

CHAPTER 2

OVERVIEW OF THE BILL

2.1 This chapter briefly outlines the purpose, background to, and main provisions of, the Bill.

Purpose of the Bill

2.2 The Bill seeks to amend the Copyright Act to provide for film directors to be joint copyright owners of films, along with producers, for the purposes of the retransmission statutory licence in Part VC of the Copyright Act.

2.3 The retransmission statutory licence allows free-to-air broadcasts to be retransmitted by pay-TV platforms without permission from copyright owners if the retransmitter pays fair remuneration to the owners of copyright in the underlying materials in broadcasts (including films and pre-recorded programs). Under the Bill, directors and producers would share a right to this remuneration, as joint owners of the copyright in their films for this purpose.

2.4 According to the Explanatory Memorandum (EM), the Bill delivers a commitment made by the Federal Government in its Strengthening Australian Arts policy for the last election.¹ In particular, the Bill seeks to:

- address concerns about the level of recognition available to directors in Australia;
- provide appropriate copyright recognition for the creative contribution of directors;
- enable directors to share in the new income stream provided by the Part VC retransmission scheme, in recognition of their creative contribution to the film-making process;
- maintain, as far as possible, current financial arrangements for the Australian film industry, and the ability of producers to fully exploit films to recoup the cost of production and attract investors; and
- avoid, as far as possible, any negative impact on consumers, user groups (for example, broadcasters and educational institutions) and society generally.²

Background to the Bill

2.5 The Copyright Act does not currently recognise directors as makers of films or as copyright owners in film. The 'maker' of a film is the person 'by whom the

1 *Explanatory Memorandum*, p. 2.

2 *Explanatory Memorandum*, p. 7.

arrangements necessary for the making of the film were undertaken'.³ This is usually the producer. Under the Copyright Act, the maker (that is, the producer) is normally the copyright owner of the film. Section 86 of the Copyright Act provides that this copyright owner has the exclusive right to:

- make a copy of the film;
- cause the film to be shown or heard in public; and
- communicate the film to the public (including via broadcast and online).

2.6 The EM states that these exclusive rights are called primary economic rights, because they enable the copyright owner to control the uses of the work that provide the primary economic returns (for example, publication and distribution). Granting producers (as copyright owners) these rights allows them to commercially exploit their films to recoup investment costs (through, for example, cinema release, broadcast via free-to-air and pay-TV, and the production of videos).⁴

2.7 Producers – as copyright owners – are also entitled to payment where their films are used under statutory licences set out in the Copyright Act; that is, for the copying of broadcasts by educational institutions (Part VA) and the retransmission of free-to-air broadcasts (Part VC). These licences or rights are called 'secondary rights' because they do not relate to the primary uses of the material. They allow copyright owners to obtain remuneration for ongoing dealings with copies of works that have been created under the primary economic rights (for example, the copying and retransmission of authorised broadcasts).⁵

2.8 Under these licences, the permission of the relevant copyright owners is not required to copy or retransmit broadcasts of their material in specified circumstances, provided equitable remuneration is paid by the user to a collecting society declared by the Attorney-General, for distribution to the copyright owners. In the case of the Part VA and VC licences, the declared collecting society is Screenrights.

2.9 The relevant copyright owners for the purposes of these licensing schemes are the producer of the film being copied or retransmitted, and the copyright owners of the underlying original material included in the film (such as the screenwriter and composer). Broadcasters do not receive remuneration for the copying or retransmission of material under these licences. Both schemes apply only to traditional broadcasts, and do not include webcast or video-on-demand services.⁶

2.10 The Part VC scheme is a new revenue stream that was introduced by the *Copyright Amendment (Digital Agenda) Act 2000*. It applies only to the

3 para 22(4)(b).

4 *Explanatory Memorandum*, p. 4.

5 *Explanatory Memorandum*, p. 4.

6 *Explanatory Memorandum*, p. 4.

retransmission of free-to-air broadcasts over traditional broadcasting services (for example, cable, satellite or airwave services, as opposed to online or video-on-demand services). To fall within the statutory licence, the retransmission must be simultaneous with the original broadcast, or delayed only to allow for time zone differences. The content of the original broadcast must be unchanged. The scheme will essentially apply to pay-television providers who wish to retransmit free-to-air broadcasts over their systems. This enables pay-television customers to receive all their broadcast material through a single cable or satellite signal, increasing quality of reception and ease of use.⁷

2.11 No money has yet been collected or distributed under the scheme. The fees payable by those engaged in retransmitting broadcasts are currently the subject of arbitration in the Copyright Tribunal between the primary retransmitters (that is, Australian pay-television operators), and the declared collecting society (Screenrights). The portion of this fund distributed to each copyright owner will be determined by a formula set by Screenrights.⁸

2.12 Directors are currently granted moral rights in films by the Copyright Act. This means that directors must generally be attributed in relation to uses of their film, and may take action in response to derogatory treatment of their work. However, directors are not recognised as film makers for copyright purposes. Thus they have no economic rights by virtue of the Copyright Act in the films that they take a primary role in creating; they rely instead on contractual means for financial remuneration. As they are not recognised as copyright owners, directors also do not have any rights to remuneration under the Part VA and VC statutory licences.⁹

2.13 In his Second Reading Speech, the Attorney-General stated that the case for recognising directors' copyright was raised by the Australian Screen Directors Association (ASDA) when the *Copyright Amendment (Digital Agenda) Act 2000* was being debated. According to the Attorney-General:

The government agreed to look at the issue of extending a share of copyright in films to directors. An issues paper was published and submissions were received from stakeholders, including ASDA and also representatives of film producers and broadcasters.

The bill...has resulted from a careful consideration of those submissions and from consultation with the main stakeholders.¹⁰

2.14 The Federal Government considered various regulatory and non-regulatory options for addressing the issue of directors' copyright. These options were as follows:

7 *Explanatory Memorandum*, p. 4.

8 *Explanatory Memorandum*, p. 4.

9 *Explanatory Memorandum*, p. 4.

10 The Hon Philip Ruddock MP, Attorney-General, *House of Representatives Hansard*, 17 March 2005, p. 1.

- Option 1 – Maintain status quo
- Option 2 – Adoption of joint authorship model
- Option 3 – Co-ownership with presumption in favour of producers
- Option 4 – Remuneration of directors under the secondary rights schemes
- Option 5 – Remuneration of directors under the retransmission scheme.¹¹

2.15 Option 5 is the approach taken in the Bill.

Significant provisions of the Bill

2.16 Clause 4 of the Bill provides that the amendments in Schedule 1 apply to films that commence to be made after Schedule 1 commences. Subclause 4(2) provides that the amendments have no effect to the extent that the rights they provide are inconsistent with the rights arising under a contract entered into before the commencement of those amendments.¹²

2.17 Item 1 of Schedule 1 of the Bill inserts new subsections 98(4), 98(5), 98(6) and 98(7) into the Copyright Act. Section 98 of the Copyright Act relates to ownership of copyright in cinematograph films.¹³

2.18 Subsections 98(2) and (3) of the Copyright Act generally provide that the maker of a film is the owner of the copyright in it, subject to any contrary agreement. New subsection 98(4) provides that each director will be taken to be a 'maker' of a film if the film is not a 'commissioned film' (defined in new subsection 98(7): see paragraph 2.22 below).¹⁴

2.19 The effect of new subsection 98(4) is that, where a film is not a commissioned film, the director, as a maker of the film, will be a copyright owner in addition to the person who falls within the definition of a maker of a film in paragraph 22(4)(b).¹⁵ Since the majority of films made in Australia are commissioned films, the extent of ownership by directors of film copyright will be fairly limited in practice.

2.20 New subsection 98(5) provides that if a director directed a film under the terms of his or her employment under a contract of service or apprenticeship, then in the absence of any agreement to the contrary, the director's employer will be a 'maker

11 For explanations and impact analyses of each of these options, see *Explanatory Memorandum*, pp 8-21.

12 *Explanatory Memorandum*, p. 24.

13 *Explanatory Memorandum*, p. 24.

14 *Explanatory Memorandum*, p. 24.

15 Para 24(4)(b) provides that 'the maker of the cinematograph film is the person by whom the arrangements necessary for the making of the film were undertaken.' As explained above, this is usually the producer of the film. See para 2.5 of this report.

of the film', and hence a copyright owner, in place of the director, for the purposes of new subsection 98(4).¹⁶

2.21 New subsection 98(6) provides that, if a person becomes an owner of copyright in a film as a result of the operation of new subsections 98(4) and/or (5), then the copyright in the film shall only comprise the right to include the film in a retransmission of a free-to-air broadcast.¹⁷

2.22 Several terms are defined in new subsection 98(7):

- 'commissioned film' is defined as a film made as mentioned in paragraphs 98(3)(a) and (b). These paragraphs provide that a commissioned film refers to a film made in pursuance of an agreement made by a person for valuable consideration with another person, for the making of a cinematograph film by the other person.
- 'director' is defined as having the same meaning as in Part IX of the Copyright Act. The effect of this provision is that where two or more people are involved in the direction of a cinematograph film, then 'director' is to refer only to the principal director.
- 'free-to-air broadcast' is defined as having the same meaning as in Part VC of the Copyright Act. The effect of this provision is that a free-to-air broadcast refers to a broadcast delivered by a national broadcasting service, commercial broadcasting service, or community broadcasting service within the meaning of the *Broadcasting Services Act 1992*.
- 'retransmission' is defined as meaning a retransmission, as defined in section 10 of the Copyright Act, to which Part VC applies. That is, a retransmission, other than over the Internet, of a free-to-air broadcast where the content of the broadcast is unaltered and either the retransmission is simultaneous with the original transmission or, if the retransmission is in an area with a different time zone to that of the broadcast, the retransmission is delayed until no later than the equivalent local time.¹⁸

16 *Explanatory Memorandum*, p. 25.

17 *Explanatory Memorandum*, p. 25.

18 *Explanatory Memorandum*, p. 25.

