



SERVING AUTHORS WORLDWIDE
AU SERVICE DES AUTEURS DANS LE MONDE
AL SERVICIO DE LOS AUTORES EN EL MUNDO

SG16-0622

Source Language: English
Published on: 01/06/2016

CISAC Response on the Draft Report of the Australian Government's Productivity Commission on Intellectual Property Arrangements

1. Executive summary

CISAC, the International Confederation of Societies of Authors and Composers, thanks the Australian Federal Government's Productivity Commission (the "Commission") for the opportunity to provide its response on the Draft Report on Intellectual Property Arrangements (the "Draft Report").

CISAC welcomes any initiative intending to implement a more effective, efficient and adaptable copyright system if it is respectful of creators' rights. Thus, we are writing to you to express our concerns with some of the copyright recommendations in the Draft Report which are out of step with international law and practice, and which will have a deeply detrimental impact on creators by jeopardising their ability to continue making a living from their creative works.

First of all, we would like to remind the Commission that cultural and creative industries fuel the economy as a whole. A recent study commissioned by CISAC and carried out by Ernst & Young¹ shows that the cultural and creative industries generate US\$ 2.250b of revenues and 29.5 million jobs worldwide, and that they are a locomotive of the online economy. A recent PwC report² also ranked the copyright industries as 4th in terms of its contribution to the Australian economy. These studies establish that copyright sits at the heart of innovation and a modern economy, and provide sufficient flexibility in response to change, in particular with the challenges brought by the transition to a digital economy.

On that note, after review of the Draft Report, the following points contain the most important issues which, if unchanged, will be very detrimental for author's rights and are also without any proper justification in the international regulatory framework:

1. Inadmissible limitation of the copyright protection term (Section 4.4, draft finding 4.2 and draft recommendation 4.1);
2. Unacceptable introduction of a broad "fair use" exception (Section 5.2, draft recommendation 5.3);
3. Inappropriate extension of safe harbours regime to cover the broader set of online service providers (draft recommendation 18.1).

Finally, in light of the information requested in Section 5.2 of the Draft Report, we would like to provide the Commission with some insights related to the code of conduct for collective management societies. Indeed, good governance and best practices in collective management are among the core activities of CISAC. Since 2008, CISAC has implemented a sophisticated system of Professional Rules and Binding Resolutions ("the Rules") which set the highest standards of professionalism in collective rights management activities.

These Rules, adopted voluntarily by our members, deal with various issues including, without limitation, membership, corporate governance, documentation, licensing, collection, distribution, complaints, and dispute resolution. The Rules also include a compliance review process, which reflects CISAC's ability and willingness to hold its members accountable to the highest standards of professional conduct, and, reinforce the legitimacy of collective management of rights. Thus, we would like to underline that the Australian collective management societies who are members of CISAC already respect, to a large extent, the thresholds set by these Rules.

¹ "The first global map of cultural and creative industries", EY, December 2015, <http://www.worldcreative.org>

² "The Economic Contribution of Australia's Copyright Industries 2002 – 2014", PwC, 2015, https://www.copyright.org.au/acc_prod/ACC/News_items/Copyright_Industries_continue_to_be_a_significant_contributor_to_the_Australian_Economy.aspx

2. CISAC's response

CISAC, the International Confederation of Societies of Authors and Composers, is a non-profit non-governmental organization, composed of over 230 authors' collective management societies from more than 120 countries. APRA (Australasian Performing Right Association Ltd), AMCOS (Australasian Mechanical Copyright Owners Society Ltd), ASDACS (Australian Screen Directors Authorship Collecting Society), AWGACS (Australian Writers' Guild Authorship Collecting Society Ltd), CAL (Copyright Agency) and VISCOPY (Australasia's Visual Arts Copyright Collecting Agency) are CISAC member organisations that administer rights on behalf of creators in Australia.

Through its membership, CISAC represents over 3 million authors, scriptwriters, authors, painters, composers, photographers and publishers. These creators are drawn from a wide range of artistic fields, including music, literature, drama, graphic, photographic and audio-visual.

CISAC's goal is to promote the interests of its members by strengthening the development of the international network of collective management organisations. As the umbrella organisation for authors' societies, CISAC fosters a global network of collective management and promotes good governance, transparency and best practices among its members. As representatives of authors and their collective management organisations, our priority is to ensure that an appropriate legal framework is in place to allow them to protect their copyright works, collect royalties from users, and make a livelihood from their creations. As such, on-going reform projects within the regions where our members operate are of great interest to us.

Our main concerns with the Commission's draft copyright recommendations included in the Draft Report are set forth below.

2.1. Inadmissible limitation of the copyright protection term

The Draft Report suggests that the Australian Government should amend copyright in Australia so that the current terms of copyright protection (i.e. life + 70 years) will now apply to unpublished works, and suggested that the copyright protection term should not exceed 15 to 25 years after creation.

With due respect, these suggestions are *prima facie* untenable. Reducing the duration of the protection of copyright to 15 or 25 years after creation *would put Australia completely in breach with its obligations under widely adopted international copyright treaties, including the Berne Convention and the WCT*, which state that the term of protection shall be at least the life of the author plus 50 years after his or her death. Breach of these treaties could mean the loss of international copyright protection for the works of Australian creators.

Currently, and thanks to the pioneering efforts of the European Union, the standard term of post mortem copyright protection for many countries around the world is life plus 70 years. To the best of our knowledge, the lowest level of any protection in the developed world is the term of the protection of the Berne Convention. Indeed, the vision of a growing number of countries to provide for a longer period of protection is to ensure that creators and their heirs are well protected and fairly remunerated. It is of almost importance to incentivise the creation of works. This vision has also been taken up in the final text of the Trans-Pacific Partnership³, in which Australia was a signatory. It provides that the term of protection for copyright shall not be less than the life of the author plus 70 years after the author's death.

³ <https://www.mfat.govt.nz/assets/securedfiles/trans-pacific-partnership/text/18.-intellectual-property-chapter.pdf>

Reducing the term of protection would also mean that Australian authors and their families lose potential ongoing copyright royalty streams not only from the Australian market, but also from other countries that apply reciprocity and deny the longer term to works originating from countries that do not recognise it.

Thus clearly the Australian Government should maintain a term of protection of 70 years after the death of the author, in order not to put Australian creators and their descendants at a disadvantage when compared with foreigners.

CISAC urges the Australian Government to maintain the duration of the copyright protection terms in line with the one existing in most other countries around the world, which is 70 years post mortem. This is a matter of pure fairness and compliance with international norms.

In this regard, CISAC welcomes the recent statement by the Minister for Communications and the Arts, Mitch Fifield⁴ that “Recently, it has been wrongly claimed that the Government is planning to reduce the life of copyright to 15 to 25 years after creation, rather than 70 years after the death of the author as it is currently. This is not something the Government has considered, proposed or intends to do.”

2.2. Unacceptable introduction of a broad fair use exception

The Commission is recommending Australia’s current exception for *fair dealing* to be replaced with a broader US-style *fair use* exception.

The current Australian *Copyright Act* (Cth) 1968 already has a large range of exceptions, in particular ‘fair dealing’ exceptions which allow the use of copyright material for specified purposes such as news reporting, criticism or review, parody or satire, personal research or study, people with disabilities, and/or copying by libraries.

The removal of such ‘fair dealing’ exceptions in favor of an open-ended exception for “fair use” is bound to create more confusion with respect to the scope of permitted acts under Australian law and weaken the value of creators’ exclusive rights. Even if the “fair” criteria of the new exception could be adequately assessed based on the list of the four factors recommended by the Commission, it will leave scope for judicial interpretation and, as a result, will create much ambiguity in the market. As seen in the US, the vague system of “fair use” as a defense leaves both copyright owners, as well as those who wish to use copyright material, in a vague situation of not understanding what is and is not a “fair use” without being forced to go to court. It may result in fewer licenses as users rely on “possible” fair use as has been the case in Canada. Thus this new “fair use” approach in Australia could be expected to increase the number of cases that reach courts on this issue, as both rights holders and users will be unable to determine the scope of the exception in advance, requiring judicial intervention. This situation will put authors at a disadvantage, both because of the costs of legal proceedings to those authors that can afford it, and because of the period of time it will take for a decision to be issued. Many authors who are not in a position to fund legal proceedings will simply be unable to stop unauthorized, unfair use of their creative works.

⁴ Minister for Communications and the Arts “CONJECTURE ON COPYRIGHT CHANGES UNFOUNDED” *Media release*, May 2016 at <http://www.mitchfifield.com/Media/MediaReleases/tabid/70/articleType/ArticleView/articleId/1179/Conjecture-on-copyright-changes-unfounded.aspx>.

Moreover, expanding any exceptions to copyright limits further the already-limited scope of rights granted to authors. It should therefore be clearly defined and narrowly drafted. It should also comply with the “three step test”, the international criteria against which copyright exceptions are judged (under the Berne Convention Article 9(2), TRIPS Agreement Article 13, WIPO Copyright Treaty Article 10). Under the three step test, an exception must be confined to certain special cases which do not conflict with normal exploitation of the work and do not unreasonably prejudice the rights holder. An open-ended exception such as the one proposed under “fair use” fails to meet these prongs of the three step test and, as result, could find Australia in breach of its international obligations.

Finally, the introduction of a “US-like” fair use exception would be very detrimental to rights holders as several uses currently licensed under a fit-for-purpose licensing and remunerated system will now be free for users. Indeed, it may allow users, for example universities or schools, to copy copyrighted works without licence and free of charge. A recent PwC report⁵ on the costs and benefits of introducing a fair use exception in Australia estimated the losses for creators in the millions. If Australian creators are unable to continue making a living from their creations, it has to be expected that their incentive to create will be reduced and thus that the production of Australian works will be certainly negatively impacts. This is a key issue in the defence of Australian cultural diversity.

In light of these considerations, we *strongly* urge the Commission and the Australian Government to maintain the existing approach of fair dealing exceptions and avoid an open-ended US style ‘fair use’ exception under Australian copyright legislation. We request the Australian Government to support CISAC’s Australian members (set out above) in defending the economic and moral interests of Australian and foreign authors and refrain from placing copyright owners in a significantly worse position in Australia than in other countries.

2.3. Undesirable extension of safe harbours regime to cover a broader set of online service providers

The Commission has recommended in the Draft Report that the current safe harbour regime provided by the Australian Copyright Act be expanded to a broader category of online service providers.

Australia’s safe harbour scheme was introduced in 2006 and adopted the definition of the carriage service providers of the Australian Telecommunication Act (“... a person that supplies a listed carriage service to the public using a network unit owned by one or more carriers, or a network unit that has a nominated carrier declaration”). Due to this definition, in practice, only telecommunications infrastructure providers and internet service providers (“ISPs”) enjoy the benefit of protections under the safe harbour system.

CISAC commends the current Australian provisions which place responsibility on online service providers for dealing with infringing content. Indeed, safe harbours laws, which establish rules on liability of online intermediaries, exist under several country laws including the United States’ Digital Millennium Copyright Act (DMCA) and Europe’s e-Commerce Directive 2000/31/EC. These were created in the 1990s and early 2000s to apply to online services that were genuinely passive, neutral and had no knowledge of infringement.

⁵ “Understanding the costs and benefits for introducing a fair use exception”, PwC, February 2016
https://www.screenrights.org/sites/default/files/uploads/PwC_Fair_Dealing_CBA_Final.pdf

Nowadays, many digital services play an active role by facilitating access to content and monitoring the usage of content and user activity over their platforms. They also use this information to advertise and monetise content. Despite this, they claim passivity as being merely “hosting” services with no knowledge of the activities taking place on their platforms in order to justify underpaying or not paying rights holders at all. They are exploiting outdated laws to their advantage and the result is the transfer of value (also known as the “value gap”) from content creators to digital services. This transfer of value is threatening the viability of creation in the digital era.

The transfer of value has now created an inefficient market that threatens the long-term viability and health of cultural and creative industries because rights holders are no longer in a position to enforce their rights in the online environment, and thus they are, at worst, not remunerated at all, or, at best, unfairly remunerated.

The creators’ community and representatives of the music industry are also becoming increasingly vocal on this issue. The safe harbour regime is a talking point because of increased frustration over services like YouTube, which rely on safe harbour protection to operate streaming services without paying fair remuneration based on the huge value they generate from the exploitation of creative content. A recent review of the DMCA in the US brought hundreds of comments from artists and creators against the law, which is seen to be outdated given the advances in technology in the past twenty years which allow digital services to identify the content they are hosting.

Therefore, CISAC urges the Australian Government not to follow the Commission’s draft recommendation to expand the protections offered by the safe harbour scheme to additional online service providers. This would be against the grain of current initiatives at the European or U.S levels, and could potentially put Australia behind developing world standards. Indeed, in addition to the US DMCA review, the European Commission has clearly put on the table the liability of online service providers in the copyright field in the framework of its Digital Single Market initiative.

CISAC is convinced that an equitable digital economy, where innovative digital companies and creators can coexist and flourish, can be achieved without such reform.

3. Conclusion

CISAC hopes its submission is useful, particularly to provide an international perspective on the Commission’s Draft Report. It thanks the Commission for taking its response into consideration. Through CISAC’s representation of creators and rights owners, we believe in the value of strong copyright systems which incentivise creativity. We remain at your disposal should you need any further information or clarification on the above-mentioned considerations.