



Tuesday 20 July 2004

The Committee Secretary
Senate Select Committee on the Free
Trade Agreement between Australia
and the United States
Parliament House
CANBERRA



Dear Sir/Madam

Australia – US Free Trade Agreement Interim Report

APRA/AMCOS notes with interest the Interim report recently published by the Committee on this subject. We wish to make comments on some aspects of the report on behalf of our membership and we thank the Committee for the opportunity to do so.

Australasian Performing Right Association Limited

The Australasian Performing Right Association (APRA) is a non-profit organisation, established in 1926, which represents over 33,000 Australasian composers, songwriters and music publishers. It owns or controls the rights of public performance and communication in musical works of its members and members of affiliated societies throughout the world.

Australasian Mechanical Copyright Owners Society

The Australasian Mechanical Copyright Owners Society (AMCOS) is a non-profit company representing over 200 music publishers in Australasia. It administers certain reproduction rights on behalf of its members and affiliates. APRA administers the operations of AMCOS, under contract.

The “balance” of copyright protection and extension of term

APRA/AMCOS wish to rebut the suggestion that the Copyright provisions dramatically alter the balance of copyright protection in favour of copyright owners, as stated in paragraph 3.39 of the Interim report. The radical change in the balance of copyright protection internationally has been brought about by the digitisation of copyright materials and the facility to reproduce and make them available on networks without authorisation. The WIPO Internet treaties concluded in 1996 go some way in restoring the balance and in protecting the rights of copyright owners in the digital environment.

We note the comment in paragraph 3.38 that the provisions of the Australia – US FTA will not result in a complete harmonisation with many of Australia’s trading partners. Dr Matthew Rimmer of the ANU observes that many of Australia’s larger trading partners, such as China, Asia and the Middle East do not enjoy the longer basic term of life plus 70 years. These are of course countries where copyright administration is feeble and therefore there are insubstantial returns to Australian copyright owners, even where their works may be used. The EC and the US would be the major source of revenue outside of Australia for copyright owners in music. Harmonising to the term of protection in those territories will allow Australian rightsowners to benefit from the comparison of term provisions, particularly in the EC.

If, as is contended by Dr Rimmer, there will be a discrepancy in retrospectivity between Australia, the US and the EU, then this should be addressed in the implementing legislation, to ensure Australian copyright owners and users will benefit from the harmonised term of protection. The issue of acquired rights must then also be addressed.

The provisions strengthening the rights of copyright owners by establishing a harmonised international term and those relating to technological protection were initiated to redress the drastic shift in the balance of copyright protection with the advent of digitisation of copyright materials. The widespread unauthorized copying and sharing of copyright materials on digital networks poses a significant threat to creators and copyright industries. Therefore there is no justification to “counter the effects” of extension to copyright protection.

Cost/benefit analysis

We wish to comment on the basis of estimation of costs of extension proposed by Dr Philippa Dee and referred to in the interim report. The assumption that these losses will stem from a constant flow of royalties to each author is fundamentally flawed. This would provide a grossly inflated estimate of costs to users. It could not possibly form the basis of any policy decisions on such an important issue. The evidence is that only a small proportion of copyright works will enjoy popularity for more than a short period of time. This is discussed in detail in some of the submissions in the US Eldred case. This is based on evidence of works in print and copyright registration and renewal in the US. It seems this point under the FTA has only been looked at from the perspective of incentives to authors to create new works. However, copyright provides also importantly provides incentives to publishers and producers to invest in the creation, preservation, dissemination and marketing of copyright materials. Typically only a few significant works will have the success required to recoup the investment in a broad range of new works.

Similarly, we note that no analysis has been undertaken in Dr Dee’s study of the significant increase in the transaction costs of locating and negotiating with foreign rightsowners if we were not to harmonise with our major trading partners. Users in this territory often wish to

acquire world rights in protected materials which are now public domain in Australia. As they are not protected here, users cannot approach a local rightsowner to obtain the necessary permissions. The question of "orphaned works" is not a significant problem in practice, in our view. Users often resolve the problem by employing 'good faith notices'. For most copyright materials, the existence of sophisticated international networks of collecting societies overcomes any difficulties in identifying ownership.

Educational and library provisions in our Act

We note that there are already extensive provisions in the *Australian Copyright Act 1968* which enable universities, libraries, educational and research institutions to both readily and cost effectively access material for academic and related purposes. Many of these provisions allow copyright protected material to be used without permission and without payment for specific purposes and others are detailed statutory licences which have been elaborated over many years and are subject to the jurisdiction of the Copyright Tribunal. These exceptions have also been extended recently under the Digital Agenda Amendments.

The AUSFTA does not require any revision of these exceptions and the term extension provision does not confer any windfall to copyright owners. It certainly will not place a large burden on the educational and library sector, as is being claimed. In most cases, the universities, libraries and educational institutions will rely on free exceptions, statutory licences or voluntary blanket licences. For example, the quantity of musical works that would benefit from the extra twenty years of protection for these uses would be a very small portion of the works used by these institutions. It would therefore be unlikely that the costs to these users under statutory or blanket licences would increase by anything other than a nominal amount. The costs projected by Dr Dee do not seem to take into account the existence of blanket voluntary and statutory licences.

"Fair Use" exception

APRA/AMCOS does not believe that there is any requirement for the AUSFTA to consider implementing a broad "fair use" exception under Australian law. The existing specific exceptions in our Act for fair dealing, and libraries and educational copying, operate effectively to ensure access to copyright works without prejudicing the interests of copyright owners. To extend such provisions along the lines of the US "fair use" provisions, may undermine our international obligations under Article 9 of the Berne Convention, which requires such exceptions to be applied only to specific acts. In the US, each case is assessed on the merits of the case and the resulting uncertainty places unreasonable transaction and legal costs on copyright owners, their representatives and users. The Interim report acknowledges this by observing in paragraph 3.49 that our system is "more pragmatic and regulated, depending less on litigation and development of case law".

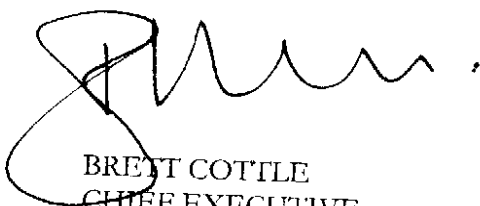
Our *Copyright Act 1968* is based on the UK 1956 Act, and these exceptions have a long history of interpretation by the courts and negotiation between copyright owners and users. The UK extended its term of protection from 1 January 1996 in response to the EC Term Directive. At no stage was the issue of the introduction of an open-ended fair use exception discussed in the context of extension of term. In fact, the fair dealing defence in the UK was amended in October last year to conform with the EC Information Society Directive to **further restrict** its application to "non-commercial" uses and private study.

Again, the AUSFTA does not require the Australian government to address the question of time and space shifting. If such issues are to be addressed under Australian law, the Copyright Law Review Committee should undertake an analysis of the question. It should not be dealt with by providing a "fair use" defence, but rather be considered in light of international law and practice on private copying, including an analysis of the US digital audio recoding scheme, Article 9 of the Berne Convention and the possibility of users relying on any such defence for "library building". This latter practice would have a significant effect on the market of copyright owners.

We do not understand the justification in the terms of the FTA for reviewing the standard of originality required for subsistence of copyright under our law. We believe that legislating on this question could provide significant practical difficulties. The question should also be considered in connection with any proposals to introduce *sui generis* database protection in this jurisdiction.

Please let us know if we can provide any further and specific assistance to the Committee on any of the issues raised above, or other issues generally.

Yours sincerely



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