



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

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1. Who are we?

As stated in our previous submission of November 2015, 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.

Since inception ASDACS has negotiated reciprocal collection agreements with 22 overseas partner territories. Over the last 20 years, ASDACS has collected approximately \$7.5 million of secondary royalties on behalf of its members, largely based on reciprocal arrangements with overseas collecting societies. Of this, only \$3,500 is from retransmission royalties collecting in Australia through the Australian government mandated collecting society, Screenrights.

ASDACS is also an audio-visual authorship collection society member of CISAC (International Confederation of Authors and Composers Societies) who collected on behalf of their worldwide membership €7.9 Billion in 2014 and whose royalty collections for audiovisual is growing 5 per cent year-on-year, now exceeding €500M/year. The international growth trend for creative audio-visual exports derived royalty income amounted to a net increase of 60 per cent in 2014 for Australian and New Zealand directors. In 2016, ASDACS will distribute close to \$1,000,000 to Australian and New Zealand directors, whose creative works have been exported and broadcast in ASDACS' partner territories. However, due to a number of anomalies within Australian copyright legislation ASDACS is unable to reciprocate to the full extent of our international partners, compromising our obligations under existing international agreements.

2. The Productivity Commission Inquiry

The ADG and ASDACS welcome the opportunity to provide a further submission to the Productivity Commission in relation to its Draft Paper of 29 April 2016 (the **Draft Paper**). At the outset, we note that whilst the Productivity Commission's objective of creating a fairer and more equitable system is to be commended, we have concerns about specific elements of the Draft Paper as they seem inconsistent and somewhat counter-productive to the Productivity Commission's intended aims. Furthermore, the Productivity Commission's draft recommendations could have a very damaging effect and non-productive outcome on the audio-visual sector.

Our further submission to the Productivity Commission is set out below, covering the following key areas:

1. The framing of the Draft Paper by the Productivity Commission

2. The importance of intellectual property (IP), and more specifically copyright and the need for copyright reform to recognise directors as authors of audio-visual works and ensure fair remuneration for their creative contribution
3. Copyright term – in particular the reduction in the term of copyright
4. Copyright scope – in particular, The introduction of US style “fair use”
5. Collecting societies and the response to the Productivity Commission’s information request.

3. Framing of the Draft Paper

At the outset, the ADG and ASDACS are concerned with the hostility in the framing of the Productivity Commission’s Draft Report regarding IP particularly around copyright which is described as “copy(not)right”.¹ In particular, it appears that the Productivity Commission:

- Assumes that Australians are simply passive consumers of content, rather than appreciating that Australia has a vibrant creative sector that creates, produces and indeed, successfully exports Australian “stories” and culture
- Characterizes “rights holders” as monoliths and “users” as a somehow disenfranchised. Authors, including directors, are original creators and rights holders and some of them face clear imbalances of bargaining power in retaining and exploiting their rights. Furthermore, users of creative content are not simply Australian consumers, they are large foreign corporations like Google and YouTube who have created business models that leverage others’ creativity for commercial gain.

As an overall point, the Draft Report is a shot across the bows of Australian creators. It demonstrates a complete lack of appreciation of creators and the creative industries by the Productivity Commission. The tone of the Draft Report in referring to “creators” in inverted commas is further reinforced by the draft recommendations in relation to term of protection for copyright and US style fair use, both of which are in our view, unwarranted for the reasons set out below.

4. The importance of copyright for directors

As stated in our previous submission, copyright is a lynchpin of the creative economy which is a significant financial contributor to the Australian economy.^{2 3} Within the creative economy, Australian screen directors make vital contributions to culture, diversity and economic growth. 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 instils an appreciation of history, Australian culture and our community’s perspective on other cultures. Australian stories through film and television are exported to the world every year.

The contribution of the Australian screen industry to the Australia economy is set out in our previous submission,⁴ together with the specific contribution of Australian film directors. Australian screen

¹ Page 16 of the Draft Report.

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.

³ Ibid.

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>.

directors are creators of Australian stories and reflective of culture that is exported worldwide for example through successful Australian films include: George Miller's *Mad Max* (1978), *Mad Max 2: The Road Warrior* (1981), *Mad Max 3: Beyond Thunderdome* (1985), *Mad Max: Fury Road* (2014), Peter Weir's *Picnic at Hanging Rock* (1975), Baz Lurhman's *Australia* (2008), *Strictly Ballroom* (1992), Phillip Noyce's *Dead Calm* (1989), Chris Noonan's *Babe* (1995) and Gillian Armstrong's *My Brilliant Career* (1979). Popular television program examples include: *Home & Away*, *Neighbours*, *Mrs Fisher's Murder Mysteries* and the recent *Cleverman* as well as children's television shows like *Nowhere Boys*.

However, despite this international success in film and television, Australian screen directors lack financial incentives, a situation which is compounded by their lack of copyright ownership and thus bargaining power.

In Australia, as the Commission is aware, 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 this is usually the producer except in relation to limited retransmission rights which were granted to film directors in 2006.

Examples: Director, Peter Weir

Peter Weir, one of Australian's most iconic screen directors, provides two excellent examples of the impact of the unfair lack of copyright ownership for directors: GALLIPOLI and PICNIC AT HANGING ROCK.

After a visit to Gallipoli shores in the 1970's, Peter was inspired by the words of soldiers pleading for a film to be made. He decided to make a film about the landing at Gallipoli. Peter wrote the initial story for the film and then involved producer, Pat Lovell and scriptwriter, David Williamson to assist. Yet despite the film GALLIPOLI reached critical acclaim, Peter had no creative ownership or copyright in the film. Both Pat Lovell and David Williamson owned copyright in the film and script respectively. Even the initial composer of the music for the film had rights in the musical composition. Under Australian copyright laws, Peter owned nothing and still owns nothing. GALLIPOLI continues to earn copyright royalties as a result of widespread educational use throughout Australia. Peter shares in none of these financial rewards despite being the true creative behind the project.

Similarly, the famous Australian film PICNIC AT HANGING ROCK was made famous through Peter's selection of pipe music and his vision of young girls in turn-of-the -century frocks against the harsh Australian bushland. It was only years later after making the film, that Peter realised all the copyright belonged to Pat Lovell as the producer of the film. Despite Peter's creative vision for the film, again he has no copyright ownership or ongoing share in remuneration.

In a nutshell, and as stated previously 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.

The key issues for Australian screen directors with respect to copyright protection are therefore as follows:

1. Parity

- Australia is well behind the rest of the world in recognition of directors' copyright
- 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 through copyright ownership
- Even in the US, directors benefit from strong union negotiated agreements with residual agreements (i.e. stakes in ongoing financial rewards through contract)
- 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 through the partnership agreements

2. Remuneration

- Half of all director members of the ADG make less than \$25,000 a year despite most having worked in the industry for more than 10 years
- At a time when funding for the Arts has been significantly reduced, directors urgently need secure ongoing income streams through copyright 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 previously, 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
- Copyright is critical to the rights and respect of directors

Therefore, the ADG and ASDACS express their disappointment that the Productivity Commission did not directly refer to this important issue in the Draft Report or its recommendations. 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.⁵ This simple yet effective amendment would 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 small legislative change would 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. Furthermore, 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

⁵ Section 22(4) of the Act.

share in copyright with producers. Finally, our proposal for directors' entitlement to fair remuneration is also supported worldwide through the international authors' body, Writers and Directors Worldwide.⁶

5. Term of copyright

The ADG and ASDACS note with disappointment the observation of the Productivity Commission that the term of protection of copyright is "excessive"⁷ and the allegations that:⁸

...the vast majority of works do not make commercial returns beyond their first couple of years on the market.

We are particularly surprised by the suggestion that "the average commercial life of film is between 3.3 and 6 years."⁹ In our view, this is plainly incorrect. Firstly, even in the writing and production phases alone, television programs and films can take up to five years to come to fruition. Secondly, in terms of distribution, deals are often done territory by territory allowing for a staggered release depending on the success of the film. Overall this may mean that the period of commercial exploitation, one that is necessary to get the required return on investment, is closer to 10 years for Australian film and television.

Famous Australia films such as *Strictly Ballroom*, *Muriel's Wedding*, *Shine*, *Animal Kingdom* took over 10 years in development alone.

Film and television programs also have "long tails". Peter Weir's 1970's masterpiece *Picnic at Hanging Rock* has been playing in territories around the world since its release and provides its creators with a steady income. Other examples of Australian created work that has played regularly since the 1970's include *The Rocky Horror Picture Show*, the *Mad Max* series of films and popular children's program, *Skippy*. Other examples include *Breaker Morant*, *Mad Max*, *Shine*, *The Devils Playground* and television programs like *Neighbours* and *Home and Away* have over 20-30 years on ongoing broadcast success.

Therefore, the Productivity Commission's suggestion that the term of copyright could be reduced to 15-25 years *after creation* as recommended, is completely nonsensical and with due respect, suggests that the Productivity Commission does not understand the creative process or indeed creative industries and their business models.¹⁰ To provide some other real-life examples:

- The filming of George Miller's recent *Mad Max: Fury Road* (2015) was first attempted in 2001, however delayed due to the September 11 attacks and later the start of the Iraq War, taking some 14 years to complete. The first of the four Mad Max films was made in 1978, with the production of the whole series spanning some 37 years.
- Greg Mclean's *Wolf Creek* (2004) sequel, *Wolf Creek 2* (2013) and novel *Wolf Creek Origin* (2014) has recently been adapted into a six-part television mini-series with its release in May 2016 (directed by both Tony Tilse and Greg Mclean). The commercial life of the production since its conception in early 2000, remains relevant and is likely to continue well into the future.

⁶ <http://www.writersanddirectorsworldwide.org/> (accessed 24 September 2015).

⁷ Page 113 of the Draft Report.

⁸ Page 114 of the Draft Report.

⁹ Ibid.

¹⁰ Draft Finding 4.2 at page 29 of the Commission's Draft Report.

Furthermore, overlooking the practicality of the recommendation (i.e. the need to override the Australia-United States Free Trade Agreement and other international agreements), the idea that the term of copyright in Australia would be significantly reduced to that of our trading partners could place Australian creators at a significant commercial disadvantage. Australian film makers would be restricted to shorter terms for commercial returns compared to territories such as the United States. This would no doubt contribute to a mass-exodus of talented Australian film makers to other territories where their copyright would be sufficiently protected to enable them returns on their creative and financial investment.

6. (Un)Fair use

The ADG and ASDACS do not support the Productivity Commission’s recommendation for the introduction of a US style fair use provision, particularly given that it is far broader than that proposed by the Australian Law Reform Commission.¹¹

In our view, there are no compelling reasons as to why this would better serve creators and consumers in the current environment. As stated at the outset, the discussion on fair use presupposes that all copyright owners are large corporations and all users of content are Australian consumers. In fact, often copyright owners are individuals like screen directors in relation to their retransmission rights, and users of copyright content are large multinational organisations that use other creators’ content for their own commercial purposes, like Google and YouTube.

We are particularly concerned about the uncertainty created by the introduction of fair use. This will necessarily necessitate the amassing of comprehensive Australian case law to articulate what is and what is not fair use under these proposed new laws. This places creators, including directors at a significant disadvantage given that they do not have the financial and other resources required to mount expensive legal battles in the courts to argue that their work has not been fairly used.

Furthermore, the application of fair use for out-of-commerce works, i.e. those that are not commercially available will further negatively impact on creators’ ability to earn a living from and control their creative output. If a director has directed a film and does not wish it to be commercially exploited *at that time*, it should be their choice as to whether their creativity can be leveraged by third parties (together with other copyright owners in the film). Fair use legislation should not allow for the use of that work without their permission.

Finally, we note that the Productivity Commission proposes to extend the defence of fair use to third parties that make use of the material on behalf of the users. We assume that this could mean that service providers that would ordinarily licence material could have the coverage of fair use and may not be required to independently licence the material or take “reasonable steps” to avoid authorisation liability. Again, this has the potential to significantly negatively impact on creators’ ability to earn a living from their film and television programs.

Overall, the recommendation to introduce fair use in Australia has the capacity to:

- Reduce the opportunities for copyright owners to license their works
- Reduce the capacity for copyright owners to control how their work is used
- Increase the uncertainty for both owners and users of copyright material.

¹¹ Draft Recommendation 5.2 at page 31 of the Commission’s Draft Report and discussed at pages 159-161.

7. Collecting Societies

Finally, we note the Productivity Commission's information request regarding the Attorney-General's Collection Society Code of Conduct. We do not think that this is the right forum for a discussion of any Code issues and would urge the Australian Government to consider these issues separately, perhaps through a review of the Code.

8. Conclusion

In conclusion, the ADG and ASDACS refute the suggestion that the Australian Copyright Act is weighted too heavily in favour of copyright owners, to the detriment of the long-term interests of users.

The ADG and ASDACS strongly argue 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, rather than reduce the scope of copyright, we argue that 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.

The ADG and ASDACS are concerned about the Productivity Commission's framing of the Draft Report in a way that does not reflect a true understanding or appreciation of creators or the creative process. Furthermore, we do not agree with recommendations to shorten the term of copyright protection nor to introduce US style fair use legislation in Australia.

We look forward to the opportunity to discuss this in more detail at the Productivity Commission's Public Hearings in Sydney.