

**A SUBMISSION TO THE SENATE LEGAL
AND CONSTITUTIONAL COMMITTEE**

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

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As the auteur or author of the motion picture, it is the director who determines the look and message of the film.

Rudolph Carmenaty

Despite Australia's prodigious directing talent our *Copyright Act* operates under the legal fiction that there is no author of a film.

Australian Screen Directors Association

In Australia, we've ignored the importance of directors and locked them out of copyright.

Scott Hicks, the director of *Shine* and *Snow Falling on Cedars*

How can a producer be the creative force behind a work? What does he do exactly? There are very few producers who have any clue what goes on ... That's why film is such an abused medium.

Paul Cox, the director of *The Man of Flowers* and *Molokai*

Directors are key creative contributors to film and TV, and to be excluded because of an anomaly in the Copyright Act would have been grossly unjust, and made Australia a laughing stock.

Chris Noonan, the director of *Babe*

The principal director of a cinematographic or audiovisual work shall be considered as its author or one of its authors. Member States shall be free to designate other co-authors.

European Copyright Term Directive

EXECUTIVE SUMMARY

I am a senior lecturer at the Faculty of Law at the Australian National University, specialising in intellectual property. My academic qualifications include a Bachelor of Arts with Honours, and a Bachelor of Laws with Honours from the Australian National University, as well as a Doctorate of Philosophy from the University of New South Wales. I have published twenty-seven refereed articles in a range of Australian, British, European, and American academic journals. In particular, I have published work on copyright and directors - Rimmer, M. "Shine: Copyright Law And Film", *Australian Intellectual Property Journal*, August 2001, Vol. 12, No. 3, p 129-142; and Rimmer, M. "Heretic: Copyright Law And Dramatic Works", *Queensland University of Technology Law And Justice Journal*, May 2002, Vol. 2, No. 1, p. 131-149.

The Federal Government is to be congratulated on introducing the *Copyright Amendment (Film Directors' Rights) Bill 2005 (Cth)* into Parliament. The reforms are long overdue. This submission is sympathetic to the situation of the Federal Government. It notes that the debate over film directors' copyright has been an exhaustive process, with much special pleading by all sides. The various stakeholders have all had ample opportunities in the past six years in which to address this issue. There certainly has been a comprehensive consultation about film directors' copyright.

The particular issue of retransmission royalties for film directors arose during the debate over the *Copyright Amendment (Digital Agenda) Act 2000 (Cth)*. The matter was deferred for further policy deliberations. The Attorney General's Department and the Department of Communications, Information Technology, and the Arts co-ordinated a policy review of film directors' copyright. Seventeen submissions were received from directors, producers and other interests in the Australian film and television industries. Submissions addressed the issue of whether, and if so, how, the *Copyright Act 1968 (Cth)* should be amended to include directors as owners of copyright in film. The current bill before Parliament was based upon a consideration of the responses to this inquiry.

This submission is divided into three parts. First of all, it considers the history of authorship in cinematographic films under Anglo-Australian laws. It notes that initially cinematographic films were protected as either dramatic works or as artistic works in the form of individual photographs. Such a categorisation was awkward - many significant audio-visual works, such as documentaries, did not fit into the

subject matter of dramatic works. This submission considers the creation under the *Copyright Act 1968 (Cth)* of the special category of cinematographic films and the award of ownership to producers. It argues that the policy justifications in the Gregory Report and the Spicer Report for the treatment of cinematographic films as entrepreneurial ventures are weak and implausible. The submission notes the expansion of the category of cinematograph films to include new technologies. It therefore observes that any decision will also implicate subject matter, such as animation and multi-media. This submission also considers the legal developments in 2000 - namely, the *Copyright Amendment (Digital Agenda) Act 2000 (Cth)* and the *Copyright Amendment (Moral Rights) Act 2000 (Cth)*. It observes that the current copyright regime lacks simplicity and symmetry.

Second, this submission considers the range of options available in respect of film directors' copyright in cinematographic films. It rejects Option 1 - namely, the protection of the status quo. This submission is supportive of Option 2. It maintains that joint authorship of the economic rights of cinematographic films should be shared between the director, the producer, and even the screenwriter. Alternatively, this submission supports Option 3. However, it notes that the operation of presumptions as to ownership could prove to be inflexible. This submission raises concerns about Options 4 and 5. It argues that it is inconsistent and anomalous to consider the film director an author for the purposes of statutory licensing schemes and retransmission royalties, but not for the sake of economic rights in cinematographic films.

Third, this submission conducts an international survey of authorship in audio-visual works. It observes that the *Berne Convention for the Protection of Literary and Artistic Works* treats cinematographic films as literary and artistic works. This submission notes that other Commonwealth countries, such as Canada and New Zealand, are struggling to deal with the division of economic and moral rights in cinematographs. As a result of European Union Directives, the United Kingdom has had to recognise that principal directors are authors of cinematographic films. This should be taken into account, given that British law is the original model for the *Copyright Act 1968 (Cth)*. This submission considers United States law on joint authorship of audio-visual works, and ownership of works made for hire. It stresses the need to develop indicia to determine joint authorship. This submission also notes recent legal developments in Israel, with the recognition of film directors' copyright.

PART 1.
HISTORY OF AUTHORSHIP IN
CINEMATOGRAPHIC FILMS

Cinematographic films were first perceived as inventions. As F. Jay Dougherty observes, there was initial resistance to conception of motion pictures as works of art:

In the earliest days of film, there was either a single filmmaker, or a stage manager and a camera operator, filming either simple images of real events or, sometimes, more imaginative special effects. The films were novelties, but hardly works of genius. Film companies were owned by inventors and manufacturers, such as Thomas Edison, and film was viewed more as another form of manufacturing by artisans than as an art form.¹

The earliest battles over motion pictures took place in the field of patent law. As Peter Drahos and John Braithwaite note: "Right from the industry's beginnings, when Thomas Edison used his camera and film patents to cartelize the industry, intellectual property rights have been an important tool of domination."² Edison famously formed a patent pool with his competitors in 1908 to control all aspects of the industry, from the production of film to the exhibition of pictures.

A. *Copyright Act 1912 (Cth)*

Copyright law was slow to accommodate cinematographic films as protected works. As F. Jay Dougherty observes

Gradually, as the public tired of the mere novelty of seeing moving pictures, filmmakers developed the motion picture as a vehicle of story telling and utilized more sophisticated production techniques such as editing and camera motion. As that occurred, specialization and division of labor became necessary, partly because the exhibition industry needed a large supply of films to satisfy its audiences.

First, the cameraman emerged, then the director, and finally the screenwriter. At the same time, film developed as an art form of its own, rather than just a photographic documentary of real events or the optical recording of a stage play. Some directors began to be recognized as creative artists, and in the 1950s a group of French film critics associated

¹ F. Jay Dougherty. "Not A Spike Lee Joint? Issues in the Authorship of Motion Pictures Under U.S. Copyright Law", *UCLA Law Review*, October 2001, Vol. 49, p. 225.

² Peter Drahos and John Braithwaite. *Information Feudalism: Who Owns The Knowledge Economy*, London: Earthscan Publications, 2002, p. 174.

with the Cahiers du Cinema focused attention on the director as the auteur of a film, which was said to reflect the personality, the "genius," of the director.³

The first British copyright statute to expressly deal with films was the *Copyright Act 1911* (UK). This provided the model for the *Australia Copyright Act 1912* (Cth). Such Anglo-Australian law accorded protection to cinematographic films within the category of "dramatic works" - where "the arrangement, the acting form or the combination of incidents represented" gave the work an original character. While other parts of the film, such as the script, scenery or soundtrack might attract separate protection as literary, artistic or musical works, the film itself was not subject to copyright. Thus, films lacking an original character as a dramatic work - such as documentaries and news reports - received no protection under the 1911 Act.

In *Australian Olympic Committee Inc v The Big Fights Inc*, the Federal Court of Australia considered the ownership of footage shot of the 1956 Melbourne Olympics.⁴

As part of the 1956 Melbourne Olympics, Peter Whitchurch was appointed as Director of the Official Film Unit by OCOG to manage the production of films for the games. The films which were produced fell into four categories: unedited films, edited films, newsreels and Sports TV films. In dispute was the ownership of the copyright in the films and ownership of certain particular copies of them.

The AOC commenced the first action claiming ownership of the physical films and copyright in the films on the basis that it is the successor in title to OCOG, the physical films and copyright in the films were owned by AOF to which AOC is successor in title. It argued that, if Peter Whitchurch had any proprietary rights in the films and the copyright in the films, the AOC was the assignee of those rights by deed dated 20 October 1997 executed by John Whitchurch, the sole surviving executor of Peter Whitchurch's will and co-executor of Elsie Whitchurch who was alone beneficially entitled to Peter Whitchurch's estate. TBF's claim was that it derived title through PWP which in turn acquired title through Peter Whitchurch, or alternatively through an assignment effected by Benson who was co-executor of Elsie Whitchurch's will. TBF's claim was that Peter Whitchurch acquired copyright in the

³ F. Jay Dougherty. "Not A Spike Lee Joint? Issues in the Authorship of Motion Pictures Under U.S. Copyright Law", *UCLA Law Review*, October 2001, Vol. 49, p. 225.

⁴ *Australian Olympic Committee Inc v The Big Fights Inc* [1999] FCA 1042 http://www.austlii.edu.au/au/cases/cth/federal_ct/1999/1042.html

edited films by virtue of his having been author of them and by virtue of an assignment in his favour from AOC on 23 November 1960.

Justice Lindgren considered the subsistence and nature of copyright in respect of cinematograph films prior to the *Copyright Act 1968* (Cth). His Honour held that the footage of the Melbourne Olympics could not be classified as a dramatic work:

The AOC submits that the definition of "dramatic work" requires that the "author" orchestrate or dictate the events captured on film. It emphasises the definition's reference to "cinematograph production". The word "production" does indeed suggest that more is required than the recording of real life events.

In my opinion, the notion of "cinematograph production" in the definition necessarily presupposes that the "producer" has been responsible for "the arrangement, the acting form or the combination of incidents" which gives the end product an original character. The expression "dramatic work" itself also suggests that the action must be staged, contrived or directed, and not simply recorded. Perhaps it is possible to film naturally occurring events and then, through a process of editing, create a drama or story that is not otherwise present in them. There is no suggestion that this happened in the present case. The editing process may have highlighted the drama of events at the Games but it did not "produce" that drama. In my view, the exertion of skill and labour in filming and editing does not characterise what remains essentially a film of real life events over which the producer of the film had no control as an original dramatic work for the purposes of s 222(1) of the Act.

In the result, neither the filming nor editing work produced an original dramatic work. It follows that the Edited Films, like the Unedited Films, attract copyright only in the artistic work that is constituted by the individual photographs of which those Edited Films consist.⁵

His Honour held, though, that in respect of the films, copyright subsisted in the photographs which constituted them - but not in the films as a whole.

Justice Lindgren held that OCOG was the owner of the copyright in the films as well as the copies of those films now held in storage. His Honour found that OCOG did not assign to Peter Whitchurch the copyright in the edited films, nor did it sell to him the copies of the edited films now held in storage. In 1960, OCOG granted to Peter Whitchurch, for the duration of the copyright, a non-exclusive right to reprint and sell copies of the edited films, and, for that purpose, the right to possess the copies of the edited films now held in storage. OCOG's copyright in the films and the copies

⁵ *Australian Olympic Committee Inc v The Big Fights Inc* [1999] FCA 1042 http://www.austlii.edu.au/au/cases/cth/federal_ct/1999/1042.html

of the films now held in storage are transferred to the AOC pursuant to a deed between the AOC and the ASC dated 20 October 1997. The AOC therefore now owns the copyright in the films as well as the copies held in storage. The AOC is not prevented from asserting its copyright or its ownership of the copies. The AOC has not at this stage shown that any of the respondents have infringed its copyright or are threatening to do so.

It should also be recognised that film directors have struggled to protect their creations under the category of "dramatic works" in other contexts.

The United Kingdom case of *Norowzian v Arks* concerned the meaning of a "dramatic work" under sections 1 (1) and 3 (1) of the *Copyright, Designs, And Patents Act 1988* (UK).⁶

In 1992, Mehdi Norowzian made a short and distinctive film called "Joy", which made extensive use of jump-cuts. It featured a man dancing to music in a quirky manner against a surreal canvassed background. Mehdi Norowzian declined to adapt the film for a Guinness advertisement, because he felt that it would involve no new input of creativity.

In response, the Irish advertising agency Arks Ltd engaged an alternative director to produce "Anticipation". It also featured a man dancing to music against a similar background but featured the Guinness drink in the foreground. It also adopted similar dance movements, facial expressions, used varying camera speeds, jumpcutting and shared the same feel of unreality and quirkiness. The director admitted that he was instructed to emulate "Joy".

Mehdi Norowzian sued Arks Ltd and Guinness (Ireland) Ltd for breach of copyright in the film and dramatic content in the film, and passing off. The passing off claim was later discontinued.

In an interlocutory hearing, Steinfeld QC found that the film "Anticipation" did not infringe any copyright in the cinematographic film "Joy". He noted that, given the second film was only an imitation of the first, and there was no copying of any single frame, there could be no infringement. In making this finding, the court followed the two Australian cases of *Telmak Australia Pty v Bond International Pty Ltd* (1985) 5 IPR 203 and *CBS Records Australia Ltd v Telmak Teleproducts (Aust) Pty Ltd* (1997) 9 IPR 440.

⁶ *Norowzian v Arks (No 1)* [1998] FSR 394; and *Norowzian v Arks (No 2)* [2000] FSR 363.

In *Norowzian v Arks (No. 1)* (1998) FSR 394, the trial judge Rattee J of the Chancery Division held that “Joy” was not a dramatic work or a recording of a dramatic work.⁷ He emphasized that a film could not be a dramatic work. The uncut version of the dancer could have been a recording of a dance or mime but not the final cut version. The court held that the work had to be or be capable of being physically performed. The jump cut editing of the film rendered this impossible and so “Joy” was held not capable of being a dramatic work. The court followed the Privy Council decision of *Green v Broadcasting Corporation Of New Zealand* [1989] RPC 700, which held that “a dramatic work must have sufficient unity to be capable of performance”. In the alternative, Rattee J went on and found that, even if “Joy” was a dramatic work, it was not infringed by “Anticipation”

In *Norowzian v Arks (No. 2)* (1999) FSR 63, Nourse, Brooke and Buxton JJ of the Court of Appeal decided that there was no substantial copying and dismissed the appeal.⁸ However, it was held that the content of a film was capable of being a dramatic work for the purpose of the 1988 Act. Nourse LJ defined a dramatic work as “a work of action, with or without words or music, which is capable of being performed before an audience”. There was no requirement of performability of the content of the work merely of the work itself. A film can be a work of action: it is capable of being performed before an audience and was therefore capable of being a dramatic work. Nourse LJ held that the film “Joy” attracted copyright protection as an original dramatic work.

The English academic Anne Baron comments: "The effect of the recent *Norowzian* litigation, however, has been to revive the reductive formalist approach to what might be called the law's 'ontology' of film."⁹

These cases illustrate some of the difficulties of directors seeking to protect their works under the category of "dramatic works".

B. The Development of the *Copyright Act 1968* (Cth)

In 1952, the UK Gregory Committee considered the status of cinematographic films. It recommended that a distinct copyright should be accorded to all films as a 'distinct type of work'. The Committee then considered the question of the ownership of

⁷ *Norowzian v Arks (No. 1)* (1998) FSR 394

⁸ *Norowzian v Arks (No. 2)* (1999) FSR 63

cinematographic films. It maintained that it was difficult to identify a single author of a film "considered as a work in itself". The Committee concluded:

The obvious and logical owner of the copyright in the film is the person responsible for making it. This may be either a company or an individual; in either case what we have in mind is the entrepreneur (if the word is not too old-fashioned) under whose care the labours of the many contributors are brought to a successful issue. The Cinematograph Films Act of 1938 and 1948 define the "maker" in relation to a film as "the person by whom the arrangements necessary for the making of the film are undertaken" and such a definition might serve here. We consider that any copyright that may subsist in any individual photograph forming part of a film should also vest in the owner of the 'film copyright'.¹⁰

The Committee conceives of a film as an "author-less" entity because there are multiple contributors. Surely this is a non-sequitur - such evidence could just as easily support the case for joint authorship. The Committee fails to justify why the producer should obtain all the economic rights - beyond saying that it is axiomatic. To my mind, it is neither obvious nor logical that the owner of the copyright in the film should be the maker.

In a 2004 *Modern Law Review* article, Anne Barron comments: "The Gregory Committee misrecognised the problem of the mismatch between film form and dramatic form as a problem of originality, and so did not consider introducing a new category of original copyright work, separate from the 'dramatic work' category and specifically tailored to accommodate what has since become recognised in the civil law jurisdictions of Continental Europe as a cinematographic or audio-visual work."¹¹

In Australia, the Spicer Committee followed the approach of the Gregory Committee, and the *Copyright Act 1968* placed cinematographic films in Part IV, with other subject matter. The Committee observed rather flatly:

Although, having regard to the provisions of the Brussels Convention, cinematography films could be included among the general provisions governing literary and artistic works, we think it is appropriate that a particular copyright in cinematography films should be created with its own special term of protection...

⁹ Anne Barron, "The Legal Properties of Film", *Modern Law Review*, 2004, Vol. 67 (2), p 177-208 at 196.

¹⁰ Gregory Committee. *Report of the Copyright Committee*, Board of Trade, 1952, Cnmd 8662.

¹¹ Anne Barron, "The Legal Properties of Film", *Modern Law Review*, 2004, Vol. 67 (2), p 177-208 at 196.

If our above recommendations are put into effect, copyright in a film will subsist as such independently of any copyright subsisting in its component features. When copyright expires in a film we do not think that the owner of copyright in the component features such as the script, background music and so forth should be in a position to prevent the reproduction or performance of that film...

We approve the principle of sub-section (4) of section 13 that the maker of the film should be the first owner of copyright. However, in conformity with our other recommendations we are of the opinion that where a film is commissioned for valuable consideration the person who commissioned the film should in the absence of agreement to the contrary be the owner of copyright to the extent of his purpose in commissioning the film provided that his purpose is communicated to the maker before the film is made. We think a provision of this nature is particularly desirable in the case of films as we understand that in Britain there has been considerable confusion and doubt in particular cases as to who is the “maker” of a film.¹²

However, the Spicer Committee did not properly explain why it thought that cinematography films should be placed in the separate category of other subject matter. The Committee was also rather reticent about why it approved of the principle that the maker of the film should be the first owner of copyright.

The Attorney-General Nigel Bowen introduced the *Copyright Bill 1967 (Cth)* in the following terms:

The present copyright law in force in Australia is the Imperial Copyright Act 1911, which was extended to Australia by the Copyright Act 1912 of this Parliament. This law has remained substantially unchanged for more than fifty-five years, during which time there have been great changes in the means of reproducing and disseminating copyright works. The film industry and the record industry were only in their infancy in 1911. Broadcasting and television have developed almost entirely within that period. Photographic techniques of reproducing books, either singly or in quantity, exist today which were unknown in 1911, and they have brought considerable changes in library administration and the printing industry. The invention of the tape recorder provided a means which is widely available for recording and reproducing music. There has been an increasing acceptance, both here and overseas, of Australian authors, composers, and performing artists. Thus the law of copyright is assuming greater practical and economic importance both within Australia and internationally. These

¹² Spicer Committee. *Report of the Committee appointed by the Attorney-General of the Commonwealth to Consider what Alterations are Desirable in the Copyright Law of the Commonwealth*. Commonwealth of Australia, 1959.

developments have all affected, in one way or another, the operation of the law of copyright and have made necessary a complete revision of the law.¹³

Part IV of the 1968 introduced new categories of subject matter upon which copyright protection is conferred in order to protect entrepreneurial investment, rather than authorship or the well recognised expression of creative endeavour inherent in the adjectives literary, dramatic, musical, and artistic.

In his second reading speech, the Attorney-General Nigel Bowen observed:

A cinematograph film is protected under the existing law in two ways. Inasmuch as an ordinary cinematograph film consists of a series of individual photographs, each frame is protected as an artistic work. But if the arrangement or acting form or the combination of incidents represented in a cinematograph film give the work an original character, the film is protected as a dramatic work.

The present Bill establishes a separate protection for cinematograph films. The rights given to the owner of the copyright in a cinematograph film are set out in clause 86 of the Bill. The copyright in a cinematograph film continues until the expiration of 50 years from the end of the calendar year in which the film was first published.

For many purposes, ordinary cinematograph film and video tape are interchangeable. The Bill therefore assimilates videotape to ordinary cinematograph for the purposes of copyright protection and the term 'cinematograph film' appearing in the Bill is defined as including videotape.¹⁴

The Government thus conceived of a cinematograph film not as a Part III work, but as other subject matter in Part IV - along with sound recordings, television and radio broadcasts, and published editions. It also awarded ownership to the maker of a cinematographic film - rather than the creative contributors involved in the film.

C. The Digital Millennium

In *Galaxy Electronics Pty Ltd v Sega Enterprises Ltd*, the Federal Court of Australia adopted an expansive definition of "cinematographic films" to include certain new technologies - such as arcade games.¹⁵ The respondents were the manufacturer and the exclusive Australian licensee of two video games, "Virtua Cop", and "Daytona

¹³ The Hon. Nigel Bowen. "Speech on the Copyright Bill 1967 (Cth)", House of Representatives, Hansard, May 1967.

¹⁴ The Hon. Nigel Bowen. "Second Reading Speech on the Copyright Bill 1968 (Cth), House of Representatives, Hansard, 16 May 1968, p 1533-1534.

USA Twin”. The appellants imported in Australia machines containing copies of the computer program that generated the visual and images and sounds constituting the games. They concede that if the video games were a “cinematographic” film, their actions constituted an infringement of the respondents’ rights.

The Full Court of the Federal Court held that the aggregate of the visual images generated by the playing of each of the two subject video games constituted a cinematographic film within the meaning of s 10 of the Act. Wilcox J held:

It would be wrong to interpret narrowly the definition of ‘cinematograph film’ in s 10 and s 24. These provisions were intended to cover new technologies, the emphasis being on the end product – motion pictures – rather than the means adopted to create those pictures. Nonetheless, the definition will apply to any particular new technology only if that technology satisfies the words of the definition, liberally read.¹⁶

Wilcox J emphasized that the visual images must be “embodied” in an article or thing – that is, they must give a material or discernible form to an abstract principle or concept. He found: “The images were embodied in the computer program built into the video game machine so as to be capable, by the use of that program, of being shown as a moving picture. It does not matter that they were embodied in a different form; that is, three-dimension vertices of the polygon model, rather than a two-dimensional image”.¹⁷ Wilcox J noted: “It may be true that no two sequences will be identical. But that does not mean the sequence is incapable of coming within the definition of ‘cinematograph film’”.¹⁸

There has been much discussion as to whether such a definition of cinematographic films would also embrace technologies, such as multi-media. Dr Kathy Bowrey of the University of New South Wales comments upon the tensions within the case over the categorisation of new subject matter:

Sega evidences the flexibility of copyright law in meeting new technological challenges, but conversely, the very need to stretch existing definitions suggests there must be some limits to this strategy. Observers of the decision voice some anxiety about the implications of the case, one summing the ongoing problem facing the courts up as “the well-recognised problem of

¹⁵ *Galaxy Electronics Pty Ltd v Sega Enterprises Ltd* (1997) 37 IPR 462

¹⁶ *Galaxy Electronics Pty Ltd v Sega Enterprises Ltd* (1997) 37 IPR 462

¹⁷ *Galaxy Electronics Pty Ltd v Sega Enterprises Ltd* (1997) 37 IPR 462

¹⁸ *Galaxy Electronics Pty Ltd v Sega Enterprises Ltd* (1997) 37 IPR 462

trying to force a square peg into a round hole". While *Sega* demonstrates a commitment to expand the purview of the legislation, this is still moderated by a desire to remain faithful to the words of the statute. While the judiciary were happy to rely upon a creative and rather eclectic use of sources to assist the interpretative practice, this is considered a short-term measure. Continually stretching definitions to keep pace with contemporary demand for protection is perceived as potentially undermining the jurisprudential advances achieved by 20th century law reform.¹⁹

The High Court will have an opportunity to revisit the definition of a cinematograph film in its forthcoming judgment in *Stevens v Sony* in the context of litigation over the Sony Playstation.

Copyright Amendment (Digital Agenda) Act 2000 (Cth)

The Australian Screen Directors Association fought for directors to be included in the scheme for statutory royalties for the retransmission of free-to-air broadcasts on pay television in the introduction of the *Copyright Amendment (Digital Agenda) Act 2000 (Cth)*. This was part of a larger campaign by directors to gain recognition as copyright authors in respect of economic rights as well as moral rights.

In the Advisory Report on the *Copyright Amendment (Digital Agenda) Bill 1999 (Cth)*, the House of Representatives Committee was persuaded by the arguments put forward by the Australian Screen Directors Association.²⁰ It recommended that the proposed Part VC of the Bill be amended to include film directors amongst the class of underlying rights holders who are to receive remuneration under the statutory scheme. However, Australian Screen Directors Association failed to take into account divisions within the Federal Government. The executive and the bureaucracy did not agree with the views of the Parliamentary committee.

The Federal Government rejected the recommendation from the bi-partisan House of Representatives Committee looking at the scheme.²¹ It excluded directors from the proposed legislation on cable re-transmission of free-to air television. After the Federal Government rejected their proposal, the directors could only obtain the support of the Labor Opposition.

¹⁹ Kathy Bowrey. "The Outer Limits Of Copyright Law - Where Law Meets Philosophy And Culture", *Law and Critique*, 2001, Vol 12:1, pp1-24.

²⁰ House of Representatives Standing Committee on Legal and Constitutional Affairs. *Advisory Report on The Copyright Amendment (Digital Agenda) Bill 1999*. Canberra: The Parliament of The Commonwealth of Australia, 1999, p. 92-93.

Senator Bolkus of South Australia argued on behalf of the Australian Labor Party:

We moved an amendment in the House of Representatives to provide directors with retransmission rights. However, the government opposed that amendment and did not support amending the copyright regime to allow for the equitable remuneration of directors, claiming that this bill was not the appropriate vehicle. We believe in the importance of ensuring that the contribution of directors to the making of films is acknowledged. We were therefore prepared to move the amendment again today to provide directors with retransmission rights. I understand that, as a result of Labor's continual pressing of this particular position, the government has now committed itself to introducing legislation this year that will address the exact issue that Labor were pursuing through our amendments in the House. I understand further that the government has committed itself to a three-month review process to consider copyright issues for directors, at the conclusion of which legislation will be introduced.²²

The Labor Opposition agreed not to introduce further amendments on the understanding that the Federal Government would undertake a review of this issue.

The Democrats expressed in principle support for the proposals of the Australian Screen Directors Association. However, they believed that the Labor amendments were badly drafted. Senator Natasha Stott-Despoja commented:

We are sympathetic for what the Labor Party's amendment would have achieved and would have quite happily voted for the amendment they pursued in the lower house except that there were clearly defects in that amendment which would not have resulted in what we believe would have been appropriate or good law. For that reason we have chosen to pursue the attainment of that issue through different means. I commend the minister, his office and other officers for pursuing this matter that has now been outlined. I think it was perhaps a little cheeky of Senator Bolkus to suggest that, if it were not for the Labor Party pursuing this issue, we would not be investigating the issue through an inquiry and hopefully having some resolution to the issue of directors' rights before the end of the year.²³

The Democrats, too, looked forward the outcome of the review of film directors' rights.

²¹ Harty, J. 'Directors Dropped from Rights Scheme', *Encore*, Wednesday, 28 June, 2000.

²² Senator Nick Bolkus. "Copyright Amendment (Digital Agenda Bill) 2000 (Cth): Second Reading Speech", The Senate, Hansard, 17 August 2000, p. 16578.

²³ Senator Natasha Stott-Despoja. "Copyright Amendment (Digital Agenda Bill) 2000 (Cth): Second Reading Speech", The Senate, Hansard, 17 August 2000, p. 16586.

The director Scott Hicks was dismayed at the exclusion: "There is a fundamental principle at stake here – that directing is a creative act and produces intellectual property, for which directors should be rewarded in the same way as any other creator".²⁴ He believed that Australia was in danger of becoming an international laughing stock as a result of the legislation's failure to recognise the creative contributions of directors.

However, the Federal Government promised to review the issue of whether copyright law should recognise the creative contribution of film directors.²⁵ Senator Richard Alston assured the Parliament:

As a matter of priority in September the government will be calling for submissions on the issue of film directors' copyright. It is hoped that any amendments arising from the review will be ready to be introduced by the end of this year. A press release that will be going out shortly makes it clear that the government intends to begin work on the important question of reforming copyright to recognise the crucial role that directors play in film production. I acknowledge Senator Stott Despoja's keen interest in this area and I hope that that will assuage the concerns of those in the community who thought that this matter ought to have been finally addressed now. We intend to look at it very thoroughly but expeditiously.²⁶

There was a review undertaken by the Federal Government in respect of film directors' copyright; and the bill before us now is the result of such consultations.

The Copyright Amendment (Moral Rights) Act 2000 (Cth)

After much disagreement within the film industry, the Federal Government withdrew the moral rights bill until there was further industry debate and discussion.

The vice-president of the Guild, Ian David, put forward a compromise.²⁷ He submitted that authorship should be shared between the screenwriter, the director, and the producer where there was genuine collaboration in a film. He also said that the waiver provisions should be removed in return for an industry agreement stipulating what industry practices will be consented to. There has been industry discussion about this proposal. Other professional associations have also been involved.

²⁴ Harty, J. 'Directors Dropped from Rights Scheme', *Encore*, Wednesday, 28 June, 2000.

²⁵ Copyrites. 'Film Directors – Consultation on Copyright', Canberra: Department of Communications, Information Technology and the Arts, 2000, Issue 32, p. 15.

²⁶ Senator Richard Alston. "Copyright Amendment (Digital Agenda Bill) 2000 (Cth): Second Reading Speech", The Senate, Hansard, 17 August 2000, p. 16591.

The Federal Government essentially accepted the proposal put forward by the film and television industry. It passed the *Copyright Amendment (Moral Rights) Act 2000* (Cth). The Guild has provided affirmative public support to the Federal Government for accepting the proposals. The president of the Guild, Mac Gudgeon, said it was a great day for writers:

The legislation reflects the collaborative nature of film-making. Australia has a vibrant television and film industry which relies heavily on the creative talents of its writers, producers, and directors. These talents should be nurtured, recognised and celebrated – moral rights provide a framework in which this can be achieved. It provides a reasonable and workable solution that creates certainty for all parties.²⁸

Ian David called it "World-beating legislation for a common law country" that represented a new era for Australia's writers and creators.²⁹ He envisaged: "We will now see in a new century feeling better, stronger and more confident as creators and Australians".³⁰ Such public endorsements reflect the involvement of the Guild in the drafting of the legislation. However, it is not clear whether the screenwriters have necessarily won the struggle.

First, the Federal Government accepted the recommendation of the Senate Committee that the writers of scripts for film and television should be considered authors of the film or television program alongside the authors designated by the original legislation – namely, the producer and the director.³¹ In practice, this proposal will have a different operation between television and film. A producer would be able to claim co-authorship in the case of a television series if they created the characters and storyline, or assumed responsibility for the visual style and casting. However, a producer would be able to claim co-authorship in the case of documentaries, mini-series and feature films if they were initially involved in the making of the film.

²⁷ Coslovich, G. 'Writing the Wrongs', *The Age*, 29 September 1998.

²⁸ Staff Reporter. 'Artists to Win Rights', *The Sydney Morning Herald*, 10 December 1999, p.

15.

²⁹ Ibid.

³⁰ Ibid.

³¹ S 191 of the *Copyright Amendment (Moral Rights) Act 2000* (Cth).

Second, the Federal Government has given legal recognition to co-authorship agreements.³² It seems that a screenwriter can only take moral rights action with the consent of the other authors – namely, the director and the producer. This means that they would be unable to take action against their collaborators in situations of conflict and disagreement. Take for, instance, the experience that so politicised Jan Sardi about the need for the reform of moral rights. It was a situation in which the screenwriter was pitted against the director and the producer of a film. There would have been no recourse to legal action if the moral rights compromise proposal was in existence during this conflict. The proposal also raises the prospect that the producer would be able to stymie any moral rights actions against parties – such as the financiers, and the distributor.

Third, the Federal Government dropped the waiver provisions completely from the legislation. It accepted the argument of creators that the waiver provisions were a means by which economically powerful users of their works could force them to give up these new rights altogether. The Federal Government has clarified the effect of the consent provisions.³³ It establishes that it is not an infringement of a moral right of an author if the act or omission is within the scope of a written consent given by an author. The Federal Government addressed concerns that powerful parties could abuse the consent provisions. It provided that duress or false and misleading statements would invalidate consent.³⁴

Fourth, the Federal Government has added to the original legislation by including any relevant voluntary code of practice as a factor to be taken into account in the test of reasonableness. This is the case for both the right of attribution and the right of integrity.³⁵ The Federal Government gives effect to the film and television agreement, which stipulates what behaviour is reasonable. For instance, activities such as putting commercials on television, and cutting films to fit time-slot requirements were considered to be acceptable. The circumstances in which a moral rights action could be brought seem to be extremely limited. It would appear that it would only be possible to bring a legal action in relation to serious breaches of moral rights.

³² S 195AN (4) of the *Copyright Amendment (Moral Rights) Act 2000* (Cth).

³³ S 195AWA of the *Copyright Amendment (Moral Rights) Act 2000* (Cth).

³⁴ S 195 AWB of the *Copyright Amendment (Moral Rights) Act 2000* (Cth).

³⁵ S 195AR (3)(g) and s 195AS (3)(g) of the *Copyright Amendment (Moral Rights) Act 2000* (Cth).

Fifth, the Federal Government added to the original legislation by including a requirement that, before granting an injunction, a court must consider whether to give the parties an opportunity to reach a settlement by negotiation or mediation.³⁶ It seems that legal action may only be taken as a last resort after the processes of mediation and alternative dispute resolution are exhausted. There is a danger that the co-authors will succumb to pressure from parties with superior bargaining power in this process. It is arguable that the moral rights legislation will serve a symbolic, rather than a practical purpose. What will happen in reality is that bargaining will take place under the shadow of the legislation. Only a few intractable disputes in the area of film will reach the courts.

Sixth, the Federal Government has taken heed of consultations about the duration of the new moral rights. The author's right of integrity in relation to film expires with the death of the author.³⁷ By contrast, the author's right of integrity in relation to other copyright works continues in force until copyright ceases to subsist in a work.³⁸ Furthermore the right of attribution and the right against false attribution also continue in force until copyright ceases to subsist in a work.³⁹ This double standard can be explained by the special pleading of the film industry. Perhaps the idea is that anyone can judge whether there is proper attribution, but only the author can judge matters of personal integrity.

³⁶ S 195AZA (3) of the *Copyright Amendment (Moral Rights) Act 2000* (Cth).

³⁷ S 195AM (1) of the *Copyright Amendment (Moral Rights) Act 2000* (Cth).

³⁸ S 195AM (2) of the *Copyright Amendment (Moral Rights) Act 2000* (Cth).

³⁹ S 195AM (3) of the *Copyright Amendment (Moral Rights) Act 2000* (Cth).

PART 2.
OPTIONS FOR POLICY REFORM IN AUSTRALIA

In light of this legislative framework, there are a number of policy options available in respect of the ownership of copyright in cinematographic films. The explanatory memorandum canvasses five options. Under Option 1, 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. Under Option 2, the government would enact legislation based on the directors' rights model currently in place in the UK (introduced on 1 December 1996). Under Option 3, there would be co-ownership with a presumption in favour of producers. The Government would 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 Option 4, directors would be grant 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. Under Option 5, amendments would be introduced to grant directors rights to remuneration in respect of retransmission royalties under Part VC of the Act only. This is the Government's preferred model.

A. Producers' Copyright

The Screen Producers Association has argued that they would prefer that the status quo remain. In other words, such interests would prefer to have producers to be the sole copyright owners of any cinematographic film. This is labelled as Option 1 in the explanatory memorandum.

The Association defends the status quo - namely, that cinematographic films should be classified as other subject matter, and producers should enjoy the full economic rights. Geoff Brown maintains that the allocation of ownership to producers is appropriate given the entrepreneurial risks that they take:

Australia's copyright system has always fundamentally protected those taking the commercial risk on a film/TV project. This has ensured that the economic incentive for investment in the industry is maximised. Producers almost exclusively wear these commercial risks, whereas

directors bear no such risk. Directors are generally 'employees' of the producer in a loose sense, i.e. they ultimately follow the directions of the producer of the project, whether or not their contract is, legally one of employment, or one of providing services.⁴⁰

Perhaps producers can claim co-ownership of cinematographic films on the basis that they take entrepreneurial risks. However, it seems an inadequate justification to claim sole ownership of motion pictures. Furthermore, it is misleading to talk in such a loose sense that directors are "employees" of the producers. Such a determination would require a strict satisfaction of the legal requirements of employment. The *Copyright Act 1968 (Cth)* has very specific rules about copyright created in the circumstances of employment, and in the context of independent contracting.

The Association has argued that giving directors an economic right in the film would have an adverse impact on financing of productions, industrial relations, and the management of intellectual property. Geoff Brown comments:

Any amendments which take rights away from those providing the financial investment in film and television have the potential to act as a disincentive to investment and have a negative economic effect upon the industry... Private investment will encourage the production of more marketable products which in turn will bring more money into the local industry and will create a cycle of further attracting investment. However, for any production to attract such investment, all rights in the final product have to subsist in one body and the assignability of such rights must be easily achievable. This Bill moves towards the creation of one more difficulty in that process, and therefore runs counter to the long term good of the industry as a whole.⁴¹

Such arguments are not supported by empirical evidence. The recognition of film directors' copyright in Great Britain does not seem to have had an instrumental impact upon the level of private investment in cinematograph films in that jurisdiction. Indeed, the evidence is that the film industry in the United Kingdom is remarkably

⁴⁰ Screen Producers Association of Australia. "Submission on the *Copyright Amendment (Directors' Rights) Bill 2005*", Senate Legal and Constitutional Committee, 2005, http://www.aph.gov.au/senate/committee/legcon_ctte/film/submissions/sub04.pdf

⁴¹ Screen Producers Association of Australia. "Submission on the *Copyright Amendment (Directors' Rights) Bill 2005*", Senate Legal and Constitutional Committee, 2005, http://www.aph.gov.au/senate/committee/legcon_ctte/film/submissions/sub04.pdf

healthy.⁴² Similarly, the long-term recognition of film directors' copyright in other European Union countries does not seem to have frightened away investment.

Geoff Brown argues that it is difficult to define the role of "director" - especially as the term can deal with multiple directors on occasion and cover a wide range of differing roles in the film and television industry. However one could also say the same thing about the role of the "producer". There can be multiple producers attached to a project - and they can change over the duration of the project.

The Association has argued that remuneration for directors is adequately dealt with through industrial awards and commercial negotiations. Geoff Brown comments:

All television and television commercial directors, being employees, are already covered by relevant industrial awards, or alternatively by the Motion Picture Production Agreement 2002. There are therefore already protections in place to safeguard the rights and remuneration of such directors, and any additional grant of rights on such grounds is unnecessary and unwarranted. Feature film directors are generally in a very good commercial bargaining position to secure both remuneration and recognition under their agreements with producers. This includes in most cases premium billing in credits for the film, and securing a share of 'back end' profits of the film project (in addition to an up-front fee which may be based on a share of the production budget).⁴³

The Association further argued that the Bill was an inappropriate place to make the significant changes to Australia's copyright and intellectual property rules that director's copyright entails. The Association argues: "Directors already receive significant recognition and remuneration, commensurate with their role". The Association has claimed that there was a clear understanding that the establishment of moral rights did not amount to a precedent for the extension of economic rights: "Directors currently already enjoy protection of their moral rights under the *Copyright Act 1968*."

⁴² "In the region of about 100 films intended for theatrical exhibition are produced annually by United Kingdom producers either acting alone or in co-production with those from other countries. The total costs of production of these films is about 630 million pounds". Copinger and Skone James on Copyright. London: Sweet and Maxwell, 1999, p. 1398.

⁴³ Screen Producers Association of Australia. "Submission on the *Copyright Amendment (Directors' Rights) Bill 2005*", Senate Legal and Constitutional Committee, 2005, http://www.aph.gov.au/senate/committee/legcon_ctte/film/submissions/sub04.pdf

However, it is questionable whether the economic and moral rights of directors are adequately dealt with under contract law.

Witness what happened in the case of the film *Brazil*, written and directed by Terry Gilliam, the Monty Python animator.⁴⁴ He shot the approved script, and brought the film within schedule and within budget. Universal invested \$9 million in exchange for the North American distribution rights. It was unhappy with the ending of the film because of a belief that the dark conclusion was uncommercial. Using the contractual provision governing the film's length as a ploy, Universal compelled Terry Gilliam to make further cuts and to re-edit the film. Terry Gilliam agreed to trim the film further, but he refused to alter the ending. In response, Universal declined to release Gilliam's version of the film and threatened to release a studio cut of *Brazil*. However, Terry Gilliam enlisted the aid of sympathetic columnists and film critics who aroused public sympathy and finally obtained the acquiescence of Universal. The case suggests that the power of the director was based in the media, rather in the legal system.

Think of the recent unfortunate dispute over the film *Eucalyptus*.⁴⁵ The acclaimed director Jocelyn Moorhouse was involved in a cinematic adaptation of a literary novel by Murray Bail. She was also a co-writer of the screenplay for the film *Eucalyptus*, along with John Logan. The Academy Award winner Russell Crowe was the executive producer of the film *Eucalyptus*. He was unhappy with the script and sought to make changes to the screenplay. There was significant conflict between the director and the executive producer, and, in the end, the film was postponed indefinitely. When Moorhouse took her concerns to the producer, Italian Uberto Pasolini, and the studio, Fox Searchlight, they ultimately sided with Crowe. In such a scenario, the producer would be in a strong position, as the holder of economic rights in any resulting cinematographic film. The director would have little bargaining power in terms of legal rights - except for secondary rights in the script, which would be protected as a literary work. Accordingly, the director Jocelyn Moorhouse has withdrawn from the project. It is a terrible shame that her vision for the film *Eucalyptus* will never be realised, even though she devoted great creative and economic effort to adapt the original literary work.

⁴⁴ Rudolph Carmenaty. 'Terry Gilliam's Brazil: A Film Director's Quest for Artistic Integrity in a Moral Rights Vacuum', *Columbia - VLA Journal of Law and the Arts*, 1989, Vol. 14, p. 91.

Oscar-winning director Peter Jackson has filed suit against the movie studio behind his "Lord of the Rings" film trilogy, claiming the studio may have cost him tens of millions of dollars.⁴⁶ He has accused New Line Cinema, which financed and distributed the "Lord of the Rings" film franchise, of committing fraud in the way it dealt with ancillary revenues generated by "The Fellowship of the Ring," the 2001 movie and the first of the J.R.R. Tolkien novels that Jackson brought to the big screen. Lawyers for Jackson told *The New York Times*, which first reported the lawsuit, that the director was underpaid by as much as \$100 million. In his lawsuit, Jackson accuses New Line of granting the licensing rights to "Lord of the Rings" books, DVDs, and merchandise to other Time Warner companies without allowing bids from other entertainment companies. As a result, he claims that the total revenues related to the film were lower than they would have been had there been open bidding for these ancillary rights. In response, New Line argues: "That allegation is untrue, most (licensing rights) did not go to companies in the Time Warner family."⁴⁷

Consider the situation of Australian film-maker Paul Cox and his film *Molokai*, starring David Wenham. The Belgian/Dutch production company ERA Films sought to re-edit the film "Molokai: The Story of Father Damien" and release a new version. The director objected to the recut of the film and the addition of an alternative musical score. The director Paul Cox tried to have his name removed from this version of the film. He successfully applied to a Belgian court to stop the producers from destroying the negatives. In the end, the investors were willing to finance Paul Cox in re-cutting the movie as he wished, re-inserting eliminated scenes (including the character of the second bishop of Honolulu). The original score was restored. This is the version that was finally released.

As a result of this experience, Paul Cox has become a strong advocate for film directors' copyright in Australia. He observed: "How can a producer be the creative force behind a work? What does he do exactly? There are very few producers who have any clue what goes on ... That's why film is such an abused medium."⁴⁸

⁴⁵ Tony Davis and Susan Wyndham. "Crowe scuttles Eucalyptus film", *The Sydney Morning Herald*, 12 February 2005.

⁴⁶ "Jackson sues over 'Lord of the Rings'", CNN, 27 June 2005, http://money.cnn.com/2005/06/27/news/newsmakers/peterjackson_lawsuit/

⁴⁷ "Jackson sues over 'Lord of the Rings'", CNN, 27 June 2005, http://money.cnn.com/2005/06/27/news/newsmakers/peterjackson_lawsuit/

⁴⁸ Misha Ketchell. "Directors to Get a Cut of the Copyright", *The Age*, 25 September 2000, p. 5.

The Australian director of the film *Babe*, Chris Noonan, is also a vocal advocate for film directors' copyright. He observed:

This issue is a crucial one for directors because it is fundamentally about 'authorship'. It is both unreasonable and unjust that creators such as composers, writers, and producers will benefit from this scheme, but directors are to be excluded because of an anomaly in the Copyright Act. It is bizarre that Australian directors receive remuneration from European countries with similar schemes, but will get none from their own country. More importantly, that European money will always be at threat because Australia is unable to reciprocate. The Government could unwittingly be setting up a barrier to trade.⁴⁹

He concluded: "Directors are key creative contributors to film and TV, and to be excluded because of an anomaly in the Copyright Act would have been grossly unjust, and made Australia a laughing stock."⁵⁰

Such conflicts reinforce the need to accord economic rights to film directors - so that they can protect both the creative vision and economic potential of cinematic works.

Geoff Brown of the Screen Producers Association of Australia denies that there is an imbalance in the bargaining power between directors and producers. He responds:

Such disputes would occur regardless of the existence of economic rights and ultimately directors would not be assisted in such disputes merely on account of their intellectual property (which would be bought out as part of any agreement between a producer and a director anyway). Films ultimately don't get made without the combined agreement of directors, investors and producers. Those that do get made represent some sort of nexus between the three.

Dr. Rimmer says that it is a terrible shame that such creative visions are never realised – the truth of the matter is that the creative visions of many filmmakers aren't realised – this is nothing new or unique to the cases outlined – it happens all the time and not merely because of the lack of director's copyright.

Dr. Rimmer suggests that directors have no rights in the legal system, but does not consider what power directors have in the marketplace and how strong their bargaining position is.⁵¹

⁴⁹ Australian Screen Directors Association. "Australian Directors Call on Senate to Amend Flawed Legislation", 22 June 2000, <http://www.asdafilm.org.au/pdf/prflawed.pdf>

⁵⁰ Australian Screen Directors Association. "Australian Directors Welcome Recognition of their Rights", <http://www.asdafilm.org.au/pdf/prcreative.pdf>

Nonetheless, there has to be doubts over whether directors can exercise real power and 'clout' in the marketplace. In the cases cited, Jocelyn Moorhouse, Terry Gilliam, Paul Cox, and Peter Jackson, are well-established, highly respected directors. Nonetheless, they were undoubtedly in a much weaker position than their counterparts. Younger directors are particularly vulnerable given the great competition that exists. Thus promising auteurs like Shirley Barrett and Emma Kate-Croghan have struggled to obtain work as film-makers.⁵²

The seven large multinational motion picture companies - Walt Disney Company, Sony Pictures Entertainment Inc., Metro-Goldwyn-Mayer Studios Inc, Paramount Pictures Corporation, Twentieth Century Fox Film Corporation, Universal City Studios LLLP; and Warner Bros. Entertainment Inc - exercise significant market power in the industry. It is hard to see how screen directors - whether individually or in professional associations - can hope to be on an even footing to such behemoths.

Brown also makes a "floodgates" argument that the recognition of film directors' copyright will necessarily lead to further claims to authorship by other members of the film industry:

Given the unique nature of the film/TV industry, where many people have input into the final product, it would be inconsistent, and without basis, to grant rights to one set of individuals, to the exclusion of others who contribute significantly on a creative level. Examples of such other individuals would be writers, cinematographers, editors and composers.⁵³

Such issues suggest to me that there should be clearer rules as to joint authorship in respect of a copyright work - not that we should deny the possibility of joint authorship altogether.

⁵¹ Screen Producers Association of Australia. "Submission on the *Copyright Amendment (Directors' Rights) Bill 2005*", Senate Legal and Constitutional Committee, 2005, http://www.aph.gov.au/senate/committee/legcon_ctte/film/submissions/sub04.pdf

⁵² Jim Schembri. "Aren't You...?", *The Age*, 5 May 2005, <http://www.theage.com.au/news/Film/Arent-you/2005/05/05/1115092574563.html>

⁵³ Screen Producers Association of Australia. "Submission on the *Copyright Amendment (Directors' Rights) Bill 2005*", Senate Legal and Constitutional Committee, 2005, http://www.aph.gov.au/senate/committee/legcon_ctte/film/submissions/sub04.pdf

The notion that a cinematographic film is merely an entrepreneurial work is ultimately an unsatisfying judicial fiction. As Anne Barron observes, such a myth fails to account for a wide range of artistic practices in the field of cinema:

Copyright discourse reveals what a film essentially is when viewed from the perspective of the filmed entertainment industry: it is in copyright discourse that film-as-commodity is revealed as nothing other than a story on celluloid (or some other replicable medium). Yet there are many films, and many conceptions of what film is and where its value lies, that defy dominant industry functions and ideologies and cannot be contained by this supposed essence.⁵⁴

It is therefore imperative that the *Copyright Act 1968 (Cth)* be amended to embrace a broader notion of a cinematograph film as a work that is created by multiple authors.

B. Directors' Copyright

There is a strong case to be made that directors should have some claim to the economic and moral rights in respect of cinematograph films. As Rudolph Carmenaty observes:

Since the 1960's, film directors have become stars in their own right. Films today are often advertised on the basis of their directors. During the title and credit sequence run before after the narrative of every commercial film, the film may be labeled as "a John Huston Film" or "a Steven Spielberg film," etc. The director's name and reputation are often of great commercial value. This commercial value is the direct product of the director's creative contribution... As the auteur or author of the motion picture, it is the director who determines the look and message of the film.⁵⁵

Surprisingly, Australian copyright law has not necessarily reflected the notion that the director is the auteur or author of the motion picture.

In their submission on directors' copyright, the Australian Screen Directors' Association (ASDA) has argued strongly for changes to the *Copyright Act 1968 (Cth)* 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

⁵⁴ Anne Barron, "The Legal Properties of Film", *Modern Law Review*, 2004, Vol. 67 (2), p 177-208 at 196.

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.

ASDA has argued that the director was not recognised as the author of a film because the Australian film industry was in its infancy when the *Copyright Act 1968* (Cth) was passed through Parliament. There was no understanding of the film director's craft and there was no professional guild or lobby group for directors. ASDA submitted that the director deserved the title of authorship because of the nature of the film industry and professional organisation:

Since that time Australian film directors have become Australia's most significant cultural export in terms of human resources. Think of Peter Weir, Bruce Beresford, Baz Luhrmann, Scott Hicks, Jane Campion, George Miller, PJ Hogan, Jocelyn Moorhouse, Fred Schepisi, John Duigan, Gillian Armstrong, and Phil Noyce.

ASDA glories in a golden age of national cinema. It evokes such great films as *Picnic at Hanging Rock*, *The Chant of Jimmy Blacksmith*, *Mad Max*, *Proof*, *The Year My Voice Broke*, *Muriel's Wedding*, *Strictly Ballroom*, and *The Piano*. The underlying message is that Australian directors deserve the status of authorship, because they are responsible for the success of the film industry.

In a powerful account of auteur theory, ASDA argues that the director is the author of a cinematographic film. It submits that the director is the principal creative contributor to a cinematographic film because they control what appears in the frame: sets, lighting, costume, acting, music, the behaviour of the figures, and the staging of the scenes. ASDA denies that the film director is merely a technician who interprets the work of others:

Despite Australia's prodigious directing talent our *Copyright Act* operates under the legal fiction that there is no author of a film. Film directors are perceived as being analogous to theatre directors or conductors of an orchestra in that they merely interpret or realise screenplays rather than create new and original works.

⁵⁵ Rudolph Carmentat. 'Terry Gilliam's Brazil: A Film Director's Quest for Artistic Integrity in a Moral Rights Vacuum', *Columbia – VLA Journal of Law and the Arts*, 1989, Vol. 14, p. 91.

ASDA asserts that the director deserves the status of authorship, because they stamp a distinctive visual appearance on a film. There is a personal connection between the director and the images of the film. In contrast to the claims of script writers, ASDA emphasises that narrative is subordinate to the spectacle of a film. It insists that cinema is primarily a medium of images. According to this perspective, the writing of the screenwriter is merely secondary to the work of the director in creating the spectacle of the film.

However, ASDA is wrong to assert that the idea that the director is the author of the film commands universal acceptance in the film community. There is some doubt whether the auteur theory should provide the basis for a legal model for authorship. In the making of the film *Shine*, the director Scott Hicks eschewed the role of the auteur. He generously stressed the efforts of his collaborators – the screenwriter, the producer, the cinematographer, and the individual members of the cast. Scott Hicks was modest about his own contributions to the film. His vision of film-making was essentially a co-operative, collaborative model. So a much more realistic model would recognise that authorship is shared between the director and other key creative contributors, such as the screenwriter and the producer.

ASDA claimed that the trend in simplifying copyright law was towards acknowledging that film was a creative work. It noted that the Copyright Law Review Committee said that films should be protected at the higher level of ‘creations’, and television programs as mere ‘productions’. ASDA also sought to exploit the fact that the *Copyright Amendment (Moral Rights) Act 2000* (Cth) recognised that the director was an author of a film. It submitted that it is inconsistent and ambiguous to amend legislation to provide authorship status for a director for moral rights but not for economic rights.

C. Re-Transmission Royalties and Statutory Licensing

The Federal Government has considered whether film directors should receive rights to financial remuneration under the statutory licences, which are administered by the collecting society, Screenrights. This position has been called Option 4 in the explanatory memorandum. The Federal Government has not been inclined to upset the current arrangements in respect of statutory licensing.

The Federal Government has taken a minimalist approach to dealing with the copyright of film directors. It has embraced what is called Option 5 in the

explanatory memorandum. The Federal Government proposes providing 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* (Cth) 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 1968* (Cth). 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.

It is a little difficult to divine why the Federal Government has decided that this particular approach is the ideal solution. In his second reading speech, the Attorney-General, the Hon. Philip Ruddock, commented rather obliquely:

The government's aim in preparing this bill is to recognise and encourage the creative contribution of our many fine Australian directors, some of whom are well known and others who are far less well known. But the government also did not want to affect investment in Australia's important film industry and existing revenue sources of its producers that are so vital to its ongoing success. This bill has achieved this aim, in giving directors access to remuneration from the subscription television retransmission scheme.

With its current minimalist approach, the Bill will certainly achieve the modest aims of helping to provide recognition to film directors, and providing royalties from the subscription television retransmission scheme. It seems that the Government has limited the rights of film directors because of a concern that providing directors with a full complement of economic rights might result in an adverse impact upon investment in Australia's film industry. It is not clear whether there is any economic evidence to support this contention.

The approach adopted by the Federal Government is not without its problems. It seems rather inconsistent that film directors be treated as copyright owners of cinematographic films for the subscription television retransmission scheme; but not in relation to the rest of the economic rights regime. As a result, film directors could be put at a significant disadvantage in the event of any conflict over the production of a cinematographic film.

There is a growing problem with the lack of correspondence between the economic rights scheme and the moral rights regime under the *Copyright Act 1968* (Cth). Thus producers are considered to be the owners of cinematographic films in respect of the economic rights; directors have some claim to authorship in respect of retransmission royalties; and authorship is shared between screenwriters, directors, and producers for the purposes of moral rights. This complicated division of rights between these different actors is rather complex and confusing.

There is a similar lack of equivalence in respect of other categories of subject matter. Thus performers are tenants in common in respect of sound recordings; but are considered to be authors in respect of moral rights in respect of musical works and sound recordings, once amendments flowing from the Australia-United States Free Trade Agreement come into force. However, performers in respect of audio-visual works only have limited economic rights in respect of fixation; and no moral rights in respect of audio-visual works.

Indigenous communities can enjoy communal ownership in respect of economic rights in the last instance; and the Government has proposed that such groups could have communal ownership of moral rights, subject to the creation of legal relationships.

Surely, it would make sense for creators to receive the same complement of economic and moral rights across the range of available subject matter. Thus film directors could be conceived of as joint authors of cinematographic films for economic and moral rights, along with producers and perhaps screenwriters. Performers of both sound recordings and audio-visual performances should receive full economic and moral rights. Indigenous communities should be able to exercise communal ownership of both economic and moral rights. Such an approach provides much greater legislative consistency and harmony.

PART 3. INTERNATIONAL SURVEY OF AUTHORSHIP IN AUDIO-VISUAL WORKS

Article 2 (1) of the *Berne Convention for the Protection of Literary and Artistic Works* treats cinematographic films as literary and artistic works.⁵⁶ It observes:

The expression "literary and artistic works" shall include every production in the literary, scientific and artistic domain, whatever may be the mode or form of its expression, such as books, pamphlets and other writings; lectures, addresses, sermons and other works of the same nature; dramatic or dramatico-musical works; choreographic works and entertainments in dumb show; musical compositions with or without words; cinematographic works to which are assimilated works expressed by a process analogous to cinematography; works of drawing, painting, architecture, sculpture, engraving and lithography; photographic works to which are assimilated works expressed by a process analogous to photography; works of applied art; illustrations, maps, plans, sketches and three-dimensional works relative to geography, topography, architecture or science.

However, Article 14bis offers special provisions concerning cinematographic works. There is an allowance that "ownership of copyright in a cinematographic work shall be a matter for legislation in the country where protection is claimed." Article 14bis suggests, though, that authorship could be extended to the "authors of scenarios, dialogues and musical works created for the making of the cinematographic work" and "the principal director thereof."

Kimberlee Weatherall makes the excellent point in her submission that the Australian approach defines a unique position, which is out of harmony with the law in all the significant jurisdictions. She comments:

Under the bill, Australian law will strike out in a new direction, distinguishing between ownership for different purposes. As a result of this bill, the Australian position will be quite unlike the position anywhere else in the world that I am aware of:

- Like the United Kingdom, we will continue to recognise producers as owners of copyright in films, and like the United Kingdom, we will add directors as owners. But unlike the UK, we

⁵⁶ For a discussion of the debates over cinematographic films in the Berne Convention, see Sam Ricketson. "Chapter 10" of *The Berne Convention for the Protection of Literary and Artistic Works*. Kluwer: Centre for Commercial Law Studies, 1987.

add directors only for certain purposes, and unlike the UK, we include *all* directors, not just principal directors;

- Like the US (and like Canada) we will treat films made on commission as owned by the commissioner, but unlike the US, for other films, we will treat the producer, not the creators of the film, as the owners of copyright for most purposes. (And unlike the US, we treat directors as having moral rights in films).
- Unlike many countries of the European Union, we will treat producers as the main owners of copyright for most purposes.⁵⁷

Weatherall concludes that this issue should be weighed in the balance: "The bill thus adds to an already complex international system in relation to the position of directors, and, as a result, may add to the complexity of contractual dealings in this space."⁵⁸

It is worth considering the main international approaches to the authorship and ownership of cinematographic films. First of all, Commonwealth countries such as Canada and New Zealand have also been struggling in allocating the economic and moral rights in a cinematographic film between the various stakeholders. Second, the European Union has required its member states to recognise that the principal director can claim authorship in a cinematograph. Civil law countries such as France, German, the Benelux nations, and Italy have long recognised film directors' authorship. Both the United Kingdom and Ireland have amended their laws to recognise film directors' authorship of cinematographic films. Third, the United States recognises the possibility of joint authorship of cinematographic films. However, employers can claim ownership in respect of works made for hire. There is no recognition of moral rights in cinematographic films in the United States. Finally, Israel has recently recognised that film directors' can claim authorship of cinematographic films.

⁵⁷ Kimberlee Weatherall. *Inquiry into the provisions of the Copyright Amendment (Film Directors' Rights) Bill 2005*. Senate Legal and Constitutional Affairs Committee, 2005, http://www.aph.gov.au/senate/committee/legcon_ctte/film/submissions/sub08.pdf

⁵⁸ Kimberlee Weatherall. *Inquiry into the provisions of the Copyright Amendment (Film Directors' Rights) Bill 2005*. Senate Legal and Constitutional Affairs Committee, 2005, http://www.aph.gov.au/senate/committee/legcon_ctte/film/submissions/sub08.pdf

A. Commonwealth Countries

Other Commonwealth countries such as Canada and New Zealand have been experiencing similar confusion over the division of economic rights and moral rights between the various stakeholders in cinematographic films.

In Canada, there has been a similar debate about the authorship of cinematographic films, which has explored many of the same themes as the Australian debate. S 2 of the *Copyright Act* 1985 (RC) provides that "maker" means "in relation to a cinematographic work, the person by whom the arrangements necessary for the making of the work are undertaken". S 13 (1) provides: "Subject to this Act, the author of a work shall be the first owner of the copyright therein." S 13 (3) provides: "Where the author of a work was in the employment of some other person under a contract of service or apprenticeship and the work was made in the course of his employment by that person, the person by whom the author was employed shall, in the absence of any agreement to the contrary, be the first owner of the copyright."

In 2003, the Canadian Film and Television Production Association made a submission to the general review of the Canadian copyright regime.⁵⁹ It argued:

The Association has long maintained that the producer is the author of an audiovisual work. The producer is the person (in the greater legal sense, including corporations) who takes on the overall risk of creating the work, of assembling the creative team to realize the project, of securing the financing and of overseeing the completion and distribution of the work. As a result, it is the producer who is entitled to be first owner of copyright...

CFTPA would like to emphasize that first ownership in the hands of the producer in no way disenfranchises other players. Copyright is a resilient concept and can be the source of negotiated agreements to share benefits. This is the foundation of all labour agreements that the Association has with the unions and guilds that participate in the creation of film, television and new media productions, and the basis for the contracts involved with the commercial exploitation of the production.⁶⁰

⁵⁹ The Canadian Film and Television Production Association. "Re: Review of the *Copyright Act* in response to the October 2002 Minister's report, *Supporting Culture and Innovation: Report on the Provisions and Operation of the Copyright Act*" Submission to the Standing Committee on Canadian Heritage", 15 September 2003, http://www.cftpa.ca/government/pdfs/Copyright_review_section92final15SEP.pdf

⁶⁰ The Canadian Film and Television Production Association. "Re: Review of the *Copyright Act* in response to the October 2002 Minister's report, *Supporting Culture and Innovation: Report on the Provisions and Operation of the Copyright Act*" Submission to the Standing Committee on Canadian Heritage", 15 September 2003, http://www.cftpa.ca/government/pdfs/Copyright_review_section92final15SEP.pdf

The Association warned: "If the Government were to uphold a position that any person other than the producer should be recognized as the 'author' of an audiovisual work, this could be perceived as a significant irritant by Canada's biggest trading partner in audiovisual works, the United States." It asserted rather tendentiously: "America's copyright legislation clearly and unequivocally states that the producer is the author and first owner of copyright in audiovisual works."

In response, the Directors Guild of Canada argued that directors should be considered to be the author of audio-visual work. Its Directors Affairs Manager, Ms. Arden Ryshpan, commented:

For years, the guild has been lobbying the government for the statutory recognition of directors and screenwriters as the authors of audiovisual works. The report mentions that a variety of creative personnel, and in a couple of cases the producer, are statutorily recognized as authors in other jurisdictions. What the report fails to mention is that the common denominator, with the exception of the United States, is that the director is an author.

Gaining recognition as authors is important to the industry for a number of reasons. International levy systems, such as that of private copying or retransmission royalties, typically divide such levies between authors and producers. The lack of statutory recognition of directors as authors has complicated the work of the DRCC in collecting amounts segregated for directors in foreign jurisdictions. The consequent delays have already cost Canadian directors much in lost remuneration.

This lack of clarity has resulted in the lack of a division of retransmission royalties between producers and authors in our own jurisdiction--a continuing inequity. If in the future Canada implements a private copying regime or any similar regime to provide remuneration for unauthorized use of audiovisual works, the statutory recognition of the director and screenwriter as co-authors would help to ensure they were not forgotten in setting entitlement to such remuneration.⁶¹

She complained that, in the past three years, two of the association's directors had their works changed after completion of their projects. In both instances, the directors believed that the changes did not reflect their visions of the works they had directed. Both sought to remove their names from the completed works and insert pseudonyms, as they felt the works as completed would be injurious to their reputation as directors.

⁶¹ "Evidence to the Standing Committee on Canadian Heritage", 37th Parliament, 2nd Session, Canadian Parliament, 30 October 2003
<http://www.parl.gc.ca/InfoComDoc/37/2/HERI/Meetings/Evidence/heriev55-e.htm>

In both instances, they were unable to do so because they were not considered to be authors of their works.

New Zealand has ended up in a similar quandary to Australia, with the splitting of economic and moral rights between different owners. Producers have been awarded the ownership of economic rights. S 5 (2) (b) of the *Copyright Act* 1994 (NZ) provides that "the person who creates a work shall be taken to be... in the case of a sound recording or film, the person by whom the arrangements necessary for the making of the recording or film are undertaken". However, directors have been accorded the authorship of moral rights. S 94 (1) (b) of the *Copyright Act* 1994 (NZ) provides: "The director of a film that is a copyright work has the right to be identified as the director of the work."

The Screen Directors' Guild of New Zealand has been pushing to reform the legislation to recognise the authorship of directors in audio-visual works. It has told its members:

Primary use or exploitation rights, as the name implies, is the major economic right in the work, held by the copyright owner. In a film or television program, sales to distributors, exhibitors and broadcasters, as well as sell-through video sales are all classed as primary use.

The director is the creative author of the film. The director should share in the film's economic success.

In return for acknowledging that the producer has all PRIMARY EXPLOITATION rights to their work, the director should receive a payment ABOVE THE STANDARD FEE. This could be either: a lump sum, or a share of net profits. Do not leave this out of your contract. Not even for a short film, or one you think unlikely to be commercial. Lee Tamahori didn't think 'Once Were Warriors' would be commercial!

It is simply unacceptable that NZ directors receive such lousy fees, and yet have no profit sharing in many cases. Change will only come about when directors refuse to accept these conditions.

Furthermore, the Screen Directors' Guild of New Zealand has argued that directors should be entitled to economic returns for certain forms of secondary use of their work. In particular, the Guild has emphasized that directors should enjoy royalties in respect of cable retransmission, private copying, and statutory licensing fees. It has recommended to its members to "Ensure that your director's contract has a clause enabling the payment by collection societies for secondary use exploitation of the film."

B. European Union

In a survey of authorship of motion pictures in the European Union, F. Jay Dougherty comments:

[In] civil law regimes... various contributors of intellectual creativity to the film are viewed as coauthors, from whom the producer must obtain grants of rights in order to exploit the film. This approach can be potentially more protective of the interests of individual creators, but can complicate the assimilation of rights necessary to exploit the film and to protect the interests of financiers.

Some countries, such as Italy, designate specific persons who are coauthors of a film. Others, such as France, have statutes specifying a list of presumptive coauthors. In countries such as Germany, there is no specific list, and any contributor of personal, original intellectual material is potentially a coauthor. Where there is a list of presumptive coauthors, the director is included.

Recognizing the potential difficulties in obtaining grants from numerous coauthors, some *droit d'auteur* countries, such as Italy, provide for an automatic "legal assignment" of exploitation rights by the coauthors to the producer, and other countries, such as France and Germany, provide for a presumption of such assignment subject to contrary arrangements.⁶²

A series of European Union Directives have ensured that there is harmonisation between member states in providing protection for the economic and moral rights of film directors in audio-visual works.

In the classic text, *The Ownership of the Image*, Bernard Edelman considers the treatment of film under French law.⁶³ He discusses how authorship was initially assumed by the producer in 1939 and shifted to a team of authors, including the scriptwriter, the director, and the composer in 1957. Bernard Edelman points out that, in spite of this development, the producer maintained control over the exploitation of the film through contracts. The economic rights associated with the work are presumed to vest with the producer unless otherwise stated in the contract: "...contracts binding the producer and the authors of an audiovisual work, other than the author of a musical composition, with or without words, shall imply, unless otherwise stipulated ...assignment to the producer of the exclusive exploitation rights in the audiovisual work". However, French law states that "remuneration shall be due

⁶² F. Jay Dougherty. "Not A Spike Lee Joint? Issues in the Authorship of Motion Pictures Under U.S. Copyright Law", *UCLA Law Review*, October 2001, Vol. 49, p. 225.

⁶³ Bernard Edelman. *Ownership of the Image*. London: Routledge, 1979.

to the authors for each exploitation mode". Under this reasoning, authors "have a right to a proprietary share of producer's receipts in cases where the public pays a price." There should be some caution about the French approach, though. A legislative presumption that the director's primary economic rights vest with the producer, unless there is an agreement to the contrary, could be rigid and inflexible.

Similarly in 1965, the Federal Republic of Germany affirmed in legislation that the original copyright in a cinematographic work belonged to the creative authors of the work.

In 1992, the European Copyright Directive on rental and lending rights stated: "For the purposes of this Directive the principal director of a cinematographic work shall be its author. Member States may provide for others to be its co-authors." Similar provisions were also incorporated into the directive on cable-retransmission.

In 1993, the European Union Directive on Copyright Term of Protection sought to harmonise the protection of cinematographic films across the member states of the European Union. Article 2 (1) unequivocally provides: "The principal director of a cinematographic or audiovisual work shall be considered as its author or one of its authors. Member States shall be free to designate other co-authors." Article 2 (2) provides: "The term of protection of cinematographic or audiovisual works shall expire 70 years after the death of the last of the following persons to survive, whether or not these persons are designated as co-authors: the principal director, the author of the screenplay, the author of the dialogue and the composer of music specifically created for use in the cinematographic or audiovisual work." Such creative contributors could thus also qualify as rights-holders in the work.

In December 1996 the United Kingdom introduced legislation designed to implement this directive. The United Kingdom was required to recognise film director's copyright as a result of the European Union Directive on Copyright Term of Protection. Under the new United Kingdom 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 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. Lionel Bently and Brad Sherman have observed in the second edition of *Intellectual*

Property Law: "The recognition of the principal director as author of the film marks an important change in the way films are treated by British copyright law from films being treated as a type of entrepreneurial work, to films being treated as a hybrid of entrepreneurial and authorial works".⁶⁴

The Irish Government has followed suit, and reformed its legislation to comply with the European Union Directive. S 22 (1) of the *Copyright and Related Rights Act 2000* (Ireland) provides: "In this Act, 'a work of joint authorship' means a work produced by the collaboration of two or more authors in which the contribution of each author is not distinct from that of the other author or authors." S 22 (2) states: "A film shall be treated as a work of joint authorship unless the producer and the principal director are the same person."

An illustration of European law on copyright law and film directors may be provided by a recent case from the Court of Appeals in Paris. In *Luc Besson & Gaumont v. SFR & Publicis*, the celebrated French Director, Luc Besson, brought a legal action over an advertisement made by the French advertising agency, Publicis, for its client SFR, a mobile phone company.⁶⁵ The main character of the campaign was red-haired, dressed in white stripes and played by Milla Jovovich. A newspaper, *L'Expression*, observed: "[Milla Jovovich]... is above all a personality who, through her role in the *Fifth Element*, embodies the technological avant-garde that Vodafone Live represents."

Luc Besson, as director and co-writer of *The Fifth Element*, claimed that the advertisement was infringing his copyright on the movie and that the advertisement constituted a parasitic use of the movie where Milla Jovovich, his ex-wife, played Leeloo. He argued that his moral right had been infringed through the "denaturing of the images of the film for promotional and mercantile ends contrary to the intention and to the spirit of the work."

In March 2004, a first instance tribunal considered that while there was no copyright infringement, the advertisement did constitute a parasitic use of the movie. SFR and Publicis were ordered to pay 300,000 euros to Gaumont, the producer of the movie and to cease the broadcasting and the posting of the campaign.

⁶⁴ Lionel Bently and Brad Sherman. *Intellectual Property Law: Second Edition*. Oxford: Oxford University Press, 2001, p 119.

⁶⁵ *Luc Besson & Gaumont v. SFR & Publicis* (8 September 2004) the Paris Court of Appeal.

On September 8, 2004, the Paris Court of Appeal handed down a decision against the advertiser and its agency. On the ground of parasitical use, the court considered that the advertisement was taking advantage of the notoriety of the movie and that it was creating a deliberate confusion in the mind of the target audience, which is similar in both cases. On the ground of copyright, the court held that there were several qualitative similarities between the advertisement and the film, and that there was infringement. The court ordered the defendants to pay 750,000 euros to Gaumont for copyright infringement, based on Gaumont's patrimonial rights on the movie; 1,000,000 euros due to the parasitic use of the movie; and 1,000,000 euros to Luc Besson for copyright infringement, based on Luc Besson's moral right on the movie.

Senior lecturer Elizabeth Adeney from Deakin University comments upon the significance of the decision of the Paris Court of Appeal:

This case, offering a glimpse into another legal world, is significant to us in several ways. First, it shows what kinds of action can potentially be taken under French law by Australian litigants, either because French law governs a relevant contract, because French law is the applicable law pursuant to treaty provisions and principles of private international law, or because the *French Code* itself allows such action. Second, it shows those engaged in commerce in France the liabilities that they may incur there through the utilisation of the intellectual works of others. The international nature of the entertainment industry ensures that such liabilities will regularly arise. Third, it helps to explain the types of protection that French moviemakers and directors would hope and expect to find in Australia... In the world of intellectual property, and of the *Berne Convention*, citizens of other creative nations will necessarily seek correspondences between our laws and their own.⁶⁶

She concludes that there is a need to think about alternative regimes "if the legal systems of the world are to move towards the often-stated goal of harmonising national copyright regimes."⁶⁷

⁶⁶ Elizabeth Adeney. "Of Personalities and Personae: A French Victory for Film Producers and Authors", *Australian Intellectual Property Journal*, 2005, Vol. 16, p. 110.

⁶⁷ Elizabeth Adeney. "Of Personalities and Personae: A French Victory for Film Producers and Authors", *Australian Intellectual Property Journal*, 2005, Vol. 16, p. 110.

C. United States

F. Jay Dougherty, the former senior vice president of Twentieth Century Fox, and a Professor at the Loyola Law School in Los Angeles, has provided a useful gloss upon issues in the authorship of motion pictures under U.S. copyright law.⁶⁸ He observes:

A motion picture is a type of audiovisual work defined by the 1976 Copyright Act. A motion picture is also one of the most collaborative types of works created by authors - the product of the efforts of numerous contributors, many of whom provide copyrightable material. In the U.S. film industry, most of those contributions customarily qualify as "work made for hire," with the hiring party, usually the producer/financier, deemed both the author and the initial owner of the copyright in the contributions.

Yet problems do arise... Individuals create various contributions to a motion picture with the intent that their contributions be merged into inseparable or interdependent parts of a unitary whole. This highly collaborative work becomes a motion picture. To the extent that those individual contributions fail to qualify as works made for hire, the resulting "unitary whole" might constitute a work of coauthorship - a "joint work" under the Copyright Act.⁶⁹

Thus, in the United States, the producer will gain the ownership of the economic rights in an audio-visual work if it is a "work made for hire". Otherwise, there could be joint authorship of the economic rights of an audio-visual work between a range of creative contribution. There is no comprehensive recognition of moral rights in the United States.

In *Aalmuhammed v Lee*, the United States Court of Appeals for the Ninth Circuit considered a claim of co-authorship in the motion picture *Malcolm X*.⁷⁰

In 1991, Warner Brothers contracted with Spike Lee and his production companies to make the movie *Malcolm X*, to be based on the book, *The Autobiography of Malcolm X*. Lee co-wrote the screenplay, directed, and co-produced the movie, which starred Denzel Washington as Malcolm X. Washington asked Jefri Aalmuhammed to assist him in his preparation for the starring role because Aalmuhammed knew a great deal about Malcolm X and Islam. Aalmuhammed, a

⁶⁸ F. Jay Dougherty. "Not A Spike Lee Joint? Issues in the Authorship of Motion Pictures Under U.S. Copyright Law", *UCLA Law Review*, October 2001, Vol. 49, p. 225.

⁶⁹ F. Jay Dougherty. "Not A Spike Lee Joint? Issues in the Authorship of Motion Pictures Under U.S. Copyright Law", *UCLA Law Review*, October 2001, Vol. 49, p. 225.

⁷⁰ *Aalmuhammed v Lee* 202 F.3d 1227 (9th Cir. 2000), http://www.law.cornell.edu/copyright/cases/202_F3d_1227.htm

devout Muslim, was particularly knowledgeable about the life of Malcolm X, having previously written, directed, and produced a documentary film about Malcolm X.

During the summer before Malcolm X's November 1992 release, Aalmuhammed asked for a writing credit as a cowriter of the film, but was turned down. When the film was released, it credited Aalmuhammed only as an "Islamic Technical Consultant". Aalmuhammed claimed that the movie Malcolm X was a "joint work" of which he was an author, thus making him a co-owner of the copyright. He sought a declaratory judgment to that effect, and an accounting for profits. He is not claiming copyright merely in what he wrote or contributed, but rather in the whole work, as a co-author of a "joint work."

Circuit Judge Kleinfeld explores who might qualify as a "joint author" in the context of a motion picture:

Who, in the absence of contract, can be considered an author of a movie? The word is traditionally used to mean the originator or the person who causes something to come into being, or even the first cause, as when Chaucer refers to the "Author of Nature." For a movie, that might be the producer who raises the money. Eisenstein thought the author of a movie was the editor. The "auteur" theory suggests that it might be the director, at least if the director is able to impose his artistic judgments on the film. Traditionally, by analogy to books, the author was regarded as the person who writes the screenplay, but often a movie reflects the work of many screenwriters. Grenier suggests that the person with creative control tends to be the person in whose name the money is raised, perhaps a star, perhaps the director, perhaps the producer, with control gravitating to the star as the financial investment in scenes already shot grows. Where the visual aspect of the movie is especially important, the chief cinematographer might be regarded as the author. And for, say, a Disney animated movie like "The Jungle Book," it might perhaps be the animators and the composers of the music.⁷¹

Circuit Judge Kleinfeld observed that the US Copyright Act defines a "joint work" as "a work prepared by two or more authors with the intention that their contributions be merged into inseparable or interdependent parts of a unitary whole". There are three requirements for a joint work - there must be (1) a copyrightable work, (2) two or more "authors," and (3) the authors must intend their contributions be merged into inseparable or interdependent parts of a unitary whole. A "joint work" in this circuit

⁷¹ *Aalmuhammed v Lee*, 202 F.3d 1227 (9th Cir. 2000), http://www.law.cornell.edu/copyright/cases/202_F3d_1227.htm

"requires each author to make an independently copyrightable contribution" to the disputed work.

First, the judge considered the requirement for "some minimal level of creativity" or "originality" for the subsistence of a copyright work. His Honour observes that this criteria lacks subtlety in adjudicating claims to joint authorship:

But that measure of a "work" would be too broad and indeterminate to be useful if applied to determine who are "authors" of a movie. So many people might qualify as an "author" if the question were limited to whether they made a substantial creative contribution that that test would not distinguish one from another. Everyone from the producer and director to casting director, costumer, hairstylist, and "best boy" gets listed in the movie credits because all of their creative contributions really do matter. It is striking in *Malcolm X* how much the person who controlled the hue of the lighting contributed, yet no one would use the word "author" to denote that individual's relationship to the movie. A creative contribution does not suffice to establish authorship of the movie.⁷²

Thus the judge notes that a creative contribution alone will not suffice to establish authorship of a motion picture.

Second, Judge Kleinfeld considers the problem of defining "authorship" in new media. His Honour refers to the case of *Burrow-Giles Lithographic Co. v. Sarony* which dealt with photographs of the Irish playwright, Oscar Wilde. Klenfeld observed:

Burrow-Giles defines author as the person to whom the work owes its origin and who superintended the whole work, the "master mind." In a movie this definition, in the absence of a contract to the contrary, would generally limit authorship to someone at the top of the screen credits, sometimes the producer, sometimes the director, possibly the star, or the screenwriter - someone who has artistic control. After all, in *Burrow-Giles* the lithographer made a substantial copyrightable creative contribution, and so did the person who posed, Oscar Wilde, but the Court held that the photographer was the author.⁷³

The judge cited with approval various English authorities that the author was "the person who has superintended the arrangement, who has actually formed the picture

⁷² *Aalmuhammed v. Lee* 202 F.3d 1227 (9th Cir. 2000), http://www.law.cornell.edu/copyright/cases/202_F3d_1227.htm

⁷³ *Aalmuhammed v. Lee* 202 F.3d 1227 (9th Cir. 2000), http://www.law.cornell.edu/copyright/cases/202_F3d_1227.htm

by putting the persons in position, and arranging the place where the people are to be - the man who is the effective cause of that"; "'author' involves originating, making, producing, as the inventive or master mind, the thing which is to be protected"; "the man who really represents, creates, or gives effect to the idea, fancy, or imagination." His Honour observed that an "author," was "he to whom anything owes its origin; originator; maker; one who completes a work of science or literature."⁷⁴

Third, the judge emphasized that the contribution of the joint authors must be inseparable.

The word "author" is taken from the traditional activity of one person sitting at a desk with a pen and writing something for publication. It is relatively easy to apply the word "author" to a novel. It is also easy to apply the word to two people who work together in a fairly traditional pen-and-ink way, like, perhaps, Gilbert and Sullivan. In the song, "I Am the Very Model of a Modern Major General," Gilbert's words and Sullivan's tune are inseparable, and anyone who has heard the song knows that it owes its existence to both men, Sir William Gilbert and Sir Arthur Sullivan, as its creative originator. But as the number of contributors grows and the work itself becomes less the product of one or two individuals who create it without much help, the word is harder to apply.⁷⁵

His Honour emphasized that "putative coauthors make objective manifestations of a shared intent to be coauthors, as by denoting the authorship of *The Pirates of Penzance* as 'Gilbert and Sullivan'."⁷⁶ The judge also suggested: "The audience appeal of the work turns on both contributions and 'the share of each in its success cannot be appraised'."⁷⁷

On the facts of the case, Circuit Judge Kleinfeld rejected the claim for co-authorship by Aalmuhammed:

Aalmuhammed did not at any time have superintendence of the work. Warner Brothers and Spike Lee controlled it. Aalmuhammed was not the person "who has actually formed the picture by putting the persons in position, and arranging the place. . . ." Spike Lee was, so far

⁷⁴ *Aalmuhammed v Lee* 202 F.3d 1227 (9th Cir. 2000), http://www.law.cornell.edu/copyright/cases/202_F3d_1227.htm
⁷⁵ *Aalmuhammed v Lee* 202 F.3d 1227 (9th Cir. 2000), http://www.law.cornell.edu/copyright/cases/202_F3d_1227.htm
⁷⁶ *Aalmuhammed v Lee* 202 F.3d 1227 (9th Cir. 2000), http://www.law.cornell.edu/copyright/cases/202_F3d_1227.htm
⁷⁷ *Aalmuhammed v Lee* 202 F.3d 1227 (9th Cir. 2000), http://www.law.cornell.edu/copyright/cases/202_F3d_1227.htm

as we can tell from the record. Aalmuhammed, like Larson's dramaturg, could make extremely helpful recommendations, but Spike Lee was not bound to accept any of them, and the work would not benefit in the slightest unless Spike Lee chose to accept them. Aalmuhammed lacked control over the work, and absence of control is strong evidence of the absence of co-authorship.

Also, neither Aalmuhammed, nor Spike Lee, nor Warner Brothers, made any objective manifestations of an intent to be coauthors. Warner Brothers required Spike Lee to sign a "work for hire" agreement, so that even Lee would not be a co-author and co-owner with Warner Brothers. It would be illogical to conclude that Warner Brothers, while not wanting to permit Lee to own the copyright, intended to share ownership with individuals like Aalmuhammed who worked under Lee's control, especially ones who at the time had made known no claim to the role of co-author. No one, including Aalmuhammed, made any indication to anyone prior to litigation that Aalmuhammed was intended to be a co-author and co-owner.

Aalmuhammed offered no evidence that he was the "inventive or master mind" of the movie. He was the author of another less widely known documentary about Malcolm X, but was not the master of this one. What Aalmuhammed's evidence showed, and all it showed, was that, subject to Spike Lee's authority to accept them, he made very valuable contributions to the movie. That is not enough for co-authorship of a joint work.⁷⁸

The judge concludes: "The broader construction that Aalmuhammed proposes would extend joint authorship to many 'overreaching contributors,' like the dramaturg in Thomson, and deny sole authors 'exclusive authorship status simply because another person render[ed] some form of assistance'." ⁷⁹ His Honour observes: "Claimjumping by research assistants, editors, and former spouses, lovers and friends would endanger authors who talked with people about what they were doing, if creative copyrightable contribution were all that authorship required."⁸⁰

F. Jay Dougherty is critical of the formula developed by Justice Kleinfeld in this case:

Judge Kleinfeld's laudable goal was to encourage authors' consultation with others during the creative process and to limit the risk of claims by overreaching contributors. His approach may encourage authors to consult, but it will arguably discourage other people from consulting

⁷⁸ *Aalmuhammed v Lee* 202 F.3d 1227 (9th Cir. 2000), http://www.law.cornell.edu/copyright/cases/202_F3d_1227.htm

⁷⁹ *Aalmuhammed v Lee* 202 F.3d 1227 (9th Cir. 2000), http://www.law.cornell.edu/copyright/cases/202_F3d_1227.htm

⁸⁰ *Aalmuhammed v Lee* 202 F.3d 1227 (9th Cir. 2000), http://www.law.cornell.edu/copyright/cases/202_F3d_1227.htm

with them. It does not solve the problem of overreaching contributors, because it may be considered infringement for the author to use any minimally creative expressive material a contributor provides. Also, it may not really benefit production companies because the tests of control and of audience appeal are inherently unpredictable and uncertain.⁸¹

In his view, it would have been more helpful to production companies and possibly fairer to contributors for the court to find that material such as that created by Aalmuhammed is indeed a contribution to a joint work. The court could then elaborate rules that a co-author has a nonexclusive right to exploit the work and is entitled to a pro rata share of proceeds from the work under the *Copyright Act 1976*.

D. Israel

Other jurisdictions have been also grappling with whether film directors should be considered to be authors of cinematographic films.

In Israel, the Tel Aviv District Court recently ruled that directors have copyright in respect of cinematographic films they have directed, as they have contributed their creativity to the productions.⁸² The suit was filed by Collecting Society of Film and TV Directors in Israel (Tali) along with directors Shai Carmeli and Doron Tsabari, against Channel 2 franchisees Keshet and Telad. The plaintiffs sought a declaration that Carmeli held copyrights to episodes of TV series "Zbeng," broadcast by Keshet, and that Tsabari similarly owned copyrights to the documentary "The X-Ray," which was shown by Telad. The court was also asked to declare they had a right to royalties for every broadcast of films and programs they had directed. The franchisees argued that directors are not due any royalties as they were not authors of the works.

Justice Zipora Brun noted that even though copyright law does not specifically mention directors, since the law dates back to the early 1900s when films and TV did not yet exist, it should not be interpreted as excluding directors. After examining each parties' contribution to the works, Brun determined that the directors held copyright in the cinematographic films. The ruling means that directors could demand royalties for films or programs they have directed which are broadcast on television.

⁸¹ F. Jay Dougherty. "Not A Spike Lee Joint? Issues in the Authorship of Motion Pictures Under U.S. Copyright Law", *UCLA Law Review*, October 2001, Vol. 49, p. 225.

⁸² Tamara Lev. "Court: TV Directors Get Royalties, Too", *Haaretz Daily*, 2005, <http://www.haaretzdaily.com/hasen/spages/577805.html>

CONCLUSION

Ultimately, this submission supports the adoption of a joint authorship model to deal with economic rights vested in cinematographic works (Option 2). To adopt such a model, the Australian Government would have to introduce a number of amendments:

- all copyright materials (including films) would be classified as 'works', with 'authors' as the first copyright owners;
- the producer, the principal director and the screenwriter could qualify as '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.

Perhaps it would be useful if the Government gave more general consideration to the determination of "joint authorship" under the section 10 (1) of the *Copyright Act 1968* (Cth). It would helpful if the courts received greater guidance as to the determinative factors to be considered in deliberations over "joint authorship".