



Australian Film Industry Coalition

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30 April 2004

Secretary
Senate Select Committee on the Free Trade Agreement
between Australia and the United States of America
Suite S1.30.1
The Senate
Parliament House
CANBERRA ACT 2600

Dear Secretary

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

Please find attached the submission to the Committee by the Australian Film Industry Coalition. The Coalition consents to the submission being included on your website and would appreciate the opportunity to meet with the Committee.

Please let me know if you have any questions.

Yours sincerely

IAN SANDS
Chairman - AFIC

**SENATE SELECT COMMITTEE ON THE FREE TRADE AGREEMENT BETWEEN AUSTRALIA AND
THE UNITED STATES OF AMERICA**

**A Submission by the Australian Film Industry Coalition
April 2004**

1. THE COALITION

The Australian Film Industry Coalition was formed in 2003 to represent the interests of participants in the Australian film industry – producers (majors and independents), distributors, exhibitors and retailers (rental and sale) in the protection of intellectual property rights. The Screen Producers Association of Australia (SPAA) and the Australian Subscription Television & Radio Association (ASTRA) are also members.

The Coalition was created to provide the local film industry with an effective voice – both within Government and in public fora – in relation to policy and legislative issues of importance to the industry. Its formation coincided with the commencement of the FTA negotiations between Australia and the US and the Government's announcement of the Digital Agenda Review of provisions of the *Copyright Act 1968* (Cth).

The Coalition seeks to work with Government to put in place the legal and policy tools required to allow the Australian film industry to continue to be a dynamic part of the global film industry, and to tackle effectively the various enforcement issues facing the industry, including threats from piracy on the Internet.

2. EXECUTIVE SUMMARY

The Coalition is pleased with the negotiated outcomes in Chapter 17 of the FTA. The Coalition believes that the full and proper implementation of these outcomes will assist copyright owners in Australia to protect their content, particularly in the online environment.

At the same time the implementation of the FTA offers the opportunity to achieve the best outcomes for the Australian rights owners and to take account of local conditions and changes in the technological environment that have occurred in recent years.

Areas of significant focus for the Coalition that are the subject of this submission are:

- Internet service providers.
- Technological protection measures.
- Criminal enforcement measures.
- Civil enforcement measures.
- Digital rights information.

Each of these issues are developed below.

Where relevant, the following submissions refer to the recently released *Digital Agenda Review Report and Recommendations*, prepared by Phillips Fox and provided to Government (**Digital Agenda Report**). It must be kept in mind that, as the press release accompanying the report stated, in many areas the FTA will supersede the recommendations contained in the report.

3. INTERNET SERVICE PROVIDERS

One of the most important issues facing the Australian film industry and other copyright industries is the enforcement of copyright on the internet. The Coalition believes that the FTA text provides an appropriate framework for the implementation of measures that will strengthen the ability of copyright owners to protect their material online in the face of significant current and future threats of copyright infringement.

Appropriate legal implementation depends on the balance struck between the interests of the copyright owners and those of the internet service providers whose infrastructure is used by internet pirates. This balance reflected in the text of the FTA should be fully maintained in any legislation implementing the FTA in Australia. Calls for qualifications to the regulation of ISPs or the rights of copyright owners under the FTA text should be resisted.

3.1 Background

One of the key strategies for the film industry in the future is to develop and implement a range of appropriate online business models that will enable both copyright owners and consumers to enjoy the benefits of new technologies. However, without an ability to effectively protect its copyright in the online environment, and to quickly and decisively enforce its rights, the film industry is concerned that it may find itself unable to develop and implement viable online business models.

The online environment requires special consideration as it poses unique challenges for enforcement by the film industry and other copyright owners. Whereas the size of files and limits on communications methods have traditionally meant that film copyright was not subject to the same level of infringement on the Internet as other file types, such as music or software, that position is changing rapidly.

Increasingly, infringing copies of films (in a variety of formats) are being identified as being distributed and downloaded from the Internet, and the technological capacity of users to upload or download film files has increased greatly with the take-up of broadband Internet connections and the development and wide dissemination of new compression technologies such as the “DivX” codec.

The participants in the Internet industry, particularly ISPs, are becoming the primary means for distributing illegal files, whether knowingly or unknowingly.

The current position in Australia with respect to the obligations of ISPs is unclear. ISPs are potentially liable for “authorising” infringements of copyright that occur via their facilities, or potentially liable as joint tortfeasors. However, the current uncertainty regarding certain aspects of their liability has given rise to a situation where the internet industry and content industries have been unable to agree upon a code of practice containing the specific steps that should be taken.¹

Therefore the Coalition welcomes the introduction in Australia of provisions that will provide greater certainty in this area as long as the text is fully and faithfully implemented consistently with Article 17.11.29.

3.2 Balancing interests

The policy behind the notice and takedown procedures in s.512 of the US Copyright Act, largely replicated in the FTA text, was described in the US House of Representatives Conference Report² as follows:

“Title II preserves strong incentives for service providers and copyright owners to cooperate to detect and deal with copyright infringements that take place in the digital networked environment. At the same time, it provides greater certainty to service providers concerning their legal exposure for infringements that may occur in the course of their activities.”

¹ Further background on the current Australian law regarding ISP liability is detailed in the Coalition’s submission to the Digital Agenda Review, available at www.phillipsfox.com.

² House Report 105-796, page 72.

Similarly, article 17.11.29 of the FTA text requires the parties to provide “legal incentives for service providers to cooperate with copyright owners”.

The provisions are therefore a legislative “trade off”, with copyright owners agreeing to forego certain rights in exchange for the certainty of having ISPs co-operate in certain steps to deal with infringements, including procedures to “take down” infringing material from the internet. A limited and conditional immunity from liability provides the incentive for ISPs to cooperate with copyright owners. The regime includes a number of provisions designed to achieve a fair balance between copyright owners and ISPs.

While the Coalition supports the introduction of Australian solutions to implement the FTA, the Coalition is strongly opposed to any self-regulatory approach that would place the obligations of ISPs into an industry code, regulated by ISPs themselves, while implementing the safe harbours from liability into legislation relating to copyright.³

Such an approach is likely to have the effect of altering the fundamental balance achieved in the FTA provisions inexorably in favour of the internet industry, to a point where ISPs may seek to give themselves immunity from responsibility lessening any incentive to cooperate with copyright owners in appropriate enforcement measures. The failure of the copyright industries and the ISP industry to reach agreement on the terms of a Code for online enforcement underlines this concern.

3.3 ISP Takedown obligations

The FTA incorporates obligations for ISPS to take down certain content identified by copyright owners as being infringing. The takedown procedures contained in the FTA are triggered by Article 17.11.29(b)(v)B.

Take down procedures are a crucial part of the balance between copyright owners and ISPs under the FTA. Eligibility for any safe harbour protection under the FTA text is conditioned on the ISP:

“expeditiously removing or disabling access to the material residing on its system or network on obtaining actual knowledge of the infringement ... such as through effective notifications of claimed infringement in accordance with paragraph (ix)”.

³ The Coalition is therefore concerned with some press reports that suggest the Government may be considering a weakening of the obligations on ISPs that appear in the US law and the FTA in order to be eligible for safe harbour protection. In an article in The Australian on 9 March 2004, entitled “ISPs left in the dark over internet copyright law”, a spokeswoman for Daryl Williams is quoted as saying that ‘A co-regulatory regime to address certain aspects of the ISP liability provisions is one option the Government will consider.’ ... ‘Australia has a different regime and we are not required to import US laws into Australia as a result of the FTA’.

Paragraph (ix) requires the parties to establish appropriate procedures for effective notifications of claimed infringement and effective counter-notifications for those whose material is affected where there is a belief that the material is not infringing.

Additional detail regarding the takedown procedure is then contained in the Side Letter on ISP Liability, including provisions that address the rights of internet users whose material is the subject of a take down notice.⁴

The Coalition strongly supports the full and unqualified implementation of the FTA takedown obligations. They provide the clearest, most appropriate process for the quick, cost effective and relatively dispute free approach to removal of infringing content from the internet. The immediate removal of material suspected of being infringing protects the interests of copyright owners and provides the incentive for them not to resort to legal avenues in the first instance at greater cost to the copyright owner, the internet user and the ISP. The immediate and selected takedown of material reduces the likelihood that the interests of other internet users will be affected by interruption, particularly on high volume sites.

There is no evidence that the FTA takedown procedure would or would be likely to impose any significant burden on ISPs. ISPs are already subject to takedown procedures in other regulatory regimes and the evidence is that this does not impose any significant or unreasonable burden on them.⁵

The Coalition does not support any weakening of the takedown procedures required by Article 17.11.29(b)(v)B and the Side Letter on ISP Liability, such as by diminishing the obligation to immediately takedown the suspect material pending a response from the affected internet user.⁶ Delaying takedown pending a response from internet users would alter the balance struck in the FTA between the interests of the copyright owners and ISPs which provides safe harbours in exchange for prompt takedown. It would permit unscrupulous internet users to move infringing material to other locations thereby repeating the problem and maximising the damage caused to legitimate rights holders from the availability and distribution of infringing material on the internet.

⁴ The detail provided is very clear down to the content of notices and counter-notices that form the basis of the takedown procedure. This procedure has been followed repeatedly in the United States with little if any legitimate complaint from ISPs or affected internet users.

⁵ Takedown provisions of Schedule 5 to the *Broadcasting Services Act 1992* (Cth) relating to prohibited content.

⁶ This is part of a recommendation contained in the Digital Agenda Report, see for example paragraph 16.36.

3.4 Safe harbours

The other key element of the balance between copyright owners and ISPs is the regime for safe harbours available to ISPs that otherwise operate in a way that is consistent with minimising preventable copyright infringements on their networks or facilities.

The FTA text includes a set of four safe harbours with differing conditions for eligibility attached to each safe harbour.

The conditions fall broadly into the following categories:

- (a) general overarching conditions for eligibility (see Article 17.11.29(vi));
- (b) conditions specific to the particular function being performed (these include defining technological conditions, and compliance with takedown obligations) (see Article 17.11.29 (i) to (iv); and
- (c) disqualifying conditions (see Article 17.11.29 (v)).

Insofar as the conditions are reflected in the FTA text, the Coalition supports their implementation without qualification. Any qualification to the strict obligations that ISPs are required to satisfy will undermine the balance struck in the text.

There are, however, opportunities in the implementation of these conditions for Australia to ensure that legislation is effective to deal with the threat of internet piracy as it exists today. The US implementation of the conditions in the DMCA reflected the state of the internet industry and technology in 1998. It has shown itself to suffer from difficulties where the legislation has been applied since.

The nature of internet infringements has changed significantly since that time. In particular, large scale piracy occurring via peer-to-peer (P2P) networks has become prevalent internationally and in Australia.

Peer-to-peer networks, most notably FastTrack, are used to illegally distribute files around the world, and are becoming a significant threat to the film industry as they continue to gain in popularity. It is estimated that when all peer-to-peer services are taken into account, more than 2.6 billion files are copied each month, with as many as 2 million users simultaneously using peer-to-peer services at any one time.⁷ In addition, a new generation of services such as eDonkey and BitTorrent are designed to enable the transfer of larger files even more quickly and

⁷ See www.musicunited.org.

efficiently, posing new challenges to the movie industry's fight against piracy. The Australian Federation Against Copyright Theft has commenced monitoring peer-to-peer activity in Australia which is currently running in excess of 100 movies being uploaded per week. Downloads from these sites, which are not yet being measured are likely to number many multiples of that figure.

Internet piracy using these networks is thus on a scale beyond that ever encountered by the copyright industries and requires an effective legal framework.

The Coalition does not support closely defined, technology-dependent safe harbours which fail to deal with changes in technology, such as the emergence of P2P and the role of ISPs which has changed over time with the varying usage of the internet.

The Coalition submits that in implementing the FTA text in this area, account should be taken of the technological conditions now prevailing and likely to prevail in the near future, so as to avoid some of the pitfalls that have occurred in the US under the DMCA. Areas of particular relevance are:

- Ensuring that ISP user policies reflect the experience of copyright owners in responding to internet infringers in order to meet the general eligibility conditions for limited liability. This is particularly important in terms of proper notification of rights and responsibilities, intervention where appropriate and action taken against recidivists. ISPs in Australia virtually all have extensive contractual rights to deal with infringers and should be encouraged to exercise the rights.
- Ensuring that the implementation of the safe harbours does not take away from the overall scheme of liability under the Copyright Act for authorisation or secondary infringements where ISPs are sufficiently involved in infringing conduct. The proper characterisation of "conduit", "caching" and "linking" safe harbours requires careful consideration and consultation to avoid these safe harbours being abused. The pitfalls in the implementation of these safe harbours are apparent from the US experience with the DMCA where Courts have expanded the safe harbours to such a degree that they effectively negate the ability of the DMCA to ensure the protection of copyright material in the new p2p internet environment, and provide incentives for not controlling to any extent the use of material online.⁸
- Ensuring that the disqualifying conditions, where an ISP obtains direct benefit from infringing activity or had knowledge of the activity, are implemented appropriately to respond to the manner in which ISPs conduct their businesses. It should encompass

⁸ US courts have interpreted the definition of conduit ISP in the DMCA in a manner that allows that ISP to store copies of infringing material for as long as 14 days (see *Ellison v. Robertson* 189 F.Supp.2d 1051 (C.D. Cal. 2002)). This circumvents the other obligations on ISPs to take steps to assist in the minimisation of online piracy.

activities where ISPs offer services in consideration of benefits bestowed by infringers.⁹ The knowledge condition should be implemented in a manner consistent with Australian copyright law on knowledge.¹⁰

3.5 Limitations on court ordered relief against ISPs

Paragraphs 17.11.29(b)(viii) and (i) of the FTA text contemplate restrictions on the type of relief that a Court may order against an ISP.

Any implementation of restrictions on Court processes needs to be approached cautiously. Courts constantly fashion new forms of orders to deal with changes in technology and practice. The internet is a case in point. Information that is available on the internet is accessed by means of a series of technical proposals.

Examples of recent Court orders that respond to changes in the copyright enforcement environment include:

- Injunctions against the hosting of infringing material on the internet.¹¹
- Anton piller orders for preservation of volatile computer data.¹²
- Other orders for the production of volatile computer data.¹³

The Coalition submits that implementation of any limitations should not affect the availability of these orders that have been made by Courts in response to digital infringement of copyright and respect the carve-out under the FTA text (see paragraph (viii)).

3.6 Disclosure of information

Another key feature of the balance between the interests of copyright owners and ISPs under the FTA text is the opportunity for copyright owners to obtain information about the identity of infringers using appropriate administrative or judicial means. The Coalition submits that balance cannot be struck if this opportunity is not given to copyright owners.

⁹ This would include situations such as where an ISP offers free hosting services to a customer in return for advertising on the infringing website or hosting the infringing site free of charge.

¹⁰ Legislative wording in the form of “knew or ought reasonably to have known” is more appropriate for the Australian context than wording found under US copyright law: “aware of facts from which infringing activity was apparent”.

¹¹ *Universal Music Australia Pty Ltd v Cooper* [2004] FCA 78 (13 February 2004).

¹² *Universal Music Australia Pty Ltd v Sharman License Holdings Ltd* [2004] FCA 183 (4 March 2004).

¹³ *Sony Music Entertainment (Australia) Limited v University of Tasmania* [2003] FCA 532 (30 May 2003).

It is in the nature of digital copyright infringements, particularly those on the internet, that they are often committed by persons who are either difficult for copyright owners to identify without access to computer systems (often maintained by ISPs or public institutions) or who take active steps to disguise themselves. Copyright owners have extensive experience of this in Australia.

Legal avenues for obtaining information about the identity of infringers exist under Australian law but they are generally expensive, time consuming and disproportionately difficult when compared with the nature of the infringements involved.¹⁴ They require the commencement of legal proceedings and impose an inappropriately high burden on copyright owners in order to obtain information about infringers who in most cases are unable to assert any claim of right at all.

The Coalition strongly supports the enactment of a streamlined procedure to obtain personal information in relation to infringers as contemplated by Article 17.11.29(xi). Elements of the process set out in the Digital Agenda Report could provide a guide to the specifics of such a procedure.¹⁵ The Coalition is willing to provide a further, more detailed submission on these issues if required.

4. TECHNOLOGICAL PROTECTION MEASURES

The Coalition supports the full implementation of the provisions of the FTA text that relate to technological protection measures under Article 17.4.

A significant number of changes are required to Australian copyright in order to fully implement the provisions of the text. Key changes that the FTA would require to Australian copyright law in relation to technological protection measures include:

- Amendment of the definition of TPMs to extend to include “pure” access controls (article 17.4.7(b))
- Creating a criminal and civil prohibition on the act of circumvention (article 17.4.7(a)(i))
- Extension of the definition of “circumvention device” (article 17.4.7(a)(ii))

¹⁴ Preliminary discovery, such as under Order 15A of the Federal Court Rules is one example. The significant effort, expense and difficulty associated with such an application by copyright owners even in clear cases of infringement of copyright are apparent from cases such as *Sony Music Entertainment (Australia) Limited v University of Tasmania* [2003] FCA 532 (30 May 2003) . This was also the finding of the Digital Agenda Report, see paragraph 16.50 and following.

¹⁵ See Digital Agenda Report, paragraphs 16.53 to 16.59, which recommends a subpoena procedure administered through the Federal Magistrates’ Court.

- Consideration and possibly narrowing of the existing exceptions for permitted purposes (article 17.4.7(e) and (f)).

The Coalition notes that the FTA text allows two years from the date in which the FTA comes into force to implement the provisions relating to technological protection measures, but the Coalition believes the appropriate amendments to the *Copyright Act* should be implemented as soon as possible to close the opportunity for infringers to take advantages of the far lower restrictions on their activities than in the US. There is currently an opportunity for arbitrage between the US and Australia that would enable certain acts to be undertaken in Australia for the purposes of obtaining benefits in the US where those acts could not have been lawfully undertaken.

4.1 Extension of the definition of technological protection measures

The decision in *Sony v Stevens* means that under current Australian law, determining whether a technological protection measure is protected will depend on whether the measure “prevents or inhibits” infringement of copyright. There is still some uncertainty post-*Sony* about the scope of measures that are protected.

Examples of measures that may not be protected include measures that protect “pay per view” content, including pay per view movies. Depending upon the technological method of delivery of pay per view content, the delivery of a movie may not implicate any copyright right and therefore measures designed to prevent unauthorised use of pay per view content may not be protected under the *Sony* formula.

Under the FTA text, reflecting the US Copyright Act, protected measures include those that “control access” to a protected work, in addition to those that “protect any copyright” (see article 17.4.7(b)).¹⁶ This places beyond doubt the position of items such as pay per view. “Pure” access controls are also protected in the EU.

The Coalition urges consideration to be given to the implementation of an extended definition of technological protection measures, to include “pure” access controls, in the short term.

The existing uncertainty about entire categories of technological measures means that the industry is reluctant to commit resources to developing those measures. Given that the US and EU both protect access control measures, the Coalition considers that maintaining the current

¹⁶ The Coalition notes that the sections of the Digital Agenda Report concerning this issue (see paragraphs 18.1 to 18.16) have clearly been superseded by the obligations contained in the FTA text. In particular, the Digital Agenda Report notes that extension of the definition of TPMs in the manner required by the FTA was “outside the terms of reference” of the Digital Agenda review: paragraph 18.8.

“gap” in Australia will give rise to just the type of trade barriers that the FTA was designed to avoid, and will discourage online content providers from moving into the Australian market.

The existing permitted purpose exceptions available under the *Copyright Act 1968* provide significantly more protection for users of copyright material than is available under comparable regimes such as that in the US.

Therefore the Coalition considers that the prejudice caused to Australia’s content industries by failing to implement the extended definition in line with Australia’s trading partners as soon as possible, is far greater than any possible prejudice that may be caused to users of copyright material.

4.2 Creation of a criminal and civil prohibition on the act of circumvention

The FTA text reflects the US Copyright Act, and requires a prohibition on circumvention of access control measures (article 17.4.7(a)(i)). This prohibition gives rise to criminal penalties when it is wilful and for the purpose of financial gain or commercial advantage. The text does not require a prohibition on the circumvention of measures that protect against copyright infringement.

The rationale in the US Act for omitting a prohibition on circumventing measures that protect against copyright infringement was that a person circumventing a “copy control” will also infringe copyright and therefore a circumvention prohibition is not required.

The Coalition supports a prohibition on circumventing both types of TPMs, not following the precise manner in which the issues has been addressed under US copyright law. This is the approach taken in the EU Directive, now implemented in the UK. Such a prohibition has the advantage of removing the difficult analysis of whether a measure “prevents or inhibits infringement”. This approach is of course permitted by the FTA text, which allows Australia to implement greater protections than that contained in the text.

With respect to criminal liability, while the Coalition is not opposed to a criminal prohibition, civil liability may be sufficient to achieve the policy goals of the prohibition in the short term, and the Coalition is therefore content to consider criminal liability over the course of the two year implementation period.

4.3 Commercial dealings in circumvention devices

The FTA text requires each party to impose criminal liability to cases where there is “commercial or private financial gain”. Current Australian law already contains provisions prohibiting commercial dealings. It also includes cases where there is no such gain, in particular making a

device available online to an extent that will affect prejudicially an owner of copyright. This notion of prejudicial effect to the copyright owner is well established in Australian law, and should be retained in any implementation.

4.4 Definition of circumvention device

The definitions of circumvention device, contained in paragraph (a)(ii), are broader than the current Australian provisions.

In the Coalition's view, the current restrictions on the definitions of "circumvention device" and "circumvention service" to devices and services "having only a limited commercially significant purpose or use, or no such purpose or use" other than circumvention of a TPM, inappropriately narrows the scope of the crucial new enforcement measures relating to these devices and services in ss.116A and 132 of the *Copyright Act*.

This has had the effect of undermining one of the core objectives of the Digital Agenda Act, which was to provide a practical enforcement regime for copyright owners.

There are a number of problems with the current limited scope of these definitions which should be addressed by the expansion of the definitions required by the FTA text:

- Firstly, they require Courts to focus on an analysis of the purpose of a device, rather than the purposes of the individuals or organisations dealing in the device. It is not immediately apparent that a device can itself have a purpose, so this potentially excludes an entire limb of the definition.
- Secondly, the definitions require courts to undertake an assessment of the commercial significance of the various uses that a device may have. In the case of a device with more than one such use, the task is inherently difficult, potentially requiring detailed expert evidence about the potential markets for the device and their relative significance. Establishing whether uses other than circumvention are of only "limited commercial significance" may ultimately come down to a subjective judgment.
- Thirdly, as currently drafted, the definitions provide opportunities for – and may even encourage – activities designed specifically to avoid the anti-circumvention provisions of the Act. In particular, the maker of a device designed primarily to circumvent a TPM could add a feature or function to the device with the aim of trying to bring it within the "other commercially significant use" carve-out, and thereby seek to avoid all liability for dealings in that device.

5. CRIMINAL ENFORCEMENT PROVISIONS

Article 17.11.26(a) and (b) of the FTA text require the extension of existing criminal liability to provide for criminal procedures and remedies in relation to copyright piracy on a “commercial scale” which includes:

- significant wilful infringements of copyright that have no direct or indirect motivation of financial gain;
- wilful infringements for the purposes of commercial advantage or financial gain;
- the remedy of tracing the profits of infringing activities.

These areas are not covered by existing Australian copyright laws. Currently the reproduction of any number of infringing articles does not lead to the commission of a copyright offence *per se*. A purpose to deal in the articles is also required before the preconditions exist for the commission of a copyright offence. This has the unfortunate and frequent result that Australian law enforcement agencies are less likely to investigate or prosecute copyright infringers who are caught with substantial (commercial quantities) of infringing products because of the obligation to prove purpose even though the possession of those quantities is inconsistent with any legitimate purpose.

Remedies such as tracing the proceeds of copyright infringements are currently not available under Australian copyright law and unlikely to be available under Proceeds of Crime legislation in Australia.

In order to implement this article of the FTA, Australian copyright law would need to:

- Extend criminal liability to include acts of reproduction as well as distribution (see s.132 *Copyright Act 1968* (Cth)) and refer to commercial gain as an additional factor that leads to a finding of secondary infringement.
- Provide for a specific order available to a Court to enable an account to be taken of the profits from infringements and the tracing of those profits into property.

The Coalition also submits that any implementation of these extensions of criminal liability should include infringements in the electronic or online context, consistently with the *No Electronic Theft Act 1997* in the United States.

6. CIVIL ENFORCEMENT PROVISIONS

The Coalition notes that the Government's Guide to the FTA released by the Department of Foreign Affairs and Trade states in relation to the civil enforcement provisions, in Article 17.11.5 to 17.11.15, that "the Article relating to civil remedies is not expected to require legislative change".

While the Coalition considers that many of the civil enforcement provisions are broadly in line with Australia's existing law, it also considers that legislative change is required to properly implement other provisions. The provisions relating to civil enforcement that, in the Coalition's view, require legislative change are as follows.

6.1 Border measures

The importation and subsequent sale within Australia of pirate copies and illegal parallel import copies is an ongoing and significant problem for the film industry. The industry's experience is that vast quantities of pirate DVDs and illegal parallel imports are imported, especially from countries in South East Asia where pirate copies are mass-produced. The industry is frequently involved in assisting in police prosecutions of persons selling pirate or parallel import copies. Despite these efforts there continue to be large flows of illegal product into Australia, particularly copies of new release films.

Preventing the articles from entering the country in the first instance is a more efficient way to deal with the problem, meaning that the powers given to Customs officers are important.

Article 17.11.22 of the FTA text requires that:

"Each Party shall provide that its customs authorities may initiate border measures ex officio with respect to imported merchandise, without the need for a specific formal complaint."

There is no qualification to this clear obligation under the Side Letter.

This provision needs to be considered in light of the current Australian border protection regime. Under the Australian Copyright Act (sections 134B to 135AK), a Customs officer may seize infringing copies at the border only if:

- the copyright owner has previously lodged a notice with the CEO of Customs indicating that it is the owner of copyright in certain material and that it objects to the importation of copies of that material (section 135); and

- a person attempts to import copies of the copyright material for the purpose of selling, exposing for sale, or distributing the copies for the purpose of trade or another purpose that will affect prejudicially the owner of copyright (section 135(7)).

Once items are seized, the copyright owner must generally commence infringement proceedings within 10 working days of the date on which Customs notifies the owner (unless the timeframe is extended by the CEO of Customs following a request from the copyright owner). If proceedings are not commenced within the specified timeframe, Customs is obliged to return the copies to the importer (section 135AF), even if they are plainly infringing.

Importantly, the Australian provisions apply to parallel imports as well as pirate copies (section 135(4)). This is of particular significance to the film industry, since parallel imports of DVDs are not permitted by the Copyright Act.

Under the US Copyright Act, although there is also provision for copyright owners to lodge notices with Customs regarding copyright works, Customs' seizure powers arise independently of any notice lodged by a copyright owner, that is, they are "ex officio". In particular:

- the importation of infringing copies is prohibited by US Customs, and the port director must seize any item in the possession of a person which he determines to be an infringing copy; and
- if the port director has any reason to believe that an imported article may be an infringing copy, he must withhold delivery of the article and notify the importer and the copyright owner (section 603(a) and CFR Title 19, part 133).

There is no requirement that the copyright owner commence legal proceedings in order to prevent products that are infringing from being returned to the importer, although they are free to do so if they wish.

The Coalition supports the introduction in Australia of ex officio powers for Customs officers to seize and detain products they believe are infringing. There are good reasons for the implementation of these powers consistently with the FTA text:

- There is no reason why the border protection regime should be wholly dependent on notices. The US border protection regime, that forms the basis for the FTA text, is an efficient system and fairly balances the rights of copyright owners with the rights of importers. There is no anecdotal evidence to suggest that the system does not work fairly in practice.

- The notice based system currently in force in Australia places a significant burden on copyright owners. Notices can rarely feasibly be lodged for all copyright works of the copyright owner with the consequence that many works are inevitably left outside the border protection system. Lodging notices inevitably depends on a prediction as to which works will be the subject of piracy, a prediction that often cannot be made until it is too late.
- The US approach to restrictions on the return of seized items are a more realistic response to the current problem of importation piracy. The Australian requirement for copyright owners to commence infringement proceedings means that many infringing copies will be returned to importers simply because it is often uneconomic, even in cases of clear piracy, to commence legal proceedings in relation to every shipment detained by Customs. Infringers often rely on this to break up shipments into smaller parts to minimise the prospects of detection and of legal proceedings being commenced against them over any small group of infringing products. The infringing copies released by Customs will inevitably end up in circulation at a later time, and require further enforcement measures to be taken.

The film industry already works closely with Customs to educate its officers in the identification of unlawful imports. If ex officio powers were introduced for Australian Customs officers, the film industry would provide extensive ongoing support and advice as necessary to ensure that the powers were able to be exercised effectively.

6.2 Presumptions in relation to copyright material

Article 17.11.4 of the FTA text requires that Australia implement evidentiary presumptions to assist copyright owners in proving subsistence and ownership of copyright.

The Copyright Act now incorporates a range of new presumptions that assist copyright owners, including the film industry, in the proof of copyright in Australia. These presumptions go a significant way towards implementing the obligations under the FTA. However in the implementation of the FTA there is an opportunity for Australia to implement additional presumptions for the protection of films that are in line with the current regime available to owners of copyright in sound recordings and that are more consistent with the obligations under the FTA for all forms of copyright protected subject matters.

Sections 130(2) and 132B of the Copyright Act create civil and criminal presumptions relating specifically to the form of labels generally used on records embodying sound recordings. As noted in the Supplementary Explanatory Memorandum for the relevant amendments, these provisions are consistent in form and approach with the new presumptions in ss.126A and 126B,

but they provide additional certainty in their application to the specific labels that are in common usage among owners of copyright in published sound recordings.

Giving presumptive force to specific forms of labelling in general use within an industry has the potential to greatly assist in the practical enforcement of copyright, by making it easier for copyright owners in that industry to prove the subsistence and ownership of copyright in Australia. In the Coalition's view, the considerations that led to the introduction of ss.130(2) and 132B justify the creation of similar presumptions in relation to the specific forms of labelling used in the film industry.

(a) *Copyright notices in the film industry*

Copyright notices used in the film industry are generally in the following form:

© [year] [name(s) of copyright owner(s)]

This form of notice (whether on its own or with additional words and marks) is widely used by the owners of copyright in publicly-released films, both on the film print itself (usually at or near the end of the credits) and on the outer packaging of DVDs, VCDs and video cassettes. It has a high degree of acceptance within the industry, both in Australia and overseas, and has been used for many years by the major film studios and distributors.

(b) *International basis for © notice*

Like the ® symbol for sound recordings, which has its roots in the 1971 *Convention for the Protection of the Producers of Phonograms Against the Unauthorized Duplication of Their Phonograms*, the © symbol is an internationally recognised statement of copyright ownership. The symbol, and its positioning with the other elements of the copyright notice (year of first publication and owner of copyright), derive originally from Article III of the *Universal Copyright Convention*. The copyright notice used by the film industry reflects the form of notice prescribed by Article III.

(c) *Film-specific provisions in overseas copyright legislation*

This form of copyright notice has been specifically recognised in s.401 of the US Copyright Act. Until 1989, under US copyright law it was mandatory to affix a copyright notice in the prescribed form. Without such a copyright notice, copyright protection could be lost. While it is no longer mandatory to affix a formal copyright notice, there are benefits to affixing such a notice. Under s.401(d), the effect of a notice in this form is that a defendant will be unable to rely on a defence of innocent infringement in mitigation of his or her damages. While the notice does not itself have presumptive force (as proposed by the Coalition below) because of the availability of

copyright registration under the US Copyright Act, s.401 nevertheless provides a model for the specific statutory recognition of a generally accepted and widely used form of copyright notice. A copy of s.401 appears at **Attachment B** to this submission.

The US Copyright Office has also made regulations under s.401 to give guidance on the manner and location of copyright notices (see Attachment B). The Copyright Office has determined that an acceptable method of affixing a copyright notice on a film is to embody a notice in copies of the film, by a photo-mechanical or electronic process, in such a position that it ordinarily would appear whenever the film is performed in its entirety. The Copyright Office goes on to state the locations in which such a notice may appear.

Given the importance of the US to the international film industry, the practice of affixing a copyright notice in the form prescribed by US copyright legislation is very widespread, and generally accepted as a film industry norm both inside and outside the US.

Other jurisdictions also provide for film-specific presumptions. For example, s.128(3) of the New Zealand *Copyright Act 1994* and s.105(2) of the UK *Copyright, Designs and Patents Act 1988* both make provision (in similar terms) for the operation of presumptions in relation to the labelling of films. Those provisions (copies of which appear at **Attachments C and D** to this submission) give presumptive force to certain statements appearing on copies of films issued to the public.

(d) Coalition proposal

The Coalition proposes that the form of labelling in widespread usage in the film industry be given the same presumptive force as the labelling used in relation to sound recordings. Items 1 and 2 of **Attachment A** contain drafting suggestions to implement this proposal.

Unlike the record industry, however, where the distribution model is based from first release on the sale of physical copies (CDs) directly to the general public, the film industry relies on theatrical exhibition as the primary and initial means of generating revenue. At this first stage of theatrical release, there is no physical object distributed to the general public; rather, members of the public view the sounds and images comprised in a copy of the film exhibited to them in a cinema. It is essential, therefore, that any presumption that is specific to films should be triggered by a label or mark embodied in the copy of the film itself, and displayed to viewers when the film is exhibited, or by a label or mark applied to container in which a theatrical film reel is distributed. The drafting suggestions in Attachment A reflect this approach.

The proposed new civil and criminal presumptions would apply generally, and not just when a defendant puts ownership or subsistence in issue. A rebuttable presumption based on generally accepted packaging in the film industry would provide some certainty about what is required to

prove ownership and subsistence from the time copyright subsists in a film, rather than only during proceedings if and when a defendant puts ownership or subsistence in issue.

The proposed new labelling presumptions would greatly assist the film industry to reduce the costs and complexity of many enforcement actions. For example, a threshold labelling presumption would provide assistance to owners and exclusive licensees in urgent interlocutory proceedings. During interlocutory proceedings, in order to satisfy the *prima facie* evidentiary burden for the grant of an interlocutory injunction, it is often necessary to put on extensive and expensive subsistence and chain of title evidence within very short timeframes. The new general presumptions may only provide minimal assistance in such cases, either because the interlocutory injunction application is heard *ex parte*, or because the defendant would not have an opportunity to place subsistence or ownership of copyright in issue.

In many cases the evidence required at the start of proceedings may not be located in Australia. The new subsistence presumptions in s.126A may not, therefore, provide assistance in these circumstances. As generally accepted labelling in the film industry does not specify the place of first publication, the benefits of the subsistence presumptions in s.126A(2) would not be available.

In addition, unless the copyright owner has copyright registration in a qualifying country, the presumption in s.126A(3) would not be available. In the context of urgent interlocutory proceedings, an applicant may not have time to obtain foreign copyright registration in a qualifying country to obtain the benefits of the presumption in s.126A(3). In any event, as noted in the Supplementary Explanatory Memorandum for the relevant PI Act amendments, a statement of copyright ownership in a foreign certificate can only provide evidence of copyright ownership in that foreign jurisdiction, so an Australian copyright owner would still be required to establish its chain of title or licence.

As a result of the introduction of ss.130(2) and 132B, however, the position in the music industry is significantly more efficient. In urgent interlocutory proceedings seeking orders restraining the infringement of copyright in sound recordings, the respondent record company is able to place into evidence a copy of the label or mark containing the labelling generally used on records embodying sound recordings as *prima facie* evidence of copyright subsistence and ownership. As the tests for subsistence of copyright are substantially the same for both films and sound recordings, and as both the film industry and the music industry have adopted standard and generally accepted labelling based on international conventions, the Coalition submits that it is appropriate for the additional presumptions available to the music industry to be replicated in relation to the film industry.

It is important to note that the proposed new presumptions for films would be an adjunct to, and not a replacement for, the new general presumptions introduced by the *Copyright Amendment*

(Parallel Importation) Act 2003 (Cth). If a defendant places ownership or subsistence in issue, the general presumptions would be available to the film industry, if applicable in the circumstances. However, a new civil and criminal rebuttable presumption that applies irrespective of whether the defendant places ownership or subsistence of copyright in issue, and that is based on internationally accepted copyright notices and labelling practices, would greatly assist the film industry to protect and enforce its intellectual property rights.

6.3 Additional damages and statutory damages

Article 17.11.7 of the FTA provides for the implementation of a scheme of either statutory damages or additional damages.

Statutory damages are a form of relief known under US copyright law that operates as a fixed monetary award as an alternative to the copyright owner receiving compensation for the value of infringements.

A copyright plaintiff may elect, at any stage throughout the trial, to receive an award of statutory damages in lieu of compensatory damages and an account of the defendant's profits. The plaintiff may make this election at any time, whether or not evidence of actual loss is available, and even if the plaintiff has decided not to provide evidence of its actual loss.

If the plaintiff makes this election, the court may make such award of statutory damages as it thinks is "just in the circumstances", subject to monetary limits set out in the statute. The current minimum is \$750, and the maximum \$30,000, for knowing infringement of copyright in one work. The amount can be reduced to \$200 where the defendant provides the infringement was innocent, and increased up to a maximum of \$150,000 if the infringement is "wilful". These limits are for one act of infringement of one work, and generally can be multiplied for multiple infringements of one work or infringements of other works.

Additional damages are a well known form of relief available in Australia for the punishment of copyright infringers above and beyond the award of compensation for the value of infringements. The Copyright Act provides guidance as to the factual circumstances that justify an award of additional damages, including flagrant or very deliberate infringements of copyright.

Additional damages can be important where infringers fail to defend infringement proceedings, fail to retain or produce records of infringements or where other forms of compensation are very difficult to quantify.

In practice additional damage play a significant role in Australian copyright law and the Coalition strong supports their retention in preference to implementing a form of statutory damages:

- Additional damages are understood by copyright owners and the relevant Australian Courts. They are frequently awarded in copyright cases and in such amounts that represent a real and meaningful penalty to infringers.
- Additional damages can be awarded simultaneously with compensatory damages, unlike statutory damages.
- The Court is able to award additional damages in order to deter future infringements of copyright whether by the same infringer or not.¹⁷ This explicit normative role is not reflected in the statutory damages scheme under US copyright law.

7. RIGHTS MANAGEMENT INFORMATION

The Coalition supports the full implementation of the obligations under Article 17.11.8 of the FTA text in relation to rights management information (**RMI**). The Guide to the FTA text suggests that the text provisions “largely mirror” those under existing Australian copyright laws.

The Coalition believes that there is a need and an opportunity for strengthening the current RMI provisions.

There is currently some uncertainty about the coverage of the legislative prohibitions on removing or altering electronic rights management information in ss.116B, 116C, 132(5C) and 132(5D) of the Act. These provisions should be amended to make it clear that the creation of a copy of a work without also reproducing the attached RMI is a breach of the civil and criminal prohibitions: see section 4.5 below.

As currently drafted, the provisions in the Act relating to RMI (ss.116B, 116C, 132(5C) and 132(5D)) address only:

- the removal or alteration of any RMI attached to a copy of a work or other subject matter; and
- dealings (distribution, importation, etc) in a copy of a work or other subject matter in respect of which the RMI has been removed or altered.

While the scope and operation of these provisions are yet to be considered by the courts, the Coalition is concerned that there may be a gap in the coverage of the provisions where the RMI

¹⁷ See for example *Universal Music v Hendy Petroleum* [2003] FMCA 373.

attached to a copy of a work or other subject matter is simply *not reproduced* in the process of creating new infringing copies. For example, an authorised copy of an audio-visual work may contain a digital watermark or other identifying RMI, but the RMI may not be reproduced when a person makes infringing copies of the work.

It is possible that a Court could interpret the terms “remove” and “alter” narrowly, and effectively limit their application to a situation in which the RMI attached to a *particular* copy is removed or altered, and that *same copy* is then dealt with by the infringer. In the Coalition’s view, such an interpretation may limit the effectiveness of the provisions in dealing with what will be a much more common factual scenario.

The Coalition therefore proposes that the civil and criminal prohibitions in relation to RMI be expanded to cover not only the removal or alteration of RMI, and dealings in copies of material from which the RMI has been removed or altered, but also the creation of a copy of a work or other subject matter without also reproducing the attached RMI.

8. PROTECTION OF ENCRYPTED PROGRAM-CARRYING SIGNALS

The Coalition supports the full implementation of obligations under Article 17.7 of the FTA text in relation to protection of encrypted program-carrying satellite signals. The Coalition also supports the expansion of the domestic implementation of this Article so as to protect encrypted program-carrying signals regardless of their method of delivery. This includes for example cable services.

Piracy of television services continues to be a threat to the viability of the subscription television industry in Australia and like other forms of piracy deprives revenues to copyright owners. The ability to discourage the illegal use of encrypted program-carrying signals however delivered, through civil and criminal remedy, is consistent with other forms of copyright protection achieved by the FTA. To protect against the piracy of program-carrying signals through one form of distribution to the exclusion of another would produce an ineffective result and is unlikely to be the intention of the article.

**ATTACHMENT A:
DRAFTING SUGGESTIONS**

1. After section 130

Insert:

130AA Evidence in relation to cinematograph films

(1) In an action brought by virtue of this Part in relation to copyright in a cinematograph film, if:

- (a) a copy of the film, or of a part of the film, has been supplied (whether by sale or otherwise) to the public; and
- (b) at the time when the copy referred to in paragraph (a) was supplied, the copy, or the packaging or container in which the copy was packaged or contained, bore a label or other mark consisting of the letter “C” in a circle accompanied by a specified year and the name of a person;

then the label or mark is admissible as prima facie evidence that the film was first published in that specified year and that the named person was the owner of copyright in the film in the place and at the time at which the label or mark was affixed to the copy, or to the packaging or container in which the copy was packaged or contained.

(2) For the purposes of this section:

- (a) if a cinematograph film is exhibited to the public in a cinema, it will be taken to have been supplied to the public on the date on which the film is first so exhibited; and
- (b) if a label or mark referred to in paragraph (1)(b) is embodied by a photo-mechanical or electronic process in a copy of a cinematograph film, in such a position that the label or mark would ordinarily appear whenever the film is exhibited in its entirety, that copy of the film will be taken to bear that label or mark.

2. After section 132B

Insert:

132C Evidence in relation to cinematograph films

(1) In a prosecution for an offence against section 132 in relation to a cinematograph film, if:

- (a) a copy of the film, or of a part of the film, has been supplied (whether by sale or otherwise) to the public; and
- (b) at the time when the copy referred to in paragraph (a) was supplied, the copy, or the packaging or container in which the copy was packaged or contained, bore a label or other mark consisting of the letter “C” in a circle accompanied by a specified year and the name of a person;

then the label or mark is admissible as prima facie evidence that the film was first published in that specified year and that the named person was the owner of copyright in the film in the place and at the time at which the label or mark was affixed to the copy, or to the packaging or container in which the copy was packaged or contained.

(2) For the purposes of this section:

- (a) if a cinematograph film is exhibited to the public in a cinema, it will be taken to have been supplied to the public on the date on which the film is first so exhibited; and
- (b) if a label or mark referred to in paragraph (1)(b) is embodied by a photo-mechanical or electronic process in a copy of a cinematograph film, in such a position that the label or mark would ordinarily appear whenever the film is exhibited in its entirety, that copy of the film will be taken to bear that label or mark.

3. After section 130AA *[inserted by Item 1 above]*

Insert:

130AB Presumption in relation to secondary infringement actions involving cinematograph films

In an action for infringement of copyright under section 102 or 103 by an act involving an article that is a copy of a cinematograph film, it must be presumed that the defendant knew, or ought reasonably to have known, that the making of the article constituted an infringement of copyright in the film or, in the case of an imported article, would, if the article had been made in Australia by the importer, have constituted an infringement of the copyright.

ATTACHMENT B:
EXTRACT FROM THE US COPYRIGHT ACT AND
COPYRIGHT OFFICE REGULATIONS

1. COPYRIGHT ACT

§ 401. Notice of copyright: Visually perceptible copies

(a) GENERAL PROVISIONS. — Whenever a work protected under this title is published in the United States or elsewhere by authority of the copyright owner, a notice of copyright as provided by this section may be placed on publicly distributed copies from which the work can be visually perceived, either directly or with the aid of a machine or device.

(b) FORM OF NOTICE. — If a notice appears on the copies, it shall consist of the following three elements:

(1) the symbol © (the letter C in a circle), or the word "Copyright", or the abbreviation "Copr."; and

(2) the year of first publication of the work; in the case of compilations or derivative works incorporating previously published material, the year date of first publication of the compilation or derivative work is sufficient. The year date may be omitted where a pictorial, graphic, or sculptural work, with accompanying text matter, if any, is reproduced in or on greeting cards, postcards, stationery, jewelry, dolls, toys, or any useful articles; and

(3) the name of the owner of copyright in the work, or an abbreviation by which the name can be recognized, or a generally known alternative designation of the owner.

(c) POSITION OF NOTICE. — The notice shall be affixed to the copies in such manner and location as to give reasonable notice of the claim of copyright. The Register of Copyrights shall prescribe by regulation, as examples, specific methods of affixation and positions of the notice on various types of works that will satisfy this requirement, but these specifications shall not be considered exhaustive.

(d) EVIDENTIARY WEIGHT OF NOTICE. — If a notice of copyright in the form and position specified by this section appears on the published copy or copies to which a defendant in a copyright infringement suit had access, then no weight shall be given to such a defendant's interposition of a defense based on innocent infringement in mitigation of actual or statutory damages, except as provided in the last sentence of [section 504\(c\)\(2\)](#).

2. COPYRIGHT OFFICE REGULATIONS

[Source: Copyright Office, Library of Congress – 37 CFR Ch. II (7-1-02 Edition) - § 201.20]

§ 201.21

cartridge, cassette, or other container used as a permanent receptacle for the copies.

(h) *Motion pictures and other audiovisual works.* (1) The following constitute examples of acceptable methods of affixation and positions of the copyright notice on motion pictures and other audiovisual works: A notice that is embodied in the copies by a photomechanical or electronic process, in such a position that it ordinarily would appear whenever the work is performed in its entirety, and that is located:

- (i) With or near the title;
- (ii) With the cast, credits, and similar information;
- (iii) At or immediately following the beginning of the work; or
- (iv) At or immediately preceding the end of the work.

(2) In the case of an untitled motion picture or other audiovisual work whose duration is sixty seconds or less, in addition to any of the locations listed in paragraph (h)(1) of this section, a notice that is embodied in the copies by a photomechanical or electronic process, in such a position that it ordinarily would appear to the projectionist or broadcaster when preparing the work for performance, is acceptable if it is located on the leader of the film or tape immediately preceding the beginning of the work.

(3) In the case of a motion picture or other audiovisual work that is distributed to the public for private use, the notice may be affixed, in addition to the locations specified in paragraph (h)(1) of this section, on the housing or container, if it is a permanent receptacle for the work.

(i) *Pictorial, graphic, and sculptural works.* The following constitute examples of acceptable methods of affixation and positions of the copyright notice on various forms of pictorial, graphic, and sculptural works:

(1) Where a work is reproduced in two-dimensional copies, a notice affixed directly or by means of a label cemented, sewn, or otherwise attached durably, so as to withstand normal use, of the front or back of the copies, or to any backing, mounting, matting, framing, or other material to which the copies are durably attached, so as to

37 CFR Ch. II (7-1-02 Edition)

withstand normal use, or in which they are permanently housed, is acceptable.

(2) Where a work is reproduced in three-dimensional copies, a notice affixed directly or by means of a label cemented, sewn, or otherwise attached durably, so as to withstand normal use, to any visible portion of the work, or to any base, mounting, framing, or other material on which the copies are durably attached, so as to withstand normal use, or in which they are permanently housed, is acceptable.

(3) Where, because of the size or physical characteristics of the material in which the work is reproduced in copies, it is impossible or extremely impracticable to affix a notice to the copies directly or by means of a durable label, a notice is acceptable if it appears on a tag that is of durable material, so as to withstand normal use, and that is attached to the copy with sufficient durability that it will remain with the copy while it is passing through its normal channels of commerce.

(4) Where a work is reproduced in copies consisting of sheet-like or strip material bearing multiple or continuous reproductions of the work, the notice may be applied:

- (i) To the reproduction itself;
- (ii) To the margin, selvage, or reverse side of the material at frequent and regular intervals; or
- (iii) If the material contains neither a selvage nor a reverse side, to tags or labels, attached to the copies and to any spools, reels, or containers housing them in such a way that a notice is visible while the copies are passing through their normal channels of commerce.

(5) If the work is permanently housed in a container, such as a game or puzzle box, a notice reproduced on the permanent container is acceptable.

(17 U.S.C. 401, 702)

[46 FR 58312, Dec. 1, 1981, as amended at 66 FR 34373, June 28, 2001]

§ 201.21 [Reserved]

§ 201.22 Advance notices of potential infringement of works consisting of sounds, images, or both.

(a) *Definitions.* (1) An *Advance Notice of Potential Infringement* is a notice

ATTACHMENT C:
SECTION 128 OF THE *COPYRIGHT ACT 1994* (NZ)

128. Presumptions relevant to computer programs, sound recordings, and films—

(1) In proceedings brought under this Act with respect to a computer program, where copies of the program are issued to the public in electronic form bearing a statement—

- (a) That a named person was the owner of copyright in the program at the date of the issue of the copies in electronic form; or
- (b) That copies of the program were first issued to the public in electronic form in a specified year or that the program was first published in a specified country,—

the statement shall be admissible as evidence of the facts stated and shall be presumed to be correct until the contrary is proved.

(2) In proceedings brought under this Act with respect to a sound recording, where copies of the recording as issued to the public bear a label or other mark stating—

- (a) That a named person was the owner of copyright in the recording at the date of the issue of the copies; or
- (b) That the recording was first published in a specified year or in a specified country,—

the label or mark shall be admissible as evidence of the facts stated and shall be presumed to be correct until the contrary is proved.

(3) In proceedings brought under this Act with respect to a film, where copies of the film as issued to the public bear a statement—

- (a) That a named person was the author or director of the film; or
- (b) That a named person was the owner of copyright in the film at the date of the issue of the copies; or
- (c) That the film was first published in a specified year or in a specified country,—

the statement shall be admissible as evidence of the facts stated and shall be presumed to be correct until the contrary is proved.

(4) The presumptions created in subsections (1) to (3) of this section apply in proceedings relating to an infringement alleged to have occurred before the date on which the copies were issued to the public in the same manner as they apply in proceedings relating to an infringement alleged to have occurred after the date on which the copies were issued to the public.

(5) In proceedings brought under this Act with respect to a film, where the film as shown in public, broadcast, or included in a cable programme bears a statement—

- (a) That a named person was the author or director of the film; or
- (b) That a named person was the owner of copyright in the film immediately after it was made,—

the statement shall be admissible as evidence of the facts stated and shall be presumed to be correct until the contrary is proved.

(6) The presumption created by subsection (5) of this section applies in proceedings relating to an infringement alleged to have occurred before the date on which the film was shown in public, broadcast, or included in a cable programme in the same manner as it applies in proceedings relating to an infringement alleged to have occurred after the date on which the film was shown in public, broadcast, or included in a cable programme.

ATTACHMENT D:

SECTION 105 OF THE *COPYRIGHT, DESIGNS AND PATENTS ACT 1988* (UK)

Presumptions
relevant to sound
recordings and
films.

105.—(1) In proceedings brought by virtue of this Chapter with respect to a sound recording, where copies of the recording as issued to the public bear a label or other mark stating—

(a) that a named person was the owner of copyright in the recording at the date of issue of the copies, or

(b) that the recording was first published in a specified year or in a specified country,

the label or mark shall be admissible as evidence of the facts stated and shall be presumed to be correct until the contrary is proved.

(2) In proceedings brought by virtue of this Chapter with respect to a film, where copies of the film as issued to the public bear a statement—

(a) that a named person was the author or director of the film,

(b) that a named person was the owner of copyright in the film at the date of issue of the copies, or

(c) that the film was first published in a specified year or in a specified country,

the statement shall be admissible as evidence of the facts stated and shall be presumed to be correct until the contrary is proved.

(3) In proceedings brought by virtue of this Chapter with respect to a computer program, where copies of the program are issued to the public in electronic form bearing a statement—

(a) that a named person was the owner of copyright in the program at the date of issue of the copies, or

(b) that the program was first published in a specified country or that copies of it were first issued to the public in electronic form in a specified year,

the statement shall be admissible as evidence of the facts stated and shall be presumed to be correct until the contrary is proved.

(4) The above presumptions apply equally in proceedings relating to an infringement alleged to have occurred before the date on which the copies were issued to the public.

(5) In proceedings brought by virtue of this Chapter with respect to a film, where the film as shown in public, broadcast or included in a cable programme service bears a statement—

(a) that a named person was the author or director of the film,
or

(b) that a named person was the owner of copyright in the film immediately after it was made,

the statement shall be admissible as evidence of the facts stated and shall be presumed to be correct until the contrary is proved.

This presumption applies equally in proceedings relating to an infringement alleged to have occurred before the date on which the film was shown in public, broadcast or included in a cable programme service.