The case against extending copyright protection for sound recordings and musical works under the terms of the Australia-United States Free Trade Agreement

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SOUND RECORDINGS

The original purpose of copyright

Copyright was originally the grant of a temporary government- supported monopoly on copying a work, not a property right. Its sole purpose was to encourage the circulation of ideas by giving creators and publishers a short-term incentive to disseminate their work. Over the past 50 years, as a result of heavy lobbying by the content industries, copyright has grown to such ludicrous proportions that it now often inhibits rather than promotes the circulation of ideas, leaving thousands of old movies, records and books languishing behind a legal barrier. Starting from scratch today, no rational, disinterested lawmaker would agree to copyrights that extend to 70 years after an author's death, now the norm in the European Union.

"Ever since its foundations were laid in Britain and America in the eighteenth century, copyright law has tried to strike a balance between offering an incentive to writers and publishers to create and publish works, and guaranteeing public access to the flow of ideas. The thought behind this is that "intellectual property", as published works and inventions have since become known, is different in kind from tangible property. Whereas all tangible property is scarce, ideas or their expression are not. Copyright is the grant of a temporary monopoly, through a ban on copying, to offer those who generate ideas the chance to garner a profit."
[The Economist -- January 25th 2003]

The International record industry is now lobbying for the extension of copyright protection for sound recordings from the current 50 years from the end of the year of release, the standard in most developed countries (other than in the United States … see below) to 70 years or more. Article 17.4.4 of the Free Trade Agreement also provides for extension of the term of copyright protection for sound recordings to 70 years.

The main reason for this lobbying effort, which proved successful in the United States, is that many of the industry's best-selling recordings from the beginning of the LP era (about 1950) are now beginning to go out of copyright.

However, looking at the original purpose of copyright, this is not a good reason. On the one hand, most of the artists involved are already dead and cannot therefore be motivated to make new recordings because copyright extension has been granted to them. At the same time, extending copyright protection for sound recordings will cause the record industry in general to produce and release even fewer recordings than at the present time, but in particular in the fields of classical music and jazz. The industry tends to rely more and more on the exploitation of its back catalogs for profits instead of investing in new recordings.

In reality, the industry is really only interested in very few of their best-selling recordings from the past whereas more than 95 percent of all its back catalog recordings remain unreleased and the public has no access to these recordings, many of which are of great historical or artistic importance.

While the real reason for demanding the extension of copyright protection for sound recordings is a lack of creativity and the reluctance to invest in new recordings, the industry offers a number of, on the surface at least, convincing reasons for the extension.

1.1. Musical works are protected for life of the composer plus 70 years in the European Union and for life plus 50 years in most other countries. Therefore, the industry suggests that sound recordings should be protected as long as musical works.

This is not a convincing argument, since musical works are subject to compulsory licensing, i.e. any record company can record these works and make them available to the public, subject to payment to the publisher or other owner of the musical work, of mechanical royalties.

Sound recordings, on the other hand, are not subject to compulsory licensing and only the original copyright owner is allowed to exploit them, giving him an absolute monopoly. The record industry has been abusing this monopoly by making only a fraction of its back catalog available (and then at regular, high prices, while preventing other record companies from releasing these recordings at lower prices.
Furthermore, as a leading English copyright treatise notes: "at least as regards published works, it is unreasonable to give the remote successors of the author, long after his death, a monopoly in what has in fact been made public by exploitation. That is particularly so in relation to works which by their nature involve an element of industrial enterprise, as distinct from individual and literary, musical or artistic, creativity, and the tendency has been to accord such works a shorter, usually fixed, period of protection." [Copinger and Skone, James on Copyright 343 [Sweet & Maxwell, 1991]. A recording artist, after all, only performs or interprets what was created by somebody else, a composer and/or a lyric writer. In the case of pop and rock artists, who frequently perform their own songs and/or lyrics, these will benefit from the copyright protection for musical works long after the protection for their recorded performances has ended.

1.2 . Harmonization
In 1998, Congress in the United States enacted the Copyright Extension Act, granting musical works then still in copyright protection for life of the composer plus 70 years and sound recordings (and other copyrighted matter owned by corporations) protection for 95 years (extended from the previous 75 years). The Copyright Extension Act was rushed through Congress in a single day and was subsequently challenged before the United States Supreme Court. However, the court struck down the challenge not because the court thought the Copyright Extension Act was a piece of good legislation but because the court ruled that Congress was entitled to extend copyright protection. Two Supreme Court justices dissented and even Justice Sandra Day O'Connor, who voted with the majority, reflected the comments of the other justices when she stated, "I can find a lot of fault with what Congress did. It flies directly in the face of what the framers of the Constitution had in mind – but the question is, does it violate the Constitution?"

If the US Congress makes bad laws it does not mean that Australia has to harmonize its own copyright laws with the US laws.
The record industry, in particular American companies, is now lobbying for harmonization at the new high level of U.S. copyright protection for both musical works and for sound recordings.
However, the 1998 Copyright Extension Act did little to harmonize American copyright law with that of the rest of the world and, in any event, the world has managed, for a long time, with different copyright protection regimes in different countries around the world.

2.1 Even after enactment of the Copyright Extension Act, sound recordings first released in the United States before 1972 are not protected by federal copyright. This means that American record companies can release sound recordings produced by European companies and released in the United States before 1972 without requiring permission from the original copyright owner.

2.2 No performance royalties are paid to record companies for sound recordings broadcast by radio stations, other than by digital stations. In contrast, broadcasting stations in the European

Union and Australia must pay public performance royalties to record companies for the broadcast of protected sound recordings. American record companies profit from the royalties whereas European and Australian companies do not enjoy the same revenue in the United States.

2.3 Musical works were protected in the United States for 28 years from the date of first performance or first publication (whichever came first), renewable for another 28 years. When the 1978 copyright law revision extended copyright protection for musical works to the life of the composer plus 70 years, this extension only applied to musical works then still in copyright. This means that many musical works are in copyright in the rest of the world but not in the United States and vice versa. This situation was not corrected by the 1998 Copyright Extension Act.

The world has managed with different copyright regimes in different countries for a long time and will continue to manage without harmonization. If anything, in the interest of the consumer, copyright protection should be harmonized at the lowest level, which is prevailing in most of the developed world and not at the level prevailing in the United States.

Extending copyright protection for sound recordings to 70 years in order to harmonize Australia's term with the US term would put Australia in conflict with the rest of the world and with its main trading partners in Europe and Asia. It would be a monumental task to police and enforce the longer term when the rest of the world grants protection for only 50 years.

It could also lead to the absurd situation where Australia would have to bar US reproductions of pre-1972 recordings from entering Australia because they are not protected in the United States but in Australia.

MUSICAL WORKS

Article 17.4.4 also provides for the extension of the term of copyright protections from the present life + 50 years to live + 70 years. As pointed out in paragraph 2.3 above, this would mean that many works would be protected in Australia that are not protected in the United States. The US copyright law in respect of musical works is unique in the world and uniquely complicated.

Here is a summary [taken from a chart assembled by the University of Rochester]:

Date of Musical Work	Protected From	Term
Created 1/1/78 or after	When work is fixed	Life + 70 years
Published before 1923	In public domain	None
Published between 1923 And 1963	When published with notice	28 years + could be renewed for 47 Years, extended by 20 years for a total renewal of 95 years. If not so renewed, now in public domain
Published 1964-77	When published with Notice	28 years from first term; Automatic Extension of 67 Years for second Term

Created before 1/1/78 but not published	1/1/78	Life + 70 years or 31/12/2002, whichever is greater
Created before 1/1/78, but published between then and 31/12/2002	1/1/78	Life + 70 years. or 31/12/2047, whichever is greater

From the above, it is obvious that extending the term of protection for musical works from the present Life + 50 to Life + 70 years, would do very little to harmonize Australian copyright law with US copyright law.

It would have the absurd result that, for example, the works of American composers such as Copland and Ives or of international composers such as Stravinsky, first performed or published in the United States before 1923, would be protected in Australia but not in the United States.

At the very least, if the term were to be extended, there should be a provision that no musical work should be