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***Submission to Senate Select Committee on
the Free Trade Agreement between
Australia and the United States of
America***

May 2004

Australian Copyright Council

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 policy.
2. Some of the organisations affiliated with the Australian Copyright Council have made separate submissions to the Senate Select Committee on the Free Trade Agreement between Australia and the United States of America. Some of those organisations have a different position to that of the Copyright Council in relation to extension of the term of copyright protection.
3. Our submission relates only to the provisions on Chapter 17 (Intellectual Property) relating to copyright.
4. In general, we support and welcome the provisions. Many of them give effect to submissions we have made in the past to the Government and committees of inquiry.

Accession to WCT and WPPT: Article 17.1(3)

5. We support accession to the World Intellectual Property Organization (WIPO) Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT), and have previously urged the Government to accede to these treaties. We note that the Government has previously undertaken to accede to the treaties in its free trade agreement with Singapore. We also note that Australian copyright law already meets most of the obligations in the treaties, and that the Government has undertaken to amend the Copyright Act to meet the remaining obligations.
6. As a developed country in an increasingly globalised world, we think it is important that Australia's copyright law keep up to date with international standards, particularly in relation to new technologies, to ensure that copyright continues to provide incentive and reward for creative endeavour in Australia. In addition, it is important that Australia be seen by other countries to take international standards seriously, given its interest in, and activities towards, improved copyright protection for Australian copyright material in those countries.

Extension of the term of copyright protection: Article 17.4(4)

7. The Copyright Council supports the extension of the term of copyright protection. The issue was considered by the Intellectual Property and Competition Review Committee, which recommended in its September 2000 report that there not be an extension of term without a cost/benefit analysis. Such an analysis was done in a

report by the Allen Consulting Group in 2003: *Copyright Term Extension — The Australian Benefits and Costs*.¹

Our reasons for supporting an extension of the term of protection include the following:

- The report by the Allen Consulting Group found that, on balance, the benefits of extending the term of protection in Australia outweighed the costs.
- Harmonisation of the term of protection with that of major trading partners can assist copyright compliance with clearance of rights for material distributed or made available overseas (including online). It is arguable that any copyright material made available on an Australian website must meet the copyright obligations of all countries in which that material may be viewed. A work may be out of copyright in Australia, but nevertheless need a clearance because it is distributed or available in a country in which it is still protected. Any additional costs of getting clearances for works covered by the extended period should be weighed against the costs of determining the need for a clearance.
- The current copyright term for authors' works – author's life plus 50 years – is intended to provide opportunities for payment to the creator during his or her lifetime, and to the creator's family after the creator's death. Extending the period of protection from life plus 50 year to life plus 70 years reflects increased life expectancy since the life plus 50 year standard was adopted.
- Extension of term partly address the concerns raised by Senator Aden Ridgeway about the copyrights in the works of Albert Namitjira, due to expire at the end of 2009, as it would enable the Namitjira family to benefit from uses of Namitjira's work for a longer period of time. The concerns raised by Senator Ridgeway also apply to other Indigenous creators.
- Australian rights owners will benefit from the longer period of protection not only in the US, but in all countries which provide the life plus 70 period to foreign works on the basis of reciprocity. This includes all countries in the EU, which are required under the EU Term Directive to adopt the life plus 70 standard.
- An analysis by Copyright Agency Limited, referred to in its submission to the Committee, showed that the cost of extension of term to educational institutions would be minimal.

Technological protection measures: Article 17.4(7)

We support the extension of the anti-circumvention provisions in the free trade agreement. In our submission to the review of the Digital Agenda Act, commissioned by the Government from Phillips Fox, we supported extension of the current anti-circumvention provisions to cover circumvention of access controls, and to cover use as well as manufacture and supply of circumvention devices and services. In addition, we opposed the current "permitted purposes" for which circumvention devices or services may be used. The report of the Digital Agenda Review recommended that the use of a circumvention device or service be prohibited.

¹ Available from <http://www.allenconsult.com.au/publications.php>

The copyright balance

We reject the claims made in some submissions to the Committee that adopting the copyright provisions in the free trade agreement will massively benefit copyright owners to the detriment of copyright users. We note that the Digital Agenda amendments to the Copyright Act introduced new digital use provisions for libraries and educational institutions that are far more extensive than in any other comparable jurisdiction. The library use provisions require no payment to copyright owners, and the educational use provisions require payment of equitable remuneration. These new use provisions far outweigh the new rights to copyright owners, as they apply to existing rights, particularly the reproduction right, as well to the limited new elements of the communication right.² We thus think that calls for further exceptions to copyright infringement are unfounded.

Libby Baulch
Executive Officer
May 2004

² The new elements of the communication right were the right to make available (eg on a website), which nearly always involves an exercise of the reproduction right in any event, and nonm-wireless transmission to the public on a non-subscription basis.