

13 September 2023

BY EMAIL ONLY: anna.pound@accg.gov.au

Attention: Anna Pound
Assistant Director, Competition Exemptions
Australian Competition and Consumer Commission
Level 27, 135 King Street
Sydney NSW 2000

Re: AA1000642-1 (Application) – Response to SPA submission

AWGACS provides the following information in response to the written submission by Screen Producers Australia (**SPA**) dated 30 August 2023.

SPA's objections

- 1 AWGACS notes that SPA objects to the ACCC approving the Application on the following bases:
 - (a) the ACCC should not be asked to determine who is the intended beneficiary of Secondary Script Royalties;
 - (b) the "opt out" procedure would be unduly onerous on writers who may wish to negotiate Secondary Script Royalties directly with individual producers; and
 - (c) approval of the Application would cause "*further confusion as to who is entitled to receive the Statutory Royalties*"¹ and could "*potentially give rise to more disputes*"².

- 2 AWGACS notes that SPA raised similar grounds of objection in relation to Australian Screen Directors Authorship Collecting Society Ltd's (**ASDACS**) request for authorisation of proposed conduct (Authorisation No.: AA1000474-1 "**ASDACS Application**"). In that application, SPA objected to ASDACS requiring that its members assign all of their relevant rights (being 50% of the cinematographic film

¹ Page 1 of SPA's submission.

² Page 1 of SPA's submission.

component of retransmission royalties) as a condition of being an ASDACS member. SPA proposed that ASDACS members be permitted to “opt out” of the Rights Assignment on a production-by-production basis. In relation to the Application, SPA has made an objection which is substantially identical to the objection it made in connection with the ASDACS Application.

Status quo

- 3 SPA, as the national industry body representing producers, has an obvious interest in maintaining a status quo which has historically benefitted its producer members to the detriment of writers and directors. Equally, AWGACS, as the national industry body representing writers, has an obvious interest is seeking to change that status quo for the benefit of its Writer Members.
- 4 AWGACS does not support SPA’s proposal that Writer Members be permitted to opt out of the Rights Assignment on a case-by-case basis because it would be unlikely to improve any of the broader contextual issues which are sought to be addressed by the Application. In particular, AWGACS is seeking to reduce the number of instances where screenwriters “sign away” their rights because of an inequity of bargaining power between screenwriters and producers. If Writer Members were permitted to opt out of the Rights Assignment on a case-by-case-basis, the most likely outcome is that the status quo would be maintained and producers would continue to obtain a contractual assignment of Secondary Script Royalties from writers whenever that option is open to them, due to the power imbalance the application seeks to address.
- 5 SPA negotiates industrial instruments with the Australian Writers’ Guild (**AWG**) , known as the MATA and the SASA. These instruments contain specific rights assignments clauses retaining rights for writers. These form the basis of writers’ contracts with producers. Frequently, however, other clauses (not negotiated between SPA and AWG) are inserted into contracts by producers. Further, AWGACS understands there have been instances where certain producers have purported to contract with scriptwriters using the SASA and/or MATA and not disclosed the insertion of non-SASA and MATA clauses. These contracts have been used to override those industry standard agreements, This is relevant here in that both the SASA and the MATA expressly reserve Secondary Script Royalties to scriptwriters. The effect of this is that the relevant producer(s) ends up claiming Secondary Script Royalties in competition with the scriptwriter. This is one practice which AWGACS is seeking to change with the Proposed Conduct, for the benefit of its Writer Members.

- 6 For clarity, where producers obtain such an assignment of Secondary Script Royalties from scriptwriters, they would hold those rights in addition to their own statutorily granted rights to receive Secondary Royalties as a maker of a cinematographic film, which already comprises approximately 68.5% of all Secondary Royalties payable in connection with the use of a work (50% of that amount which is shared with directors in relation to retransmission royalties only). AWGACS is seeking to ensure that, as far as possible, the 22.1% share of Secondary Royalties which is allocated to writers under the *Copyright Act* is actually paid to the writers of those scripts, as is set out in the *Copyright Act* and recognised in Screenrights' policy and scheme of allocation.

Opt out procedure

- 7 If Writers were permitted to opt out of the Rights Assignment on a production-by-production basis, AWGACS would be required to continue the current labour-intensive process of assessing the substantive merits of each Competing Claim on a case-by-case basis. As set out in the Application, this process has proved to be inefficient and, in some cases, completely ineffective at facilitating the distribution of secondary royalties to its Writer Members.
- 8 AWGACS maintains that the opt out procedure set out in the Application is appropriate and balances the interests of an individual writer (or a small group of writers) with the Writer Membership as a whole, as well as the broader system which is responsible for administering the secondary royalty regime in Australia. Scriptwriters who opt out of the Rights Assignment (and therefore, AWGACS membership) would not be barred from receiving Secondary Script Royalties. They would be able to obtain both Australian Statutory Royalties and International Statutory Royalties either directly or by becoming a member of an international collecting society.

Reducing confusion

- 9 AWGACS does not agree that the Proposed Conduct is likely to cause "*further confusion as to who is entitled to receive the Statutory Royalties*"³. The current system generates confusion and encourages departure from the statutory regime, by allowing producers to use their disproportionately strong bargaining power to claim their statutory percentage as well as that of writers. Conversely, a core purpose of the Proposed Conduct is to reduce confusion by reducing the number of potentialities of any Competing Claim to the following:

³ Page 1 of SPA's submission.

- (a) AWGACS represents the Writer Member – AWGACS (and therefore, the Writer Member) is presumed to be the owner of the rights to receive Secondary Script Royalties; and
- (b) AWGACS does not represent the Writer Member – the matter is to be assessed on a contract-by-contract basis to determine whether the Writer Member has assigned their rights to receive Secondary Script Royalties to a producer (or any third party).

Industry education

- 10 AWGACS acknowledges that participants in the film industry may require education in order to change prior beliefs, behaviours and practices when it comes to the distribution of Secondary Script Royalties. AWGACS is happy to undertake educative work after the Proposed Conduct is approved. In AWGACS's opinion, the core concept which is sought to be reiterated is straight-forward, being that Secondary Script Royalties are generally to be retained by scriptwriters.
- 11 Further, such education is also timely and warranted outside of the direct context of the Application, having regard to AWGACS's understanding of some film industry participants' practices in relation to using special conditions to obtain contractual assignments of Secondary Script Royalties where the terms of the SASA and/or MATA would otherwise be implied into the relevant contract and expressly reserve those rights to scriptwriters.

No increase in bona fide contract law disputes

- 12 AWGACS notes that SPA asserts concern that the Proposed Conduct could result in AWGACS members breaching contractual warranties and this could result in an increase in contract law disputes.

SPA's submission states:

"It is an established contracting practice in the screen industry to include standard warranties with all creators engaged on a production (writer, director, etc.). These warranties include that the writer has not dealt with or encumbered the assigned rights in any way that would inhibit or restrict the producer's exploitation of them".⁴

⁴ Page 5 of SPA's submission.

It is AWGACS's view that both Writer Members and producers should be educated and/or advised by their relevant industry membership bodies and, if required, their lawyers in relation to the purpose and effect of any warranty approximating the "standard warranty" in creators' contracts which is referred to in SPA's submission (noting the capacity to retain counsel is not equally enjoyed by producers and writers, with a production company being more likely to have the resources to seek advice). Providing such advice would be straightforward if the Proposed Conduct is approved, and it follows that the parties who are contracting with each other are in agreement about the meaning and effect of the terms which they agree to. In respect of any warranty which relates to prior dealings and encumbrances, the end drafting of such a clause could easily further clarify, where such clarity is not already sufficiently apparent, that the retention of Secondary Script Royalties by a scriptwriter does not inhibit or restrict the producer's right to commercially exploit any assigned copyright in underlying works, which is the parcel of assigned rights which is typically of principal interest to producers.

- 13 SPA is also concerned that Screenrights may change its presumptions following implementation of the Proposed Conduct.

SPA's submission states:

"If ScreenRights are required to change their presumptions, when handling disputed claims, as a result of authorisation this scenario may escalate to a contract law dispute. Under the presumption AWGACS would receive the Secondary Script Royalties, in contradiction of their contract with the producer. SPA fears such disputes would only be resolved through the legal system".⁵

- 14 The Proposed Conduct is intended to bring about the exact systemic changes which are referred to by SPA in its submission. Screenrights may be required to change the presumptions that it uses to resolve Competing Claims using its Express Resolution Process (**ERP**) in order to better align with the revised practical position sought to be implemented by the Proposed Conduct. AWGACS does not agree that changing the ERP would necessarily result in an increase in bona fide contract law disputes and suspects it will do the opposite.
- 15 AWGACS adds that Screenrights has a process for resolving disputes involving producers and writers about who is entitled to the Secondary Script Royalties. This Competing Claims Resolution Procedure provides a framework that assists competing parties to communicate with each other and encourages a timely

⁵ Page 5 of SPA's submission.

resolution. Therefore, any potential conflicts between writers and producers in regards to Secondary Script Royalties are unlikely to go to litigation in the first instance. Further, the amounts in question are generally very modest (e.g. most claims are below \$1000) and well below the threshold for litigation.

- 16 Secondary Script Royalties is a statutory income stream which is conceptually distinct from the “commercial rights” which producers require to develop, produce and/or distribute audio-visual material. The Proposed Conduct is intended to create more situations where commercial rights are assigned to Producers and Secondary Script Royalties (which do not relate to exploitation) are retained by and flow through to the scriptwriter for as long as those royalties remain payable. In AWGACS’s opinion, there is no reason why a contract which has been properly negotiated and which has resulted in the end point described above would lead to any increase in bona fide contract law disputes.

Commercial negotiations

- 17 Finally, Secondary Royalties is only one source of value capable of being negotiated between a scriptwriter and a producer in any contract for services or acquisition of rights in an underlying work. There are many other commercial terms, including those which relate to both non-contingent remuneration (e.g. writer’s fees as a percentage of gross budget) and contingent remuneration (e.g. writer’s profit entitlement), which could be the subject of negotiations between the parties.

General comments

- 18 For the sake of completeness, we also note that SPA refers to data from the Australian Bureau of Statistics on page 3 of its submissions citing that there are “4,506 production businesses operating in Australia”. This number does not reflect the number of *producers* working in the industry. This figure captures the entirety of the screen production workforce in Australia, which includes writers, directors, sound designers and editors, among others, who operate businesses involved in the production of film, TV and digital games in Australia.
- 19 As at 2022, SPA claimed 800 member corporations.⁶ By contrast, AWGACS has approximately 2,300 members, and AWG has approximately 2,500, noting significant overlap of these. Many writers, particularly senior writers, are also producers and credited as such, and while owning their own production companies,

⁶ <https://assets-us-01.kc-usercontent.com/89c218af-4a5a-00a2-9d83-3913048b3bc7/644b0e79-24c9-421b-9e07-296c51f0e4b9/20220422%20-%20SPA%20submission%20Services%20Investment%20Scheme.pdf>



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are not members of SPA. It follows that AWGACS and AWG are best placed to advocate for the interests of writers in Australia's screen industry.

If we can answer any questions or provide any further information which may be of assistance, please let us know.

Yours sincerely



Molly Ulm
AWGACS Manager