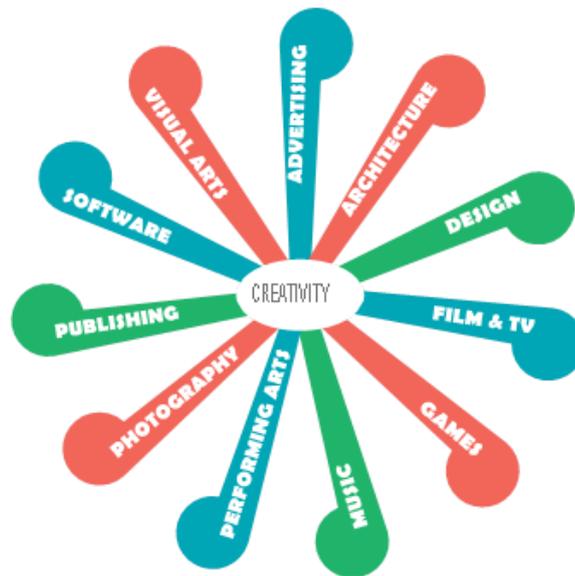


Submission to Australia Productivity Commission

Intellectual Property Arrangements

3 June 2016

WeCreate is an alliance of New Zealand's creative industries with the mission to grow and promote New Zealand's creative sector. WeCreate's 28 member organisations represent content creators and owners across the spectrum of the creative industries:



WeCreate has a strategy to facilitate growth of the New Zealand creative industries in ways that benefit individual creators and creative businesses in addition to improving the country's overall prosperity. Our submission is made in support of Australia's content creators and creative businesses. It is these people and companies that will help to deliver prosperity for Australia. Creativity generates not only economic returns to individuals, businesses and countries, but – unlike many other sectors – also delivers cultural and social benefits that are not readily valued in dollar terms.

In so comprehensively dismissing the potential value of Australia's creative sector, to both the Australian and export markets, the Commission is missing the opportunity for Australia to diversify its economy and leverage the opportunity to use the internet to get Australia's digital, weightless, largely tariff free, creative exports to markets that have previously been inaccessible.

Submitted by:

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Introduction

A narrow, legalistic approach to copyright law will not deliver either the economic, social or cultural outcomes that Australia, like New Zealand, needs for prosperity. The lack of aspiration to grow your local creative industries that is inherent in statements such as “we’re a net importer of IP” will leave the country reliant on other’s creativity for educating, entertaining and informing your future generations. Only local creative businesses and local creators will tell Australian stories and reflect Australian culture in the content that they produce. It is the uniqueness of this content that will then help to attract overseas interest to drive export growth.

Like New Zealanders, Australians love their wine. When governments are formulating regulation that will enable growth in the wine industry, they don’t talk to the people who drink wine – they talk to the industry that makes wine. And yet when it comes to creative industries, governments and government agencies, as in this review of IP arrangements, are only listening to consumers.

It may be useful to reflect on the cycle of content creation when considering submissions to this review. The cycle in which content gets to be consumed, starts at the point where content gets made – without creation there is no consumption.

Submission

Expansion of Copyright System

The costs of term extension referred to by the Commission have been recently analysed in New Zealand and found to be wanting. This was the case with the New Zealand music industry and, separately, the New Zealand publishing industry. We refer the Commission to the submission of the Publishers Association of NZ for further detail on the errors in the Ergas report.

Extending the term of copyright in Australia, as in New Zealand, gives your content creators the same rights as those in your trading partners. It’s simply a level playing-field, just as tariff-barrier removals level the playing field for trade in physical goods.

It should also be noted that technological advances mean that the ability to copy and disseminate content is now easier than at any time in history. This should mean that regulations to ensure that content creators can manage the copying of their work and take action when their copyright is infringed should be stronger, not weaker, as the potential loss is so much greater.

“Reasonable” Copyright Term

*“...under copyright law a work of the imagination, unique to its creator, is effectively confiscated from the creator's heirs 50 years after his or her death.”*¹ Paul Thomas, New Zealand journalist and author, May 2016.

The timeline for New Zealand’s most recent local movie success provides a real example for the Commission into the “commercial life” of copyright content. Barry Crump, a much-loved New Zealand author who sold over 1,000,000 books during his lifetime wrote *Wild Pork and Watercress* in 1986. He died in 1996 and now the book is the storyline for *Hunt for the Wilderpeople*, which has broken NZ box-office records and sold distribution rights into multiple territories. No doubt there are

¹ http://www.nzherald.co.nz/nz/news/article.cfm?c_id=1&objectid=11645654

equivalent Australian examples that demonstrate commercial life well beyond that put forward by the Commission. However, as stated by Paul Thomas above, why should creative content be able to be “confiscated” at all? It should be able to generate revenue for its creator for as long as that creator, or his successors, determine.

Fair Use

The terms of reference for the review this submission addresses ask for recommendations that would:

1. **encourage creativity**, investment and new innovation by individuals, businesses and through collaboration while not unduly restricting access to technologies and creative works
2. **allow access** to an increased range of quality and value goods and services
3. **provide greater certainty** to individuals and businesses as to whether they are likely to infringe the intellectual property rights of others
4. **reduce the compliance** and administrative costs associated with intellectual property rules.

It is impossible to see how fair use achieves any of the four recommendations, and particularly numbers 3 and 4.

By its nature, fair use requires the user of copyright material to make their own assessment of whether or not the unpaid use they wish to make of someone else’s content is fair. The legacy of litigation that the United States, with 200 years of a fair use copyright regime, now has is testament itself to how uncertain fair use is. There is little consistency in how US courts determine fair use cases, and it is safe to assume that there are multiple instances in which a content owner would have considered a use of their work not to be fair but did not have the resources to pursue the matter through the courts. Contrast this with the legal clarity provided by stated exceptions in Australian and New Zealand copyright law. Access to copyright materials for education, criticism and review, the visually impaired, libraries etc – is all clearly laid out so that both creator and user know what the “rules” are before they create or use content.

US-style fair use also shifts the costs of compliance almost wholly onto the copyright owner. As can be seen in recent US cases, fair use is used as “come and get me if you can” tactic and even large commercial businesses are reluctant ² to take file cases. Individual content creators are severely disadvantaged with fair use and would, if they could afford it, incur significant compliance and administrative costs.

² <http://www.pdnonline.com/news/legal/copyright/Too-Big-to-Sue-Why-Getty-Images-Isn-t-Pursuing-a-Copyright-Case-Against-Google-in-the-U-S-16515.shtml>