



Australian Screen Directors Association

**Submission to Senate Legal and Constitutional
Committee on Copyright Amendment (Film
Directors' Rights) Bill 2005**

June 2005

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ASDA

The Australian Screen Directors Association is the peak film industry organisation that represents Australian film and television directors. It represents over 500 members nationally, who work across the genres of feature film, documentary, television drama, animation, television commercials and music videos.

FILM DIRECTOR'S RIGHTS BILL

ASDA welcomes the opportunity to make this submission to the Legal and Constitutional Committee in regards to the Film Directors Rights Bill.

ASDA welcomes the introduction of this Bill, if only because for the first time since the Copyright Act was introduced in 1968, Australian film directors are to have their claim to copyright recognition formally recognised. Directors see this as a significant development.

On this basis, ASDA commends the Government for introducing this legislation, despite what it imagines was strong, if somewhat predictable, opposition from producers, broadcasters and multinational film studios.

Furthermore, ASDA acknowledges the Government's leadership on this matter. For while there are many compelling arguments for recognising directors in this way, as well as many international precedents supporting directors' economic rights¹, this is an issue that the Government has supported because it has accepted the clear merits of the policy arguments. Unlike issues such as moral rights or performer's rights, for example, director's copyright legislation is not something that the Government is compelled to introduce because of international treaty obligations, nor because of the provisions of a free trade agreement. Rather, it is a Bill that has been introduced because the Government has identified a need to redress an injustice that has occurred because of a simple, historical oversight.

ASDA sees this bill as important symbolic recognition for film directors, and a sign of the regard that they are held in by this Government. Just as importantly it is a move that will finally allow directors to be part of the rights landscape, and a player in Australia's growing information economy. Moreover, ASDA believes it will not only allow directors to a rightful share in the films that they create in Australia but we hope will also open up greater export revenue streams for Australian directors from Europe and other territories.²

¹ These were covered in ASDA's 2000 Director's Copyright submission, which can be found in the White Papers section on ASDA's website: www.asdafilm.org.au

² ASDA, through its collecting affiliate ASDACS (Australian Screen Directors Authorship Collecting Society), has been collecting money for Australian directors from European collecting schemes for almost ten years. However, this money has always been at threat

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However, while ASDA welcomes this long overdue copyright recognition, it is nonetheless concerned that the proposal for a director's copyright, as outlined in the Bill itself, does not go far enough in recognising and rewarding the authorial role that the director plays in the creation of audiovisual works.

ASDA understands the Government's concerns about the need for a balance between the interests of creators and the interests of capital in its recognition of director's copyright. However, it would contend that, even with this Bill, this balance remains unfairly weighted against directors. This is because the Bill as it is currently drafted, allows directors to share in only one very limited right, the value of which has not yet been determined. Most fundamentally, it does not extend to directors the ability to negotiate for those rights that all other creative contributors can.

In ASDA's view, this is neither equitable nor consistent in policy terms.

ASDA submits that if the creative, authorial role of the director is not in dispute – and it does not appear to be so – then directors should, at the very least, be treated in the same way as other creators in relation to other statutory licensing schemes. In ASDA's view it is bad policy to discriminate against one creator, and continue to exclude them from existing schemes, merely because they have been unjustly excluded from copyright for over 35 years.

In a sense this is punishing them for having been excluded in the first place.

ASDA will continue to argue that directors are in fact entitled to even greater copyright recognition than that proposed under the Film Directors Copyright Bill (see summary of ASDA's 2000 proposal below). However, it submits that being able to negotiate for all statutory schemes that are open to other copyright creators is the very least that directors should be afforded.

ASDA'S DIRECTOR'S COPYRIGHT PROPOSAL 2000

ASDA made a specific proposal in relation to director's copyright in response to the Government's consultations with key film and television stakeholder in 2000.

ASDA's original proposal for the introduction of a film director's copyright (see reference below) used elements of both the UK model and the European model of authorship. It offered recognition and equitable remuneration for the director, while offering certainty to producers of all forms of audiovisual works.

because ASDACS cannot reciprocate due to the lack of copyright recognition of directors under Australian law. Moreover, it has been difficult to negotiate for money from certain European countries because of this inability to return the favour. Germany has recently agreed to a deal, somewhat reluctantly, however countries such as Spain and Italy remain intransigent. It is hoped that by getting directors access to Australian schemes, ASDACS will be able to undertake deals with these countries and shore up those deals that currently exist.

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In summary, the ASDA model proposed that the director be defined as an author of the cinematographic work.

The Director's primary economic rights – those that are necessary for the usual exploitation of the film – would be assumed to vest with the producer, unless there was a contractual agreement to the contrary. This automatic transfer would be accompanied by a statutory guarantee for the director to share in equitable remuneration from secondary rights (such as retransmission, blank tape and educational copying).

The main points of the proposal were as follows:

1. A cinematographic film would be defined as a 'work', as opposed to 'subject matter other than a work'
2. The principal director would be deemed to be the author of a film
3. Where there is a principal director, the primary economic rights in a film would be first co-owned by:
 - a. the director, or the assignee of the director's future copyright interest or the director's employer, and
 - b. the 'producer', or the person who commissioned the producer to produce the film, or the assignee of the producer's future copyright interest
1. The primary economic rights would be presumed to transfer to the producer, unless otherwise stipulated in the director's contract
2. The director would have an 'non-transferable' statutory right to claim equitable remuneration for secondary rights (such as retransmission, educational copying, and blank tape levies)
3. All other rights applying to films would remain the same, as would the exceptions to those rights
4. If there were no principal director credited for the making of a film, all copyright would be presumed to vest with the producer.
5. If the director were working as a full-time salaried employee, all copyright would be presumed to vest with the producer.
6. The new provisions would apply to films made after amending legislation comes into effect
7. There would be a savings provision for contracts and other arrangements, in existence at the time the amending legislation comes into effect, relating to films to be made or completed after the amending legislation comes into effect (similar to the UK legislation)

ASDA submission is available from the White Papers section of our website at <http://www.asdafilm.org.au/>.

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GOVERNMENT'S ELECTION POLICY

Following the 2000 industry consultations, the Government formally acknowledged the inconsistency in the Copyright Act that excluded directors from copyright remuneration or recognition, while at the same time offering creators such as writers and composers copyright protection.

In line with this determination, the Government has included the introduction of director's copyright as an election commitment in its two subsequent election platforms. In its 2004 election policy *Strengthening Australian Arts* it stated that:

The Coalition Government will amend the Copyright Act to give, for the first time, film directors rights to copyright in the films they direct.

ASDA's concern is that the current Bill does not appear to give effect to this policy. Nor does it achieve one of the key stated objectives of Government action, which is to "provide appropriate copyright recognition for the creative contribution of directors".

The election policy indicated the directors would be granted rights similar to other creators of artistic works. However, as it stands it offers directors one very limited right to a specific scheme, the value of which is still a matter of some dispute.

ASDA's concern, as stated earlier, is that does not give directors access to other statutory licences, such as the educational use statutory licence in Part VA and the government use statutory licence in Part VII. This seems to be an anomaly that is both inconsistent in policy terms and inequitable, because it treats directors differently to other creators.

EXPLANATORY MEMORANDUM – COPYRIGHT OPTIONS

There are five options for Government action mentioned in the Regulation Impact Statement that accompanies the Film Directors Rights Bill. These five can be reduced to three key groupings:

- A. Maintain Status quo (Option 1)
- B. Fundamentally alter the Copyright Act (Options 2 and 3)
- C. Undertake Minimal Changes to the Copyright Act (Options 4 and 5)

ASDA's 2000 proposal made broad recommendations for reform that would fall under the options covered in group B (there are elements of both Options 2 and 3 in ASDA's submission).

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However, the current Film Director's Bill (which is in line with Option 5) indicates that the Government is, at this stage, only willing to entertain minimal changes to the Act. Given this, ASDA will focus on Options 4 and 5, and the arguments as to why the latter is the preferred option of the two.

It appears clear that the Government's reason for currently favouring Option 5 – which gives directors access to retransmission rights only – is to minimise the impact of any move recognising directors copyright. Other than completely maintaining status quo, it is the absolute minimal position that the Government could adopt.

In reaching this decision, the Government appears to have accepted the somewhat apocalyptic arguments by certain producers and copyright owners that the added complexity and cost of allowing directors to have access to educational copying remuneration under Part VA of the Copyright Act is too much to bear. That, somehow, having directors included will create an unfair and overwhelming burden on their businesses, threaten their economic viability, and create extreme uncertainty for investors.

ASDA refutes these arguments, on the following grounds:

- This is a rights industry, which is based on acquiring and assigning rights. This is the business that production companies and broadcasters engage in day-in, day-out. To argue that the industry would suddenly be debilitated by simply adding an extra claimant into the copyright mix is pushing the limits of credulity.

ASDA points to the UK, which has recently ushered in an entirely new rights regime for audiovisual works, yet has not been crippled by the burdens of greater complexity and uncertainty. And while there have been some vigorous industrial negotiations between UK directors and broadcasters regarding the value of certain 'unwaivable' rights in the UK, the fact remains that the industry is as healthy and viable as it would have been otherwise. (Downturns in any of the production sectors in the UK over the past five years have been caused by matters that have nothing to do with director's copyright recognition);

- Australian directors currently assign their copyright in contract, despite the fact that they do not actually have any.

Thus, anyone who believes that directors will suddenly be in a superior negotiating position with broadcasters and producers simply because of a newly acquired access to statutory licensing schemes is naïve in the extreme.

Directors may find themselves with a little more to negotiate, certainly, perhaps another small card to play. However, while APRA has protected the rights of composers for many years (well before television was introduced), it is worth noting very few screenwriters have the negotiating power to reserve their educational copying rights, which are summarily

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assigned in the contracting process. Most directors will find themselves in a similar situation, at least for the foreseeable future.

- Directors' fees are always a matter of negotiation, and some directors can earn significant fees for their work.

Nonetheless, it is fair to say that directors' fees in the Australian film and television production industry have, on the whole, either stayed stable or in some cases gone down over the past ten to twenty years.

It is too simplistic to argue, as some have, that "directors are adequately remunerated under existing industry arrangements". This is a blanket statement, which is not supported by any facts and could be argued no matter what directors' remuneration was.

- Giving directors the ability to negotiate for an additional right, in the way proposed under Option 4, does not alter the fundamental basis of the Australian copyright system. It does not undermine the ability of the producer to exploit and sell audiovisual works, nor their ability to return to investors.

ASDA submits that all of the arguments that it has heard against directors being given access to the Australian educational copying scheme are exaggerated and disproportionate. They should certainly not disqualify directors from being given access to rights that they have a justifiable claim to, and that they should have been given access to many years ago.

ASDA maintains that to extend the Bill in such a way would allow the Government to achieve its stated objectives in relation to the Bill, including providing appropriate copyright recognition for directors in Australia, but importantly would:

- largely maintain current financial arrangements for the Australian film industry,
- fully maintain the ability of producers to fully exploit films to recoup the cost of production and attract investors; and
- avoid any negative impact on consumers, user groups and society generally

OTHER ISSUES

No rights in commissioned films

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ASDA would also like to express its concern about the mention of "commissioned films" in the legislation, and is unclear about both the intention of this inclusion, and what the outcome is likely to be for directors.

The amendments as currently drafted would give directors an opportunity to be the owner of the retransmission right only in relation to films which are not commissioned. However, it is not clear to ASDA exactly what is meant by a 'commissioned' film.

Is a 'commissioned' film one of a 'corporate' nature, or can it include films that have been commissioned by broadcasters, distributors or producers?

Under the existing s98(3), copyright in a commissioned film vests in the commissioning party in the absence of any agreement to the contrary. Under the current law, the maker of a film may negotiate to retain copyright in a commissioned film. Proposed new s98(4) would deny directors that opportunity.

ASDA'S PROPOSED AMENDMENTS

If directors are to be granted only limited rights, ASDA submits that the following amendments, at the very least, should be made to the Bill:

(a) In proposed new s98(4), replace

"If the film is not a commissioned film, then the" with:

"The";

(b) In proposed new s98(6), replace

"the right to include the film in a retransmission of a free-to-air broadcast" with:

"rights subject to statutory licences under this Act including rights subject to Part VA, Part VC and Part VII."