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Submission to Department of Foreign Affairs and Trade on the Australia- United States Free Trade Agreement

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Introduction

The Australian Libraries' Copyright Committee and the Australian Digital Alliance welcome the opportunity to make a submission to the Department of Foreign Affairs and Trade (DFAT) in contribution to the ongoing negotiations between Australia and the United States (US) in respect of the Australia- US Free Trade Agreement (AUSFTA)

The Australian Digital Alliance (ADA) is a coalition of IT companies, scientific and research organizations, schools, universities, consumer groups, cultural institutions, libraries and individuals. ADA members are united by the common stand that intellectual property laws must strike a balance between providing appropriate incentives for creativity on the one hand, and reasonable and equitable access to knowledge on the other. The ADA believes copyright laws must balance effective protection of the interests of rightsholders against the wider public interest in the advancement of learning, innovation, research and knowledge.

The Australian Libraries Copyright Committee (ALCC) is the cross-sectoral body acting on behalf of Australian libraries and archives on copyright and related matters. It seeks to have the interests of users of libraries and archives recognised and reflected in copyright legislation, and in so doing, help build and sustain a copyright regime which promotes learning, culture and the free flow of information and ideas in the interests of all Australians.

Summary

The Australian *Copyright Act* and current copyright practices have evolved as a result of a process of review, consultation and reference to practices in the Australian cultural, educational and information technology sectors. Any changes to Australian copyright legislation or practice as a result of the AUSFTA negotiations should support, not limit the rights established by our copyright policy. The ALCC and ADA acknowledges the potential economic benefit that the AUSFTA brings as well as the risks produced through such an agreement. United States copyright law and policy are derived from a different tradition to Australia's and in recent legislative developments some divergence has developed. Pressure to harmonise copyright legislation and practice is anticipated throughout the negotiations and we urge that any harmonisation of laws or policy be to mutual advantage of the parties while minimising potential risks to established user rights in Australia.

We note that the Australia- US trade negotiations are concurrent with the review of the *Copyright Amendment (Digital Agenda) Act 2000* (DAA). Current Australian copyright legislation is looked upon by some of our overseas colleagues within the cultural and educational sector as having achieved a proper balance for copyright owners and users alike.

This submission has been made with reference to the current draft of US- Singapore Agreement and the draft Free Trade of the Area of the Americas Agreement which have been used as a guide for the anticipated tenor of the Australian –US negotiations. The ADA and ALCC limit this submission to the area of copyright only and address some of the issues that have been highlighted by the aforementioned documents and

issues raised in discussion with DFAT as possibly relevant to the agenda in the ongoing negotiations.

WIPO Internet Treaties

Australia has not to date, acceded to *WIPO Copyright Treaty (1996)* nor the *WIPO Performances and Phonograms Treaty (1996)* ("WIPO Internet Treaties") although Australian copyright policy is consistent with the underlying principles of the treaties. The delay in Australian ratification of the treaties can in part, be attributed to a number of unresolved issues in the completion of national legislative and consultative processes required before accession.

An inclusion of a commitment to ratify the WIPO treaties in the AUSFTA should not sidestep the important process of debate and consideration that is necessary to determine how best to implement the principles and provisions of the WIPO Internet treaties into Australian law, in a coherent and balanced manner.

TPMs (Technical Protection Measures) and circumvention devices

The ability of individuals and institutions to circumvent technical protection measures for certain purposes is an important part of the DAA in maintaining the copyright balance in the digital media.

The permitted exceptions on the prohibitions on circumvention devices are crucial to the ability of libraries, cultural and educational institutions to carry out their functions effectively. The exceptions to prohibition of circumvention devices in US legislation are significantly narrower than that of the Australian provisions. Restrictions narrowing the exceptions to specified and limited end purposes will be detrimental to the work of our research and educational institutions. The flexibility of our current provisions has avoided many of the controversial suits that have or are taking place in the US (such as the current Lexmark printers case). Australian copyright policy is not advanced by restricting the exceptions in such a way that discourages researchers and research; such changes will be to the detriment of Australia's international technological competitiveness.

Fair Dealing , Library and Educational exceptions

Our cultural and educational industries rely heavily on the fair dealing, library and educational exceptions in order to carry out their function of providing access to and preserving works and information. The *Copyright and Contracts* report, released by the Copyright Law Review Committee in 2002 made recommendations to mandate some of the exceptions to restore the copyright balance and effectiveness of the exceptions in the face of current licensing practices which attempt to circumscribe the operation of the exceptions. The ALCC and ADA supports the recommendations and re-affirms the importance of the exceptions as fundamental boundaries to the scope of privileges constituting copyright. We request that the freedom of each party to provide exceptions to copyright be entrenched in the AUSFTA so that Australian copyright law can continue to provide a balanced regime that supports and advances our cultural and educational progress.

Special note should be made of our higher education industries. Current policies have nurtured extremely competitive marketing of university education in Australia for international students. This has been made possible by supportive copyright legislation and policies that has enabled access to materials for students through libraries and universities.

Parallel Importation

The ALCC and ADA support the introduction of amendments to the *Copyright Act* which allowed parallel importation of music and support the *Parallel Importation Bill (2002)*. Removal of parallel importation restrictions from the *Copyright Act* would benefit the community by providing wider access, range and competitive pricing without harming the legitimate interests of copyright holders. In the coming AUSFTA negotiations, no commitment on the issue should be made to adopt the US practice of "regional exhaustion", even as a minimum standard. The freedom of each party to determine to what extent it will allow parallel importation should be maintained.

Enforcement Issues

Australia should resist pressure to agree to "enhance" enforcement measures where "enhancement" would extend the rights of owners beyond the current carefully developed levels.

While the ALCC and the ADA acknowledge that piracy is a problem in some sectors, any provision introduced into the AUSFTA that is aimed at reducing the problem should not be implemented or agreed to, if it affects in any way, the ability of users to exercise their rights to access information, through the various exceptions and limitations. In particular, any changes affecting the role or powers of collecting agencies should be examined carefully so as to avoid creating essentially private copyright police forces.

The creation of further categories of criminal liabilities for acts of copyright infringement should be severely restricted to those cases where illegal copying was committed wilfully and for commercial gain and where the measures do not create unreasonable liabilities and heavy onus on parties that are not engaged directly in the infringing acts.

Software- decompilation

The provisions in the *Copyright Act* enabling decompilation of computer programs for the purposes of interoperability, security, security including ordinary running and back- ups has enabled the growth of a sophisticated Australian IT industry and simultaneously enabled software users to make effective use of products. The provisions in Australian copyright legislation in respect of permitted purposes for decompilation should be affirmed in the AUSFTA.

The flexibility of current Australian provisions relating to permitted purposes for decompilation is vital in ensuring ability and certainty in making effective use of software. The flexibility of the Australian provisions that govern decompilation in Australian law should not be restricted by the imposition of, for example, a "sole

purpose" standard nor any "qualified persons" test for any of the permitted purposes. The *Digital Millenium Copyright Act* (US) (DMCA) decompilation and anti-circumvention provisions has created an unenviable environment for software users in the US. The DMCA provisions provide unsatisfactory assurance for software users and researchers; in the aftermath of Skylarov/ ElcomSoft case, researchers and research initiatives have been moving off-shore to avoid the vulnerabilities created by the DMCA

Commitment to harmonise Australian copyright laws with the US provisions in this respect will be made against interests of Australian IT industry and users alike; accordingly the ALCC and ADA oppose any such commitment to harmonise this area of copyright.

Duration of protection

An extension of the term of copyright protection was considered by the Intellectual Property and Competition Review Committee (IPCRC) and subsequently rejected. We support the IPCRC's decision; the Australian term of protection currently provides adequate protection for copyright owners creators while ensuring that works continue to enter the public domain to encourage and inspire new creative works.

Corporate interests can create a call for otherwise unnecessary "reform"; the US *Sonny Bono Copyright Extension Act 1998* and the case of *Eldred v Ashcroft* embody the short-sighted (im)balance in favour of copyright owners, with detrimental effects for the public and creative industries in the long term. The term mandated by the US Act is some 20 years beyond the Berne Convention limit. It is difficult to imagine how harmonisation with this aspect of US copyright law will further the Australian copyright policy goal of encouraging creative endeavours.

An extension of the duration of copyright protection to comply with the American term will directly impact on our educational and research institutions. Statutory educational licenses will need to be adjusted to cover the extended period of copyright, resulting in a significant increase in the operational costs of Australian universities and other educational sectors.

ISP liabilities

We support Australia's current copyright legislation in respect of ISP liability. The US DMCA holds ISPs liable for the transmission of copyright material unless they sign up to a content management agreement that requires them to remove material judged to be in breach of copyright law or block access to the content, which can be issued by any person or company that claims the content violates their intellectual property rights. The adoption of a similar "notice and take-down" regime will erode established user rights; ISPs under such a regime are forced into the position of having to make judgments on the validity of the infringement complaint, the decision which will affect or impose on the ability of a subscriber to exercise legitimate uses and rights. It becomes the interest of ISPs, eager to avoid legal action, to more or less facilitate the complaint by removing the material or disabling access.

The DMCA provisions relating to ISP liability is not a standard that Australian policy should conform to as it displaces the onus for dealing with enforcement, a responsibility of copyright owners. The position of US legislation is heavily influenced by the music and motion picture industries who have been very aggressive in the way that they have pursued ISPs, both within US borders and in Australia. Existing Australian copyright law provides ample recourse for rights holders to prevent infringement of their intellectual property rights without placing ISPs in a compromised position of being forced to act as essentially an agent of copyright owners.

Competition

The ALCC and ADA believe that the *Copyright Act* and related legislation should be the primary instrument in defining the nature of copyright in works. Other policy instruments such as competition policy should guide the nature of copyright only where the nature of the issues lies beyond the scope of copyright legislation.

Increased US investment in intellectual property trade in Australia will also open our cultural, educational and information industries to increased pressures from US/ multinational corporations. It is likely that we shall see a rising number of legal actions in Australia initiated by US or multinational corporations that push for changes that further extend copyright monopoly in Australian copyright policy. We urge the Australian Government to make commitments only where it will substantially assist trade *without* increasing the ease with which user rights will be potentially diminished.

Thank you for the opportunity to make this submission. We look forward to more information as the negotiations progress.

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