

Record of oral submission to the Australian Competition and Consumer Commission (ACCC)

Australian Screen Directors Authorship Collecting Society application for authorisation AA1000474

Submission: Screen Producers Australia (SPA)

Date of submission: 31 July 2020

Oral submissions

Background

- Screen Producers Australia (**SPA**) is an organisation representing screen producers in Australia.

Disagreement regarding interpretation of the Copyright Act

- SPA has been in long standing disagreement with the Australian Directors' Guild (**ADG**), and by extension ASDACS, regarding the interpretation of subsection 98(3) of the *Copyright Act 1968* (the **Copyright Act**), which determines whether a film has been 'commissioned' for the purposes of subsection 98(4) of the Copyright Act. This disagreement is relevant to ASDACS' application for authorisation because the rights to be assigned by directors to ASDACS under the proposed conduct only exist for films that are not commissioned.
- Under SPA's interpretation of the Copyright Act, only an extremely small number of films made in Australia are not commissioned films. A film that is made pursuant to an agreement, for example, between a broadcaster and a production company, which allocates the copyrights between the parties or allows a share of the copyrights to third parties such as investors, is in SPA's view a commissioned film. The film is commissioned by the agreement pursuant to which it is made.
- SPA understands that, under the ADG's interpretation, such films would be classed as non-commissioned and accordingly a significantly larger number of films would be viewed as non-commissioned films that give rise to the relevant rights.
- Interpretation of the Copyright Act has not been tested in this regard.

Industry agreement between SPA and ADG

- SPA and the ADG have been negotiating an agreement whereby producers will only claim 50 per cent of the retransmission remuneration for any given film, leaving the director free to claim the remaining 50 per cent. SPA stresses that these are contractual rights and both SPA and the ADG have reserved their right to their respective interpretations of the Copyright Act. While this agreement only applies to SPA and ADG members, once settled, this will likely become industry practice more broadly.
- A similar agreement is in place in respect of the Writer's Guild.

Views on the Proposed Conduct

- SPA is concerned that the proposed conduct, if authorised, would legitimise ASDACS'

interpretation of the Copyright Act. While this may not have legal effects, the authorisation would have practical effects in the industry, such as:

- increasing the transaction costs for Screenrights and producers. Screenrights would need to review a significantly greater proportion of films should directors be emboldened to bring a greater proportion of programs into dispute based on ASDACS' interpretation of the Copyright Act. Additionally, when negotiating a contract, producers would be required to deal with both directors or their agents and ASDACS.
- shifting the balance of bargaining power away from small production companies and independent producers towards ASDACS by increasing ASDACS' industrial weight.
- reducing market flexibility and the ability of negotiating parties to maximise production as ASDACS will adopt a single position in negotiations. Usually, producers are likely to negotiate a larger fee for a director's services in return for the assignment of the director's rights. While retransmission remuneration may currently constitute a relatively small proportion of copyright royalties compared to other rights (e.g. education rights), this may change in the event that ASDACS and directors claim royalties for a significantly greater proportion of films made in Australia.
- In addition, the proposed conduct is unnecessary and there would be no role for ASDACS to play if the 50/50 agreement between the ADG and SPA becomes the industry norm.
- SPA is also concerned that the proposed conduct would result in the inability of directors to resign from ASDACS. It would not be a viable option for directors to resign from ASDACS and require re-assignment of their rights as in doing so they would forfeit their royalties from foreign territories.