

Australian Writers' Guild and Australian Writers' Guild Authorship
Collecting Society
Submission to the Productivity Commission
- Intellectual Property Arrangements -

1. Introduction and Executive Summary

The Australian Writers' Guild (**AWG**)¹ represents more than 2,600 writers of stage and screen content, including the vast majority of professional writers of television in Australia. In 1996, the AWG established the Australian Writers' Guild Authorship Collecting Society (**AWGACS**)² as a not-for-profit company limited by guarantee to identify, pursue and negotiate reciprocal representation agreements with overseas collecting societies when they collect, distribute and account to AWGACS for royalties owed to its Australian and New Zealand screenwriter members as a result of the secondary exploitation of their copyright internationally.

The AWG and AWGACS are therefore uniquely placed to provide an evidence-based response to the issues posed by the Australian Government Productivity Commission's Issues Paper entitled "Intellectual Property Arrangements" of October 2015 (the **Issues Paper**). Our submission is limited to the AWG and AWGACS' specific areas of expertise, namely addressing those questions in the Issues Paper that are of particular interest to its stage and screen writer members in relation to copyright.

By way of executive summary, the AWG and AWGACS state as follows:

1. One of the clear purposes of the *Copyright Act* (Cth) 1968 (the **Act**) is to create incentives for authors to foster their creativity. This is particularly relevant to stage and screen writers, the majority of which are sole traders and self-employed individuals, who contribute significantly to the Australian stage and screen industries and rely on copyright in their literary and dramatic works for fair remuneration. Copyright is also important to scriptwriters as a form of artistic control though moral rights.
2. The current real world requirements for the ongoing digital and international exploitation of copyright; and the unregulated application of statutory licensing provisions in Australia have resulted in outcomes inconsistent with the legislative purpose of copyright script writers and provide little financial incentives for creation of the written copyright material (**scripts**) nor, in the overwhelming majority of cases, any sufficient financial return on the commercial assignment of that copyright.
3. There are a number of significant challenges inherent in the current regulation and administration of statutory licence schemes by the Audio-Visual Copyright Society trading as Screenrights (**Screenrights**) which must be urgently addressed.
4. Moral rights are a critical element of the current Act and provide writers with far more effective protections than those achieved through consumer and competition laws, which are not fit for purpose for individuals in commercial negotiations with international production and distribution companies.
5. The changing digital landscape provides a unique opportunity for the Productivity Commission and the audio-visual sector to review and improve the existing statutory, voluntary and direct licensing models for authors to guarantee them fair rights to

¹ <http://www.awg.com.au/> (accessed 28 October 2015).

² <http://www.awg.com.au/awgacs-64.html> (accessed 28 October 2015).

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remuneration to achieve the intended outcome for the commercial exploitation of their intellectual property.

6. The Australian copyright system should enshrine a right to fair remuneration for authors through an inalienable and unwaivable remuneration right proportional to the amount of revenue generated for the use of their work and should be administered through an appropriately representative collective management organization.
7. Such an approach is not contrary to the existing Australian approach to copyright as analogous to a property right, it is a contemporary response to the evolving commercial and technological realities, and in line with international norms in many territories.

These issues are set out in detail below as they specifically relate to the Issues Paper.

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2. Copyright broadly

*To what extent does copyright encourage additional creative works, and does the current law remain 'fit for purpose'? Does the 'one size fits all' approach to copyright risk poorly targeting the creation of additional works the system is designed to incentivise?*³

Australian stage and screen writers make vital contributions to culture, diversity and economic growth in Australia. The screen industry alone is an important economic contributor to the Australian economy, contributing \$5.8 billion to GDP in 2013.⁴ Writers' scripts form the basis of all film, television and dramatic productions. Their work is fundamental to shaping, reflecting and recording our cultural identity, both domestically and internationally, bringing people together in a shared experience of art and entertainment physically in cinemas, theatres and homes across Australia. In addition to providing entertainment, their work also educates and builds empathy in the Australian community, and takes our stories to the world, providing not only an economic return, but instilling an appreciation of history, our unique Australian culture and our perspective on other cultures.⁵

In Australia, scripts are generally protected by copyright as dramatic or literary works under the Act. The duration of copyright in Australia is 70 years from the death of the writer where the work was published or made during their life. As the author of such copyright works, writers have exclusive rights to:

1. Reproduce the work, including by copying, recording and making a digital copy
2. Publish the work for the first time
3. Communicate the work to the public, including broadcasting it or putting it online
4. Perform the work in public
5. Make an adaptation of the work (including a translation or dramatised version of a literary work; a translation or non-dramatised version of a dramatic work).

The Act also promotes a respect for writers through the parallel moral rights regime, discussed further below.

However, in contrast to many other jurisdictions, most notably in Europe, unfortunately copyright in Australia does not currently operate optimally to incentivise the vast majority of even the most successful and in-demand authors. The AWG and AWGACS have observed over the course of many years that the overwhelming majority of their members receive limited revenue streams from the exploitation of their original material beyond an initial writing fee. The traditional model (one still adhered to in the European context) of writers assigning their copyright in return for ongoing residuals for the ongoing exploitation of their work in its original form nationally and internationally

³ Issues Paper, page 20.

⁴ 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 (accessed 27 October 2015).

⁵ Drawn from the Society of Audiovisual Authors, *White Paper: Audiovisual Authors' Rights and Remuneration in Europe*, 2nd edition, 2015 at http://www.saa-authors.eu/dbfiles/mfile/7500/7566/SAA_White_Paper_2015.pdf (accessed 26 October 2015).

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and additional royalties for further exploitation in other forms has been replaced by a U.S. "fee for service" model without entitlements to remuneration for further exploitation.

In effect, screenwriters in Australia are forced to assign their copyright in the script under essentially the same conditions as the U.S. notion of "works made for hire". However in contrast to U.S. writers, in return for abdicating their future entitlements Australian writers fail to benefit from legally enforceable, collectively bargained, minimum terms and conditions in the U.S. encompassing:

1. Their initial labour, such as health and pension contributions
2. The ongoing exploitation of their copyright material
3. 50 percent of all their entitlements to secondary/ statutory royalties collected internationally.

As a general proposition, writers are overwhelmingly self-employed individuals, law prevents unionism, and the process of bringing their works to the screen may be a long and often uncertain process: seven years is the average for a feature film. In this context, copyright is an important mechanism that seeks to encourage scriptwriting innovation and creative output in the stage and screen sectors in Australia. The fact that scriptwriters have the ability to leverage their copyright in their literary and dramatic works in audio-visual content theoretically contributes to their willingness to continue to engage in their creative activities.

Effectively, the terms upon which Australian screenwriters contract are equivalent to a permanent employee, however as independent contractors they are afforded none of the protections or benefits of such an employee.

The commercial negotiations determining the value of the script must regularly, of necessity, take place long before the market value can be assessed. Writers are required to assign by contract the copyright in their works, generally to producers, prior to having even created the work and certainly prior to the exploitation of their work, and these negotiations take place in an environment where market power largely prevents individual terms being negotiated on a contract by contract basis, and the majority of contracting is on a 'take it or leave it' basis.

It is critical to note that when the contract between the screenwriter and producer is signed, the work's success and audience appeal, thus reflective of its true economic value, are unknown. In many instances the market value of their work will only begin to be determined through leveraging their own intellectual property. Directors, actors, broadcasters and international distributors will initially determine their involvement in a project based on their response to the script. Only then will budgets be finalised, and commercial parameters and prospects be able to be assessed. Screen writers are therefore not in a position to argue for fair remuneration for their works and often make considerable concessions to induce producers to produce their works.

While we acknowledge that the market-based transactions for the sale and licensing of copyright and the industrial relations framework surrounding that is not the subject of the Productivity Commission's Issues Paper, we raise these important points to emphasise that the individual contract-by-contract system is no longer viable for the entrepreneurs exploiting the copyright, and as a result the protections and incentives the current copyright regime is intended to provide are no

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longer fit for purpose for the original creators of Australian stage and screen writers upon which all stage and screen content is based. Treatment of copyright and royalties fails to fairly remunerate screenwriters as original authors.

The AWG and AWGACS are therefore of the view that an Australian copyright system in which writers are equitably rewarded for the ongoing exploitation of their creations through an inalienable and unwaivable remuneration right would be a more appropriate mechanism to incentivise additional creative works. "Future proof" business models and technologies require predictability and certainty for producers and distributors and the copyright system requires adaption so that it is "fit for purpose" for original creators in these cultural and commercially critical industries.

At an international level, Writers & Directors Worldwide (WDW)⁶ recently launched its "Fair Remuneration" campaign, which argues for four essential provisions for audio-visual authors:⁷

1. Creators, including scriptwriters must be authors of the audio-visual work
2. Creators should receive separate remuneration proportional to the amount of revenue generated for each use of their work
3. The right to remuneration cannot be waived or assigned
4. The obligation for remuneration should fall on end users such as broadcasters and digital providers and be paid through collective management organizations mandated by authors to collect and distribute on their behalf.

The AWG and AWGACS endorse this approach wholeheartedly as a way to guide the Australian copyright system continues to encourage innovation and creativity and achieve the original intention of the Act. For as Chilean screenwriter Alejandro Jodorowsky eloquently cautions:⁸ "If you eat apples without watering the tree, soon you will eat no more apples".

3. Protections under copyright

Are the protections afforded under copyright proportional to the efforts of creators?⁹

For the reasons set out above, the AWG and AWGACS do not believe that the protections afforded under copyright are proportional to the efforts of the stage and screenwriters. Rather, we are of the view that, based on the clear provisions set out above, there is a strong case that stage and screen writers in Australia should be granted an inalienable remuneration for the ongoing exploitation of their copyright, analogous to that granted to visual artists under the *Resale Royalty Right for Visual Artists Act (Cth) 2009*.

This is also supported by Australia's international obligations to authors, particularly under Article 14*ter* of the *Berne Convention* which relevantly states:

⁶ WDW, which is a Council of the International Confederation of Societies of Authors and Composers (CISAC), is an umbrella organisation that provides a cooperation, networking and support forum for dramatic, literary and audio-visual creators in all regions of the world: <http://www.writersanddirectorsworldwide.org/> (accessed 10 November 2015).

⁷ <http://www.theaudiovisualcampaign.org/> (accessed 10 November 2015).

⁸ Quoted at <http://www.theaudiovisualcampaign.org/> (accessed 10 November 2015).

⁹ Issues Paper, page 20.

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The author, or after his death the persons or institutions authorized by national legislation, shall, with respect to original works of art and original manuscripts of writers and composers, enjoy the inalienable right to any interest in any sale of the work subsequent to the first transfer by the author of that work.

As the pace of technological change and its disruption to delivery platforms hastens, creating more complexity in terms of transactions, it is impossible for stage and screen writers to monitor, audit and make claims for royalties on the ever-evolving use of their work internationally and locally. Therefore, an alienable right to remuneration for the exploitation of authors' works, if managed collectively (discussed below) would better meet the objectives of the Act to create incentives for screenwriters to innovate and create, and protect their rights proportionately to their efforts.

4. The licensing of works

*Is licensing copyright-protected works too difficult and/or costly? What role can/do copyright collecting agencies play in reducing transaction costs? How effective are new approaches, such as the United Kingdom's Copyright Hub in enabling value realisation to copyright holders?*¹⁰

The AWG and AWGACS refer the Productivity Commission to the core values articulated in the Terms of Reference of the Australian Law Reform Commission's Issues Paper *Copyright and the Digital Economy* of 20 August 2012 (the **ALRC Issues Paper**) in assessing the effectiveness of statutory licences under the Act, namely the need to:¹¹

- a. Guarantee fair remuneration for creators of copyright works whose rights have been rarely managed actively or effectively under the current statutory framework
- b. Decrease transaction costs for copyright owners to use licensing systems thereby reducing prohibitive barriers to entry to the digital economy; and
- c. Improve access to works and enhance legal certainty for non-commercial public users.

As stated in our previous response to the ALRC Issues Paper, we are of the view that the licensing of copyright works in Australia should be measured against these values. On this basis we make the following comments on the current statutory licensing regimes administered through Screenrights, which apply, to our members:

1. **Independent review** – regular, independent and robust review commensurate with the statutory monopoly licence administered by Screenrights and the Attorney General's Guidelines for Declared Societies is essential. Screenrights is not subject to formal review, contrary to those imposed on large voluntary licensing organisations such as APRA-AMCOS.
2. **Technologically neutral** - As an overall point, the existing statutory licencing schemes under the Act should be reviewed to become technology-neutral in order to achieve fair remuneration for creators. This is critical as the digital economy is underpinned by

¹⁰ Issues Paper, page 20.

¹¹ Available here: <http://www.alrc.gov.au/publications/copyright-ip42> (accessed 22 October 2015).

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constantly evolving technologies and infrastructure embedded with the capacity to facilitate multiple transmissions of audio-visual content.

3. **Lack of data transparency** - The existing statutory licensing schemes are not transparent about royalty collection and distribution particularly regarding relevant data. For example, Screenrights does not disclose any data about which audio-visual titles it has received royalties for as a result of its statutory monopoly license.
4. **System has evolved contrary to original purpose, intent and operation** – The policies and practices have evolved so as to deviate from the purpose and intent of the legislation and the requirements of the Attorney General's Guidelines in favour of large majority stakeholders. As a result of the above, the overwhelming majority of Australian film, television writers and radio writers have not received remuneration from the Australian retransmission, educational or government copying of their works through the relevant statutory schemes.

Furthermore, this contract-by-contract approach by Screenrights has positioned AWGACS and its members at a significant disadvantage internationally due to their inability to meet obligations of reciprocity with international partners representing authors' rights. This has financial consequences as overseas societies have good reason to be frustrated with the difficulties that they face in accessing royalties for their author members in Australia.

The legal committee of the international governing body for authors collecting societies recently issued the following resolution:

The CISAC Legal Committee is concerned that the Screenrights' International Presumption is prejudicial to international authors and their proper entitlements under the terms of the Berne Convention, which was ratified by the Australian government, and which sets up three basic principles that narrow the applicability of this presumption: the principle of "national treatment", the principle of "automatic" protection and the principle of "independence" of protection.

The CISAC Legal Committee therefore agreed to formally request in writing that Screenrights withdraw the Screenrights' International Presumption from the Screenrights' EDRP and not make any policies pursuant to the Screenrights' International Presumption or which would otherwise prejudice international authors, until such time as Screenrights has sought and considered independent advice on the implications of the Screenrights' International Presumption for Australia's obligations under the Berne Convention.

Finally, on the issue of the current statutory licensing schemes applicable to audio-visual works, the AWG and AWGACS urges the Productivity Commission to consider requirements for the imposition of global metadata and numbering identification systems such as the International Standard Audio-visual Number (**ISAN**). These offer relevant Australian statutory licensing systems under the Act international standardization and are already compulsory in territories such as France.

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5. Moral rights are critical

Are moral rights necessary, or do they duplicate protections already provided elsewhere (such as in prohibitions on misleading and deceptive conduct)? What is the economic impact of providing moral rights?¹²

Moral rights are a critical element of the current Act and provide scriptwriters with far more effective protections than those that could be achieved through consumer and competition laws such as the misleading and deceptive conduct provisions proposed in the Issues Paper.

Scriptwriters are granted moral rights in films under Part IX of the Act. This means that writers must be attributed in relation to the use of their works and may take certain action in response to the derogatory treatment of their work. However it should be noted that there is a clear asymmetry between moral rights and economic rights in the film (as a cinematographic work) – the former provided to the producer, screen writer and director while the latter only provided to the producer.

Moral rights protection means that agreements should set out the circumstances in which the producer or another person is entitled to make changes to the screenplay and film, as making such changes could constitute an infringement of the screen writer's moral rights. At a practical level, moral rights in screenwriters' agreements are usually dealt with by way of a pragmatic and standard agreed schedule to the agreement, which contains a consent framework negotiated between the statutory screen funding body of the time, AWG, the Screen Producers of Australia and the Australian Directors Guild.¹³

In the AWG and AWGACS' view, moral rights do not have any negative economic implications.

6. Changes to the copyright regime

To be efficient and effective in the modern era, what (if any) changes should be made to Australia's copyright regime?¹⁴

The AWG and AWGACS believe that the digital economy and converging platforms represent an enormous opportunity for the Australian screen sector. We submit that the fast-changing landscape of the digital economy provides the Productivity Commission and the audio-visual sector with a unique opportunity to review and improve the existing statutory, voluntary and direct licensing models for authors based on fair remuneration.

In particular, the growth of digital distribution technologies has led to a fragmentation of income streams for creators, for example through video-on-demand models such as:¹⁵

¹² Issues Paper, page 20.

¹³ http://afcarchive.screenaustralia.gov.au/downloads/moralrights_industryaccord.pdf (accessed 22 October 2015).

¹⁴ Issues Paper, page 20.

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1. *Transactional VOD (TVOD)* – download-to-own services where you download a copy of the film or television series and own a copy, or download-to-rent services where you rent a film for a certain time period. Consumers pay through single transactions. Examples include iTunes, Quickflix, Google Play, Dendy Direct, Ezyflix and Vimeo on Demand.
2. *Subscription VOD (SVOD)* – access to content on demand for a monthly subscription. Examples include Stan, Presto, Quickflix, Netflix and Mubi.
3. *Ad-Supported VOD (AVOD)* – free to watch content with ads in and around content. Examples include YouTube, smh.tv, theage.tv, Crackle and Snag Films.
4. *Catch-up VOD (CVOD)* – catch up on broadcast television online. These are generally free, with the exception of Foxtel which is included in the subscription price. Examples include ABC iView, Plus 7, On Demand SBS, 10 Play, 9 Jumpin and Foxtel Anytime.

However due to the multitude of “micro” transactions in these sorts of models, the value of returns to individual creators are rendered useless due to the practical impossibility of monitoring and the prohibitive administrative costs which would be required to obtain them. Therefore, collective administration through the aggregation of rights of individual screenwriters and other authors such as are utilised in the music sector are critical to allow their respective collecting societies the ability to grant flexible licences that are able to overcome these obstacles and minimize transaction costs for all parties.

The AWG and AWGACS are of the view, as previously set out in their response to the ALRC Issues Paper that amendments should be made to the Act to ensure that the management and accounting of remuneration received through collective administration schemes is such that classes of authors rather than an ensemble of rights holders are represented by collecting societies. This will also ensure audio-visual content creators are fairly remunerated and minority stakeholders are not disintitiled by administrative default.

In this regard, the AWG and AWGACS also advocate the recommendations outlined in the White Paper from the Society of Audiovisual Authors in Europe, namely that fair remuneration for authors can be achieved through:¹⁶

Securing an unwaivable right of authors to remuneration for their online rights, based on revenues generated from online distribution and collected from the final distributor. This entitlement should exist even when exclusive rights have been transferred and would secure a financial reward for authors proportional to the actual exploitation of the works.

Ensuring that the administration of this remuneration is negotiated and administered collectively. This will guarantee that audiovisual authors are paid and establish a direct revenue stream between the market place and audiovisual authors.

¹⁵ Screen Australia, *What's the Deal with Video on Demand?*, 17 March 2015 at http://www.screenaustralia.gov.au/research/VOD_DealsAnalysis.aspx (accessed 26 October 2015).

¹⁶ Society of Audiovisual Authors, *White Paper: Audiovisual Authors' Rights and Remuneration in Europe*, 2nd edition, 2015, summary at page 3 at http://www.saa-authors.eu/dbfiles/mfile/7500/7566/SAA_White_Paper_2015.pdf (accessed 26 October 2015).

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In summary, streamlined collective licensing models that recognise authors' inalienable rights to fair remuneration, coupled with streamlined and administratively efficient collective licensing models that manage increasingly fragmented remuneration streams have the potential to:

1. Maximise the incentives and rewards for content creators including authors; and
2. Increase the distribution of and access to, content for Australian and international consumers.

Finally, the AWG and AWGACS note the recent Australian Government Response to the Competition Policy Review of 24 November 2015, which relevantly states:¹⁷

The Government supports the removal of parallel import restrictions on books. The Government will progress this recommendation following the Productivity Commission's inquiry into Australia's intellectual property arrangements (see Recommendations 6 above) and consultations with the sector on transitional arrangements.

The AWG and AWGACS consider that there is overwhelming evidence that English language markets for cultural and entertainment products require policy intervention to respond to market failures. Failure to ensure appropriate policy settings results necessarily in the commercially sensible decision to make significant reductions in new, innovative and culturally significant creation. This is true for all investment of authors including scriptwriters. Given that the issue of parallel importation is comprehensively addressed by those most directly affected, and this Issues Paper is focused on innovation in the digital marketplace we limit our comments to supporting authors effected by this decision, and emphasising the often overlooked cultural implications of removing policy mechanisms without regard for the mid and long term significance.

The AWG and AWGACS appreciate the opportunity to comment on the Productivity Commission's Issues Paper. We look forward to making further contributions as necessary, including attending at the Public Hearings.

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¹⁷ At page 13 at <http://www.treasury.gov.au/PublicationsAndMedia/Publications/2015/CPR-response> (accessed 24 November 2015).