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COU09-0178

Ms Jennie George MP  
Chair  
Standing Committee on Climate Change, Water, Environment and the Arts  
PO Box 6021  
House of Representatives  
Parliament House  
CANBERRA ACT 2600

Neuilly sur Seine, 22/01/2009

Dear Ms George,

**Submission on Resale Royalty Right for Visual Artists Bill 2008**

This submission is made on behalf of the International Confederation of Societies of Authors and Composers (CISAC) which represents some 2.5 million authors, artists, composers and publishers in 118 countries. CISAC is the peak international voice of authors and artists in the field of rights administration. A summary of its activities and a list of its member organisations can be found at [www.cisac.org](http://www.cisac.org). The Confederation's head office is based in Paris.

In addition to having been made aware of both the fact, and detailed provisions, of the proposed legislation, CISAC's attention has been drawn to the House of Representatives' current inquiry into the Bill. As the current chair of CISAC's Board of Directors, Mr Brett Cottle, is based in Australia (as the Chief Executive of APRA) CISAC would be in a position to supplement this submission through oral evidence which can be provided by Mr Cottle.

Firstly, CISAC would like to commend the Australian Government for its initiative and commitment to Australian cultural life through introduction of the Bill. CISAC's members know only too well that the principles of fairness and equity that underpin authors' rights are frequently poorly understood by the general public, and even more frequently opposed by economic commentators to whom such principles have limited natural attraction. Authors and artists understand that copyright reform is rarely a popular political issue.

In particular, CISAC congratulates the Australian Government on the following aspects of the draft legislation:

- (a) The duration of the right;
- (b) The inalienability of the right;
- (c) The broad scope of the right;
- (d) The joint and several liability provisions;
- (e) The mandatory administration by an approved collecting society.

INTERNATIONAL CONFEDERATION OF SOCIETIES OF AUTHORS AND COMPOSERS  
CONFÉDÉRATION INTERNATIONALE DES SOCIÉTÉS D'AUTEURS ET COMPOSITEURS  
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With respect, the Government's approach to these issues is both enlightened and practical.

Secondly, however, CISAC has some serious concerns about key provisions in the Bill, and urges the Government to re-consider these provisions.

The main areas of concern are as follows:

**1. The limited application of the legislation under clause 11, and the impact of such a limitation on international reciprocal protection.**

As is made clear in the explanatory memorandum accompanying the Bill, the right will only apply to works created or acquired after the commencement of the legislation. That is, for existing works the right will not apply to the first transfer after commencement.

In our view, this provision will so fundamentally curtail the operation of the legislation that its purpose and effectiveness will be severely compromised. This is a simple function of the typical time span between subsequent sales of an artwork. We do not have a statistical analysis of such information, but in informally consulting our constituent members, we believe that for the vast majority of works the average period between subsequent sales is at the very least several years. In many cases it is decades.

This will mean that the transactions to which the right applies will for at least several years after the legislation comes into force, be relatively small in number; with the inevitable effect that collections will comprise only a small fraction of the amount that would otherwise have been collected. This in turn is likely to put in question the financial viability of the scheme, given the reasonable administrative requirements associated with collection, distribution and discharge of regulatory obligations under the legislation.

Furthermore, we are informed by societies operating in the field, that serious data capture issues are likely to arise for the collecting society attempting to track sales which do not give rise to an obligation to pay the royalty (ie, the second or subsequent sales comprising the required threshold acquisition for existing works after 1 July 2009). This will obviously further compromise the financial viability of the scheme.

There is a second issue associated with the operation of clause 11 of the Bill which is of particular importance to CISAC. It concerns the impact of the restricted nature of the application of the right on international protection of Australian artistic works for resale right purposes.

As the Committee is no doubt well aware, the international foundation for the existence of the *droit de suite* is Art. 14ter of the Berne Convention. The international protection regime applicable to the right is unusual under Berne in that it is based on the principle of reciprocity rather than national treatment. This is in fact acknowledged in the explanatory memorandum.

This means that protection for Australian artistic works in those Berne countries which provide for the right will depend upon the interpretation of paragraph (2) of

Art.14ter in those countries. As a number of legal commentators have observed, the meaning and effect of para (2) is far from clear. But if the view is formed that the Australian scheme – because of its limited application at least in the early years of operation - does not in effect provide for the enjoyment of the “inalienable right” referred to in para (1), it may well be that it would be open to Berne members to deny reciprocal protection to Australian artists.

Alternatively, the words *to the extent permitted...etc* in para (2) may enable a Berne country to deny application of the right to Australian works which are denied protection in Australia by reason of the operation of clause 11 of the Bill. This may in turn make determination of protected vs non-protected Australian works simply too difficult for administrative purposes.

CISAC is a fierce advocate of multi-lateralism in the field of rights protection. In its view, the international protection of works and flow of royalties can only succeed if common international standards are accepted on a multi-lateral basis. This principle is even more important where collecting society administration is involved, because the real world documentation and distribution systems required for international royalty flows demand common international standards.

With the greatest of respect, it is CISAC's view that the operation of Clause 11 of the Bill so significantly distinguishes the scheme from accepted international standards and so seriously compromises the benefit and enjoyment of the resale right for Australian and foreign artists in Australia that reciprocal international protection must be under question.

Moreover, international protection for Australian artistic works will also be affected by the operation of the EU Resale Right Directive, article 7.1 of which provides for protection of non-EU foreign nationals only where non-EU countries *give resale right protection to artists from the EU member country*.

We have not obtained advice from the EC, but it is not difficult to envisage a view being formed of the effect of clause 11 of the Bill **not** in reality providing such protection, with the consequent effect of disintitling Australian artists to the proceeds of schemes in place in Europe. This would be a major setback for Australian artists.

## **2. Rights-holder notification under clause 23(1)**

Although this provision might initially be seen to be of benefit to artists in providing maximum flexibility in administering their resale right, in CISAC's view it is more likely to undermine the purpose and intent of the legislation.

The clear policy intent of the legislation is to recognise that the only practical way in which the right can be administered in a practical, cost-effective way is through a collecting society. CISAC respectfully agrees with this policy position, which is in turn reinforced by the express prohibition of artist waiver.

Clause 23(1), combined with the effect of clause 22, seems to contradict this policy intention.

In our judgement, the most likely practical effect of clause 23(1) is to provide the incentive and means for an auction house or other art professional to coerce an artist into effectively waiving his or her resale royalty, or – in a broader strategy aimed at defeating the policy intent of the legislation – splitting and weakening the collecting society’s mandate (traditionally, authors’ collecting societies can only operate effectively when they “cover the field”).

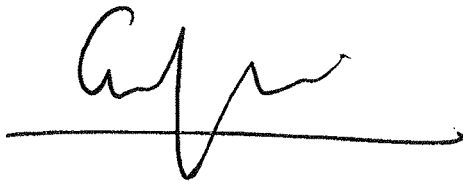
It is accordingly our strong submission to the Committee that this provision should be removed from the legislation. Its benefits to artists will be marginal at best, and the risk that its application will subvert the legislation and work against artists’ interests is substantial.

In making this submission, CISAC is aware of submissions being made by a number of advocates of artists’ rights in Australia, in particular our member organisation, VISCOPY. For that reason, we have confined our comments to what we regard as the major areas of concern.

Our respectful submission to the Committee is that the international significance of this legislation, both in terms of the impact on Australian artists around the world and on Australia’s pre-eminent reputation for copyright reform, should not be underestimated.

We would be happy to comment further on the Bill if required, or to provide any information which the Committee may consider to be of assistance.

Yours sincerely,

A handwritten signature in black ink, appearing to read 'Eric Baptiste', with a long horizontal flourish extending to the right.

Eric Baptiste  
Director General  
CISAC

A handwritten signature in black ink, appearing to read 'Brett Cottle', with a large loop at the end.

Brett Cottle  
Chairman of the Board of Directors  
CISAC