

Australian Copyright Council

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Submission on Film Directors' Copyright

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Australian Copyright Council

1. The Australian Copyright Council is a non profit company. It receives substantial funding from the Australia Council, the Federal Government's arts funding and advisory body. The Copyright Council's functions include giving information and free legal advice about copyright, research, and advocating changes to copyright law and practice which will benefit creators and other copyright owners. Further information about the Council is contained on the Council's web site – www.copyright.org.au.
2. A number of organisations affiliated with the Australian Copyright Council have made separate submissions to the Committee. Some organisations have a different position to that of the Council.

Summary of our proposed approach

We support the recognition of film directors' authorship in relation to the economic rights in a cinematograph film. Our proposal is as follows:

- where a film has a principal director, the principal director be deemed to be the author of the film;
- for some films, there may be no principal director;
- where there is a principal director, the copyright in the film would be first co-owned by:
 - the director, or the director's employer, or the assignee of the director's future copyright interest,¹ and
 - the "maker",² or the person who commissioned the maker to make the film, or the assignee of the maker's future copyright interest;
- where there is no principal director, the copyright would be first owned solely by the "maker", or the person who commissioned the maker to make the film, or the assignee of the maker's future copyright interest;
- in some cases, the same person may be the first owner of both the maker's interest and director's interest;
- the current definition of "cinematograph film" would remain;
- in addition to the current bases on which copyright may subsist in a film, copyright would also subsist if the director were a citizen or resident of Australia, or of a country listed in the International Protection Regulations;³

¹ Under s198

² As currently defined for Part IV

³ under s90 and Reg 4 of the International Protection Regulations, copyright subsists in a cinematograph film if:

- the maker is a qualified person;
- the film was made in Australia or in a country listed in the International Protection Regulations; or

Submission on Film Directors' Copyright

- if the film has a principal director, the period of protection would be the life of the director plus 50 (or 70) years; in other cases, the period of protection would be 50 (or 70) years from first publication;⁴
- the rights applying to films would remain the same, as would the exceptions to those rights;
- the new provisions would apply to films made after amending legislation comes into effect; and
- there would be a savings provision for contracts and other arrangements in existence at the time the amending legislation comes into effect, relating to films to be made or completed after the amending legislation comes into effect (similar to that in the UK legislation).

Options for implementation of the position

There are two broad options for implementing the position we have set out.

Option 1 is to retain the categorisation of films as subject matter other than works covered by Part IV of the Copyright Act. This option would require amendments to s90 (bases for subsistence of copyright), s94 (duration of copyright), s98 (ownership), and probably s84 (interpretation).

Option 2 is to categorise films as “works” protected by Part III. This option would require more extensive amendments. These would include amending or deleting sections referring to films in Part IV, and amending or adding sections in Part III to deal with films. Other issues associated with Option 2 are whether there would be an express requirement for a film to be “original” to be protected, and who (if anyone) would be regarded as the “author” of a film if there were no principal director.⁵

Issue raised by the Government

1. Nature of possible right

Would the director be a first owner of copyright, rather than “author” (bearing in mind that subject matter, including films, under Part IV of the Copyright Act 1968 (the Act) is not treated as the product of authorship)?

- the film was first published in Australia or in a country listed in the International Protection Regulations.

⁴ Under s94, films are currently protected for 50 years after the publication of the film. We confirm our support, as stated in our submissions to the Intellectual Property Competition Review Committee, for an extension of the period of protection from 50 to 70 years for all copyright material, including films.

⁵ These issues are related – the originality of a work is usually assessed by reference to the skill and labour of its author. The identification of an author is also relevant to duration – although there is provision in Part III for the copyright in anonymous or pseudonymous works to last for 50 years from first publication.

One possibility would be to treat the “maker” as the author where there is no principal director. The UK legislation treats the maker as a joint author with the director.

Submission on Film Directors' Copyright

Under our proposal, the principal director would be deemed to be the author of the film, and would be a first owner of copyright in the film unless he or she was an employee or has assigned future copyright.

Do Australia's obligations under the Berne Convention for the Protection of Literary and Artistic Works (eg, article 14bis) have a bearing on the choice of "owner" or "author"?

We submit that our proposal is consistent with the Berne Convention (and thus TRIPS as well).

Subject to any provision in the director-producer contract, what should the relationship be between them – joint owners? Would it make any difference if the producer is a corporation, and not a natural person?

Our proposal is that the author and the maker (or those who derive first ownership from them) would be co-owners of copyright, irrespective of whether they are natural persons or corporations.

Under the current law, a person may be a co-owner of copyright as a result of being an author of a work of joint authorship, or as a result of an agreement preceding the creation of the material, or a transmission of title after the work's creation. A co-owner requires permission from the other owner or owners to do anything within the scope of the copyright.⁶ Co-owners own copyright as tenants in common rather than as joint tenants.⁷ There is some authority that each author owns an equal share of the copyright unless there is an agreement to the contrary.⁸

2. Persons entitled to any new directors' copyright

Should "director" be defined to include directors of feature film, TV drama, documentary and animation?

Our proposal is that, as in the Moral Rights Bill 1999, "director" be defined to mean "principal director" and to exclude "subsidiary" directors such as associate directors, line directors and assistant directors. We also propose, following the approach in the Moral Rights Bill, that if there were more than one principal director, each director be treated as a joint author with the other principal director or directors. As for the Moral Rights Bill, the meaning of "principal director" would be determined according to industry usage.

Should the right be restricted to the principal director(s), or extended to associate and other subsidiary directors (cf Copyright Amendment (Moral Rights) Bill 1999, s.191)? (As for the producer, see the Act, s. 22(4)(b)).

See the response to the above question.

Who, if anyone, should be regarded as the director of a home movie, a film shot without any direction (eg, security camera film), a computer game or a multimedia production?

⁶ *Cescinsky v George Routledge & Sons* [1916] 2 KB 325; *Powell v Head* (1879) 12 Ch D 686; *Wiseman v Weidenfield & Nicolson* (1985) FSR 525

⁷ *Prior v Landsdowne Press* [1977] RPC 511; *Acorn v Computers Inc v MCS Microcomputer Systems Pty Ltd* (1984) 57 ALR 389; (1984) 4 IPR 214; *Lauri v Renad* (1892) 3CH 402; *Powell v Head* (1879) 12 Ch D 686.

⁸ *Prior v Landsdowne Press Pty Ltd* [1977] RPC 511; 1977 VR 65 (appeared to approve the following passage from *Copinger and Skone James on Copyright* (11th ed) para 692: "Co-authors hold the copyright as tenants in common rather than as joint tenants, and, presumably, in the absence of agreement to the contrary, in equal shares." In that case, however, there was provision in the publishing agreement that the plaintiff would receive 60% of the royalties, and the court assessed his damages for infringement on that basis).

Submission on Film Directors' Copyright

In some cases, there may be no director, or the director may be the same person as the “maker” of the film. This is likely to be the case in the examples given in the question.

Should there be a provision that if there is no director then copyright vests, as now, with the producer.

Under our proposal, if there were no director, the maker, or the person who derived their rights from the maker, would be the sole first owner.

3. Implications for other creative contributors to the making of a film

Under the Copyright Amendment (Moral Rights) Bill 1999, screenwriters are to be added as authors of films for the purposes of moral rights. Apart from the actors, other major contributors to films include cinematographers, editors and production designers (who, like directors, have no copyright in their output), and musical composers. How may directors be distinguished in order to justify conferring copyright upon them but not these other contributors?

Composers, screenwriters and performers have rights in their contributions to the film under other provisions in the Act. In relation to performers, we support the extension of performers' rights so that they are more akin to copyright rights.

The Berne Convention allows a country to recognise in its copyright legislation “authors who have brought contributions” to the making of a cinematograph work, but requires that, except in relation to the principal director, those authors may not object to certain subsequent dealings with the film.⁹

Our proposal is consistent with the Berne Convention, with the position in the UK, and with the Moral Rights Bill.¹⁰

4. Duration of any new directors' copyright

Will any directors' copyright have the same duration as that of the existing copyright in films (50 years after publication)?

Our proposal is that the copyright in a cinematograph film would last for the director's life plus 50 (or 70) years, or for 50 (or 70) years from first publication if there is no principal director.

Do Australia's obligations under the Berne Convention or the World Trade Organisation Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPs Agreement) have any bearing on this issue?

The Berne Convention (Article 7) allows a country to protect films for the life of the author plus 50 years, or for 50 years from publication (or from making if the film is not published within 50 years of making).

TRIPS (Article 12) provides that where the term of protection is determined otherwise than on basis of a person's life, the term shall be 50 years from publication, or at least 50 years from making.

Our proposal is consistent with the Berne Convention and with TRIPS.

⁹ 14bis(2)(b) and 14bis(3). A country may provide that the principal director cannot object to subsequent dealing with the film, but is not obliged to (in which case in must notify the Director-General of WIPO that it does not apply Article 14bis2(b) to principal directors).

¹⁰ It would seem that the special considerations which led to a screenwriter being treated as an author of a film, as well as the author of the screenplay of the film, for the purposes of moral rights do not apply to economic rights.

5. Transferability of any new directors' copyright

Should any new director's copyright reside in the employer of an employed director (just as an employer of an author is the holder of copyright in works of the author created in the course of employment), subject to any provision in the employment contract?

Under our proposal, the director's copyright interest would, in the absence of an agreement to the contrary, be owned by the director's employer if the director were an employee. This is consistent with the position for other authors (in s35(6)) and with the position in the UK.

Should any new director's copyright in a film which has been made under commission be held by the person who commissioned the making of the film (as is the case with existing copyright in a commissioned film), subject to an agreement to the contrary in the commissioning contract?

Under our proposal, the director's copyright interest would not be first owned by a commissioning party, unless that party were the assignee of the future copyright. This is consistent with the position of other authors,¹¹ and with the approach taken in the UK.

How should any new legislation on directors' copyright operate in relation to the subsequent dealings with the film in light of Article 14bis(2)(b) of the Berne Convention)?

Article 14bis(2)(b) of the Berne Convention provides that "authors who have brought contributions" to the making of a cinematograph work may not object to certain subsequent dealings with the film. However, Article 14bis(3) provides that (2)(b) shall not apply to the principal director unless the national legislation provides otherwise.¹²

Thus, the Berne Convention allows Australia to grant exclusive copyright rights to the principal director of a film, and to authors of "underlying works" such as the screenplay and the music, but not to other contributors such as "assistant producers and directors, those responsible for décor, costumiers, cameramen and cutters".¹³

Our proposal is consistent with the requirements of the Berne Convention.

6. Consequential amendments upon the establishment of a directors' copyright

What consequential amendments to the Act would be necessary? For instance, s.131 provides for an evidentiary presumption as to the ownership of copyright in a film on copies of which the name of the maker appears. Section 179 provides for agreement with film makers on the allocation of copyright in films commissioned by the Commonwealth, States and Territories.

The consequential amendments would depend on whether Option 1 or Option 2 were adopted. Option 1 would require fewer amendments than Option 2. We would be happy to provide further comments on consequential amendments.

¹¹ The only exception now is photographers commissioned to take photographs for a private or domestic purpose.

¹² If the country does not apply (2)(b) to the principal director, it must notify the Director-General of WIPO.

¹³ *Guide to the Berne Convention*, WIPO, Geneva, 1978, para 14bis.15 (page 89)

7. Application of any provisions giving directors copyright in their films

Should any new directors' copyright apply only to films made after the commencement of any new legislation? In the case of existing films, under the Act now, different rules apply to films made since 1 May 1969, when the Act commenced, and those made before then.

Under our proposal, the amendments would only apply to films made or completed after the amendments came into effect.

What transitional arrangements would be necessary to take account of existing contractual arrangements governing the making and exploitation of existing films and films not yet made?

The UK legislation provides that it is not an infringement of any right which the principal director has, by virtue of the 1994 amendments, to do anything after the commencement of the amendments in pursuance of arrangements for the exploitation of the film made before 19 November 1992.¹⁴ We submit that a similar provision could be included in the Copyright Act to deal with arrangements made prior to amendments coming into force.

Libby Baulch
Executive Officer
27 October 2000

¹⁴ Related Right Reg 36(2).