

7 May 2004

Senate Select Committee on Treaties
Parliament House
Canberra ACT 2600

Dear Sir/Madam,

PROPOSED AUSTRALIA – UNITED STATES FREE TRADE AGREEMENT

Introduction

1. The Copyright Agency Limited (CAL) is a copyright collecting society that administers, on a non-exclusive basis, the copyright controlled by its members.
2. CAL is a not for profit company limited by guarantee.
3. CAL currently represents the reproduction rights of over 6000 direct “author” and “publisher” members who, in turn, represent many thousands of authors and publishers. CAL also represents thousands of other copyright owners through reciprocal agreements with overseas collecting societies.
4. CAL has been declared by the Attorney-General to be the collecting society for the reproduction and communication of works by educational institutions under Part VB of the *Copyright Act* 1968 (the Act). CAL has also been declared by the Copyright Tribunal to be the collecting society for government copying for the purposes of Part 2 of Division VII of the Act.

5. Pursuant to these declarations, CAL administers statutory licences through which educational institutions and Commonwealth, State and Territory governments remunerate copyright owners for the copying of their works.
6. In addition, CAL offers voluntary licences to the public and corporations for the right to copy published works. As a single resource, CAL can provide copyright clearances for hundreds of thousands of books, articles and artistic works through its licences to copy.
7. CAL strongly supports the provisions in relation to copyright, which will benefit all copyright owners in Australia.
8. However, CAL has serious concerns about the local content quotas, and in particular the effect that these may have on Australia's cultural diversity.

Chapter Seventeen – Intellectual Property Rights – Copyright

International Agreements

9. CAL supports the requirement that Australia accede to the WIPO Copyright Treaty and the WIPO Performances and Phonograms Treaty.
10. CAL understands that the government has always intended to accede to these treaties and has been putting measures in place, such as extending the period of protection for photographs, to do so.
11. It is CAL's belief that both copyright owner and user groups support Australia acceding to these treaties.

Increased term of protection for copyright material

12. CAL supports the requirement that Australia extend the period of copyright protection to meet that accorded with the United States.
13. Since the government announced the detail of the Australia–US Free Trade Agreement there have been several media articles on the extension of the copyright term and the likely effects on the Australian public, and in particular the educational sector.
14. CAL draws the Committee’s attention to the report by the Allen Consulting Group “Copyright Term Extension” 2003 (the Allen Report), which looked into the costs and benefits of copyright extension¹.
15. The Allen Report recommends extending the term of copyright to harmonise Australian law with that of its major competitors, to encourage further foreign investment and incentivise copyright owners whose protection has been undermined by technological development which has reduced the cost of copying. Harmonisation would also result in cost savings in managing intellectual property rights, with portfolios expiring at the same time across Australia's major markets.
16. The Allen Report also sets out that the additional costs to users by an extension of the copyright term would be minimal.
17. CAL, as a licensor of copyright material to the educational sector, government and the private sector, is in the unique

¹ This report can be accessed at the following web–address:
http://www.allenconsult.com.au/resources/MPA_Draft_final.pdf

position of holding data about the type of works that are copied in Australia currently. The types of information collected by CAL includes the category of works copied – ie poetry, artworks, general works etc., and also the age of works copied.

18. CAL has recently undertaken research into the copying of out of copyright material in the educational sector (Universities, schools and TAFEs). This research is provided to the Committee on a confidential basis.
19. The material considered by CAL in this research is that which falls in the 50 to 70 year out of copyright range. CAL is aware that this material will not be brought back into copyright protection for the purposes of the Free Trade Agreement, but has undertaken this exercise to provide estimations of the effects of the proposed term extension.
20. It is too difficult to model the effect of term extension to currently in copyright works. However, the estimates made are reliable to the extent that they reflect current copying patterns in educational institutions.
21. The Committee will note that the proportion of copying in the educational sector of out of copyright material is 0.3177% of all copying. This equates to roughly 3 in every 1,000 pages.
22. The proportion of copying in the educational sector of out of copyright material within the period of extension, that is 50 to 70 years, is 0.045%. This equates to roughly 4.5 pages in every 10,000 pages.

23. CAL has made some approximate calculations of what this level of copying under CAL licences would cost the educational sector in Australia. The licence fees are paid by the educational sector under statutory licences based on the number of students enrolled full-time. These calculations are attached to this submission, and draw the conclusion that the effect would probably be between \$28,000 and \$35,000 – respectively around two thirds and eight tenths of a cent for each student per year for the 4,200,000 students currently studying in Australia and included in CAL statutory educational licences.
24. CAL also draws the committee's attention to the fact that the effects of the additional 20 years for copyright duration will phase in gradually as the terms of the Free Trade Agreement do not restore copyright protection of out of copyright works.
25. CAL draws your attention to the fact that, of the top 15 most copied out of copyright material that falls within the category of 50 to 70 years, 4 of the copyright owners are Australian. In particular the most copied out of copyright material in the 50 to 70 year range by the educational sector is Banjo Patterson. Others include Arthur Streeton, CJ Dennis and John Sulman.
26. It is clear that, at least in the case of the copying of works by educational institutions, that the extension of term will have minimal effect on the copyright licence fees payable by institutions. Further, the argument made by user groups that the copyright extension only rewards US creators is also not true.

US Fair Use/ Educational Use in Australia

27. The copyright law of each country is a set of checks and balances that are adapted to the particular circumstances of

each country. However, there are certain fundamental principles that are common to all countries that, like Australia, have acceded to the Berne Convention. The implementation of the FTA into Australia needs to be considered in this context.

28. CAL is aware of arguments propounded by educational and other interests in relation to the provisions being more restrictive for the use of copyright material contained in the Free Trade Agreement.
29. There have been suggestions in various educational user group submissions to the JSCOT that if the provisions of the FTA are to be adopted in Australia, then the US fair use doctrine must also be imported into Australia. They argue this on the grounds that the US fair use has broader application to comparable provisions of Australian domestic law. It is claimed that this would serve to balance the interests of users and owners of copyright as it would counter the benefits to copyright owners through the stronger copyright protection and enforcement provisions contained in the FTA.
30. CAL is of the belief that the situations user groups are referring to – copying of works in the educational sector – are permitted by the educational statutory licences contained in the Australian Copyright Act and that these uses would not be considered fair uses in the US.

Internet Service Providers

31. CAL supports the introduction of procedures for notice and takedown of infringing copyright material by Internet Service Providers (ISP).

32. CAL notes that although the current Australian Act has provisions in relation to an Industry code of conduct to be agreed by ISPs and copyright owners, CAL is not aware that such a document was ever agreed upon. CAL is therefore of the view that legislative provisions, such as those required in the agreement, would be more acceptable.

Anti-Circumvention

33. CAL supports the requirement that the Australian Copyright Act be amended to meet the standard of the current US law on anti-circumvention devices and services.

34. It is CAL's view that Australian content creators have been reluctant to develop electronic products, as opposed to their US counterparts, and that an important contributor to this has been the concern Australian content creators have with circumvention devices generally as well as a perception by them that the current Australian legislation does not afford them any protection.

35. For example, in the AMR Interactive Report titled CAL Digital Agenda Amendments Report of one educational publisher described the impact of the provisions as follows:

"I think the circumvention provision is terrifying – not so much in terms of the impact of 50 digital copies of a work being made, but in terms of ... We provide our academic customers who use our textbooks a whole lot of content to help them deliver the course. We give them test banks, PowerPoint slides, etc and they use that stuff increasingly because their resources are being stretched, so they use what we give them more and more to deliver the course and assess students. So we make that stuff available and we password protect it and make it available in the instructor versions of our websites, and under the provisions of this Act, a library can hack into that site legally and make that content available to students. If a lecturer is using our stuff to assess students and you have a plagiarism situation where students are accessing the test banks, our customers are going to turn around and say we used your stuff because you promised us it was secure and it isn't, so we

are dropping your book, so maybe you have a customer who is using a thousand copies of a textbook for a first year psychology subject, now that is worth \$100 000 in revenue to us, and disenfranchises a key customer who then tells their colleagues 'don't go to (publisher's name), they can't protect their products'."

36. A copy of the AMR Interactive Report titled CAL Digital Agenda Amendments Report is provided in hardcopy format to the committee on a confidential basis.
37. The approach taken so far by Australia in relation to anti-circumvention devices is out of step with other jurisdictions, which has an impact on the ability of Australian copyright owners to compete internationally.
38. CAL therefore supports this provision, as it will encourage Australian content creators to make their works available electronically and give them an equal footing with their trading partners.

Enforcement

39. CAL supports the requirement that Australia enhance enforcement measures to combat piracy.
40. CAL notes that many of the requirements are consistent with the recommendations in the report of the House of Representatives Committee on Legal and Constitutional Affairs on enforcement of copyright, *Cracking Down on Copycats*.

Standards of Copyright Protection – Right of Copyright Owners to contract freely

41. CAL supports the requirement that Australian copyright owners have the right to contract freely.
42. CAL opposed the recommendations made by the CLRC that the Copyright Act be amended to include provisions that would make ineffective certain contractual provisions dealing with exceptions to copyright infringement.

Ambiguities

43. CAL notes that there are still a number of matters not expressly dealt with by the agreement that may, nonetheless, be covered by the agreement. These include:
 - a. Peer to peer copying;
 - b. Whether there is a requirement for Australia to adopt a distribution right; and
 - c. Whether the extension of copyright term is to be applied to unpublished works.
44. CAL would appreciate clarification from the Committee as to the status of the above matters.

Non-Conforming Measures – Annex I & II – Local Content

45. As set out above, CAL's members consist of authors, artists and publishers. They are Australians who create works which reflect an Australian voice and reflect the diversity and creative wealth of our culture. They share the concerns of Australian creators who are involved in making material for the audio-visual sector, and many of CAL's members are also directly involved in this sector.

46. The Australia–US Free Trade Agreement has a number of requirements, and in particular the requirements in relation to local content, that will fundamentally affect Australian culture and Australian content creators.
47. CAL is extremely disappointed that the agreement is a “negative list” agreement. That is, that all aspects of trade between Australia and the US are included excepting those that are “subtracted” through explicitly stated provisions.
48. In CAL’s view such an arrangement is unsafe, as it requires foresight at the negotiating table as to what matters to subtract from the agreement. In the case of culture, this requires the negotiators to predict the cultural landscape of Australia into the future. This is an impossible requirement.
49. In agreeing to a negative list agreement the Australian government is stopped from regulating cultural activities as they arise in the future.
50. Prior to this agreement the Australian government had the right to regulate in support of Australian culture as they saw fit. Under this agreement, the Australian government will have very limited rights, as defined in the agreement.
51. CAL therefore opposes these aspects of the agreement.

Conclusion

52. Thank you for the opportunity to provide these comments. CAL would be pleased to offer any assistance to the Joint Standing Committee on Treaties in relation to this matter.

Yours sincerely,

Michael Fraser
Chief Executive