

AUSTRALIAN CINEMATOGRAPHERS' SOCIETY

Senate Legal and Constitutional Legislation Committee.
Inquiry into the
The Copyright Amendment Bill 1997

Supplementary Submission. 28 August 1997
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INTRODUCTION.

The Australian Cinematographers' Society is concerned about a number of issues involving film authorship and the waiver provisions of the Copyright Amendment Bill 1997.

AUTHORSHIP.

The Society is concerned that an impression may have been given to the committee that cinematographers will enjoy moral rights in their underlying works in relation to a film. In his opening statement to the Committee, on the 18th of August this year, Mr Chris Creswell said:

"The moral rights provisions will apply to screenwriters, music composers and cinematographers in relation to their works which are used in the film". (Source, Proof Committee Hansard, 18th August, Pg. 3)

The ACS has clearly outlined in its submission why we believe this is not the case. The Bill leaves cinematographers with no rights at all. This ignores Article 14bis of the Berne Convention which clearly contemplates the recognition of "authors of scenarios" (i.e., cinematographers) as co-authors of a film.

The ACS also questions the motivation of the Screen Producers' Association of Australia (SPAA) in claiming to represent producers who are natural people. SPAA requested the definition of producer be clarified - to mean the natural person who was credited as the producer of the film. They said that producers were creative, that they were happy to be included as authors, and that they deserved moral rights.

However, SPAA also contend that investors will not support a project unless the creators waive their moral rights from the outset. This will include waiver of the producer's rights

- rights SPAA claims to represent.

Organisations, like SPAA, who primarily represent production companies, consider moral rights to be a form of economic right. The opinions expressed by the Federation of Australian Television Stations, on the issues of employee's rights and retrospectivity, demonstrate an astounding lack of comprehension of even the most basic concept of moral rights.

It is folly to suggest there is no justification in granting moral rights to employees. On the issue of retrospectivity, moral rights are not totally new rights. In the past these rights were protected by other laws, although in a fragmentary and incomplete way. Production companies do not acquire rights to defame authors, nor pass work off as the authorship of another person, when they purchase copyright.

Production companies have no right to expect to acquire moral rights with copyright. They need to understand that a company cannot be "creative".

If moral rights are to have an educative role they must be inalienable. Films are not fundamentally different from other types of collaborative works. Their creators must not be treated in a discriminatory way.

WAIVER AND IT'S RELATIONSHIP TO OVERSEAS SALES.

Ms Di Mattina, Corporate lawyer, Australian Children's Television Foundation, claimed moral rights waivers were essential for overseas sales.

The Society believes she is wrong. A waiver under Australian law does not necessarily apply in another jurisdiction (see article 5 of the Berne Convention). Moral rights are defined by the country in which the protection is sought or the infringement took place. An Australian waiver would be useless in France. French law does not recognise the ability to waive moral rights.

Even if Australia has no waiver provision we believe there is nothing to prevent a "maker" seeking a NZ, UK or Canadian waiver, under those respective laws, for films released in those countries. In the US, of course, there is no film moral rights provisions, so therefore no need for a waiver at all.

The lack of a waiver in Australia need not affect overseas sales.

THE DISCRIMINATORY EFFECT OF WAIVER

The ACS believes that waiver will unfairly impact upon the rights of contemporary Australian authors. People who create works after the introduction of the proposed law will be worse off than those who created their works before. In fact, they may be better

able to protect their moral rights under existing law.

Authors of works created in the past cannot be forced to sign a waiver. They are not under the same economic pressure as a contemporary author. Neither are authors who are employees. Foreign authors, whose country of origin does not provide for waiver, or who have more comprehensive "consent clause" style contracts, will possibly enjoy greater rights in this country than contemporary Australian authors.

It is independent authors who will be most affected by the waiver provisions. They will need to make their living producing works under contract - contract that will contain a comprehensive waiver clause. This category of authors includes most of our highly respected film makers. It is these creators that the legislation is supposed to protect.

To deny employees moral rights, remove the , so called, retrospective application of moral rights and provide for waivers applying to works not yet created, would be unacceptable. Not only would it effectively deny all film makers access to moral rights, it would undoubtedly be inconsistent with the terms and spirit of Australia's obligations under the Berne Convention.

The only fair option is to remove the waiver provision entirely and replace it with a workable consent clause. Mr Harris, of the SPAA, suggested that a lot of waivers will be partial waivers, rather than general waivers. In reality a partial waiver is a consent to an act or omission.

THE NEED FOR INALIENABLE MORAL RIGHTS

The ACS is not without sympathy for the position of organisations, like the Screen Producers Association of Australia, who seek certainty from the legislation. However, it must be understood that creators seek certainty too. Certainty that when an authors' work, or name, is grossly mistreated that they have remedy under law. Creators must be certain that they cannot be forced, by economic pressure, to waive moral rights and thus be prevented from taking action in even the most extreme cases.

Once a waiver has been signed the only recourse a creator will have to protect their integrity, in the event their work is grossly distorted, is existing laws, i.e. defamation law. However, the signing of a waiver could prejudicially affect an author's defamation action. They would, in this case, be better off under current law without a waiver.

I would like to provide an example of the kind of actions we are trying to protect creators against.

The film "Thunderheart" was edited by 22 minutes for its US television premiere, removing part of the Native American subtext the director, Michael Apted, felt was vital to the story.

Native Americans agreed to participate in the film, and allowed Apted to film on their reservation, because he was a respected documentary film maker. Apted was quoted by the LA Times, saying, "I wanted to break down stereotypes of the Indians as presented by Hollywood". The re-editing of the film deleted scenes Apted had promised the reservations' residents would be included.

Apted filed suit in the US District Court, in an attempt to have his name removed from the film and replaced with a pseudonym. This was the only option he had to protect his moral right under US law. He was supported by the Directors Guild of America (DGA). DGA spokesperson Chuck Warn said, "They are going to present a version of the original film so different under the same title that it amounts to consumer fraud."

Arbitrator Michael Rappaport ruled in favour of Apted, finding that the substantial editing violated the "good faith and fair dealing" requirements of the DGA agreement. The studio filed suit in the Federal Court to appeal the ruling.

"I have never had an argument with a studio before," Apted said, "But there is a line that absolutely must not be crossed. And that line was crossed."

I have personally heard American studio representatives argue that they must have the right to substantially edit films, not because of market necessity, but because there is a demonstrated financial advantage in re-releasing an extended "directors cut" five years after the initial release. They showed little concern for the rights of consumers, who thought they were paying to see the creators' vision the first time around.

Films are not fundamentally different to other types of collaborative works. Their creators should not be treated in a discriminatory way.

Moral rights are not about money. They are not about unreasonably restricting a copyright owner's opportunity to profit from art they legally own. They are about the public knowing that when they view the work of a creator they are really sharing in the personal vision of that individual. They are about protecting creators rights of attribution and integrity because their works are an extension of their personality. Mr Apted was right, there is a line that must not be crossed, and that line will be crossed if waive becomes the norm.

Thank you for your consideration.

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Australian Cinematographers' Society.