

AUSTRALIAN CINEMATOGRAPHERS' SOCIETY.

Submission to the

SENATE LEGAL AND CONSTITUTIONAL
LEGISLATION COMMITTEE

on

Moral Rights and The Copyright Amendment Bill 1997. 4 August 1997

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INTRODUCTION.

The Australian Cinematographers' Society is a national organisation committed to the advancement of the art and craft of cinematography in Australia.

The Society takes the position that:

- **Moral rights should be granted to cinematographers because they create the visual images of a film.**
- **The visual images of a film should be protected in the same way as a work of photography.**

MORAL RIGHTS

Moral rights are the author's rights to attribution and integrity as defined by the Berne Convention.

Moral rights must be distinguished from the economic rights associated with the protection of copyright. The protection of moral rights is the protection of a creator's entitlement to recognition and expectation that the work which has been created will not be modified without consent. It is not about protecting a right to financial return or reward.

The nature of moral rights is also apparent from its application to "works" and the extension of that concept to include cinematograph films. These are creations in respect of which the creative efforts of certain individuals can be clearly defined, be they composers, artists or authors.

The proposal to accord moral rights in respect of cinematograph films to producers and directors is wholly inconsistent with the concept and purpose of moral rights. The creators (in the true sense of the word) of a cinematograph film are the director, writer and cinematographer. The producer, while playing an important role, is involved in aspects of the film distinct from the creative processes in which the director, writer and cinematographer are involved. The producer's recognition and rights properly reside in copyright - not moral rights.

It is unthinkable that a producer should be accorded moral rights in preference to, or to the exclusion of, writers and cinematographers. If it is determined that producers should receive those rights, then the moral rights amendments must be expanded in scope to include writers and cinematographers. To do otherwise would be to misrepresent the whole creative film making process and undermine the decision of Australia to implement its obligations as a signatory of the Berne Convention.

The concept of moral rights for cinematographers is easy to understand. The existence of a cinematograph film is dependent upon someone photographing a motion picture. In its most basic form a film need have only one author - the person who takes the pictures. When a cinematographer takes motion pictures for an employer they should retain moral rights to their work, in the same way as a photographer.

In his book "One Crowded Hour" author Tim Bowden describes the work of combat cameraman Neil Davis and how his cinematography was an expression of his feelings and attitudes.

His film was never just a collection of shots; feeling was always there. Maybe it was expressed in shots of tight, taunt faces, children, burnt hands and the humanity of war to underline its basic inhumanity. Davis was a film essayist who composed stories in his camera often using less than 100ft of film to fix details in a sequence able to engage the viewer and expand comprehension,

Later in the book Bowden uses a quote from Davis to underline the personal importance the cinematographer placed on his work.

The narration and pictures are history. History must not be tampered with in any way whatsoever, not even if it's harmless - that is, if the editors want to run the film longer. If they think there is not enough footage of helicopter gunships attacking in the air and want to put in say twenty five more seconds, it is possible to splice in footage from a coverage the day before. Nobody will know the difference.

But it is not the same. It's not the same helicopter, and if you could not get that footage on the same day, it's unacceptable. There should be no exceptions whatsoever. It must be one hundred per cent historically correct.

I want to be able to say at the end of my working life that I recorded history faithfully. But you have to keep at it, and this means battling head office. I think I battled fairly successfully under the circumstances. But it did get me into many arguments with London.

Neil Davis gave his life to bring pictures of war to the World. The so called "makers" of his work sat in London. He would be entitled to neither attribution nor integrity under Australian Law. Is this fair?

A stills photographer working on a film set would be entitled moral rights protection for their photographs - photographs taken of scenes carefully lit and composed by the cinematographer. A stills photographer whose work is reproduced in a film is entitled attribution. Why is the cinematographer denied this?

The creative contribution of cinematographers is acknowledged through attribution in film credits, seniority on the set of a film and personal recognition through industry awards. The works of Australian cinematographers Damien Parer, Dean Semler, ACS and John Seale, ACS ASC, have been honoured with Academy Awards.

The film industry, and the general community, widely acknowledge the creative contribution of the cinematographer.

A submission from the ACS was considered by the Office of the Attorney General prior to finalising the moral rights provisions of the Bill. In a letter to ACS President Milton Ingerson, dated 24 July 1997, David McCulloch, replying on behalf of the Attorney General, The Hon Daryl Williams AM QC MP, said.

The Government's position in relation to which individuals should be recognised as the principle 'authors' of a cinematograph film for the purposes of moral rights is reflected in the Bill. That is, the principle director and the principle producer of a film will have the moral rights in relation to the final version of the film. The Government is aware that other creators such as the cinematographer, the script writer and the composer also play an integral part in the making of some films. However, these creators are not usually regarded as having the key responsibility for the final version of the film. The moral rights provisions will, of course,

apply to the underlying works of these creators.

Unfortunately this is not the case. The moral rights provisions do not protect the underlying works of the cinematographer in any way.

Moral rights should be granted to the creative contributors of a film.

DURATION AND WAIVER OF MORAL RIGHTS.

Moral rights should not be subject to waiver. The legislation acknowledges that moral rights are personal rights and should not be capable of assignment. The concept of waiver treats moral rights in the same manner as copyright or other economic rights, rather than accepting moral rights as a separate form of right. A person cannot cease to be the creator of a work, nor does the integrity in that work cease to exist, simply because of a waiver. Providing for the possibility of waiver of moral rights will, in practise, lead to a significant dilution of those rights. Economic imperatives will lead to the inclusion of waiver clauses in all contracts relating to works and cinematograph films.

Linking the duration of moral rights to copyright, while convenient, detracts from the treatment of moral rights as a separate and distinct form of right. As the rights are personal rights, the duration should be linked to the life of the creator and maintained for 50 years after death.

Moral rights should not be subject to waiver and they should be maintained for 50 years after the death of the author.

DEFINING PHOTOGRAPHY.

The making of a film involves photography. Photography is the process of recording images by the action of light. This process is undertaken by a cinematographer. On a film set the cinematographer is often referred to as the director of photography.

Once a frame of film has been exposed copyright should exist in that image, because a print derived from a frame is identical to a photograph. Copyright exists in a shot, (a sequence of frames), because it is a *cinematograph film*. Copyright also exists in a film that is an edited sequence of shots.

The Copyright Act does not define the copyright that exists in a frame. A frame taken from a film cannot be defined as a *cinematograph film* because it is not an aggregate of visual images embodied in an article or thing capable of being shown as a moving picture. Neither can a frame be considered a photograph, because it embodies a visual image which forms part of a *cinematograph film*.

Digital technology blurs the line between still and motion picture photography. Digital cameras are currently available that capture images that can be viewed as either a moving image or individual photographs. Computers can capture frames from a film and modify or copy such frames in the same way as a photograph.

The Act should define a frame, viewed in isolation from a film, as a photograph. The author of a photograph is the person who took the photograph. The author of a frame is the cinematographer.

The term *cinematograph film* encompasses both complete, edited, films and the individual shots created during the production of a film.

The process of editing gives a film an original character and while the director of a film may be responsible for the original character of the film they are not the author of the images. Images can be, and are, shot without any input from the director, or prior to the director's involvement.

The shots, from which the film is edited, are works in their own right and copyright exists in them separately, whether they are used in a film or not.

The work of the cinematographer forms both an underlying work, (the frames and the shots), and a work integral with the edited film itself.

Clause 10 of the Copyright Act should define a frame, taken from a cinematograph film, as a photograph.

The cinematographer should be defined as the author of the visual images of a cinematograph film.

EXAMPLES OF MORAL RIGHTS VIOLATIONS

Any action that could infringe the moral rights of a photographer could equally infringe the moral rights of a cinematographer.

- Images shot by Australian cinematographer Don McAlpine, for the film "Clear and Present Danger" were used in the television series "JAG", out of context and without attribution. Twenty eight shots were taken from one of the best known sequences of the film.
- The Danish High Court found that the panning and scanning of the widescreen film "Three Days of the Condor", "mutilates" and "distorts" the film. In this particular case the action was brought by Sidney Pollack, the director of the film. However, modifying an image in this way could clearly constitute a breach of the cinematographer's right to integrity as it alters composition by deleting more than 50% of the frame.
- In February 1995 Trimark Pictures announced its intentions to colourise the low budget US feature film "Federal Hill", against the wishes of director Michael Corrente. Corrente credited cinematographer Richard Crudo with the choice of black and white to achieve the film's look. The studio later backed down under pressure from the Hollywood creative community.
- An Australian company called AdExchange has sold Australian made TV commercials overseas, to advertise products and services totally different from their original purpose.

The following quote appeared in an article written by Peter Adams, Director, about AdExchange.

"Moral Rights is something being considered for inclusion in the Copyright Act - hopefully this will happen soon. When it does, Mr Blanket's rights to use other people's work without their permission will be severely curtailed. His on-selling of Australian commercials overseas

is a gross invasion of the moral rights of the directors, actors, cameramen and creative teams who created and crafted the commercial in the first place. It is their expertise he is profiting from and he is doing so at their expense. Without them AdExchange would be nothing."

John Daniel, Past Executive Director of SPAA

Other ways the moral rights of a cinematographer could be infringed are:

- A magnificent landscape shot, filmed for use in a "Lawrence of Arabia" style epic but edited out of the final film, is used in a political TV advertisement, against the express wishes of the cinematographer.
- A frame from a natural history documentary film is used as a photograph in an Australian wildlife calendar, without attribution to the cinematographer. The cinematographer spent six weeks alone in a hide to record the shot. All other photographs used in the calendar are attributed.

THE SITUATION IN OTHER COUNTRIES.

Moral Rights

Countries that specifically recognise cinematographers as authors include; Estonia, Jordan, Latvia, Moldova, Russia and Slovenia.

Countries whose legislation would allow cinematographers to be recognised as contributing authors to a film include; France, Germany, Hungary, Japan, Panama, Poland and Switzerland.

Frames as Photographs

Italian Copyright Law specifically defines a frame taken from a film as a photograph.

Countries such as France and Germany do not exclude frames from the definition of photographs.

The United States.

The United States has limited moral rights protections. However, two 'film specific' Bills have been introduced over the past few years. The Film Disclosure Act would require alterations to a film to be explained in a disclaimer preceding the picture. The Film Authorship Act would provide moral rights protection for film authors. In both Acts the authors of a film are defined as the director, writer and cinematographer.

The United Kingdom, Canada and New Zealand.

These countries do not provide moral rights protection for cinematographers. Neither do they define the author of a photograph as the person who took the photograph. For example, under Canadian Law, the author of a photograph, and therefore the person entitled to exercise moral rights, is the person who owned the photograph when the photograph was made.

SUMMARY OF RECOMMENDATIONS

- Moral rights should be granted to cinematographers because they create the visual images of a film.
- A work of cinematography should be protected in the same way as a work of photography.
- Moral rights should be granted to the creative contributors of a film.
- Moral rights should not be subject to waiver and they should be maintained for 50 years after the death of the author.
- Clause 10 of the Copyright Act should define a frame, taken from a *cinematograph film*, as a photograph.
- The cinematographer should be defined as the author of the visual images of a *cinematograph film*.

SPECIFIC AMENDMENTS.

The ACS has three major concerns with the Copyright Amendment Bill in its current form.

- It fails to recognise the authorship of the cinematographer.
- It fails to clearly define film authorship. For example, the inclusion of the Producer is based on the assumption that they are a key creative contributor to the film, yet the Act permits a body corporate to be defined as the Producer.
- It permits waivers of authors rights.

The ACS suggests the following amendments.

- The definition of *author*, in relation to a cinematograph film, be amended to include the cinematographer. References to the *maker* of the film should be deleted, to avoid confusion with other sections of the act, and replaced with *author*.
- Amend the Act by replacing *director or producer* with *author*.
- Clause 190 be amended to define the producer of a film as a natural person.
- Amend clause 195AG to ensure that the right of attribution of authorship in respect of the work is a right of each joint author. Under this section as drafted it appears a body corporate producer could modify a film and infringe the director's right, yet the director could not claim an act of false attribution. (...altered by a person other than the director or producer of the film,...)
- Amend clause 195AL "Duration of Moral Rights" to read:
The moral rights in respect of a work continue in force until the expiration of fifty years after the expiration of the calendar year in which the author of the work died.

- Clause 195AV (2) be deleted. The ACS is not aware of any legal difference between a written consent and a waiver.
- Amend clauses 195AQ and 195AR to include additional matter to be taken into account:
(3) (i) whether the author consented to the act or omission.
- Delete clause 195AZG, Waiver of moral rights.
- Amend Clause 195AZH, "Parts of Works", to include material shot for a completed film. Whilst the ACS recognises the sensible and practical approach taken in ensuring moral rights exist only in relation to a completed film consideration must be given to the possibility that "out takes" or other independent material could be used in a way damaging to the author.
- Amend clause 195AZI, Works of joint authorship, to include a cinematograph film.
- Delete clauses 195AZJ and 195AZK.