



ADG AND ASDACS SUBMISSION TO DEPARTMENT OF
COMMUNICATIONS AND THE ARTS – AMENDMENTS TO THE
COPYRIGHT ACT (CTH) 1968

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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 amendments to the Copyright Act

In December 2015, the Department of Communications and the Arts (the **Department**) announced proposed amendments to the *Copyright Act (Cth)* 1968 (the **Copyright Act**) releasing a Stakeholder Consultation: Proposed Reform of the Copyright Act 1968 Guiding Questions (the **Guiding Questions**).

The ADG and ASDACS submission to the Department is set out below and relevantly refers to:

1. The importance of access to copyright works by consumers and cultural institutions being balanced with incentives for creativity for screen directors in the form of copyright under the present copyright arrangements
2. The need for copyright reform to recognise directors as authors of audio-visual works and ensure fair remuneration for their creative contribution under the Copyright Act
3. The expansion of "safe harbour" provisions being predicated on the finalization of the Industry Code of Conduct for dealing with online copyright infringement.

3. Access to copyright balanced with incentives to create

At the outset, as stated in our submission to the Productivity Commission of 30 November 2015, the ADG and ASDACS are supportive of copyright in Australia, for the benefit of both creators and consumers. Copyright is a significant contributor to the Australian economy, with copyright industries assessed as the fourth largest industry by PwC in a recent report.¹ 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:²

- Employing over 1 million people, which constituted 8.7 per cent of the Australian workforce

¹ 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 11 January 2016).

² Ibid.

- 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.

At an international level, a recent study by EY entitled report "Cultural Times - the First Global Map of Cultural and Creative Industries" analysed the economic weight of 11 sectors - advertising, architecture, books, gaming, music, movie, newspapers/magazines, performing arts, radio, TV and visual arts - demonstrating that the creative and cultural industries, including the screen industry are a massive contributor to the world economy.³ In 2013, these sectors together generated US\$2,250 billion in revenues, equating to 3 percent of world's GDP, and 29.5 million jobs (1 percent of the world's active population).

Given the importance of copyright materials, ADG and ASDACS broadly support the goals of the Department in relation to the current reform proposed to:⁴

1. Simplify the preservation exceptions for copyright material in libraries, archives and prescribed 'key cultural institutions'
2. Consolidate and modernise the statutory licences that allow educational institutions to use and pay licence fees for works and broadcasts
3. Allow copyright materials to be incorporated into educational assessments conducted online.

However, we support the submission by the Australian Copyright Council (of which both ASDACS and ADG are members) in relation to the issues associated with the proposed amendments to the Copyright Act in this regard.

Given international developments in the area of cultural institutions, for example the *Marrakesh Treaty to Facilitate Access to Published Works by Visually Impaired Persons and Persons with Print Disabilities* of 28 June 2013 and the ongoing deliberations of the World Intellectual Property Organization (**WIPO**) Standing Committee on Copyright and Related Rights, it is clear that access to, and the preservation of copyrighted material remains a key issue for these many of these stakeholders.

However, we support the submission by the Australian Copyright Council (of which both ASDACS and ADG are members) in relation to the issues associated with the proposed amendments to the Copyright Act in this regard.

Further, it should be noted that in relation to modernising statutory licences that allow educational institutions to use and pay licence fees for works and broadcasts, screen directors continue to be one of the few classes of "authors" in Australia's substantial screen sector that do not benefit from these statutory licences. Therefore, the ADG and ASDACS strongly urge the Department to consider our proposal, most recently to the Productivity Commission, to urgently review of the Copyright Act to ensure that screen directors will be fairly and equitably remunerated from their works, including through statutory schemes that apply to educational institutions.

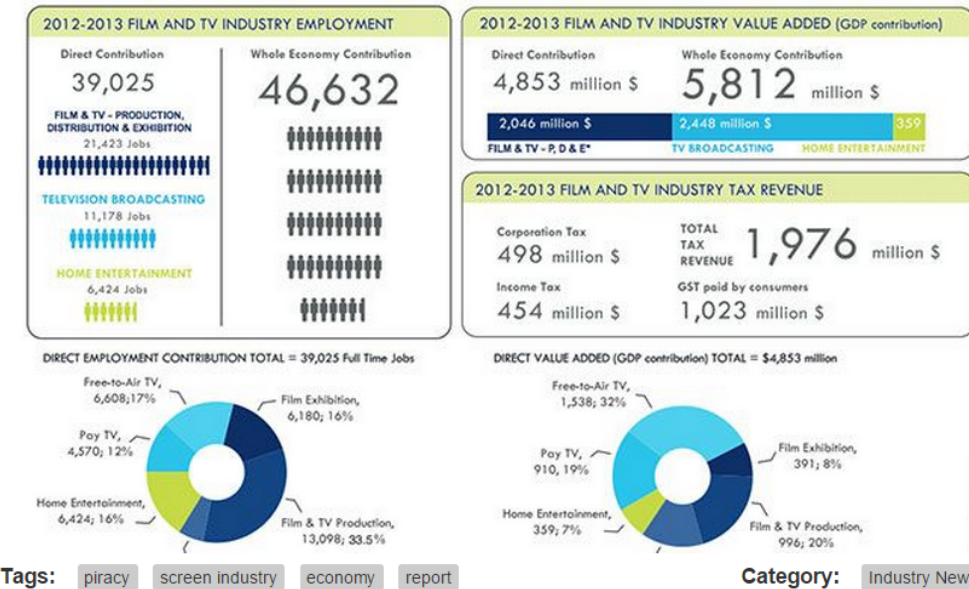
The background to our proposal is set out below.

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 2015.⁵

³ EY, *Cultural Times: The First Global Map of Cultural and Creative Industries*, 2015 available at <http://www.worldcreative.org/> (accessed 12 January 2016).

⁴ Guiding Questions, page 1.



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,⁶ 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 part due to a copyright regime that does not recognise their authorship in films.

In a survey conducted in 2015 of the ADG’s full members:⁷

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

⁵ 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 11 January 2016).

⁶ Australian Bureau of Statistics, *Arts and Culture in Australia: A Statistical Overview*, 2010.

⁷ This is based on the yearly applications for full membership to the Australian Directors Guild for 2014.

- 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.⁸

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.⁹

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 Copyright Act does not currently recognise directors as makers of films or as copyright owners in film.

Rather under the Copyright Act the ‘maker’ of a film is the person by whom the arrangements necessary for the making of the film were undertaken.¹⁰ 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.

Limited retransmission rights

Put simply, Australian screen directors do not have economic rights by virtue of the Copyright Act *except in relation to limited retransmission rights*. This means that the current changes proposed to the Copyright Act in relation to the statutory licensing scheme applicable to educational institutions will not benefit screen directors. In 2005, the Australian Government agreed to look at the issue of extending a share of copyright in films to directors¹¹ and enacted the *Copyright Amendment (Film Directors’ Rights) Bill 2005* symbolically recognising directors as copyright owners for the purposes of the statutory retransmission scheme.¹² This is an entitlement to royalties when a free-to-air

⁸ Ibid.

⁹ The Arts Law Centre, Submission on Directors’ Copyright in Films, 13 November 1999, pages 2-3.

¹⁰ 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.

¹¹ The Hon. Philip Ruddock, Attorney-General, *House of Representatives Hansard*, 17 March 2005, p. 1.

¹² Section 98 of the Act.

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 Copyright Act if directors are able to even get appropriate contractual clauses in their agreements.¹³

Moral rights

Rather paradoxically directors are granted moral rights in films under Part IX of the Copyright 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 rights¹⁴ 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.

Changes needed to copyright to incentive creation

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 Australian 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.

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 the Copyright Act in 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.

¹³ 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.

¹⁴ As provided for under Article 6 *bis* of the Berne Convention.

As outlined above, a cinematographic film is protected under the Copyright 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 statutory schemes, including applicable to educational institutions, 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 that need to be urgently addressed are as follows:

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 residuals¹⁵
- 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

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

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 Copyright 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.¹⁶ 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.

¹⁵ Knox, D, “Aussie directors lacking Residuals deal, says US director”, *TV Tonight*, 5 November 2015, at <http://www.tvtonight.com.au/2015/11/aussie-directors-lacking-residuals-deal-says-us-director.html>.

¹⁶ Section 22(4) of the Act.

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. This proposal for directors' fair remuneration is also supported worldwide through the international authors' body, Writers and Directors Worldwide¹⁷ who recently passed a resolution supporting our campaign in Australia.¹⁸

Importantly, changes to the Copyright Act that recognise directors as makers of films would ensure that the proposed amendments to the Copyright Act set out in the Guiding Questions fairly apply to and benefit all creators in the creative process for film and television.

4. Safe Harbours

In relation to proposed amendments to "safe harbours", the Guiding Questions relevantly state:¹⁹

The proposed amendments expand the current 'safe harbour' provisions in the Act to cover a broader range of entities, including educational institutions and other online services (such as online search engines, bulletin boards and cloud storage services). The proposed definition of a service provider reflects the definition of a service provider in Article 17.11.29(xi) of the Australia-United States Free Trade Agreement and Article 18.81 of the Trans Pacific Partnership Free Trade Agreement.

The amendments propose that the term 'carriage service provider' be replaced with the term 'service provider' as defined in the new section 116AB as defined as:

Service provider:

- (a) in relation to an activity mentioned in section 116AC—means a provider of transmission, routing or connections for digital online communications without modification of their content between or among points specified by the user of material of the user's choosing; and
- (b) in relation to an activity mentioned in section 116AD, 116AE or 116AF—means a provider or operator of facilities for online services or network access.

The new definition is stated to be reflective of the definition used in the Australia-United States Free Trade Agreement (**AUSFTA**) and Article 18.81 of the Trans-Pacific Partnership Agreement (**TPP**).

The "safe harbour" provisions were implemented after the review of the *Digital Agenda Act* and at this time it was understood that an Industry Code of Conduct would also apply. We note that despite ongoing negotiations and discussions in this area, a final Code is still not in place some 15 years later.

Therefore, in our view the expansion of "safe harbour" provisions to other entities, particularly search engines and online cloud providers is premature. While there may be the view by some stakeholders that the expansion of the "safe harbour" regime will facilitate the expansion of the notice and take-down scheme under the Copyright Act for the benefit of copyright owners, we remain concerned the scheme is still not well-articulated through an Industry Code of Conduct.

¹⁷ <http://www.writersanddirectorsworldwide.org/> (accessed 11 January 2016).

¹⁸ Beijing Executive Council meeting of WDW, November 2015.

¹⁹ Paragraph 23 at page 6.

Furthermore, following the iiNet decision there is little incentive for service providers to cooperate with copyright owners. Without such an effective agreement, the framework for dealing with online copyright infringement cannot operate as intended.

Therefore, the ADG and ASDACS submit that the expansion of “safe harbour” provisions should be predicated on the finalization of the Industry Code of Conduct for dealing with online copyright infringement. Any expansion of the “safe harbour” provisions should also be careful not to disincentivize any commercial licensing solutions between creators and intermediaries that ensure ongoing fair remuneration.

5. Conclusion

In conclusion, the ADG and ASDACS believes that copyright has the potential to provide appropriate incentives for innovation, investment and the production of creative works and a balanced regime of access to such creativity by the disability, educational, libraries and archives sectors is important.

That said, screen directors who make vital contributions to culture, diversity and economic growth in Australia as a result of their work in the screen industry, at present will not benefit from the proposed changes to the statutory schemes as they apply to educational institutions because quite simply, they not enjoy sufficient copyright ownership in their film and television productions. The ADG and ASDACS urge further review of the Copyright Act to define screen directors as makers of their films. This will facilitate further creativity and innovation by these talented individuals, thus benefitting consumers of Australian film and televisions including those in the disability, educational, libraries and archives sectors.

Finally, the ADG and ASDACS do not support the extension of the “safe harbour” regime at this point in time until an effective Industry Code of Conduct to address online copyright infringement is in effect.

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				
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