



AUSTRALIAN  
COPYRIGHT  
COUNCIL



---

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

---

**July 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. The Australian Copyright Council made a written submission to the Senate Select Committee (the Committee) on the Free Trade Agreement between Australia and the United States of America, and has appeared before it in connection with its enquiry. In those representations, we confirmed our support for most of the provisions relating to copyright in the AUSFTA.
3. This supplementary submission addresses issues raised before the Committee relating to private copying – including of music and from television – and the possible introduction into Australian law of provisions similar to the fair use provisions in the United States Copyright Act.
4. These issues were also raised before the Joint Standing Committee on Treaties (JSCT), and we have provided to the Senate Select Committee our response to the JSCT recommendations.
5. Some of the organisations affiliated with the Australian Copyright Council have made separate submissions to the Senate Select Committee.

## Urgent need for review of issue of private copying

---

6. We regard uncontrolled private copying, including that connected with peer-to-peer networks, as having wide-ranging detrimental effects and thus requiring urgent attention by the Government. The issue is very complex and affects a wide range of interests. We think that the Government's standing committee, the Copyright Law Review Committee, should be asked to inquire into the issue of private copying, and that the issues covered by the inquiry should include the following:
  - the economic and social implications of unauthorised private copying, including copying:
    - connected with peer-to-peer networks;
    - of programs from television for both "time-shifting" and "library building"; and
    - of music for "space-shifting" purposes;
  - the approach to these activities in other countries, including: the private copying levy schemes in the US, Canada, Japan, and member countries of the EU; the fair use provisions in the US Copyright Act; and the provisions on private copying in the EU Directive on the Information Society;
  - Australia's international treaty obligations;
  - options for addressing the issue of private copying in Australia; and
  - recommendations for change.

## Why the issue requires review

---

7. We did not anticipate that issues relating to private copying and the possible introduction of provisions similar to the US fair use provisions would be raised before JSCT Committee or the Senate Select Committee, as the AUSFTA does not require consideration of these issues. Consequently, neither committee has had an opportunity to hear and consider the full range of views relating to these issues. Partly for these reasons, we strongly oppose the introduction of new exceptions into the Copyright Act without further careful consideration of all the complex issues involved. These issues include:
- One of JSCT's two rationales for introducing a fair use type provision into Australian law was to "counter the effects of the extension of copyright protection". The effects of the extension of the term of copyright, however, are likely to be limited. The cost estimates by Dr Philippa Dee were based on an obviously flawed premise: that there is a constant flow of royalties throughout the period of copyright protection. Data collected by Copyright Agency Limited shows that 70% of works used are less than 10 years old, and that works which would currently be in the extended period (50 to 70 years after the author's death) make up only 0.02% of material copied.
  - JSCT's other rationale was "to correct the legal anomaly of time-shifting and space-shifting". There is no reference, however, in the JSCT report, to the US provisions requiring payment of a levy on digital audio recording equipment and media. In addition, the economic and other effects of these activities in the current Australian environment need to be carefully considered.
  - It is not appropriate to simply "import" a US statutory provision; the fair use provision has a much more complex application than may immediately appear, as a result of a large body of case law and the relationship of the provision to the copyright power in the US Constitution.

## Review of the copyright provisions of the AUSFTA

---

8. We would support a review of the effects in practice of the AUSFTA a reasonable time after the provisions come into effect. We note that the provisions in the AUSFTA relating to technological protection measures do not have to be implemented until two years after the AUSFTA comes into effect.
9. Any such review must be done differently to the recent three-year review of the Digital Agenda Act, promised by the Government at the time the Digital Agenda Act was introduced. While we supported that review in principle, we have concerns about the way in which it was carried out, and in particular that it was outsourced to a private law firm rather than given to the Copyright Law Review Committee. In our view, any review of the copyright provisions of the AUSFTA should be done by the Government or by the Copyright Law Review Committee.

Libby Baulch  
Executive Officer  
July 2004