Senate Legal and Constitutional Affairs Committee

Inquiry into the provisions of the Copyright Amendment (Film Directors' Rights) Bill 2005

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I am a lecturer in law and a specialist in intellectual property law in particular. I have researched on copyright-related issues since 1996, and since 2003 have been associated with the Intellectual Property Research Institute of Australia. This submission is made in my personal capacity, and not as Associate Director of IPRIA. The purpose of the submission is to provide some information and background on the legal issues involved in relation to directors' copyright interests in films.

The Effect of the Bill

In the *Copyright Amendment (Film Directors' Rights) Bill* 2005, the government has chosen to define the 'owner' of a film in 2 ways:

1. The first owner of copyright in **commissioned films** will be the person who commissioned the film;[1]
2. The first owner of copyright in a film which has *not* been commissioned will, however, depend on which copyright right is in issue:
    - The owner of copyright for most purposes will be the **maker** of the film, defined, in 22(4) as the 'person [or entity, eg company] by whom the arrangements necessary for the making of the film were undertaken', meaning the arrangements for the production of the first copy of the film.
    - The owner of copyright for the purposes of the scheme for equitable remuneration for retransmission will be:
        - The maker as defined in s 22(4), *and*
        - 'each director of the film' (new s 98(4))

The 'maker' is generally understood in Australian law to be the producer who arranges the production of the first negative or tape of the film, the '"the entrepreneur" who brought the work of the contributors to a successful issue'[2] (although, in some cases, copyright may go to some parties other than the official 'producer', depending on the facts of the case).

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[1] *Copyright Act* 1968 (Cth) s 98(3)

[2] Lahore, *Copyright and Designs* (LexisNexis Looseleaf), [20,145], quoting *Report of the Copyright Committee* , Cmnd 8662, HMSO, London, 1952, paras 102–3

What are the potential problems with this approach?

I wish to draw two potential problems with this approach to the attention of the Senate Committee. These are:

- The additional complications that may arise, as a practical matter, where the term ‘owner’ is defined differently for different purposes;
- The lack of harmony with other international copyright systems.

Multiple definitions of ‘owner’

It is possible that offering two different definitions of ‘owner’ in the Act may cause confusion and some legal drafting problems.

The Attorney-General’s Department appears to have adopted the view, in relation to both performers’ rights,[3] and here again in relation to directors’ interests in copyright, that it is better to split existing rights than to create ‘new’ rights in copyright.

It may be that such an approach is conceptually more satisfying than creating a new set of rights, and there are (as noted in the Explanatory Memorandum) reasons of statutory drafting that prevent an apparently simpler approach – like simply providing, in Part VC, that directors are to receive a share of any remuneration, subject to contract.

However, the Senate Committee should perhaps bear in mind that defining ‘owner’ in different ways for different purposes does lead to practical issues, arising from the fact that it is no longer possible to simply refer to the ‘owner’ of copyright in a film and be clear on what that means. For example:

- What happens when a contract between various parties refers to the ‘owner’ of copyright in a film? Do we read into the contract the different owners for different purposes?
- Legal advisers will have to qualify a simple term like ‘ownership’ of copyright in a film as a ‘term of art’ when talking to their creative clients. They won’t be able to simply advise their clients that they are, or aren’t, ‘owners’. A simple question like ‘who owns copyright in a film’ generates a complicated, not a simple response.

These practical costs do need to enter into the balance when thinking about the desirability of defining ownership the way that the government has.

[3] As a result of the *US Free Trade Agreement Implementation Act* 2004 (Cth), ownership of copyright in sound recordings is now split between the producer and the performers whose performances have been recorded: see *Copyright Act* 1968 (Cth) s 97. This is in fact particularly complicated owing to the need for transitional provisions which give different rights to different owners of copyright in the sound recording, depending on whether the recording was made pre- or post-1 January 2005: see *Copyright Act* Part IV Div 5B. Fortunately, transitional provisions were not required in relation to directors’ rights.

Lack of harmony with the position worldwide

The second issue which the Senate Committee should bear in mind in any consideration of the Bill is that the bill defines a unique Australian position – out of harmony with the law in all significant jurisdictions of which I am aware.

There is, in fact, a lack of international harmony on this issue generally. Because no existing multilateral (or bilateral) treaty sets down requirements for who owns copyright in films,[4] different countries have adopted quite different approaches.

The first approach is the approach of the Continental European countries, which have, historically, treated directors as the primary creators of films, and as first owners of copyright.

The second approach is that of Anglo-Australian systems, which have tended to define the owner of copyright in film to be the producer – the investor who brings all contributions together. This is currently the position in Australia, and was the position in the UK until 1996.[5] The justification for this position is twofold:

- First, there are multiple contributors to a film: no single author or group of authors is truly the 'author' of the film considered as a work in itself;[6]
- Second, such an approach concentrates ownership in the hands of the person best placed to exploit the copyright: having too many owners makes exploitation and distribution difficult.

It is worth noting that the Australian (and, prior to 1996, the UK) position has been called 'surprising' by leading academics in this field.[7] In many copyright systems around the world, films are considered 'works', and the author of the film is the director of the film. As Ricketson and Creswell note,

> 'After all, it is the director who is ultimately responsible for the co-ordination and bringing together of the artistic and technical aspects of the film production process. Furthermore, the film director has long been given parity of status along with authors, artists and composers in the vast majority of cultural and legal traditions, whether Anglo-Australian or not…'[8]

Distinguishing only between these two approaches is, however, no longer accurate. Internationally, the position has in recent times become more complex.

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[4] According to Article 14*bis* of the Berne Convention, authorship (and hence first copyright ownership) of a film is left to the national legislation of the country where protection is sought. Australia can, but is not obliged to, apply a presumption that ensures that the rights of those who make contributions towards a film move to the producer: Berne Convention, Article 14*bis*(2)(b) and (c).

[5] Note that Canada, on the other hand, treats a film as an original work, which means that the owner of copyright in the film is the 'author': see Canadian *Copyright Act* s 14.

[6] *Report of the Copyright Committee* , Cmnd 8662, HMSO, London, 1952, paras 102–3

[7] Sam Ricketson and Chris Creswell, *The Law of Intellectual Property: Copyright, Designs and Confidential Information* (Thomson/Lawbook Co Looseleaf), [8.60]

[8] Ibid.

In Europe, as a result of several copyright-related Directives, Member States are now *required* to treat principal directors as the author (or one of the authors) of a film.[9] Importantly, as a result of this, the position in the United Kingdom has now changed. As a member of the European Union, the United Kingdom now recognises that a principal director is an owner of copyright in a film, along with the producer.[10]

The United States, to some extent, stands on its own. In the United States, a film (commonly referred to as an 'audio-visual work' or motion picture) is treated as an original work of authorship. This means that authorship, and hence first ownership, is treated under ordinary US copyright principles. This means that those who make a sufficiently significant creative contribution to the film are joint authors and joint owners of copyright in the film. The director would be one of these people, but in some cases a producer or even cinematographer or editor may be a joint author. Many, but by no means all films will be affected by the 'work made for hire' doctrine, in which case the 'the employer or other person for whom the work was prepared is considered the author … and, unless the parties have expressly agreed otherwise in a written instrument signed by them, owns all of the rights comprised in the copyright'.[11] To qualify as a work made for hire, however, this status does need to be agreed in written form.[12]

Under the bill, Australian law will strike out in a new direction, distinguishing between ownership for different purposes. As a result of this bill, the Australian position will be quite unlike the position anywhere else in the world that I am aware of:

- Like the United Kingdom, we will continue to recognise producers as owners of copyright in films, and like the United Kingdom, we will add directors as owners. But unlike the UK, we add directors only for certain purposes, and unlike the UK, we include *all* directors, not just principal directors;
- Like the US (and like Canada) we will treat films made on commission as owned by the commissioner, but unlike the US, for other films, we will treat the producer, not the creators of the film, as the owners of copyright for most purposes. (And unlike the US, we treat directors as having moral rights in films).
- Unlike many countries of the European Union, we will treat producers as the main owners of copyright for most purposes.

The bill thus adds to an already complex international system in relation to the position of directors, and, as a result, may add to the complexity of contractual dealings in this space. This may not be a reason to reject the bill, but it is an issue which should be weighed in the balance.

The Explanatory Memorandum states that a reason for not recognising directors as owners of copyright for purposes other than Part VC is that this would entail too significant a change to Australian law, and would upset industry practice. However, it is worth noting that in

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[9] *Council Directive 93/98/EEC harmonizing the term of protection of copyright and certain related rights,* O.J. L 290, 24/11/1993, p.0009-0013. See also Article 2(2) of the Rental Rights Directive (*Directive 92/100/EEC on rental right and lending right and on certain rights related to copyright in the field of intellectual property* (18 June 1992), O J L 346, 27.11.1992 p.61).

[10] *Copyright, Designs and Patents Act* 1988 s 9(2)(ab).

[11] 17 U.S.C. §201(b).

[12] 17 U.S.C. §101, Nimmer and Nimmer, *Nimmer on copyright : a treatise on the law of literary, musical and artistic property, and the protection of ideas,* §5.03[2][b].

Europe, there was similar considerable concern, including in particular from the United Kingdom, regarding the move to recognize a principal director as an author of a film. However, according to a report issued in 2002 by the European Commission, this concern has turned out to be unfounded. According to that report, "harmonisation has not caused any difficulties in practice", "[c]ontrary to concerns expressed before the adoption of Directive 92/100/EC".[13] As a result of the change, the report states, "[a]greements concerning the [sic] film production have been adapted to take account of the modified legislation and to provide a new basis upon which to build the exploitation of films."[14]

Waivability/transferability of rights

Under the Bill, all rights are transferable by contract. It may be of interest to the Committee to know that in many countries, certain rights granted to performers and authors, including directors, are made not waivable. This position is taken because:

> 'Authors and performing artists have long been recognised as the weaker party to transactions relating to the exploitation of their productions, for whom protective measures are necessary to prevent that they be unfairly or unreasonably disadvantaged. It is indeed no use granting rights to authors and performing artists if the latter are unable to draw from the exploitation of these rights all the benefits to which they are entitled under the law. … the legislature is asked to weigh the publishers' and producers' need for legal certainty in obtaining a broad transfer of rights against the social and economic impact that extensive transfers of rights will have on authors and performers.'[15]

Legislatures particularly in Europe have achieved this 'balancing' by allowing rights of exploitation to be transferred to producers, while preserving to authors (including directors) and performing artists some share of equitable remuneration schemes. For example, under the *Rental Rights* Directive,[16] a Member State can provide that a director is presumed to have transferred his or her rental right to a film producer when he or she concludes a contract for the production of a film. This presumption ensures that the producer when, and how, the right is to be exercised, and can exploit that right to the best economic advantage. However, the Directive *also* provides that where the author has assigned their rental right, s/he retains the remuneration right, which **cannot be waived**.[17]

In the US, rights are fully transferable, however, rights to remuneration for 'residuals' (uses of films subsequent to theatrical presentation) have been protected largely through collective action on the part of creative workers: creative workers in the United States are heavily

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[13] European Commission, *Report from the Commission to the Council, the European Parliament and the Economic and Social Committee on the question of authorship of cinematographic or audiovisual works in the Community,* 6 December 2002, Com(2002) 691 final at 10.

[14] Ibid at 10.

[15] L. Guilbault and P. Bernt Hugenholtz, *Study on the Conditions Applicable to Contracts Relating to Intellectual Property in the European Union*, Institute for Information Law, May 2002, pp.1-2

[16] *Directive 92/100/EEC on rental right and lending right and on certain rights related to copyright in the field of intellectual property* (18 June 1992), O J L 346, 27.11.1992 p.61

[17] Article 4, *Directive 92/100/EEC on rental right and lending right and on certain rights related to copyright in the field of intellectual property* (18 June 1992), O J L 346, 27.11.1992 p.61

unionized, and the significant power of the unions has led to the establishment of minimum conditions which include remuneration for residual uses.[18]

United Kingdom academic William Cornish has recommended that Anglo-American systems should take seriously the need to protect individual authors and creators, even while investors and producers are protected by various provisions under Copyright law.[19]

Please note that the purpose of this submission is not to advocate for such a position, merely to inform the Committee that there are alternatives to complete transferability of rights, even in Anglo-Australian systems such as the United Kingdom. Such systems need not interfere with the exploitation of copyright in films, if they are confined to provisions relating to schemes for remuneration. I have not considered in any detail whether such provisions would be consistent with the Australia-United States Free Trade Agreement.

Contact Details

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[18] See generally Richard E. Caves, *Creative Industries: Contracts Between Art and Commerce* (2000), 121, 134-135.

[19] W R Cornish, 'The Author as Risk-Sharer', 26 *Colum. J. L. & Arts* 1, 12 (2002)