House of Representatives
Standing Committee on Legal and Constitutional Affairs
Parliament House
CANBERRA ACT 2600
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Submission- H of Reps Comm
Australian Screen Directors Association and Australian Screen Directors Authorship.
W8BNMSWD
Background to ASDA and ASDACS

ASDA is an industry association representing the interests of film and television directors, documentary filmmakers, animators and independent producers throughout Australia. Formed in 1980, it has approximately 1000 members including world-renown feature film directors like Peter Weir, Jane Campion, Baz Luhrman, Scott Hicks, Gillian Armstrong, Chris Noonan, Phil Noyce, Fred Schepisi, John Duigan; emerging talent like Ana Kokkinos, Shirley Barrett, John Curran, Samantha Lang, Peter Duncan and Emma-Kate Croghan; award winning documentary filmmakers Bob Connolly, David Bradbury, and Dennis O'Rourke; television directors like Michael Carson, Michael Jenkins, Denny Lawrence, Di Drew; and producers like Jane Scott, Tristram Miall, John Maynard, Tony Buckley and many others.

ASDA works to promote excellence in screen direction, to encourage communication and collaboration between directors and others in the industry, and to provide professional support for its members. It maintains a high profile and leading cultural and policy role through its efforts to address issues affecting the industry from a broad perspective.

ASDACS was established by ASDA in response to information from a number of European collecting societies that they had collected the director's share for Australian directors for income arising from cable retransmission and private copying schemes. ASDACS was formed as an independent company limited by guarantee in November 1995 with the aim of collecting, administering and distributing income arising from secondary use rights.

In December 1996 ASDACS received its first instalment of monies from the French collecting society SACD. In its reciprocal collecting agreement with SACD (and other European collecting societies) provision is made for ASDACS to collect on behalf of European directors who generally speaking are granted these rights pursuant to the authors' rights laws of Europe.

ASDACS is a member of the Australian Copyright Council; the International Association of Audiovisual Writers and Directors (AIDAA), a non-governmental organisation regularly consulted by institutions of the European Union, UNESCO and the World Intellectual Property Organisation; and has recently applied for membership to the International Confederation of Societies of Authors and Composers (CISAC).

Part VC Retransmission of Free-To-Air Broadcasts – Current Draft

ASDA and ASDACS wish to confine their comments to Part VC of the Bill, the introduction of a statutory licensing scheme for the retransmission of free-to-air broadcasts.

Part VC of the Bill provides for the introduction of a statutory licensing scheme for the retransmission of free-to-air broadcasts, subject to the retransmitter paying equitable remuneration to the relevant copyright owners . The relevant copyright owners for this purpose, as defined under s 135ZZI, are those who own copyright in a work (literary, dramatic, musical and artistic), a sound recording or a cinematograph film.

As it presently stands there is no opportunity for a film or TV director to benefit from this scheme because the Copyright Act in this country fails to acknowledge the director as an author or creator of a cinematograph film. This is in stark contrast to all other retransmission schemes around the world. The failure to include directors in the forthcoming retransmission scheme is of real concern to ASDA and ASDACS.

To deny directors the right to participate in the scheme is unjust for two reasons. First, it fails to recognise the significant role of the director in film making. Secondly, it is likely to cause international disquiet and may result in Australian directors being unable to receive export income to which they are entitled. We will elaborate on our concerns in more detail below but firstly will summarise the history of our involvement in the evolution of this scheme.

History of ASDA/ASDACS involvement

ASDA and ASDACS, along with other production industry associations, have been advocating the introduction of a retransmission scheme for a number of years.

We were invited by the Department of Communications and the Arts (DOCA) to be a member of the production industry working party consulted by DOCA in May 1997 on the appropriate model for retransmission. We were (and still are) members of the Retransmission Coalition coordinated by Screenrights which included other industry associations like the Australian Writers Guild, the Screen Producers Association of Australia, Australasian Performing Right Association and others.

Although we were consulted on the creation and drafting of the retransmission scheme, the current draft fails to encompass directors' interests. A letter dated 3 September 1997 was sent to Ms Beverley Hart of DOCA stressing the importance of including directors as potential beneficiaries, to Catherine Hawkins of the Attorney General's Department on

10 October 1997 to this same effect ( in response to the discussion paper Copyright Reform and the Digital Agenda ) , and again to the Copyright Law Review Committee on 14 August 1998.

On 19 March 1999 ASDA and ASDACS made a submission to the Attorney General's Department in response to the exposure draft of the Bill, outlining our concerns at the drafting of the Bill from a screen director's perspective. This was followed up with discussions with the appropriate ministers and/or their advisers.

Because of the government's reluctance to make any further amendments to the Bill to accommodate our demands, a letter was sent to the Prime Minister on 18 June 1999 co-signed by Australia's top directing talent. A copy of that letter is appended to this submission ( Appendix A).

The omission of directors not only affects Australian directors but overseas directors who are either rights holders pursuant to their copyright laws (throughout Europe including the United Kingdom) or through industry agreements with producers ( the United States). The paradox is that Australian directors have benefited from retransmission schemes in Europe but we are unable to reciprocate. Letters of concern to the government from collecting societies SACD of France and Suissimage of Switzerland (the main distributors of secondary use income for Australian directors) and the Directors Guild of America are attached at Appendices B,C and D respectively.

Objections to the inclusion of Directors in the Retransmission Scheme

Despite being involved in the consultation process and our requests for clarification on the issue, it appears that screen directors were never seriously considered as a class of creators who could potentially benefit from the scheme because of the silence of the Copyright Act as to who is an author of a cinematograph film. This means that a film producer, screenwriter, composer, record company and even an artist whose work is incorporated in a film may receive equitable remuneration from this scheme but not the director.

In a letter from DOCA dated 31 October 1997, we were advised that as screen directors hold no copyright in their films ergo they have no right to equitable remuneration for the retransmission of their films. To acknowledge such a right "would amount to the extension of copyright in film to directors". The letter adds: " The question of extending copyright like intellectual property rights to those apart from the producer associated with the creation of a film, is a particularly complex and contentious issue". ( Appendix E)

This stance was further evident in a letter from Senator Alston's office dated 16 July 1999 to Gillian Armstrong, on behalf of all directors who were co-signatories to the letter to the Prime Minister. The letter essentially states that we are putting the "cart before the horse" - that is, until the issue of authorship of film is addressed the government cannot a statutory right for screen directors. The letter suggests that we should raise the issue of film authorship when the government seeks submissions in response to the CLRC's

report on the simplification of the Copyright Act (A copy is attached at Appendix F)

We are mindful that seeking a director's retransmission right is pre-empting the larger issue of film authorship but we believe there are compelling arguments and international precedents that clearly outweigh any administrative inconvenience of introducing such a retransmission right for directors.

Our response to this "cart before the horse" argument is that the notion of authorship of a film has already been introduced into the Act, at least in its current draft form for the forthcoming moral rights legislation where directors are acknowledged as an author of a film. We would prefer to tackle the bigger issue first – the introduction of a director's copyright (and we do intend to raise this issue when the government asks for submissions to the CLRC's report on simplification of the Act as well as the review of Australia's intellectual property framework by the Intellectual Property and Competition Review (IPCR)) – but as the House Standing Committee would be aware, the process of copyright reform is notoriously slow and we can see no compelling reason why directors should be excluded from this scheme. In our opinion the changes to the Act we advocate reflect good and fair business practices and are consistent with prevailing government policy and international developments.

The other main objection to a retransmission right for directors comes from the Screen Producers Association of Australia(SPAA). They argue in their recent Annual Report that to grant such a right would "implicitly give copyright in a film to directors" which SPAA opposes because it has "serious implications for the management of intellectual property rights in audio-visual works, for the financing of production and for industrial relations". They also argue to allow a directors copyright would open the gates to performers copyright. This is not the forum to respond to SPAA's concerns about this broader issue of directors copyright in detail. Put simply we believe their fears are unduly alarmist. It is, and will remain, a standard feature of directors' contracts that rights will be assigned to the producer. There is a presumption rule under Article 14 bis of the Berne Convention to that effect. We would encourage directors to reserve their statutory licensing rights, such as a retransmission right, but that will come down to individual contractual negotiations. As to the "floodgates" argument, directors and performers copyright are two distinct issues and both should be considered on their separate merits not as one entity.

We will expand on our arguments in favour of a directors retransmission right below, but before doing so it is worth examining where screen directors stand with respect to our copyright legislation.

The Copyright Act 1968

A cinematograph film is protected by copyright as "other subject matter" under the 1968 Act. The Act is silent on the issue of who is an author of a film. Instead we have the "maker", the producer or production company, who is vested with first ownership of a film.

This current framing of the Act in respect of film is a legacy of the period in which the legislation was drafted and enacted in the late 1960s, hardly a watershed in Australian cinema. Films like “Journey out of darkness” ( with Ed Deveraux and Kamahl cast as Aborigines!), “Koya No Toseinin” ( a Japanese western shot around Tamworth) and “Age of Consent” by English director Michael Powell and starring James Mason and Helen Mirren were typical of the movies being produced in Australia during that time. There was no understanding of the film director’s craft and there was no professional guild or lobby group for directors. An Australian film industry did not really emerge until the mid 1970s.

Since that time Australian film directors have become Australia’s most significant cultural export in terms of human resources. Think of Peter Weir, Bruce Beresford, Baz Luhrman, Scott Hicks, Jane Campion, George Miller, PJ Hogan, Jocelyn Moorhouse, Fred Schepisi, John Duigan, Gillian Armstrong, and Phil Noyce.

Despite Australia’s prodigious directing talent our Copyright Act operates under the legal fiction that there is no author of a film. Film directors are perceived as being analogous to theatre directors or conductors of an orchestra in that they merely interpret or realise screenplays rather than create new and original works.

The reality is that a director spends his or her entire working time making creative decisions about what will appear on the screen. The director has significant input into all the obvious creative elements, including the development of the script, the cinematography and its style, the casting and the acting style, the production design, the makeup and costumes, the lighting, the music and soundtrack, the editing and the grading of the final print. The director decides where the camera will be placed, what sort of shot will be shot ( long shot, tracking shot, close up, etc), whether the actors will be fully visible or partly obscured and plans how these shots will be cut together with the editor for specific effects. The success of a film is more than merely its content. It requires the talents and skill of a director to bring to the story a distinctive visual style and the ability to convey the subtext of that story to an audience. Finally, the director controls the rhythms of a film – pacing, tempo and timing- which is one of the most important elements in ultimately making a film a successful work or not.

In the second part of its report on the Simplification of the Copyright Act 1968, the Copyright Law Review Committee (CLRC) acknowledged that an anomaly existed in dealing with film as a category of subject matter under Part IV of the Act ( para 3.15). The CLRC proposed that film attract a higher level of protection as a “creation” - their proposed nomenclature - to replace the existing “works” category (para 5.57). On the subject of ownership the CLRC proposed that the owner of copyright in a Creation is the person who undertakes creation of it, recognising that such an approach may produce an outcome different from the current position on ownership in film (paras 5.109 - 5. 111). Even the one dissenting CLRC member agreed that film should be treated as a “work” rather than “other subject matter”

This trend towards acknowledging authorship in film is also evident in the draft

legislation for the introduction of moral rights in this country, and is also recognised in almost all European copyright laws, including the United Kingdom where amendments in 1996 provide that the director is the co-author, with the producer, of a film or television program.

## Arguments for the Inclusion of Directors in the Retransmission Scheme

### Consistency with Government Policy on Film Authorship

Despite the Copyright Act's failure to identify who is an author of a film, the CLRC and most other commentators, such as the Australian Copyright Council and the Arts Law Centre of Australia, acknowledge that film is a creative work and should be acknowledged as such, with the corollary being that the director would be, at the very least, an author of that work.

The Copyright Amendment Bill 1997 introduced moral rights for creators (although these provisions were later removed from the legislation until the film and TV industry reached consensus in relation to waiver of moral rights). The Bill recognised directors and producers, and later writers as the authors of a cinematograph film. The government now clearly recognises in public policy terms that there is an author or creator of a film and that the director is one of those authors.

We submit that it is inconsistent and ambiguous to amend legislation to provide authorship status for a director for one set of rights (moral rights) but not the other (economic rights). Either the director is a rights holder for both moral and economic purposes, or not at all.

### Consistency with International Copyright Developments

As mentioned above almost all countries that are members of WIPO and that have significant film industries recognise directors as authors of film, including the United Kingdom who amended their copyright legislation in 1996 to include directors and producers as authors and introduced a rental rights scheme to pay equitable remuneration for the authors.

Those countries that have retransmission schemes all include directors as potential beneficiaries.

Consideration should also be given to the trend towards harmonisation of laws in the European Community in 1992-93. Because of the different different approaches to authorship of a film – some European countries confer authorship to the producer, others the director- it was felt that this created uncertainty in contractual practices and distorted competition between the member states. Directives were introduced that provided minimum harmonisation between the members states had to confer authorship on the

principal director but could still consider other physical persons, such as the film producer, as a co-author such as in the instance of the United Kingdom. This has enabled European countries to provide reciprocity to a wide range of authors and rightsholders in film in the collective administration of rights, an issue discussed next.

Reciprocal Obligations to European Directors

Since 1996 Australian directors have benefited from the generosity of European countries like France, Switzerland and the Netherlands despite the lack of reciprocity from our shores. ASDACS has entered into reciprocal agreements with these societies and is in the process of negotiating similar arrangements with the appropriate collecting societies in Germany, Italy, Spain and other European countries.

As our Copyright Act does not acknowledge directors not only are Australian directors denied remuneration for the retransmission of their work but foreign directors are also disadvantaged. Although we may not be strictly in breach of our legal obligations to reciprocate to those European collecting societies who collect on behalf of Australian directors, it would certainly be against the spirit of the intended relationships between our organisations. Furthermore, the failure to reciprocate will definitely inhibit any future arrangements with other countries and thereby prevent the additional flow of additional secondary use income. ( We have been advised, unofficially, by members of AIDAA and CISAC that many countries are resistant to entering reciprocal agreement with Australia until there is something tangible we can give in return).

Principle of Fairness and Equity

The scenario of Australian and foreign directors being denied remuneration from this scheme whilst producers, writers, composers, record companies and other underlying rights holders to a film reap the benefits would be both incongruous and difficult to justify from a public policy perspective.

At present there is no legislative or industrial mechanism for Australian directors to receive remuneration for secondary or subsequent uses of their work. Australian directors slip into that economic no-man's land between strong collective bargaining institutions (like the Directors Guild of America and the Directors Guild of Canada which have residual arrangements with producers and studios to ensure back-end payment for directors) and the European tradition of collective administration which collects remuneration for cable retransmission, rental rights, private copying and other secondary uses. Australia has neither. Australian directors get paid a fee for their services and the use of their "rights" and occasionally the often illusory notion of a share of net profits.

Competition Principles

It is ironic that Australia produces such a large and impressive array of screen directing talent and yet, in contrast to our international counterparts, they are the most poorly remunerated. Apart from a few high profile feature film directors, most directors are in an

inferior bargaining position when it comes to negotiations with producers. Quite simply it is a buyers market where there are too few projects for the suppliers of creative services such as directors. Many directors cannot exist on their director's income alone and must supplement it with ancillary work, like teaching or lower paid corporate videos, or they just simply leave the market. Of course directors are not alone. It applies to all elements in the production process for what is a very competitive market.

However, when they are able to subsist professionally as directors they should be paid fair remuneration for their creative skills and labour and this is where there is current market failure, particularly in comparison to film and TV directors in America and Europe, and this has been one of the reasons why directors have gone to Hollywood. No doubt there are other factors such as the ability to work with larger budgets but the potential to be paid fairer remuneration for their creative endeavours is a principal driving factor. Australian budgets and directors fees will never be able to compete with Hollywood but subsequent payments for the secondary use of their work, via this scheme, may go some of the way to stemming the talent drain to the United States. In the United States through their collective bargaining system the large and powerful Directors Guild of America (DGA) has negotiated residuals and repeats for subsequent uses of director's work as well as income from the retransmission of their work, in those countries that have statutory licensing schemes for retransmission, through an agreement with the DGA and the Motion Pictures Association of America (MPAA).

By comparison with the DGA, ASDA as a professional association can only do so much. ASDA is not a union and has no industrial remit in an industrial court, and is a small and resource-strapped organisation in contrast to the Screen Producers Association of Australia(SPAA). Its demands on behalf of directors for residuals or a share of retransmission monies have always been resisted by SPAA on the basis that as directors have no rights they have nothing to claim. This argument is spurious. Directors in the United States, who also have no rights, have been able to negotiate these standard conditions of secondary and subsequent use income because there is a level playing field between the directors guild and the studio/producer associations. Furthermore, if Australian directors don't have rights why is an assignment of rights clause a standard provision in directors contracts.

The Public Lending Right Act was introduced in Australia, modelled on European schemes, to compensate authors for the potential loss of royalty income caused by libraries lending their books. The public lending right is not an exclusive right under the Copyright Act nor something mandated under n international treaty but rather a statutory scheme introduced to redress market failure and properly reward authors for their creative endeavours. In a similar vein we would suggest that despite the absence of an underlying directors right, the introduction of a director's retransmission right would go some way in redressing the current market imbalance between the director and the producer.

Finally, consideration should be given to the international trade dimension of those overseas directors who own the retransmission right but are unable to be remunerated from the Australian scheme. In essence by excluding directors from the scheme, which is

inconsistent with all other similar schemes around the world, we are artificially setting up a barrier that is distorting competition by preventing the free flow of statutory licensing income between Australia and those European countries that have collected and distributed such income on behalf of Australian directors.

## Practical Effect of Introducing a Retransmission Right for Directors

It should be said that introducing a retransmission right for directors will have no significant impact in practice. As mentioned, it is standard industry practice to acquire an assignment of rights from directors just as it is with screenwriters. ASDA and ASDACS would advocate that this particular right be reserved from all other "rights" assigned to the producer, analogous to composers reserving their performance rights (which are then assigned to APRA).

One further point needs to be made. It is sometimes argued that matters of remuneration are better dealt with in contract than in legislation, that it is administratively more efficient for producers to add a component into the salary structure and "buyout" these statutory licensing rights rather than leave it to a collection agency to distribute amongst a number of parties to the film collaboration. We would strenuously object to such a move. The experience in the United Kingdom where the introduction of equitable remuneration for rental rights is a good case in point. UK producers having been buying out these rights in contract with no tangible increase in the directors fee creating industrial turmoil in that country. We attach an article from the UK magazine Broadcast on the directors campaign to negotiate a "fair deal" ( Appendix G).

Just as producers argue that their right to equitable remuneration should not be bought out by broadcasters in their licence fee[1] ,because producers are generally in an inferior bargaining position, so the same logic should apply to the director-producer relationship.

## Recommendation

In light of the above reasons for the inclusion of directors in the retransmission scheme, we recommend that the government expressly state the classes of rights holders who may be entitled to remuneration under the scheme.

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[1] See article by Stephanie Faulkner "Retransmission rights in broadcast signals from the authors' perspective" Copyright Reporter Vol 14, No 3 ( Dec 1996) ,pp 115-116. Faulkner says: "..rather than ensuring that underlying rights holders are paid equitable remuneration for their retransmission rights, the broadcasters would be under immense pressure to drive the price for retransmission rights to zero to maximise their opportunity for profit in their subsequent transactions with pay television operators."

Consistent with our submission, ASDA and ASDACS argues that directors should be entitled to equitable remuneration from the retransmission scheme. We would submit that to clear up any uncertainty as to who is entitled to benefit from this scheme, it should be expressly stated in the legislation that directors, producers, writers and composers are entitled to a share of equitable remuneration. This is common for many cable retransmission schemes in Europe.

Most European laws pertaining to collective administration of cable retransmission and similar secondary use rights specifically state the classes of creators who are entitled to equitable remuneration, in some cases the actual share is legislatively mandated. For example, under Swiss law 50% is distributed to authors (25% to screenwriters and 25% to directors) and 50% to the production company.

Accordingly, we would recommend that the House Standing Committee support an amendment to the Bill whereby the definition of "relevant copyright owner", under section 135ZZI, be replaced with the expression "relevant rights holder" which would be defined to mean the holder of a retransmission right in a work or cinematograph film, including but not limited to writers, composers, directors and producers, and the owner of the copyright in a sound recording.

Relevant Collecting Society

Under Part VC the relevant collecting society negotiates the payment of equitable remuneration on behalf of the relevant copyright owners ( or our preferred definition "relevant rights holders").

We would suggest that if the House Standing Committee is mindful of supporting a directors retransmission right, as recommended in this submission, then consideration could be given to appointing ASDACS as a declared society to collect on behalf of directors. We would submit that we adhere to the criteria listed under s135ZZT(3). We should stress that we have no objection in principle to Screenrights being the declared society under Division 3 although it does appear to us as duplicating functions to some degree, particularly as ASDACS has reciprocal agreements with a number of European collecting societies. However, at the same time we would not object to any recommendation by the House Standing Committee to appoint only one collecting society on the basis that it is more administratively efficient and effective to have one declared society negotiate terms and rates with the retransmitters. In such a case it would appear appropriate that Screenrights be declared the relevant collecting society.

If Screenrights are appointed the declared society then on the issue of distributing the shares between the relevant rights holders, we would suggest that in the first instance Screenrights be delegated the power to determine a distribution policy that is fair and reasonable for all classes of relevant rights holders, as they currently do under the educational copying scheme, but failing an accord on the distribution, an aggrieved party should have the right to vary and approve such distribution arrangements in line with the

Simpson report on collecting societies ( see also the CLRC report paras 7.44 - 7.51) and have recourse to the Copyright Tribunal. As it presently stands there is no recourse for specific classes of rights holder or copyright owners to apply to the Tribunal, only in respect of the amount of equitable remuneration between the retransmitter and the collecting society ( see ss135ZZM - ZZN )

Accordingly, we would recommend that s 135ZZT be amended to include provision for a class of relevant copyright owners ( or our preferred expression “relevant rights holder”) to apply to the Copyright Tribunal for a determination on the share of the equitable remuneration received from the retransmitter to be paid to that class.