



ADG AND ASDACS SUBMISSION TO PRODUCTIVITY COMMISSION'S INQUIRY INTO AUSTRALIA'S INTELLECTUAL PROPERTY SYSTEM

26 November 2015

AUSTRALIAN DIRECTORS GUILD &
AUSTRALIAN SCREEN DIRECTORS AUTHORSHIP COLLECTION SOCIETY

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1. Who are we?

The Australian Directors Guild (**ADG**) is the industry association and union representing the interests of film and television directors, writers/directors, documentary film makers and animators throughout Australia. Formed in 1982, it has over 700 members nationally and has recently been registered as an association of employees under the *Fair Work (Registered Organisations) Act (Cth)* 2009.

The Australian Screen Directors Authorship Collecting Society (**ASDACS**) is a collecting society representing the interests of film and television directors, documentary filmmakers and animators throughout Australia and New Zealand. It was established in November 1995 in response to support from the French collecting society, SACD, which had collected the director's share for Australian directors for income arising from private copying schemes. The purpose of ASDACS is to collect, administer and distribute income for Australian screen directors arising from secondary use rights.

2. The Productivity Commission Inquiry

On 18 August 2015, the Australian Government announced the Productivity Commission Inquiry into Australia's intellectual property system (the **Inquiry**).¹ The relevant scope of the Inquiry (the **Terms of Reference**) is as follows:

The Australian Government wishes to ensure that the intellectual property system provides appropriate incentives for innovation, investment and the production of creative works while ensuring it does not unreasonably impede further innovation, competition, investment and access to goods and services. In undertaking the inquiry the Commission should:

1. Examine the effect of the scope and duration of protection afforded by Australia's intellectual property system on:
 - a. research and innovation, including freedom to build on existing innovation;
 - b. access to and cost of goods and services; and
 - c. competition, trade and investment.
2. Recommend changes to the current system that would improve the overall wellbeing of Australian society, which takes into account Australia's international trade obligations, including changes that would:
 - a. encourage creativity, investment and new innovation by individuals, businesses and through collaboration while not unduly restricting access to technologies and creative works;
 - b. allow access to an increased range of quality and value goods and services;
 - c. provide greater certainty to individuals and businesses as to whether they are likely to infringe the intellectual property rights of others; and
 - d. reduce the compliance and administrative costs associated with intellectual property rules.

¹ The Hon. Joe Hockey and the Hon. Bruce Billson, "Productivity Commission inquiry into Australia's intellectual property arrangements", *Media release*, 18 August 2015 at <http://jbh.ministers.treasury.gov.au/media-release/073-2015/> (accessed 22 September 2015).

In undertaking the inquiry and proposing changes, the Commission is to have regard to:

- a. Australia's international arrangements, including obligations accepted under bilateral, multilateral and regional trade agreements to which Australia is a party;
- b. the IP arrangements of Australia's top intellectual property trading partners and the experiences of these and other advanced economies in reforming their IP systems to ensure those systems meet the needs of the modern economy;
- c. the relative contribution of imported and domestically produced intellectual property to the Australian economy, for example to Australia's terms of trade and other economic impacts of IP protection, including on inward investment;
- d. the Government's desire to retain appropriate incentives for innovation and investment, including innovation that builds on existing work, and production of creative works;
- e. the economy-wide and distributional consequences of recommendations on changes to the existing intellectual property system, including on trade and competition;
- f. ensuring the intellectual property system will be efficient, effective and robust through time, in light of economic and technological changes;
- g. how proposed changes fit with, or may require changes to, other existing regulation or forms of assistance (such as research subsidies) currently providing incentives for the development of intellectual property;
- h. the findings and recommendations of the Harper Competition Policy Review in the context of the Australian Government's response, including recommendations related to parallel import restrictions in the Copyright Act 1968 and the parallel importation defence under the Trade Marks Act 1995; and
- i. the findings and recommendations of the Advisory Council on Intellectual Property's Review of the Innovation Patent System; the Senate Economics References Committee's inquiry into Australia's innovation system; and the Australian Law Reform Commission's Copyright and the Digital Economy report.

The Productivity Commission released its Issues Paper entitled *Intellectual Property Arrangements* in October 2015 (the **Issues Paper**).

The ADG and ASDACS submission to the Productivity Commission on the Issues Paper is set out below, covering the following areas:

1. The importance of intellectual property (IP), and more specifically copyright
2. The lack of incentives for creativity for screen directors in the form of copyright under the present IP arrangements
3. The need for copyright reform to recognise directors as authors of audio-visual works and ensure fair remuneration for their creative contribution.

3. The importance of copyright

At the outset, we support the submission of the Australian Copyright Council (**ACC**) in terms of the importance of IP, in particular copyright in Australia, both to creators and users. Copyright is a significant contributor to the Australian economy, with copyright industries assessed as the fourth

largest industry by PwC in a recent report.² Based on methodology designed by the World Intellectual Property Organization (**WIPO**) and utilising Australian Bureau of Statistics' data, the longitudinal study commissioned by the ACC highlighted that copyright industries make a significant contribution to the Australian economy, including through:³

- Employing over 1 million people, which constituted 8.7 per cent of the Australian workforce
- Generating economic value of \$111.4 billion, the equivalent of 7.1 per cent of gross domestic product (**GDP**)
- Creating over \$4.8 billion in exports, equal to 1.8 per cent of Australia's total exports.

4. Incentives for creativity - copyright

To what extent does copyright encourage additional creative works, and does the current law remain 'fit for purpose'?⁴

We applaud the Australian Government's statement that:⁵

The Australian Government wishes to ensure that the intellectual property system provides appropriate incentives for innovation, investment and the production of creative works...

Indeed, Australian screen directors make vital contributions to culture, diversity and economic growth in Australia. Directors are creative and talented individuals which form the basis of all film, television and dramatic productions. Their work brings people together in the form of entertainment, in addition to educating and building empathy in the community. Furthermore it instills an appreciation of history, Australian culture and our community's perspective on other cultures.

Australian television and film contribution to economy

The Australian screen industry contributed a total of \$5.8 billion in GDP, supported 46,600 full time jobs and contributed almost \$2 billion in tax revenues for the Australian economy - according to the 2012/13 report by Deloitte Access Economics released in February 2015.⁶

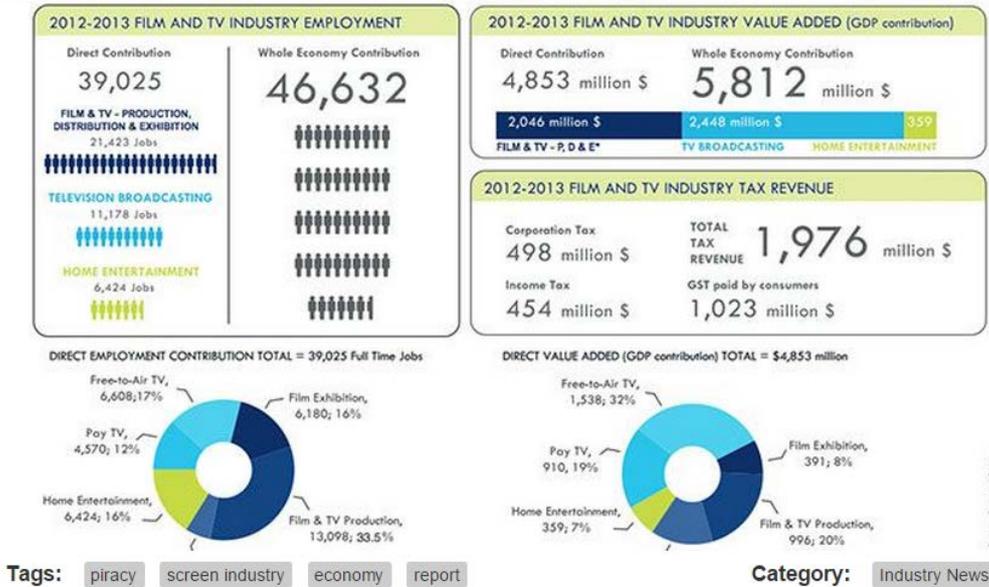
² PwC, *The Economic Contribution of Australia's Copyright Industries: 2002-2014*, 2015 available at: https://www.copyright.org.au/acc_prod/ACC/News_items/Copyright_Industries_continue_to_be_a_significant_contributor_to_the_Australian_Economy.aspx (accessed 20 November 2015).

³ Ibid.

⁴ Issues Paper, page 20.

⁵ Scope of the Terms of Reference.

⁶ Deloitte Access Economics, *Economic Contribution of the film and television in Australia*, February 2015 at http://www.screenassociation.com.au/uploads/reports/ASA_Economic_Contribution_Report.pdf.



As the ADG argued in its submission to the 2011 National Cultural Policy, more than any aspect of Australian life, screen culture dominates the cultural landscape and the director plays a key role in this regard. Quoting the ABS,⁷ 87 percent of Australians watched or listened to television for an average of under three hours a day totalling Australians aged over 15 years spending an average of 42 million hours watching or listening to television each day.

The critical role of directors

Australian screen directors are critical to the creation of cinematographic films. They make creative decisions about what will appear on the screen through input into creative elements such as the development of the script, the cinematography and its style, the casting and the acting style, the production design, the makeup and costumes, the lighting, the music and soundtrack, the editing and the grading of the final print.

The director also generally determines where the camera will be placed, the type of shot that will be constructed, whether the actors will be fully visible or obscured and plans how the shots will be cut together. The director also controls the rhythms of the film. In short, the talents and skills of a director bring the story a distinctive visual style and the unique ability to convey “their message” to the audience.

Lack of financial incentives for directors

Yet in contrast to this unique creative talent, an overwhelming amount of Australian screen directors are financially struggling particularly in relation to their counterparts in film production.

In a survey conducted in 2015 of the ADG’s full members:⁸

- 50 percent earn less than \$25,000 a year
- 19 percent earn between \$25,000-\$50,000 a year
- 11 percent earn between \$50,000 - \$70,000 a year

⁷ Australian Bureau of Statistics, *Arts and Culture in Australia: A Statistical Overview*, 2010.

⁸ This is based on the yearly applications for full membership to the Australian Directors Guild for 2014.

- Over 35 percent of these member directors have worked in the Australian film industry for more than 20 years and another 25 percent for more than 10 years.⁹

The lack of financial incentives for Australian screen directors is compounded by their lack of copyright ownership and thus bargaining power, which is further discussed below.

Lack of copyright ownership

The director has ultimate responsibility for creating the cinematographic film (which is the subject of copyright protection) using the individual creative contributions of, in most cases, a variety of people. Some of those other contributors will have separate copyright in underlying work (such as the script or the score). The director has no separate copyright in any underlying work and, currently no copyright in the film. Despite directors sharing the responsibility of making the film with the producer, their creative contribution is nowhere recognised.¹⁰

In Australia, a cinematographic film is protected as “other subject matter”. In contrast to many other jurisdictions, including most of Europe and the United Kingdom, South America and Hong Kong, the Australian *Copyright Act (Cth) 1968* (the **Act**) does not currently recognise directors as makers of films or as copyright owners in film.

Rather under the Act the ‘maker’ of a film is the person by whom the arrangements necessary for the making of the film were undertaken.¹¹ This is usually the producer. The maker of the film is normally the copyright owner of the film who has exclusive rights to:

- Make a copy of the film
- Cause the film to be shown or heard in public
- Communicate the film to the public including via broadcast and online.

Such exclusive rights enable the copyright owner, namely the producer, to control the use of the work in a way that provides the primary economic returns and are called the ‘primary economic rights’. Other key creators in films including producers, script writers and musicians have an entitlement to ongoing economic rights in their films and television programs.

Retransmission rights

Put simply, Australian screen directors do not have economic rights by virtue of the Act *except in relation to limited retransmission rights*. In 2005, the Australian Government agreed to look at the issue of extending a share of copyright in films to directors¹² and enacted the *Copyright Amendment (Film Directors’ Rights) Bill 2005* symbolically recognising directors as copyright owners for the purposes of the statutory retransmission scheme.¹³ This is an entitlement to royalties when a free-

⁹ Ibid.

¹⁰ The Arts Law Centre, Submission on Directors’ Copyright in Films, 13 November 1999, pages 2-3.

¹¹ Section 22(4) of the Act defines a ‘maker’ of a cinematographic film as in effect its producer:

- a. A reference to the making of a cinematograph film shall be read as a reference to the doing of the things necessary for the production of the first copy of the film; and
- b. The maker of the cinematograph film is the person by whom the arrangements necessary for the making of the film were undertaken.

¹² The Hon. Philip Ruddock, Attorney-General, *House of Representatives Hansard*, 17 March 2005, p. 1.

¹³ Section 98 of the Act.

to-air television broadcast is retransmitted across a different network. Directors are not entitled to a share of these royalties if they have not retained their right to receive royalty income in their contracts or where the film is a 'commissioned' film. This is different to the position in other territories, where the right is unalienable.

At a practical level, an assignment of retransmission copyright by Australian directors is commonplace industry practice due to the inequality of bargaining power. Furthermore, there is ongoing dispute about the shares of retransmission rights that accrue to screen directors under the Act if directors are able to even get appropriate contractual clauses in their agreements.¹⁴

Moral rights

Rather paradoxically directors are granted moral rights in films under Part IX of the Act. This means that directors must be attributed in relation to the use of their film and may take certain action in response to the derogatory treatment of their work. There is a clear asymmetry between moral rights and economic rights in copyright – the former provided to the producer, director and screenwriter while the latter only provided to the producer.

It should be noted that moral rights¹⁵ do not have a direct economic impact for screen directors. However, as personal rights that are inalienable (for example, the right against false attribution of authorship) they are critical to enhancing respect for screen directors and their contribution. At a practical level there are a number of ongoing challenges to directors' moral rights – including the fact that many television productions are transitioning credits to internet websites rather than at the beginning or end of the television show itself.

5. Changes to the current copyright system

To be efficient and effective in the modern era, what (if any) changes should be made to Australia's copyright regime?¹⁶

As the Australian Prime Minister has recently stated 'there has never been a more exciting time to be alive than today'. This is certainly true for members of Australia's creative industries as the arts and digital technologies converge to create a new landscape that is providing new ways for artists, including screen directors to engage with their audiences. The new distribution channels of the National Broadband Network (**nbn**) will redefine how copyright and authorship is interpreted in the future.

As stated above, directors of films and television programs are at the very centre of an enormously creative process into which many people invest huge amounts of time and energy. However, for the most part, Australian directors (in contrast to their overseas counterparts and other creators in the screen industry) receive very little by way of ongoing income from the works they are often the driving creative force of.

¹⁴ This is because the Act does not specify the shares of retransmission rights for producers and directors. At a practical level, this has negative implications for the efficient and effective distribution of any such royalties by the designated collecting society in Australia, Screenrights.

¹⁵ As provided for under Article 6 *bis* of the Berne Convention.

¹⁶ Issues Paper, page 21.

Appendix A provides a table of the huge number of overseas territories in which directors have copyright ownership in their films. This is in direct contrast to Australia.

In a nutshell, Australian screen directors are denied any ongoing return in the films and television they make because of an out dated and unfair interpretation of Australia's copyright laws. For close to 50 years, the directors of Australian film and television have been denied any meaningful 'ownership' of the films they make. This has been reinforced by industry practice, which provides the majority of economic rights to producers as the deemed 'makers' of the film.

As outlined above, a cinematographic film is protected under the Act as 'other subject matter'. The Act does not recognise directors as 'makers' of films or as copyright owners in film and as a consequence they do not have economic rights except, in the very limited case of retransmission of rights. This is in stark contrast to the fact that Australian directors do have moral rights in the film.

Despite past victories that have returned a small stream of retransmission royalty payments, Australian directors continue to face strong opposition for fair pay for their creative work. They often receive no benefit from the growing digital market and have no body of work to derive future incomes from in contrast to directors from other parts of the world including notably, the United Kingdom.

Therefore, the key issues for Australian screen directors are as follows:

1. Parity

- Australia is well behind the rest of the world in recognition of directors' rights
- Currently, directors in more than 35 international territories including most of Europe, the United Kingdom, South America and Hong Kong receive ongoing economic returns for the films they make
- U.S. directors benefit from strong union negotiated agreements with residuals
- Other key creators in Australia including producers, script writers and musicians have an entitlement to ongoing returns; directors do not
- Australian directors get royalty payments collected overseas, and need to reciprocate

2. Remuneration

- Half of all members of the ADG make less than \$25,000 a year despite most having worked in the industry for more than 10 years (as referred to above)
- At a time when funding for the Arts has been significantly reduced, directors urgently need secure ongoing income streams through royalty payments
- Many Australian directors are forced to work overseas with the flow on impact of less productions, less mentoring and less jobs in Australia – all necessary for a fully functioning creative ecosystem in film and television

3. Landscape

- The work of directors is the foundation of Australia's screen industry which, as stated above, contributed \$5.8 billion in GDP, supported 46,600 full time jobs and contributed almost \$2 billion in tax revenues in 2012-2013
- The accelerating pace of digital distribution and production has disrupted traditional business models which no longer provide fair ongoing returns for directors

In our view, a simple amendment to the Act so the definition of “maker” of a film specifically refers to directors will enable directors to share copyright in films and television productions with producers.¹⁷ This simple yet effective amendment will ensure that directors are able to meaningfully participate in the opportunities of the digital revolution, strengthening their creative recognition and in turn, the screen industry in Australia.

This change will ensure a sustainable future for directors with improved recognition of their creative contribution in film and television in line with producers, screen writers and composers. The proposed solution is in line with the United Kingdom amendments to its copyright legislation in 1996 where directors were deemed to be makers of the film and thus share in copyright with producers.

Our proposal for directors’ entitlement to fair remuneration is also supported worldwide through the international authors’ body, Writers and Directors Worldwide.¹⁸

6. Conclusion

In conclusion, the ADG and ASDACS believes that copyright, a critical form of IP, has the potential to provide appropriate incentives for innovation, investment and the production of creative works. As such, screen directors who make vital contributions to culture, diversity and economic growth in Australia as a result of their work in the screen industry should be extended broader copyright ownership in their film and television productions. This will encourage further creativity and innovation by these talented individuals, and thus benefitting consumers of screen internationally.

¹⁷ Section 22(4) of the Act.

¹⁸ <http://www.writersanddirectorsworldwide.org/> (accessed 24 September 2015).

Appendix A

List of Territories with Directors' Copyright in audio-visual work/ cinematographic film

Country	Director	Scriptwriter	Music Composer	Producer
<u>Europe</u>				
1. Austria				
2. Belgium				
3. Czech Republic				
4. Estonia				
5. Finland				
6. France				
7. Germany				
8. Hungary				
9. Italy				
10. The Netherlands				
11. Poland				
12. Portugal				
13. Romania				
14. Slovakia				
15. Spain				
16. Sweden				
17. Switzerland				
18. United Kingdom				
<u>South America</u>				
19. Chile				
20. México				
21. Colombia				
22. Argentina				
23. Bolivia				
24. Brazil				
25. Costa Rica				

Country	Director	Scriptwriter	Music Composer	Producer
26. Dominican Republic				
27. Ecuador				
28. El Salvador				
29. Guatemala				
30. Honduras				
31. Nicaragua				
32. Panamá				
33. Paraguay				
34. Peru				
35. Uruguay				
36. Venezuela				
<u>Asia</u>				
37. Hong Kong				

Author of audio-visual work or cinematographic film	
Author of pre-existing or separate work	

Note: in some territories, including in Europe and South America there is a presumption that while the Director is an author and owner of either the audio-visual work or cinematographic film, the economic rights are transferred to the producer of the work.