

**ACCC Draft Determination on arrangements for the
distribution of income arising from retransmission of audio-visual work**

Authorisation number AA 1000474

Screen Producers Australia Submission

3 July 2020

The Application

We refer to the ACCC Draft Determination dated 17 June 2020 [AA1000474].

ASDACS (the **Applicant**) is seeking and has provisionally been granted authorisation to alter its constitution *to provide that:*

- (a) as a condition of membership, members must assign to ASDACS all future copyright, and any past or present copyrights they hold in relation to the 'Retransmission Scheme' (as set out in the Copyright Act)*
- (b) ASDACS will administer the collection and distribution of income attributable to director members under the Retransmission Scheme, and*
- (c) after a minimum period of 12 months and with a minimum of three months' notice, members may resign from ASDACS and require the reassignment of their copyrights from ASDACS*

(the **Proposed Conduct**).

As outlined in paragraph 2.1 of the Draft Determination, the *entitlement that falls within the scope of the proposed assignment of rights from directors to ASDACS is comprised of the copyright ownership interest in a cinematograph film, given to directors under section 98 of the Copyright Act (the Relevant Rights)*.

Summary of SPA Objection

Screen Producers Australia (SPA) objects to the Draft Determination and submits it should not be made.

The Draft Determination appears to be based on a premise that the relevant law in section 98 of *the Copyright Act 1968* ('the Act') is uncontroversial and agreed between SPA and ASDACS and the Australian Director's Guild (ADG) (the interested parties). In fact the interested parties do not agree on the interpretation of section 98 yet the effect of the Draft Determination is to resolve this disagreement in favour of the Applicant.

Although the point is not expressly canvassed in the Draft Determination, the ACCC appears to implicitly accept that the interpretation of the application of section 98 of the Act is a settled matter between the interested parties. In our submission, the Draft Determination is based on assumptions which are not correct. The ADG and SPA have been in long standing

disagreement as to what constitutes a ‘commissioned film’ (as defined pursuant to s.98(3)) as opposed to a ‘non-commissioned’ film (s.98(4)), and thereby whether or not a director is a copyright owner for the purposes of the right to claim the ‘retransmission royalty’ for the retransmission of a free-to-air broadcast in Australia pursuant to section 98(6) of the Act.

It appears from the Draft Determination that the ACCC has not expressly considered the fact there are different, contested views between ASDACS, ADG and SPA about the interpretation of section 98. In our submission, the grant of the authorisation on the Applicant’s terms has the practical effect of conferring validity on the interpretation adopted by the Applicant. In effect, the ACCC will have intervened to resolve the dispute in the Applicant’s favour.

Dispute about section 98(3) Commissioned Films

We set out the following by way of background.

Section 98(3) of the Act reads as follows:

“Where:

(a) a person makes, for valuable consideration, an agreement with another person for the making of a [cinematograph film](#) by the other person; and

(b) the film is made in pursuance of the agreement;

the first-mentioned person is, in the absence of any agreement to the contrary, the owner of any [copyright](#) subsisting in the film by virtue of this Part.”

Pursuant to this subsection, where a **third party** (for example, a television broadcaster company) makes an agreement with another person (in this case referred to as ‘the production company’) for the making of a cinematograph film, and the film is made pursuant to that agreement, the owner of copyright in that cinematograph film is held by the third party, ‘in the absence of any agreement to the contrary’. Accordingly, unless there is agreement to the contrary, the film is a commissioned film in which copyright is held by the third party.

As an example, a television broadcast company can enter into an agreement with a production company to make a television program and set out its requirements for the making of that television program, including, of course, the consideration for making it and, in the absence of any contrary agreement, copyright in the television program will be held by the television broadcast company.

However, subsection 3 also allows the third party (or broadcaster) to enter an agreement with a production company to make the cinematograph film and also agree that copyright in the cinematograph film could be held in some other manner. By way of example, only, the agreement could provide that 50% share of copyright will be held by the television broadcast company and a 50% share of copyright will be held by the production company, in part consideration of the agreement for the making of the cinematograph film. In this situation,

the film is a 'commissioned film' as it is made pursuant to subsection 3(a) and (b), and there is an agreement to the contrary which deals with an alternative copyright holding.

In summary, section 98(3) of the Act works as a deeming provision in respect of ownership of copyright by the third party in commissioned films only in the absence of any agreement to the contrary on the ownership of copyright.

The vast majority of Australian made cinematograph films which are broadcast by Australian television broadcasters (and also commercially released in Australia in cinemas) are made by independent film and television producers in Australia as commissioned films in accordance with subsection 98(3) of the Act. The budgetary requirements of productions are such that they almost always cannot be made any other way. That is, they are made in accordance with an agreement between a person - being one or maybe more of a television broadcaster, distributor, or investor (including government funding agencies, such as Screen Australia or private investors) - and a production company. The agreement provides valuable consideration for making the cinematograph film and also often provides that copyright is shared in accordance with the relative contributions (or deemed contributions) to the making of the cinematograph film, or assigned in some other manner.

Conversely, the percentage of non-commissioned films which are broadcast on an Australian television channel is extremely small.

It is important to note our understanding that the ADG does not agree with this view of what constitutes a 'commissioned film'.

Section 98(4) of the Act will only operate in circumstances where there is no agreement for valuable consideration between a third party and a producer/production company which deals with the making of a film pursuant to section 98(3) of the Act. Where section 98(4) applies, SPA agrees that a producer and director working together to make a film, where the director is not an employee of the producer (or production company, as the case may be), will be joint owners of copyright in the cinematograph for the purposes of the right to include that film in a retransmission of a free-to-air broadcast within Australia (only).

In summary, where a film is made for valuable consideration in pursuance of an agreement with another person (being a commissioned film under s.98(3)), absent express (*contractual*) terms to the contrary within that agreement, the director will not have a copyright holding.

The effect of this is that directors as a class do not have *statutory* rights assignable to ASDACs in relation to commissioned films made under s.98(3).

Background to section 98 of the Copyright Act

In understanding the operation of section 98 of the Act by the *Copyright Amendment (Film Director's Rights) Act 2005*, it is useful to look at the information contained in the Bills Digest for the *Copyright Amendment (Film Directors Rights) Bill 2005*, available at the following link:

https://www.aph.gov.au/Parliamentary_Business/Bills_Legislation/bd/bd0506/06bd036

The following passage is an extract from the Bills Digest (with added highlights in yellow):

“Likely impact of the Bill

Of those directors who are not employees or whose films are not commissioned (the ones who benefit under this Bill), a few will be sufficiently established to have enough bargaining power to reach a commercial arrangement under which they have rights equal to, or better than, those given under the Act. Those directors will likely be no better or worse off.

Of the remainder, it can be argued that some will have insufficient bargaining power to resist the common practice of the producer either taking an assignment of the director's copyright (director's copyright is not expressed to be non-transferable) or engaging the director as an employee. The position of those directors will not likely be improved by this measure.

In practice, it is possible that very few directors will benefit from the limited copyright given by this legislation. The Senate Committee heard that the percentage of uncommissioned films made in Australia is very small, perhaps only 1 or 2 per cent; since directors waive most of their rights under the terms of their contractual arrangements with producers.⁽²¹⁾ Thus the Bill will affect only a handful of directors.

The Senate Inquiry into this Bill concluded that:

*It is apparent that the Bill will have little practical impact on the Australian film industry or on investment in that industry. The Bill will only confer a limited right on directors (that is, the right to retransmission in a free-to-air broadcast). This right only applies in respect of the retransmission scheme under Part VC, which is a new regime that has yet to generate an income stream. **It does not extend to commissioned films, which are the overwhelming majority of films currently being made in Australia.** Nor does it automatically extend to employed directors. Moreover, industry practice in Australia is for directors to assign any copyright they may have to the producers of the film they are to direct. The committee also notes the Department's advice that the Bill will not disturb existing industry practices for the financing of films, nor for securing investment and arranging distribution.⁽²²⁾*

Concluding Remarks

The stated policy rationale for this Bill is not matched by the measures that the Bill implements. The Explanatory Memorandum includes this introductory paragraph:

Film directors make a major creative contribution to the film making process. Other than moral rights, Australian copyright law does not currently recognise this contribution, while other creators involved in the making of a film such as screenwriters and composers are recognised. The Government considers that there is a need to amend the Copyright Act to give, for the first time, film directors a copyright in the films they direct.⁽²³⁾

Ultimately, despite the Senate Committee's view that the Copyright Act should reflect the collaborative nature of the film-making process and the role of directors in that process, this Bill grants symbolic recognition rather than meaningful economic benefits.⁽²⁴⁾

On its face, the Bill slightly improves the position of a class of directors by giving them a very limited right compared with the rights held by producers. Of this class, some directors will already be powerful enough to negotiate to have these rights (and more). Others face the risk of having these transferable rights taken away by commercial agreement.

In the end, these limited rights come at the expense of the addition of a great deal of complexity to the law which is out of proportion to the benefit it confers. As one submission to the Senate Inquiry observed, this complexity is demonstrated by the fact that there will now be three senses in which the word owner can be used in relation to film copyright; the producer who holds all of the rights of exploitation and the director who wears two hats as the holder of limited rights in re-transmission royalties and as holder of moral rights in the film.

Having said that, this measure represents an effort to improve on the status quo, the maintenance of which was one of the options considered by the Government. Furthermore, in recognising the role of directors in the film making process, it may open the door to further extension of directors rights after the effect of this incremental change is assessed. And, in addition, this measure will not impact significantly on the ability of producers to commercially exploit films because the agreement of directors will not be required in relation to decisions concerning commercialisation."

Contribution of ACCC Draft Determination to the dispute

The ACCC's Summary on page 2 provides:

"Further, due to ASDACS' clear ownership of the Relevant Rights, the Proposed Conduct is likely to reduce the likelihood of disputes arising over the relatively small amounts of money involved in Retransmission Remuneration."

The ACCC also asserts in paragraph 4.8:

"Where ownership of the Relevant Rights may otherwise be the subject of a dispute between producers and ASDACS' member directors, clear ownership of the Relevant Rights by ASDACS is also likely to reduce the overall likelihood of disputes arising and result in less resources being spent in determining who owns the Relevant Rights if a dispute does arise."

These are very concerning statements.

It is not correct to speak in a general sense of the ‘*clear ownership of the Relevant Rights*’. Nor in our submission is an ACCC Draft Determination an appropriate mechanism to resolve a dispute about the application of section 98.

The ACCC statements above assume that this Draft Determination will resolve a genuine dispute between the relevant parties in favour of ASDACS, more or less by default. By seeking this Draft Determination, ASDACS wishes to resolve this dispute in its favour and effectively lock in an interpretation of the law, which SPA submits is incorrect.

It is important to emphasise, as noted in the SPA Submissions of 7 May 2020, that SPA and the ADG have been negotiating to resolve this dispute. Prior to the issue of this Draft Determination, SPA and the ADG reached an in principle agreement on a compromise arrangement (including in respect of commissioned films) as part of a wider industrial agreement on terms and conditions for television directors on scripted drama, comedy and children’s programs. Having agreed in-principle terms, the parties were finalising the (long-form) *ADG Directors Television Agreement (Scripted) 2020* when the pandemic hit and discussions were suspended. It now appears that ASDACS wishes to circumvent that agreement (and further negotiation on other cinematographic films) by locking its members into an alternative arrangement approved by the ACCC.

It is instructive to look at the Explanatory Memorandum in respect of the *Copyright Amendment (Film Directors’ Rights) Bill 2005*, which includes in the rationale for the preferred model ‘Option 5’, that it enables industry and individual negotiation. The Explanatory Memorandum is available at this link:

<https://www.legislation.gov.au/Details/C2005B00043/Explanatory%20Memorandum/Text>
Paragraph 71 of the Memorandum, which deals with ‘Option 5’ being the recommended Option pursued in this legislation, provided as follows:

“71. Option 5 allows industry and individual negotiations to remain flexible. As the new directors’ rights would be fully assignable, individual directors and producers could still use these rights to bargain in individual agreements. In the absence of assignment to the producer of the right of the director, neither could enter into voluntary arrangements with the retransmitters that bypass the statutory licence (as allowed under the scheme) without the other’s permission.”

This paragraph is significant as the legislation clearly contemplated industry as well as individual negotiations on such rights. In fact, industry negotiations between ADG/SPA have been occurring for at least two years and these negotiations recently resolved the issue of directorial rights (to retransmission fees) on ‘commissioned films’ made across certain agreed genres. In SPA’s submission, the ASDACS application seeks to circumvent this agreement as well as circumventing the need for future negotiations. The ACCC should not issue an authorisation that has the effect of extending or settling the law, and thus serves to resolve a dispute between parties, in one party’s favour.

Conclusion

It is the primary submission of Screen Producers Australia that the Draft Determination should be withdrawn. The parties are demonstrably able to resolve this dispute by negotiation and

an ACCC Draft Determination should not be the mechanism to make a de facto legal determination of the dispute.

Alternatively, if an authorisation is granted, the Draft Determination should be amended to make clear that it does not change or determine the law as to what does and does not constitute a 'non-commissioned film'. The question of whether a director has ownership of copyright on a s.98(3) 'commissioned film' is a matter to be decided on a case by case basis turning on whether the agreement, pursuant to which the commissioned film is made, expressly grants copyright to the director. Crucially, this is a *contractual* allocation of copyright to the director, not a statutory one, and therefore cannot be part of the rights granted to directors under section 98 of the Act.

In our submission, as a minimum, the Draft Determination needs to be amended to clearly state that the Relevant Rights remain subject to the provisions of clause 98 of the Act, in particular, that they apply strictly as follows:

1. to non-commissioned films pursuant to section 98(4) of the Act;
2. for films which are not directed by a director pursuant to the terms of an employment agreement, unless otherwise agreed between the director and their employer;
3. will not circumvent any agreement reached between industry bodies which seeks to deal with a dispute in respect of the application of section 98 (particularly section 98(3)) of the Act;
4. will not otherwise apply to any cinematograph films for which the parties are in dispute as to whether a film is 'commissioned film'.

SPA also relies on and continues to press our submissions dated 7 May 2020, notably that any authorisation should provide only for the elective assignment of the Relevant Rights and conversely not impose opt-out requirements so onerous as to effectively render it not feasible for directors and producers to negotiate individually on rights .