Law Council
OF AUSTRALIA

Ms Joanne Towner
Committee Secretary
Senate Legal and Constitutional Committee
Department of the Senate
Parliament House
CANBERRA ACT 2600

Dear Ms Towner,

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

This submission is made by the Intellectual Property Committee of the Business Law Section of the Law Council of Australia ("the Committee").

Please note that these comments have been endorsed by the Business Law Section. However, owing to time constraints, the comments have not been considered by the Council of the Law Council of Australia.

The Committee does not take a position on the Bill, but has the following comments to make on the purposes and policies underlying the Bill.

First, the stated rationale for the amendments indicates that the policy basis for protecting cinematograph films under Australian copyright law requires clarification. The Explanatory Memorandum states that:

> "Film directors make a major creative contribution to the film making process. Other than moral rights, Australian copyright law does not currently recognize this contribution, while other creators involved in the making of a film such as screenwriters and composers are recognized. The Government considers that there is a need to amend the Copyright Act to give, for the first time, film directors a copyright in the films they direct."

In contrast to this broad statement of principle, however, the right proposed to be conferred on film directors is very narrow and limited. It is also unclear to the Committee what the costs and benefits of the new right would be. Under the proposed amendments, Australian film directors would be entitled to participate in royalty payments under Part VC of the *Copyright Act* 1968 ("the Act") and, possibly,

receive royalty payments from similar, overseas schemes. On the other hand, overseas film directors will also be entitled to receive royalty payments and distributions. The Committee notes that the Explanatory Memorandum considers it likely that payments to Australians will be greater than payments to overseas directors on the basis that, currently, more than 57% of material broadcast on Australia's free to air channels is Australian in origin. The Explanatory Memorandum does, however, describe the outcomes as 'speculative'.

Secondly, as the Senate Committee will be aware, cinematograph films are currently protected under Part IV of the Act. That is, they are protected as a producer's right on the basis of the investment made in production. They are not protected under Part III as original copyright works. International treaties to which Australia is party, including the Berne Convention and the TRIPS Agreement permit a country to protect films on either basis. Most European countries protect films as original works. Australia, other British Commonwealth countries and the USA protect them as producers' rights.

At the moment there is one exception in the Act to the treatment of films as producers' rights: directors along with individual producers are accorded moral rights. In contrast to the protection of films as a producer's right under the Act, therefore, the Bill would be the second explicit recognition of directors' authorial contribution to film-making under our law.

The distinction between Part III and Part IV rights has important practical consequences and is not just a matter of academic interest. For example, if a film were protected as a work of original authorship (i.e., a Part III work, not a Part IV subject matter), the authors of the film would be the first owners of copyright (subject to any written agreements to the contrary and other presumptions of transfer such as arise in the employer/employee relationship). In most, if not all, legal systems where films are protected as original works of authorship, <u>all</u> authors of the film – not just the principal director – are recognised as the first owners of the resulting copyright. This is reflected in the European Union's Directive on rental right and lending right by art.2(2) which specifies that the principal director shall be considered one of a film's authors, but member states may provide for others to be consider co-authors.

Some countries have a defined, closed list of categories of contributors who qualify as authors of the film. Other countries do not have a closed list and test authorship by the nature of the contribution to the overall result. The point, however, is that the copyright does not vest in the principal director only.

Thirdly, the Committee notes that the Explanatory Memorandum suggests that "screenwriters" and "composers" receive copyright protection in or over films. The protection they receive, however, is related to original works which are used in a film, not film copyright per se. As already noted, the copyright in a film under the Act currently vests in the producer or commissioning party. Any copyright screenwriters and composers receive is in respect of entirely different subject matter: original literary or dramatic works, in the case of screenwriters, and original musical works, in the case of composers. These types of works are protected under Part III of the Act.

Finally, if Parliament is not clear about the policy basis on which films are to receive protection under the *Copyright Act*, there is also a danger that there will be a proliferation of rights in a film which are not dealt with consistently and which, moreover, will greatly complicate dealing in films such as obtaining licences to exploit the film.

Accordingly, the Committee submits that Parliament should undertake a review of the policy basis on which films should be protected by copyright.

Yours sincerely,

Peter Webb.
Secretary-General

22 . June 2005