

Australian Writers' Guild and Australian Writers' Guild Authorship
Collecting Society
Further submission to the Productivity Commission
- Intellectual Property Arrangements -

1. Introduction

The Australian Writers' Guild (**AWG**) and the Australian Writers' Guild Authorship Collecting Society (**AWGACS**) welcome the opportunity to provide a further submission to the Productivity Commission in relation to its Draft Paper of 29 April 2016 (the **Commission's Draft Paper**).

For the purposes of this further submission, we have not repeated the comments made in our earlier submission of 30 November 2015 except to the extent that they are relevant to the Commission's Draft Paper. Our submission is again limited to the AWG and AWGACS' specific areas of expertise, namely addressing those questions that are of particular interest to its scriptwriter members in relation to copyright.

Our further submission to the Productivity Commission makes the following key points:

1. The framing of the Draft Paper by the Productivity Commission constitutes an attack on the livelihoods of Australian creators without an understanding of the process of creation or the creative industries
2. The importance of intellectual property (**IP**) and particularly copyright to create incentives for authors to foster their creativity. This is particularly relevant to screenwriters, the majority of whom are self-employed individuals who contribute significantly to the Australian screen industry and rely on copyright in their literary and dramatic works for fair remuneration. Copyright is also important to screenwriters as a form of artistic control though moral rights.
3. The concept that a reduction in the term of copyright to 15-25 years *from creation* would be beneficial demonstrates a complete ignorance of the commercial reality of film, television and stage production. The impact such a recommendation would have on these creators, were it even possible, including scriptwriters whose works may not be initially commercialised for a decade, and may then be commercially exploited for decades, after they have been written could be devastating. For example, many classic movie scripts from the flowering of Australian-grown cinema in the 1970s would now be unprotected by copyright.
4. The introduction of US style "fair use" provides no clear benefits to Australian creators or consumers. The current fair dealing provisions in Australian copyright law are sufficient to balance the interests of creators and users.
5. There is a need for a separate review of the Collecting Society Code of Conduct to ensure the efficient and effective working of the copyright system.

1. Framing of the Draft Paper

The AWG and AWGACS are concerned that the Commission's Draft Report is a shot across the bows of Australian creators that has the potential to negatively impact their lives and livelihoods. It demonstrates a complete lack of appreciation of creators and the creative industries by the Commission. Indeed, the tone of the Draft Report in referring to "creators" in inverted commas and copyright as "copy(not)right"¹ evidences the fact that the Commission unfortunately either does not understand, or has failed to undertake due process to understand the true nature of creativity and its cultural and economic benefits for Australian society and consumers.

¹ Page 16 of the Draft Report.

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In particular, we are concerned that the Commission:

1. Assumes that Australians are simply passive consumers of content, rather than appreciating that Australia has a vibrant creative sector that creates, produces and successfully exports Australian stories and culture, with Australian screenwriters playing the foundational role in this process.
2. Portrays "rights holders" as monoliths and "users" as a somehow disenfranchised. Authors such as scriptwriters are original creators and rights holders. The majority of scriptwriters are self-employed individuals and small business owners who contribute significantly to the Australian screen industry and rely on copyright in their literary and dramatic works for fair remuneration; without which there would be no incentive to create these scripts which underpin the viewing of millions of Australian viewers per day in addition to their successful export. Most scriptwriters face significant imbalances of bargaining power in retaining and exploiting those rights. Furthermore, the users of their creative content are not individual Australian consumers as the Commission makes out. Rather, they include large multinational corporations like Google and YouTube, whose business models rely on the exploitation of others' creativity at low or no cost for their commercial gain.
3. Casts Australia simply as a "net importer" of intellectual property. This overlooks the fact that Australians regularly successfully export their Australian stories to the world. Indeed, the Chief Economist of the World Trade Commission has openly criticised the Commission's stance on this issue stating: "It's important for Australia not to view itself as an island of IP - a net importer - rather than thinking about it in a more global context and how its position might evolve."²

2. The importance of copyright

Screenwriters are creative and talented individuals who form the basis of all film, television and dramatic productions. Their work is fundamental to bringing people together both emotionally in a shared appreciation for art and physically in cinemas, theatres and homes across Australia. In addition to providing entertainment, their work also educates and builds empathy in the Australian community, instilling an appreciation of history, our unique Australian culture and perspective on other cultures.³

As we stated previously, as a general proposition, writers are overwhelmingly self-employed individuals and the process of bringing their works to the screen may be long and often uncertain. Copyright is therefore a critical mechanism that seeks to encourage a longer-term approach to scriptwriting innovation, quality and creative output in the audio-visual sector in Australia. The fact that scriptwriters have the ability to leverage their copyright in their literary and/or dramatic works in audio-visual content contributes to their willingness to continue to engage in their creative activities. The Copyright Act also promotes a healthy respect for screenwriters through the parallel moral rights regime.

² Greber, J, "WTO chief economist challenges Productivity Commission view on IP", *The Financial Review*, 19 May 2016 at <http://www.afr.com/news/economy/wto-chief-economist-challenges-productivity-commission-view-on-ip-20160518-goxypf#ixzz49APs7Kgg>.

³ Drawn from the Society of Audiovisual Authors, *White Paper: Audiovisual Authors' Rights and Remuneration in Europe*, 2nd edition, 2015 at http://www.saa-authors.eu/dbfiles/mfile/7500/7566/SAA_White_Paper_2015.pdf (accessed 26 October 2015).

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In our previous submission we referred to the fact that the AWG and AWGACS are of the view that an Australian copyright system in which there is a right to fair remuneration through an inalienable or unwaivable remuneration right would be an even more appropriate mechanism to encourage additional creative works and ensure that it is “fit for purpose”. We note with disappointment that the Commission did not endorse this recommendation nor provide reasons for not doing so.

3. Term of copyright

In the Draft Report the Commission states that the term of protection of copyright is “excessive”⁴ and alleges that:⁵

...the vast majority of works do not make commercial returns beyond their first couple of years on the market.

The AWG and AWGACS did not agree with the proposition that “the average commercial life of film is between 3.3 and 6 years” and that “literary works provide returns 1.4 and 5 years on average”.⁶ Furthermore, these statements do not capture the true creative process that occurs prior to the screen and stage programmes being produced and broadcast or otherwise disseminated. Furthermore, even if the commercial success of certain films is short-lived, this is no argument to condemn as valueless those that have a life lasting over generations.

Title (year completed)	Years to develop
The Piano (1992)	6
Lilian's Story (1995)	7
The Boys (1998)	7
Babe (1994)	8
The Wog Boy (1999)	8
Kiss or Kill (1996)	10
Romper Stomper (1991)	11
Shine (1995)	11

*Source: Compiled by the Australian Film Commission

In terms of commercial exploitation, on the Internet and technology-fuelled global economy, the “long tail” is in fact becoming even more important. For example, many Australian films and television programs continue to have commercial success in territories around the world for many years after their production and particularly after the initial writing of the script. Furthermore, it is common for sequels and other formats to be created from the original production.

The following are just four examples of how scripted plays, movies, musicals and books develop over many years:

⁴ Page 113 of the Draft Report.

⁵ Page 114 of the Draft Report.

⁶ Ibid.

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Shine – Writer, Jan Sardi

Shine took over 10 years to get to production and a further two years to reach a worldwide audience. Originated in the mid-1980s, Shine finally went into production in 1995 and was released in Australia in 1996. A year later it was released around the world. Nominated for seven Oscars (including Best Original Screenplay), it won an Oscar and a British Academy of Film, Television and the Arts (BAFTA) award. Shine continues to be shown around the world, and domestically, with three recent screenings on SBS. It continues to generate revenue,

Gallipoli – Writer, David Williamson

The movie Gallipoli originated in 1977, involved years of research and rewrites and was finally released in Australia in 1981 to immediate acclaim, winning eight Australian Film Institute (AFI) awards, including Best Screenplay and a Golden Globe nomination for Best Foreign Film. Screenwriter David Williamson still receives royalties from his small share of producer's net profits. Gallipoli is part of both the primary and high school curriculum and is considered a defining film in both Australia's culture and cinematic history.

The Adventures of Priscilla Queen of the Desert – Writer, Stephan Elliott

The Adventures of Priscilla Queen of the Desert premiered in Cannes in 1994, made \$100 million on initial theatrical release and a further (unrecorded) amount on DVD sales. The screenplay went into print and on school curriculum in 1995. Stephen Elliott's work on the book for "Priscilla The Musical" started in Jan 2005, with the live production premiering Sydney Oct 2006. The Adventures of Priscilla Queen of the Desert is the most successful Australian stage export of all time, and continues to find new international markets, being set to open in Israel in July 2016. The stage success brings further exposure and commercial return for the original film.

Strictly Ballroom – Writers, Craig Pearce & Baz Luhrmann

Strictly Ballroom began as an idea at NIDA in 1984 and after some stage productions it was developed for the screen. It took three years for screenwriters, Luhrmann and Pearce to complete the screenplay. Strictly Ballroom premiered at the Cannes Film Festival in 1992. One of the highest grossing Australian films of all time, it earned eight AFI and three BAFTA awards. It has regularly been included in high school curriculums across the country and "Strictly Ballroom the Musical" premiered in Sydney in 2014 and is set for its first UK staging in November 2016.

Therefore, the Commission's suggestion that the term of copyright could be reduced to 15-25 years *after creation* is completely out of touch with commercial reality and would have significant detrimental effects on Australian scriptwriters, and thus the entire industries which they support, reducing their ability to rely on future income streams in the form of royalties that enable them to continue to write new scripts for new films and television programs.

In addition, investment in these large scale, international projects require absolute certainty. Production companies simply cannot run the risk of later challenges to ownership of international copyright.

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Importantly, as the Commission itself acknowledges, the Australian Government is simply not in a position to override the variety of international trade agreements that create obligations for the term of copyright, including most importantly the Australia-United States Free Trade Agreement. Thus the findings appear to be based on a predisposition or ideology rather than evidence-based research about the commercial realities of some of the key industries they would be affecting.

If the Australian Government were to bilaterally negotiate lower terms of copyright with other trading partners, as the Commission has suggested, this would place Australian scriptwriters at a further serious commercial disadvantage compared to their international counterparts. In fact, Australia's high-profile and emerging scriptwriting talent would seek the benefit of selling their work to companies in territories who will offer viable, effective financial incentives, including moving to territories where their copyright was secure for the extended term.

Therefore, the AWG and AWGACS welcome the recent statement by the Minister for Communications and the Arts, Mitch Fifield:⁷

Recently, it has been wrongly claimed that the Government is planning to reduce the life of copyright to 15 to 25 years after creation, rather than 70 years after the death of the author as it is currently. This is not something the Government has considered, proposed or intends to do.

4. Fair use

The AWG and AWGACS do not support the Productivity Commission's recommendation for the introduction of a US-style fair use provision, particularly given that it is far broader than that originally proposed by the Australian Law Reform Commission (**ALRC**) in 2014.⁸

We are particularly concerned about the uncertainty created by the introduction of fair use, a US legal concept that has no relevance or history in Australian jurisprudence. While the Commission has suggested that the Explanatory Memorandum accompanying the introduction of fair use legislation would provide practical examples of instances of fair use, we do not think that this will overcome the need for comprehensive Australian case law to determine the scope of fair use in Australia. Unfortunately, this will place an unfair burden on creators. It will be contingent on scriptwriters, for example, to mount legal cases that their work has been infringed and is not subject to legitimate fair use by the respondent, who is likely to be a large corporation such as a news organisation or search engine. Frankly, scriptwriters are unlikely to have the financial or other resources to engage in lengthy litigation in order to flesh out the boundaries of a new legal concept in Australian law and are likely to be forced to accept that whatever use is made of their work.

From a policy perspective, we find this unacceptable, unfit for purpose and would put Australian creators at a distinct disadvantage internationally.

It is also important to state for the record that common law and Australian copyright law already contain fair dealing provisions that for many years have dealt efficiently and effectively with those

⁷ Minister for Communications and the Arts "CONJECTURE ON COPYRIGHT CHANGES UNFOUNDED" *Media release*, May 2016 at <http://www.mitchfifield.com/Media/MediaReleases/tabid/70/articleType/ArticleView/articleId/1179/Conjecture-on-copyright-changes-unfounded.aspx>.

⁸ Draft Recommendation 5.2 at page 31 of the Commission's Draft Report and discussed at pages 159-161.

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people and organisations that on occasions – and for genuine reasons – use copyright materials for the purposes of fair dealing exceptions. In contrast to these provisions in Australia, US style fair use laws are weighted heavily in favour of those who wish to exploit for their own commercial gain the effort and investment made by the work's creators.

We are also concerned about the Commission's proposed application of fair use for out-of-commerce works, i.e. those that are not commercially available. In our view this will also further negatively impact on scriptwriters' abilities to earn a living from and control their creative output. If a writer has written a script and does not wish it to be produced or commercially available, then it should not be able to be used by third parties due to that decision. Quite simply, it should be their choice as to when and how their creative output is used by third parties. The introduction of fair use should not allow for the use of a script without the scriptwriter's permission. The loophole created would have the practical effect of denying even those writers legally entitled, living and readily accessible from fair remuneration. One recent example is the BBC indicating that it was unable to contact one of the key writers of the *The Two Ronnies* for over a decade. The writer was an active member of the Writers' Guild, which could be established with a single email or web search.

Finally, we note that the Productivity Commission proposes to extend the defence of fair use to third parties that make use of the material on behalf of the users. This means that service providers that would ordinarily licence material could have the coverage of fair use and may not be required to independently licence the material or take "reasonable steps" to avoid authorisation liability. In our view again this has the potential to significantly negatively impact on scriptwriters' ability to earn a living from their creative efforts in writing scripts for film and television.

The AWG and AWGACS believe that the recommendation to introduce fair use in Australia has the capacity to:

- Reduce the opportunities for scriptwriters to license their works;
- Reduce the capacity for scriptwriters to control how their work is used; and
- Increase the uncertainty for both scriptwriters and users of copyright material, resulting in expensive and lengthy court battles. The US Google Books decisions, which ran over 10 years, are a good example of this.

Therefore, there are no compelling reasons why US style fair use would better serve creators and consumers in the current Australian environment.

5. Collecting society code of conduct

Finally, we note the Productivity Commission's information request regarding the Attorney-General's Collection Society Code of Conduct (the **Code**) which states:⁹

INFORMATION REQUEST 5.2

Is the code of conduct for copyright collecting societies sufficient to ensure they operate transparently, efficiently and at best practice?

⁹ Page 38 of the Draft Report.

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For the sake of completeness, we have set out again our initial comments in respect of the collecting societies in Australia.

First, the AWG and AWGACS refer the Productivity Commission to the core values articulated in the Terms of Reference of the ALRC's Issues Paper *Copyright and the Digital Economy* of 20 August 2012 (the **ALRC Issues Paper**) in assessing the effectiveness of copyright statutory licences under the Copyright Act, namely the need to:¹⁰

- a. Guarantee fair remuneration for creators of copyright works whose rights have been rarely managed actively or effectively under the current statutory framework;
- b. Decrease transaction costs for copyright owners to use licensing systems thereby reducing prohibitive barriers to entry to the digital economy; and
- c. Improve access to works and enhance legal certainty for non-commercial public users.

As stated in our previous response to the ALRC Issues Paper, we are of the view that the licensing of copyright works in Australia should be measured against these values. On this basis we make the following comments on the current statutory licensing regimes which are administered through a collecting society that is subject to the Code, namely the Audio-Visual Copyright Society trading as Screenrights (**Screenrights**) which apply to our scriptwriter members:

1. **Lack of data transparency** - The existing statutory licensing schemes are not transparent about royalty collection and distribution particularly regarding relevant data. For example, Screenrights does not disclose any data about which audio-visual titles it has received royalties for. Rather, AWGACS must ask its reciprocal collecting society partners in overseas territories to provide millions of lines of data detailing every title and author they represent (in a Screenrights' compatible data system), and then AWGACS makes claims for tens of thousands of titles, despite the fact that the vast majority of these foreign titles are not screened in Australia. The system is impossible in practice, highly inefficient where it is delivering royalties, and puts the burden on the original creators worldwide that are simply not appropriately resourced for this extensive exercise, nor should they be. The Australian system is out of sync with international and domestic norms, unnecessarily, and subject to wide international concerns about international treaty obligations.
2. **System inherently unfair to authors** - Screenrights allows large owners and distributors of films to make wholesale warrants on their entire catalogue in the Screenrights' system. In practice, Screenrights has paid and continues to pay royalties to these entities *unless authors have specifically registered their interests and put evidence on to support their claims*. The system favours large owners and distributors of copyrighted works who have the financial incentives to put in blanket claims for entire catalogues regardless of their true entitlement, without any independent review by Screenrights. In stark contrast, the existing statutory licensing scheme requires that AWGACS claims on every individual title to register a "conflict" on behalf of its members. Despite a relatively new Express Dispute Resolution Process,¹¹ Screenrights ostensibly requires that every contract needs to be sighted by it and "adjudicated" prior to any payment being to be made to an author.

¹⁰ Available here: <http://www.alrc.gov.au/publications/copyright-ip42> (accessed 22 October 2015).

¹¹ <https://www.screenrights.org/content-owners/royalties-in-conflict/express-dispute-resolution-process>.

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As a result of the above, we remain concerned that the overwhelming majority of Australian film and television writers have not received appropriate remuneration from the Australian retransmission, educational or government copying of their works through the relevant statutory schemes managed by Screenrights.

Furthermore, this contract-by-contract approach by Screenrights has positioned AWGACS and its members at a significant disadvantage internationally due to their inability to meet obligations of reciprocity with international partners representing authors' rights. This has financial consequences as overseas societies have good reason to be frustrated with the difficulties that they face in accessing Australian and New Zealand royalties for their author members.

As a result, on 3 March 2016, the AWG and AWGACS filed a case in the Federal Court of Australia against Screenrights over their failure to fairly protect and represent Australian and international screenwriters and their rights. We have been forced to take this step as a last resort, following years of negotiation and attempts to resolve the matter directly with Screenrights. We are of the view that Screenrights' actions had, and continue to have, the effect of denying to scriptwriters the royalties that would otherwise have been due to them over decades.¹²

While we appreciate that these legal proceedings are still afoot, for many of the reasons set out above we would urge the Australian Government to consider a separate and thorough review of the Code, particularly given that the current Code Reviewer has stated that the scope of this exercise is outside the remit of its three-yearly review process. We agree that it is necessary, in line with the Commission's comment that:¹³

Ensuring collecting societies operate efficiently is important to the overall operation of Australia's copyright arrangements.

We understand that the users of the licences remain willing, for the most part, to pay for the licences, but they are strongly committed to their monies being directed as intended to creators and such data being transparent.

The AWG and AWGACS appreciate the opportunity to comment on the Commission's Draft Paper.

We look forward to making further contributions as necessary, including attending the Public Hearings in Sydney in June 2016.

Jacqueline Elaine
Executive Director
AWG and AWGACS

3 June 2016

¹² AWG, SCRIPTWRITERS FILE LEGAL CASE FOR FAIR SHARE OF FILM AND TV ROYALTIES, *Media Release*, 7 March 2016 at <http://www.awg.com.au/news-18/latest-news/798-march-2016-screenrights-press-release.html>.

¹³ Page 136 of the Draft Report.