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ABN: 63 001 228 780

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***Submission on proposed free trade  
agreement with the United States***

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**January 2003**

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## Australian Copyright Council

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1. The Australian Copyright Council is a non profit company. It receives substantial funding from the Australia Council, the Federal Government's arts funding and advisory body. The Copyright Council provides information about copyright via its publications, training and website, provides free legal advice about copyright, conducts research, and represents the interests of creators and other copyright owners in relation to policies and legislation.
2. Some of the organisations affiliated with the Australian Copyright Council are also making submissions in relation to the proposed free trade agreement with the United States.

## The main copyright issues

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3. The main copyright issues we understand the United States may want to include in discussions on the free trade agreement with Australia are:
  - parallel importation:
    - repeal of the 1998 amendments to the Copyright Act which allow parallel importation of articles containing sound recordings, and branded goods;
    - abandonment of the Copyright Amendment (Parallel Importation) Bill 2002, recently passed in the House of Representatives and introduced into the Senate, which would allow parallel importation of books, computer programs, computer games and enhanced CDs;
  - repeal of the 1999 amendments to the Copyright Act which allow reproduction of computer programs to make interoperable products;
  - enforcement:
    - measures to combat piracy of VCDs and DVDs, including imported counterfeit product and unauthorised imports of "Zone 1" DVDs;
    - greater availability of criminal remedies for piracy;
    - the Government's failure to respond to the recommendations in the report of the House of Representatives Standing Committee on Legal and Constitutional Affairs, *Cracking Down on Copycats*, dealing with enforcement of copyright.
  - the definition of "market power" in the Trade Practices Act, as it relates to markets for copyright products;
  - inadequacy of provisions dealing with the liability of Internet Service Providers; and
  - inadequacy of the anti-circumvention provisions in the Australian Copyright Act.
4. We share the US concerns on each of these issues; we have outlined our position in relation to each below. We have made submissions on many of these issues; these are available on our website ([www.copyright.org.au](http://www.copyright.org.au)), and we are happy to supply copies.

5. Other issues we understand may be raised by the United States are:
  - Australia's accession to the 1996 WIPO treaties: the WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT);
  - the term of copyright protection (there is a longer period of protection in the United States);
  - the relationship between copyright and contract law, the subject of recent recommendations by the Copyright Law Review Committee (CLRC), to which the Government has not yet responded; and
  - compensation for private copying of audio recordings.
6. Again, our position on each of these issues is likely to be that of the US. We outline our position on each of these issues below.
7. The only issue that Australia may want from the United States, that we are aware of, relates to the "home-style" exemption for public performance of music in the US Copyright Act.

## **Our position on these issues**

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### **Parallel importation**

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8. The Copyright Council continues to oppose repeal or diminution of control over parallel importation. We take the view that creators and copyright owners, particularly Australian rights owners, are harmed by parallel imports; that the benefits for consumers are exaggerated by proponents of parallel importation; and that any benefits do not outweigh the harm to copyright owners.
9. Our submissions on this issue include a 2001 submission to the Senate Legal and Constitutional Legislation Committee on the Copyright Amendment (Parallel Importation) Bill 2001.
10. We would support repeal of the 1998 amendments which have allowed parallel importation of articles containing sound recordings, and we would support the abandonment of the Copyright Amendment (Parallel Importation) Bill 2002.

### **Decompilation of computer programs**

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11. We would not oppose repeal of the 1999 amendments which allow reproduction of computer programs to make interoperable products.

**Enforcement**

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12. In our submission to Government of April 2001, we supported most of the recommendations in the report of the House of Representatives Committee on Legal and Constitutional Affairs on enforcement of copyright, *Cracking Down on Copycats*.
13. We are concerned that the Government has still not responded to the recommendations, two years after the report was released. We note also the concern about this issue expressed by the Senate Legal and Constitutional Legislation Committee in its inquiry into the Copyright Amendment (Parallel Importation) Bill 2001.
14. We support improved measures for combating piracy.

**Definition of “market power”**

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15. We share the concerns of the US Government about the Federal Court’s view of “market power” in *Australian Competition and Consumer Commission v Universal Music Australia Pty Limited*. We note that the decision has been appealed to a full court of the Federal Court. If our concerns are not addressed in the full court’s decision, there may be a case for legislative change.

**ISP liability**

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16. We support the introduction of procedures for notice and takedown of infringing copyright material by Internet Service Providers. We note that a code of conduct is currently being drafted, to be adopted by Internet Service Providers and copyright owners.

**Anti-circumvention provisions**

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17. Our position is that the anti-circumvention provisions should apply to the use of circumvention devices and services (as is the case in the US legislation), as well as to their manufacture, importation and supply. We oppose the provisions in the Australian Act which allow manufacture, importation and supply of circumvention devices and services for “permitted purposes”. These issues were raised in our submissions on the Copyright Amendment (Digital Agenda) Bill.
18. We have concerns about the Federal Court decision in *Sony v Stevens*, (which held that access codes on CD-ROMs of computer games were not “technological protection measures” for the purposes of the Copyright Act) but note that the decision has been appealed to a full court of the Federal Court.
19. We note also that there is a drafting error in the anti-circumvention provisions. The definitions of “circumvention device” and “circumvention service” in section

10(1) refer to “an effective technological protection measure”; “effective” should have been omitted.

### **Accession to the 1996 WIPO treaties**

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20. We support Australia’ accession to the 1996 WIPO treaties, and have urged the Government to do so. We note that the Government is preparing legislation intended to put Australia in a position to accede to the treaties, by extending performers’ rights and extending the period of protection for photographs.

### **Term of copyright protection**

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21. We support an extension of the period of copyright protection, but note that an extension of term was rejected by the Intellectual Property and Competition Review Committee with a costs/benefits analysis showing benefits for Australia, and that this recommendation was accepted by the Government.

### **Copyright and contract**

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22. We oppose the recommendations by the CLRC that the Copyright Act include provisions that would make ineffective certain contractual provisions dealing with exceptions to copyright infringement. We are preparing a submission on this issue.

### **Compensation for private copying**

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23. The United States, like many other countries, has provisions in its Copyright Act which provide compensation for private copying of audio recordings. Australia introduced such a scheme in 1989, but the scheme was held invalid by the High Court on the basis that it imposed a tax, and did not comply with the requirements of the Australian Constitution regarding taxation laws. Work on a new scheme was begun by Government but not followed through. A group of Australian copyright owners, including Screenrights and AMCOS has recently urged the government to introduce compensation for private copying. A discussion paper on the subject is available from our website.

### **US exemption for “home-style” performances of music**

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24. The main issue concern with the US Copyright Act for Australian copyright owners is exemption for “home-style” public performances of music. This exemption was held by a World Trade Organization (WTO) Panel to be inconsistent with the TRIPS Agreement, following a complaint by the European

Union. Australia was an observer to the proceedings. The Panel subsequently made a determination as to the compensation payable by the US.

25. To date, the US has not amended its legislation to comply with the TRIPS Agreement. This has resulted in ongoing loss of royalties to composers and publishers whose music is played in the US, including Australian composers and publishers.

### **Protection for cultural industries**

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We understand that the United States may seek removal of protections for cultural industries, such as broadcast quotas. This is not a copyright issue, but we support the position of our affiliated organisations and the Australian Coalition for Cultural Diversity (ACCD) in opposing any such removal.

Libby Baulch  
Executive Officer  
January 2003