



**SUBMISSION TO THE ALRC Review “Copyright & the Digital Economy”
BY THE AUSTRALIAN DIRECTORS GUILD
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ABOUT THE AUSTRALIAN DIRECTORS GUILD

This submission is made by the Australian Directors Guild (ADG), the industry association representing the interests of film and television directors, writer/directors, documentary filmmakers, animators and independent producers throughout Australia. Formed in 1980, the ADG has over 500 full members nationally. These members include directors in feature film, television drama, documentary, animation and new media. They include some of the highest profile director in the world including BAZ LUHRMANN, PETER WEIR, GILLIAN ARMSTRONG, FRED SCHEPISI and PHILLIP NOYCE to name a few.

The ADG works to promote excellence in screen direction, to encourage communication and collaboration between directors and others in the industry, and to provide professional support for its members. It maintains a high profile and leading cultural and policy role through its efforts to address issues affecting the industry from a broad perspective.

The ADG is affiliated through the International Association of English-Speaking Directors Organisations (IAESDO) with the Broadcasting, Entertainment Cinematograph and Theatre Union (BECTU), the Directors Guild of America (DGA), the Directors Guild of Canada (DGC), Directors UK, the Screen Directors Guild of Ireland (SDGI) and the Screen Directors Guild of New Zealand (SDGNZ).

The ADG is also a member of the Copyright Council.

EXECUTIVE SUMMARY

In broad terms we have found that the *Copyright Act 1968 (Cth)* has worked effectively and to the benefit of copyright owners, copyright users and society as a whole. We believe it has worked best when it has been framed in a technologically neutral way, as this has allowed copyright owners to adapt to the very fast technological change inherent in the digital economy.

But for directors, this has not necessarily been the case.

In 2005 the Copyright Act was changed to include directors (see *Copyright Amendment (Film Directors' Rights) Act 2005*) and to bring the act in line with moral rights established under international treaties. Although this was a step forward for directors the wording of the amendment has made the execution of those rights difficult. It was not until 2012 (this year) that a director received remuneration from the retransmission of one of his programs that he received income as a result of the amendment.

The ADG recognises that the future of digital distribution of programming will have a profound impact on the rights of directors. The expansion of broadcasting platforms outside of traditional free-to-air television networks is inevitable. Although this review does not encompass these revolutionary changes in our broadcasting environment it should still take into account the fundamental changes recommended in both the CONVERGENCE REVIEW and the NATIONAL CULTURAL POLICY whose recommendation the government is currently considering.

We do have a number of comments on certain issues in the ALRC review of the act in relation to the digital economy that are in line with our colleagues at the Copyright Council.

We support the digital economy, we support innovation and competition, we support recognising rights holders and our international obligation, we wish to promote fair access to and wide dissemination of content, we acknowledge that there are new ways of using copyright material and the reduction in the complexity of copyright law would be beneficial. We also support promoting an adequate, efficient and flexible framework for copyright law, however we do not support any changing of copyright law that will diminish the rights of copyright owners and weaken the already effective licences that operate with the creative industries.

We will not delve into all aspects of the review but refer to the principles and questions that are relevant to directors.

THE INQUIRY

Question 1.

The first question in the review relates directly to the current and future livelihood of directors both now and in a converged environment. All parts of the question impact on directors:

**“(a) affects the ability of creators to earn a living, including through access to new revenue streams and new digital goods and services;
(b) affects the introduction of new or innovative business models;
(c) imposes unnecessary costs or inefficiencies on creators or those wanting to access or make use of copyright material; or
(d) places Australia at a competitive disadvantage internationally.”¹**

On 19 December 2005, in response to sustained lobbying from directors, and with the support of other concerned interest groups, the Government enacted the *Copyright Amendment (Film Directors Rights) Act 2005* (Cth) (Act). The Act provided directors with a limited right to be joint copyright owners (together with producers) of the programs they direct when these programs are retransmitted from free-to-air to cable channels.

The objectives of the Act included:

- addressing concerns about the level of recognition available to directors in Australia;
- providing appropriate copyright recognition for the creative contribution of directors;
- enabling directors to share in the new income stream provided by the Part VC retransmission scheme, in recognition of their creative contribution to the filmmaking process.

The Act provided directors with a limited symbolic recognition of their creative contribution to the film making process. It was also to provide on-going remuneration to directors to help sustain their creative careers.

Unfortunately the change in the legislation has not succeeded in changing industry practice so that directors may share in retransmission royalties. Current industry practice dictates that directors assign all their rights (including any right to receive retransmission secondary use) to broadcasters and production companies. This has been able to occur because of an overly broad interpretation of the meaning of “commissioned film” within the legislation and a refusal by producers and broadcasters to allow directors to include a clause in their contracts in which they reserve their rights to their share of retransmission royalties.

The retransmission statutory licence allows free-to-air broadcasts to be retransmitted by subscription television platforms without permission from copyright owners if the retransmitter pays fair remuneration to the owners of

¹ Copyright and the Digital Economy, August 2012, p.5.

copyright in the underlying materials in broadcasts (including films and pre-recorded programs).

Under the Act, directors and producers share a right to this remuneration, as joint owners of the copyright in their films for this purpose.

These rights are given to film directors who are not employees.

The rights are given in relation to films that are not commissioned.

Directors are recognised as authors/makers under the moral rights clauses of the *Copyright Act 1968 (Cth)* (as amended by the *Copyright Amendment (Moral Rights) Bill 1999*).² The rights provided under the *Copyright Amendment (Film Directors Rights) Act 2005* does not change the moral rights that directors have in their films.

The ADG's position is that the legislation that was introduced did not give full effect to this policy.

The ADG was realistic about the proposed legislation; never expecting that the Government would give directors the sort of authorship recognition afforded them in Europe and the UK. These countries give directors a first economic ownership in the films that they direct.

However, the understanding was that this commitment would – at the very least – offer directors an opportunity to benefit from income generated by statutory licenses in Australia in the same way that other creators benefit, particularly the educational copying statutory license in Part VA. The ADG assumed that the Government would grant more than one right to film directors, whereas the legislation grants only one, very limited right – i.e. access to the recently introduced retransmission scheme.

Therefore, while the ADG welcomed the introduction of directors' copyright as an important precedent in 2005, its view is that the current legislation is both inequitable (in that directors are treated as inferior to other creators) and inconsistent with other policies in this area.

So what could be done to solve this problem?

The main solution would be the amendment of section 98 of *the Copyright Act 1968 (Cth)* to delete the references to "commissioned film", and to make the rights of the director absolute unless the director is an employee whose employment with the employer continues to exist beyond the production of the film, so that retransmission royalty payments will flow to directors as they are intended to under the legislation.

² The term "maker", under the Copyright Act in relation to a cinematograph film, means the director of the film, the producer of the film and the screenwriter of the film.

The ADG also believes that directors should have access to other revenue streams as an equal creator of audiovisual works. We are currently examining options as to how to expand the scope of the rights currently held by Directors and we have proposed one change in a later question. For all intents and purposes Director's Copyright in its current form is economically insignificant, due to a large number of constraints placed upon its scope.

INTERNATIONAL IMPLICATIONS

One of the other areas that have been of great concern to the ADG has been the lack of reciprocity in regards to rights for foreign directors. Currently, Australian directors are able to take advantage of collecting schemes in other countries when a film is broadcast or screened. Royalties are collected by the Australian Screen Directors Authorship Collection Society (ASDACS) and distributed amongst relevant directors.

If Australia was able to offer reciprocal rights to directors from other countries a large number of new territories would be opened up to Australian directors, thus increasing their income significantly. We estimate it could double the current collections.

In a recent exchange between ASDACS and various European Collection Agencies it has been made clear to ASDACS that unless the "anomaly" relating to the working of the Directors Copyright Amendment is clarified, a number of European agencies will not recognise Australian directors payments on retransmitted work in their countries.

If the Copyright Act is to be effective for creators, then they should be remunerated accordingly. We feel that the strengthening of directors' copyright in the act will be an important signal to the creative industry that the Australian Government takes seriously its obligation both nationally and internationally.

GUIDING PRINCIPLES FOR REFORM

Question 2

The ADG largely supports the guiding principles stated by the ALRC. We note the reservations expressed by the Australian Copyright Council in relation to principles 4 to 8 and agree with these. We also note our proposal for changes to the directors copyright section of the act above.

THE PRINCIPLES

Principle 1: Promoting the digital economy

The ADG supports the principle of promoting the digital economy. We believe that new technologies will play an important part in the development of new avenues for content creators to connect directly with audiences. We would expect this content to be paid for in whatever form it is delivered.

Principle 2: Encouraging innovation and competition

The ADG supports this principle. As long as Australia's content creators are protected both at a domestic and international level.

Principle 3: Recognising rights holders and international obligations

We support the basic right for copyright holders as outlined by the World Intellectual Property Organisation (WIPO):

“to encourage a dynamic creative culture, while returning value to creators so that they can lead a dignified economic existence, and to provide widespread, affordable access to content for the public.”³

We also support the three-step test, as it appears in the Berne Convention (Article 9 (2), the Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS) (Article 13), the WIPO Copyright Treaty (WCT) (Article 10) and the WIPO Performances and Phonograms Treaty (WPPT) (Article 16). Moreover, several European Directives contain the test.⁴

We support the Copyright Councils view that the inclusion of the three-step test should be included as a guiding principle for reform.

Principle 4: Promoting fair access to and wide dissemination of content

As with all general principles we support fair access to and wide

³ www.wipo.int/copyright/en

⁴ The Three Step Test Within the Copyright System by Tobias Schonwetter, University of Cape Town, South Africa - Department of Commercial Law.

dissemination of content. We believe this principles meaning should not be mistaken for “free” access. A number of exceptions in the Copyright Act have worked successfully to allow fair use and we believe that the act does support this principle in its current form.

Principle 5: Responding to technological change

Technological change is inevitable in the screen content creation business. We recognize that technological neutrality in any changes to copyright law is the key to ensuring that content creators continue to benefit from their work.

Principle 6: Acknowledging new ways of using copyright material

The ADG is very aware of the new ways in which copyright material is being used and accessed and that the changes in the uptake of copyright material on new platforms outside of the traditional commercial pathways is causing great concern in our industry. Piracy has become a real issue and the ability of consumers to access copyright material without permission or for no cost can be measured in loss of income for content creators.

We acknowledge that some new ways of using that material are fair and legitimate such as using time-shifting devices such as iview to allow more flexibility for the consumer. But not all uses are legitimate as has been shown in the Optus TV case. We note that this was resolved satisfactorily through the current use of Copyright law.

Principle 7: Reducing the Complexity of Copyright Law

The ADG is very concerned at the inability of the government and the ALRC to provide copyright creators and users with a simple and clear explanation of Copyright law. Although simplification would be desirable we understand the complex nature of copyright law and can see that this may not be possible.

We recognise that copyright law is quite a technical area of law and cannot be simplified easily but we believe an attempt to make copyright law simpler and more coherent is an important goal for this review to achieve. We would also urge the ALRC to seriously look at an education campaign to provide the public with a better understanding of the way the copyright act works to enable greater support for content creators by the users.

Principle 8: Promoting an adequate, efficient and flexible framework

The ADG supports this principle. As one of the industries that will be impacted the most by the Convergence Review we urge the ALRC to take its recommendation into account as part of its deliberations. It might also be useful to look at the National Cultural Policy that is also currently under review by government.

CACHING, INDEXING AND OTHER INTERNET FUNCTIONS

Question 3.

We support the position of the Copyright Council

Question 4.

We support the position of the Copyright Council

CLOUD COMPUTING

Questions 5 & 6

The ADG is aware of the ever-changing technologies that are allowing individuals to store copies of copyrighted material in the cloud. The Optus Now case proved that the mechanisms available under current copyright legislation are adequate to deal with infringements using this new technology.

We do not believe that cloud based computer services are being impeded by Australian copyright law. The growth in licensed services to provide legally obtained copyright material is an important part of the fight against piracy. We therefore do not believe that there needs to be any new exceptions to deal with this new delivery system.

COPYRIGHT FOR PRIVATE USE

Question 7.

Copying for private use is adequately covered in the exceptions that are outlined in the Act. We do not believe that this should be changed and that copyright material should not be made more freely available.

Exceptions that are currently in place make it legal for private copying by individuals. Consumers are currently able to copy broadcast material under the fair dealing provisions; the format shifting provision (s110AA), which allows for analogue to digital copying of audiovisual material; and the time shifting provision (s111), which allows for the copying of a broadcast to watch at a later time.

Any change to make the legal copying more freely available should then be remunerated.

Questions 8-9:

We propose that no further exception be made in format shifting unless these exceptions carry an obligation by the user to pay for that right.

We support our colleagues at Screenrights who have proposed:

“Screenrights submits that there should be no extension of the private copying exceptions in the Copyright Act, unless these are remunerated. In particular, if a new exception to allow time shifting by means of cloud based personal video recorders (PVRs) of the kind offered by the Optus TV Now service was proposed by government, it would be vital that it be a remunerated exception. Broader exceptions without payment risk contravening the three-step test as embodied in the Berne Convention and TRIPS and the US-Australia Free Trade Agreement (FTA). “

Question 10:

We accept that a clarification of the Copyright Act 1968 (Cth) would be useful in regards to the backing up of data for data recovery. We again emphasise that this should be restricted to private use and any change should reflect this in its definitions.

ONLINE USE FOR SOCIAL, PRIVATE OR DOMESTIC PURPOSES

Question 11 to 13

We support the position of the Copyright Council

TRANSFORMATIVE USE

Question 14 to 18

We support the position of the Copyright Council

LIBRARIES, ARCHIVES AND DIGITISATION

Question 19 to 22

We support the position of the Copyright Council

ORPHAN WORKS

Question 23 & 24

We support the position of the Copyright Council

DATA AND TEXT MINING

Question 25 to 27

We support the position of the Copyright Council

EDUCATIONAL INSTITUTIONS

Question 28 to 31

We support the position of the Copyright Council

CROWN USE OF COPYRIGHT MATERIAL

Question 32 to 34

We support the position of the Copyright Council

RETRANSMISSION OF FREE-TO-AIR BROADCASTS

Question 35 - 39

We agree with our colleagues at Screenrights that the “*current retransmission provisions are working effectively*”.⁵ We do not have a strong position on a “must-carry” regime only to say that whatever form the transmission of free-to-air broadcasts take, the statutory licensing schemes that are in place to cover the remuneration to content creators must be maintained.

While the Convergence Review has called for licenses to “no longer be required to provide any content service” it has not resulted in any regulatory change as yet. In fact, the government’s reluctance to comment on the recommendations of the review and to implement any of them can only be taken as reluctance to accept the recommendations.

We believe the Convergence Review is a step in the right direction to map out the way a new and converged media can operate. Inherent in the recommendations of the review is the continued commitment of the government to local content. This can only be supported by strict support either through regulation or subsidy. The review has opted for subsidy. But it has not abandoned the necessity for support of Australian content through regulation.

It is clear that the exclusion of transmission of a free-to-air broadcast over the Internet will not work in a converged world. With the advent of IPTV, Apple TV and the like it is almost impossible to distinguish signals transmitted over the Internet with those using broadcast spectrum. The more successful example of this is the ABC’s iView. To argue what is and isn’t technically speaking “retransmission over the internet” as has been done in point 227 will only add to the confusion and muddiness that now exists in copyright law. As we have argued earlier a technology neutral approach should apply.

We believe that the statutory licensing scheme for the retransmission of free-to-air broadcasts should therefore apply to retransmission over the Internet.

⁵ Screenrights Submission, November 2012.

As we have stated earlier we believe in a technological neutral approach to copyright law and the way a signal is delivered to the consumer should not impact on the obligations of the carrier to uphold the rights of the content creators. Geoblocking is therefore an effective tool to enable this to occur.

Again we would concur with our colleagues at Screenrights on a way forward in this area. Maintaining geographic control of retransmission is an objective we would support. We would therefore support the following recommendation from Screenrights:

“Screenrights submits that the conditions precedent in Free Trade Agreement side letter have been met and that the Commission should recommend that the Government write to the US Government in order to initiate negotiations to amend the FTA by replacing the internet exception with a strict requirement to limit retransmitted signals to their intended geographic markets.”⁶

We believe that the Internet issues should be resolved by the ALRC Review and not through the Convergence Review. It is in our opinion a copyright issue. We believe it is inevitable that the Internet will be a prime source of broadcasting for all types of content including retransmitted content. Again we maintain that the *Copyright Act 1968 (Cth)* should be technologically neutral and protect the interests of the copyright owners however the material is transmitted.

We also believe there is no technical argument against this view and that the current technological advances in geoblocking and digital delivery support this.

STATUTORY LICENCES IN THE DIGITAL ENVIRONMENT

Question 40:

As part of the director’s rights that we outlined in the first part of our submission, the Australian Screen Directors Authorship Collection Society (ASDACS) collects royalties for directors from around the world. In Australia, Screenrights collects the limited retransmission royalty as per Section 98 of the *Copyright Act 1968 (Cth)*. The use of digital technology has provided both organisations with ways to track and collect royalties for directors both here and overseas. This technology continues to be developed and we believe will make the collection of these royalties much easier in the future;

Effectively, the new digital technology has allowed the easier monitoring of licenses and the collection of royalty for content creators.

Question 41.

⁶ Screenrights Submission, November 2012.

We believe the *Copyright Act 1968 (Cth)* works effectively but in the case of directors copyright has not been able to enforce the statutory right that is enshrined in the act. This is an example of how the act fulfills a principle, in this case upholding moral rights but fails in practice by not allowing the content creators, in this case directors, to enforce their right.

In regards to directors we believe that a change to *Copyright Amendment (Film Directors Rights) Act 2005 (Cth)* (Act) to clarify the meaning of the phrase “commissioned film” and the extending of the royalty to include educational copying would be effective in giving rights holders fair remuneration.

Question 42.

Under the current legislation, film directors are joint copyright owners of their films, along with producers, for the purposes of the ***retransmission statutory licence*** only.

However there are a number of other secondary rights and a number of other potential secondary rights to which director’s copyright may apply.

The current schemes to which director’s copyright may potentially apply are the Educational Copying of Broadcasts Statutory Licence and the Government Copying Licence.

The Government Copying licence allows for copying from television and radio by government departments provided a royalty is paid. Due to the nature of the Government Copying licence and the Retransmission licence as outlined above, neither licence currently generate significant income.

The Educational Copying of Broadcasts Statutory Licence allows Australian education institutions to copy television broadcasts and use them for their teaching purposes. Screenrights has administered the statutory licence since 1990 and distributed \$28.03 million in royalties to copyright owners under the Part VA Australian Educational Service in 2011/12.⁷

Because each film and television program contains a number of copyrights, Screenrights' Board determines how the total amount for each title should be allocated among these various copyrights. The following table details the current allocation:

Copyright	Australian Educational Royalties
Film	68.5%
Script	22.1%
Musical Works	7.4%
Sound recordings of musical works	2.0%

⁷ Screenrights Annual Report, 2011/12, p.14.

Extending this scheme to directors was considered in the development of the Copyright Amendment (Film Directors Rights) Act 2005.

The producers strongly opposed the extension of this scheme to include director's copyrights because as 68.5 per cent of the amount distributed by Screenrights has been allocated to the copyright owners of cinematographic films (i.e. producers), producers have increasingly relied upon on this secondary stream for cost recovery.

Increasing user payments was considered in order to "increase the pie" however this was ultimately rejected as it was considered

"unlikely that these payments would be increased to compensate for an increase in the number of beneficiaries in a purely-market driven environment. Negotiations as to payment levels are conducted between the collecting society and those making payments; the negotiations focus on the value of the content and its use rather than the need to remunerate all potential beneficiaries, such as producers and directors. As the value of the film itself has not increased, it is unlikely that an application to the Copyright Tribunal would result in any increase in the remuneration payable by users. Additional remuneration was not sought from users following the decision in Phonographic Performance Company of Australia v Federation of Australian Commercial Television Services (1998) 40 IPR 225, which added copyright owners in sound recordings as beneficiaries of remuneration under the Part VA copying scheme. It is also difficult to see how such an increase could be easily mandated or justified as a legislative measure.⁸

Despite this there remain a number of cogent arguments in favour of extending director's copyright to the Educational Copying licence. These are:

Equity

It makes no sense that Director's under the current *Copyright Act 1968 (Cth)* are recognised as makers of a film under the moral rights provisions and the retransmission licence but get no benefit from this.

It remains a significant anomaly that Director's are not recognised as makers under the Educational Copying Licence.

However the ADG could put forward the following arguments:

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<http://www.comlaw.gov.au/ComLaw/Legislation/Bills1.nsf/bodylodgmentattachments/5698E4316280834ECA256FC80009896E?OpenDocument>

- Directors are already acknowledged as makers under the moral rights legislation along with Producers and Writers. Economic rights are similarly recognised under the retransmission scheme. Economic rights are already conferred on one scheme but not the other;
- The scheme has already been altered once to accommodate the rights of legitimate rights holders (sound recordings) ("Phonographic Performance Company of Australia v Federation of Australian Commercial Television Services (1998) 40 IPR 225"). While the ADG acknowledges that this involves difficulties, they are necessary difficulties to deliver equity and justice;
- The government is seeking to deliver a sustainable industry. A sustainable industry requires sustainable production enterprises as well as sustainable directing enterprises. By denying directors the right to an equitable share of secondary rights is undermining the industry's ability in a holistic sense to make money.

The ADG believe that the best solution to ensure a sustainable career for Australian directors would be to develop a scheme for the redistribution of Educational Copying Rights that would be satisfactory to the most parties.

Question 43.

At this stage we do not see any need for change from the current system that operates. We do, however, see the need to clarify the directors copyright issue prior to the introduction of any new legislative schemes based on the recommendations of the convergence review.

Collection agencies such as Screenrights and ASDACS are essential in the collection of royalties for directors and direct collection of these royalties by the rights holders is neither practical nor desirable. Until the establishment of Screenrights and ASDACS, directors were unable and ill equipped to collect the royalties they were owed. There are also international laws that only allow designated collection agencies to collect rights for directors, such as ASDACS. Also, the complicated licensing issues that the production of audiovisual material require need an organization with the skills and support to navigate these rights for content creators. Both Screenrights and ASDACS fulfill these function for directors.

Question 44.

We would again agree with our colleagues at Screenrights and argue that copyright material covered by a statutory license should not be covered by a free-use exception.

The Statutory Broadcast License is set out in Part VA of the Copyright Act and permits educational institutions to copy and communicate radio and television programs from:

- free-to-air radio and television
- satellite and subscription (pay) radio and television

Educational institutions can also copy and communicate podcasts and webcasts which originated as television and radio broadcasts and which are available on the broadcaster's website.

FAIR DEALING EXCEPTIONS

Question 45-47

We support the position of the Copyright Council

OTHER FREE-USE EXCEPTIONS

Questions 48-51

We support the position of the Copyright Council

FAIR USE

Questions 52 & 53

We support the position of the Copyright Council

CONTRACTING OUT

Questions 54 & 55

We support the position of the Copyright Council