

# **SCREEN DIRECTORS GUILD OF IRELAND**

**SCREEN DIRECTORS GUILD OF IRELAND**

**SUBMISSION**

**to**

**THE COMMITTEE FOR THE REVIEW OF IRISH COPYRIGHT LAW**

**14 July 2011**

---

Contact:  
Birch Hamilton  
Executive Director  
Screen Directors Guild of Ireland  
Curved Street South  
Temple Bar  
Dublin 2

Tel: 00 353 1 6337433  
Email: [birch@sdgi.ie](mailto:birch@sdgi.ie)

Board: Ciaran Donnelly (Chair), Paddy Breathnach,  
Neil Jordan, Lenny Abrahamson, Terry Loane, Dearbhla Walsh, Declan Recks,  
Jim Sheridan, Conor Horgan.

The Irish film industry “is now achieving critical mass of filmmaking talent to match the kind of influence, disproportionate to its small size, that it has always enjoyed in the fields of literature and theatre. Following in the footsteps of Sheridan and Jordan comes a generation that includes such directors as Lenny Abrahamson, Conor McPherson, Dearbhla Walsh, Ciaran Donnelly, John Carney, Kirsten Sheridan, Lance Daly and Paddy Breathnach....”<sup>1</sup>

The audiovisual content production sector in Ireland is estimated to be worth over €550 million per annum. It employs over 6,000 individuals. Over 560 small and medium sized enterprises operate in the sector. These figures do not take into account the added value that the industry brings to the tourist industry.<sup>2</sup>

And yet, with all this conspicuous success, much of it attributable to the creative talent of Irish directors, at the heart of the industry there is inequity in the treatment of those directors for the purposes of their copyright.

### *The Screen Directors Guild of Ireland*

The Screen Directors Guild of Ireland (“SDGI”) is the representative body for over 220 director members involved in the Irish and international audiovisual industry. These include directors of feature films, fiction, documentary, television drama, short films, commercials and animation.

The Guild promotes the interests of Irish directors on a national and international scale. It is a member of the European Federation of Directors Organisations (FERA) and is affiliated to International Affiliation of English Speaking Directors Organisations (IAESDO). It receives funding from the Irish Film Board and the Arts Council.

SDGI operates an audiovisual collecting society, which collects remuneration for secondary usage of directors’ work and has 14 bilateral agreements with foreign collecting societies. It is registered as a licensing body with the Irish Patents Office.

### *The Director as innovator*

The skill of the director lies in the ability to emotionally connect with the audience through the manipulation and juxtaposing of performance, light, framing, subject matter, tone, sound and time. The distinct style of the work of an individual director is recognised and celebrated much as the unique style of the work of a painter or sculptor. It is this that draws the audience to follow the work of a particular director and the creative team to work with the director. Audiences go to see a Jim Sheridan, Neil Jordan or Lenny Abrahamson, for

---

<sup>1</sup> This is a quotation from *Variety*, reproduced on the website of the Irish Film Board

<sup>2</sup> This information also from the website of the Irish Film Board

example, as they would go to a Louis LeBrocqy or a Robert Ballagh exhibition.

### *The Director as author*

Under the Copyright Act 1963, the copyright in cinematographic films was treated as a related right, with the right granted to the “maker” of the film, defined to mean “the person by whom the arrangements necessary for the making of the film are undertaken”. This was of course the producer. Irish law mirrored UK law in this respect. The laws of most European countries were quite different. In 1992, the EU Rental and Lending Right Directive<sup>3</sup> harmonised the European approach, formally recognising the director as an author of the audiovisual work for the first time. This was already the case in all but three Member States.

Ireland was in delay in transposing the Directive. It was only finally implemented with the Copyright and Related Rights Act 2000 (“the CRRA”). Section 21CRRA provides that the “author” is “the person who creates the work and includes.....(b) in the case of a film, the producer and the principal director”. Accordingly, the director and the producer are now co-authors under Irish law.

This ought to mean that Irish directors, while they may receive a single payment for the primary act of exploitation of their rights, should also be entitled to enjoy remuneration for secondary uses such as rental, broadcasting and cable retransmission. In other countries, in addition to these secondary rights, directors enjoy a share in private copying levies. In some countries, there is what is known as a “bestseller” clause under which the director can revisit the engagement contract if the profit to the copyright owner is disproportionate to the revenue paid to the author.

### *Contractual practices*

While the recognition of the director as co-author *ought* to mean that the director shares in the remuneration streams flowing from a successful production, this is unfortunately not the case. Contracting practices following the Act simply altered to *include* a complete transfer of all rights by the director to the publisher and thus to *exclude* the director from all exploitation revenue. This is the “buyout contract”. Directors are rewarded by a single payment, which is tendered in full payment for the services rendered as directors and the acquisition of all rights arising from the director’s creative role as author for the full term of copyright.

Other right holders such as actors, writers, composers and musicians receive royalties for secondary uses of their work: directors do not. Since the

---

<sup>3</sup> 1992/100/EC, Codified version 2006/115/EC

introduction of the buyout contract, directors have systematically been denied a financial share in their own creations. They receive no downstream royalty, no matter how successful the film.

Had directors in Ireland been more vocal and organised in the period following the introduction of the Act, the buyout contract might not have taken hold. However, the Irish film industry had yet to take off. There were very few Irish directors and they had no established bargaining power. In consequence the buyout contract did take hold and directors now have an uphill battle ahead to try to reverse the position and secure meaningful recognition of the rights, which they enjoy under copyright law.

**It is our submission that it is important that the Copyright Review Committee should draw attention to unfair contractual practices pointed out to them, in circumstances such as these, where parties with lesser bargaining power are effectively coerced into accepting “all rights” provisions in a non-negotiable fashion.**

#### *The rental right*

As fully-fledged authors under the Rental and Lending Right Directive, directors *ought* to receive remuneration from rental and lending. They do not.

The Directive permitted transfer of the rights, but provided that, even after transfer, the author should receive an unwaivable right to equitable remuneration<sup>4</sup>.

Section 125 of the Act provides that after transfer of the rental right, the author retains a right to equitable remuneration. This right is not waivable and the author may not assign it except to a collecting society. Section 125 (4) states that the remuneration is payable by the person to whom the right is transferred. However, section 124 states that without prejudice to the right to equitable remuneration, where an agreement concerning film production is concluded between an author and a producer, the author *will be presumed* to have transferred the rental right in respect of the film.

The remuneration is payable by the person to whom the right is transferred. The amount is “that which has been agreed by the person by and to whom it is payable”. Finally, and crucially, at section 126 (6) the Act provides that “remuneration shall not be considered inequitable because it is paid by way of a single payment or at the time of transfer of the rental right”.

The buyout contract contains provisions stating that the remuneration received

---

<sup>4</sup> Article 4

by the director pursuant to the contract will be deemed to include payment in respect of the rental right.

It can be seen that the provisions were carefully crafted to suit the producer and to enable the matter to be sewn up neatly by contract.

This is not an interpretation that was envisaged by the Directive. The clear intent of the Directive was to provide an unwaivable right to equitable remuneration, even after transfer.

**It is our submission that the combined effect of the provisions at sections 124 – 126 of the Act are such as to deprive the director of the right conferred by the Directive, and that it is necessary to amend those provisions to bring the Act into conformity with the Directive.**

#### *The cable retransmission right*

The Act, at section 174, provides a clear right for the author of a film to a cable retransmission right. It may only be exercised through a licensing body.

Film directors *ought* to be receiving remuneration for this form of secondary licensing. Thus far they have not been successful in claiming such remuneration. There is no legal barrier other than the contractual position *vis a vis* the producer.

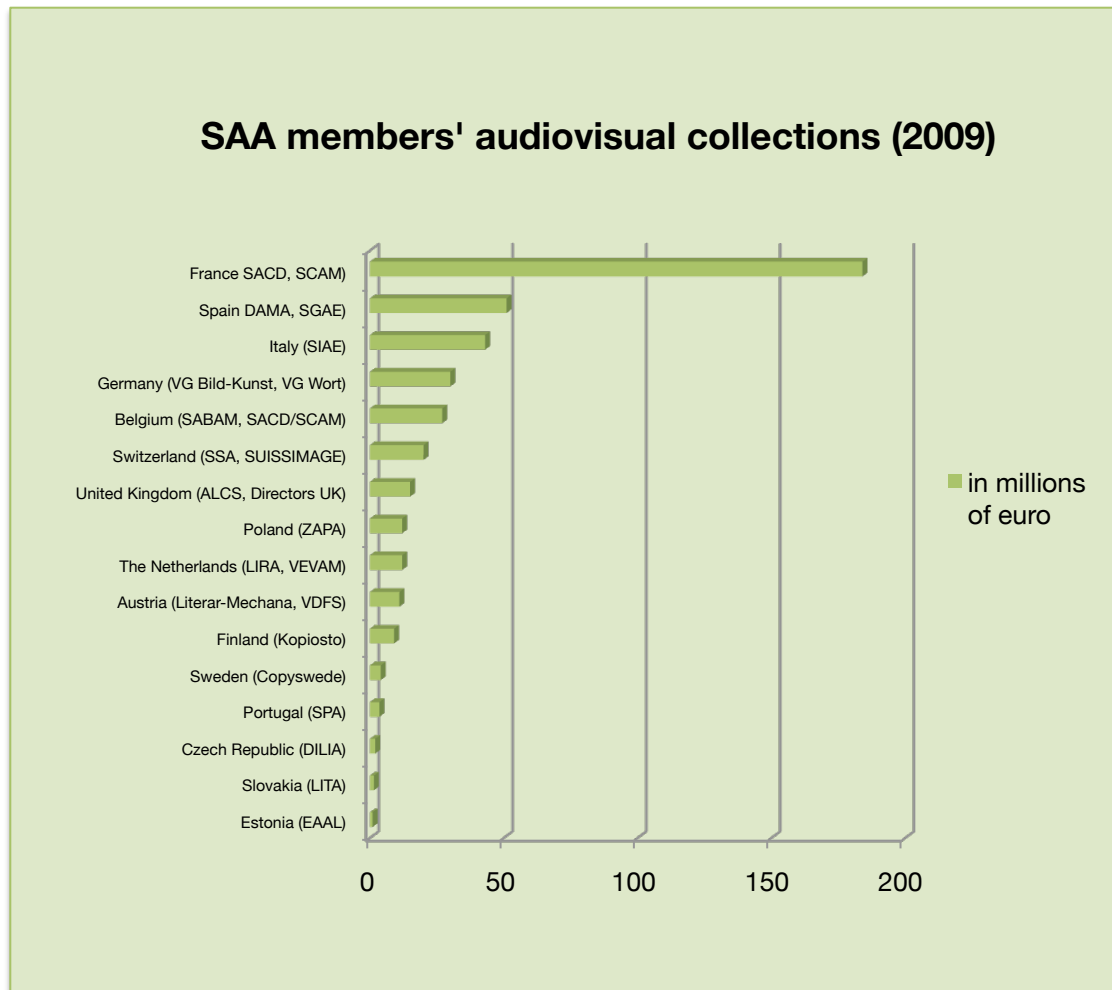
#### *Other secondary uses*

There are other secondary streams of remuneration in which directors ought to share. These include royalties for repeat broadcasts after the first screening. Directors have not as yet been successful in claiming such remuneration. There is no legal barrier other than the contractual position *vis a vis* the producer.

#### *What are these rights worth?*

US reports include Screen Digest, which maintains that the business in online rental of film (where films are ordered online and delivered to the door, known as DVD Cubs, e.g. Lovefilm) has increased by 530% since 2007. Reuters estimates the annual DVD Club revenues to have been US\$8 billion in 2008. The video on demand (VOD) market is forecast iSuppli (Applied Marketing Intelligence) to reach US\$ 13 billion by the end of 2010, with 150 million active VOD subscribers. These exclude traditional rental outlets.

The diagram below shows how much European Audiovisual Collecting Societies collect for directors and screenwriters.



#### *The position in other countries*

#### The UK

In 1996, UK directors were acknowledged as authors of the film by virtue of the Copyright and Related Rights Regulations 1996. They were made equal joint owners of the copyright, as tenants in common with producers. The provisions were similar to the provisions in the CRRRA. An equitable right to remuneration for rental was granted which could only be exercised through a collecting society. A presumption of transfer of the rental right to the producer was also provided.

As in Ireland, UK producers did not recognize the directors' equality of ownership in engagement contracts. UK directors were required to sign buyout contracts. All exploitation income in all markets continued to be collected by the producers.

In the early 2000s, Directors UK (a collecting society and campaigning body for directors) launched the UK Directors' Rights Campaign.

This campaign has had a number of successes, including:

An agreement with BBC, ITV, Channel 4, Channel Five, Sky and S4C for payments by the broadcasters for repeat transmissions, overseas sales and DVD releases. This money is distributed by Directors UK to directors of films or programmes made for television.

An agreement with DPRS, BECTU (Broadcasting Entertainment Cinematograph & Theatre Union) and DGGB (Directors Guild of Great Britain) with five main provisions:

This agreement marks the beginning of a new relationship between directors and those who employ them in the UK. This relationship is expected to be based on mutual respect, fair remuneration and ongoing dialogue.

The UK position contrasts with Ireland, where directors are still in the same position as their UK colleagues were prior to the Directors' Rights Campaign.

## Germany

It is illustrative to contrast the position in Ireland and the UK with a European country.

In a judgement given 7<sup>th</sup> of October, 2009 the Federal Court of Justice in Germany decided that buyouts contracts under which an author of a work gets a single payment only may not necessarily be illegal.<sup>5</sup> However, they may be regarded as providing equitable remuneration only if the user of the work can precisely estimate the value of the use of the work to the date of expiry of the copyright. As in almost all cases it will be impossible for the user to accurately estimate how much this will be, single payments cannot be considered as providing equitable remuneration for the author. According to the court, this leads to the conclusion that in almost all cases an author needs to participate in the profits the user gains from the exploitation of his or her work.

Under German copyright law there is no presumption of the transfer of the rental

---

<sup>5</sup> BGH 1. Zivilsenat, ZR 40/07.

right and the remuneration for rental is collected from the final user of an author's work.

Additionally, German copyright law provides for private copying levies. German directors (and other copyright holders) are entitled to receive equitable remuneration for the production of devices that are capable of copying works that are protected by copyright law.

This levy is added to the price of such devices. So every consumer who buys a blank tape or a computer with a DVD writer, etc. also pays a fee for the acquired possibility to copy the works of copyright holders. The producers of the devices pass this money on to the German central office of private copying rights (ZPÜ). The ZPÜ subdivides these payments to several different collecting societies (GEMA, VG Bild-Kunst, VG Wort) who allocate them to their members, including film directors.

German directors also get compensation for cable retransmissions of their works. In Germany broadcasters pay a fee to cable providers to have their programs added to cable networks. The cable providers have contracts with the German collecting society that represents directors and other visual artists (VG Bild-Kunst). This contract obligates the cable providers to pay an appropriate share of this fee to the collecting society, which then again allocates this money to their members.

## The US

In the US the Directors Guild of America are involved in an agreement in which all parties in the chain of creation and production of a film conclude a Distributor's Assumption Agreement, under which every party that may licence an aspect of the rights in the film (for example, the distributor, the rental outlet) undertakes to share its revenues with the director of the film, in accordance with fee scales negotiated by the DGA. US directors also have a share in foreign blank tape levy income, cable retransmission and rental revenues collected by film producers from foreign collecting societies.

The DGA oversees the collection and distribution of these revenues.



## *Conclusion*

It can be seen that, by comparison with their foreign counterparts, Irish directors are still a long way from establishing at a practical level the rights, which are accorded to them by copyright law.

As was necessary in the US and the UK, Irish directors will have to engage in serious and protracted negotiation to improve their position. It will be of assistance if the Copyright Review takes note of our two specific submissions:

- 1. The Review Committee should explore remedies for unfair contractual practices whereby directors and other authors are required to sign non-negotiable all rights contracts with parties of superior bargaining power, thereby preventing them from sharing in the profits of a successful work and from exercising secondary exploitation rights granted to them by copyright law.**
- 2. The combined effect of the provisions at sections 124 – 126 of the Copyright and Related Rights Act 2000 is such as to deprive the director of the rights conferred by the Rental and Lending Right Directive. It is necessary to amend those provisions to bring the Act into conformity with the Directive.**