

Calling a Spade a Spade: Winners and Losers under a Retrospective Copyright Term Extension.

A submission to the Senate Select Committee on the USFTA

This submission is an attempt to address, in simple terms, the consequences of the extension of the duration of copyright effected by Article 17.4.4 of the proposed US-Australia Free Trade Agreement (FTA). Chapter 17 of the agreement is an elaborate document, and the Committee will no doubt have encountered some elaborate arguments about the chapter as a whole and about Article 17.4.4 itself. Despite intricate claims to the contrary, I hope that the brief explanation set out below can help to convince the Committee that the consequences of Article 17.4.4 *are easy to predict*. Article 17.4.4 should be interpreted as a straightforward transfer of wealth away from the Australian public and some contemporary Australian artists, to a small group of copyright owners, a disproportionate number of whom are based in the United States. That transfer is likely to be in order of tens of millions of dollars per year in perpetuity. There are also side effects of a comparable size, which are solely harmful to the Australian public.

In short, the retrospective expansion of copyright must be regarded as a substantial loss to the Australian community. Over the next twenty years, that loss is likely to be the best part of a billion dollars. This cost must be weighed appropriately against any benefits the community may stand to obtain from other chapters of the FTA.

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1. The Motivation and Consequences of Copyright Monopolies

The only sound and defensible reason why society should have copyright laws is that they make us, collectively, better off. By rewarding creativity and investment in culture and other forms of information production, it is possible to improve the position of both producers and consumers of information, and for us to take pride in the fact that our legal system supports at least some of our great artists.¹ But copyright grants rewards in the form of small monopolies, and those monopolies have very real costs in terms of reducing the use of and benefit from copyrighted goods.

If works are covered by strong and effective copyright laws, many fewer people obtain copies of them, and so their benefit to society is substantially reduced.

Let me illustrate how much of an effect copyright can have on the extent of use and benefit from cultural goods. We can get an idea of this, a rough estimate, because copyright is currently being

¹ Although, unfortunately, because of the risk-sharing arrangements which are prevalent in the music industry in particular, copyright does not necessarily guarantee a reward for great musicians. For a frank description of this phenomenon, from a successful industry participant, see Steve Albini, *The Problem With Music* <http://www.negative.land.com/albini.html>.

ignored by millions of Australians, allowing us to see the difference between the extent of paid distribution which happens when copyright is in play, on one hand, and the extent of free distribution ("piracy") which occurs when copyright is not determinative, on the other.

According to research commissioned by ARIA, Australians (illegally) download about 430 million, and receive "burnt CD" copies of about 337 million, songs per year.² In 2003, a record-breaking year, we purchased about 677 million legal songs.³ So illegal copies account for over 50% of the distribution of music in this country.⁴ If copyright was actually working the way it is supposed to, none of that illegal activity would be happening. And if that were the case, about half of Australians' consumption of music would stop at once.⁵

Of course, this copying is occurring today despite the fact that the law states that it should not. But the law should be evaluated, not from the basis that it will be ignored, but as a statement of the way things ought to occur in the majority of cases. If policy suggests it is best to allow or prohibit particular actions and benefits amongst the Australian public, the law should reflect that.

Importantly, the point I am trying to make isn't about the copying of new works, which accounts for most, but not all, of Australians' illegal file sharing and CD burning. *The point isn't that file sharing is necessarily a good thing.* The point is that when copyright law covers a particular work, it effectively says that Australians' use of and benefit from that work should be more or less halved.⁶ That cost to society may well be acceptable, *if* it results in significant benefits to authors and artists, or increases the incentives to produce new works

2. The Effect of a *Retrospective* Expansion of Copyright

The *retrospective* copyright expansion included in the FTA has all of the costs associated with copyright – a very large reduction in Australians' expected consumption of old works, especially in electronic form.⁷ But it has *none* of the legitimate benefits. It can't help authors and artists, because those whose work is affected are already buried. It can't provide incentives to do things in the past.

This absurdity only applies to the retrospective part of the extension. But to be frank, **nobody who is**

2 These figures come from a study by Quantum Market Research, conducted for ARIA

(http://www.aria.com.au/documents/AriaIllegalMusicResearchReport_Summary.pdf). 11% usage amongst 16.6 million people aged 10+: 1.83 million downloaders × 19.6 average files per month × 12 months = 429.5 million songs downloaded. 40% of 16.6 million people received copied CDs: 6.64 million CD recipients × 3.9 average CDs per year × 13 songs per CD = 336.6 million songs on copied CDs.

3 From ARIA's 2003 sales figures (<http://www.aria.com.au/news/stats2000.htm>): 50.6 million albums × 13 songs per CD + 9.5 million singles × 2 songs per CD = 677 million songs sold on CD.

4 53%, according to these approximate figures.

5 The reader might wonder how many of those lost free copies would be replaced by legally paid-up copies. It's hard to believe that a large fraction of illegal reproductions would be replaced by sales of albums, which cost \$20-30 each; after all, most teenagers' pocket money can't cover many CDs. The claim that the "exchange rate" between illegal and legal copies is quite high is also supported by the fact that album sales have *increased* (currently standing at 47 million; they were 39 million in 1998). A recent econometric study in the US also reaches similar conclusions; see F. Oberholzer and K. Strumpf, *The Effect of File Sharing on Record Sales: An Empirical Analysis*, http://www.unc.edu/~cigar/papers/FileSharing_March2004.pdf. The Quantum study suggests a 12% reduction in CD purchases amongst file sharers, but that alone doesn't allow calculation of the "exchange rate", because we don't know what fraction of CD purchases were accounted for by those file sharers.

6 The estimated reduction from the figures above should be 53%, less the number of pirated copies replaced by legal ones if the law was strictly enforced, plus the number of extra copies made by people who would never make illegal copies, but who would start copying if the law allowed it.

7 The reduction in digital copies will apply to most kinds of subject matter. But there are also significant reductions in distribution of old-fashioned versions; for example, the number of copies sold of a \$15-\$30 edition of a copyrighted book will be much lower than the number of copies of a \$3-\$10 out-of-copyright "classics" edition.

alive today really cares about an extension of copyright for *new* works from life+50 to life+70 years. Such a change would make no difference for the next 50 years, and little difference for decades after that. Nobody is thinking that far ahead. This debate is really just about retrospectively extending monopolies over the works of authors and artists who are already dead. The real beneficiaries are recording and publishing companies, and in some cases, the grandchildren of those who actually made cultural contributions in the past.

How much is the extension worth to these groups? How much will it cost Australian consumers? There is very little in the way of concrete data with which to calculate exact figures. But it's relatively easy to make an indicative back-of-the-envelope estimate.

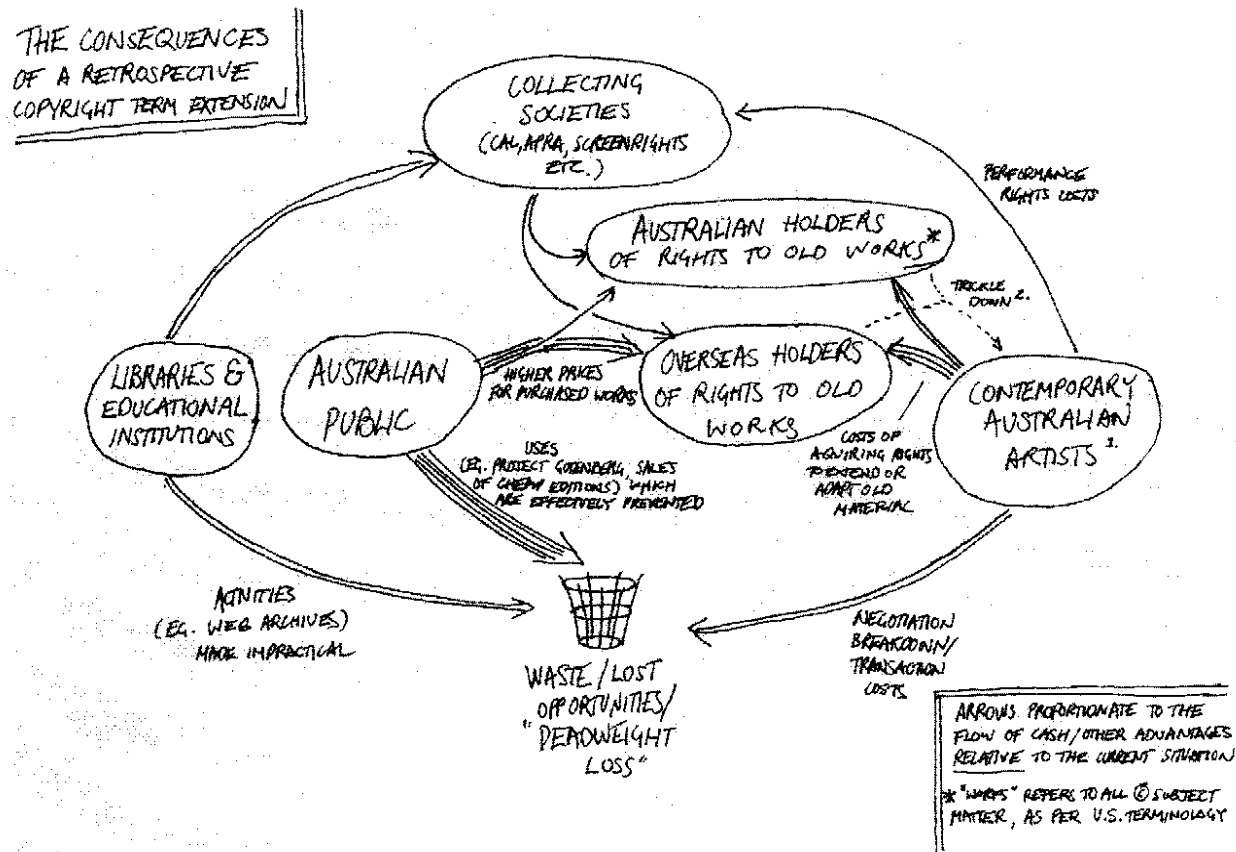
Assume that each year, one in four Australians, aged 10 or over, purchase or receive a work which is affected by the extension. That could be a book by an author who died in the period from the 1950s to the 1970s, a jazz or blues album by a composer who died in the same period, or a DVD from those same decades when cinema was coming of age (perhaps Akira Kurosawa, Ingmar Bergman, Clint Eastwood or Peter Sellers). The price increase as a result of copyright can conservatively be estimated at \$10.⁸ These extra expenses will be phased in over the next twenty years, as more and more items are affected by the extension. That adds up to a \$415 million dollar transfer away from Australian consumers, over the next twenty years, or an average of \$21 million per year.⁹ Twenty years out, the ongoing cost will be \$42 million per year in today's dollars. These costs only include increased prices paid by consumers; *they do not include the additional "deadweight loss" of reduced distribution.* As indicated in Section 1, the volume reduction in distribution is likely to be similar to, or even larger than, the volume of works sold, so the deadweight loss is an additional cost of tens of millions of dollars per year.

It is illustrative to see where the full flow of benefits and costs actually lie from this extension. Included below is a diagram which attempts to indicate who wins and who loses, and in roughly what proportions.

8 Based on the difference in prices between copyrighted books and "classic" editions, between copyrighted and "unauthorised" CDs (which cost \$5-\$10).

9 $25\% \times 16.6 \text{ million people} \times \$10 \times 50\% \text{ of those works affected over 20 years} = \$21 \text{ million per year.}$

3. Winners and Losers



This diagram shows why the US is lobbying for the extension. US and other overseas copyright owners will receive the lion's share of the payments from more expensive copies of old books, music and film. Australian rights holders are also in favour, because they get something (though a smaller amount) for free. The public at large is the big loser (globally, that happens relatively often in copyright policy making, because it's understandably difficult for the public to realise what's at stake in such an esoteric area, and make their interests heard¹⁰).

The cost to the public takes two forms – higher prices (which benefit copyright owners), and the fact that higher prices cause a big reduction in the number of copies made (analogous to the almost 50% reduction in distribution, discussed in Section 1 above), which is a loss that has no corresponding winners.

Notes on subtle aspects of the diagram:

1. *Costs to contemporary Australian artists.* Only some contemporary artists will suffer a significant negative effect from the copyright extension. In particular, the effect will be felt by those artists who use old material – old songs, writing and film – as direct ingredients for the creation of new works. They will have to pay royalties to the owners of rights in those old works, and also suffer from the costs

¹⁰ See Jamie Boyle, *A Politics of Intellectual Property: Environmentalism for the Net?*, Duke Law Journal, volume 47, pp 87–116, 1997 (<http://www.law.duke.edu/journals/dlj/articles/dlj47p87.htm>).

associated with “rights clearance”, *i.e.* working out who actually owns an old work (which is sometimes a very difficult undertaking) and then persuading them to accept a reasonable offer for a license.

The cost of performing old musical works only falls to artists indirectly. Venues pay collecting societies for the right to perform copyrighted composition on their premises. If collecting societies raise their rates following the extension, then venues will have less money to pay performers. If collecting societies do not raise their rates, then contemporary artists will receive a smaller slice of the pie as more money is diverted to the holders of old copyrights.

2. “Trickle down” effects. It is an interesting question as to whether contemporary Australian artists and authors will receive any “trickle down” benefit from extra royalties on old works, collected by their publishers. The answer is probably “no”, except in unusual circumstances. Contemporary artists may receive something from publishers who are altruistically committed to supporting cultural production to the greatest extent possible. They may also benefit in the case of publishers who can't raise enough capital to support all of the projects they would like to – so that the extra royalty payments are available to fund those projects. If publishers are self-interested and can obtain credit on decent terms, contemporary artists receive nothing from the extension.

4. Other Arguments for the Copyright Term Extension:

There are two other noteworthy arguments for expanding copyright term retrospectively, which I will address briefly:

Harmonisation: there is a common argument that copyright monopolies should be retrospectively extended in order to ensure that our laws are the same as those in other jurisdictions. This hardly deserves to be dignified with a response. Clearly the transaction costs faced by prospective users of old works, who have to identify, negotiate with, and pay rights holders, vastly outweigh the mental strain caused to practitioners who have to engage in trivial arithmetic (subtracting 20 years from the duration of their monopoly) when moving to Australia.

Incentive to digitise old works: rights holders from time to time claim that copyright term extensions are necessary in order to provide incentives to digitise and re-issue works which would otherwise be sitting in dusty archives. In some cases, a monopoly may genuinely motivate digitisation which would not otherwise have occurred. But this should not be mistaken for a reason to extend all copyright terms by twenty years.

If the Australian government wants to provide incentives for digitisation, a much more suitable measure would be a brief (3-5 year) right vested in digitisations, which anyone can obtain by digitising a work for the first time. Such a right could remain pro-competitive by only attaching to the digitiser's version — so that if the digitiser's terms or price for a license are too restrictive, others can still make their own alternative digitisations.