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12 October 2001

SUBMISSION

TO: Performers Rights Submissions
Ministry of Economic Development
Attention: Warren Hassett

ON: Performers Rights

INTRODUCTION

1. This submission is from the Screen Producers and Directors Association of New Zealand (SPADA).
2. SPADA is the foremost industry organisation representing film and television producers in New Zealand. We have 280 members. Our mission statement is to be *the leading advocate for a robust screen production industry which strives to enhance the diversity of screen culture in New Zealand.*
3. This submission has been approved by SPADA's Executive, a Board annually elected by its members.
4. Reference to the Act and other abbreviations used throughout this submission have the corresponding meaning to that given in the Discussion Paper, "Performers Rights".

BACKGROUND

5. Our interest in this inquiry derives from many of SPADA's members being involved in the production, distribution and exploitation of New Zealand films, television programmes and videos (collectively referred to throughout as "films") and the interest of all our members in a thriving film and television industry in this country.

6. As commissioners of productions, producers are usually the copyright owner of the film. They are the party responsible for protecting and exploiting the rights in and to the film. Their ability to earn revenue from the film is dependent on their ability to control those rights and to prevent others from exploiting them.
7. A film is made up of a large number of disparate and individual underlying works which each have their own copyright. These can include the original work upon which the film is based, the script as a literary work, various set properties that may be artistic works in their own right; pre-existing musical numbers, choreographed dance routines, the specifically composed sound track for the film etc.
8. In addition to these copyrighted works there are performers' rights and the directors' rights (moral and in relation to rental and lending activities).
9. The tying together of all these rights into one bundle, able to be dealt with as a single entity is one of the producer's primary functions. This is in order for the producer to permit others to deal with the film, to meet the requirements of domestic and international investors and to maximise opportunities to gain revenue from the exploitation of the film and its various components.
10. The health of the film and television industry in New Zealand is dependent in large part on the ability of producers to secure and exploit these various rights.
11. The value of creative ability and expertise is well-recognised in an industry that is highly collaborative and requires large numbers of individuals to see a production delivered to the film or television screen. One has only to take the time to look at the credits that trail on endlessly after a programme or film has come to an end to realise just how many people are involved in a single production.
12. The Copyright Act 1994 is the single most important piece of legislation for producers, directors, writers, performers and musicians. The protection granted or denied by the Act helps determine the value – or otherwise – of the creative abilities and proceeds of these individuals.
13. In these circumstances SPADA welcomes the opportunity to make comment on the discussion paper on Performers Rights.

Questions 1 - 4: Awareness of current regime

14. Producers are generally well versed in the current performers' rights regime. The relationship between performers and producers is generally positive. Any difficulties in this relationship are rarely directly attributable to the rights regime.
15. Producers are required by investors and distributors of their films to secure all rights that create what is known as "the chain of title". For every location, product, word, picture, performance, piece of music, lyric or activity shown or included in a film, a producer needs to secure a written release or consent from the relevant owner or rights holder. In relation to performers' performances this is done directly with the performer, their agent or, where a performer has an existing recording contract, through the record company.
16. *SPADA's position is that the current legislation provides sufficient protection for performers.*
17. *The critical issue for producers is that flexibility in contracting arrangements is retained.*

Question 15 & 16: Moral Rights for Performers

18. In practical terms, authors' and directors' moral rights are always required to be waived by both domestic and overseas distributors and investors. Depending on the territory in which the film is released and that territory's censorship issues; depending on language requirements or depending on the medium of release, ie theatres, television, aircraft, hotels etc, films are often required to be edited or altered slightly from the original.
19. In these circumstances a writer's or director's right against derogation of his or her work conflicts with the commercial realities of film production and exploitation.
20. The expense of potential litigation and risk of the film being withdrawn from exhibition or broadcast in the event that a writer or director subsequently relies on their right against derogation of the work and objects to the editing of that work means that inevitably writers and directors are required to waive their moral rights.
21. Producers have no say in this. Unless they obtain such waivers they cannot secure distributors for their works. Such waivers would also be required in the event that performers were also granted moral rights in their performances.
22. *We submit that, because of the requirements upon producers from investors and distributors, moral rights must able to be waived.*

Questions 17 & 18: Rental Rights for Performers

23. Currently directors and composers agreements make reference to an equitable payment for rental and lending rights so as to conform with the requirement of the EC Directive in relation to the same. This type of provision is usually in the following form:

The Director hereby assigns to the Producer all rights he may have with respect to the Film pursuant to Article 2(1) and (2) of the E.C. Directive 92/100, OJ L346/61 (27 November 1992) on Rental and Lending Rights provided that nothing in this clause shall prevent the Director from receiving monies collected by authorised collecting agencies of any country in respect of any rental and lending rights and any similar rights to which the Director may hereafter become entitled under the laws of any country in connection with the exploitation of the Film provided that nothing herein shall impose any obligation on the Producer to make or collect such payments.

24. As may be seen, there is no obligation on the producer to make or collect such payments but the director (or composer as the case may be) is still entitled to receive money from end users.
25. SPADA has no objection to the implementation of a similar provision with respect to performers. However, the commercial reality with respect to such additional "equitable remuneration" is that film and programme budgets are extremely limited in New Zealand. There is a finite fee able to be paid a performer, director, composer etc. Although rental and lending rights may be seen as giving an individual an opportunity for leveraging additional payments, the reality is that the flat fee is simply apportioned to the various rights that release or consent is being sought for.
26. Regarding secondary use fees for performers, we stress that it is extremely rare for the investors in a New Zealand programme or film to recoup their investment (one of the main reasons why subsidy through public funding is necessary). Until recoupment, the producer rarely if ever sees any return from the programme or film he or she created.

27. To create an onus on a producer to pay a performer additional fees for each subsequent use of the programme / film would be tantamount to commercial suicide for a producer. There needs to be a fixed certainty as to costs in a production budget rather than a loose and infinite obligation to pay further sums of money as and when possible secondary uses are made of the programme or film.
28. *SPADA has no objection to performers being granted equitable remuneration for secondary uses of their performances, so long as the equitable remuneration is payable by end users rather than the producer, ie, from broadcasters, exhibitors and end users through fees payable to collecting agencies such as those that currently account to composers, writers and film/programme copyright owners.*

Conclusion

29. SPADA submits that the existing legislation is sufficient to cover performers' needs and that it is sufficiently flexible to allow the parties to do business in the existing commercial environment.

Karen Soich
President
Screen Producers and Directors Association

[sent unsigned by email]