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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
7 July 2004

Dear Mr Holmes,

Supplementary submission to Senate Select Committee

We have previously made a submission to, and appeared before, the Senate Select Committee in relation to the copyright provisions in the Australia-US Free Trade Agreement (AUSFTA).

We have prepared a response to the recommendations of the Joint Standing Committee on Treaties (JSCT) in relation to the copyright provisions in the AUSFTA. As those provisions are also being considered by the Senate Select Committee, we would like to submit our response to the JSCT recommendations as a supplementary submission to the Senate Select Committee.

If you need any further information, please let us know.

Yours sincerely,

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***Response to recommendations of the Joint
Standing Committee on Treaties on the
Australia – United States Free Trade
Agreement***

July 2004

Australian Copyright Council

1. The Australian Copyright Council is a non profit company. It receives substantial funding from the Australia Council, the Federal Government's arts funding and advisory body. The Copyright Council provides information about copyright via its publications, training and website, provides free legal advice about copyright, conducts research, and represents the interests of creators and other copyright owners in relation to policy.
2. The Australian Copyright Council made a written submission to the Joint Standing Committee on Treaties (JSCT) in relation to copyright issues in the Australia–United States Free Trade Agreement (AUSFTA).
3. This response relates only to the JSCT recommendations relating to copyright, and in particular recommendations relating to issues extraneous to the requirements of the AUSFTA. Some of the organisations affiliated with the Australian Copyright Council have made, or will make, separate responses to the JSCT recommendations on the AUSTFA.
4. We are preparing a separate submission on the US Free Trade Agreement Bill 2004.

Recommendation 16

The Committee recommends that the Government enshrine in copyright legislation the rights of universities, libraries, educational and research institutions to readily and cost effectively access material for academic and related purposes.

5. There are already extensive provisions in the Copyright Act which allow libraries and educational institutions to use copyright material in both hardcopy and digital form.¹ These provisions will continue to apply for the extended period of copyright protection.
6. The purposes for which libraries (and other cultural institutions) may make free use of copyright material include supply to clients for research or study, supply to other libraries for their collections, preservation and replacement, and administrative purposes. These provisions are more extensive than the provisions applying to libraries in the United States, the United Kingdom or Canada.²
7. Educational institutions are entitled to use a wide range of copyright material without permission, subject in most cases to payment of equitable remuneration. In the absence of an agreement between the institution and the relevant collecting society, the amount of remuneration payable is determined by the Copyright Tribunal. Our understanding is that very little of the copyright material used by educational institutions would be currently in the public domain, and that the cost

¹ These provisions were extended to material in digital form in 2001, and have been the subject of a recent review: see www.ag.gov.au/DigitalAgendaReview/reportrecommendations.

² See Ian McDonald, *A Comparative Study of Library Provisions: From Photocopying to Digital Communication*, Centre for Copyright Studies, 2001 (available from <http://www.copyright.org.au/page11.htm>).

to educational institutions of extending the term of copyright has been exaggerated. An analysis by Copyright Agency Limited, referred to at para 16.18 of the JSCT report, showed that the cost of extension of term to educational institutions would be minimal.

Recommendation 17

The Committee recommends that the changes being made in respect of the Copyright Act 1968 replace the Australian doctrine of fair dealing for a doctrine that resembles the United States' open-ended defence of fair use, to counter the effects of the extension of copyright protection and to correct the legal anomaly of time-shifting and space-shifting that is currently absent.

8. We strongly oppose this recommendation, for the same reasons we opposed the similar recommendation by the Copyright Law Review Committee (CLRC) in its 1998 report *Simplification of the Copyright Act: Part 1*.³ These reasons include:
- We do not think the proposal is consistent with the “three-step test” for exceptions to copyright, required under the international treaties. This test requires exceptions to be limited to “certain special cases”.⁴
 - Irrespective of the international treaty obligations, the three-step test is the appropriate test for the balance between protection and access in Australia.
 - The copyright legislation of most countries specifies the purposes for which copyright material may be used without the permission of the copyright owner. The United States legislation is atypical, and it is arguable that the fair use provision in the United States Copyright Act is not consistent with the three-step test.
 - There was no requirement in the CLRC’s recommendation that reliance on its proposed “open-ended” fair dealing exception serve a public interest. In the United States, the fair use exception has been interpreted by the courts with reference to the section in the United States Constitution which gives Congress the power:

To promote the progress of science and useful arts, by securing for limited time to authors and inventors the exclusive right to their respective writings and discoveries.⁵
 - We disagree that the introduction of an open-ended fair dealing exception would simplify the Copyright Act, as claimed by the CLRC. It would create uncertainty about which activities were covered by the exception, and make it more difficult to give advice about the operation of the provision. The

³ The CLRC report is available from www.law.gov.au/clrc. Our response of March 1999 is available from our website www.copyright.org.au (click “Submissions”).

⁴ The three-step test is required by the Berne Convention, the Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS), the WIPO Copyright Treaty and the WIP Performances and Phonograms Treaty. The test requires that any exceptions must:

- apply in special cases;
- not conflict with a normal exploitation of a work; and
- not unreasonably prejudice the legitimate interests of the rights owner.

See further Sam Ricketson, *The Three-Step Test, Deemed Quantities, Libraries and Closed Exceptions*, Centre for Copyright Studies, 2002 (available from <http://www.copyright.org.au/page11.htm>).

⁵ US Constitution, art 8, § 8, cl 8

Committee's views about which activities would be covered by the proposed exemption, and which would not, are evidence of this uncertainty.⁶

9. We do not accept that the implementation of the AUSFTA copyright obligations will result in a significant increase in protection at the expense of access, as has been claimed by some, and we do not accept that an expansion of the current fair dealing provision is necessary or desirable. The focus of the copyright provisions in the AUSFTA is the unprecedented losses to copyright owners from unauthorised copying, particularly of digital material.
10. The AUSFTA provisions do not require the introduction of "balancing" access provisions for users. Extensive access provisions were introduced by the Digital Agenda Act, including provisions allowing digital and online uses of copyright material by libraries, educational institutions, students and researchers. The access provisions introduced by the Digital Agenda Act were more extensive than the extensions to copyright protection introduced by that Act, as they gave access in relation to existing rights (the right of reproduction) as well as to the new elements of the right of communication.
11. As noted above, the provisions allowing free use by libraries, and use by educational institutions would apply to material for the extended period. Other access provisions, such as fair dealing for research or study, would also apply.

Private copying: "time-shifting and space-shifting"

12. In its inquiry into the simplification of the Copyright Act, which resulted in recommendations to introduce an open-ended fair use provision into Australian law, the CLRC did not address the question of private copying for "time-shifting" or "space-shifting" purposes.
13. In our view, however, free private copying of musical works and television programs would not be covered by the CLRC's proposal, having regard to the factors for assessing whether a use is fair.⁷ These are:
 - the purpose and character of the dealing;
 - the nature of the work;
 - the possibility of obtaining the work within a reasonable time at an ordinary commercial price;
 - the effect of the dealing on the potential market for, or value of, the work; and
 - in a case where part only of the work is copied, the amount and substantiality of the part copied in relation to the whole work.
14. In relation to time-shifting:
 - the benefit to the consumer of the opportunity to watch the program at a more convenient time is similar to the benefit from hiring or purchasing a video for more convenient watching, both of which may result in payment to copyright owners;
 - although there is always some benefit to a person who tapes a program, the degree of benefit may vary depending on the period of time the person has

⁶ These are outlined in our response to the CLRC's report, referred to above.

⁷ See further Australian Copyright Council, *Remuneration for Private Copying in Australia: A Discussion Paper*, available from <http://www.copyright.org.au> (click "Research projects").

access to it. Where there is a levy on blank recording media, the consumer only pays one levy for each piece of media, irrespective of the number of programs or films which are copied onto it. If, for example, the levy is \$1, a person who copies only one program onto the media pays \$1 in respect of that program. On the other hand, a person who does not retain recorded programs but uses the same piece of media to record tape a series of programs, erasing the previously recorded program each time, pays a much smaller amount per program. If, for example, the media is used to record 25 programs successively, the consumer pays a levy of 4 cents per program; and

- a substantial proportion of recorded programs are retained as part of a collection.⁸

15. The United States Copyright Act includes provisions which require payment of a levy on digital audio recording devices and media, and exempts from copyright infringement the non-commercial use of audio recording media and devices. There is no reference to these provisions in the JSCT report, and it is not clear whether or not they were brought to the Committee's attention. There are similar schemes for audio and audiovisual private copying in many other countries, including Canada, Japan, and member countries of the European Union (EU). The EU Directive on the Information Society requires private copying to be subject to equitable remuneration.
16. The issue of private copying requires urgent review by the Government, so that the effects of private copying, including peer to peer file-sharing, can be assessed, and solutions canvassed, having regard to Australia's international and bilateral treaty obligations.

Technological protection measures

17. There appears to have been a misapprehension by some that introducing an open-ended fair use provision will provide access to material protected by technological protection measures. It will not. Under AUSFTA, the circumstances in which a circumvention device may be manufactured, supplied or used will be determined by a review process, which is to occur at least every four years. We note that the report of the review of Digital Agenda amendments says that no evidence about reliance on the "permitted purposes" was provided in connection with the review.
18. We think that the AUSFTA mechanism for determining when a circumvention device may be manufactured, supplied or used is appropriate and fair. Australia has two years in which to implement the AUSFTA provisions dealing with technological protection measures, and the Government has not yet indicated details of how it intends to implement the provisions.

Cost of extending the term of copyright vastly exaggerated

19. In its report, the JSCT refers at para 16.3ff to costs and benefits of extending the term of copyright in Australia. The report notes, at para 16.17 that "the

⁸ *Survey Report: Private Copying on Videotape, prepared for Audio-visual Copyright Society (now trading as Screenrights), October 1995. The survey found that more than half of the videotape holdings surveyed were to be kept, and that less than 20% of households had tapes used exclusively to time-shift.*

See also the documents on the Screenrights website at www.screen.org/about/submissions.html, including draft legislation for a remunerated private coping scheme.

Committee understands from most parties that estimating the economic impact is virtually impossible". The report goes on to refer, at para 16.19, to Dr Phillipa Dee's view that the cost "could amount to up to \$88 million per year, or up to \$700 million in net present value terms". These estimates are meaningless, as they are based on an assumption that there is a constant flow of royalties to each author. This assumption is completely contrary to commonsense, and contrary to the statement on page 22 of Dr Dee's report that "Some products, such as computer software, have a very short economic life. For these products, the extension of copyright term will have no effect at all".⁹

20. We note the evidence of Copyright Agency Limited referred to by the JSCT at para 16.18, that:

Out-of-copyright material is 0.3 per cent of total copying...If you look at the period of 50 to 70 years it is 0.02, which is roughly two pages out of every 10,000 pages.¹⁰

Recommendation 18

The Committee recommends that the Attorney-General's Department and the Department of Communications, Information Technology and the Arts review the standard of originality applied to a copyrighted material with a view to adopting a higher standard such as that in the United States.

We have no objection to such a review, but note that legislating for a higher standard of originality may be technically difficult.

Recommendation 19

The Committee recommends that the Attorney-General's Department and the Department of Communications, Information Technology and the Arts ensure that exceptions will be available to provide for the legitimate use and applications of all legally purchased or acquired audio, video and software items of components, equipment and hardware, regardless of the place of acquisition.

21. As noted above, we think that the AUSFTA mechanism for determining when a circumvention device may be manufactured, supplied or used is appropriate. We anticipate that the review process required by the AUSFTA will provide an opportunity for the issues raised by the JSCT to be considered.

⁹ This point was also made by the Department of Foreign Affairs and Trade in its response to Dr Dee's report. In Dr Dee's response to the DFAT comments (*AUSFTA – A Response to Comments by the Department of Foreign Affairs and Trade: Supplementary note prepared for the Senate Select Committee on the Free Trade Agreement between Australia and the United States of America*, 30 June 2004), she appears to accept that her estimate of the costs of extending the term of copyright is overstated, but defends her position on the basis that her estimate "used the same assumptions as used in the CIE/DFAT report to estimate the gains from extending the term of copyright. If the costs are overstated, then so are the benefits" (para 16). However, the CIE report acknowledges (at p37) that an estimate of gains based on assumption of a constant flow of royalties will be overstated.

¹⁰ This statement is based on an analysis of the copying data collected by CAL from educational institutions.

Recommendation 21

The Committee recommends that a scheme that allows for copyright owners to engage with Internet Service Providers and subscribers to deal with allegedly infringing copyright material on the Internet be introduced in Australia that is consistent with the requirements of the AUSFTA. In doing so, the Attorney-General's Department and the Department for Communications, Information Technology and the Arts should

- take note of the issues encountered in the US as outlined in this report*
- tailor a scheme to the Australian legal and social environment*
- monitor the issue of peer to peer file sharing.*

22. We support this recommendation. We will comment on the provisions addressing this issue in the US Free Trade Implementation Bill in our submission on that Bill.

Libby Baulch
Executive Officer
July 2004