Government’s proposal to remake the Determination in its current form for a limited period of 3 – 5 years. We further support Government’s plan to engage in close, meaningful dialogue with industry groups and other key stakeholders in the development of a new definition.

Conclusion

41. Screenrights looks forward to continuing to play a role in the development and reshaping of Australia’s media regulation landscape.

For further information:

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