of speech but uncertainty too long has an inhibiting effect.' (Law of Contempt, 3rd ed. 236). It is submitted that the appropriate trigger point should be the moment when extradition is ordered and the person is surrendered to the Australian authorities. It is that moment which seems most closely to approximate the arrest of a person in the Australian jurisdiction. It is only at that time that the wheels of the criminal process in the Australian jurisdiction inevitably begin to roll, that the person is certain to be brought before the courts in the place where the charges must be answered. The issuing of a warrant seems too early and would, as in the case of Christopher Skase, result in public comment being unduly stifled when there is next to no chance of the person ever returning to Australia.

Courts, of course, will generally be more concerned to protect the criminal justice process than free speech and, if asked the question in relation to circumstances such as Dunn's, are likely to settle upon an earlier rather than later time. Whatever the correct legal position may be, it seems unlikely that the authorities in New South Wales will be going out of their way to ensure the fair trial of an alleged pedophile, - at least, that is, until he sets foot back on Australian soil.

Ross Duncan is a solicitor at the ABC.

[1]see also *R -v- Clarke, ex parte Crippen* [1908-1910] All ER 915 at 921 per Coleridge J for obiter statement that the English common law considers proceedings pending from the issue of a warrant.

Moral Rights - Beware the Waiver Mongers

Simon Lake of the Australian Writers' Guild examines the current proposed amendments to the Copyright Act to introduce moral rights in Australia and argues that the inclusion of waiver provisions is theoretically and operationally flawed

At the end of each episode of *the Simpsons*, the production company logo emerges with an invisible child's voice saying "I made that".

Innocent as it sounds, the claim of authorship has been one of the most contentious copyright and creative issues in the audio visual world. In Australia, the stage on which this battle has been fought is the legislation on moral rights[1] which is currently before the Senate.

The Senate Committee in its report on the Bill which was released in October, said that writers should be included along with directors and (unfortunately in our view) producers as an "author" or "maker" of a film.

We understand that the Bill is due to be debated in March 1998.

The Australian Writers' Guild ("AWG") has received overwhelming support for its view that the writer should be considered along with the director as being an author of the film. Space does not permit me to explore the authorship debate to the degree that it deserves.

Those that make films know the reality and centrality of the writers role and they have supported our position. Needless to say we are grateful to the Senators, particularly the Coalition Senators, who also supported our view.

In this article I want to concentrate however, on a debate which has not attracted the same degree of publicity as authorship. That is, the objection of writers and directors to the waiver provisions in the bill and recent developments in forging an industry consent clause to replace the application of blanket waivers.

Some members of the legal profession have warned that moral rights will stop production and investment. Not since the introduction of the Mabo legislation, when suburban free-hold backyards were supposedly being threatened, has there been such self serving rhetoric from sectors of the legal profession.

I hope to put those fears in context and put forward an argument that Australia should embrace moral rights as an important step in confirming our respect for artists and their contribution to society.

These goals of respect and investment certainty can co-exist. The production industry has made considerable positive progress in creating a better solution with an industry consent clause and will continue to do so. That is, unless the "waiver-mongers" get their way.

WHY THE AUSTRALIAN WRITERS' GUILD OBJECTS TO WAIVER

Waiver treats moral rights as an economic right subject to contractual negotiation, as opposed to an inalienable personal right, such as the right to vote or the integrity of the body.

Although the legislation recognises moral rights as a personal right to the extent that moral rights cannot be assigned, it does in its present form, allow an artist to waive their moral rights in works already in existence.

In our submission to the Senate Committee we argued that a waiver is effectively a relinquishment of one's rights.

What a waiver is saying in effect is that there are no circumstances, in the present or in the future, under which you can protect your work from gross distortion or mutilation. And there is no aspect of consultation or negotiation implicit in a waiver.

Moreover, the reality for writers and directors is that they are in a weak bargaining position and will be forced to waive their rights. This is the experience in all countries with waiver provisions. In England the Writers' Guild and the Directors' Guild have confirmed that the waiver is uniformly enforced.

In Australia many production companies are insisting on waiver as a condition of signing the contract. Australian writers and directors are already losing work if they refuse to sign waiver clauses.

Our French counterparts find the insistence on a waiver very baffling, driven more by ideology than actual experience. Given that they have a 50 year

history with moral rights, and manage to have a thriving film and television industry, they cannot see how a waiver can be justified.

The French are not alone in this regard. Countries as diverse as Austria, Brazil, Denmark, Italy, Japan, Mexico, Portugal, Norway, the Netherlands, Spain and Sweden, all regard moral rights as being inalienable.

The only purpose of moral rights is to protect artists and their rights yet the legislation provides the means, via a waiver, to undermine this very purpose.

As Jan Sardi, the award winning writer of *Shine*, puts it:

> *"If they're allowing people to waive their rights to artistic integrity, why have the legislation? It's a Clayton's law otherwise, it's nonsense. It's the law you have when you don't want to have a law".*

DO WE NEED WAIVERS?

Let's be blunt.

The only interest that many lawyers have in moral rights is in getting rid of them through 'waiver'. It is both an unfortunate and unnecessary mind set. Moral rights do not and cannot affect the production of a film, because under proposed legislation they do not come into existence until a film is in existence.

The application of blanket waiver undermines the legislation. Writers and directors are told that they must sign waivers as a condition of signing their contract. It is a situation which both the AWG and the Australian Screen Directors Association (**"ASDA"**) believe is unconscionable.

The Minister for Communications and the Arts, Senator Richard Alston, certainly appears to agree. When asked by Senator Kate Lundy about his attitude to a mandatory waiver of moral rights in the Senate Estimates Committee on 21 August , he said:

> *"My immediate reaction is that that would be contrary to the spirit of a waiver because it ought to be a judgement freely exercised by the rights holder. So an across-the-board approach irrespective of the merits seems to be contrary to that. I will check and see if there is anything in the legislation that outlaws it."*

Senator Alston's assertion that "blanket waivers" are against the spirit of the legislation has helped redefine the debate in Australia and has provided the opportunity for a negotiated solution.

Those that drafted the Bill were obviously mindful of the fact that writers and directors would be put under inordinate amounts of pressure and for this reason, we suspect, they only allowed for waiver in future works. Whilst we welcome the sentiment behind this, we believe that there is a better solution.

THE MISPLACED VIEW OF THE WRITER AND DIRECTOR AS ECONOMIC VANDAL

There is a hidden and unspoken fear that a waiver is necessary because artists, at their core, might be considered to be economic vandals. The insistence on waiver suggests that artists cannot be trusted with the protections afforded to them by the legislation.

The Attorney-General, Daryl Williams, in introducing the legislation, argued that in order for the Act to be workable a waiver needs to be a central element. In the joint press release on 4 May 1997 Williams and Senator Alston stated that:

> *"To ensure the continued viability of cultural industries, artists will be able to waive their rights in writing. In addition, the reforms will prescribe standards of reasonableness and normal industry practice as conditions for moral rights to apply.*
>
> *These measures will ensure that people who use artistic works, such as broadcasters and publishers, continue to have a reasonable degree of certainty. And at the same time, creators will have greate protection for their professional standing and identification with their works."*

TO BE 'WORKABLE' MEANS THE PROTECTIONS GIVEN TO ARTISTS HAVE TO BE TAKEN AWAY FROM THEM. WHERE IS THE EVIDENCE FOR THIS VIEW?

There are a handful of cases around the world and none of them provide evidence of films being held up. The "waiver mongers" are operating on the grounds of untested assertion and they are certainly not making reference to the legislation in Australia, which has a number of strong protections against a succesful moral rights action.

Writers and directors in the audio-visual medium make their money from the exploitation of their works. So they have an obvious and strong economic interest in having their works broadcast across any medium. It should be noted that under standard industry contracts writers and directors have the right to withdraw their name from the work, and in these situations the production is completed anyway.

The vast majority of writers and directors are not able to afford the court fees let alone the lawyers to run an action. It is difficult to envisage a situation where writers are in the Federal Court bringing unjustified actions.

Moreover, in an industry which is completely founded on reputation, it would be professional suicide for a writer or director to bring an unfounded claim. The expression *"you'll never work in this town again"* did not come out of an accountants conference. It came from the entertainment industry and it continues to have great force in inhibiting behaviour which could potentially threaten production.

It should also be noted that there are a number of "padlocks" on the door to any successful action including reference to industry practice and reasonableness. I imagine these provisons could only be read broadly and it would have to be an extreme act of, to use the words of the legislation, "gross treatment" or "mutilation", before any claim was upheld.

So why should artists be in a position where they have to waive their rights when a case has not yet been properly made for a blanket waiver?

AN ALTERNATIVE - CONSENT INSTEAD OF WAIVER

In the Senate Committee the AWG and ASDA argued for the removal of the waiver clause and for a negotiated consent clause to replace waiver.

The Senate committee was split on the issue with the majority recommending that the waiver remain and apply to future works and the Labor Party and the Democrats recommending the deletion of the waiver clause. Given the finely balanced nature of the Senate it would be difficult to predict how a vote would go on this issue.

Senator Alston's statement on 21 August however proved to be a timely and productive intervention in the debate on waiver.

A series of meetings on a possible consent clause were initiated and chaired by the First Assistant Secretary of the Department of Communication and the Arts, Alan Stretton. Participants in those meetings were the AWG, ASDA, the Screen Producers Association of Australia (**"SPAA"**), the Australian Film Finance Corporation (**"FFC"**), Village, Southern Star (representing Sales Agents) and the Federation of Commercial Television Stations.

The meetings were held at the offices of the FFC which we believe was symbolically important in that they are the principal investors in film and television in Australia.

The AWG and ASDA gave a lot of ground because we think it is important that this issue be resolved harmoniously and not in a spirit of acrimony.

In those discussions we argued that if there is a waiver there is not an effective moral rights regime from a writer and director's perspective. If you have a consent clause, writers and directors have an opportunity to protect their reputation and their work against the rare cases of, using the words of the Act, "gross mutilation and distortion".

The consent clause spells out "industry practice" and provides a mechanism for producers to protect themselves from any potential actions. It allows writers and directors to consent to specific uses. We have defined these and they include such uses as cutting for the purposes of insertion of commercials. The AWG and ASDA sought to accomodate every issue which was raised in these negotiations in the consent clause.

If a use goes beyond those broad consents, the producer will have to contact the writer or director and ask them for their permission. This permission cannot be unreasonably withheld.

It is a system used by the American Director's Guild in their standard agreement as part of their creative rights, and it does not appear to have caused any problems for distributors or producers.

The consent clause creates industrial and investment certainty and meets all of the concerns raised by producers and investors in the negotiations.

The majority of the Senate Committee strongly supported our efforts to reach an agreed consent clause. In the minority report, the Labor and Democrat Senators said:

> *"We believe that such negotiated solutions are vastly superior to legislatively determined ones. Labor and the Australian Democrats congratulates all the parties to the agreement on their initiative and encourages other parties seeking to pursue moral rights to adopt similar negotiated solutions."*

WHAT IS THE STATUS OF THE CONSENT CLAUSE?

None of the parties sought to have the consent clause incorporated into legislation. We all felt that this would be too restrictive. So the status of the clause is that it is a recommended industry standard.

By having all of the major players at the table operating in an atmosphere of good will and compromise we believe that we have forged a solution which the production industry can be proud of.

The boards of the AWG, ASDA and SPAA have endorsed the consent clause. It is the view of the ASDA and the AWG that the consent clause should apply to all forms of audio visual work including series and serials.

SPAA has endorsed the use of the consent clause for feature films, long form dramas, tele-movies and mini series. It has written to all of its members recommending that they use the consent clause for the above mentioned forms. ASDA and the AWG are advising members to use the clause for all forms. The FFC have moved away from their policy of blanket waiver. We expect that they, along with the AFC, will be making policy statements on these issues in industry briefings which will be held in December.

Whilst the AWG will continue to oppose waiver we believe that the consent clause has shown that the industry can act positively together to respond to real concerns. Parliament will be passing an act which confers rights to artists and we want these to be exercised in an

environment which respects those rights, but does not inhibit investment or production.

The negotiation of the consent clause shows that the Australian production industry does not have to follow the pattern of antagonism and resentment which has marred the debate in other common law countries.

We are confident that we have forged a better path than that.

INDUSTRY ACCORD ON PROVISIONS WHICH BY CONSENT MAY BE INCORPORATED IN CONTRACTS

(Terms beginning with capitals are as defined in the *Copyright Act*)

The Producer recognises that the Author(s) has Moral Rights in the Cinematograph Film. The Author(s) consents to material alterations to the Cinematograph Film, for the benefit of the producer its licensees and its assignees, subject to reasonableness and industry practice for the following purposes:

A. Consents

1. To edit a Cinematograph Film to meet TV time slots.

2. To incorporate advertisements into a Cinematograph Film to be broadcast on television or transmitted on a diffusion service

3. To meet the legal requirements of broadcasting authorities.

4. To ensure that the proposed program meets any legal requirements or classification requirements or to avoid a breach of law.

5. To make foreign language versions by way of dubbing or subtitling the cinematograph film.

6. To make inflight versions of the Cinematograph Film.

7. To use excerpts of the Cinematograph Film for the purpose of promotion of the cinematograph film including by way of, teasers, advertisements and excerpts for promotion of copies.

B. Consent to material alterations not described in clause A

In the event that consents (which shall not be withheld unreasonably) are required to any material alterations other than those referred to in Clause A:

1. The producer will contact the Author(s) to seek consent by making every reasonable effort in writing to contact the Author(s) to inform them that a request is being made for material alterations possibly outside Clause A;

2. To assist in contacting the Author(s) a copy of the notification will be lodged at the Australian Writers' Guild or the Australian Screen Directors Association.

3. The Author(s) have 5 working days from receipt of the producer's notification to notify the producer in writing that the Author desires to be consulted with reference to the proposed use or material alteration.

4. After receiving notice from the Author(s) within the notice period specified in clause 3, the producer will nominate a time and place for such consultation at which the Author may express views with regard to the proposed use or material alteration.

5. The Author(s) services for the consultation will be provided at no cost to the producer.

Simon Lake is the Executive Director of The Australian Writers' Guild.

1. Moral rights have three elements. The right of attribution, the right against false attribution and the right to protect the integrity of the work. They are founded on the idea that both an artist's reputation and an artist's work are valuable. Since artists rarely own the copyright in their work they need some other form of protection that floats above copyright ownership. In 67 countries that protection is moral rights.

Building a Better Internet: Things to Look for in a "Killer Application"

John Collette pinpoints the 3 attributes which contribute to a successful application - media, networking and processing

In the last two issues of the CLB I have discussed the difficulty of creating a new creative culture around the engineering base of the internet, and the reasons why "video on the net" is a bad value proposition for the foreseeable future. In this issue I would like to address some of the things to plan for in a good internet application.

OLD MODELS ON THE NEW MEDIA

The case of video on the internet is a good place to start, because it typifies the imposition of "old media" models on the new media. People are slow to adapt to new ideas, and in the quest for the killer application that will turn the streams of data into a stream of revenue, the urge to understand what is new in the light of what has gone before extends so far as to turn a networked media environment into a replication of the "dumb terminal" model that is the broadcast receiver. While people may argue that the provision of video as a media type extends the capabilities of the network, the limitations with bandwidth and quality pale into the background behind the big question of who will choose to put video on the net, instead of one of the existing high quality distribution formats - broadcast, cassette and even CD ROM which has, at worst, a bandwidth 100 times that of a modem connection.

The recent rush of hyperbole about "push" technology arose from the same type of thinking - that computers would ultimately function as a "screen" for content that was pre-packaged. After downloading Pointcast, and overcoming the initial gee whiz factor at the graphic quality, all you are left with is a computer