

A M C O S

The Committee Secretary  
Joint Standing Committee on Treaties  
Parliament House  
Canberra ACT 2600

Thursday 22 April 2004

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Dear Sirs

### **Australia – US Free Trade Agreement**

APRA/AMCOS is grateful for the opportunity to make comments on the text of the Free Trade Agreement with the United States of America which was concluded in February.

APRA/AMCOS congratulates the Government in concluding the Agreement. We believe that it provides significant benefits for our members and copyright owners generally. It will ensure Australia remains abreast of international best practice in copyright, especially in the area of technological protection and the digital use of copyright materials.

#### ***Australasian Performing Right Association Limited***

The Australasian Performing Right Association (APRA) is a non-profit organisation, established in 1926, which represents over 33,000 Australasian composers, songwriters and music publishers. It owns or controls the rights of public performance and communication in musical works of its members and members of affiliated societies throughout the world.

#### ***Australasian Mechanical Copyright Owners Society***

The Australasian Mechanical Copyright Owners Society (AMCOS) is a non-profit company representing over 200 music publishers in Australasia. It administers certain reproduction rights on behalf of its members and affiliates. APRA administers the operations of AMCOS, under contract.

### **Duration**

APRA/AMCOS welcomes the extension of the term of copyright from life + 50 to life + 70 years: Article 17.4.4

We do not believe that this extension will incur significant costs or burdens on copyright users. Rather, Australian copyright owners and users will benefit from the harmonisation of term with our major trading partners, and we believe that the harmonisation will have other significant benefits, including encouraging investment opportunities.

As part of this submission, we annex the Allens Report dated July 2003. The Allens Consulting Group, commissioned by the Motion Picture Association (and supported by APRA, CAL and Screenrights), was asked to identify the benefits, if any, for Australia resulting from extension to the term of copyright and to consider whether those benefits are outweighed by any demonstrable costs.

I refer the Committee to the report generally but also to page 4 of the report, Table 1.1 being the Comparative Table of Copyright Terms in selected countries for Literary, Dramatic, Musical and Artistic Works.

Finally, in relation to the issue of extension of copyright, we expect the Government will enact appropriate transitional provisions allowing for works that have gone out of copyright recently, and say since the conclusion of the Free Trade Agreement in principle, may be awarded the same extension protection.

#### **ISP Liability – Take Down and Notice**

We consider the provisions relating to ISP liability and the exchange of letters establishing a “notice and take down” procedure to be important and support the implementation of any such scheme. This is particularly so in view of the fact that negotiations with the Internet industry with respect to a Voluntary Code of Conduct stalled last year.

We note that the exchange of letters between the Australian and US Governments respectively sets out what each notice is likely to contain. We note that there is no time frame specified within these Notices and counter-notices. APRA/AMCOS considers that for such notices to be effective, there will have to be strict time frames within which each Notice is to operate.

In implementing the scheme, we believe the provisions should be drafted so as to deal with the issue of peer-to-peer copying of copyright materials.

We would note for the Committee that there is a legislative model for a code where minimum standards are legislated; refer to schedule 5 of the *Broadcasting Services Act 1992*.

We reserve our right to comment further on this topic when it is clearer whether the proposed code is to be legislative scheme or one developed in consultation with relevant participants in the industry.

### **Statutory Damages**

We note that Article 17.11, Enforcement of IP Rights, provides for a system of statutory damages to be established if the current regime of additional damages is not sufficient to compensate copyright owners and to deter infringement.

APRA/ AMCOS believes that the current judicial discretion under Australian law to award additional damages in appropriate circumstances should be retained, without the need to implement a regime of statutory damages. We would however welcome any procedure that may assist in the deterrence argument for 'infringers'.

In the infringement actions undertaken by APRA each year, additional damages may be pleaded. However, APRA's priority is to prevent the infringing conduct, that is have the infringers take out the appropriate licence and have damages (namely unpaid licence fees) assessed for the relevant period during which the Premises was not licensed.

Given that we do not often seek "additional damages" in infringement proceedings, we would nonetheless not oppose a system where additional damages are subject to a statutory limit. This in fact may be more relevant for actions taken by AMCOS with respect to unauthorized reproductions of musical works.

However on the basis that "additional damages" are intended to apply or in fact compensate, inter alia, where 'undetected instances of infringement take place', the amount of damages will have to be at such level to take this into account, and may be best specified as a range.

### **Cultural Exception**

APRA is a member of the Australian Coalition for Cultural Diversity (ACCD) and is aware that the ACCD has put in a submission to JSCOT.

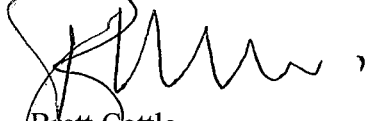
We reiterate here our support for the stance taken in that submission insofar as it relates to the provisions in the Chapter on Services which seek to impose caps and ratchet provisions for local content quotas in broadcasting. Further, we support the view that the Government should have insisted on a "cultural exception" as in the Australia-Singapore Free Trade Agreement. We believe that it is crucial that the Government retain its ability to intervene and regulate to preserve the fostering of Australian voices and culture in our media. This is particularly so in the area of developing new media, where it is not yet apparent what means of intervention may be necessary.

We also share the concerns of the film industry as to the effects of Article 11.17.4(f) requiring national treatment for investment in Intellectual Property on the structure and operation of film funding bodies such as the AFC and FFC.

Thank you for the opportunity to make this submission on what we presently consider to be our main areas of comment. We fully appreciate that the fine tuning of the Free Trade Agreement will be process that may require further input from APRA/ AMCOS from time to time and intend to participate in this process where appropriate.

Please let us know if we can provide any further and specific assistance to the Committee on any of the issues raised above, or other issues generally.

Yours sincerely

A handwritten signature in black ink, appearing to read 'Brett Cottle', written over a circular stamp or mark.

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