

SCREEN PRODUCERS ASSOCIATION OF AUSTRALIA (SPAA)
SUBMISSION TO THE HOUSE OF REPRESENTATIVES
STANDING COMMITTEE ON LEGAL AND CONSTITUTIONAL AFFAIRS
COPYRIGHT AMENDMENT (DIGITAL AGENDA) BILL 1999

1. INTRODUCTION

This submission is made by SPAA (The Screen Producers Association of Australia) and comments on the Copyright Amendment (Digital Agenda) Bill (the Bill).

The Screen Producers Association of Australia (SPAA) is the industry association of the Australian independent film and television production industry. The Association represents some 500 companies involved in the production and marketing of audio-visual programs, including feature film, all forms of television, commercials and corporate video. SPAA is also a federally-registered employer association.

SPAA represents the interests of all producers on issues which affect the business of audio-visual production and aims to create and maintain the environment and conditions under which a vigorous independent production industry can thrive in Australia.

2. SUMMARY

SPAA is a member of the Retransmission Coalition represented by Screenrights (The Audiovisual Copyright Society Ltd) and has authorised the separate Screenrights submission to the draft legislation and the current 30 September 1999 submission.

SPAA welcomes the amendment to the Copyright Act 1968 (the Act) that will introduce remuneration to copyright owners for the use of their work through retransmission on cable and other electronic distribution mechanisms.

SPAA supports the statutory licensing scheme proposed in the Bill, but for the same reasons advanced by Screenrights believes that the Attorney General should declare only one society for the purpose of collecting and distributing revenue from cable retransmission.

However, we wish to oppose any proposal that the beneficiaries of revenue from cable retransmission should be extended beyond the relevant owners of copyright defined in the Act and the Bill. Specifically we oppose the extension of remuneration rights to the directors of cinematograph films.

It is our strongly held view that introduction of a remuneration right for directors from cable retransmission represents the explicit introduction of a directors copyright. This would represent a fundamental change to the legislative framework of copyright in the cinematograph film. While we would oppose such a change we also believe it is not the purpose of this Bill to address this issue. We do not believe that sufficient investigation and analysis has been done to justify the introduction of such a fundamental change to copyright law.

3. GENERAL SUBMISSION

The Bill seeks to rectify the legislative anomaly that undermined the right of owners of intellectual property in audiovisual works to obtain remuneration for the additional use involved in cable retransmission. Remuneration under the statutory licence scheme proposed is to go to those whose copyright is exercised by the act of retransmission.

The relevant copyright owners are the owners of the copyright in a work, a sound recording or a cinematograph film. The owner of the copyright in a cinematograph film under the Act is the maker of the film, being the person who undertook the arrangements necessary for the making of the film. The first owner of copyright in the cinematograph film is the production company responsible for the development, financing, physical production and subsequent commercial exploitation of the film.

In practice, cinematograph films are produced by an individual producer or individual producers under the auspices of a production company which may or may not have been established for the production of the cinematograph film.

SPAA does not know of any instance where a cinematographic film was produced by a production company without the involvement of a individual producer or producers. In most cases the individual producer will be a principal of the production company and as a result will have ownership of the copyright in the cinematograph film.

Directors on the other hand are employees and are not among the classes of persons who have copyright in a cinematograph film or in the underlying literary, dramatic or musical works or sound recordings that are incorporated into the film.

Like the scheme currently applying to educational copying the cable retransmission scheme will provide equitable remuneration for the secondary use of the copyright involved in the retransmission of the cinematograph film, as well as of the script/screenplay, of any musical work and of any sound recording incorporated in the film.

3.1 Directors remuneration

Directors are currently remunerated as employees under the provisions of relevant industrial awards applying to various forms of production or as a result of individual employment contracts between directors and producers.

It is important to consider that screen production encompasses a large range of productions: feature film, television production, documentaries, television commercials and corporate video.

Television broadcasters and independent production houses which supply programs and television commercials for broadcast, are major employers of directors. Television programs (not including advertisements) account for close to two-thirds of Australian audio-visual program production each year. Approximately 65% of commercial television production expenditure, for example, is on programs such as news, sport, current affairs, game shows and infotainment, which are typically produced by producers and directors operating under contracts of employment.

Generally in an employer-employee relationship, an employer is entitled to ownership of all rights (including copyright) in their employee's works created in the course of their employment. Except in very limited circumstances, copyright in material created by a person in the course of his or her employment under a contract of service or apprenticeship, vests in the employer.

In the film and television program production context there are very good reasons for all rights (including copyright) in an employee's work vesting in the employer - production house or broadcaster. Employed producers, directors and other creators engaged in television and film production are simply individual members of a highly skilled team, which works under the creative control, direction and supervision of the employer. In the case of continuing television drama series and serials and regularly scheduled programs (such as game shows), various episodes may well be produced, and directed, by different combinations of people. It is conceivable that a single episode may well involve the efforts of a number of employed producers and employed directors.

It is common practice for directors to receive personal margins of skill in recognition of their experience and creativity that are considerably above the minimums established by industrial agreement. These vary according to the type of production and the budget involved, but the going rate for directors is generally above the award. In the case of the top feature film directors their remuneration is commensurate with their stature and the contribution they will make to the commercial success of the production.

The Australian Film Commission's Production Budgeting manual publishes the following rates as provided by ASDA (the Australian Screen Directors' Association) as the minimum fees directors should expect.

Description	Budget	Fee
Feature film	less than \$1 million	\$30-40,000
	less than \$2 million	\$40-80,000
	over \$2 million	minimum of 3% of total budget (ie, \$10 million film = \$300,000 fee)
	Plus in all cases, 3-5% of producer's share of net profit	
Telemovie	n/a	\$55,000 - \$85,000
Documentary	1 hour doco	\$30,000 - \$40,000

SPAA estimates for other categories:

Mini-series	per series	\$100,000 - \$200,000
Series	per episode	\$15,000 - \$30,000/episode
Serials	per week	\$2,200 - \$2,500/week
Television Commercials	per 60 second advertisement	\$25,000-\$50,000

However, the success or failure of a film rarely rests solely on the merit of the director's contribution. Factors such as the script, the timing of the release or broadcast of the film, the cast, the competition and the publicity generated, arguably play an equal or even greater part of the success or failure of the film than the contribution of the director.

In film and television to the extent that a director has a successful reputation that may attract a larger audience, they are already compensated. It would be inequitable and unreasonable to single out a director to exercise the economic rights involved in copyright, ignoring the financial and creative role played by the employers, including the employers' complete assumption of risk in financing and distributing the production.

3.2 Moral Rights

There has been considerable discussion about the introduction of moral rights over the last five years with the prospect of legislation imminent.

The current understanding is that moral rights will be introduced and that in relation to the cinematograph film for the purposes of moral rights the authors will be the producer, the director and the writer. Moral rights are personal rights and are separate from economic rights. As personal rights they go to the reputation of the producer, director and the writer and are akin to the rights in law against defamation.

The moral rights proposed to be introduced are:

- a) the right of attribution of authorship, which provides the author with the right to be identified as the producer, the director or the writer of the film;
- b) the right not to have authorship falsely attributed; and
- c) the right of integrity of authorship, which is the right of the producer, the director and the writer to object to any distortion, mutilation or other material alteration of the film that would be prejudicial to their honour or reputation.

After much discussion the industry groups representing producers, directors, writers and broadcasters have reached a compromise as to the practical application of moral rights to screen production. During this lengthy period there was a clear understanding that the establishment of a moral right did not amount to a precedent for the extension of economic rights.

If directors were to get an economic right in the film as a result of the precedent of moral rights then it would potentially alter the economics of production, impacting on financing of productions, industrial relations, and the management of intellectual property.

The director would share in the copyright in the film with the production company, even though the director may not have participated in the development of the film and is unlikely to have raised the finance necessary to make the production. From the point of view of the producer this goes towards giving the director a free ride on the investment and risk shouldered by the producer. Consequently there would be considerable pressure to reduce the current levels of upfront remuneration to directors in recognition of the risk involved and the potential for a share in future revenue, if it eventuates.

We emphasise that these comments on the issue of directors' copyright should not be seen as questioning the value of the director. The director's contribution is valued as evidenced by our willingness to debate the issue of moral rights for directors, our recognition of their vital role and of their right to receive reasonable remuneration. However we believe that there must be a careful examination of the issues before a decision is made about directors' rights in Australia.

3.3 International implications

Amendment of the Act to recognise directors' copyright would have serious ramifications for copyright outside the area of cable retransmission. These ramifications would extend outside of Australia to its treaties and trading partners, upcoming WTO negotiations, and the World International Property Organisation (WIPO).

SPAA does not believe it is in Australia's best interests to consider directors' copyright ahead of any international consensus in the WIPO on the recognition of both performers' rights and the rights of broadcasters. While there appears to be wide international support for the introduction of

economic and moral rights for performers there are a number of issues of policy and practice to be resolved.

Australia is yet to make clear its position on the Protocol to the *WIPO Performances and Phonograms Treaty (WPPT)*. This treaty would provide a framework in international intellectual property law for countries to deal in their own domestic law with audiovisual performances. In contrast no such potential framework exists for dealing with a directors' copyright and SPAA is not aware that any substantive discussion has yet occurred that would lead to such a framework.

If Australia were to move on this issue ahead of that discussion and the formulation of relevant international law there may well be serious implications for our relations with our audio-visual trading partners.

Further there is no urgency for Australia to act in the context of the present Bill under consideration. There is no international obligation with which we have been tardy in complying and unlike many countries, Australian directors enjoy the protection offered by industrial awards and agreements.

4. CONCLUSION

SPAA believes that the Copyright Amendment (Digital Agenda) Bill 1999 is an inappropriate place to make the significant change to Australia's copyright and intellectual property rules that directors' copyright entails.

The proposal to extend directors rights is unusual, in that it proposes an extension of intellectual property rights into an area in which industrial awards have applied and where the remuneration of directors has been equitably settled by means of negotiation.

It is clear that issues of remuneration are capable of resolution between directors and producers and one questions whether legislation granting economic rights to employees is needed to override contractual or industrial arrangements.

In any case it will remain a matter of debate whether extension of such rights would lead to increased remuneration for directors, or merely provide further legal underpinning for the financial rewards already received by directors by virtue of contracts or awards.

SPAA members have not been compensated for the exploitation of their rights under retransmission for over five years, and it would be unfair to delay the proposed legislation due to sidetracking the legislation into areas that should be debated in context of further reforms of the Copyright Act or internationally, under WIPO.

Significant consultation with industry guilds and unions and the government would be needed before such far-reaching and sweeping change is made.