Shine: Copyright Law and Film

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This article looks at the various experiences of the film-makers involved in Shine in relation to copyright policy and litigation. Part 1 considers the involvement of Jan Sardi in the campaign to get screenwriters included in the moral rights regime in the film industry. Part 2 recounts the efforts of Scott Hicks to push for directors to acquire royalties under the re-transmission scheme in the Copyright Amendment (Digital Agenda) Act 2000 (Cth). Part 3 discusses the contractual dispute between independent producer Jane Scott and the distributor over the gross receipts to the film Shine. Part 4 explores the disputes over the use of Sergei Rachmaninov's music in the film Shine.

If the blockbuster *Crocodile Dundee* was a symbol of entertainment law in Australia in the 1980s,[1] then the film *Shine* can be seen in some ways as representative of copyright law and film in the 1990s. The motion picture raises critical issues about the division of labour in the film industry. Should the authorship of the film be limited to the producer? Should authorship be shared between the key collaborative team of the writer, the director, and the producer? Or should authorship be shared among a larger range of collaborators, including the composer, the performers and the cinematographer?

The film *Shine* provides a useful case study into authorship and collaboration in Australian cinema because of an unusual configuration of circumstances. It engaged the film community, the legal system, and the media. The motion picture received popular acclaim and critical success. The actor Geoffrey Rush won an Academy Award for his portrayal of the protagonist, David Helfgott. The film-makers sought to capitalise on the success of the film in policy debates about copyright law reform. The screenwriter Jan Sardi sought to defend the position of screenwriters in a dispute over the *Copyright Amendment (Moral Rights) Act* 2000 (Cth). The director Scott Hicks lobbied for directors to be included as beneficiaries in the re-transmission of films on pay television in the *Copyright Amendment (Digital Agenda) Act* 2000 (Cth). Furthermore, the film *Shine* was embroiled in litigation. The producer Jane Scott faced law suits from the distributor, Pandora Films, the composer, David Hirschfelder, and the grandson of the composer Sergei Rachmaninov. She sought to resolve such disputes through negotiation, litigation and publicity.

This article considers the debate over the film *Shine* in the tradition of theoretical investigations into authorship and collaboration in cinema. In the classic text, *The Ownership of the Image*, Bernard Edelman considers the treatment of film under French law.[2] He discusses how authorship was

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[1] M Morris, "Tooth and Claw: Tales of Survival and Crocodile Dundee" (1987) 25 *Art & Text* 36.

[2] B Edelman, *Ownership of the Image: Elements for a Marxist Theory of Law* (Routledge, London, 1979), pp 52-63.

initially assumed by the producer in 1939 and shifted to a team of authors, including the scriptwriter, the director, and the composer in 1957. Bernard Edelman points out that, in spite of this development, the producer maintained control over the exploitation of the film through contracts. The authors could only exercise moral rights in respect of the film. In a chapter from *Of Authors and Origins*, Marjut Salokannel discusses how copyright law became accommodated within film.[3] She discusses the artistic, economic, and technological discourses about cinema. Marjut Salokannel charts the rise of the director as the auteur. She claims that this discourse about the director enabled cinema to be granted copyright protection. In *Contested Culture*, Jane Gaines considers the treatment of cinema in the United States.[4] She is especially interested in the position of performers under contract law, copyright law and publicity rights. Her work is also concerned with the protection of character merchandising in the field of film. Similarly, in *Cultural Rights*, Celia Lury looks at branding, trade marks, and cinema.[5]

This article looks at the various experiences of the film-makers involved in *Shine* in relation to copyright policy and litigation in Australia. It examines how authorship and collaboration in cinema is understood in terms of artistic, legal, and media discourses. Part 1 considers the involvement of Jan Sardi in the campaign to get screenwriters included in the moral rights regime in the film industry. Part 2 recounts the efforts of Scott Hicks to push for directors to acquire royalties under the *Copyright Amendment (Digital Agenda) Act* 2000 (Cth). Part 3 discusses the contractual dispute between independent producer Jane Scott and the distributor over the gross receipts to the film *Shine*. Part 4 explores the disputes over the use of Sergei Rachmaninov's music in the film *Shine*. The conclusion examines the symbolic struggle between the different communities in the film industry to determine the content of copyright law in respect of film.

1. Film vandals: the screenwriter

Copyright Amendment Bill 1997 (Cth)

The screenwriter of *Shine*, Jan Sardi, is a leading member of the Australian Writers' Guild (the Guild) for screenwriters in film and television. He became a copyright activist after a script that he wrote for a film called *Breakaway* in the 1980s was distorted because the director allowed the actors to improvise too much and failed to provide adequate coverage of the scenes. Jan Sardi was concerned that his reputation as a screenwriter could be damaged by being associated with the film. He sought legal advice whether he could take his name off the scriptwriting credits for the film.[6] Jan Sardi was advised that he could be sued by the film's investors for "causing injury" should the sales agent fail to pay for the film on the grounds that the film was not representative of the screenplay. In the end, Jan Sardi left his name off the scriptwriting credits and hoped that no one would see the film. Ironically, he won an Australian Writers' Guild award for the screenplay.

Jan Sardi appeared before the Senate Legal and Constitutional Legislation Committee to give evidence about the introduction of the Copyright Amendment Bill 1997 (Cth).[7] He was angry that directors and producers were defined as the authors of film in the legislation, but screenwriters were excluded from this status. Jan Sardi asked a rhetorical question of Chris Creswell, the assistant secretary of the Intellectual Property Branch:

> "I am sure the Attorney-General's Department did a lot of homework and looked at all the different legislation around the world, but they got it badly wrong. Did you at all look at a script to see what was on the script, Mr Creswell?"[8]

His point is that the drafters of the Bill did not

[3] M Salokannel, "Film Authorship in the Changing Audio-visual Environment" in B Sherman and A Strowel (eds), *Of Authors and Origins: Essays on Copyright Law* (Clarendon Press, Oxford, 1994), p 57.

[4] J Gaines, *Contested Culture: The Image, the Voice and the Law* (British Film Industry Publishing, London, 1992).

[5] C Lury, *Cultural Rights: Technology, Legality and Personality* (Routledge, London and New York, 1993).

[6] M Rimmer, "Supplementary Correspondence from Jan Sardi", Melbourne, 28 November 2000.

[7] Senate Legal and Constitutional Legislation Committee, *Copyright Amendment Bill No 1* (Parliament House, Canberra, 1997).

[8] Senate Legal and Constitutional Legislation Committee, "Public Hearings: Copyright Amendment Bill No 1" (Monday, 18 August 1997), p 22.

pay enough attention to matters external to legal knowledge – like the aesthetics of film scripts, and the division of labour in the film industry.

In its submission, the Guild acknowledged that under the provisions of the Bill, writers were accorded moral rights in the film script. The Guild maintained that moral rights in the script were not enough. In an interview, Jan Sardi reflected:

"Screenplays are not written to be read. They are written to be seen ... The screenplay is not the film. I would not get any satisfaction out of telling people, 'Why don't you come round to my place for a reading of my screenplay, *Shine*?' "[9]

Even so, there is a growing market for film scripts. For instance, Bloomsbury Paperbacks published the screenplay for *Shine* by Jan Sardi in the wake of the film's success. However, it is difficult to appreciate screenplays in and of themselves because they need to be performed and directed. As the film critic Adrian Martin comments: "Scripts rarely hold up as literary objects, because they are mere skeletons without flesh, tales without poetry or metaphor, figures without life."[10]

In his evidence to the Committee, Jan Sardi argued that there was a personal and inherent connection between the writer and the film. He illustrated his point with a page from the screenplay of the Oscar-winning film *Shine*:

> "The screenplay is the film on the page ... People often just think maybe writers write the story or they just write some dialogue. There is some dialogue there, there are also visual effects, there are sound effects, there is some lighting, there are special effects, there is make-up, there is music, there is editing, and there is also the narrative device obviously to move the story along. That is the scene in the film where David Helfgott collapses on the stage. I sat down and that came from here, okay. I had to type that, and I was thinking when a writer writes they write in a sense with the film happening up in the head, and what you are doing is, you are putting it down in order for people to be able to interpret that and to realise that, and the entire production process is that, basically. It is trying to realise the intentions of the screenplay."[11]

Jan Sardi claims that screenwriters deserve moral rights on the grounds that they are creators and originators. He notes: "In 90% of cases, the writer is the only genuine creator in the Oxford Dictionary definition of the word, which is to create something out of nothing."[12] However, in the case of the film *Shine*, it was the director Scott Hicks who first came up with the idea of the story for the film.

Jan Sardi maintains that screenwriters are indispensable in the process of film-making. He glosses over the corporate and collaborative nature of writing that is characteristic of Hollywood film studios.[13] It is rare for a screenwriter to exercise control over a work. It is common for them to be subject to editors and script doctors. Furthermore, screenwriters are liable to be replaced if the director, the producer, or the financiers are unhappy with the script. Witness, for instance, what happened in the case of the film adaptation of the novel, *The Year of Living Dangerously*. The author of the novel, and the screenwriter of the film script, Christopher Koch, was at loggerheads with the director, Peter Weir, over the presence accorded to one of the characters, Mel Gibson. As a result, a new scriptwriter, David Williamson, was brought in to rewrite the film script. Another good example is the film about the concert pianist, Percy Grainger, called *Passion*. Peter Goldsworthy, Peter Duncan, and Don Watson successively worked on the film script. It seems to be the case that screenwriters are treated just like any other employee or independent contractor who are hired and fired depending on their performance.

Jan Sardi was also critical about the waiver provision in the legislation. The clause provided that the creator could waive all or any of his or her moral rights for the benefit of everyone, a particular person or persons or a particular class of persons.[14] Jan Sardi said in an interview with Rebecca

[9] M Rimmer, "Interview with Jan Sardi", Melbourne, 30 April 1999.

[10] A Martin, "Making a Bad Script Worse: The Curse of the Scriptwriting Manual" (1999) 209 *Australian Book Review* 23 at 25.

[11] Senate Legal and Constitutional Legislation Committee, op cit n 7.

[12] Rimmer, op cit n 9.

[13] I Hamilton, *Writers in Hollywood 1915-1951* (Harper and Row Publishers, New York, 1990).

[14] Senate Legal and Constitutional Legislation Committee, op cit n 7.

Goreman:

> "Well, it just seems absurd that here we are with this legislation being introduced in order to protect artistic integrity, and then we have a waiver provision to take it away. If they're allowing people to waive their rights to artistic integrity, why have the legislation? It's a Clayton's law otherwise, it's nonsense. It's the law you have when you don't want to have a law."[15]

Jan Sardi was concerned that financiers spread misinformation that screenwriters were "film vandals" who would disrupt and interfere with the production and distribution of Australian film and television. He maintained that screenwriters should be included in the inner circle of policy-makers in the film industry.

In addition to such parliamentary submissions, the Guild also used the media as a platform to persuade the public of the rightness and correctness of its views. It relied upon stars and celebrities to broadcast its views in a range of different media. As a leading representative of the Guild, Jan Sardi was heavily involved in the public debate over moral rights. He spoke with Rebecca Goreman on the radio program PM, appeared on the television arts program "Express", and wrote letters to *The Sydney Morning Herald*. His arguments were also displayed upon a web site maintained by the Guild. The Guild made public letters it sent to the Prime Minister, John Howard, and the Minister for the Arts, Senator Alston.[16] It maintained that "writers have been denied their moral rights because of pressure from United States interests".[17] The Guild also picketed the opening of the Sydney Film Festival opening in 1998 to step up political pressure over moral rights.[18] It staged this media event to attract coverage of the issue. The Guild hoped that such attention would force the Federal Government to reconsider its policy about moral rights.

The Copyright Amendment (Moral Rights) Act 2000 (Cth)

Under pressure from the Guild, the Federal Government withdrew the section on moral rights until there was further industry debate and discussion.

The vice-president of the Guild, Ian David, put forward a compromise.[19] He submitted that authorship should be shared between the screenwriter, the director, and the producer where there was genuine collaboration in a film. He also said that the waiver provisions should be removed in return for an industry agreement stipulating what industry practices will be consented to. There has been industry discussion about this proposal. Other professional associations have also been involved.

The Federal Government essentially accepted the proposal put forward by the film and television industry. It has passed the *Copyright Amendment (Moral Rights) Act* 2000 (Cth). The Guild has provided affirmative public support to the Federal Government for accepting the proposals. The president of the Guild, Mac Gudgeon, said it was a great day for writers:

> "The legislation reflects the collaborative nature of film-making. Australia has a vibrant television and film industry which relies heavily on the creative talents of its writers, producers, and directors. These talents should be nurtured, recognised and celebrated – moral rights provide a framework in which this can be achieved. It provides a reasonable and workable solution that creates certainty for all parties."[20]

Ian David called it "World-beating legislation for a common law country" that represented a new era for Australia's writers and creators.[21] He envisaged, "We will now see in a new century feeling better, stronger and more confident as creators and Australians".[22] Such public indorsements reflect the involvement of the Guild in the drafting of the legislation. However, it is not clear whether the screenwriters have necessarily won the struggle.

First, the Federal Government accepted the

[15] R Goreman, "Interview with Jan Sardi", PM Program, Australian Broadcasting Corporation, 20 June 1997.
[16] L Martin, "Writers Plan to Picket", *The Sydney Morning Herald*, 3 June 1998, p 19.
[17] Ibid.
[18] Ibid.
[19] G. Coslovich, "Writing the Wrongs", *The Age*, 29 September 1998.
[20] Staff Reporter, "Artists to Win Rights", *The Sydney Morning Herald*, 10 December 1999, p 15.
[21] Ibid.
[22] Ibid.

recommendation of the Senate Committee that the writers of scripts for film and television should be considered authors of the film or television program alongside the authors designated by the original legislation – namely the producer and the director.[23] In practice, this proposal will have a different operation between television and film. Producers would be able to claim co-authorship in the case of a television series if they created the characters and storyline, or assumed responsibility for the visual style and casting. However, producers would be able to claim co-authorship in the case of documentaries, mini-series and feature films if they were initially involved in the making of the film.

Secondly, the Federal Government has given legal recognition to co-authorship agreements.[24] It seems that screenwriters can only take moral rights action with the consent of the other authors – namely the director and the producer. This means that they would be unable to take action against their collaborators in situations of conflict and disagreement. Take for, instance, the experience that made Jan Sardi so aware of the need for the reform of moral rights. It was a situation in which the screenwriter was pitted against the director and the producer of a film. There would have been no recourse to legal action if the moral rights compromise proposal had been in existence during this conflict. The proposal also raises the prospect that the producer would be able to stymie any moral rights actions against parties – such as the financiers, and the distributor.

Thirdly, the Federal Government dropped the waiver provisions completely from the legislation. It accepted the argument of creators that the waiver provisions were a means by which economically powerful users of their works could force them to give up these new rights altogether. The Federal Government has clarified the effect of the consent provisions.[25] It establishes that it is not an infringement of a moral right of an author if the act or omission is within the scope of a written consent given by an author. The Federal Government addressed concerns that powerful parties could abuse the consent provisions. It provided that duress or false and misleading statements would invalidate consent.[26]

Fourthly, the Federal Government has added to the original legislation by including any relevant voluntary code of practice as a factor to be taken into account in the test of reasonableness. This is the case for both the right of attribution and the right of integrity.[27] The Federal Government gives effect to the film and television agreement, which stipulates what behaviour is reasonable. For instance, activities such as putting commercials on television, and cutting films to fit time-slot requirements were considered to be acceptable. The circumstances in which a moral rights action could be brought seem to be extremely limited. It would appear that it would only be possible to bring a legal action in relation to serious breaches of moral rights.

Fifthly, the Federal Government added to the original legislation by including a requirement that, before granting an injunction, a court must consider whether to give the parties an opportunity to reach a settlement by negotiation or mediation.[28] It seems that legal action may only be taken as a last resort after the processes of mediation and alternative dispute resolution are exhausted. There is a danger that the co-authors will succumb to pressure from parties with superior bargaining power in this process. It is arguable that the moral rights legislation will serve a symbolic, rather than a practical purpose. What will happen in reality is that bargaining will take place under the shadow of the legislation. Only a few intractable disputes in the area of film will reach the courts.

Sixthly, the Federal Government has taken heed of consultations about the duration of the new moral rights. The author's right of integrity in relation to film expires with the death of the author.[29] By contrast, the author's right of integrity in relation to

[23] Section 191 of the *Copyright Amendment (Moral Rights) Act* 2000 (Cth).
[24] Section 195AN(4) of the *Copyright Amendment (Moral Rights) Act* 2000 (Cth).
[25] Section 195AWA of the *Copyright Amendment (Moral Rights) Act* 2000 (Cth).
[26] Section 195AWB of the *Copyright Amendment (Moral Rights) Act* 2000 (Cth).
[27] Section 195AR(3)(g) and s 195AS(3)(g) of the *Copyright Amendment (Moral Rights) Act* 2000 (Cth).
[28] Section 195AZA(3) of the *Copyright Amendment (Moral Rights) Act* 2000 (Cth).
[29] Section 195AM(1) of the *Copyright Amendment (Moral Rights) Act* 2000 (Cth).

other copyright works continues in force until copyright ceases to subsist in a work.[30] Furthermore the right of attribution and the right against false attribution also continue in force until copyright ceases to subsist in a work.[31] This double standard can be explained by the special pleading of the film industry. Perhaps the idea is that anyone can judge whether there is proper attribution, but only the author can judge matters of personal integrity.

The efforts of the film industry to regulate the effects of moral rights will no doubt encourage other copyright industries to engage in special pleading. In particular, the music industry will no doubt rely upon contract law to protect themselves from moral rights actions from disgruntled composers and musicians. It will also have the internal discipline to negotiate and impose an industry-wide agreement about consent and reasonable conduct.[32] It remains to be seen whether the publishing industry, galleries, performing arts companies, and the Internet community will have the cohesion and the organisation to impose industry agreements on their respective communities.

2. Celluloid heroes: the director

The director Scott Hicks was inspired to make the film *Shine* after reading an article by Samela Harris about David Helfgott for *The Adelaide Advertiser* in South Australia. He attempted to write a screenplay, which was called "The Flight of the Bumble Bee". However, Scott Hicks decided to bring in Jan Sardi in 1990 to get a fresh interpretation of David Helfgott's life story and write a new screenplay. He approached the producer Jane Scott to raise finance for the film. It took the producer a long time to obtain money from funding bodies and commercial organisations to finance the film.

Jane Scott incorporated a new company called Momentum Films in order to make the film *Shine*. She thought that this model provided protection in the form of limited liability. Jane Scott made Scott Hicks a director of Momentum Films. She believed that this partnership allowed for a sharing of copyright ownership and royalties. Jane Scott talks about the nature of this relationship:

> "Economically, these things have to be set out very clearly on paper both with the writer and the director. I negotiate the deal with the writer's agent or the director's agent. It is a clear negotiation about fee and equity. They usually have some equity in the production and some share in the profits. From the creative point of view, you can only set out the working relationship on paper in an ideal form. In practice, it is a matter of personalities working together. I most prefer entering into a partnership with the key people - whether it be the writer or the director. I make them a director of the company, so they are very much a part of the whole thing. It is then really not a question of who has what. That seems to work very well. So Scott Hicks was a director of Momentum Films."[33]

Jane Scott has been using this method of partnership in the last seven years. She believes that the model of the corporation was a good way to define the responsibilities and obligations of the key creative team.

The film-makers attempted to protect the director's vision for *Shine* against outside interference. Jane Scott reflected that it was a matter of incredible negotiation to preserve the creative control of Scott Hicks. She sought to ensure that the studio who bought the film did not get any rights to cut the movie or re-edit it. Jane Scott was in a strong bargaining position because the film was successful at the Sundance Film Festival. She was able to secure the director's cut because of intense competition for the distribution rights in the United States. Scott Hicks reflected in his diaries:

> "We extract pledges from Fine Line: no cuts, strong P & A (prints and advertising budget), platform release (in three stages). They offer resources for Oscar push, consultation with us all down the line and US $2 million advance for Northern American rights … At last, we opt for Fine Line, excited and in trepidation. A

[30] Section 195AM(2) of the *Copyright Amendment (Moral Rights) Act* 2000 (Cth).

[31] Section 195AM(3) of the *Copyright Amendment (Moral Rights) Act* 2000 (Cth).

[32] Section 195AR(2)(f) and s 195AS(2)(f) of the *Copyright Amendment (Moral Rights) Act* 2000 (Cth).

[33] M Rimmer, "Interview with Jane Scott", Sydney, 29 July 1999.

handshake all round and Bollinger seal the deal. We have sold the North American rights for close to half the film's budget ($6 million)."[34]

The film-makers remained wary of the vision for the film being compromised by outsiders. The director was aghast at the suggestion from a representative at the Film Finance Corporation that the film should be market-tested by an American audience. He was concerned that the content of the film would be changed in light of the results of the preview.

Since the international success of the film *Shine*, the director Scott Hicks has become a leading spokesperson for the Australian Screen Directors Association (ASDA) because of his high media profile and status. He fought for directors to be included in the scheme for statutory royalties for the re-transmission of free-to-air broadcasts on pay television in the introduction of the *Copyright Amendment (Digital Agenda) Act* 2000 (Cth). This was part of a larger campaign by directors to gain recognition as copyright authors in respect of economic rights as well as moral rights.

ASDA argued that the director was not recognised as the author of a film because the Australian film industry was in its infancy when the *Copyright Act* 1968 (Cth) was passed through Parliament. There was no understanding of the film director's craft and there was no professional guild or lobby group for directors. ASDA submitted that the director deserved the title of authorship because of the nature of the film industry and professional organisation:

> "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 Luhrmann, Scott Hicks, Jane Campion, George Miller, PJ Hogan, Jocelyn Moorhouse, Fred Schepsi, John Duigan, Gillian Armstrong, and Phil Noyce."[35]

ASDA glories in a golden age of national cinema. It evokes such great films as *Picnic at Hanging Rock*, *The Chant of Jimmy Blacksmith*, *Mad Max*, *Proof*, *The Year My Voice Broke*, *Muriel's Wedding*, *Strictly Ballroom* and *The Piano*. The underlying message is that Australian directors deserve the status of authorship, because they are responsible for the success of the film industry.

In a powerful account of auteur theory, ASDA argues that the director is the author of a cinematographic film. It submits that the director is the principal creative contributor to a cinematographic film because directors control what appears in the frame: sets, lighting, costume, acting, music, the behaviour of the figures, and the staging of the scenes.[36] ASDA denies that the film director is merely a technician who interprets the work of others:

> "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."[37]

ASDA asserts that directors deserve the status of authorship, because they stamp a distinctive visual appearance on a film. There is a personal connection between the director and the images of the film. In contrast to the claims of script writers, ASDA emphasises that narrative is subordinate to the spectacle of a film. It insists that cinema is primarily a medium of images. According to this perspective, the writing of the screenwriter is merely secondary to the work of the director in creating the spectacle of the film.

However, ASDA is wrong to assert that the idea that the director is the author of the film commands universal acceptance in the film community. There is some doubt whether the auteur theory should provide the basis for a legal model for authorship.[38] In the making of the film *Shine*, the director Scott Hicks eschewed the role of the auteur. He generously stressed the efforts of his collaborators –

[34] S Hicks, "From Sundance to Golden Globes: How Shine Seduced Hollywood" in R Caputo and G Burton, *Second Take: Australian Film-makers Talk* (Allen and Unwin, Sydney, 1999), p 305.

[35] Australian Screen Directors Association, *Submission to the House of Representatives Standing Committee on Legal and Constitutional Affairs* (Parliament House, Canberra, 1 October 1999).

[36] S Wallace, *Auteur or Author? Moral Rights and the Film Industry* (Arts Law Centre of Australia, Sydney, 1994).

[37] Australian Screen Directors Association, op cit n 35.

[38] M Cooper, "Moral Rights and the Australian Film and Television Industries" (1997) 15 (4) *Copyright Reporter* 166.

the screenwriter, the producer, the cinematographer, and the individual members of the cast. Scott Hicks was modest about his own contributions to the film. His vision of film-making was essentially a co-operative, collaborative model. So a much more realistic model would recognise that authorship is shared between the director and other key creative contributors, such as the screenwriter and the producer.

ASDA claimed that the trend in simplifying copyright law was towards acknowledging that film was a creative work.[39] It noted that the Copyright Law Review Committee said that films should be protected at the higher level of "creations", and television programs as mere "productions". ASDA also sought to exploit the fact that the *Copyright Amendment (Moral Rights) Act* 2000 (Cth) recognised that the director was an author of a film. It submitted that it is inconsistent and ambiguous to amend legislation to provide authorship status for a director for moral rights but not for economic rights.

The Screen Producers Association (the Association) claimed that there was a clear understanding that the establishment of moral rights did not amount to a precedent for the extension of economic rights. It argued that giving directors an economic right in the film would have an adverse impact on financing of productions, industrial relations, and the management of intellectual property. The Association argued that remuneration for directors is adequately dealt with through industrial awards and commercial negotiations. They further argued that the Bill was an inappropriate place to make the significant changes to Australia's copyright and intellectual property rules that director's copyright entails. However, it is questionable whether the economic and moral rights of directors are adequately dealt with under contract law.

Witness what happened in the case of the film *Brazil*, written and directed by Terry Gilliam, the Monty Python animator.[40] He shot the approved script, and brought the film within schedule and within budget. Universal invested $9 million in exchange for the North American distribution rights. It was unhappy with the ending of the film because of a belief that the dark conclusion was uncommercial. Using the contractual provision governing the film's length as a ploy, Universal compelled Terry Gilliam to make further cuts and to re-edit the film. Terry Gilliam agreed to trim the film further, but he refused to alter the ending. In response, Universal declined to release Gilliam's version of the film and threatened to release a studio cut of *Brazil*. However, Terry Gilliam enlisted the aid of sympathetic columnists and film critics who aroused public sympathy and finally obtained the acquiescence of Universal. The case suggests that the power of the director was based in the media, rather in the legal system.

Given the vagaries of bargaining with powerful parties under contract law, ASDA lobbied the Federal Government over including directors as beneficiaries of the re-transmission scheme. Scott Hicks played a key role in this campaign. He presented the keynote speech to the annual conference of the professional organisation in Wollongong, 1999. Scott Hicks used the opportunity to express his worries about the continued erosion of the director's position in Australia, with battles on such issues as moral rights, residuals and credits. Scott Hicks commented, "We haven't really devised the same sort of mechanisms to nurture and nourish the director that we have for writers".[41] He emphasised to the Minister for the Arts, Peter McGauran, that the position of the director must be respected in Australia.

In the Advisory Report on the *Copyright Amendment (Digital Agenda) Bill* 1999 (Cth), the House of Representatives Committee was persuaded by the arguments put forward by ASDA.[42] It recommended that the proposed Pt VC of the Bill be amended to include film directors amongst the class of underlying rights holders who are to receive

[39] Copyright Law Review Committee, *Simplification of The Copyright Act 1968: Part 2. Rights and Subject Matter* (Attorney-General's Department, Canberra, 1999).

[40] R Carmenaty, "Terry Gilliam's Brazil: A Film Director's Quest for Artistic Integrity in a Moral Rights Vacuum" (1989) 4 *Columbia VLA Journal of Law and The Arts* 91.

[41] G Maddox, "Taking Shine to Hollywood", *The Sydney Morning Herald*, 11 October 1999, p 15.

[42] House of Representatives Standing Committee on Legal and Constitutional Affairs, *Advisory Report on The Copyright Amendment (Digital Agenda) Bill 1999* (Australian Parliament, Canberra, 1999), pp 92-93.

remuneration under the statutory scheme. However, ASDA failed to take into account divisions within the Federal Government. The executive and the bureaucracy did not agree with the views of the Parliamentary committee.

The Federal Government rejected the recommendation from the bipartisan House of Representatives Committee looking at the scheme.[43] It excluded directors from the proposed legislation on cable re-transmission of free-to-air television. After the Federal Government rejected their proposal, the directors could only obtain the support of the Labor Opposition. The Democrats refused to support the proposals of ASDA because the amendments were badly drafted. Scott Hicks was dismayed at the exclusion:

> "There is a fundamental principle at stake here – that directing is a creative act and produces intellectual property, for which directors should be rewarded in the same way as any other creator".[44]

He believed that Australia was in danger of becoming an international laughing stock as a result of the legislation's failure to recognise the creative contributions of directors. However, the Federal Government has publicly called for submissions on the issue of whether copyright law should recognise the creative contribution of film directors.[45] It will provide another chance for ASDA to press its case.

3. Pandora's box: the producer

The producer Jane Scott had great difficulties raising the finance for the film *Shine*. Scott Hicks reflected that funding for the project fell through on a number of occasions:

> "The project did come seriously close to having the lid nailed down two or three times. But every time it was almost financed, and then fell over again, I'd reassess. And I'd pick up the script and reread it again, and it said and did the same things to me, and somehow I'd find the resolve and the drive to stay with it."[46]

However, Jane Scott remained determined in her efforts to find financial partners who were willing to fund the production of the film *Shine*.

Ronin Films expressed interest in becoming the Australasian distributor and the Film Finance Corporation began to talk of getting behind the project too. "In the early stages this encouragement was crucial", said Jane Scott. "It kept the project alive."[47] However, there was a need to raise finance from overseas. Jane Scott observed that the size of the budget – about $6 million dollars – made it necessary to get pre-sales finance from overseas sales agents and distributors:

> "A low budget would have been easier to finance but the film would have been harder to make properly. A higher budget meant going overseas for a bigger proportion of the finance, which was immediately more challenging."[48]

Scott Hicks resented the fact that the Australian Film Finance Corporation compelled Momentum Films to bring in another financing company from outside Australia. He made some pointed comments on the need for film-makers to share in the profits of their success. Had the Film Finance Corporation not brought in an extra financing partner, he and producer Jane Scott would have earned enough from *Shine*'s international success to establish a company to develop projects – another Kennedy Miller.

The film-makers entered into a deal with Pandora Cinemas, a film distribution company incorporated in Luxembourg and based in France. They reserved for themselves distribution rights throughout Australasia and the United Kingdom; and granted Pandora distribution rights throughout the world. The film-makers were ambivalent about the involvement of Pandora Cinema. The producer Jane Scott was appreciative that the involvement of the distributor made it possible to make the film *Shine*:

> "Once Pandora came in it triggered the rest. The Film Finance Corporation, the British Broadcasting Commission and South Australian Film Commission, and Film Victoria. It was quite a mixed bag. At one point I was dealing

[43] J Harty, "Directors Dropped from Rights Scheme", *Encore*, 28 June 2000.
[44] Ibid.
[45] Department of Communications, Information Technology and the Arts, "Film Directors – Consultation on Copyright" (2000) 32 *Copyrites* 15.
[46] J Sardi and S Hicks, *Shine: The Screenplay* (Bloomsbury Publishing, London, 1997), p 145.
[47] Ibid.
[48] Ibid.

with eighteen different lawyers."[49]

However, she had some reservations about whether the distributor would be reliable in passing on the money to Momentum Films.

Jane Scott discovered that the royalty returns from Pandora Cinemas were wrong. She filed suit in 1998 in Sydney's Supreme Court, saying that on her reading of the pact with Pandora, the French group owed her money:

> "I believe there's a discrepancy in the way in which Pandora is reporting and so I'm taking them to court. It sits sadly and in this case I'm forced into this position."[50]

Momentum Films were able to bring this action because of the success of the film and the support of Australian film finance bodies. Pandora Films filed a suit over jurisdiction in the United Kingdom and counter-sued Jane Scott, saying that on its reading of the contract, she owed them money. In response, Jane Scott dropped her Australian action and defended the mirror claim of Pandora. She thought that a judgment would be easier to enforce in a United Kingdom court than from an Australian court. A tactical decision was taken that it was better to sue Pandora Films in Europe where the company was located.

In *Pandora Investment SA v Momentum Films*, Justice David Steel of the High Court of Justice, Chancery Division, considered the proper construction of a written acquisition agreement made between the producer and the distributor.[51] The key provision was clause 5 of the agreement, which concerned the allocation of receipts between the parties. The parties agreed that clause 5(a) of the agreement dealt with the application of Pandora Investment's gross receipts. They also concurred that clause 5(b) dealt with the receipts of the owners as a result of distribution in Australasia and the United Kingdom. However, there was a division of opinion over the proper interpretation of clause 5(c) of the agreement.

In the Chancery Division of the High Court, Steel J rejected the interpretation of the contract put forward by Pandora Cinemas:

> "For my part, I am wholly unpersuaded that the owners' construction and the outcome just described can be categorised as commercial nonsense. It is true that if the owners' construction be right Pandora could have sought to negotiate a better deal where they were held harmless from contributing to the net production cost regardless of the time at which receipts reached the owners. But a bad deal, let alone a deal less advantageous than it might have been, is not an absurd deal. It may well be that Pandora sought to negotiate a better arrangement; maybe they did not; maybe they assumed that the film was likely to sell, if it all, in the United Kingdom and Australia and thus the risk of paying off the net cost was minimal."[52]

His Honour ruled in favour of Momentum Films, Scott's production company for Shine, validating its interpretation of the contract.

Pandora Films appealed against the decision of Steel J in respect of the *Shine* case on the grounds that his reading of the contract was incorrect or perverse. The chairman, Charles Bourguignon, denied that the distributor owed any outstanding monies to Momentum Films.[53] In response, Jane Scott retorted, "I am surprised they pursued this but I'm not surprised he might be re-writing history. Nobody likes to be proven wrong".[54]

In the end, three judges of the English Court of Appeal were unanimous in dismissing the appeal brought by Pandora Films.[55] Jane Scott confirmed that the film's Australian investors would now be able to recoup about $2 million dollars, up to half of which has been awarded as legal costs. She discussed the implications of the decision for film-makers:

> "I've been fighting this for a long time and I've been vindicated. The film has taken over $100 million, but very little of that has sifted through. *Shine* has well repaid the film's budget and has allowed a lot of people to make a lot of money on the way through, but certainly for myself at the bottom of the pile, it is difficult. Film-makers

[49] Ibid.

[50] M Woods, "Success Breeds 'Shine' Lawsuits" (1998) 370 *Variety* 18.

[51] *Pandora Investment SA v Momentum Films Pty Ltd* (unreported, High Court of Justice, 30 June 1998), p 9.

[52] Ibid.

[53] M Woods and N Tartaglione, "'Kolya' Suit Joins 'Shine' in Pandora Legal Tangles" (1998) 371 *Variety* 23.

[54] Ibid.

[55] *Pandora Investment SA v Momentum Films Pty Ltd* (unreported, Court of Appeal Civil Division, 17 December 1999).

also need to be kept financially liquid so they can go on and make more films."[56]

The result is significant because it is believed to be the first time that an Australian producer has launched a successful action against an international distributor or sales agent.

The legal dispute between Pandora Films and Momentum Films received a considerable amount of publicity. It received notable coverage in the film industry journals, *Variety* and *Encore*, and mainstream Australian newspapers, like *The Sydney Morning Herald*. Jane Scott believes that publicity is a good alternative to litigation. She observed that the controversy made it difficult for the owners of Pandora Films to sell the company. The chief executive of the Film Finance Corporation, Catriona Hughes, commented to the media:

"I believe the English Court of Appeal's decision confirms the legal position of the parties and I congratulate Jane Scott on her win. I regret that Jane had to go through this unnecessary court process for this vindication. The Film Finance Corporation will always support producers enforcing their rights, and our motivation in doing so goes beyond simply protecting our investment."[57]

The effect of the publicity was to send a warning to international distributors and sales agents to respect Australian film-makers.

The publicity also gave heart to other producers who were experiencing contractual and financial disagreements with Pandora Films. After the decision of the High Court of Justice in relation to Momentum Films, the producer of *Kolya*, Eric Abrahams, launched another writ on behalf of Portobello Pictures and Biograf Jan Sverak against Pandora Films.[58] The plaintiffs wanted their pact with Pandora Films terminated and damages paid for various alleged breaches of contract by Pandora. Areas of dispute included marketing expenditure and strategies, Pandora's inking of a first and last look deal on remakes, sequel and prequel rights with Miramax, and cross-collateral and recoupment matters. The film distributors Pandora Cinemas have decided to reach a settlement with Eric Abrahams. They do not want to take his case further to court.

The litigation highlights the need for greater protection of independent producers in contractual dealings with film distributors and international sales agents. Jane Scott has been instrumental in setting up an informal association of independent film and television producers. She drafted a petition to the Federal Government and canvassed the support of 19 other independent producers, including Tristram Miall of *Strictly Ballroom*, Helen Bowden of *Soft Fruit*, Martha Coleman of *Praise*, and Patricia Lovell of *Picnic At Hanging Rock*. The group has lobbied for greater funding from the Federal Government. Their statement observed that they themselves subsidise every production by relying on a working partner, another business or by mortgaging their home while they are developing their films and finding backers – a period, often several years, when there is more likelihood of failure than success. The film producers asked the Australian government to impose a tax on "offshore productions" or on movie tickets for non-Australian films. The money would be used to set up a fund that could be leveraged by local producers to help fund their movies. Such financial security would strengthen the bargaining position of Australian film producers in negotiations over the distribution of films overseas.

4. The ghost of Rachmaninov: the composer

David Hirschfelder was the musical director and composer for the film *Shine*. He recalls that the life and music of David Helfgott provided the inspiration for the work:

"On one occasion, we asked David to play a few bars of Rachmaninov and Liszt and he wouldn't do it. He kept on muttering to himself, 'Tragic fragments. Tragic fragments.'

I realised this music was bringing back bad memories for him and I said, 'No, David, these are not tragic fragments, but magic fragments'. His eyes lit up, he laughed and said, 'That's right, that's right. Accentuate the positive, accentuate the positive. Magic fragments: that's good, that's good', and he played the pieces straight away. The idea of 'tragic fragments' stuck in my head though, and, when I was

[56] L Martin, "Shine Investors Win $2m in British Court Battle", *The Sydney Morning Herald*, 7 July 1998, p 11.
[57] L Zion, "Short Cuts", *The Age*, 23 December 1999, p 4.
[58] Woods and Tartaglione, op cit n 53.

writing the score, here and there up popped these jarring, tangled, tragic chords, which I feel reflect David's state of mind."[59]

The musical composition for the film is a mixture of interpretations of the work of Liszt, Rachmaninov and others, and original compositions.

David Hirschfelder

In 1997, the composer David Hirschfelder lodged a writ at the County Court of Victoria over the soundtrack royalties for *Shine*.[60] He alleged that the agreed 2 per cent royalty on each soundtrack unit sold had not been paid by Momentum Films, and sought $200,000 damages in compensation. His solicitor Phil Dwyer said, "We say that he is entitled to a royalty calculated on a retail basis; they say he isn't".[61]

Jane Scott has settled this court action with the composer. The terms of the agreement are confidential. After the settlement with David Hirschfelder, Jane Scott said in a *Variety* interview:

"It all comes down to the interpretation of contracts. People pick up pieces of paper two years later with something else in their minds and the success of the film behind them."[62]

Jane Scott believes that there was a contract in respect of royalties for the soundtrack for the film *Shine*. However, the parties had different interpretations of that agreement in light of the success of the film *Shine*. Jane Scott believes that contracts are not fixed and immutable documents. They become negotiable documents, especially when a producer is dealing with a composer. It is difficult to draft a contract that will cover all of the contingencies and eventualities.

Jane Scott is exasperated by such legal disputes over copyright to musical works and sound recordings in relation to the film *Shine*. She points out that the main problem is that composers have licensed or assigned away their rights to the music to recording companies and musical companies. It is difficult to establish who has ownership of work. Jane Scott observes:

"This is a nightmare. Music is just awful. It is partly awful because most composers seem to have entered into a publishing deal with a music publishing company. I have had so much trouble with that. They are putting themselves outside any possibility of future negotiation. I never want to deal with a composer via a music publishing company. This was the case with *Shine* with David Hirschfelder and Polygram."[63]

Jane Scott makes the general observation that composers and managers often unwisely assign away their economic rights in musical works and sound recordings to recording companies and musical publishers. The litigation taken by composers and musicians such as George Michael, Elton John, and Holly Johnson from the band Frankie Goes To Hollywood demonstrates that it would be difficult for film composers to get out of agreements negotiated with recording companies and musical publishers.[64] The individual fights she has had with composers and musical publishers takes place against the background of an industry-wide struggle over the royalties paid in respect of soundtracks.[65]

Rachmaninov's estate

Jane Scott and David Hirschfelder faced claims that the use of the work of Sergei Rachmaninov in the film *Shine* was a breach of economic rights and the moral rights of the estate.

Economic rights

Jane Scott believed that the musical work of Sergei Rachmaninov would have fallen outside the period of copyright duration, which in Australia was for the life of the author plus 50 years. She noted that the film was made in 1996, more than 50

[59] D Moss, "Score: An Interview with David Hirschfelder" (1997) 122 *Cinema Papers* 18-21, 70.

[60] Staff Report, "Disharmony over Soundtrack", *The Sydney Morning Herald*, 19 February 1997, p 3; and F Magowan, "Shine: Musical Narratives and Narrative Scores" in R Coyle, (ed), *Screen Scores: Studies in Contemporary Australian Film Music* (Australian Film and Television School, Sydney, 1998), pp 118 and 120.

[61] Staff Report, ibid.

[62] Woods, op cit n 50.

[63] Rimmer, op cit n 33.

[64] *Schroeder Music Publishing Co Ltd v Macaulay* [1974] 1 WLR 1308; *O'Sullivan v Management Agency and Music Ltd* [1984] 3 WLR 448, *Panayiotou v Sony Music Entertainment (UK) Ltd* [1994] EMLR 229.

[65] *Phonographic Performance Company of Australia Limited v Federation of Australian Commercial Television Stations* (1998) 40 IPR 225.

years after the death of the composer Sergei Rachmaninov in 1943.

However, Jane Scott discovered at the end of the production that the musical work was still in copyright protection in certain countries such as France andGermany, where duration was for the life of the author plus 70 years.

Furthermore, Jane Scott also found that the United Kingdom had just extended the duration of copyright protection from the life of the author plus 50 years to 70 years in line with the European Union.[66] She had made the film and recorded the music in the no-man's land period between the 50-year end of copyright and the United Kingdom extension to 70 years of copyright.

Her lawyers believed that she had grounds for argument under *The Duration of Copyright and Rights in Performances Regulations* 1995. Regulation 23 protected Jane Scott against claims of copyright infringement on the grounds that she was pursuing arrangements – written agreements with financiers – to produce the film *Shine* which were made before the necessary date. Regulation 24 provided that a compulsory licence could be obtained in respect of revived copyrights subject to reasonable remuneration.

After obtaining this legal advice, Jane Scott refused to surrender to the demands of the music publishers for exorbitant royalties. She was able to negotiate a smaller payment of royalties, and sign off on a copyright licence with the musical publishers of Rachmaninov's work.

Moral rights

Alexandre Rachmaninov, the grandson of composer Sergei Rachmaninov, brought a moral rights action in France against the makers of *Shine*. He sought damages from Jane Scott, David Hirschfelder, the distributor Gaumont/BVI and the music publisher Polygram.[67] Alexandre Rachmaninov argued that the makers of the film *Shine* had infringed the moral right of attribution because his grandfather's music had received insufficient credit in the film and supporting materials, and claimed damages of more than five million francs ($1.25 million). He also argued that the makers of the film *Shine* had violated the moral right of integrity because the film's musical director, David Hirschfelder, had improperly fragmented and denigrated the composer's musical works in his adaptations.

Jane Scott was unable to dismiss the case on the procedural grounds that Alexandre Rachmaninov did not have standing to represent the relatives of the dead composer, so she had to contest the substantive claims that the film-makers had violated the moral rights of Sergei Rachmaninov.

First, Jane Scott claimed that the use of Rachmaninov's work in the film actually enhanced the honour and the reputation of the composer. The film gives the work of Rachmaninov the imprimatur of romantic greatness and genius. Take, for instance, the reverence with which the performers John Gielgud and Noah Taylor speak about his work in the course of the film.

Secondly, Jane Scott put forward evidence that the grandson benefited enormously from the use of Rachmaninov's music in the film *Shine* through royalties from the soundtrack, the sound recordings of Rachmaninov's music by other performers, and the increase in sales of sheet music.

Thirdly, Jane Scott argued that Alexandre Rachmaninov himself did not believe that the film *Shine* was in any way detrimental to the honour or reputation of his grandfather. He had taken out a large advertisement in trade paper *Variety* congratulating Geoffrey Rush for his Academy Award and others associated with the film. He had invited David Helfgott to the family home on Lake Geneva to play his grandfather's piano. He also spoke highly of the film while having tea at the Dorchester with David Helfgott's manager.

In the end, a Paris court threw out Alexandre Rachmaninov's moral rights case over the use of Serge Rachmaninov's music in the 1996 Australian film.[68] It dismissed the case and ordered the plaintiff

[66] G Dworkin, "Authorship of Films and the European Commission Proposals for Harmonising the Term of Copyright" (1993) 15 (5) *European Intellectual Property Review* 16; L Kurlantick, "Harmonization of Copyright Protection" (1994) 16 (11) *European Intellectual Property Review* 463; and J Antill, and P Coles, "Copyright Duration: The European Community Adopts 'Three Score Years and Ten'" (1996) 18 (7) *European Intellectual Property Review* 379.

[67] The music publisher Polygram passed in ownership from Philips to Universal.

[68] L Barber, "D Minor for Shine Lawsuit", *The Australian*, 14 June 2000, p 5.

to pay 10,000 francs in costs to the defendants, including production company Momentum Films. Jane Scott said that she was "totally relieved" by the decision, which ironically came after she had decided to settle the case out of court to stop it dragging on. However, the Rachmaninov family has appealed against the decision of the Paris court.[69] It is doubtful, though, that such an action will be successful.

The question arises: how would this case have fared if it had been brought under the proposed moral rights legislation in Australia? It is important to recognise that there are important differences between moral rights in civil law and common law countries.[70] The regime in Continental countries is quite robust. Alexandre Rachmaninov was able to bring an action for violation of moral rights in France, even though the outcome went against him. By contrast, the regime of moral rights proposed for Australia is but a pale imitation of the European system. It would have been difficult to bring an action for the violation of the moral right of attribution because of the operation of industry agreements. It would have been impossible for Alexandre Rachmaninov to bring an action for infringement of the moral right of integrity in Australia because the cause of action would have expired with the death of his grandfather. So the outcome of the litigation would have been the same whether it was brought in France or Australia. However, it is arguable that the process would have been quite different. Jane Scott could have been saved the legal uncertainty and financial hardship of defending such a case in the jurisdiction of Australia.

Conclusion

The film *Shine* was the subject of practical negotiations and litigation over the operation of copyright law. The artistic practitioners engaged in innovative, pragmatic strategies for dealing with the management of economic and moral rights under copyright law, and litigation over authorship and ownership.

The film *Shine* was also part of wider symbolic struggles over the reform of copyright law. The artistic practitioners sought to represent their guilds and unions in a competition over the monopoly of the right to determine the content of copyright law in respect of films.

For all of its internal struggle, the film industry has been united in its efforts to maintain its autonomy from other fields of cultural production. It has engaged in special pleading in relation to the reform of copyright law. It has demanded that film requires particular rules because of the collaborative nature of film-making, and the high levels of capital investment in the project. The independence of film runs against the simplification project of the Copyright Law Reform Committee which argues that creations should be treated alike.

[69] M Rimmer, "Supplementary Interview with Jane Scott", Sydney, 15 December 2000.

[70] J Ginsburg, "Moral Rights in a Common Law System" in P Anderson and D Saunders (eds), *Moral Rights Protection in a Copyright System* (Griffith University, Brisbane, 1992), p 13; J Ginsburg, "A Tale of Two Copyrights: Literary Property in Revolutionary France and America" in B Sherman and A Strowel (eds), *Of Authors and Origins: Essays on Copyright Law* (Clarendon Press, Oxford, 1994); and E Adeney, "The Moral Right of Integrity of Authorship: A Comparative View of Australia's Proposals to Date" (1998) 9 *Australian Intellectual Property Journal* 179.