



Copyright Amendment (Film Directors' Rights) Bill 2005

Jonathan Chowns
Law and Bills Digest Section

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Copyright Amendment (Film Directors' Rights) Bill 2005

Date Introduced: 17 March 2005

House: House of Representatives

Portfolio: Attorney-General

Commencement: The formal provisions commence on Royal Assent. Schedule 1 commences on a date to be proclaimed or 6 months after Royal Assent, whichever is the sooner.

Purpose

The Bill amends the *Copyright Act 1968* to give limited *economic* rights to some directors of some films. The Bill gives film directors a right to receive fees from the re-transmission of free to air broadcasts by pay TV operators. These rights are given to film directors who are not employees. The rights are given in relation to films that are not commissioned. The Bill does not change the *moral* rights¹ that directors have in their films. The concept of 'economic rights' is explained below.

Background

Basis of policy commitment

In Australia, the debate about ownership of copyright in films has been around for some time. Presently, film copyright is held, at first instance, by the 'maker'² (usually the producer). If the film is commissioned, the commissioning party holds the copyright.³ However, others involved in film making—most notably, directors—have agitated for years for recognition and parity of treatment with producers. Such treatment has been accorded in some other countries. In most countries in continental Europe⁴ and, more recently, in the UK⁵, other participants in the film making process, including directors, are given recognition as 'co-authors' and hold copyright in films.

The issue gained recent prominence as part of consideration of the *Copyright Amendment (Digital Agenda) Bill 2000* by a House of Representatives committee.⁶ One element of that Bill was the creation of a statutory right to re-broadcast free-to-air broadcasts by pay TV operators upon payment of a reasonable fee. The committee received submissions in support of directors being given a right to part of those fees.

The Government did not, at that time, accept the committee's bipartisan recommendation that the claim by directors be supported.

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However, in its 2001 election policy 'Arts for All', the Government undertook to 'consult key stakeholders on proposals to amend the Act to grant new rights to film directors'.⁷ This inquiry was conducted jointly by the Attorney-General's Department and the Department of Communications, Information Technology and the Arts (DCITA). A request for submissions was made on 27 October 2000⁸ accompanied by a list of non-exclusive key issues that the Government considered relevant.⁹

In the course of that review, the Government agreed to give consideration to '[a] model granting limited rights to directors which takes account of the views of...stakeholders'.¹⁰ Upon approval by the Government of a model, the Government said that 'interest groups will be provided with a further opportunity to comment on the proposed approach'.¹¹ In 2004, following the review, the Government undertook, in its 'Strengthening Australian Arts' policy statement, to give film directors rights to copyright in the films they direct. At the time, the Government did not indicate the extent of the rights that it would give to directors or the manner in which those rights would be implemented. Since then, the Government has considered these issues and identified four options for change.¹²

The model implemented by this Bill is the outcome of the above process. It does not appear that further public consultation on this model was undertaken prior to introduction of the Bill.¹³ However, the Bill was referred to the Senate Committee on Legal and Constitutional Affairs which reported recently. The report and submissions are available at: http://www.aph.gov.au/senate/committee/legcon_cte/film/index.htm

The current position: Who holds the copyright in films?

As a general proposition, copyright initially resides with the creator or author (for works) or with the 'first owner' (for other subject matter) of the thing. Films are 'other subject matter'. Presently, in Australia, the 'first owner' of copyright in cinematograph films is the 'maker' of the film¹⁴. The 'maker of the cinematograph film is the person by whom the arrangements necessary for the making of the film were undertaken'.¹⁵ This is generally taken to mean the film's producer.

In the absence of any agreements to the contrary, directors do not have any *economic* rights in film copyright although, since 2000, they do have moral rights.¹⁶ The expression 'rights' is used in this digest to denote the economic rights comprised in copyright. 'Moral rights' will be designated as such.

What are economic rights? Short explanation of copyright

Copyright protects original 'works' (literary, dramatic, musical and artistic) and 'subject matter other than works' (cinematograph films, sound recordings, radio and television broadcasts and published editions).

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The copyright in film as a whole is distinct from the copyright which exists separately in some elements which make up the film like the script (a dramatic work) and the musical score (a musical work).

To hold the copyright in something is not to have absolute ownership or dominion over it. Rather, copyright protection confers upon the copyright owner a number of exclusive rights for a period specified by the Copyright Act. These are economic rights.

Commercial exploitation of the film

The ownership of copyright in a cinematograph film gives the right:

- to make a copy of the film
- to cause the film to be seen or heard in public, and
- to communicate the film to the public.

Practically, this amounts to a right and power to commercially exploit the film and receive payment for it.

Receipt of payment under statutory licences

However, the right to commercially exploit a film is subject to certain statutory licences which provide that certain acts that would normally require the permission of the copyright holder, may be done without that permission.

Part VA of the Act permits educational institutions to make copies of broadcasts without the permission of the copyright holder.

Part VC of the Act permits the re-transmission by pay TV operators, of free-to-air broadcasts. Free-to-air broadcasts are those made by the national broadcasters (ABC and SBS), the commercial broadcasters (like channels 7, 9, and 10) and community broadcasters.

In the case of both statutory licences, the rights given by the licence are subject to the satisfaction of conditions including the payment of reasonable remuneration to the copyright holder. These payments are collected by a collecting society, Screenrights, on behalf of the copyright holders.

In short, under the present scheme, a producer has the right to commercially exploit a film (and to receive payment for doing so) and to receive payment under these statutory licences.

(Under this Bill, directors share only a small portion of these rights. They are not given the rights of commercial exploitation but are given the right to share in payments under one kind of statutory licence; ie, the re-broadcast licence.)

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Main Issues

In the debate about film directors' copyright, the main issues are;

- Should anyone else have rights in films?
- If so, who should have those rights?
- What is the nature and extent of the rights to be given?
- Should any such rights be expressed to be non-transferable?

How does this Bill address these issues?

The extent of the copyright given

The Bill extends the ownership of copyright in films to a class of directors but only in a limited way. The Bill does *not* give to directors all of the exclusive economic rights that 'makers' or producers have under the Act. Rather, directors are given only the right to receive payment from pay TV operators which exercise their statutory right to re-transmit free-to-air broadcasts.

In other words, directors have no right to commercially exploit a film or to receive payment for copying by educational institutions under the statutory licence in Part VA. The right given to directors is, therefore, narrower than the rights held presently by producers.

Importantly, the right given to directors is not expressed to be non-transferable (ie it is transferable). A director may transfer their rights given under this Bill to a third party including, for example, the producer.

The class of directors to whom copyright is given

Furthermore, a director will not hold this limited copyright if the film is commissioned (in which case the commissioning party will hold it) or if the director is an employee (in which case the employer holds it unless there has been an agreement to the contrary).

Is the Bill uncontroversial?

No. There are diverse views about the main issues identified above.

Some—notably interests associated with film producers—say that there should be no change to the law.¹⁷ (Some say that, not only should directors be given no economic rights, but that they should not have been given moral rights¹⁸). To extend copyright to others would, it is said, amount to a sharing of rights which would interfere with the

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commercial exploitation of, and investment in, films. This is because agreement would be required between the rights holders in order to deal commercially with a film.

Amongst those who agree that copyright in film should be extended, there are different views about the people who should benefit and about which economic rights should be given. On the basis that the policy intent is said to be the recognition of creative input, some commentators consider that copyright should be extended to others having creative input. Besides directors, this would include, for example, screenwriters.¹⁹

There are many possible models under which those creatively involved in the film-making process can be given *economic* rights. The submissions to the Senate inquiry suggest that there is a lot of support for a joint ownership model which would equip directors with the same rights of commercial exploitation as producers currently have.²⁰

As to whether the rights given to directors (whatever their nature) should be transferable there are divergent views. By making rights non-transferable, directors would not face the prospect of losing their rights by agreement with more powerful parties.

Likely impact of the Bill

Of those directors who are not employees or whose films are not commissioned (the ones who benefit under this Bill), a few will be sufficiently established to have enough bargaining power to reach a commercial arrangement under which they have rights equal to, or better than, those given under the Act. Those directors will likely be no better or worse off.

Of the remainder, it can be argued that some will have insufficient bargaining power to resist the common practice of the producer either taking an assignment of the director's copyright (director's copyright is not expressed to be non-transferable) or engaging the director as an employee. The position of those directors will not likely be improved by this measure.

In practice, it is possible that very few directors will benefit from the limited copyright given by this legislation. The Senate Committee heard that "the percentage of uncommissioned films made in Australia is very small, perhaps only 1 or 2 per cent; since directors waive most of their 'rights' under the terms of their contractual arrangements with producers."²¹ Thus the Bill will affect only a handful of directors.

The Senate Inquiry into this Bill concluded that:

It is apparent that the Bill will have little practical impact on the Australian film industry or on investment in that industry. The Bill will only confer a limited right on directors (that is, the right to retransmission in a free-to-air broadcast). This right only applies in respect of the retransmission scheme under Part VC, which is a new regime

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that has yet to generate an income stream. It does not extend to commissioned films, which are the overwhelming majority of films currently being made in Australia. Nor does it automatically extend to employed directors. Moreover, industry practice in Australia is for directors to assign any copyright they may have to the producers of the film they are to direct. The committee also notes the Department's advice that the Bill will not disturb existing industry practices for the financing of films, nor for securing investment and arranging distribution.²²

Concluding Remarks

The stated policy rationale for this Bill is not matched by the measures that the Bill implements. The Explanatory Memorandum includes this introductory paragraph:

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.²³

Ultimately, despite the Senate Committee's view that "the Copyright Act should reflect the collaborative nature of the film-making process and the role of directors in that process", this Bill grants symbolic recognition rather than meaningful economic benefits.²⁴

On its face, the Bill slightly improves the position of a class of directors by giving them a very limited right compared with the rights held by producers. Of this class, some directors will already be powerful enough to negotiate to have these rights (and more). Others face the risk of having these transferable rights taken away by commercial agreement.

In the end, these limited rights come at the expense of the addition of a great deal of complexity to the law which is out of proportion to the benefit it confers. As one submission to the Senate Inquiry observed, this complexity is demonstrated by the fact that there will now be three senses in which the word "owner" can be used in relation to film copyright; the producer who holds all of the rights of exploitation and the director who wears two hats as the holder of limited rights in re-transmission royalties and as holder of moral rights in the film.

Having said that, this measure represents an effort to improve on the status quo, the maintenance of which was one of the options considered by the Government. Furthermore, in recognising the role of directors in the film making process, it may open the door to further extension of directors' rights after the effect of this incremental change is assessed. And, in addition, this measure will not impact significantly on the ability of

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producers to commercially exploit films because the agreement of directors will not be required in relation to decisions concerning commercialisation.

Main Provisions

Schedule 1

Item 1 provides that a director of a film that is not a commissioned film will hold 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.

Endnotes

- 1 The moral rights under Part IX of the Copyright Act 1968 are; the right to be recognised as the author of a work; a right of attribution; and, a right to prevent others from modifying, distorting, or otherwise interfering with the integrity of that work.
- 2 Copyright Act, subsection 98(2).
- 3 Copyright Act, subsection 98(3).
- 4 Explanatory Memorandum to Bill, p. 5.
- 5 Explanatory Memorandum to Bill, p. 6.
- 6 Advisory report on Copyright Amendment (Digital Agenda) Bill 1999. House of Representatives. Standing Committee on Legal and Constitutional Affairs, chapter 5.
- 7 http://www.pm.gov.au/news/media_releases/2001/media_release1351.htm.
- 8 <http://www.ag.gov.au/agd/www/Attorneygeneralhome.nsf/0/670CBE21A2E07B1BCA256B650013A44B?OpenDocument>
- 9 [http://www.ag.gov.au/agd/www/securitylawHome.nsf/Page/Publications_Intellectual_Property_Proposal_for_a_Directors'_Copyright_in_films](http://www.ag.gov.au/agd/www/securitylawHome.nsf/Page/Publications_Intellectual_Property_Proposal_for_a_Directors%27_Copyright_in_films).
- 10 http://www.dcita.gov.au/ip/directors_performers_and_photographers_ip/directors_copyright_in_films.
- 11 http://www.dcita.gov.au/ip/directors_performers_and_photographers_ip/directors_copyright_in_films.
- 12 Explanatory Memorandum, p. 8.
- 13 The level of consultation on the model adopted in this Bill was the subject of criticism in the Senate Inquiry into this Bill. See, for instance, the submission of the Screen Producers Association of Australia, p. 2.
- 14 Copyright Act 1968, section 98.

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- 15 Copyright Act 1968, subsection 22(b).
- 16 The moral rights under Part IX are the right to be recognised as the author of a work, a right of attribution and a right to prevent others from modifying, distorting, or otherwise interfering with the integrity of that work.
- 17 See: for example, the submission to the Senate Inquiry on this Bill by the Screen Producers Association of Australia. The submissions can be found here:
http://www.aph.gov.au/senate/committee/legcon_ctte/film/submissions/sublist.htm
http://www.aph.gov.au/senate/committee/legcon_ctte/film/submissions/sublist.htm
- 18 The creation of moral rights was originally proposed in a Bill, the Copyright Amendment Bill 1997 which was the subject of a Senate Inquiry. The report can be found here:
http://www.aph.gov.au/senate/committee/legcon_ctte/completed_inquiries/1996-99.htm
- 19 see: submissions of Australian Writers' Guild to the Senate Inquiry into this Bill.
- 20 see: for instance the submission of the Australian Copyright Council to the Senate Inquiry.
- 21 Senate Committee Report into Provisions of the *Copyright Amendment (Film Directors' Rights) Bill 2005*, page 22, para 3.51.
- 22 Senate Committee Report into Provisions of the *Copyright Amendment (Film Directors' Rights) Bill 2005*, page 28 paragraph 3.70.
- 23 Explanatory Memorandum, p. 2.
- 24 Senate Committee Report into Provisions of the *Copyright Amendment (Film Directors' Rights) Bill 2005*, page 28, para 3.73.

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