

30 August, 2023

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Our ref: AA1000642  
Contact Officer: Anna Pound  
Contact Phone: (03) 9290 6920

Dear ACCC,

**RE: AA1000642 – AWGACS application for authorisation**

Screen Producers' Australia (**SPA**) is an interested party in the Australian Writer's Guild Authorship Collecting Society Limited (**AWGACS**) application for authorisation to amend its constitution (with member approval) to allow members to assign their rights to receive statutory royalties for under the Copyright Act.

SPA is the organisation that represents independent producers of audio-visual content in Australia. SPA's membership is overwhelmingly made up small-medium screen production businesses, independent of broadcasters, studios, or streaming platforms. SPA currently represents just under 700 members.

SPA members are entitled to a share of Australian Statutory Royalties, generally as the owner of the copyright in the cinematographic film which attracts the Secondary Royalties through permitted third-party use.

SPA was not aware of this application until it was recently brought to our attention by another interested party. We accept that a Notice for Interested Parties was sent to the SPA office on 7 June 2023 but was inadvertently misplaced. We apologise for this late lodgement of our response.

SPA objects to the application for authorisation on the following grounds, detailed further below:

1. there remains uncertainty, within the screen industry, as to who is entitled to receive the literary portion of the Secondary Royalties (**Secondary Script Royalties**) collected with regard to a cinematographic film. As such, it is inappropriate for the ACCC to be asked to determine that writers are the sole intended beneficiary of the Secondary Script Royalties. This determination is best left to other bodies; and
2. approval of the authorisation would:
  - (i) impose an onerous requirement on writers who wish to negotiate the Statutory Royalty directly with producers. In order to do so, the writer must resign from AWGACS and forego any secondary royalties arising from the use of copyright material in foreign jurisdictions;
  - (ii) potentially give rise to more disputes of "competing claims" as there will be further confusion as to who is entitled to receive the Statutory Royalties.

This submission adopts the definitions used in the application, unless otherwise defined.

## Background

### *SPA / Australian Writers Guild Industry Agreements*

SPA and the Australian Writers Guild (**AWG**), the establishing body of AWGACS, have negotiated three agreements which apply to select form of scripted dramatic content, being:

- Miniseries & Telemovie Agreement (**MATA**); and
- Series and Serials Agreement (**SASA**); and
- Children's Television Agreement (**CTA**).

These agreements set the minimum rates and conditions on which a SPA member is expected to engage writers when producing these forms of programs. Both the MATA and SASA agreements contain an operating clause regarding Secondary Royalties, in which it was agreed, the writers were entitled to the Secondary Script Royalties as prescribed by Screenrights, the entity setup to administer and collect Statutory Royalties for audio-visual works. These clauses are identical and can be found at clause 21 of the MATA and clause 26 of the SASA. The clause is extracted below:

*...The Producer agrees that the Producer will not claim:*

- a) in relation to any copyright in the Script solely created by the writer pursuant to this Agreement, educational copying and communication royalties under Parts VA and VB and government copying royalties under section 183 of the Copyright Act, currently 22.1% of the total royalties payable by Screenrights or the rate as amended by Screenrights, retransmission royalties in Australia under Part VC of the Copyright Act, currently 22.1% of the total royalties payable by Screenrights or any alteration of the rate as amended by Screenrights; and*
- b) payments in relation to the Script made under any other statutory or voluntary licensing scheme or under collective or reciprocal Agreements negotiated by collecting societies, including but not limited to Australian Writers' Guild Authorship Collecting Society Limited (AWGACS), either in Australia under Australian law or in other countries under the law of those countries.*

As far as SPA is aware, all productions contracting using the MATA and SASA uphold this contractual provision and the writers of the programs claim the Secondary Script Royalties, either through AWGACS or directly from Screenrights.

The CTA, on the other hand, is silent about Secondary Royalties. Under the CTA, writers and producers are free to negotiate who receives Secondary Script Royalties. SPA is unable to provide a breakdown on how the Secondary Script Royalties are handled on these programs, however it is likely that some productions see the writer receive the Secondary Script Royalties, and others the producer.

Additionally, there are no agreements between SPA and AWG that cover feature films, documentaries, or any other form of production outside of the MATA, SASA and CTA. For these productions, like the CTA, it is a commercial negotiation between the parties. SPA's understanding is the Secondary Royalties, including the Secondary Script Royalties, for these productions are mostly claimed by the producer.

Note: Agreements between SPA and the AWG inform standard industry practice and both organisations recommend their usage by members. They are not registered industrial agreements and have no standing at industrial law. They may be altered by agreement between the writer and producer to reflect any commercial negotiations that have taken

place.

## 1. Industry Uncertainty about Recipient of Statutory Royalties

In paragraph 3.3 of AWGACS application (**the Application**), AWGACS provides the primary rationale for the proposed conduct: “to help clarify who owns Secondary Royalties at any point in time”. The amendment to AWGACS constitution would seek to achieve this by having all existing and prospective AWGACS members assign their rights to receive Secondary Royalties to AWGACS.

SPA submits that there is uncertainty within the screen industry as to who is legally entitled to receive the Statutory Royalties. Therefore, it is inappropriate for the ACCC to be asked to resolve the industry and legal uncertainty.

Currently, there is uncertainty within the industry as to whether the Australian Statutory Royalty scheme was designed to entitle the original authors of literary works (the script) in a cinematographic film, or the owner of the copyright in the cinematographic film at the time the Statutory Royalty becomes payable, to claim the Secondary Script Royalties. The AWG and AWGACS have advanced a position that it was the legislator’s intent that screenwriters receive Secondary Script Royalties in a cinematographic film. However, there remains a large portion, potentially the majority, of producers who claim those royalties supporting the position that the owner of copyright is entitled to the Secondary Script Royalties. As a result of this uncertainty there is no clear or set industry practice on who receives these Secondary Script Royalties.

As stated above, SPA and the AWG have negotiated certain agreements that cover some of the forms of scripted content – miniseries, telemovies, series, serials, and children’s TV (programs specifically broadcast for school aged children under 16) programs. Two of the agreements contain clauses that expressly deal with Statutory Royalties.

These agreements can’t be said to have set an industry standard as they only apply to productions produced by SPA members. SPA membership is a fraction of the 4,506 production businesses operating in Australia<sup>1</sup>. Therefore, there remains a large number of productions not covered by these agreements, including all feature films and documentaries, in which the Secondary Script Royalties form part of the negotiation between the writer and producer. It is SPA’s understanding that the majority of claims made to Screenrights for the Secondary Script Royalties are made by Producers.

In light of this uncertainty, it is SPA’s submission that it is inappropriate for the ACCC to be asked to determine the intent of the legislation by granting this authorisation. An approval allowing AWGACS to amend its constitution would set a profound precedent in relation to who is entitled to receive these royalties.

Until the uncertainty is resolved, SPA would not object to an amendment to the AWGACS constitution which allowed for the automatic assignment of the right to collect Secondary Script Royalties on behalf of the writer, for projects that the writer has negotiated that entitlement with the producer.

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<sup>1</sup> Film, Television and Digital Games, Australia 2020-21 – Australian Bureau of Statistics (22/06/2023) <[Film, Television and Digital Games, Australia, 2021-22 financial year | Australian Bureau of Statistics \(abs.gov.au\)](https://www.abs.gov.au/australian-bureau-of-statistics/features/collections/film-television-and-digital-games)>



## 2. Effects of the Authorisation

SPA submits an approval of the Application will have detrimental effects on the writers required to adhere to the Rights Assignment as well as potentially increasing the disputed claims for Secondary Script Royalties.

### A. Onerous Requirement on Writers

At paragraph 3.1 of the Application, AWGACS seeks to amend its constitution as follows:

*...The proposed conduct comprises AWGACS amending its constitution to:*

- (a) Require all prospective Writer Members to complete the Rights Assignment as a condition of their AWGACS membership application being approved;*
- (b) Require all existing Writer Members to either complete the Rights Assignment or resign as an AWGACS member (subject to limited exceptions); and*
- (c) Make the necessary ancillary amendments required to implement the Rights Assignment...*

If granted, the amendment would impose an onerous requirement on those writers who wish to negotiate Secondary Script Royalties directly with producers, as it is not a viable option for writers to opt out of the rights assignment to AWGACS.

The only way for a writer, whether an existing or prospective AWGACS member, to opt out of the rights assignment is to resign from the organisation or be excluded from joining the organisation. The consequence of resigning or being excluded from membership to AWGACS is to forfeit all secondary royalties that would have otherwise been received from usage in foreign jurisdictions collected by international collecting societies and disbursed by AWGACS to its members only.

The international secondary royalties will be forfeit because, through negotiated partnerships with foreign collecting societies, AWGACS is the only body approved to receive them. The majority of these partnerships are with European countries due to the fact that their copyright laws, as opposed to Australia's, often acknowledge that author's entitlements to secondary royalties are an important passive income stream that cannot be given away. As a member who has resigned or is excluded will be unable to receive international secondary royalties for works, they have written.

Further, at paragraph 8 of the Application, AWGACS says:

*Any Writer Member who wishes to collect Secondary Royalties is free to do so. AWGACS memberships is voluntary, and Writer Members are not prevented or impeded from receiving their Minimum Equitable Remuneration by not signing up as an AWGACS member.*

This statement is true only of Statutory Royalties within Australia and secondary royalties within those territories with whom AWGACS does not have a negotiated partnership. Writers who do not adhere to the proposed rights assignment will be barred from receiving foreign secondary royalties from jurisdiction that have partnered with AWGACS.

The effect of this requirement is that the price of opting out becomes prohibitively high. It is unreasonable to set the price of opting out at the forfeiture of other rights. This would

mean that, in a very real, practical way, negotiating directly on a commercial basis is no longer a viable, genuine option for those who wish to negotiate. In our submission, this runs contrary to the schema of the legislation.

In the interest of preserving competition and to enable commercial negotiations to occur directly if parties wish, the application should be amended to give writers the capacity to opt out of the rights assignment without resigning from the organisation.

In SPA's submission, a more commercially viable proposal that maintains commercial negotiations and confers authority on AWGACS to act collectively on behalf of writers would be as follows:

*Should a member decide they no longer want their right to receive Secondary Rights to be collected by AWGACS, they are able to either:*

- i. resign from AWGACS in accordance with the constitution; or*
- ii. opt out from assignment on written notice in relation to a particular production.*

#### *B. Potential Rise in Disputed Claims*

Approval of the Application may give rise to further disputed claims particularly in scenarios when the writer has not informed the producer they are a member of AWGACS.

As stated above, it is SPA's understanding that the majority of claims for Secondary Script Royalties are made by producers. This indicates that producers believe they, as the owner of copyright in an audio-visual work, are rightfully entitled to the Statutory Royalties.

If authorisation is approved, this, in SPA's view is unlikely to change. Producers, used to claiming all Secondary Royalties, will likely continue to make claims for Secondary Script Royalties, as the copyright owner. Leading to continued or increased disputed claims.

This has the additional element of placing AWGACS members in a precarious legal position in instances where they fail to inform the producer of their membership and the contract is silent on Statutory Royalties.

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.

In this scenario, the writer would be in breach of this warranty as they have already dealt with the assigned rights in a way that would prohibit the producer benefit – they have assigned the right to receive Statutory Royalties to AWGACS, allowing AWGACS to claim on their behalf. This creates more instances where AWGACS, on behalf of the writer, and the producer are entering competing claims for the script portion of the Statutory Royalties.

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.

SPA objects to any change in the contracting practices of the industry that may have an increased chance of legal disputation. As stated above, SPA would not object to an automatic assignment, from the writer to AWGACS, of the right to collect Secondary Script Royalties where they have been negotiated between the writer and producer.

Yours Sincerely,



Andy Barclay  
**Manager, Business & Legal Affairs**  
**Screen Producers Australia**