

# Australian Copyright Council

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Mr Steve Moran  
Trade Policy Section  
Trade Negotiations Division  
Department of Foreign Affairs and Trade  
RG Casey Building  
John McEwen Crescent  
Barton  
ACT 0221

27 May 1999

Dear Mr Moran,

I am writing in response to the Request for Public Comment on Australia's approach to further multilateral trade negotiations and to an invitation from Mark Pierce from the Department to comment on the forthcoming review of the TRIPS Agreement. I apologise for the delay in my response.

The Copyright Council is an independent non-profit organisation. The Council's objectives include assisting creators and other copyright owners to exercise their rights effectively and seeking changes to law and practice to enhance the effectiveness and fairness of copyright. I have enclosed a brochure containing more information about the Council and a list of our member organisations.

In responding to the Government's invitation, I have confined my comments to the copyright aspects of the TRIPS Agreement. I have briefly outlined our position in relation to issues in TRIPS that could be clarified and additional copyright issues that TRIPS could deal with. Some of our member organisations have specific concerns about compliance and enforcement, particularly in the Asian region, and I anticipate that a further submission or submissions in relation to these issues will be made by the Council or member organisations.

## **General comments**

The Copyright Council supports the continuation of a strong and comprehensive TRIPS Agreement and its full implementation in all World Trade Organisation member states. The Agreement has delivered some important changes to the law in favour of copyright owners in Australia and around the world.

The Council would like to see any renegotiation of the Agreement result in a strengthening and expansion of the protection afforded to copyright owners.

I note that, alongside TRIPS, the Berne Convention (and the 1996 protocol, the WIPO Copyright Treaty (WCT)) continues to play a very important role in setting international standards for the protection of copyright. In order for TRIPS to remain relevant and effective, it must take account of the developments in technology that have been recognised by the WCT.

## **Issues in the TRIPS Agreement that need to be clarified or further elaborated**

### **Trade-related intellectual property rights**

The term “trade-related intellectual property rights” in the title and preamble to the TRIPS Agreement arguably limits the application of the Agreement to protected works and other subject matter which are produced in commercial quantities. The Council would like to see the Agreement clarified to ensure that it applies to all protected subject matter whether produced in commercial quantities or not.

### **Criminal procedures**

Article 61 provides for criminal procedures and penalties to be applied at least in cases of copyright piracy on a “commercial scale”. The term “commercial scale” is vague and arguably denotes a certain level or volume of infringing activity. It is not clear, for example, whether certain acts to which criminal penalties apply under our legislation would fall within the category of “piracy on a commercial scale”, such as distributing an article for any purpose that will prejudice the interests of the copyright owner or causing a performance of copyright material at a place of public entertainment. The Agreement ought to be clarified to ensure that criminal penalties are applicable to appropriate acts of infringement and not just those that involve a certain volume or level of infringing activity.

## **New intellectual property issues that TRIPS should address**

### **Protection for copyright owners in the digital environment**

The Council would like to see the TRIPS Agreement amended to ensure that it effectively protects copyright owners in the digital environment. This could be achieved by adopting standards similar to those contained in the WCT, including a right of communication to the public and protection for technological measures and rights management information.

In the Council’s view, an amendment of this nature is a particularly high priority. It is very important to have consistent international standards in this area given the ease and speed with which copyright material is communicated and accessed all around the world.

I have commented below in relation to the protection of performers and phonogram producers in the digital environment.

### **Rental rights**

Rental is a commercial use of copyright material, like communication, public performance and publication, which should be controlled by the copyright owner. The TRIPS Agreement currently provides rental rights for owners of copyright in sound recordings (and works included in sound recordings), computer programs and “cinematograph works” (unless it is the case that rental of cinematograph works has not led to widespread copying which materially impairs the owner’s exclusive right of reproduction). The Council would like to see the TRIPS Agreement amended to include a right of rental in respect of all copyright subject matter and the reservation regarding rental of film removed.

### **Private copying**

The Council would like the Government to consider supporting an amendment to the TRIPS Agreement that requires contracting parties to introduce a blank media royalty to compensate copyright owners for the private copying of music, film and other copyright material. This right exists in many other countries and, although not a high priority, I understand that the introduction of a blank tape levy is still under consideration by the Government, following the unsuccessful attempt to introduce a levy several years ago.

### **Moral rights**

The Council would like to see the removal from the TRIPS Agreement of the part of paragraph 1 of Article 9 which provide that members do not have to comply with Article 6bis of the Berne Convention.

### **Performers’ rights**

The Council would like to see the TRIPS Agreement increase the protection it gives to performances in line with the standards of protection set by the WIPO Performances and Phonograms Treaty (WPPT). Specifically performers should be granted the following rights:

- reproduction of performances fixed in phonograms;
- distribution of performances fixed in phonograms;
- rental of performances fixed in phonograms;
- making available to the public (by wire or wireless means) of performances fixed in phonograms;
- remuneration for the broadcast and communication to the public of performances fixed in phonograms; and
- moral rights in respect of performances fixed in phonograms.

The Council supports the extension of performers’ rights to performances on audiovisual recordings, such as film and television. I note that there are currently negotiations taking place in relation to a protocol to the WPPT and the Council has urged the Government to support such a protocol. The Council would also like to see such protection provided for in the TRIPS Agreement.

### **Sound recordings**

The Council would also like to see protection for sound recordings in the TRIPS Agreement upgraded to the level of the WPPT by the recognition of the following exclusive rights:

- distribution right;
- right of making available (by wire or wireless means); and
- right to remuneration for broadcasting and communication to the public.

### **Protection for photographs**

Currently, the TRIPS Agreement standard for the duration of copyright in photographs is the same as that under the Berne Convention – 25 years from the taking of the photograph. However, the WCT provides that members agree not to apply the Berne standard, with the result that they are obliged to protect photographs for the same period as other works, namely, for the life of the author plus 50 years.

The Council would like to see the TRIPS Agreement amended to render it consistent with the WCT and to ensure that photographs are protected consistently with other copyright material.

### **Importation**

The Council has always supported the right of copyright owners to control parallel imports of copyright material, arguing that they are fundamental to the effective implementation of copyright rights and to international trade.

When the TRIPS Agreement was originally negotiated, our position was that the Agreement should recognise the territorial nature of copyright and the exclusive right of copyright owners right to control importation of items containing copyright material. This is still our position, although we recognise that the Government's recent approach to the issue of parallel imports in relation to certain types of material does not accord with this view.

### **Distribution right**

The Council would like to see the TRIPS Agreement recognise an exclusive right to authorise the making available of the original or copies of a work through sale or other transfer of ownership, consistent with the WCT. However unlike the WCT, we would like to see TRIPS adopt the principle of national exhaustion so that copyright owners would have the right to prevent parallel imports (as stated above).

## **Enforcement**

### **Remedies**

Article 45 of the TRIPS Agreement provides for the remedy of damages but does not provide for an account of profits as an alternative to damages. In the Council's view, Article 45 ought to provide for account of profits as an alternative to damages. This would be consistent with the approach taken under our legislation.

### **Further information**

Please contact me if you would like to discuss the Council's submission or if you require clarification or further information.

Yours sincerely,

Virginia Morrison  
Acting Executive Officer