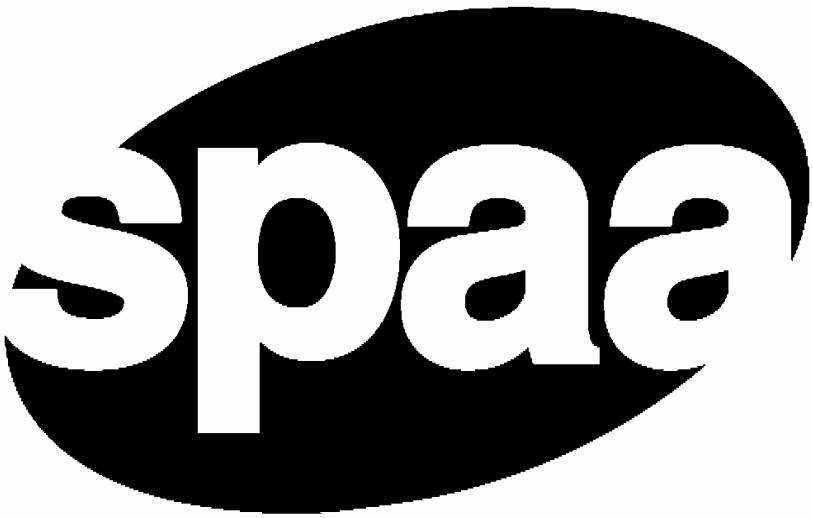
COPYRIGHT AMENDMENT (DIRECTORS RIGHTS) BILL 2005

SUBMISSION TO THE SENATE LEGAL AND CONSTITUTIONAL AFFAIRS COMMITTEE



Screen Producers Association of Australia
34 Fitzroy Street, Surry Hills, NSW 2010
Ph (02) 9360 8988
Fax (02) 9360 8977

SUMMARY

The Copyright Amendment (Directors Rights) Bill 2005, has some serious flaws including but not limited to:

- There has been a distinct lack of comprehensive industry consultation on the issue of director's copyright – SPAA's position in particular has been ignored;
- Directors are already in an advantageous position to negotiate over the profits of any film or TV production; and
- The new Bill does not make any distinction between different categories of directors and consequently makes a policy prescription, which is not based on the commercial realities of the industry.

SUBMISSION

SPAA would like to express its concerns at what we see as a serious failure on the government's part to communicate and consult widely with the industry on the issue of proposed amendments to the *Copyright Act 1968* to introduce, among other things, a copyright interest for screen directors.

In 2000, the issue of director's copyright came to industry attention in the context of debate over the Government's Digital Agenda reforms, and a push by the screen producers to receive remuneration under the statutory scheme for cable retransmission in Part VC of the Copyright Act 1968. While that did not come to pass the Government in 2001 made an election policy in the *Arts for All* statement to:

'consult key stakeholders on proposals to amend the Copyright Act to grant new rights to film directors so as to address concerns about the level of recognition available to directors in Australia'

SPAA is one of the key stakeholders because it represents film and television industry employers and its members engage the majority of screen directors in Australia. Since that time, SPAA has received very little direct communication from Government on the issue of directors' copyright. A review of the websites of the two departments concerned turned up only several isolated press releases on the issue that did little more than repeat the Government's election promise to consult.

Releases from the Attorney-General's department in April and September of 2003 foreshadowed new legislation, however at the same time repeating the message of consultation. SPAA is not aware of how widely such releases were circulated, but none of them was directed to SPAA. Clearly there has not been to date any process of 'consultation with key stakeholders' on the issue of directors' copyright. As the rights that are currently being held by Producers are being split up and given partially to directors as a result of this legislation, it is puzzling that producers have not been asked to make a submission.

Given this lack of consultation, we believe that it is inappropriate that a Bill has now been introduced into Parliament.

On the substantive matter which arise from the general issue of Director's copyright, SPAA advances the following arguments:

1. Directors take no risks – 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. 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.

2. Creative and Contractual Responsibility – It is as a result of the producer's relationship with every creative and contractual element connected with the project that the producer is afforded copyright (i.e. the producer is responsible for putting into place all necessary arrangements to 'make' the cinematographic film, which is the basis of the current copyright ownership under s98 of the Copyright Act 1968. SPAA sees no reason for an amendment to these provisions so as to create a copyright interest for person who do not assume these responsibilities.

3. Creative Recognition/Remuneration – Directors sometimes cite recognition of authorship as a reason for a copyright interest. SPAA argues:
    a. Directors already receive significant recognition and remuneration, commensurate with their role. Feature film directors in particular are widely recognised. Directors are generally the best renumerated individuals of all of those who have input into a film or audio-visual program;
    b. Directors currently already enjoy protection of their moral rights under the *Copyright Act 1968*;
    c. 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);

d. 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.
e. Significant uncertainty exists in situations where a number of ‘directors’ are attached throughout various stages of development without a deal being concluded, i.e. such instances create difficulty in determining when a director becomes a ‘director’ for the purposes of copyright protection in a project.

4. Definition of ‘director’ – the term director covers a wide range of differing roles in the film and television industry. Rights which may be applicable or workable with respect to feature film directors may not be appropriate to directors of, for example, weekly commercial television series, or moreover, news/current affairs/ light entertainment programs. Given that both the nature of the role and the terms of employment/ engagement of such ‘directors’ differ substantially, SPAA argues than any blanket rights seeking to cover the entire industry are likely to be unworkable.

5. Assignability – Producers have a direct contractual relationship with financiers and invariably are obliged to adhere to various approval rights of those financiers. Producers are the central repository of all forms of rights in connection with the project (include. script, music, performances etc.) and so it is essential for chain of title purposes, and to satisfy investors, for copyright in the project to be amassed in the one entity. SPAA strongly opposes any amendments which fetter or restrict the ability for rights to be assigned. Any such restrictions would have a profound effect on funding and incentive for investment. SPAA submits that if assignment of rights is permitted, such rights are likely to be assigned in practise to producers in the vast majority of cases. European civil law countries provide a practical example in this regard. The costs and uncertainty involved in introducing rights which will not ultimately alter the status quo is not justified.
6. International Obligations – SPAA submits that there is nothing in any International treaty which requires the Government to provide for a directors' copyright. The closest relevant provision is Article 14bis of the Berne Convention, which provides that:

> '…a cinematographic film shall be protected as an original work. The owner of copyright in a cinematographic work shall enjoy the same rights as the author of an original work.'

This requires nothing more than that films be accorded protection in their own right, as opposed to being considered derivations of traditional works. Current Australian copyright law complies with this obligation.

With regard to the current legislation before Parliament it fails to conform to the commercial realities of the screen production industry.

This is mainly because of its fundamental lack of distinction between those directors who have substantive creative input into projects and those directors whose creative input is fairly limited.

In the case of those directors whose creative contribution to the production of the feature film is substantial, the director will already be in a position to negotiate a very good percentage of the film's profits.

In the case of those directors whose creative contribution to the production of the feature film is limited, the director will already be paid a rate that is in line with the kind of work that they do and there is no further justification for copyright.

This ultimately means that the whole thrust of this current Bill is redundant since director's rights are already compensated for in the vast majority of cases. And in those cases where they are not, compensation would be unjustified.

In the Government's election campaign in 2004, a commitment was made by the Government to the recognition of directors' copyright in the following terms:

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

this situation on the Strengthening Australian Arts election commitment.”

Yet, as outlined above the contributions of directors are already fully compensated for in the market place. Such interference in the marketplace is simply not warranted.

The kind of marketplace interference suggested in various policy proposals currently before the government, would serve only to increase the bargaining position of directors in negotiations of agreements between them and producers (prior to any application for funding or investment). Producers would once again be pressured into negotiating deals where their efforts are inadequately recognised. In order to accommodate the demands of directors and performers as well as all the other parties that producers need to employ, producers will be forced to take less and less in compensation for their efforts. Some producers have to give up the only guaranteed source of income from films – producers fees – and hope for some share in profits. Recent trends in the Australian film industry would suggest that such moves lead to very little compensation.

It is not necessary and not advisable for this Bill to be passed into law. Directors will not directly benefit from this Bill in its current form since it only provides for re-transmission rights.

However superfluous the rights granted, this Bill will, however, become the genesis of a number of broader claims both by way of lobbying and also in law. The Bill, if passed, will create a general perception that directors have copyright in films and that this can and should lead to the grant of further rights. The Australian Screen Directors Association has been quite candid in saying that this Bill

is merely the first step. They submit that the rights gained in this Bill are small as compared with the rights they intend to acquire. How long will it be before such rights are granted? Will there be comprehensive industry consultation when the next round of legislation is introduced into Parliament?

Dr. Rimmer, in his submission, makes mention of several disputes that have occurred between producers and directors over creative aspects of the films involved. He uses these disputes as evidence that economic rights should be granted to directors in order to give them a stronger bargaining position. This argument is not compelling. 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.

SPAA has been lobbying the Government on a number of issues. Most if not all of our lobbying has been centred around the idea that the industry needs more private investment if it is to survive. The industry cannot rely on FFC funding for its long term success. 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 difficultly in that process, and therefore runs counter to the long term good of the industry as a whole.

Geoff Brown
Executive Director
Screen Producers Association of Australia