



ADG AND ASDACS RESPONSE TO THE PRODUCTIVITY COMMISSION'S  
INQUIRY REPORT TO THE COMMONWEALTH INTO AUSTRALIA'S  
INTELLECTUAL PROPERTY SYSTEM

**14 February 2017**

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 900 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. Introduction

The ADG will be responding to certain sections of the Inquiry Report by the Productivity Commission on Intellectual Property Arrangements that affect the screen industry and in particular directors of screen content. We are particularly concerned at the lack of understanding of director's copyright issues that were put forward in the report. the response to our call for an extension of copyright for directors. The Commission did not seem to understand that directors already had limited copyright that was granted in 2005 by the Commonwealth in recognition of directors' moral rights and that the ADG was calling for Australia to reflect the international situation of our major trading partners and expand directors copyright to mirror those.

We have also read and endorse the submissions made by Australian Copyright Council (of which we are a member), Copyright Agency|Viscopy, Screenrights, APRA|AMCOS, AMPAL, the Australian Society of Authors and PPCA.

We will look at the following recommendations and comments by the Commission:

- Directors Copyright;
- That the length of copyright needs to be changed and that "the commercial life of most material is less than 5 years"<sup>1</sup>;
- Introduction of a "Fair Use" system as the cure all for Australian copyright;
- Acceptance of submitted economic data by PWC and Deloitte providing evidence of the strength of the IP industry and value of our IP exports;
- That the Australian Government should strengthen the governance and transparency arrangements for collecting societies.

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<sup>1</sup> Productivity Commission Inquiry Report – Overview and Recommendations, p.7

### 3. Directors Copyright

As outlined in our original submission to the Commission 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 film.

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:<sup>2</sup>

- 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
- 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.<sup>3</sup>

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.<sup>4</sup>

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

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<sup>2</sup> This is based on the yearly applications for full membership to the Australian Directors Guild for 2014.

<sup>3</sup> Ibid.

<sup>4</sup> The Arts Law Centre, Submission on Directors’ Copyright in Films, 13 November 1999, pages 2-3.

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.<sup>5</sup> 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 directors<sup>6</sup> and enacted the *Copyright Amendment (Film Directors' Rights) Bill 2005* symbolically recognising directors as copyright owners for the purposes of the statutory retransmission scheme.<sup>7</sup> This is an entitlement to royalties when a free-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.<sup>8</sup>

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<sup>5</sup> 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.

<sup>6</sup> The Hon. Philip Ruddock, Attorney-General, *House of Representatives Hansard*, 17 March 2005, p. 1.

<sup>7</sup> Section 98 of the Act.

<sup>8</sup> 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.

## 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 rights<sup>9</sup> 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.

At the hearings into the granting of limited copyright to directors a number of committee members made the observation that the limited right does not reflect the actual input by directors or the international situation. This can best be summed up by Nicola Roxon:

*"..one of the strongest rationales for including directors in the retransmission scheme is that it will help our directors receive reciprocal royalties from retransmissions of their work in other countries, which gives directors economic rights, principally in the large European market. This is a stream of export revenue which can be tapped to support our directors."*<sup>10</sup>

And further

*"The question has to be asked: could economic rights have gone further? The Australian Screen Directors Association, as I have said, would have liked this bill to go further. They would have liked some provision to include directors in future statutory royalty schemes. Labor believes that this is impractical at this stage, as we cannot make rules today that will govern schemes in the future—schemes that do not yet exist. I can give a commitment on behalf of Labor, however, that we will certainly consider the inclusion of film directors in any statutory scheme that is proposed in the future. One of the great benefits of the current bill is that it should mean that film directors are brought to the table whenever a new scheme is being considered. **The Australian Screen Directors Association also wanted to see film directors included in the educational copying and communication licensing scheme in part VA.** They argue that it is inconsistent to recognize the creative contribution of directors. in part VC but not in part VA. They also argue that it is discriminatory, as other creative contributors such as composers and writers are included in part VA of the scheme."*<sup>11</sup>

This was also echoed by Dr Rimmer

*"My concern at the moment is that there seems to be a bit of a disjunction with the status quo, with economic rights being provided to the producer and moral rights being shared between the producer, the director and the screenwriter...[O]n a theoretical level it is very confusing that a director is not considered to be an author for the purposes of economic rights and statutory licensing but will be considered to be an author for the purposes of retransmission royalties and in relation to moral*

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<sup>9</sup> As provided for under Article 6 *bis* of the Berne Convention.

<sup>10</sup> Hansard, Tuesday 13 September 2005 House of Representatives p.33 N. Roxon

<sup>11</sup> *Ibid* p.34

*rights. My preferred option is that there be a greater mirroring between the notions of authorship in relation to moral and economic rights.”<sup>12</sup>*

It seems clear to us that the value of the director as “author” of a film is not understood by the Commission. This was even after lengthy evidence at the hearings and the admission by the Commission that they had spoken to one other filmmaker in the course of the hearings and that he was a first time filmmaker. Contrary to the inquiry report we believe we have shown clearly that the need for parity with our international colleagues is vital both for the economic benefit of the director and the economic benefit of Australia.

Reciprocal rights are vital in the P economy of today. Many countries will not enter any negotiation unless they see reciprocity. The UK recognised this when they changed their copyright act to include directors as the makers of the film alongside producers. The result is one of the healthiest and most successful screen industries in the world.

#### 4. Length of Copyright

At the hearings in Sydney before the Commission, Kingston Anderson, CEO of the Australian Directors Guild, outlined to the Commission the life of a normal feature film and how a limit of copyright would deny the creators and copyright holders the remuneration that they deserve due to the success of their screen content. In particular, he mentioned an iconic film created by Australians, **The Rocky Horror Picture Show** which has been playing in cinemas and on television screens around the world continually since 1975 – for over 40 years. In the scenario that is outlined by the Commission on page 8 of the overview it states *“a term of around 25 years enables rights holders to generate revenue comparable to what they would receive in perpetuity (in present value terms). Of course, some very successful works have commercial lives well beyond a few years, as repeatedly cited by inquiry participants in submissions and public hearings. But it remains the case that these are exceptions to the norm”*.<sup>13</sup>

We would argue that this is not outside the norm and cite PICNIC AT HANGING ROCK, MAD MAX, STRICTLY BALLROOM, WAKE IN FRIGHT, SKIPPY, CROCODILE DUNDEE and GALLIPOLI to name a few. All these films are playing somewhere in the world today and continue to generate revenue for Australia filmmakers. In fact, a new online streaming service, Ozflix, has just commenced business, streaming only Australian films. This begs the question, if copyright was limited to 25 years or less, who would receive these royalties and payments from the screening of these films?

Although the Commission notes that due to international obligations the limiting of copyright is not possible (did they not know this before including it in the report?) we believe it was important to understand the importance of copyright durations to creators in the screen sector.

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<sup>12</sup> Ibid. p.21

<sup>13</sup> Productivity Commission Inquiry Report, Overview. P.8

## 5. Introduction of a Fair Use system of Copyright

We have argued in our submission before the Australian Law Reform Commission (ALRC) that the introduction of a Fair Use system of Copyright would not be in the best interests of creators. We would refer you to that submission and the submission by the Australian Copyright Council.

[http://www.copyright.org.au/acc\\_prod/ACC/News\\_Policy/Policy/ACC/Public\\_Content/Policy.aspx?hkey=8165a305-9517-4517-b372-8b1b6c3a9f6d](http://www.copyright.org.au/acc_prod/ACC/News_Policy/Policy/ACC/Public_Content/Policy.aspx?hkey=8165a305-9517-4517-b372-8b1b6c3a9f6d)

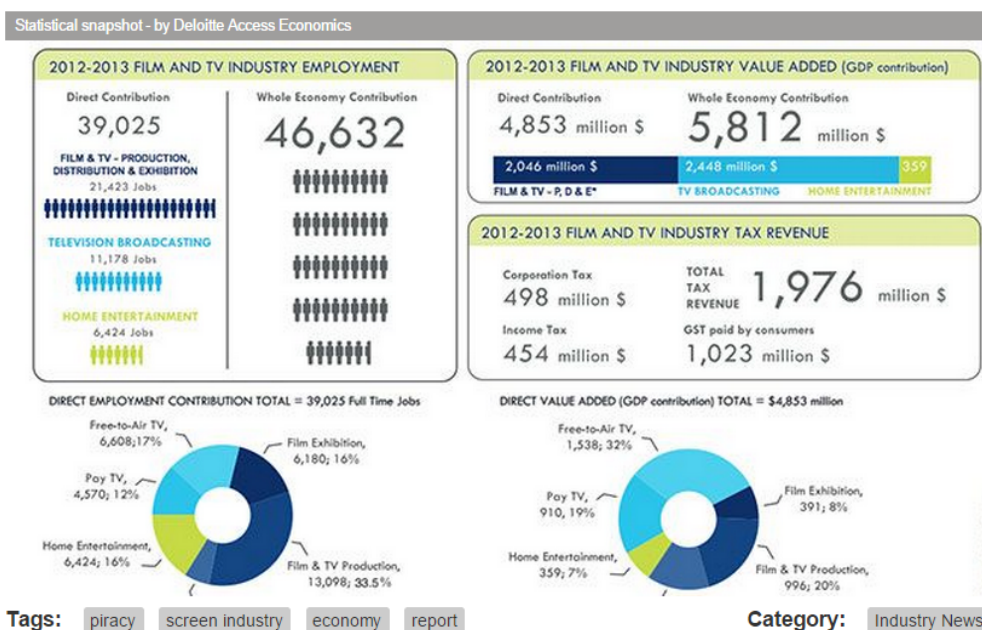
## 6. Economic Data

In our submission to the Commission we used evidential material to show the strength of the IP industry and in particular the PwC Report on the Economic Value of Australian Copyright Industries, noting that market value is not necessarily economic value (p 106) and the ABS data on arts and culture. We note that the PwC Report measured GDP, employment and trade. These are part of a methodology established by the World Intellectual Property Organisation to measure the economic contribution of copyright industries around the world.

<http://www.wipo.int/copyright/en/performance/>

As such, the PwC Report enables Australia to compare its performance with other jurisdictions over time.

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:<sup>14</sup>



<sup>14</sup> 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](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. Quoting the ABS,<sup>15</sup> 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.

We refer to and support the submissions of the Australian Copyright Council, Australian Society of Authors, APRA|AMCOS, Copyright Agency|Viscopy and Screenrights.

## 7. Governance and Transparency of Collecting Societies

In recommendation 5.4 the Commission has proposed the Australian Competition and Consumer Commission review the voluntary Code of conduct for Copyright Collecting Societies. As a society that collects on behalf of Australian and New Zealand Directors in 24 countries around the world we are subject to scrutiny by our international body CISAC and by the local voluntary code. We are not opposed to a review by the ACCC. We would support the submissions by our colleagues at Australian Copyright Council, Screenrights, APRA/AMCOS, Copyright Agency Limited and PPCA.

## 8. Conclusion

We believe that a constructive and collaborative approach to copyright reform is needed if we are to keep pace with the world. We do not believe that a combative approach, like the one the Commission has taken is both useful and constructive. We agree that there are changes that need to be made to the IP arrangements to ensure our creative industries can keep pace with technological change. We believe that this is something that we can develop in our own unique way that will not destroy a creative echo system that is not just based on economic gain. Governments of all persuasions have recognised that to encourage our creative potential has both a social and economic benefit for Australia. The adoption of copyright regimes like Fair Use which was not been developed with our system of jurisprudence in mind or the unique position our content makers find in Australia, would seem ill advised. I hope the Commission will work with the content creators to develop a uniquely Australian approach to IP arrangements.

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<sup>15</sup> Australian Bureau of Statistics, *Arts and Culture in Australia: A Statistical Overview*, 2010.