



**AUSTRALIAN WRITERS' GUILD
AND
AUSTRALIAN WRITERS' GUILD AUTHORSHIP
COLLECTING SOCIETY**

**Joint Submission to the Australian Law Reform Commission
In Response to the Issues Paper entitled:
Copyright and the Digital Economy**

30 November 2012

EXECUTIVE SUMMARY

This submission is limited to our specific areas of expertise, addressing only the questions posed in the Issues Paper of particular interest to our stakeholders not otherwise canvassed by our colleagues comprehensive submissions, in particular that of the Australian Copyright Council (ACC).

The Australian Writers' Guild (AWG) represents more than 2,600 writers of stage and screen content, including the vast majority of professional writers of television in Australia. The AWG is uniquely placed to provide evidence-based responses to these questions as we conduct regular contract audits and provide advice to over 776 writers each year. By way of example, the Arts Law Centre refers copyright enquiries from writers of audiovisual content to the AWG for specialist advice.

The AWG established the Australian Writers' Guild Authorship Collecting Society (AWGACS) in 1996 as a not-for-profit company limited by guarantee to identify, pursue and negotiate reciprocal representation agreements with sister societies overseas who then collect, distribute and account to the AWGACS for royalties owed to its Australian and New Zealand screenwriter members.

In 2011, the AWGACS collected \$1,470,329 in secondary royalties, the highest ever total from 18 collecting societies in other territories around the world including Mauritius, Uruguay, Latvia, United Kingdom, Argentina, Chile, Estonia, Finland, Netherlands, Slovakia, Norway, France, Spain, Italy, Greece, Switzerland, Germany, and Poland. The 2011 collections will be distributed at the end of 2012 as per normal practice. Last year the AWGACS distributed \$1,135,604 to its members.

With this experience and knowledge base, the AWG has observed, and wishes to bring to the Australian Law Reform Commission's (ALRC) attention, that despite the clear purpose and intent of the *Copyright Act 1968* (Cth) (the Act) for it do so, the current real world application of copyright and statutory licensing provides no meaningful financial incentive for the original creators of the written copyright material in audiovisual product, nor in the overwhelming majority of cases, any financial return whatsoever on the commercial assignment of that copyright.

Therefore, while we are mindful of the ALRC's focus on assessing the current exceptions in the context of the digital environment, we would like to emphasise that the first point in the Terms of Reference i.e. - the objective of copyright law in providing an incentive to create and disseminate original copyright materials - should provide a primary point of departure and be considered independently, not only in relation to an assessment of access and exceptions.

THE INQUIRY

Question 1. The ALRC is interested in evidence of how Australia's copyright law is affecting participation in the digital economy. For example, is there evidence about how copyright law:

- (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.**

With this evidence base we have observed that the overwhelming majority of writers of audiovisual material receive no revenue stream from the exploitation of their original material beyond the initial writing fee. The traditionally established model of writers assigning the copyright in their work in return for ongoing 'residuals' for the ongoing exploitation of their work in its original form both locally and internationally, and additional royalties for further exploitation in other forms (e.g. DVD sales) has been replaced with a fee for service model with no remuneration for continued exploitation of copyright. The initial payment upon which further royalties are calculated was previously used as a minimum basic use fee with all future use payable on the actual exploitation. With no additional financial incentive or consideration, this upfront writing fee is now being used in practice as a total 'buy-out' of all rights. The use of the U.S. term "work made for hire" is increasingly applied in Australian contracts and is being attributed to the need for ease of copyright registration in America.

Writers in Australia are being asked to assign the copyright in their work under essentially the same conditions as American writers on "works made for hire". However, Australian writers are uniquely disadvantaged in this regard. In return for abdicating their entitlements as authors and copyright owners, U.S. audiovisual writers are subject to legally enforceable collectively bargained minimum terms and conditions for both the exploitation of that copyright material and for their initial labour, including health and pension contributions. U.S. writers receive royalties for the ongoing and various exploitations of their work. In addition they receive 50% of all the writers' entitlements to secondary/statutory royalties collected internationally for the works on which they are authors. The overwhelming majority of Australian film and television writers have never received any income at all from the retransmission, educational or government copying of their work.

In Australia, audiovisual writers are required by contract to assign the copyright in their work in full prior to having created the work. As independent contractors they are not permitted to collectively bargain, and minimum terms and conditions are not enforceable. They are being asked to contract in terms equivalent to those of a permanently employed advertising executive, without any of the benefits or protections of an employee. We have extensive evidence that decades of Australian works made under contracts that explicitly provide for royalty streams attached to exploitation of those works have not resulted in any payment to the authors of those works. This evidence can be provided to the ALRC under a separate cover and on a confidential basis.

The AWG acknowledges that market based transactions for the sale and licensing of copyright are part of the essential chain of title and monetisation of the original material. We are also aware that the industrial relations framework is not the subject of

this review. We raise this issue only to emphasise that the contract-by-contract treatment of copyright and secondary royalties has failed the original creators who are not receiving any remuneration for their copyright. They are being paid a fee for service, and are not receiving the financial incentive the copyright in their work was intended to provide them.

There is a strong case for audiovisual writers in Australia to be granted an inalienable royalty stream for the ongoing exploitation of their copyright such as that granted to visual artists under the *Resale Royalty Right for Visual Artists Act 2009* (Cth). This is especially true as the number and complexity of delivery platforms proliferates. It is simply impossible for an individual independent contractor to monitor, audit and make claims for the ever-evolving use of their work locally and internationally. An inalienable right to royalties for the ongoing exploitation of the writer's copyright, if managed collectively, would meet the objectives of the Act to create a financial incentive for creators, whilst providing a predictable, efficient platform for all parties to meet their obligations with minimal transaction costs.

GUIDING PRINCIPLES FOR REFORM

Question 2. What guiding principles would best inform the ALRC's approach to the Inquiry and, in particular, help it to evaluate whether exceptions and statutory licences in the *Copyright Act 1968* (Cth) are adequate and appropriate in the digital environment or new exceptions are desirable?

The AWG recommends that the core values articulated in the Terms of Reference should guide the ALRC's assessment of the exceptions and statutory licences in the Act with a clear intent to:

1. guarantee fair remuneration for creators of copyrighted works whose rights have been rarely managed actively or effectively under the current statutory framework;
2. decrease transaction costs for copyright owners to use licensing systems thereby reducing prohibitive barriers of entry to the digital economy; and
3. improve access to works and enhance legal certainty for non-commercial public users.

The AWG makes the following comments with respect to Principle 3: '*Recognising Rights Holders and international obligations*':

It is imperative that the ALRC identifies and observes Australia's existing, as well as proposed, international obligations to original creators of copyright material as separate and distinct from any international obligations to the eventual owners of the copyright in the creator's work.

This is to avoid a failure to observe obligations such as Article 14^{ter} of the *Berne Convention* for the protection of literary and artistic works, which states in Clause 1:

"The author, or after his death the persons or institutions authorised by national legislation, shall, with respect to original works of art and original manuscripts of writers and composers, enjoy the inalienable right to an interest in any sale of the work subsequent to the first transfer by the author of the work".

It is essential that the ALRC use this opportunity to provide the financial incentives for authors to continue to create and innovate in sectors that require the wholesale transfer of copyright at a point when creators are unable to properly determine a fair market value for their work, and negotiate on fair terms.

TRANSFORMATIVE USE

Question 18. The Copyright Act 1968 (Cth) provides authors with three 'moral rights': a right of attribution; a right against false attribution; and a right of integrity. What amendments to provisions of the Act dealing with moral rights may be desirable to respond to new exceptions allowing transformative or collaborative uses of copyright material?

The AWG acknowledges and agrees with the comments made by the ACC as to questions 12-18 with respect to the introduction of Transformative Use exceptions. The AWG recognises the differences the ACC highlights between U.S. and Australian legislation with respect to an author's moral rights. We note that whilst U.S. courts have not had to reconcile fair use with authors' moral rights, as outlined above, Australian authors of works whose distributors may hope for U.S. distribution are consistently and repeatedly required to "contract out" or waive their moral rights for ease of copyright registration in U.S. jurisdictions and any other jurisdictions which similarly do not recognise the concept of 'droit morale' or 'the moral rights of the artist'. The AWG is able to provide examples of common moral rights waiver clauses proffered by audiovisual content producers in screenwriters' contracts to the ALRC by way of evidence under a separate cover and on a confidential basis.

In these situations it is explicit that the works shall be deemed a "work made for hire" for the purpose of the Copyright Laws of the U.S., meaning the "author" of the work is no longer the individual who created the work, rather the "author" is considered to be the entity which hires the actual creators of the work (such as a corporation the author works for as an employee). As discussed above, Australian writers are at a considerable disadvantage to both their European colleagues who benefit from the non-assignable protections afforded to original creators; and to their U.S. counterparts who have the benefit, in most states, of enforced unionism and collectively bargained agreements governing remuneration even for independent contractors who are the creators of the screenplays. Australian screenwriters are singularly disadvantaged by the current contract-by-contract approach to copyright and secondary royalties.

RETRANSMISSION OF FREE-TO-AIR BROADCASTS

Question 35. Should the retransmission of free-to-air broadcasts continue to be allowed without the permission or remuneration of the broadcaster, and if so, in what circumstances?

The AWG supports the principal that all parties in the chain of creation and exploitation be properly remunerated for the commercial use of their product. The current system whereby retransmission royalties are in practice distributed only to one link in the creation-distribution continuum does not appear to serve the intent of the Act. For this reason the AWG supports the right for free-to-air (FTA) broadcasters to be properly remunerated for use of their signals, as part of a value chain which also ensures the original creators benefit from that exploitation.

Section 212 of the *Broadcasting Services Act 1992* (Cth) coupled with Part VC of the Act are based on an outdated and inadvertent inconsistency which undermines

fundamental principles of both broadcasting and copyright legislation by enabling subscription television providers to appropriate FTA television broadcasts, devoid of the initial broadcaster's license.

The AWG submits, as is the case with the underlying rights holders of proprietary and intellectual property rights, the rights of FTA broadcasters should be respected and properly remunerated.

Question 36 Should the statutory licensing scheme for the retransmission of free-to-air broadcasts apply in relation to retransmission over the internet, and if so, subject to what conditions—for example, in relation to geoblocking?

In principle, the AWG supports substituting the exception provided by s 135ZZJA of the Act with a requirement to obtain a license to retransmit FTA broadcasts over the internet for commercial purposes. This license should be restricted to the intended geographic market of the initial broadcast.

However, the digital economy is underpinned by constantly evolving technology and infrastructure embedded with the capacity to introduce a plethora of options to transmit and carry audiovisual content. In this context the AWG is concerned that the inflexibility of the existing statutory licensing model will become increasingly limiting and jeopardise the “fair” remuneration of all “relevant copyright owner(s)” and creators. The AWG has clear and overwhelming evidence that the vast majority of screenwriters have found it almost impossible to obtain payments for even traditional secondary use royalties through Screenrights.

The contract-by-contract model in place has positioned the AWGACS and its 1150 members at a competitive disadvantage internationally in that it has been rendered unable to meet its obligations of reciprocity under many of its agreements with 18 other international agencies representing authors' rights. International societies quite reasonably expect that their Australian counterpart will be able to provide them with broadcast and/or collection data enabling them to make their legitimate claim on those royalties on behalf of their millions of members.

The current Australian system is singularly opaque in the AWGACS experience. Screenrights does not disclose any of the data about what titles it has received royalties for. This requires the AWGACS to ask international claimants to provide millions of lines of data from more than a dozen foreign societies detailing every title and every author they represent, transposing that data into a Screenrights compatible system, and then making a claim for hundreds of thousands of titles, despite the minimal volume of foreign titles on Australian screens. It is self-evident that such a system is inefficient. The AWGACS is able to provide full accounting for all distributions received from Screenrights to the ALRC by way of evidence under a separate cover on a confidential basis.

The financial consequences for Australian authors are far-reaching in that reciprocity is the good faith basis for all of these foreign collections, and foreign societies have good reason to be frustrated with the difficulties they face in even finding out what their entitlements are in Australia, let alone receiving those entitlements.

Once a list of titles has been established, as the Australian system is based on contract, ostensibly every contract needs to be sighted for any payment to be made. In practice however, the large owners and distributors of the copyrighted works make wholesale warrants on their entire catalogue without reference to the individual contracts, are paid by Screenrights on these broad warrants, and individual creators

are largely unaware that these entitlements ever existed, and largely powerless to seek to make contract-by-contract claims in the face of such a system. When such individual claims are made by individual writers, or by AWGACS on their behalf, the system generates a conflict that needs to be resolved on a contract-by-contract basis between the parties.

Consequently, the AWGACS concludes that Australian authors are being significantly financially disadvantaged both with regard to their entitlements under Australian law, and with access to their entitlements under international law.

STATUTORY LICENCES IN THE DIGITAL ENVIRONMENT

Question 40. What opportunities does the digital economy present for improving the operation of statutory licensing systems and access to content?

The AWG submits that the digital economy presents the audiovisual sector with the opportunity to review statutory, voluntary and direct licensing to improve and streamline models as a means of maximising the incentive and reward for content creators and owners of copyrighted works, as well as increasing access to content for end-users.

The AWG observes that the distribution of content in the digital economy triggers fragmentation of remuneration streams. This is because revenues from licensed content can flow from either audience interaction with a specific project in incremental payments, or via extensive subscriptions, which could include a monthly subscription for some content coupled with a pay per view charge for IPTV and video on demand offerings. Increasingly, the traditional screens are also becoming marketing vehicles creating awareness of, and links to, other portals where income is generated through a variety of progressively more creative cross-platform advertising opportunities. The ensuing accounting practices are far more composite and convoluted than those employed to reconcile per ticket box office gross calculations, and in many cases inaccurate given that line-by-line accounting is simply not feasible for licensees who deliver subscription packages to end-users and/or video on demand services subsidised by advertising profits.

The value of the returns is diminished by the high cost of administrative overheads that are incurred to manage the multitude of diminutive transactions in this licensing model.

Question 41. How can the Copyright Act 1968 (Cth) be amended to make the statutory licensing schemes operate more effectively in the digital environment—to better facilitate access to copyright material and to give rights holders fair remuneration?

The AWG believes that collective administration through the aggregation of rights of individual members will permit representative collecting societies to grant flexible licenses that are able to overcome these obstacles and minimise transaction costs. For this model to be an effective alternative, management of authors' rights should not be conflated with those of the copyright holder: these should administered by separate bodies as specified below in our response to question 42.

Moreover, the Commission should consider the imposition of global metadata and numbering identification systems such as the International Standard Audiovisual Number (ISAN). These promise to ensure collective licensing models will be even more

effective than they have been in other jurisdictions such as the Nordic market. Identification procedures coordinated by ISAN are already compulsory in some countries such as France, and are becoming a most important tool in advancing collaboration between sister collecting societies and monitoring and pursuing usage royalties from around the world.

Question 42. Should the Copyright Act 1968 (Cth) be amended to provide for any new statutory licensing schemes, and if so, how?

Further to the Australian Competition and Consumer Commissions' (ACCC) submission to this enquiry, collective licensing schemes, whether they are extended by statute or voluntarily opted into, can have anti-competition implications.

As such, the AWG proposes that amendments to the Act should be made to ensure that management and accounting of this remuneration is delegated to collective management societies representative of classes of authors rather than an ensemble of all rights holders. This will guarantee that audiovisual content creators are properly rewarded and create a clear and direct revenue stream between the market and the audiovisual authors.

The AWG advocates the recommendations that were delivered in a recent White Paper from Europe's Society of Audiovisual Authors (SAA), specifically:

"An unwaivable right of authors to remunerations for their online rights, based on revenues generated from online distribution and collected from the final distributor. This entitlement should exist even when exclusive rights have been transferred and would secure a financial reward for authors proportional to the actual exploitation of the works. From a consumer's or user's perspective, payment should be made in the territory of use in conformity with Article 5(2) of the Berne Convention which states that "the extent of protection, as well as the means of redress afforded to the author to protect his rights, shall be governed exclusively by the laws of the country where protection is claimed".¹

Further, it is crucial that the Act be amended in a way that allows greater transparency in the data concerning uses of rights that licensees provide to owners of copyrighted works, and similarly improved and accurate accounting for those uses by the copyright owners to the original creators.

Question 43. Should any of the statutory licensing schemes be simplified or consolidated, perhaps in light of media convergence, and if so, how? Are any of the statutory licensing schemes no longer necessary because, for example, new technology enables rights holders to contract directly with users?

To the extent that existing statutory licensing systems concern broadcasting, the AWG believes it is essential that the Commission consider the recommendations of the Convergence Review in this regard. The AWG wishes to emphasise that simplification should not be considered synonymous with consolidation. The experience of the AWG and the AWGACS, and our observations of the systems our international colleagues work in, is that collective licencing, either voluntary or extended, on the basis of defined classes of authors, is the most cost efficient and effective way of achieving the financial incentives of copyright for creators, while minimising the

¹ http://www.saa-authors.eu/dbfiles/mfile/1900/1913/SAA_white_paper_english_version.pdf

transaction costs and restrictions for users.

The AWG contends that increased opportunities for owners of copyrighted works to enter into direct licensing contracts with end-users, does not substitute or diminish the need for statutory licensing.

Thank you for this opportunity to comment on the ALRC's Issues Paper entitled: Copyright and the Digital Economy and we look forward to making further contribution as the Review progresses.

Yours sincerely,



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