



Film Australia/Holding Redlich

# INTRODUCTION TO COPYRIGHT AND RELATED ISSUES FOR DOCUMENTARY FILM MAKERS



**FILM AUSTRALIA/HOLDING REDLICH**

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## 1 INTRODUCTION

This booklet has been prepared by Film Australia in association with Holding Redlich to assist documentary film makers with an understanding of copyright laws and, in particular, the important distinction between the ownership of copyright and the contractual right to receive revenues.

This booklet covers:

- the basics of copyright law in Australia;
- the importance of the way in which rights are defined in contracts dealing with the licensing and assignment of copyright, and provides some examples of rights relevant to documentary film makers and how these rights are commonly defined;
- the basics of other rights of creators of works in which copyright subsists, in particular, performers' rights and moral rights, in Australia; and
- the distinction between the ownership of copyright and the contractual right to receive revenues.

This booklet does not provide an exhaustive coverage of copyright law in Australia as it applies to documentary film makers, nor to all of the issues which should be considered by documentary film makers in their negotiation of contracts dealing with the licensing and assignment of copyright. This booklet does not constitute legal advice, and is intended only to provide general assistance to documentary film makers. Documentary film makers should, in respect of any particular project, seek competent legal and financial advice in respect of the particular circumstances of that project.

## 2 COPYRIGHT

### 2.1 What is copyright?

In Australia, copyright is protected by the *Copyright Act 1968* (Cth) (**Act**).

Copyright is a “bundle” of rights, exclusive to copyright owners, to do (or authorise others to do) or prevent others from doing things in respect of materials which are protected under the Act.

Copyright is a type of intangible property under the category of “intellectual property”. It is separate to the physical ownership of property.

Copyright exists to reward makers of creative materials and to encourage further creative materials to be made for the benefit of society.

## 2.2 What materials are protected?

The following categories of materials (commonly referred to as “copyright materials”) are protected under the Act:

### Works

- literary works (such as novels, poems and song lyrics);
- dramatic works (such as scripts);
- music;
- artistic works (such as drawings, paintings, buildings, maps and photographs);

### Materials other than Works

- cinematograph films (such as documentaries, feature films, short films, television programs and animations);
- sound recordings;
- television and sound broadcasts; and
- published editions of literary works, dramatic works, music and artistic works.

For the purpose of copyright, a “cinematograph film” is the combination of visual images embodied in an article capable (by use of that article) of being shown as a moving picture and the sounds embodied in a soundtrack associated with the visual images.

For copyright materials to be protected by copyright, they must:

- be original (that is, not be copies of other materials and, in the case of literary, dramatic, music and artistic works, be created with skill and labour);
- be in a material form (that is, be expressed in writing or “fixed” in some other material form); and
- have a connection to Australia (or another country granted copyright protection in Australia – being most countries with which documentary film makers in Australia may ordinarily deal). A film will have an Australian connection if, during a substantial part of the period during which it was made, the filmmaker was an Australian resident or citizen, or it was made or first published in Australia, or another country granted copyright protection in Australia.

Things which are not protected by copyright include:

- ideas;

- styles, techniques and methods; and
- names, titles and slogans.

These things may be protected by other areas of law such as trade marks, passing off, consumer protection and fair trading laws, confidential information and defamation.

### **2.3 What rights are protected?**

In relation to literary works, dramatic works and music, copyright is the right to do any or all of the following things:

- reproduce the works;
- publish the works;
- communicate the works to the public;
- perform the works in public; and
- make adaptations of the works.

In relation to artistic works, copyright is the right to do any or all of the following things:

- reproduce the works;
- publish the works; and
- communicate the works to the public.

In relation to films and sound recordings, copyright is the right to do any or all of the following things:

- copy the films or sound recordings;
- cause the films or sound recordings to be seen or heard in public; and
- communicate the films or sound recordings to the public.

In relation to television and sound broadcasts, copyright is the right to do any or all of the following things:

- make films or sound recordings of the broadcasts;
- re-broadcast the broadcasts; and
- communicate the broadcasts to the public (otherwise than by broadcasting).

Unless otherwise agreed to in writing, the above rights belong exclusively to copyright owners.

## **2.4 How is copyright created?**

In Australia:

- copyright comes into existence freely and automatically upon the creation of copyright material;
- there is no requirement to register or pay a fee for copyright; and
- there is no requirement to include a copyright notice in or on copyright materials (that is, the © symbol followed by the copyright owner's name and the year of first publication). Doing so (for example, on an outline of a film, a treatment or draft of a script), however, is good practice because it notifies users that the materials are protected by copyright and identifies the relevant copyright owner.

## **2.5 Who owns copyright?**

The ownership of copyright in copyright materials is separate from the ownership of physical articles containing or embodying copyright materials. For example, a person who purchases a DVD will own the physical copy of the DVD but will not own the copyright in the film contained in the DVD.

Copyright ownership is often determined by the terms of an agreement between the parties. In the absence of such an agreement, copyright is generally owned by the creator of the copyright material, with the following exceptions:

- the copyright in films is usually owned by the producer or the person who paid for the film to be made;
- the copyright in copyright materials created by an employee in the course of employment is owned by the employer;
- the copyright in a commissioned film or sound recording is owned by the person who gave the commission;
- the copyright in broadcasts is owned by the maker of the broadcasts; and
- the copyright in a published edition of works is owned by the publisher of the edition.

Copyright ownership in "underlying works" (for example, the script on which a film is based) is usually owned, at least initially, by the creator (for example, the writer), unless the terms of an agreement provide otherwise.

## **2.6 Director's copyright**

As of 19 December 2005, film directors and producers (of films which began production after 19 December 2005) are considered joint copyright owners of the film for the limited purpose of retransmission of free-to-air television broadcasts by pay television services, unless the film is commissioned, or the director is working as an employee (in which case the commissioner or the employer will obtain the interest).

## **2.7 How long does copyright last?**

For literary works, dramatic works, music and artistic works which were still in copyright on, or created on or after, 1 January 2005, copyright lasts for the life of the creator plus 70 years. There is a special exception for certain unpublished literary works, dramatic works and music, the copyright in which lasts for 70 years after first publication.

For literary works, dramatic works, music and artistic works which were not in copyright on 1 January 2005, the previous threshold still applies – copyright lasts for the life of the creator plus 50 years.

From 1 January 2005, copyright in a film and sound recording lasts for 70 years after the expiration of the calendar year in which the film or sound recording is first published. Prior to 1 May 1969, there was no separate copyright in films, however, copyright in the “underlying” works of such films (for example, the scripts) may still exist.

Copyright in a television or sound broadcast lasts for 50 years after the expiration of the calendar year in which the broadcast is made. Like films, however, there was no separate copyright in broadcasts prior to 1 May 1969.

When copyright expires, the relevant materials are said to be “in the public domain”. Materials in the public domain may be reproduced without permission.

## **2.8 How is copyright infringed?**

Copyright is infringed when a person other than an owner or authorised licensee uses copyright materials in any one of the ways listed in section 2.3 above.

Copyright is not infringed, however, when:

- less than a “substantial” (important, essential or distinctive) part of the copyright materials are used;
- the copyright owner's permission has been obtained; or
- one of the following exceptions or licences applies.

## 2.9 What are the exceptions and licences?

Copyright materials can be used without permission if one of the following exceptions (relevant to film makers) applies:

### (a) Exception – fair dealing for criticism or review

An audio-visual item (and any work or other audio-visual item included in the audio-visual item) can be used without permission for the purpose of **criticism or review** if the use is “fair” and a sufficient acknowledgement (that is, identification of the item’s title and author) is made (e.g., a review of a new film which incorporates segments of that film)

For this exception to apply, a person’s criticism or review must be genuine. If the use is primarily for other purposes (for example, to make profit or divert consumers away from competition), the fact that there is some criticism or review is irrelevant and the exception will not apply.

### (b) Exception – fair dealing for reporting news

An audio-visual item (and any work or other audio-visual item included in the audio-visual item) can be used without permission if the use is “fair” and for the purpose of or associated with the **reporting of news**:

- in a newspaper or magazine or similar periodical (and a sufficient acknowledgement of the item is made); or
- by means of a communication to the public or in a film.

For this exception to apply, the item must genuinely report or comment on news including recent events and information previously not known to the public. If the primary purpose of the item is to entertain, the presence of newsworthy issues will most likely be irrelevant and the exception will not apply.

The Act does not state particular factors to be considered in determining whether a use is “fair”, however, the following factors may provide guidance:

- how the interests of the copyright owner are affected;
- whether the copyright owner and reporter are in competition; and
- the extent of the use and whether the copyright materials have been dealt with for some other purpose.

**(c) Exception – fair dealing for parody or satire**

An audio-visual item (and any work or other audio-visual item included in the audio-visual item) can be used without permission if the use is “fair” and for the purpose of **parody or satire**.

This exception is relatively new in the Act and it is unclear how it will be applied by the film and television industry and the courts.

The words “parody” and “satire” are not defined in the Act but are defined in the *Macquarie Dictionary* as follows:

- “parody” means “1. a humorous or satirical imitation of a serious piece of literature or writing. 2. the kind of literary composition represented by such imitations... 4. a poor imitation; a travesty”;
- “satire” means “the use of irony, sarcasm, ridicule, etc., in exposing, denouncing, or deriding vice, folly, etc”.

In determining whether the use is “fair”, the following factors may be considered:

- the amount of copyright material used;
- the context in which the parody or satire is used; and
- whether or not the copyright owner generally licences such uses.

**(d) Exception – fair dealing for research or study**

Copyright materials can be used without permission if the use is “fair” and for **research or study**. For example, film makers can copy historical information for the purpose of research before making a film.

The Federal Court of Australia has held that the words “research” and “study” are intended to have their *Macquarie Dictionary* meanings:

- “research” means the “diligent and systematic inquiry or investigation into a subject in order to discover facts or principles”; and
- “study” means “1. Application of the mind to the acquisition of knowledge, as by reading, investigation or reflection. 2. The cultivation of a particular branch of learning, science, or art... 3. A particular course of effort to acquire knowledge... 5. A thorough examination and analysis of a particular subject”.

Under this exception, the use will be “fair”:

- in the case of a literary work, dramatic work or music (or an adaptation of such a work) that is contained in a published edition of at least 10 pages – if no more than 10% of the number of pages is copied (or one chapter, if the work is divided into chapters);
- in the case of a literary work or dramatic work published in electronic form (or an adaptation of such a literary work or dramatic work published in electronic form) – if no more than 10% of the number of words in the work or adaptation is copied (or one chapter, if the work or adaptation is divided into chapters); and
- in the case of a literary work, dramatic work or music (or an adaptation of such a work) contained in an article in a periodical publication such as a magazine – if only one article is copied (or more than one article if the articles are related to the same research or course of study).

For all other types of copyright materials, including audio-visual items, the following factors should be considered (as set out in the Act) in determining whether the use is “fair”:

- the purpose and character of the use;
- the nature of the copyright materials;
- the possibility of obtaining the copyright materials within a reasonable time at an ordinary commercial price;
- the effect of the use on the potential market for, or value of, the copyright materials; and
- where only parts of the copyright materials are copied - the amount and substantiality of the parts copied.

**(e) Exception – filming in public**

The following copyright materials can be included in a film or television program without permission:

- a sculpture or a work of artistic craftsmanship situated in a public place, otherwise than temporarily (for example, a statue in a park);
- a building or model of a building; and
- an artistic work if its inclusion is only incidental to the principal matters represented in the film (for example, a painting in the background of a scene filmed at an art gallery).

**(f) Exception – use of unpublished films in libraries and archives**

As outlined in section 2.6 above, copyright in films and sound recordings lasts indefinitely until first publication.

However, if a film or sound recording remains unpublished for 50 years, and a copy of the film or sound recording is kept in a public library or archive, the film or sound recording (and any copyright materials contained in it) may be copied or communicated without permission, provided that various conditions are satisfied (including the condition that the copying or communicating must be done for the purpose of research or study, or with a view to publication).

**2.10 Copyright can be assigned or licensed**

**(a) Assigning copyright**

Like physical property, copyright can be assigned (i.e., its ownership transferred). When copyright is assigned, the assignee (being the person receiving the transfer of ownership) becomes the new owner of it. It is important to understand that the assignment (i.e., sale or transfer) of copyright is separate to the sale or transfer of physical property which may embody copyright material. Accordingly, if you purchase a DVD you do not become the owner of the copyright in the film embodied in the DVD. Similarly, if you purchase a painting you do not become the owner of the copyright in the painting – the copyright remains with the artist.

**(b) Licensing copyright**

Copyright can also be licensed (i.e., its use permitted by others, usually in a written agreement). When copyright is licensed, the licensee obtains permission to use copyright materials to do certain things (set out in the grant of licence) but does not become the owner of copyright.

A licence may be either exclusive or non-exclusive. Under an exclusive licence, the licensee is given the exclusive right to do certain things (set out in the grant of licence) in respect of the licensed copyright materials. Under a non-exclusive licence, the licensee is given the right to do certain things (set out in the grant of licence), but the copyright owner may also give the same right to other licensees.

**(c) What can be assigned or licensed?**

Any or all of the rights listed in section 2.3 can be assigned or licensed.

The rights are divisible and can be assigned or licensed according to the following criteria:

- **territory** (the place in which the assignment or licence will apply);
- **term** (the duration of the licence); and/or
- **media** (the types of media the assignment or licence will apply to).

For example, instead of assigning all of the copyright in a film, a copyright owner may wish to licence the right to communicate the film to the public (one of the rights listed in section 2.3) in Australia only (the territory), for 6 months (the term) and in cinemas only (the medium).

In the film and television industry, there is a strong emphasis on dividing the rights according to media. For example, the following rights may be assigned or licensed in Film Australia's distribution agreements:

- **Airline and Hotel Rights** – rights to permit or licence the communication of copyright materials to non-paying audiences by means of closed circuit televisions in buses, trains, hotels, motels, aeroplanes and ships;
- **DVD Rights** – rights to duplicate and reproduce copyright materials by means of DVDs and to distribute, sell, let, hire and otherwise dispose of those DVDs;
- **Free-to-air Television Rights** – rights to communicate copyright materials to the public by means of free-to-air television broadcast or any other free-to-air television technology;
- **Pay Television Rights** – rights to communicate copyright materials to subscribers of subscription television services, including “Basic Pay Television Rights” (where subscribers pay for specific packages of channels and services), “Premium Pay Television Rights” (where the subscribers pay for specific channels or services) and “Pay Per View Pay Television Rights” (where the subscribers pay an additional fee for specific programs);
- **Video on Demand Rights** – rights to licence copyright materials on a service where consumers can request, for domestic or other non-theatrical private purposes, the viewing of a program on a television screen or other monitor by way of a direct signal which is not commonly accessible by multiple users, in return for a fee;
- **Theatrical Rights** – rights to permit or licence the exhibition of copyright materials in motion picture theatres or other places of public entertainment to which the general public is customarily invited and admitted upon the payment of an admission fee;

- **Non-Theatrical Rights** – rights to communicate copyright materials to non-paying audiences in educational institutions, churches, museums, hospitals, prisons, business and industry and other organisations of an educational, cultural, religious, charitable or social nature, including drama groups, film societies and professional associations;
- **Music Rights** – rights to exploit all or any part of the copyright in music made or developed for or in the course of producing copyright materials (such as film or television programs), including the copyright in the sound recordings and manuscripts;
- **Footage Rights** – rights to licence the copying and incorporation of any part of the copyright materials in other audio-visual materials, and to authorise the exploitation of those other audio-visual materials in some way;
- **Novelisation Rights** – rights to publish or cause to be published a book or other publication based on copyright materials and to exploit all of the copyright in that book or other publication;
- **Re-versioning Rights** – rights to edit, cut-down, lengthen or reconstruct copyright materials (whether by omission of existing materials, addition of new materials, variation of a soundtrack, re-mixing or re-colouration);
- **Synopsis Rights** – rights to reproduce copyright materials by way of a synopsis of the contents of the copyright materials;
- **Derivative Rights** – rights to make sequels, prequels, remakes, spin-offs or television series from an existing script or series;
- **Online Rights** - rights to use, store and reap digitally all or any part of copyright materials (and associated materials) by means of computer technology or other technology known or subsequently invented in any format and delivered through any platform or online service;
- **Merchandising Rights** – rights to, and to permit others to, use copyright materials and any part of them and any of the characters, identities and situations in them, including by name or characteristic, in connection with the supply of goods or services;
- **Interactive Rights** – rights to communicate copyright materials to the public by means of any technology now known or subsequently invented whereby there is a combination of computer technology and audio-visual material (including a DVD, CD ROM and CD Interactive) and the right to distribute, sell, let, hire or otherwise dispose of such technology; and

- **New Technology Rights** – rights to use, store and reproduce digitally all or any part of copyright materials by means of fixed distribution media including any computer technology or other technology now known or later brought into existence in any format and to deliver them through any platform or online or internet service.

The emergence of new types of content (such as live-streamed internet programs) and new technologies (such as 3G mobile phones) has complicated the division of the rights according to media. For example, the following rights (most of which derive from the above media rights) are sometimes assigned or licensed in relation to films:

- **Podcasting Rights** – rights to deliver, via the internet using RSS technology, audio-visual material (such as MP3s) to subscribers for download onto a computer or portable device (such as iPods) on a regular basis (and these rights may be a subset of the “New Technology” rights referred to above);
- **Mobile Content Distribution Rights** – rights to distribute copyright materials and the right to create and exploit ring tones, logos, static and animated wallpapers and screensavers, mobile games and audio - visual clips for any mobile telecommunication service now known or later discovered, by means of any technology now known or later discovered, whether or not for payment of a fee (and these rights may be a subset of another right such a “Merchandising” rights referred to above); and
- **Live-Streaming Rights** – rights to deliver audio-visual material over the internet at a point in time so that it can be processed as a steady and continuous stream allowing consumers to view the material before the entire material has been transmitted from its source, whether or not a fee is paid and whether or not from pre-recorded files or as part of a live feed (and these rights may be a subset of “New Technology” and “Online” rights referred to above).

However, there are limitless ways in which copyright may be divided. For example, although it may not be common in the film and television industry in Australia to divide rights by way of type of transmission licence, this is possible, for example:

- **Datacasting Rights** – rights to use a datacasting licence to deliver, using broadcasting services bands, a wide variety of content (for example, short extracts of television programs, information about programs via interactive on-screen menus and information in the form of text and still pictures) to persons having equipment appropriate for receiving such content; and

- **Narrowcasting Rights** – rights to deliver a broadcasting service limited to a special or common interest group, a particular location or a period or special event.

**It is crucial for film makers to understand that rights definitions change (sometimes quite dramatically) from one agreement to another and, as such, reading and understanding the rights definitions in each agreement which forms part of the suite of agreements which attach to any particular project is of great importance.**

Even though, for example, a filmmaker may have reserved for the filmmaker “new technology rights” under one distribution agreement (as defined in that first distributor’s distribution agreement), it is a risky filmmaker who agrees to grant “new technology rights” under another distribution agreement (as defined in that second distributor’s distribution agreement) without reading, analysing and, where necessary, obtaining advice, as to whether those two definitions cover the same ground or, on the other hand, the filmmaker is granting to the second distributor more rights than in fact the filmmaker reserved from the first distribution agreement!

**(d) How is copyright assigned or licensed?**

In most cases, rights are assigned or licensed by way of written agreements between the parties which set out exactly what rights are assigned or licensed in each case (having regard to territory, term and media).

To be effective, an assignment or exclusive licence of copyright must be in writing and signed by the assignor. A non-exclusive licence may be verbal or in writing, however, it is best practice for it to be in writing and signed by the licensor also.

**2.11 Some Practical Tips**

- Consider the material and the rights that would be required to use the material, in your project, prior to using it and not as an afterthought. Otherwise you may find that either you cannot acquire the rights (i.e., they are exclusively licensed to another filmmaker for their project) or the acquisition of rights is too expensive for the budget for your project.
- In considering the rights that you require for your project, distinguish between those rights that are essential for the project, and those that you desire but are not essential. For example, for many documentaries, podcasting rights are desirable but not essential. In this regard, it will be very

important to consider the requirements of every person to whom you may licence rights such as a distributor or television broadcaster.

- If your project is destined for international release, or release in jurisdictions outside Australia, consider that the copyright laws in other jurisdictions differ to those in Australia and, to avoid disputes, it is generally prudent to obtain permissions from all owners of copyright in material even where it is legally possible to use that material without permission in Australia under the Act. For example, a defence of fair dealing for reporting news may be available under the Act for use of your material in Australia, but not in another jurisdiction outside of Australia where your project is likely to be released.

There is a checklist in Annexure A to this booklet to assist you in determining when you need permission from the owners of copyright in material you wish to use in your project, however, you should note the point above in respect of an international release of your project.

### 3 MORAL RIGHTS

#### 3.1 What are moral rights?

Moral rights are the personal rights of creators of literary works, dramatic works, music, artistic works and films to:

- be identified as authors of their materials (**right of attribution of authorship**);
- not have authorship to their materials falsely attributed (**right not to have authorship falsely attributed**); and
- prevent derogatory treatment of their materials which prejudicially affects their honour or reputation (**right of integrity**).

Moral rights apply to uses of literary works, dramatic works, music and artistic works that take place on or after 21 December 2000 (irrespective of when the work was created).

Moral rights apply to films (and works included in such films) made on or after 21 December 2000.

#### 3.2 Who is granted moral rights?

Only individuals who are creators of materials are granted moral rights in those materials. Companies are not granted moral rights under the Act, as they are rights which are personal to the creator.

In relation to films, only principal directors, producers (who are not companies) and screenwriters are granted moral rights under the Act.

Moral rights cannot be assigned.

### **3.3 How long do moral rights last?**

Except for a creator's right of integrity in relation to films, which lasts only until the creator dies, a creator's moral rights continue in force for the duration of copyright. Therefore, if a creator dies, and their moral rights continue, their moral rights may be administered by their estate on their behalf.

### **3.4 When will moral rights be infringed?**

#### **(a) Infringing the right of attribution of authorship**

A person infringes a creator's right of attribution of authorship in respect of a work or film if the person does, or authorises the doing of, certain things without identifying the creator as the author of the work or film.

For example, in relation to a film, such things include:

- the making of a copy of the film;
- the exhibition of the film in public; and
- the communication of the film to the public.

The right of attribution of authorship is not generally an issue with films and television programs as everyone, including the caterers, are usually credited.

#### **(b) Infringing the right not to have authorship falsely attributed**

A person infringes a creator's right not to have authorship of a work or film falsely attributed if the person does an "act of false attribution".

In relation to a film, it is an "act of false attribution":

- to insert or affix, or to authorise the inserting or affixing of, a person's name on the film or a copy of the film so as to imply falsely that the person is the director, producer or screenwriter of the film;
- to deal with the film or a copy of the film if a person's name has been so inserted or affixed on the film or a copy of the film and the attributor knows that the person is not the director, producer or screenwriter of the film; or
- to communicate the film to the public as being a film of which a person is the director, producer or screenwriter if the attributor knows that the person is not the director, producer or screenwriter of the film.

**(c)     Infringing the right of integrity of authorship**

A person infringes a creator's right of integrity of authorship in respect of a work or film if the person subjects all or a substantial part of the work or film to "derogatory treatment".

In relation to films, "derogatory treatment" means:

- the doing of anything that results in a material distortion of, the mutilation of, or a material alteration to, the film that is prejudicial to the makers' honour or reputation; or
- the doing of anything else that is prejudicial to the honour or reputation of the makers of the film.

**3.5     What are the exceptions?**

**(a)     Reasonable conduct**

It is a defence to an infringement of the right of attribution of authorship and the right of integrity of authorship that the relevant conduct was reasonable in all the circumstances.

In relation to works, the matters to be taken into account in determining whether conduct was reasonable include:

- the nature of the work;
- the purpose for which the work is used;
- the manner and context in which the work is used;
- any relevant industry practice or code of practice;
- any difficulty or expense that would have been incurred as a result of identifying the author;
- whether the film was made in the course of employment; and
- whether the work was created under a contract for the performance by the author of services for another person.

In relation to a film, the matters to be taken into account in determining whether conduct was reasonable include:

- the nature of the film;
- the purpose for which the film was used;

- the manner and context in which the film was used;
- any relevant industry practice or code of practice;
- whether the film was made in the course of employment; and
- whether the primary purpose for which the film was made was for exhibition at cinemas, for broadcasting by television or for some other purpose.

**(b) Consent to conduct that would otherwise infringe moral rights**

Creators may consent in writing to actions that might otherwise infringe their moral rights.

Consents, however, are not valid if they are made under duress or as a result of a false or misleading statement.

**(c) Waivers of moral rights**

Some foreign jurisdictions allow a "waiver" (i.e., full revocation) of moral rights rather than consent (i.e., permission). So, while obtaining a consent is sufficient to provide a waiver, obtaining a waiver from a creator may not provide a consent to what would otherwise be an infringement of a moral right. Therefore, a waiver most likely cannot be relied upon under the Act and a consent, in writing, must therefore be obtained from the creator.

### **3.6 Moral rights of performers**

Performers' moral rights are confined to live performances and performances recorded on sound recordings, and not to audio-visual performances.

Identical moral rights apply in respect of performers:

- the right of attribution of performership;
- the right not to have performership falsely attributed; and
- the right of integrity of performership.

A person who fails to attribute a performer, falsely attributes a performer or treats a performance in a derogatory manner which is prejudicial to the performer will infringe the performer's moral rights, unless the performer consented to the person's act or omission in writing or the act or omission (except a false attribution of the performer) was reasonable.

### 3.7 Some practical tips

- At the same time you consider the material and the rights that are required for your project, you should consider the written moral rights consents that you require. Obviously, a comprehensive moral rights consent is preferable although this is not always possible. To assist producers, the Screen Producers Association of Australia (SPAA), the Australian Directors Guild (ADG) (formerly ASDA), and the Australian Writers Guild (AWG) have agreed upon a standard moral rights consent framework for films, dramas and documentaries which allows producers to alter material to meet television slot requirements, incorporate advertisements and other acts (refer to the framework in Annexure B to this booklet).
- To the extent possible, you should obtain written moral rights consents at the same time as you obtain written assignments or licences of copyright. Where the owner of copyright is not the author of the material, you will still need to obtain a written moral rights consent from the author of the material.
- If undertaking a project with foreign contributors (i.e., a co-production or off-shore work), you should ensure the moral rights documentation provides for a consent to an infringement of moral rights. A waiver (without a consent provision) is most likely not valid under the Act.
- Wherever possible and where the material is primary (in copyright terms) to your project (e.g. from the scriptwriter of a project), you should obtain a written moral rights consent directly from the author. However, in respect of other material, you could require the owner of copyright to supply you with a copy of the author's written moral rights consent (and ensure that it would extend to acts or omissions undertaken by you or others in connection with your project) and/or obtain a warranty from the owner of copyright in the material that it has obtained a written moral rights consent from the author and it extends to acts or omissions undertaken by you or others in connection with your project.

See the checklist in Annexure A to this booklet.

## **4 PERFORMERS' RIGHTS**

### **4.1 Introduction**

Performers who contribute to the sounds of a performance (including the conductor) have two rights in relation to their performances:

- the right to bring an action for the unauthorised use of their performances; and
- the right to share in the ownership of copyright in sound recordings of their performances.

Generally, a performance is only protected if it is a live performance (whether in front of an audience or otherwise).

To be protected, a performance must also be one of the following:

- the performance (including an improvisation) of a dramatic work, including a performance given with the use of puppets;
- the performance (including an improvisation) of a musical work;
- the reading, recitation or delivery of a literary work;
- the performance of a dance; or
- the performance of a circus act or a variety act or any similar presentation or show.

Exempt from "performance" for the purposes of the Act are:

- the reading or delivery of news;
- the performance of sporting activities;
- performances by members of audiences; and
- performances by teachers in the course of educational instruction.

### **4.2 Right to bring an action for unauthorised performances**

#### **(a) Performers' right**

Performers may bring an action against a person if that person does any of the following things without the relevant performer's consent:

- makes a recording (direct or indirect) of a performance;

- makes a copy of a recording of a performance and the person knows, or ought reasonably to know, that the recording is unauthorised;
- communicates a performance to the public, either directly from the live performance or from an unauthorised recording of it;
- sells, lets on hire, or, by way of trade, exhibits in public or offers or exposes for sale or hire an unauthorised recording of a performance, and the person knows, or ought reasonably to know, that the recording is unauthorised;
- distributes an unauthorised recording of a performance for the purpose of trade or for any other purpose which will affect prejudicially the financial interests of a performer, and the person knows, or ought reasonably to know, that the recording is unauthorised;
- causes a recording of a performance to be heard or seen in public and the person knows, or ought reasonably to know, that the recording is unauthorised; and
- makes, for use in a soundtrack, a copy of an unauthorised sound recording of a performance and the person knows, or ought reasonably to know, that the making of the sound recording was not authorised for the purpose of use in that or any other soundtrack.

**(b) How long do the rights last for?**

Generally, the period of protection for a performance in relation to a film is 20 years after the end of the calendar year in which the performance is given. As it relates to a sound recording, the period of protection is 50 years from the end of the calendar year in which the performance is given.

**(c) Industry Agreements**

In practice, performers' rights are often determined by industry agreements and other contracts. With many audio-visual performances, it will be necessary to look at the industry agreements between the Screen Producers' Association of Australia (SPAA) and the Media Entertainment and Arts Alliance (MEAA) to determine the rights of a performer and filmmaker.

**4.3 Right to share ownership of copyright in sound recordings**

In relation to sound recordings of live performances (the copyright in which existed on or after 1 January 2005), a performer will share in the ownership of copyright, together with the other performers (if any) and the person who owns the recording media, unless:

- the recording of the performance is made for a fee;
- the recording is made in the course of employment; or
- there is a contrary agreement in place.

This right only applies to sound recordings of the types of performances listed in section 4.1.

#### **4.4 Some practical tips**

- Although there is no general law in Australia which prevents people from being filmed without their permission outside of performers' rights in the Act, the Trade Practices Act 1974 (and State Fair Trading Acts) and the tort of passing off affect certain uses of a person's image, in particular, if a person's image is used in a way that may suggest that the person has endorsed that use or is otherwise associated with a project.

## **5 EQUITY AND COPYRIGHT**

It is important to understand the distinction between the rights which flow from the ownership of copyright as compared to the rights which flow from the contractual arrangements between the parties involved in the production and distribution of programs.

### **5.1 Contractual Arrangements**

The contractual arrangements operate separately and independently from copyright ownership of a program and they can usually deal with all of the important commercial issues between the parties. For example:

- (a) if a party is the executive producer of a program, it can ensure by the terms of the contracts it enters into with the production company producing the program that it has appropriate approval rights (including appropriate approvals over cuts) as executive producer of the program, even it does not own any copyright in the program; and
- (b) if a party is the distributor of a program, it can ensure by the terms of the contracts it enters into with the owners of copyright in the program or, at the least, the party or parties who own the distribution rights, it has the exclusive right to distribute the program in the media it is to distribute the program (for example, for a documentary film, one distributor often acts as the distributor of the documentary film, theatrically (if relevant), and by means of all forms of television and DVD), even though the distributor does not (as is usual) own any copyright in the film itself (which would usually be owned by the production company and investors).

Of course, the contractual arrangements also determine the arrangements between the parties as to the share of revenues from the exploitation of a program. A common misunderstanding is that ownership of a share of copyright in a program ensures “control” of the program. This is incorrect. You could, for example, have no copyright ownership at all, and an entitlement to 50% of revenues flowing from the exploitation of the program. On the other hand, you could, for example, own 50% copyright in a program and be entitled to 25% of revenues flowing from the exploitation of the program. The possibilities are, of course, endless.

## **5.2 Accounting Treatment**

It is important to understand that a contractual right to receive income is a valuable asset in much the same way that copyright is, and will most likely be treated in the same way on the balance sheet of a company.

For example, if a production company owns 20% of the copyright in a documentary program which is anticipated to earn gross receipts of \$400,000, the value of the copyright owned by the production company will be shown in its balance sheet as an asset with a value of \$80,000 (ie 20% of \$400,000).

However, if the production company owns no copyright in the documentary program but has an enforceable contractual entitlement to receive 20% of the gross receipts earned from the distribution of the program, and those gross receipts are anticipated to be \$400,000, the value of the production company’s entitlement to gross receipts will also be shown in its balance sheet as an asset with a value of \$80,000 (being, again, 20% of \$400,000).

## **6 FURTHER INFORMATION**

Further information on copyright generally and copyright as it applies to film and television production may be obtained from the Australian Copyright Council ([www.copyright.org.au](http://www.copyright.org.au)). The Council’s website contains answers to frequently asked questions about copyright and also contains a list of the Council’s publications, several of which are of direct relevance to film makers.

**Holding Redlich/Film Australia Limited**  
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## **ANNEXURE A**

### **HANDY CHECKLIST**

#### **When do you need to obtain permission to use material in your film?**

1. Is the material a type of material that is protected by copyright?
2. Even if it is a type of material that is protected by copyright, has the copyright expired?
3. Even if it is a type of material that is protected by copyright, are you intending to use a substantial part of the copyright material?
4. Even if it is a type of material that is protected by copyright and a substantial part is being used, is the intended use a use that the copyright owner has the right to control?
5. Even if it is a type of material that is protected by copyright, a substantial part is being used and the intended use is a use that the copyright owner has the right to control, does a special exception apply?
6. If need to obtain permission, who is the copyright owner?
7. Is the copyright owner also the “author” for the purposes of moral rights?
8. If need to obtain permission/consent, what type of arrangement should you enter into with the copyright owner/author?

## ANNEXURE B

### ASDA, AWG, SPAA, AFC, FFC

### AUSTRALIAN MORAL RIGHTS CONSENT FRAMEWORK

Industry accord on provisions which, by consent, may be incorporated into Agreements

#### Introduction

ASDA, AWG, SPAA the AFC and the FFC have agreed that the following framework should be adopted by production companies and by authors who hold moral rights in cinematograph films ("**Authors**") concerning moral rights which may arise under the Copyright Act 1968 (the "**Act**").

#### Application

- This framework only applies to a cinematograph film which is a documentary or drama (including an animated drama) other than a series or serial ("**Film**").
- The parties intend that the application of this framework may be extended on a case by case basis.
- This framework only applies to the exploitation of Films within Australia. Exploitation in other territories is to be the subject of separate negotiation on a case by case basis.

#### Moral Rights Acknowledgement

Production companies acknowledge that Authors have moral rights in Films pursuant to the Act.

#### Consent to Editing for Specific Purposes

Authors will consent to material alterations to a Film, for the benefit of the production company and its licensees and assignees, for the following purposes:

- (a) to meet television time slot requirements;
- (b) to incorporate advertisements into a Film which is to be transmitted by means of a television or diffusion service;
- (c) to meet the legal requirements of broadcasting authorities;
- (d) to ensure that the Film meets any legal or classification requirements or to avoid any breach of law;
- (e) to make foreign language versions by means of dubbing or sub-titling the Film;
- (f) to make in-flight and/or on-board versions of the Film;
- (g) [to make non-interactive on-line versions of the Film; and]

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