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Sidley, Kristine (REPS)

From: Jennefer Nicholson [jennefer.nicholson@alia.org.au]
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Please find the submission of the Australian Library and Information Association attached.

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Jennefer Nicholson
Executive Director
Australian Library and Information Association
PO Box 6335, Deakin. ACT 2604
E-mail: jennefer.nicholson@alia.org.au
phone: 0262158215; fax: 0262822249

Australian Library and Information Association

Submission to the Parliamentary Joint Standing Committee on Treaties (JSCOT) inquiry into the Australia-United States Free Trade Agreement

The Australian Library and Information Association (ALIA) is the national body for the Australian library and information sector, representing 5000 individual professionals, 900 library and information organisations and the interests of 10.7 million users of library and information services. On behalf of its members and library and information services users the Association thanks the Committee for the opportunity to comment on the effects of the Australia-United States Free Trade Agreement, in particular articles in chapter 17, Intellectual Property, and the inclusion of cultural services in Annexes 1 and 2.

The Association's position is:

ALIA opposes adoption into Australian law of provision 17.4.4 extension of the copyright term, cited below, and asserts that to do so is contrary to the interests of Australian creators and information users;

ALIA urges caution in adopting the strict measures of the US Digital Millennium Copyright Act regarding: the circumvention of technological measures set out in article 17.4.7; the removal of rights management information set out in article 17.4.8; and the enforcement provisions set out in 17.11;

ALIA requests the Committee to support further analysis of the technological protection measures and penalties in Chapter 17 and the distinction between private copying or caching for educational purposes and what is already identified in Australian law as criminal activity, that is copying for fraudulent commercial gain.

If the Australian Government is to adopt stricter protections for copyright owners, it should establish general principles of rights for information users. These should include legalisation of one-off domestic digital copying, the strengthening of privacy protections if copyright owners are able to gain access to Internet use records on the basis of alleged copyright breaches, the preservation of library resource-sharing and a requirement that extensions of copyright protection should be in the public interest;

ALIA supports the submission of the Council of Australian University Librarians, particularly in relation to the delivery of educational services and the promotion of Australian research.

ALIA urges the Committee not to support extension of the copyright term (Article 17.4.4); and not to adopt the technological protections measures and penalties in Chapter 17 without distinguishing between private copying, caching for educational purposes and those activities already prohibited in Australian

law as criminal, that is, the breaching of owner's rights undertaken for fraudulent commercial gain.

ALIA urges the Committee to recommend retention of the Australian Government's powers to encourage Australian cultural industries by legislation and subsidy in any way appropriate for the public interest now or in the future.

ALIA believes that the Australian Government should follow the example of Canada, a veteran of trade agreements with the United States, in not acceding to provisions which impair its right to legislate on intellectual property and culture for the primary interests of its citizens.

COPYRIGHT TERM EXTENSION

ALIA opposes adoption into Australian law of provision 17.4.4 extension of the copyright term, cited below, and asserts that to do so is contrary to the interests of Australian creators and information users;

[Chapter 17 Intellectual Property Rights]

17.4.4 Each Party shall provide that, where the term of protection of a work (including a photographic work), performance or phonogram is to be calculated:

(a) on the basis of the life of a natural person, the term shall be not less than the life of the author and 70 years after the author's death; and

(b) on a basis other than the life of a natural person, the term shall be:

(i) not less than 70 years from the end of the calendar year of the first authorised publication of the work, performance, or phonogram, or

(ii) failing such authorised publication within 50 years from the creation of the work, performance, or phonogram, not less than 70 years from the end of the calendar year of the creation of the work, performance, or phonogram.

No economic argument for copyright term extension

Extensions of the copyright term benefit producers and publishers of massive amounts of content. They do not benefit the estates of individual creators or promote further creativity, the basic objective of copyright law.

The fullest economic analysis of copyright extension has been produced by the 'father' of economic rationalism, Milton Friedman, and 17 other economists (including five Nobel prize winners). The economists found that the economic benefit of the extra 20 years to copyright owners was less than one US cent a year for an individual work and was, therefore, unsustainable as an economic argument for extension. The report, *The Copyright Term Extension Act of 1998: an economic analysis*, is published by AEI-Brookings Joint Center for Regulatory Studies and available at http://www.aei-brookings.org/admin/authorpdfs/page.php?id=16.

Economic burden of seeking permissions

In contrast, a US universities' study (the Carnegie-Mellon study) found that pursuing copyright permissions for out-of-print or commercially unavailable works cost from $US150 to $US200. Every time an information user needs to contact a copyright owner for permission to quote from or use the whole or part of a work, this cost is incurred without guarantee of a response, let alone a favourable response. If the copyright owner is not found, there is no "good faith" defence (along the lines of 'made every reasonable attempt to find and am willing to compensate at a commercial price') available to protect or mitigate in an action for breach of copyright.

Anti-competitive and counter to the aims of copyright
The aim of copyright is to reward the creator for a limited time and then release information into the public domain in order to stimulate further creativity and innovation. Locking up information for longer periods is counter to that goal.

Four years ago, the Intellectual Property and Competition Review Committee concluded that there was no merit in proposals to extend the copyright term. Importantly, the committee further recommended that Australia should not extend it, without a prior thorough and independent review of the resulting costs and benefits. There has been no thorough, independent review of the costs and benefits of copyright extension in Australia, and in evidence to the Senate Foreign Affairs, Defence and Trade Legislation Committee on 2 March 2004 the head of the Australian negotiating team, Stephen Deady, advised that he had never seen the Milton Friedman report (p12 Proof Committee Hansard). In correspondence to ALIA in December 2003 the Minister for Trade, Hon. Mark Vaile, told ALIA that the Government did not support the term extension.

The extension of copyright terms is an extension of corporate monopoly. It has no place in a free trade agreement, is anti-competitive and burdens information consumers with escalating and unpredictable costs and legal obligations.
The drive of American copyright owners, expressed by one lobbyist as extension of the copyright term for "infinity minus a day", is to use the profit potential of cheap digital distribution to establish a new basis for copyright law, one of reward for investment, with diminishing or no space for public or free uses. This is completely against the public interest of any country and it places no obligation on the copyright owner to continue to invest or make the information available commercially.

As creators vanish into obscurity and corporate publishers and distributors change or disappear, the ownership of information and the ability to seek permission to use it becomes economically burdensome. The number of books which rapidly disappear into the out-of–print category indicates that profit to creators and to publishers accrues in the first 20 years. Worse, the regime of extended protection, not only through the Copyright Term Extension Act (CTEA), but through the US Digital Millennium Copyright Act (DMCA), impedes the digital preservation of and access to older materials.

Imbalance of interests between owners and users
To extend the term of copyright protection creates an imbalance of interests of owners and users. It makes no sense for Australia, a net importer of information, to extend the copyright term. It would add to the cost of our information, education and research, without providing commensurate benefits to Australian creators and publishers, because they don't produce in the volume which makes a few cents per product economically viable.

Copyright owners have the right to exploit their works commercially and they also have the legal right to not exploit them at all, a right which inhibits innovation and further creativity.

These negative rights of multiple copyright owners have prevented libraries from giving digital access to local history and private collections of material which may be

of public benefit. A recent example of this is the inability of the Alice Springs Public Library to be able to legally digitise collections of contemporary (ie 1975-6) information on the devastation of Darwin by Cyclone Tracy and the effect on citizens of the Northern Territory. The material will never be published in its present form, has multiple copyright owners, and yet has value as a collection because it includes media and private accounts and photographs which complement each other. The economic burden of seeking individual permissions is too great to digitise the collection, which is therefore available only as a print file. Extension of copyright terms has made digitising collections by American libraries more difficult and more expensive, even though such material will never be available as a commercial product.

If users are going to be disadvantaged by extensions of owner rights, by lengthening the period of protection, by redefining and limiting user access to information (as the Copyright Agency Ltd has suggested in its push to redefine library in the review of the Digital Agenda amendments) or by redefining a "work" subject to copyright in order to promote payment for increasingly small amounts of digital information (known as "granularity" after grains of wheat in a slice of bread), the copyright law will depart completely from its historic aims.

Digital Agenda amendments review
The Digital Agenda amendments review has been quarantined from the consultative processes of the Australia/US Free Trade Agreement. Issues in the two processes affect the balance between owner and user interests and should be considered together. Otherwise there will be further distortions of the aims and objectives of copyright.

Experience of Canadian information users
Canada has consistently taken the view that it is in the interests of Canadians to be cautious about adopting intellectual property rules dictated by European and US content publishers without proper parliamentary debate and attention to Canadian interests. Canada has participated in trade agreements with the United States since the early 1980s and still holds to the Berne Convention copyright term of death of the author plus 50 years.

Australia's protection of copyright owner rights
Australia has consistently met its obligations in regard to copyright protection. Before Federation, the Australian colonies were covered by Berne Convention obligations from 1887 through the law of the United Kingdom and, from 1911, Australia honoured its international obligations under Federal law. By contrast, the United States resisted signing the Berne Convention until 1989.

Australian legislatures have consistently reviewed copyright in the light of international legal changes and technological development. We have a consistent record of regular review, ongoing legislative amendment and effective judicial action. Unlike some other countries, including the United States, Australian publishing has no history of copyright piracy.

The Australian Government already protects the interests of copyright owners. It doesn't have to disadvantage Australian researchers, students and library and

information users in order to benefit American motion picture and recording association members, the main lobbyists backing term extension.

ADOPTING THE STRICT MEASURE OF THE US DIGITAL MILLENNIUM ACT

ALIA urges caution in adopting the strict measures of the US Digital Millennium Copyright Act regarding: the circumvention of technological measures set out in article 17.4.7; the removal of rights management information set out in article 17.4.8; and the enforcement provisions set out in 17.11.

ALIA requests the Committee to support further analysis of the technological protection measures and penalties in Chapter 17 and the distinction between private copying or caching for educational purposes and what is already identified in Australian law as criminal activity, that is copying for fraudulent commercial gain.

The Australian Copyright Act prohibits the manufacture, sale or advertising of circumvention devices, but is deliberately silent on the use of such devices. This silence presumably allows someone who buys a digital product or has a legal right to access digital information the ability to exercise their right of access by circumventing a technological barrier to that information.

There are cases where a person should be able to circumvent technological blocks to information which they have legally acquired. Some examples are:

- Where a person or a library has purchased a subscription to a digital information service. Unless warned before purchase, the consumer should be able to get access to the information purchased without being subjected to a technological time expiry, (which has occurred in the provision of some legal loose leaf services);

- Where a purchaser of a digital product finds, without prior warning, that it can only be used on a particular brand of hardware;

- Where a purchaser finds that legally acquired software has a geographic zone barrier.

The FTA provisions also seem to allow little room for the future balancing of the interests of copyright owners and users. The Copyright Law Review Committee's report on *Copyright and contract* recommended that where unconscionable contractual terms (such as obtain in click-warp or shrinkwrap licences) removed access permitted under the Copyright Act fair dealing or library exceptions, then copyright should prevail over contract. While this recommendation has not passed into Australian law, it and other decisions should not be pre-empted by adoption of a US legal regime.

The penalties outlined in Article 17.11 go beyond present Australian law. Activities such as peer-to-peer file-swapping or a teenager downloading music in her own home do not align with activities designed to interfere with the commercial business of a content producer. It is not in the public interest that the concept of piracy should be

equally applied to domestic and commercial copyright breaches and Australian courts and tribunals should be left with the discretion to discern the levels of seriousness of breaches of copyright.

AMERICANS USERS HAVE BROAD RIGHTS, AUSTRALIANS HAVE NARROW RIGHTS

The Committee should also take into account the differences between the narrow, clearly limited exceptions of fair dealing and library access to copyright information and the broad fair use rights of American copyright users. Under fair use, for example, some domestic copying is permitted. In Australian law, such copying needs to be prescribed in legislation.

If the Australian Government is going to adopt stricter protections for copyright owners, it should establish general principles of rights for information users. These should include legalisation of one-off domestic digital copying, the strengthening of privacy protections if copyright owners are able to gain access to Internet use records on the basis of alleged copyright breaches, the preservation of library resource-sharing and a requirement that extensions of copyright protection should be in the public interest.

ALIA also supports the submission of the Council of Australian University Librarians, particularly in relation to the delivery of educational services and the promotion of Australian research.

The Association urges the Committee not to support extension of the copyright term (Article 17.4.4) and not to adopt the technological protections measures and penalties in Chapter 17 without distinguishing between private copying, caching for educational purposes and those activities already prohibited in Australian law as criminal, that is, the breaching of owner's rights undertaken for fraudulent commercial gain.

CULTURAL INDUSTRIES

ALIA urges the Committee to recommend retention of the Australian Government's powers to encourage Australian cultural industries by legislation and subsidy in any way appropriate for the public interest now or in the future.

Libraries are custodians of Australia's culture and the Association urges the Committee not to restrict the ability of Australian governments to encourage its expression in present and future technologies and media.

The United States has by far the largest share of audio-visual access in Australian cinemas and television. It needs no special provisions for further market access or protection.

Of particular concern are:

- the failure to exempt agencies such as the Australian Broadcasting Corporation, the Australian Film Commission, the Film Finance Corporation and the Special Broadcasting Service from the operation of the FTA thus permitting challenges by US Government on behalf of US corporations to the operations of Australian tax-funded organizations mandated to foster

Australian cultural expression. The Agreement's references to subsidy appear to penalise the subsidisation by government-funded agencies of Australian films which may potentially make a profit. It is unnecessary for Australia to protect Hollywood from the competition of Australian film and television producers;

- the agreement to stand-still and rollback of Australian content regulation on commercial television;

- the acceptance of lower targets for Australian content in pay television and any media not yet invented;

- the caps on expenditure requirements for pay television, Australian adult drama (20%) and children's document, arts and education channels (10%) These are the lowest levels of local content in the developed world.

The Association supports the submission of the Australian Coalition for Cultural Diversity on these issues.

The Association believes that the Australian Government should follow the example of Canada, a veteran of trade agreements with the United States, in not acceding to provisions which impair its right to legislate on intellectual property and culture for the primary interests of its citizens.

I am happy to provide further information about matters arising from this submission.

Yours sincerely

Jennefer Nicholson
Executive Director
Australian Library and Information Association
PO Box 6335
KINGSTON ACT 2604

Tel: (02) 6285 8215
Fax : (02) 6282 2249
Email: **jennefer.nicholson@alia.org.au**