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THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

HOUSE OF REPRESENTATIVES

**COPYRIGHT AMENDMENT (FILM DIRECTORS' RIGHTS) BILL 2005**

EXPLANATORY MEMORANDUM

(Circulated by authority of the Attorney-General,  
the Honourable Philip Ruddock MP)

## COPYRIGHT AMENDMENT (FILM DIRECTORS' RIGHTS) BILL 2005

### OUTLINE

Film directors make a major creative contribution to the film making process. Other than moral rights, Australian copyright law does not currently recognise this contribution, while other creators involved in the making of a film such as screenwriters and composers are recognised. The Government considers that there is a need to amend the Copyright Act to give, for the first time, film directors a copyright in the films they direct.

This Bill provides rights to directors to share, as copyright owners, in remuneration for the retransmission of films included in free-to-air broadcasts.

The amendments to the *Copyright Act 1968* provide for film directors to be joint copyright owners of their films, along with producers, for the purposes of the retransmission statutory licence in Part VC of the Copyright Act. The retransmission statutory licence allows free-to-air broadcasts to be retransmitted without permission from copyright owners provided the retransmitter pays fair remuneration for the owners of copyright in the underlying materials in broadcasts, including films and pre-recorded programs. Under the amendments, the directors and producers would share a right to part of this remuneration, as joint owners of the copyright in their films for this purpose.

### **Financial impact statement**

The proposed amendments are expected to have minimal direct impact on Commonwealth expenditure or revenue.

## REGULATION IMPACT STATEMENT Film Directors' Copyright

### Issue Identification

#### ***What is the issue being addressed?***

*Film directors make a significant creative contribution to the film making process. Australian copyright law does not currently recognise this contribution, while other creators such as screenwriters and composers are recognised. The Government recognises this anomaly and undertook to address this situation in the Strengthening Australian Arts election commitment.*

#### **Film production and broadcasting in Australia**

1. According to the Australian Bureau of Statistics in the year ending in June 2003 the Australian film and video production industry generated an overall income of \$1,596 million for the Australian economy, and a before-tax operating profit of \$91.7 million. The industry employed 16,427 people in 2,174 businesses.
2. The *Broadcasting Services (Australian Content) Standard 1999* requires that 55% of all programs broadcast by commercial television networks be Australian. An 'Australian' program is one which is produced under the creative control of Australians and is made without financial assistance from the government's television production fund.
3. Excluding the Special Broadcasting Service (SBS) (for which no definitive 2003-2004 figures were available) approximately 57.8% of programs broadcast on national free-to-air television in 2003 were Australian in origin. This includes 58.68% of programs on the commercial networks (Seven, Nine and Ten) and 57% of the Australian Broadcasting Commission's (ABC) programming. In the most recent year available for SBS (2003-2004) approximately 22% of its programming was Australian. In 2003, 92% of all commercials broadcast by the networks were Australian.
4. The Australian film and video production industry has been growing substantially in the last decade, from an operating loss of \$98.1 million in 1993/94 to a profit of \$91.7 million in 2002/03. Encouraging the continued development of the industry was a commitment of the Government's *Strengthening Australian Arts* policy statement in 2004.

## Copyright in Australia

5. Copyright is the branch of the law that protects creative works from unauthorised use. According to Staniforth Ricketson, the principal rationale put forward in support of copyright protection is twofold. Firstly, from an ethical point of view, 'it is argued that it is unfair that a person should work at creating something and then have the fruits of this work appropriated by another party'.<sup>1</sup> Thus fairness requires that the person creating a work has the right to control economic uses of it.
6. Secondly, it is argued, society benefits from the individual's creation through the increase of its stock of ideas and cultural resources, and through more traditional economic means. In order to encourage people to continue this creative activity, some incentive must be created, 'an incentive which is provided by the grant of a proprietary right in relation to the product of their labours . . . the granting of such a right provides security for the considerable investments of time, labour, resources and skills which such persons often make in order to produce their works'.<sup>2</sup> Thus both society and the individual gain from the granting of copyright protection.
7. However, if society is to continue to benefit from the intellectual products granted copyright protection, these products must be made available to the public, to be used for further creative endeavour. In order to ensure the public has reasonable access to copyright works, the Copyright Act includes exceptions to the exclusive rights of copyright owners for particular uses (such as research and study) and users (such as libraries). This maintains a balance between the promotion of creative endeavour and the public interest in disseminating information.
8. Copyright protection in Australia is granted and regulated by the *Copyright Act 1968 (Cth)* ('the Act'). It grants protection to original works of creative endeavour, including literary, dramatic, musical and artistic works. The creators of these works are recognised as 'authors' and given certain rights to control how their works are used and disseminated. In most circumstances such works will receive copyright protection for the life of the author plus 70 years.
9. Copyright also protects 'subject matter other than works'. This category includes published editions, broadcasts, sound recordings and cinematograph films. These materials are recognised as original interpretations of creative works such as screenplays and musical works and receive a slightly lower level of protection than works. Their creators are recognised as 'makers'. Subject matter other than works is generally protected for 70 years from the date of first publication.

## Copyright in Films

10. Currently the Act does not recognise directors as makers or copyright owners in film. The 'maker' of a film is the person 'by whom the arrangements necessary for the

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<sup>1</sup> Ricketson, Staniforth: *The Law of Intellectual Property: Copyright, Designs and Confidential Information*, The Law Book Company, Sydney, 2002, p.15

<sup>2</sup> *ibid*

making of the film were undertaken' (s. 22(4)(b)). This is usually the producer. Under the Act the maker (ie the producer) is normally the copyright owner of the film. Section 86 of the Act provides that this copyright owner has the exclusive right to:

- (a) make a copy of the film;
- (b) cause the film to be shown or heard in public; and
- (c) communicate the film to the public (including via broadcast and online).

11. These exclusive rights are called primary economic rights, because they enable the copyright owner to control the uses of the work that provide the primary economic returns, eg the publication and distribution. Granting producers (as copyright owners) these rights allows them to commercially exploit their films to recoup investment costs, eg through cinema release, broadcast via free-to-air and pay-TV and the production of videos.
12. Producers are also entitled to payment where their films are used under statutory licences set out in the Act, ie the copying of broadcasts by educational institutions (Part VA) and the retransmission of free-to-air broadcasts (Part VC). These rights are called 'secondary rights' because they do not relate to the primary uses of the material. Instead, they allow copyright owners to obtain remuneration for ongoing dealings with copies of works that have been created under the primary economic rights listed above, eg the copying and retransmission of authorised broadcasts. Under these licences, the permission of the relevant copyright owners is not required to copy or retransmit broadcasts of their material in specified circumstances, provided equitable remuneration is paid by the user to a collecting society declared by the Attorney-General, for distribution to the copyright owners. In the case of the Part VA and VC licences the declared collecting society is Screenrights. The relevant copyright owners for the purposes of these schemes include not only the producer of the film being copied or retransmitted, but also the copyright owners of the underlying original material included in the film, such as the screenwriter and composer. Broadcasters do not receive remuneration for the copying or retransmission of material under these licences. Both schemes apply only to traditional broadcasts, and do not include webcast or video-on-demand services.
13. The Part VC scheme is a new revenue stream that was introduced by the *Copyright Amendment (Digital Agenda) Act 2000*. It applies only to the retransmission of free-to-air broadcasts over traditional broadcasting services (eg cable, satellite or airwave services, as opposed to online or video-on-demand services). To fall within the statutory licence, the retransmission must be simultaneous with the original broadcast, or delayed only to allow for time zone differences. The content of the original broadcast must be unchanged. The scheme will essentially apply to pay-television providers who wish to retransmit free-to-air broadcasts over their systems. This enables pay-television customers to receive all their broadcast material through a single cable or satellite signal, increasing quality of reception and ease of use.

14. No money has yet been collected or distributed under the scheme. The fees payable by those engaged in retransmitting broadcasts are currently the subject of arbitration between the primary retransmitters (ie Australian pay-television operators) and the declared collecting society (Screenrights). The portion of this fund distributed to each copyright owner is determined by a formula set by Screenrights.
15. Directors are granted moral rights in films. Directors must generally be attributed in relation to uses of their film, and may take action in response to derogatory treatment of their work. However, directors are not recognised as film makers for copyright purposes. Thus they have no economic rights by virtue of the Copyright Act in the films that they take a primary role in creating and rely instead on contractual means for financial remuneration. As they are not recognised as copyright owners, directors also do not have any rights to remuneration under the Part VA and VC statutory licences.

### **International**

16. The majority of European countries have traditionally granted directors both economic and moral rights over the films on which they have worked. This is due to the emphasis that European civil law places on the right of the primary creative contributors to a work to control and benefit from uses of that work. In the majority of European countries directors and producers share copyright in films, and must reach agreement regarding the allocation of the rights and the uses of the films. However, many European countries, including France, the Netherlands and Germany, have a legislative presumption that the director's primary economic rights vest with the producer, unless there is an agreement to the contrary. In these countries directors are generally granted specific rights to a share in remuneration from secondary and ongoing sales and uses of films under 'authorship schemes'.
17. In contrast, common law countries such as the United Kingdom, Australia, New Zealand, Canada and the United States have traditionally emphasised the right of the principal investor in a creative project to commercially exploit the products of their investment. This emphasis is reflected in the copyright protection conferred on producers of 'subject matter other than works' such as films and sound recordings, which traditionally require a high level of financial outlay. Consequently it is the person responsible for making the arrangements for the making of a film who traditionally receives copyright in the finished product.
18. With the creation of the European Union (EU) and the harmonisation of copyright laws across Europe, the recognition of directors as film makers for copyright purposes is fast becoming the international norm. The EU Directive on rental right and lending right and on certain rights related to copyright in the field of intellectual property,<sup>3</sup> which was passed on 19 November 1992, requires that the principal director of a film be recognised as its author and joint copyright owner. The director's rights may be transferred to another, either through a legal presumption or a contract.

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<sup>3</sup> European Council Directive 92/100/EEC

However, directors must be granted a non-transferable right to obtain equitable remuneration for the rental of the film.

19. In December 1996 the United Kingdom introduced legislation designed to implement this directive. Under the new UK system, the producer and director of a film are deemed to be joint authors and first copyright owners of the work. The director receives full primary economic rights in their films. If the director is an employee of the producer these rights are presumed to vest with the producer. The primary economic rights of a non-employee director may be (and usually are) transferred to the producer via contract. However, all directors retain a non-transferable right to remuneration when the film is rented or lent under the secondary rental rights scheme.

### **The issue**

20. In its 2001 election policy commitment *Arts for All*, the Government undertook to 'consult key stakeholders on proposals to amend the Act to grant new rights to film directors'. In the 2004 election policy commitment *Strengthening Australian Arts*, the Government undertook to 'amend the Copyright Act to give, for the first time, film directors rights to copyright in the films they direct.'
21. Directors argue that as the key creative force in the film making process, they should be recognised as makers of, and copyright owners in, films. They point out that it is inconsistent that other major creative contributors to the film making process, such as composers and scriptwriters, receive economic recognition of their work while directors do not.
22. The Australian Screen Directors Association (ASDA) reports that it has had difficulty negotiating for recognition for Australian directors under authorship schemes, such as those in place in Germany, Italy and Spain, due to the lack of reciprocal payments available from Australia.
23. Under the current system directors are usually granted remuneration in the form of a lump sum payment. More prominent directors may also receive a percentage of net profits. Film directors do not have copyright entitling them to ongoing remuneration for the use of their films. This lack of rights to a steady royalty income stream does not provide an incentive for directors to continue to work in the Australian film industry and may encourage them to leave Australia to work in overseas markets, or leave the industry altogether. Increasing the financial stability of directors by providing them with rights to ongoing remuneration would encourage the creative talent to remain in the Australian film industry and increase the ability of directors to concentrate on film making full time. This will, in turn, benefit the Australian film industry and contribute to the broader economy and Australian culture.
24. The Government recognises that Australian directors provide an important creative input in the film making process and play a key role in the national and international success of Australia's film and television industry. It acknowledges that it is inconsistent that directors are not entitled to copyright remuneration or recognition, while other contributors such as screenwriters and composers are receiving copyright protection. At the same time, the Government wishes to minimise disruption to

current industry arrangements as far as possible. Therefore, it recognises that where new income streams arise in relation to film copyright, due consideration must be given to the inclusion of directors among the benefiting groups.

### ***Why is government action needed to correct the problem?***

25. Legislative amendment is required to address the Government's objectives as copyright does not subsist other than under the Copyright Act.
26. The Act defines the nature of copyright in relation to all creations, including films. It sets out who is the 'maker' and copyright owner of a film, who controls its primary economic uses and who will receive remuneration under the statutory licences (see more detail below). The Act must be amended to alter or expand these definitions, if film directors are to be granted additional rights over the films they produce.

## **Objectives**

### ***What are the objectives of the Government action?***

27. In response to its commitment to amend the Act to grant rights to film directors in the *Strengthening Australian Arts* policy statement, the Government seeks to:
  - address concerns about the level of recognition available to directors in Australia;
  - provide appropriate copyright recognition for the creative contribution of directors;
  - enable directors to share in the new income stream provided by the Part VC retransmission scheme, in recognition of their creative contribution to the film making process;
  - maintain, as far as possible, current financial arrangements for the Australian film industry, and the ability of producers to fully exploit films to recoup the cost of production and attract investors; and
  - avoid, as far as possible, any negative impact on consumers, user groups (eg broadcasters and educational institutions) and society generally.

### ***Is there regulation or policy currently in place? Who administers it?***

28. Copyright is governed by the *Copyright Act 1968*. The Attorney-General has responsibility for copyright policy and administration of the Act.
29. Section 86 of the Act defines copyright protection for cinematograph films (see para 10 above).



30. Section 98(2) of the Act states that the maker of a film is the copyright owner. Section 22(4)(b) defines the maker (see para 10 above).
31. Part VA of the Act sets out the statutory licence providing for remuneration for the copying and communication of broadcasts of films by educational and other institutions. Part VC sets out the licence for the retransmission of free-to-air broadcasts of films (see para 13 above).
32. Section 189 of the Act recognises the director as a ‘maker’ of a film for the purposes of the moral rights scheme in Part IX only (see para 15 above).

## **Options**

### ***What regulatory and non-regulatory options (including quasi-regulation) for dealing with the problem are being considered?***

NB – each of the legislative models would include savings and transitional provisions to ensure contracts and other arrangements which exist at the time the amendments come into effect are not affected.

### **Industry self-regulation, quasi-regulation and co-regulation**

33. None of these regulatory mechanisms is appropriate in this case.
34. The existing market, including industry awards and practices, does not recognise directors as makers of film or include remuneration of directors for ongoing uses of films. The history of industry negotiations suggests that it is unlikely that the market alone will provide an incentive for additional recognition of the creative input of directors, or that codes of practice designed to encourage this will be agreed to by major industry players.

### **Option 1 – Maintain status quo**

35. Under this model copyright arrangements would remain as they are, with all copyright in a film vesting with the producer. Directors would continue to rely on contractual arrangements for economic recognition of their creative contribution to films.

### **Option 2 – Adoption of joint authorship model**

36. Enact legislation based on the directors' rights model currently in place in the UK (introduced on 1 December 1996). Under this model:

- all copyright materials (including films) would be classified as ‘works’, with ‘authors’ as the first copyright owners;
- the producer and the principal director would be deemed to be ‘joint authors’ of films made after the enactment of the legislation;
- ‘producer’ would be defined as ‘the person by whom the arrangements necessary for the making of the film are undertaken’ (this is essentially the definition of a ‘maker’ in the current Copyright Act);
- ‘principal director’ would not be defined;
- if the director is working as an employee, their employer would own copyright in their work (unless there is an agreement to the contrary);
- directors would have non-transferable statutory rights to claim equitable remuneration under the retransmission (Part VC) and educational copying (Part VA) schemes;
- directors could assign all other rights, including future copyright interests.

### **Option 3 – Co-ownership with presumption in favour of producers**

37. Introduce a presumptive model similar to that in use in France, which guarantees economic remuneration for directors whilst retaining the ability of producers to market their product. Under this model:

- the principal director would be deemed to be a maker of a film, along with ‘the person by whom the arrangements necessary for the making of the recording or film are undertaken’ (ie, leaving films as subject matter other than works as regards to the concept of authorship);
- where there is a principal director, the primary economic rights in a film would be first co-owned by the director and the producer;
- the director’s primary economic rights would be presumed to transfer to the producer, unless otherwise stipulated in the director’s contract (in contrast with Option 2 - where there would be no such presumption);
- the director would have a non-transferable statutory right to claim equitable remuneration under the retransmission (Part VC) and educational copying (Part VA) schemes;
- if there is no principal director all copyright would vest with the producer ;
- if the director is working as a salaried employee, copyright would vest with the employer (eg, the producer).

#### **Option 4 – Remuneration of directors under the secondary rights schemes**

38. Grant directors limited rights under the statutory licences for educational copying of broadcasts and retransmission of free to air broadcasts. Directors would not be considered makers of the film and would therefore not be able to exercise primary rights in films. This would provide directors with additional remuneration with minimal impact upon the rights of producers or their ability to recoup production costs. A model could be introduced which would:

- recognise directors as joint copyright owners for the purpose of the licence schemes in Parts VA and VC of the Act only;
- specify that the rights of a director working as an employee vest with the employer (eg, the producer);
- specify that directors' rights are fully transferable by assignment.

#### **Option 5 – Remuneration of directors under the retransmission scheme only**

39. Introduce amendments which grant directors rights to remuneration under Part VC of the Act only. This is the Government's preferred model.

40. Under the Option 5 model:

- the director would be deemed under s.98 to be a maker of a film along with the 'person by whom the arrangements necessary for the making of the film were undertaken' (ie, the 'maker' – see s.22(4)(b));
- as such, the director would be a joint owner of copyright in a film by virtue of s.98, but only for the purposes of retransmission under Part VC;
- provisions relating to employee directors and to assignment would be included, as under Option 4.

### **Impact analysis of each option**

#### ***Who is affected by the problem and who is likely to be affected by its proposed solutions?***

41. The groups potentially affected by changes to the copyright in films include:

- Film directors
- Film producers
- Broadcasters (may be affected both as producers and users of films)
- Investors

- Distributors (including cinema houses and video retailers)
- Educational institutions, schools and universities
- Other copyright owners with an interest in the film (including script writers and composers)
- Copyright collecting societies
- The Australian film industry as a whole
- Public and cultural institutions such as archives, museums and libraries who use films
- Individual consumers
- Other contributors to films who do not have film intellectual property rights, eg, cinematographers, production designers.

***How will each proposed action affect existing regulations and the roles of existing regulatory authorities?***

42. Option 1 requires no legislative changes. Each of the other proposed options requires some changes.
43. Option 2 makes fundamental changes to Australia’s copyright laws and industry that would require substantial primary and consequential amendments to the Act as a whole. Drafting and implementation costs for the introduction of what would essentially amount to an entirely new copyright system would be substantial. The division between ‘works’ and ‘subject matter other than works’ is a fundamental concept in both the Copyright Act and the *Copyright Regulations 1969*. Any alterations to this division would require amendments to the majority of the provisions of the Act and the Regulations. Further consideration would need to be given to whether specific rights and exceptions that currently apply only to works should apply to films and vice versa. This could require the recasting of the statutory licences set out in Parts VA, VB and VC of the Act and the powers and responsibilities of the collecting societies that administer these licences. As many of the powers of the Copyright Tribunal relate only to works or subject matter other than works, these would also need to be revised.
44. Option 3 would require a substantial reworking of the provisions of the Act relating to films with substantial drafting and implementation costs. It would require the amendment of those provisions relating to the definition of ‘maker’ for films, the insertion of provisions establishing a presumption in favour of producers and the insertion of provisions dealing with the rights of directors who are also employees. It would also require the insertion of provisions establishing non-transferable rights to remuneration for directors in statutory licensing schemes in Parts VA and VC of the Act. These provisions would be a complete departure from the operation of the existing provisions the Copyright Act, which do not currently provide for any non-transferable economic rights. The powers and responsibilities of the collecting societies administering these statutory licences would require review. Consequential amendments to the Regulations would also be required.

45. Option 4 would require slight amendments to the established copyright system. Minor amendments would be required to the statutory licences set out in Parts VA and VC of the Act to establish directors as joint copyright owners for the purpose of these licences. Consequential amendments to the Regulations and the administrative arrangements of the relevant collecting societies would be required. These collecting societies may experience some increase in ongoing costs due to the addition of directors as beneficiaries to the schemes, in particular the established Part VA scheme. No adjustment of the powers of the Copyright Tribunal should be required.
46. Option 5 requires only minimal amendments to the established copyright system. Changes in the provisions of the Act dealing with copyright ownership in films and setting out the Part VC statutory licence would be required. The internal administrative arrangements of Screenrights, the collecting society which administers the Part VC licence, would also require some slight adjustment. It is anticipated that the costs of this adjustment to Screenrights and the drafting and implementation costs to the Australian Government in giving effect to this option will be minimal, as it makes only slight changes to a statutory licence which is not yet fully operational, rather than introducing a whole new scheme or requiring adjustments to an existing scheme where collection and payment procedures are well established. The majority of costs regarding the development of the proposal (eg consultation costs) have already been met. All other costs should be absorbed within the costs of setting up the administration of the retransmission licence generally, to which the Government is already committed. Screenrights may experience some additional ongoing costs due to the need to identify and distribute to additional beneficiaries.

***Identify and categorise the expected impacts of the proposed options as likely benefits or costs; determine which groups are likely to experience these benefits or costs and what the extent of their impacts is likely to be; quantify these effects where possible.***

### **Option 1 – Maintain status quo**

47. As this option makes no changes to the existing arrangements there would be no costs to the Australian film industry or Australia as a whole. However, it does not meet the Government's objective of enabling directors to share in the new income stream provided by the Part VC retransmission scheme, in recognition of their creative contribution to the film making process. Neither does this option meet the Government's election commitment to consider amendments to the Act granting new rights to directors.
48. As is discussed in para 34 above, in the current market environment it is unlikely that directors will be granted additional recognition for their creative input without Government intervention.

## **Option 2 – Adoption of joint authorship model**

### **Benefits**

49. Option 2 provides significant benefits for directors, granting them additional legal recognition as authors, economic rights as copyright owners and ongoing financial remuneration under the secondary licensing schemes. The benefits and costs of providing recognition for directors under the licences will be discussed at Option 4 below.
50. As directors' economic rights under the statutory licences are non-transferable under this model, the director's right to equitable remuneration would not be vulnerable to market and industry pressure.
51. Producers and investors (and, if they are recognised as copyright owners, directors) would benefit from the additional protection films would receive as works rather than subject matter other than works. For example, as subject matter other than works, films are currently protected for 70 years from publication. As a work, a film would be protected for a potentially much longer time, because copyright in published works lasts for the life of the author plus 70 years. This would provide economic benefits for copyright owners and investors, as they would retain control over and receive remuneration for their works for far longer than under the current system.

### **Costs**

52. The amendments necessitated by reclassifying films as 'works' would create substantial costs for the broader community, particularly with respect to the extended duration of protection. This increased protection would require that users such as broadcasters, distributors and the general public pay to use films for far longer than they do under current law, directly financing the 'benefits' for producers and their investors. This could be a particular problem for the public organisations who are currently major users of copyright material, eg, archives (including ScreenSound Australia) and educational institutions.
53. The copyright regime is currently balanced to provide sufficient remuneration to creators in order to encourage the creation of new works, without imposing an undue burden or restrictions on the community as a whole. The existing balance has been developed over a number of years. Any readjustment of this balance, or reclassification of films as works, would represent a fundamental change to Australian copyright law.
54. In granting directors non-transferable rights to remuneration under the statutory licensing schemes, this model would introduce another extensive change to Australian copyright law. The concept of non-transferable economic rights is contrary to the fundamental principles of copyright in Australia, which regards copyright as a form of property to be transferred and dealt with as a market commodity. Granting

directors non-transferable economic rights will reduce the flexibility of the current remuneration system and prevent individual directors from negotiating for larger up-front payments and other benefits. It fetters the ability of directors and producers to reach mutual agreement regarding remuneration and control.

55. Implementing such fundamental changes to Australian copyright law would also require consequential changes to many provisions of the Act, and result in substantial administrative and implementation costs.
56. The changes this model would make to the ownership of primary economic rights in films would have the potential to impose major costs on producers and investors, the film industry, and ultimately Australia's cultural industry as a whole. The ability of film producers to market and distribute their films and to recoup the costs of production is heavily dependent upon their ability to control primary economic rights and to license and reproduce films without gaining permission from other parties. Removing, even partially, these primary economic rights from the control of producers could result in major financial costs to the Australian film industry. Under this model, the producer would be required to negotiate an assignment of the rights, or alternatively to gain the permission of the director for all uses of the film, either through a broad contract or through agreements specific to each situation. As the model does not distinguish between 'high end' productions such as feature films (in which directors have a high level of creative input) and 'low end' productions such as game shows (in which the director's input is minimal) this could result in directors who have little or no creative input potentially gaining some control over a film's distribution.
57. Granting directors joint control over the primary economic rights of films would add a further layer of negotiations to the already complex bargaining process which surrounds the marketing of films. This would increase the overall costs of audiovisual production and potentially reduce the ability of producers to fully exploit their films. This in turn could create uncertainty for investment and reduce the appeal of the Australian film industry to the international market.
58. The UK model has also been criticised as being open to market manipulation. Some industry representatives have suggested that since the model's introduction, UK producers have pressured directors into giving up their rights without adequate compensation. On the other hand, it has also been argued that UK directors have been taking collective action to use the primary economic rights granted to them as joint copyright owners to achieve unreasonable pay-offs. It has been suggested that UK directors are transferring their future rights to directors' societies in order to circumvent transfer clauses in standard industry contracts, combining their rights to increase the collective bargaining power of directors. No quantitative evidence supporting either assertion is currently available.

### **Option 3 – Co-ownership with presumption in favour of producers**

#### **Benefits**

59. Option 3 would again provide substantial benefits for directors, granting them additional recognition of and remuneration for their contribution to film making. However, through the introduction of the presumption that directors' primary economic rights vest with producers it ensures that producers can fully exploit their films to recoup up-front costs and to create reasonable returns for investors.

#### **Costs**

60. This model incurs many of the same costs as Option 2, requiring the same fundamental changes to Australian copyright law caused by the introduction of non-transferable rights.
61. Furthermore, whilst it ostensibly keeps primary economic rights in the control of producers, it does so only by a complicated and confusing legal presumption. Although this presumption is in favour of producers (ie, primary economic rights vest with producers notwithstanding that the director is the first legal owner of the copyright) it could be rebutted and has the potential to be challenged frequently, giving rise to extensive litigation. The presumption could also be overruled by any prior assignment. Thus directors could in theory 'circumvent' the presumption by assigning their future rights to a third party, cutting the producer out entirely. Objections have been raised by industry representatives that this has occurred in the UK, with directors pre-assigning their rights to societies to increase their bargaining power (see para 58).

### **Option 4 – Remuneration of directors under the secondary rights schemes**

#### **Benefits**

62. Option 4 grants directors rights to financial remuneration under the statutory licences. It is in line with indications by directors that they are interested primarily in recognition and remuneration under these licences. This model also has the advantage that producers indisputably retain primary economic rights, and can thus market and distribute their films efficiently.

#### **Costs**

63. This model does not grant directors the broader recognition as 'makers' of films under the Act generally that they have lobbied for. However, directors should be willing to support a model that, whilst not granting them this recognition, does nonetheless provide them with ongoing financial remuneration. Furthermore, directors already receive some recognition of the creative contribution they make to films under the moral rights provisions set out in Part IX of the Act.



64. If this model were to be introduced, producers would still experience some loss in economic remuneration, as the payments they currently receive under the educational statutory licence would have to be shared with directors. Producers are likely to strongly oppose any model that erodes their remuneration under this scheme, which they argue could have negative consequences for the industry as a whole. In the financial year 2003/2004, Screenrights collected \$15,903,669 under the Part VA statutory scheme, \$14,168,681 of which was allocated for distribution to beneficiaries under the scheme. According to Screenrights' published formula 68.5% of this amount, or \$9,209,642 should have been allocated for distribution to the copyright owners of cinematographic films (ie producers). Producers argue that these funds are heavily relied on by many producers for cost recovery. This is particularly the case with respect to small budget and educational programs, such as those produced by the ABC, which receive a substantial portion of this pool.
65. The alternative to reducing the producer's remuneration under the Part VA licence is to increase user payments. Such a step would impose additional financial costs on educational institutions. However, it is unlikely that these payments would be increased to compensate for an increase in the number of beneficiaries in a purely market-driven environment. Negotiations as to payment levels are conducted between the collecting society and those making payments; the negotiations focus on the value of the content and its use rather than the need to remunerate all potential beneficiaries, such as producers and directors. As the value of the film itself has not increased, it is unlikely that an application to the Copyright Tribunal would result in any increase in the remuneration payable by users. Additional remuneration was not sought from users following the decision in *Phonographic Performance Company of Australia v Federation of Australian Commercial Television Services* (1998) 40 IPR 225, which added copyright owners in sound recordings as beneficiaries of remuneration under the Part VA copying scheme. It is also difficult to see how such an increase could be easily mandated or justified as a legislative measure.
66. As no money has yet been collected or distributed under the retransmission scheme, producers will not experience any real cost in relation to the addition of directors as beneficiaries to this scheme (see below at para 69).
67. The collecting society for the statutory licence schemes may experience some increase in administration costs if this model were introduced, due to the additional complexity of the distribution scheme, with the addition of directors as a new class of beneficiaries. However, these will be minimised by the fact that they will only affect payment distribution, not collection.

## **Option 5 – Remuneration of directors under the retransmission scheme only**

### **Benefits**

68. As with Option 4, Option 5 provides additional financial remuneration for directors without jeopardising the ability of producers to effectively market and distribute their films. It also grants directors general recognition as 'makers' of film. However, the

level of remuneration directors receive under this model is likely to be less than under the previous options.

69. Option 5 has the advantage over Options 2-4 in that it does not have any potential to impose additional costs on educational institutions and does not erode existing sources of income relied upon by producers to recoup investment costs. The Part VC retransmission scheme is a new income stream only introduced in 2001. While a collecting society (Screenrights) has been declared by the Attorney-General to administer that scheme, proceedings are currently pending in the Copyright Tribunal for determination of the amount payable by broadcasters retransmitting material under the scheme. No money has been collected or distributed under the scheme. Collections and distributions under the existing educational copying statutory licence scheme are not comparable to, and cannot be used to provide estimates for, collections likely to be made under the retransmission licence. Screenrights collects remuneration payable under the educational statutory licence for copying of broadcasts by every school and educational institution in Australia. The retransmission licence applies primarily to Australia's few pay-television services (the scheme applies only to traditional cable and airwave broadcasting services – it does not apply to webcasting or video-on-demand services). Furthermore, as no timeframe for the collection or distribution of moneys have yet been set, producers cannot even be sure when or for which projects remuneration will be paid. Thus no quantitative figures or estimates on the scheme or the effect of proposed changes to it are available.
70. Consequently, any remuneration figures anticipated by producers under the retransmission scheme can be only speculative. Producers cannot yet be acting in reliance on this remuneration. Under the new Part VC scheme, producers will still receive more money than they do currently. The only effects of the proposed amendments are that the additional remuneration from this new revenue stream may be less than producers may have expected in the absence of amendments to recognise the right of directors to share in the new remuneration scheme.
71. Option 5 allows industry and individual negotiations to remain flexible. As the new directors' rights would be fully assignable, individual directors and producers could still use these rights to bargain in individual agreements. In the absence of assignment to the producer of the right of the director, neither could enter into voluntary arrangements with the retransmitters that bypass the statutory licence (as allowed under the scheme) without the other's permission.
72. Of the options presented, this model is the most likely to receive the support of both producers and directors, as it addresses these groups' primary concerns (see further paras 89-90). Producers will benefit from the fact that they retain both control over marketing and distribution of films and full remuneration under Part VA, whilst directors benefit from recognition as film makers and from ongoing remuneration under Part VC. Option 1 is likely to be strongly objected to by directors, as it does not address their legitimate concerns. Meanwhile, Options 2-4 will be rejected by producers, as these options have the potential to greatly reduce their revenue streams and ability to exploit their films.

## Costs

73. The amount of remuneration producers receive under the new retransmission scheme may be lower than expected to accommodate payments to directors (see paras 77-78 below). However, as no money has yet been distributed under this scheme, this will not result in a direct cost to producers. Any remuneration figures expected by producers can only be speculative.
74. Likewise, as no fees have yet been determined under the scheme retransmitters will not suffer any increase in costs. Furthermore, as is also discussed above, in the past when beneficiaries were added to an existing statutory licence scheme the fees payable under the scheme did not increase.

### ***Identify distributional effects and attribute these to the groups affected.***

75. The preferred model (Option 5) has minimal distributional effects, as it simply reallocates a portion of funds yet to be collected under a statutory licence which is yet to be implemented from one group of individuals (producers) to another (directors). Estimates of the flow-on effects of these changes can at best be only speculative, as the effect of the introduction of the retransmission scheme overall is unknown.
76. Increasing the number of beneficiaries under the scheme will only affect the cost of receiving retransmitted material to consumers if it results in an increase in costs to retransmitters. As is discussed above at para 65, past experience suggests that this is unlikely to occur, as the number of beneficiaries does not affect the economic value of content being used under the statutory licence.
77. It is possible that copyright owners other than producers (eg, scriptwriters and composers) who receive payments under the scheme will find their remuneration levels lower than expected. Screenrights has released a distribution scheme for the retransmission licence. Funds collected under the retransmission licence will be divided thus:

Owners of copyright in films	68.5%
Owners of copyright in literary and dramatic works	22.1%
Owners of copyright in musical works	7.4%
Owners of copyright in sound recordings of musical works	2.0%

78. It is possible that these percentage levels will be adjusted should directors be added as beneficiaries of the scheme, resulting in all copyright owners receiving a smaller portion of the distributable funds. However, it is more probable that the current formula will be maintained and that the moneys set aside for distribution to owners of copyright in films will be divided between producers and directors. The portions allocated to other copyright owners will remain the same.

79. In that case, only producers will be affected by the granting of directors' rights under the retransmission scheme. As is discussed at para 70 above, this effect will be, at the most, the loss of a speculative amount of income they may possibly receive under the scheme. Producers will still be receiving more money than they currently receive. Thus the flow-on effect to the community at large and other businesses reliant upon the film industry should, in consequence, be at most minimal.
80. Option 5 should have no negative effect on Australia's balance of trade. Approximately 57.8% of material broadcast on Australia's free-to-air channels (excluding SBS) is Australian in origin. Thus the majority of the directors and producers affected by the proposed changes will be Australian. Furthermore, under the current retransmission licence, where a film being retransmitted in Australia is produced by a foreign national but directed by an Australian, all payments will go off shore. Under the proposed model, however, the Australian director will share in this ongoing remuneration. Given the comparative size and strength of the Australian film industry and economy in relation to its international peers such as the US and UK, it is far more likely that an Australian-foreign co-production will be produced off shore and directed by an Australian than vice versa. According to the Australian Film Commission, all three of the feature film co-productions (ie with a mix of Australians and foreigners in key creative positions) during the 1999/2000 financial year were directed by Australians. All four of the live action television co-productions during the same financial year are also listed as solely or primarily directed by Australians. Furthermore, of the five foreign feature films produced in Australia during this period (ie productions under foreign creative control with a substantial amount shot in Australia), at least two were directed by Australians (crew details were not available for two of the titles).
81. There may be further distributional effects in favour of directors under the other models. These models each have the potential to affect the levels of payment for certain uses of film in existing markets. With respect to Options 2 and 3, which make changes to the ownership of primary economic rights of films this effect could be substantial. The extent of the effect will depend on the behaviour of the general market for uses of films. With respect to Option 4, which makes changes to the ownership of film copyright under the existing educational statutory licence scheme, the effect will depend on whether the collecting society for the schemes (currently Screenrights) seeks to increase payment levels in response to the increase in beneficiaries. This issue does not arise under Option 5, as remuneration levels under Part VC are yet to be fixed.
82. By making directors and producers joint copyright owners, Options 2 and 3 also have the potential to increase administrative requirements for those negotiating directly with film copyright owners, as they may be required to gain permission from, and make payments to, two separate people. Options 4 and 5 are unlikely to impose any additional compliance requirements on the public or business, as they make changes only to the statutory licence schemes which are administered by a single body.

**Identify the data sources and assumptions used in making these assessments.**

83. The sources and basis for these assessments are:

- Submissions in response to the invitation published in *The Australian* newspaper on 16 September 2000. (See further paras 86-88 below.) Key submissions made include those from the Film and Television Industry Group and the Australian Screen Directors Association
- United Kingdom *Copyright, Designs and Patent Act 1988*
- Australian *Copyright Act 1968*
- Get the Picture 6<sup>th</sup> Edition, Australian Film Commission, 2002 – <http://www.afc.gov.au/gtp/>
- National Survey of Feature Film and TV Drama Production 2000/01, Australian Film Commission, 2001 – <http://www.afc.gov.au/resources/online/nps/>
- Screenrights Annual Report 2004 - <http://www.screen.org/html/publish.htm>
- Australian Broadcasting Corporation Annual Report 2004 - <http://abc.net.au/corp/ar01/>
- Special Broadcasting Service Annual Report 2004 <http://www.sbs.com.au/sbsannualreport2000.pdf>
- The Australian Broadcasting Authority, Content regulation - <http://www.aba.gov.au/tv/content/index.htm>
- Australian Bureau of Statistics, 2002-2003 [Television](#), Film and Video Production Survey
- Internet Movie Database – <http://www.imdb.com>

**Summarise outcomes for each option examined.**

84. The outcomes for each option examined are summarised below:

**Option 1 – Maintain status quo**

- No costs or benefits to directors, producers, or Australia as a whole.
- Does not meet the Government's election commitment to consider amendments the Act granting new rights to directors.

**Option 2 – Adoption of joint authorship model**

- Grants directors additional financial remuneration and legal recognition of their creative input to the film making process.

- Conferring primary economic rights on directors jointly with producers could significantly impede the ability of producers to fully exploit films for recoupment of capital outlay (producers would need to obtain an assignment of such rights).
- Requires fundamental and potentially wide-reaching changes to Australia's copyright law with respect to classification of subject matter and assignment of property rights.
- Potentially substantial direct and distributional costs.

### **Option 3 – Co-ownership with presumption in favour of producers**

- Grants directors additional financial remuneration and legal recognition.
- Returns primary economic rights to producers only by a complex and potentially uncertain 'presumption' model which is likely to ignite litigation.
- Requires fundamental and potentially wide-reaching changes to Australia's copyright law with respect to assignment of property rights.
- Potentially substantial direct and distributional costs.

### **Option 4 – Remuneration of directors under the secondary rights schemes**

- Grants directors ongoing financial remuneration, but only minimal legal recognition of their creative contribution.
- Keeps primary economic rights under the control of producers, allowing them to effectively market films for recoupment of capital outlay.
- Could substantially erode the educational copying income stream relied upon by many 'low-budget' projects.
- Potentially some distributional costs to educational institutions.

### **Option 5 – Remuneration of directors under the retransmission scheme only**

- Grants directors legal recognition as makers of film.
- Grants directors rights to ongoing financial remuneration, though at a lesser level than under Options 2-4.
- Does not affect existing revenue sources relied upon by producers.
- Minimal direct costs to industry organisations and the Government.
- Unlikely to have flow-on effects to the broader community.

## **Consultation**

### ***Consultation undertaken***

85. In September 2000 the Department of Communications, Information Technology and the Arts (DOCITA) and the Attorney General's Department (AGD), sought comments and written submissions on the issue.
86. Seventeen submissions were received from directors, producers and other interests in the Australian film and television industries. Key submissions include those from ASDA and the Film and Television Industry Group (FTIG). FTIG's members include the Federation of Australian Commercial Television Stations, the Australian Subscription Television and Radio Association and most major broadcasters and production companies. Further meetings were held with both ASDA and FTIG to clarify their positions.
87. A draft of the legislation was shown to interest groups for comment.

### ***Who are the main affected parties? What are the views of those parties?***

88. The main affected parties are film directors and copyright owners in films (this group includes producers and broadcasters). These parties were represented in consultations by ASDA and FTIG.

### ***What are the views of those parties?***

89. In their submission on directors' copyright ASDA argued strongly for changes to the Copyright Act which would give directors recognition for their creative contribution to films, and would grant them additional remuneration with respect to uses of films. In this submission, they proposed that films be reclassified as works (as in Option 2) and that directors be recognised as makers of films and joint copyright owners with producers, with a presumption in favour of producers with respect to primary economic rights (as in Option 3). They also proposed that directors be granted non-transferable rights to remuneration under the statutory licensing schemes in Parts VA and VC (as in Option 3).
90. In subsequent consultations ASDA representatives have indicated that directors are primarily interested in receiving recognition as 'makers' of films and remuneration under the Part VA and VC statutory licences. They have also re-emphasised the need for directors to be granted unassignable rights to remuneration under these schemes, in order to guarantee these rights are not negotiated away.
91. When Part VC was introduced at the time of the Digital Agenda amendments in 2000, ASDA made a submission which proposed that directors be remunerated under the retransmission scheme only.

92. Film producers and copyright owners have indicated, both in their submissions and subsequent consultation, that they would prefer that the *status quo* remain. In its submission FTIG stated that it objects in principle to directors receiving any economic rights with respect to films because, unlike the producer, they do not take the economic risk. It also stated that it believes that directors are adequately remunerated under existing industry arrangements, and that any alterations to these arrangements could have significant detrimental effects to the Australian film industry. In subsequent consultations they have indicated particular objection to directors gaining control over primary economic rights to films or receiving remuneration under the Part VA statutory licence scheme.

## **Conclusion and Recommended Option**

93. It is proposed that Option 5 be adopted, with directors recognised as makers of films and copyright owners, but only for the purposes of remuneration under the Part VC retransmission scheme. This model recognises the important role directors take in film making and grants them additional financial rewards whilst maintaining a balance with the interests of producers and broadcasters.

## **Implementation and Review**

94. Adoption of the preferred option will require legislative change. It is proposed that these changes take effect immediately upon the passing of the relevant legislation.

95. No further legislative or administrative changes by the Government or its agencies should be necessary. Screenrights may have to make some adjustments to its internal administrative system (see para 46). However, introducing the changes immediately, before the administrative arrangements for the retransmission scheme in its current form are finalised, should substantially reduce the impact of any such adjustments.

96. The effect of the amendments could be assessed during future reviews related to general copyright policy. No specific review commitments are planned at this time.



## **NOTES ON CLAUSES**

### **Clause 1: Short Title**

1. Clause 1 is a formal provision specifying the short title.

### **Clause 2: Commencement**

2. This clause provides that sections 1 to 4 of the Bill, when enacted, will commence on the day it receives Royal Assent. Schedule 1 to the Bill will commence on Proclamation or, failing Proclamation, on the day after 6 months from Royal Assent to the Act.

### **Clause 3: Schedule(s)**

3. By virtue of this clause the provisions in the *Copyright Act 1968* (the Act) are amended or repealed as set out in Schedule 1 to the Bill.

### **Clause 4: Application**

4. Clause 4 provides that the amendments made by Schedule 1 apply to films that commence to be made after the commencement of the Schedule. Subclause 4(2) provides that the amendments have no effect to the extent that rights for which they provide would be inconsistent with the rights arising under a contract entered into before the commencement of those amendments.

## **SCHEDULE 1 - AMENDMENT OF THE COPYRIGHT ACT 1968**

### **Item 1: At the end of section 98**

5. Item 1 inserts new subsections 98(4), 98(5), 98(6) and 98(7). Section 98 of the Act relates to ownership of copyright in cinematograph films.
6. Subsection 98(3) of the Act vests copyright in a film made on commission in the commissioner, in the absence of any agreement to the contrary. New subsection 98(4) provides that if a film is not a commissioned film under subsection 98(3) – see new subsection 98(7) below – then the reference in subsection 98(2) to the maker of the film includes a reference to each director of the film, defined in new subsection 98(7) below. The effect of new subsection 98(4) is that, where a film is not a commissioned film, the director as a maker of the film, will be a copyright owner in addition to the person who falls within the definition of a maker of a film in paragraph 23(4)(b). The extent of a director's ownership of copyright is limited by new subsection 98(6).

7. New subsection 98(5) provides that if a director directed a film under the terms of his or her employment under a contract of service or apprenticeship, then in the absence of any agreement to the contrary, the director's employer will be a maker of the film, and hence a copyright owner, in place of the director, for the purposes of new subsection 98(4).

8. New subsection 98(6) provides that if a person becomes an owner of copyright in a film as a result of the operation of new subsections 98(4) and/or (5) then the person is such an owner of copyright in the film only so far as the copyright consists of the right to include the film in a retransmission of a free-to-air broadcast. The right to include the film in a retransmission of a free-to-air broadcast is a subset of the right to communicate a film to the public as provided in subsection 86(c). The definition of 'communicate' in s10(1) of the Act includes 'electronically transmit...a work or other subject matter'.

9. Several terms are defined in new subsection 98(7):

- 'commissioned film' is defined as a film made as mentioned in paragraphs 98(3)(a) and (b). The effect of this definition is that a commissioned film refers to a film made in pursuance of an agreement made by a person for valuable consideration with another person, for the making of a cinematograph film by the other person.
- 'director' is defined as having the same meaning as in Part IX of the Act. The effect of this provision is that where two or more people are involved in the direction of a cinematograph film, then 'director' is to refer only to the principal director.
- 'free-to-air broadcast' is defined as having the same meaning as in Part VC of the Act. The effect of this provision is that a free-to-air broadcast refers to a broadcast delivered by a national broadcasting service, commercial broadcasting service or community broadcasting service within the meaning of the *Broadcasting Services Act 1992*.
- 'retransmission' is defined as meaning a retransmission, as defined in section 10, to which Part VC applies. The effect of this provision is that retransmission refers to a retransmission, other than over the Internet, of a free-to-air broadcast where the content of the broadcast is unaltered and either the retransmission is simultaneous with the original transmission or, if the retransmission is in an area with a different time zone to that of the broadcast, the retransmission is delayed until no later than the equivalent local time.