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
AUSTRALIA

5 May 2004

Dear Secretary,

Proposed Copyright term extension

This submission deals with only one aspect of the proposed Free Trade Agreement – Article 17.4.4, the proposal to extend Australia's term of copyright.

At present the term is limited to the life of the author plus 50 years, as required by the Berne convention. Article 17.4.4 would extend the term to the life of the author plus 70 years, as has been done in Europe and the US.

(For films and sound recordings Article 17.4.4 would extend the term form 50 years to 70 years.)

The proposal has been examined in four major studies. In my work as a journalist I have needed to compare and contrast those studies.

They are, in the order in which they were conducted:

1. Amici 2002, *An Economic Analysis of the Main Features of the Copyright Term Extension Act of 1998*, brief submitted to the Supreme Court of the United States, Eric Eldred et al., Petitioners, v. John D. Ashcroft, Attorney General, Respondent.
http://www.aei-brookings.org/admin/authorpdfs/page.php?id=16

This is an analysis of the proposal that became law in the US in 1998. The authors are 17 of the world's leading economists, including five Nobel Prize winners.

They find that

…it is difficult to understand term extension of both new and existing works as an efficiency measure.

And that

As a policy to promote consumer welfare, [it] fares even worse, given the large transfer of resources from consumers to copyright holders.

2. Intellectual Property and Competition Review Committee, *Review of intellectual property legislation under the Competition Principles Agreement. Final Report.* September 2000 (The Ergas Report) prepared for Senator the Hon Nicholas Minchin Minister for Industry, and the Hon Daryl Williams AM QC MP Attorney-General. http://www.ipcr.gov.au/

This is the report commissioned by the Australian government in 1999 to review Australia's existing intellectual property laws in accordance with its competition policy procedures.

It finds, in relation to Australia's term of copyright:

The Committee is not convinced there is merit in proposals to extend the term of copyright protection, and recommends that the current term not be extended.

We also recommend that no extension of the copyright term be introduced in future without a prior thorough and independent review of the resulting costs and benefits."

3. The Allen Group, *Copyright Term Extension, Australian Benefits and Costs,* July 2003 http://www.allenconsult.com.au/resources/MPA_Draft_final.pdf

The Allen group was commissioned to examine the copyright term by groups that support an extension of the term, as part of the input to the Free Trade Agreement with the United States.

The Allen Group finds that

Overall, the net financial impact of term extension in Australia is likely to neutral

But that, in contrast to the earlier two studies, and for other reasons

copyright term extension should be supported.

4. Centre for International Economics, *Economic analysis of AUSFTA. Impact of the bilateral free trade agreement with the United States*, Prepared for Department of Foreign Affairs and Trade April 2004.

The Centre for International Economics was asked to examine the economic impact of the proposed FTA by Australia's Department of Foreign Affairs and Trade.

It finds that

The incremental cost associated cannot be determined.

But adds the reassuring note that:

available evidence suggests it will be marginal.

Where are these reports coming from?

The first point to note is that studies 1 and 2 are quite different kinds of studies to 3 and 4.

3 and 4 were commissioned and paid for by organisations that believe they would benefit from an extension in Australia's term of copyright.

3 was commissioned and paid for by the Motion Picture Association, the Australian Performing Right Association, Copyright Agency Limited, and Secreenrights.

4 was commissioned and paid for Australia's Department of Foreign Affairs and Trade, which negotiated the Free Trade Agreement.

In contrast, Study 1 was paid for by the authors themselves in order to provide economic input into a US Supreme Court hearing.

The authors say they

represent neither party action in this action

and

were not compensated in any way; the Stanford Institute for Economic Policy Research defrayed printing costs.

Study 2 was prepared by an independent committee set up by Ausatralian Government Ministers. It received 139 submissions and held public consultations, receiving input from organisations including some of those that later commissioned the Allen Group's report.

Only reports 1 and 2 were independent, and it is noteworthy that both come out strongly against an extension of the copyright term.

It is noteworthy as well that even the two commissioned reports fail to come up with what they say are strong arguments in favour of extending the copyright term.

Study 1. Seventeen economists.

The economists point out that the main economic benefit from copyright is the incentive it gives an author to create new works.

But they point out that, for *new works* – the extra incentive brought about by the proposed extension of the copyright term is tiny.

As I put it in the Sydney Morning Herald on April 14, 2004:
http://www.smh.com.au/articles/2004/04/13/1081838720006.html

It is true that increasing the copyright term from zero to 20 years would provide a good deal of extra incentive to write. But increasing the term from an entire lifetime plus 50 years to an entire lifetime plus 70 years would provide much less incentive at the time when the decision is being made to write. A lifetime plus half a century seems so far away, let alone additional decades.

Income in future years is worth less to people than income in the present. Economists quantify the effect by using a discount rate. Each future year of income is worth a certain per cent less to the recipient than it would be had it been received the year before. Using a typical discount rate of seven per cent the economists find that the extra incentive resulting from a proposed copyright extension so far out into the future would be worth about 0.33 per cent to a would-be author (in other words, next to nothing).

The economists arrived at that figure assuming that the stream of royalties was constant 100 or so years out into the future. In reality for most works the stream of royalties declines very rapidly. Justice Breyer of the US Supreme Court reworked the economists numbers taking that into account and found that the effect on incentive of the proposed extra 20 year term to be far smaller than one third of one per cent (in other words, much less than next to nothing.)
http://www.edwardsamuels.com/copyright/beyond/cases/eldredbreyer2.htm

The economists point out that an extra copyright term *for existing works* would of itself bring about no extra incentive to create, because the existing works have already been created.

Once a work is created, additional compensation to the producer is simply a windfall.

They do acknowledge the curious argument that an extension of the copyright term could have an effect on the incentive for creating new works by creating an expectation that in the future the government would extend the copyright term yet again. But they point out that even if there was such an expectation its effect on incentive would be tiny for the reasons outlined earlier.

Turning to the costs imposed by an extension of the copyright term, the economists point out that it would allow the copyright holder to overprice works for longer (remaining a monopoly supplier of those works for an extra two decades). For *new* works the present-day value of the extra cost resulting from the additional overpricing would be small, for the reasons outlined earlier.

But for *existing* works about to enter the public domain the present day value of the extra cost could be high indeed, An extension of the copyright term would see them locked away and charged for for an additional twenty years.

Most importantly, the economists note that new art is often created from the building blocks of existing works of art.

Many new creative works are built in part out of material from existing works. For example, new fiction re-tells old stories, new documentaries re-use historical footage, and new music remixes and transforms old songs. Improvements in the technology of search and recombination continue to expand the economic importance of new creation based upon old materials.

Where building-block materials are copyrighted, new creators must pay to use those materials, and may incur additional costs in locating and negotiating with copyright holders. Such transaction costs are especially large where the copyright holders whose permissions are required are numerous or difficult to locate.

By reducing the set of building-block materials freely available for new works, [an extension of the copyright term] raises the cost of producing new works and reduces the number created.

The economists find that the proposed extension of the copyright term would harm many of the *producers* of creative works as well as their consumers.

Study 2. The Ergas Committee

The Ergas committee arrived at the same conclusions as did the 17 economists. The benefits from extending the copyright term would be "trivial" and had to be set against the accompanying detriment to innovation, and "significant" additional transfers from the users of copyrighted material to the owners of that material.

A substantial share of these transfers would flow overseas, and take the form of an effective deterioration in Australia's terms of trade.

The Committee reached this conclusion after having specifically sought evidence that might convince it that this wasn't so.

During consultation, the Committee specifically sought from the Australian Copyright Council (which argued for an extension of the copyright term) evidence that an extension would confer benefits in excess of the costs it would impose. No such evidence has been provided.

Study 3. The Allen Group

The Allen Group was commissioned by the Copyright Council and others to attempt to find that evidence.

The Allen Consulting Croup has been asked to identify the benefits, if any, for Australia resulting from term extension and to consider whether those benefits are outweighed by any demonstrable costs.

In order to do so the Allen group advances some truly novel propositions.

One is that, in contrast to the accepted economic wisdom, income in future years is not worth less to people than money in the pocket right now.

That economists spend so much time explaining why a future benefit should be discounted to current dollars may suggest that the decision-making approach of the general population (and in particular, potential creators of copyrighted works) is different to that of economists.

The Allen Group asks us to believe that artists, and for that matter the general population, assess income streams in a different way to that used in standard net present value calculations.

It is well-established that the motivation for buying lottery tickets is much less calculation of the chances of winning, than simply the magnitude of the top prize. People invariably look optimistically at their chances of winning, and extension may add to this impression and stimulate additional creative activity.

It has to be noted that in other reports for other clients the Allen Group itself uses net present value calculations without including so much as a word to indicate that they might be inappropriate. It even uses the same discount rate as the one used by the Nobel prize winning economists whose approach it is criticizing.

Examples from the most recent reports on its web page are at
http://www.allenconsult.com.au/resources/ACCC_Int_Reg.pdfhttp://www.allenconsult.com.au/resources/ausfta_SA.pdf
http://www.allenconsult.com.au/resources/ACG_ARC_Report.pdf

The Allen Group observes as well that part of the motivation for creating works of art is the bequest motive, the desire to hand down pass on an inheritance to children. Its implication is that this is an idea the Nobel prize winning economists had not thought of. But the economists had included bequests in their model (it was after all, a model about an extension to an income stream after an author had died). The economists discounted this income stream in the same manner as does the Allen Group itself in other reports.

The Allen Group also warns of the danger of "over exposure" and "inappropriate exposure" of works that fall out of copyright.

... examples where this have been known to occur include the Mona Lisa, the opening of Beethoven's Fifth Symphony, and several of Van Gogh's most popular paintings. In a particularly Australian context, we can possibly see similar outcomes with respect to some Aboriginal dot paintings and the photographs of Max Dupain.

Vincent Van Gough died in 1890. Extending the term of copyright from death plus 50 years to death plus 70 years will not put a stop to overexposure of his work. The argument only makes sense as an argument for extending the copyright term indefinitely.

Max Dupain died in 1992. His works are still in copyright. If they are overexposed now, it is not because the term of copyright is too short. Perhaps they will become "overexposed" when the copyright on them expires in 40 or so. Perhaps that would be a good thing. But in any event, extending the copyright term by 20 years would not prevent that overexposure, it would only push it out for another 20 years.

The Allen Group also misrepresents concerns about the effect of copyright protection on Australia's terms of trade.

Australia is a net imported of copyrightable material.

Extending the term of copyright would increase the amount that users of copyrightable material have to pay to the owners of it (because they would have to pay it for longer).

As a result Australia's terms of trade would be harmed. More money would have to leave Australia than it would have before to obtain access to the same amount of material.

In a misrepresentation of this argument the Allen Group says

If we take this approach we miss the point that trade is about mutual gain. For example, such an approach would assume that we need to have a neutral trade balance with respect to rubber thongs, gold, wheat, professional services, and all other traded goods and services. This is clearly ridiculous.

As far as I can tell the opponents of extending the term of copyright are suggesting no such thing.

The Allen Group quotes another author as saying that opposition to an extension of the copyright term

… reveals the old mercantilist fallacy that exports are good and imports are bad which was roundly attacked by Adam Smith in his Wealth of Nations (1776). What Smith convincingly showed is that mercantilism provides a vehicle for subsidising the inefficient efforts of local producers, who seek to prevent competition from cheaper imports to the ultimate detriment of consumers.

Opposition to an extension of the term of copyright term is in fact based on the view that imports of copyrightable material are a *good* thing, and that they should not be made more expensive. It is in fact an argument *in favour* of cheaper imports, for the ultimate *benefit* of consumers.

The Allen Group report is the most disappointing where it is silent. As far as I can tell it responds not at all the argument of the economists that

By reducing the set of building-block materials freely available for new works, [an extension of the copyright term] raises the cost of producing new works and reduces the number created.

Extending the term of the copyright would harm the *producers* of creative works as well as their consumers.

For me, this was the economists' most potent argument. The Allen Group leaves it untouched.

The Group finds in favour of extending the copyright term on the ground that that this would "harmonise" Australia's rules with those of its trading partners.

The global trend to harmonisation around a longer copyright term suggests that there will be harmonisation benefits (ie, costs foregone) in similarly adopting a longer copyright term comparable with Australia's major copyright trading partners.

Yet elsewhere the report concedes that at the moment only 24 of Australia's 50 major trading partners have adopted the increased term.

The Allen Group makes no attempt to quantify the "harmonization" benefits that it speaks of.

It also mentions, but does not pursue, an argument that the copyright term should be extended to compensate copyright owners for what it says is the increasing ease with which their works can be illegally reproduced.

It is odd and probably an ineffective suggested tradeoff. If works are being illegally reproduced it is not at all clear that extending the expiry of copyright from a date way out into the future to another date way even further out into the future will make much difference.

Study 4. Centre for International Economics

The CIE acknowledges that

…the copyright extension in the agreement will at most, provide a minor additional incentive for the creation of new works.

It acknowledges as well that as the term of copyright increases

…the price of these creative works will remain higher for longer. As a net importer of copyright material, resources would be transferred form Australian consumers of books, films, music and art to US (or other international) producers of these works.

But it says this cost is not likely to be big, as most works that are out of copyright are no longer in demand anyway.

(It could have added that to the extent to which this is the case, the "minor additional incentive for the creation of new works" would also become smaller.)

The CIE also acknowledges the problem that the Allen Group does not.

…the extension of the copyright term may restrict and limit new works being produced from existing works. These creators will also face transaction costs such as locating and negotiating with the authors of the existing work. The extension of the copyright term may therefore reduce the amount of material in the public domain to be used.

But it then says that it is not possible to quantify the damage.

Its conclusion appears to be that the costs of extending Australia's copyright term exceed the benefits, but that the size of the net harm that would result cannot be quantified.

The incremental cost associated cannot be determined. However, available evidence suggests it will be marginal.

I trust this review of the four major published studies assists the Committee in its deliberations.

Peter Martin