

**THE STATUS OF THE FILM SCRIPT UNDER US COPYRIGHT REGULATIONS: A
HISTORICAL NOTE**

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ABSTRACT

[31] In 1912 the US *Copyright Act* (1909) was amended to recognise motion pictures under their own category. With this decision the unusual situation of the scenario — its complex authorship and relation to the motion picture — became an object of deliberation. As part of the struggle of creative rights, screenwriters have sought not only moral rights in their work, but also copyright protection for scenarios. This research note compares the history behind the recognition of the film script under Australian and US copyright law, but focuses primarily on the shifting status of the scenario under US copyright law, specifically the procedures of the Copyright Office.

A motion picture is usually based upon and adapted from a screenplay, which is often derived from another underlying work, such as a novel or a short story. A motion picture is a ‘derivative work’ of some pre-existing literary material, but its legal relationship to the screenplay, the most important pre-existing literary material, is surprisingly uncertain.²

The screenplay is a fascinating, if under-examined, object of legal and literary study. It stands at the intersection of at least two important lines of research. The first line of research is that of collaboration and authorship. A screenplay can have a sole author. However, the complex process of film production [32] has led to a situation where several individuals can craft the screenplay, usually in a work-for-hire or employment arrangement. Furthermore, because it is held that the screenplay is a step in the production of the film, and that to use Jean-Claude Carrière’s phrase, ‘the screenplay will disappear into the film,’³ the authorship of the screenplay merges with the

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² F Jay Dougherty, ‘Not A Spike Lee Joint? Issues in the Authorship of Motion Pictures Under US Copyright Law’ (2001) 49 (October) *UCLA Law Review* 225, 229.

³ Jean-Claude Carrière, *The Secret Language of Film* (Jeremy Leggatt translation of *Le film qu’on ne voit pas*) (1994) 148.

authorship (usually in collaboration between director-writer-editor-cinematographer and others) of the motion picture. The second line of research has to do with the status of the screenplay as a derivative and intermediary work. This is an extremely complicated area of law to the extent that motion pictures and scenarios under US law are 'joined works': the screenplay, for example, is considered published with the publication of the motion picture.⁴ At the same time, in the US (and Australia) copyright subsists in the different, derivative parts of the motion picture.

Since the 1930s screenwriters have sought to redefine the status of the script in the production process. The notion of the 'screenplay as literature' was fundamental to this process. It was used to create a way of reading, an aesthetic framework, within which the script could be appreciated as a unique kind of object.⁵ This framework balances a number of contradictory forces. On the one hand, screenwriters do not wish to lose the connection to the motion picture. On the other hand, screenwriters do not wish the literary text of the screenplay to be subordinate to the motion picture. These conflicting pressures can lead to some awkward arguments; the kind of which are evident in moral rights arguments by screenwriters, where writers risk losing a stake in a film if they over-emphasise the idea of the screenplay as a page-based end-product in its own right.⁶ This framework sets up a tension between the screenplay read as an intermediate work, and the screenplay seen as an end-product. In *The Complete Guide to Standard Script* formats we find the following argument 'in defence of a screenplay as an intermediate art form':

⁴ 'Publication of a motion picture publishes all the components embodied in it including the music, the script, and the sounds. Thus, if a motion picture made from a screenplay is published, the screenplay is published to the extent it is contained in the published work': United States Copyright Office, Library of Congress, *Circular 45: Copyright Registration for Motion Pictures Including Video Recordings* (1999) 2. This precept does not make the works identical: 'no court has gone so far as to hold that [a screenplay and a film] are, by definition, one work': Shannon T Vale and Daniel J Brennan, 'Recent Developments in Copyright Law' (1996) 4 *Texas Intellectual Property Journal* 321.

⁵ The 'screenplay as literature' was a major point of discussion in an important anthology of scenarios published in the 1940s: see John Gassner and Dudley Nichols (eds), *Twenty Best Film Plays* (1943), Introduction.

⁶ See Michelle Cooper, 'Moral Rights and the Australian Film and Television Industries' (1997) 15(4) *Copyright Reporter* 178. At one early stage in the Australian debate over moral rights the then Attorney-General Daryl Williams stated that writers could have moral rights over the script but not the film: *Moral Rights are Human Rights*, Australian Writers' Guild, <http://www.awg.com.au/reports/moral_full_sub.htm> at 23 August 2002.

Many people scoff at the idea of defending the screenplay as a form of literature. Yet it has a sense of poetry about it. Perhaps the problem is that most people have not read enough screenplays to get a sense of the beauty of them.

Serious critics maintain that a screenplay is not an end product. They point out that the finished film is the end product and that the screenplay is only a stop-gap measure.

Admitting that a screenplay is an intermediate form of art, it may be compared to a sketch that a sculptor makes while designing a bronze statue. The actual finished product might be a life-sized statue in three dimensional form which is comparable to the three dimensional reels of emulsion in film cans which is the actual release print. Both the charcoal sketch on paper (two dimensional) and the typist's ink on paper (two dimensional script) are stop gaps. But consider that the sculptor might be Picasso or DaVinci or Michelangelo. Then those scraps of charcoal sketches would be on display in a museum. So too, some Academy Award winning films have their screenplays on display at museums. The day may come when a screenplay does not have to be produced and released to become considered worthy of being included in the museum's collection.⁷

[33] Written by a screenwriting instructor at the University of Southern California, this defence gives some indication of the depth of desire for artistic recognition of the screenplay, and the difficulties associated with seeing the script as an object in itself. The museum is a curious choice of institution in this context, as it facilitates 'display' rather than reading.

While both of the lines of research mentioned above connect to interesting issues in legal and literary studies, my concern here is that given the centrality of the script to the production process, and the struggle for creative recognition by screenwriters, there is a danger in approaching the screenplay at face value. In the quote that begins this piece, for example, the notion that the motion picture is 'usually based upon and adapted from a screenplay' is accepted as a given. In a sense the author has heard the arguments of screenwriters, and is reflecting those purposefully in the text. However, historically the notion of a screenplay can be seen as a by-product of labour struggle and craft identity — and as such there are risks in treating the relationship between the motion picture and the screenplay superficially. For example, both historically and

⁷ Hillis R Cole Jr and Judith H Haag, *The Complete Guide to Standard Script Formats* (1988) 'Part One: Screenplays', i–ii.

practically several other formats of the script perform the function of pre-existent material in the production process (sketches, notes, the scenario, the continuity, and the treatment). The degree of formal use of the screenplay can vary with different modes of production. Furthermore, the term 'motion picture' is a relatively recent introduction into the copyright system, replacing the term 'photoplay'. As a way of broadening our inquiry beyond the terminology and film practice of today, this paper approaches the film script in terms of its recognition under US copyright law. The materials required to fully carry out this research would be accessible only through the Copyright Office of the Library of Congress, and a detailed investigation of the Federal Register, and as such the present notes are preliminary in nature.

The Scenario in the Australian and US Context

In Australia, 'a scenario or script for a cinematograph film' is protected under the *Copyright Act 1968* (Cth) by virtue of the definition of dramatic work in s 10. An influence on this definition was the UK *Copyright Act 1956* s 48, which defined a 'dramatic work' as including:

... a choreographic work or entertainment in dumb show if reduced to writing in the form in which the work or entertainment is to be presented, but does not include a cinematograph film, as distinct from a scenario or script for a cinematograph film.

Scenarios under Australian legislation are protected from the date they are fixed in material form. It is not an issue if the work is published or unpublished as long as the author is an Australian citizen, an Australian protected person or a person resident in Australia.

This framework gives wide protection to the screenplay except perhaps in two areas. The first area is proof of fixture of the idea in an industry based on the communication of stories, and competition in regard to those stories.⁸ In the US and Australia script

⁸ 'Television and movie scripts are often written by freelancers not under contract with a studio or production company. These writers must submit the scripts if they are to be evaluated for purchase. Submission of scripts, however, is fraught with peril, because copyright protection does not extend to many basic elements of plot and character. Additionally, although numerous common law doctrines occasionally supply an effective theory of recovery for 'idea theft', they are applied too unevenly to give much comfort to the professional scriptwriter. Consequently, it is difficult (and of course, expensive) to enforce rights in these aspects of a script, which creates a serious risk of

registration schemes, usually run by the Writers' [34] Guilds, have emerged to protect writers from possible plagiarism by establishing the date of fixture of an expression or work. The second area is the assignment of copyright as part of working on a film. As stated by the Australian Writers' Guild, 'investors (including funding bodies and broadcasters) require producers and scriptwriters to assign all of their copyright, including statutory royalties, in order to fund the production of the film or television show'.⁹ As the cinematograph film is handled separately to literary and dramatic works in the Australian *Copyright Act 1968*, writers can miss out on royalties for a film.

In the US today, a similar framework of coverage to that of Australia is in place under Title 17 of the US Code. Copyright arises in a work as it is fixed in any tangible medium of expression, and screenplays are classed as dramatic works. As in Australia, work done in a 'work for hire' arrangement can mean that the employer receives copyright, although under the *Minimum Basic Agreement* negotiated by the Writers' Guild of America (West), a contract called a 'separation of rights' transfers some rights back to the author.¹⁰ The US has an additional process whereby statutory authorship of a work can be obtained by registering it with the Copyright Office of the Library of Congress. The registration is not a condition of copyright protection, however, it is an obligation of publication and does supply legal benefits.

While on initial examination there appears to be a similarity between the two systems, their history provides an interesting way to differentiate them. Coverage of the scenario under Australian law has been in place since the *Copyright Act 1912* (Cth),

misappropriation. Firms receiving unsolicited scripts face the opposite problem: the risk of a lawsuit every time a movie or TV show bears even a passing resemblance to an unsolicited script that was received sometime in the past': Robert P Merges, 'Contracting into Liability Rules: Intellectual Property Rights and Collective Rights Organizations' (1996) 84(5) *California Law Review* 1293.

⁹ 'Submission: Copyright Amendment (Digital Agenda) Bill 1999: Part VC', Australian Writers' Guild <http://www.awg.com.au/reports/digital_agenda.html> at 8 May 2002.

¹⁰ The WGA MBA [Writers Guild of America Minimum Basic Agreement] contains a unique contractual construct called Separation of Rights, which separates out certain rights usually held or controlled by the holder of the copyright and transfers them to the original writer. These provisions entitle the writer to exploit these rights in defined ways, even though the writer no longer holds the copyright. In effect, the writer transfers the copyright in literary material to a company in one provision of their contract, and the Guild MBA returns some of the transferred rights back to the writer in another provision. Separation of Rights is an inventive legal response to the custom of U.S. writers transferring the copyright in their work to their employers. It partially mitigates the effects of that transfer': Writers Guild of America, 'Creative Rights for Writers of Theatrical and Long-Form Television Motion Pictures', Writers Guild of America <http://www.wga.org/creative_rights/#1> at 8 May 2002.

which made provision for the UK *Copyright Act 1911* to apply in Australia. This arrangement continued through several amendments to the Australian Act (1933, 1935, 1950, 1963, 1966), right up to the formulation of the Australian *Copyright Act 1968*.¹¹ Section 34 of the *Copyright Act 1911* (UK) specifies what it means by dramatic works in the following form of words:

'Dramatic work' includes any piece for recitation, choreographic work or entertainment in dumb show, the scenic arrangement or acting form of which is fixed in writing or otherwise, and any cinematographic production where the arrangement or acting form or the combination of incidents represented give the work an original character.

While the scenario is not explicitly mentioned here, the inclusion of cinematographic productions in the category of dramatic work, alongside the wording 'the scenic arrangement of acting form of which is fixed in writing', is presumed to give coverage. The 1952 Gregory Report into UK Copyright states in s 108 that 'it is also clear that the author of a film script and composer of music used in a film have similar copyright in their respective works'.¹² The 1922 decision *Milligan v The Broadway Cinema Production Ltd* found that 'there may be separate and independent copyrights in (1) a music-hall [35] sketch, (2) a film scenario adapted from such sketch, and (3) a film produced from such scenario'.¹³ It should also be noted that under the UK *Copyright Act 1911*, s 2(d), a specific right was defined: 'in the case of a literary, dramatic, or musical work, to make any record, perforated roll, cinematograph film, or other contrivance by means of which the work may be mechanically performed or delivered'.¹⁴ Combined, these aspects of the Act seem provide recognition of the film scenario.

¹¹ Thus, while the UK *Copyright Act 1911* was replaced by the *Copyright Act 1956*, Australia did not automatically adopt that Act as a basis for law. The Spicer Committee of 1959 was explicitly briefed to examine how Australia should react to the UK *Copyright Act 1956*, with the result being a new Australian Act.

¹² Copyright Committee of the British Board of Trade, *Report of the Copyright Committee* (1952) 39.

¹³ E J MacGillivray, *Copyright Cases, 1917-1923* (1924) 343. An earlier case, *Moore v Edwardes* (1903) established protection of 'scenarios' in a theatrical context: see E J MacGillivray, *Copyright Cases, 1901-1904* (1905) 44.

¹⁴ The right to authorise the reproduction or public representation of literary, scientific, or artistic works by cinematography was first articulated in a revision of the Berne convention signed at Berlin on 13 November 1908.

In the United States, before the codification of copyright law into Title 17 of the US Code, scenarios and scripts fell under the provision of the US *Copyright Act of 1909*. Motion pictures were first covered in the 1912 amendment to that Act. The 1909 Act did not contain a specific definition of ‘dramatic work’ (indeed Title 17 of the US Code still doesn’t). The specification of dramatic work was left to the Register of Copyrights, the formal head of the Copyright Office within the Library of Congress.

Under the 1909 Act publication of a work in the US involves registering copyright with the Office of Copyright and depositing copies of the work. While s 2 of the 1909 Act recognises that copyright subsists in unpublished works, under s 12, a work was not fully protected until deposit of copies and registration had taken place. For unpublished works, authors could register their claim to copyright under the 1909 Act through registration with the copyright office. Epes Winthrop Sargant, author of a series of influential photoplay handbooks between 1911 and 1916, gives us an indication of the importance of this registration when he writes, ‘if you claim the copyright protection without registering the article then you not only have no protection ... but you are liable to a fine for having claimed copyright without having actually copyrighted the article’.¹⁵

While s 4 of the US 1909 Act specified that copyright may be secured for all the writings of an author, s 5 lays down specific classes of works: Books; Periodicals, including newspapers; Lectures, sermons, addresses (prepared for oral delivery); Dramatic or Dramatico-musical compositions; Musical Compositions; Maps; Works of Art, models or designs for works of art; Reproductions of Works of Art; Drawing or Plastic works of a Scientific or Technical Character; Photographs; Prints and Pictorial Illustrations; Motion-Picture Photoplays, Motion Pictures other than Photoplays. This section specifies that these classes were not designed to limit or impair copyright protection; although the classes are significant to the extent that different rights can be attached to different classes.

¹⁵ Epes Winthrop Sargant, *Technique of the Photoplay* (2nd ed, 1913) 131. The notion that copyright protection was dependent on registering a work with the copyright office was seen as inappropriate and awkward by the Register of Copyrights, Thorvald Solberg, especially in relation to international practice. See Thorvald Solberg, ‘Copyright Reform: Legislation and International Copyright’ (1939) 14(4) *Notre Dame Lawyer* 350.

The specification of these categories, combined with the fact that the definition of dramatic work was not embodied in the Act, and the requirement that to be fully protected unpublished works had to be registered, led to complications when it came to recognition of the scenario.

Copyright Registration

In 1911, prompted by the film industry's free borrowing from literary and theatrical sources as material for motion picture — and specifically Gene Gauntier's adaptation of *Ben Hur*¹⁶ — the United States Supreme Court ruling *Kalem v Harper* stated that a moving picture based on a literary work constituted a dramatisation of that work.¹⁷ For the first time a cinematograph film was regarded as a form of 'writing' [36] within the meaning of the Constitution.¹⁸ This decision effectively restricted the free use of theatrical and literary source materials.¹⁹ On 24 August 1912, the US *Copyright Act of 1909* was amended to recognise motion pictures as the product of authors,²⁰ and from that date, motion pictures were registered under their own category with the Copyright Office of the Library of Congress.²¹

Under the amended US *Copyright Act of 1909*, registration of a film takes place under two designations; Class L 'Motion Picture Photoplays' and Class M 'Motion Pictures other than Photoplays'.²² Although not elaborated in the 1909 Act, the notion of a 'photoplay' is applied to the motion picture. The assumption seems to be that the 'Motion Picture Photoplay' is the narrative dramatization of a story from another medium. As many legal cases involved the relations between novels, theatre and

¹⁶ Tom Stempel, *Framework: A History of Screenwriting in the American Film* (3rd ed, 2000) 8.

¹⁷ Although the opinion in *Kalem v Harper Bros* 222 US 55 (1911) was careful not to consider moving pictures as simply drama, and elaborated on the mechanism involved. This is in accordance with the important emphasis on the nature of the medium of expression in US copyright law.

¹⁸ E J MacGillivray, *Copyright Cases, 1905–1910* (1911) 254.

¹⁹ Edward Azlant, *The Theory, History and Practice of Screenwriting, 1897–1920* (PhD Dissertation, University of Wisconsin-Madison, 1980) 104.

²⁰ Lizzie Franke, *Script Girls: Women Screenwriters in Hollywood* (1994) 5.

²¹ Prior to 1912, some motion pictures were registered under the categories of photographs. See United States Copyright Office, Library of Congress, *Motion Pictures, 1912–1939. Catalogue of Copyright Entries: Cumulative Series* (1951) v. Four volumes of the *Catalogue of Copyright Entries* have been incorporated into D Richard Baer (ed), *Film Superlist: Motion Pictures in the US Public Domain, 1894–1939* (updated ed, 1994).

²² This now antiquated reference to the photoplay is not present in the 1976 revision of what is now Title 17 of the US Code, which refers simply to 'motion pictures', but it is present in the *Copyright Act 1947*, and was referred to in the 1956 'Rules and Regulations of the Copyright Office' published in Stanley Rothenberg, *1958 Supplement to Rothenberg, Copyright Law: Basic and Related Materials* (1958) 30.

moving pictures, the tendency was to see the photoplay as a play or dramatization cast in moving pictures.²³

The situation regarding the scenario itself is more complex. Under the US *Copyright Act* the Register of Copyrights is able to make rules and regulations for the registration of claims to copyright as provided by the Act. This is especially important to remember in the context of the scenario, not only because it is a work not clearly specified in the classes, but also because of the fact that if authors were seeking copyright protection for scenarios on their own they would be likely to be unpublished works, which required registration in order to gain protection. The 'Rules and Regulations for the Registration of Claims to Copyright (as revised and issued in November 1917)' (the November 1917 Rules) state that:

... the designation 'dramatic composition' does not include the following: Dances, motion-picture shows ... scenarios for, or descriptions of motion pictures or of settings for the production of motion pictures. (These, however, when printed and published, are registrable as 'books'.)²⁴

This left the scenario in an awkward position. US copyright law draws a distinction between concept or idea and creation. Copyright applies to the embodied expression of a creation. As such, the script is defined in relation to the completion of the motion picture, and is regarded as having been published by virtue of the publication of the motion picture to the extent that it is contained in the published work. At the same time, US copyright is based very strongly on a notion of the work fixed in a medium of expression, and this principle has impacted on the treatment of the scenario. Thus, in respect to the November 1917 Rules discussed above, the scenario is not a motion picture, but if published it is registrable as a book.

'Dramatic composition' is another likely class of works mentioned in US copyright law that could apply to the scenario. The meaning of 'dramatic composition' is not

²³ This is supported in the 1956 'Rules and Regulations of the Copyright Office' where the photoplay is defined as 'motion pictures that are dramatic in character and tell a connected story, such as feature films, filmed television plays, short subjects and animated cartoons having a plot': *ibid*.

²⁴ See Louis D Frohlich and Charles Schwartz, *The Law of Motion Pictures: Including the Law of the Theatre* (1918) 744.

defined by the copyright statutes, [37] and the Copyright Office has the freedom to offer a construction.²⁵ As can be seen from the November 1917 Rules above, scenarios were not immediately admitted to this category. Frohlich and Schwartz note,

Whether or not a scenario of a motion picture play may be the subject of copyright as an unpublished dramatic composition is an open question. The Register of Copyrights has taken the position that Section eleven of the [1909] *Copyright Act* requires the deposit of 'one complete copy of such work if it be a dramatic composition', and that a scenario is not a completed work and hence does not fulfil the requirements of that section.²⁶

Frohlich and Schwartz go on to disagree with the Register of Copyrights. However, what is interesting about this passage is the way that the intermediate nature of the scenario complicates its classification.

It would seem that the ruling on scenarios being admitted to the category of dramatic works started to be relaxed around 1955–56. The 1955 'Rules and Regulations of the Copyright Office' included 'dramatic scripts designed for radio and television broadcast' in the designation of dramatic composition.²⁷ An information circular (No 66) on 'Scenarios', released around 1955, elaborates that the class of 'Motion-Picture Photoplays' is reserved for the complete photographic films. A 'scenario, story, or synopsis' is registrable as a book if published (which relates to the date when copies were first placed on sale, sold, or publicly distributed).²⁸ The circular goes on to state:

If, however, a scenario should be sufficiently elaborated with dialogue, directions, etc to bring it reasonably within the accepted meaning of the statutory term 'dramatic composition' ... the work would thus be taken from the category of 'book' under which publication with the copyright notice is required, and placed under that of 'dramatic composition' which classification permits registration before publication.

²⁵ See William Mack and William Benjamin Hale (eds), *Corpus Juris* (1917) 1025.

²⁶ Frohlich and Schwartz above n 24, 19.

²⁷ Stanley Rothenberg, *Copyright Law: Basic and Related Materials* (1956) 45.

²⁸ *Ibid* 110.

The phrase ‘sufficiently elaborated’ in this passage is interesting in the context of changes to the format of the scenario, suggesting that because they became more detailed, they became more like dramatic compositions. Janet Staiger’s work, however, suggests that the script reached a highly technical form by 1914, and was certainly extremely detailed by the 1930s.²⁹ By 1956, plays for motion pictures are fully integrated into the designation for dramatic composition,³⁰ and today screenplays are registrable as dramatic works under the regulations of the Copyright Office.³¹

Lobbying for Change

A full account of the lobbying and debates that went on behind the changing procedures of the copyright office in respect to the scenario is still to emerge. Of special interest would be the role of television practice (if any) in the eventual inclusion of scenarios in the category of ‘dramatic [38] compositions’ in the 1950s. The role of the craft guilds in this process is also unclear. It is one of the curiosities of histories of the Screen Writers’ Guild (the earlier name of the Writers Guild of America, West) that they rarely mention copyright.³² This is despite the fact the constitution and by-laws of the Screen Writers’ Guild of the Authors League of America Inc (incorporated in 1920), had as its first object ‘to stimulate and procure adequate copyright legislation, both international and domestic, to protect original

²⁹ Janet Staiger, ‘Blueprints for Feature Films: Hollywood’s Continuity Scripts’ in Tino Balio (ed) *The American Film Industry* (1985) 173–93.

³⁰ Rothenberg above n 22, 27, 44.

³¹ See *Fact Sheet no FL119*, Library of Congress Copyright Office <<http://www.loc.gov/copyright/fls/fl119.pdf>> at 8 May 2002. This development shifts arguments to do with the relationship between script and motion picture into the realm of a ‘derivative work’ which Title 17 of the US Code defines as ‘a work based upon one or more pre-existing works, such as a translation, musical arrangement, dramatisation, fictionalisation, motion picture version, sound recording, art reproduction, abridgment, condensation, or any other form in which a work may be recast, transformed, or adapted. A work consisting of editorial revisions, annotations, elaborations, or other modifications, which, as a whole, represent an original work of authorship, is a “derivative work”’.

³² The two main histories are Nancy Lynn Schwartz, *The Hollywood Writers’ Wars* (1982) and Christopher D Wheaton, *A History of the Screen Writers’ Guild (1920–1942): The Writers’ Quest for a Freely Negotiated Basic Agreement* (PhD dissertation, University of Southern California, 1974). Wheaton mentions at one point that ‘the other goals of the Guild (copyright protection for scenarios, freedom from film censorship, and more cooperation between motion pictures and the Guild) were largely taken over by the newly established Academy of Motion Picture Arts and Sciences (1927)’: 51. Copyright is not listed in the index to Schwartz.

story manuscript and scenarios of motion pictures, either in narrative or continuity form, whether printed or typed'.³³

A contributing factor to this state of affairs could well be that as a guild affiliated with the Authors League of America between 1920 and 1937, much of the business of copyright was conducted through that parent organisation. Set-up in response to the US *Copyright Act of 1909*, the Authors' League took an extremely proactive stance in relation to copyright law, with issues to do with the disposal of movie rights in fiction being a key area of concern. The Act of 1909 was regarded as having significant problems. In 1913, Sargant explained to would-be writers that 'until you have published that photoplay either as a printed book or a photographic film, you are not entitled the protection that is offered published works'.³⁴ He also notes that Thorvald Solberg, then the Registrar of Copyrights, had by 1913 approached a Congressional Committee twice in order to argue that the 'manuscript photoplay' be admitted to copyright, 'not that he feels that copyright protection should be needed, but because so many have sought it'.³⁵ Sargant continues, 'each time the request has been refused ... if for no other reason than the unpublished manuscript is as fully protected by common law as is the published work by Copyright Law'. We can suggest that one of the reasons why a common law solution was not felt to be effective here was because of the relationship between the script and the film, and that writers sought special recognition of this unique relationship. Efforts to improve the copyright situation in respect to scenarios continued, however. Murray Ross, in his discussion of a precursor organization to the Screen Writers' Guild of 1920, The Photoplay Authors League (established in 1914), writes that 'to safeguard its members' copyrights, it published their scenarios in a bulletin and backed an amendment to the copyright law so that the law would protect authors of unpublished scenarios'.³⁶

³³ 'Constitution and By-Laws of the Screen Writers' Guild of the Authors' League of America Inc', *Authors' League Bulletin* (1921) 8 (10, January) 9–14. The constitution of the Writers' Guild of America, West, also has an emphasis on copyright: 'To participate actively in efforts to obtain adequate copyright legislation, both domestic and foreign, and to promote better copyright relations between the United States and other countries': 'Constitution And By-Laws of The Writers Guild Of America, West, Inc' (Revised 12 May 1999) Writers' Guild of America <<http://www.wga.org/manuals/constitution/>> at 21 April 2002.

³⁴ Sargant, above n 15.

³⁵ *Ibid.*

³⁶ Murray Ross, *Stars and Strikes: Unionisation of Hollywood* (1941) 49. Around this time, the *Authors League Bulletin* reported that: 'Congressman Frank B Willis of Ohio has recently introduced a bill to amend the copyright law in regard to the registration of unpublished motion-picture plays. Under the

[39] In the 1920s, the Authors League took the step of requesting Thorvald Solberg to draft a new *Copyright Act* more suitable to the rights of authors.³⁷ In numerous articles through the 1920s, *The Authors' League Bulletin* updated members on the passage of the Bill through its many versions. Our interest in these events is sparked by a mention in a 1924 article by Solberg that the new Bill made special provisions for scenarios, and that '[s]cenarios are expressly included in the classes of works which are subject-matter of copyright'.³⁸ While these historical fragments point to a significant effort to gain copyright recognition for the scenario, the full history of the struggle for copyright recognition has yet to be told.

Postscript

Following submission of this article for printing, I became aware of research by Patrick Loughney, Head of the Moving Image section in the Library of Congress on this topic (too late for incorporation into the fabric of the argument). See Patrick Loughney, 'Appendix: Selected Examples of Early Scenario/Screenplays in the Library of Congress' (1997) 9(3) *Film History* 290–9. Loughney presents a 1904 correspondence between the US Copyright Office and the American Mutoscope and Biograph company (AM&B) regarding the submission of a scenario for protection as a 'dramatic composition'. Loughney suggests that this correspondence 'sheds a small but important light on the historical moment at AM&B when the movie scenario came of age as a creative work worthy of recognition and separate protection': 279. It is, however, only a part of the story of recognition of the scenario under US copyright regulations. Loughney's research provides a valuable glimpse of conditions of

present law unpublished dramatic compositions may be copyrighted, but the copyright office will not register scenarios for photoplays. It is of course, quite as important to secure protection on the latter as upon the unpublished drama. The Photoplay Authors' League is making strenuous efforts to secure the passage of this bill and we think that it would also be to the benefit of the members of the Authors' League of America to do whatever is in their power to further acceptance of this bill by Congress': 'Photoplay Copyright' (1914) 2(3) *The Authors League Bulletin* 4.

³⁷ This Bill was introduced into Congress, and took several incarnations in a period in which copyright was hotly debated. Some incarnations include the Solberg Bill (for which hearings closed March 1925), the 1926 Perkins Bill (HR 11,258) also known in League reports as the 'Authors Bill', and the Vestal Bill (HR 10,434) introduced into Congress in March 1926. According to Singer, 'a number of copyright revision bills were introduced but rejected from 1924 to 1940. These included the Dallinger Bill of 1924, the Perkins Bill of 1925, the Vestal Bill of 1931, the Duffy Bill of 1935, and the Sirovich Bill of 1936': Barbara A Singer, 'In Search of Adequate Protection for Choreographic Works: Legislative and Judicial Alternatives vs The Custom of the Dance Community' (1984) 38 (January) *University of Miami Law Review* 287.

³⁸ Thorvald Solberg, 'An Authors' Copyright Bill' (1924) 12(9) (December) *The Authors League Bulletin* 5.

recognition before the 1909 Act and the 1912 amendment that recognised the Motion Picture Photoplay. The correspondence documents how a 'four page folder describing a series of moving pictures' could not be excluded from the category 'dramatic composition' based on the absence of dialogue. As I discuss above, a renewed argument behind the exclusion of scenarios from the category 'dramatic composition' under s 11 of the 1909 Act related to the completeness of the script, not the absence of dialogue, although as the circular on 'Scenarios' shows (discussed above on p 37), dialogue was still an issue.