April, 2004

The Australia-United States Free Trade Agreement 2004 and the Copyright Term Extension. A Submission to the Senate Select Committee.

Matthew Rimmer, *Australian National University College of Law*

A SUBMISSION TO THE SENATE SELECT COMMITTEE
ON THE FREE TRADE AGREEMENT
BETWEEN AUSTRALIA AND THE UNITED STATES

THE UNITED STATES-AUSTRALIA FREE TRADE AGREEMENT AND THE COPYRIGHT TERM EXTENSION

DR MATTHEW RIMMER
LECTURER
FACULTY OF LAW
THE AUSTRALIAN NATIONAL UNIVERSITY

Faculty Of Law,
The Australian National University, Canberra, ACT, 0200
Work Telephone Number: (02) 61254164
E-Mail Address: Matthew.Rimmer@.anu.edu.au

TABLE OF CONTENTS

"There is a whole constituency out there with a strong view against copyright term extension and we are arguing that case."

Mark Vaile, Minister for Trade (December 2003)

"Extending our copyright term by 20 years doesn't really protect our authors, yet it still taxes our readers."

Professor Andrew Christie, Director, Intellectual Property Research Institute of Australia, the University of Melbourne

"Perpetual Copyright On An Instalment Plan"

Professor Peter Jaszi, Washington University

"A Piracy Of The Public Domain"

Professor Lawrence Lessig, Stanford University

"A Gift To Intellectual Property Producers"

Henry Ergas

"Intellectual Purgatory"

Justice Stephen Breyer, Supreme Court of the United States

"A No-Brainer"

Milton Friedman, Nobel Laureate in Economics

"Actually, Sonny [Bono] wanted the term of copyright protection to last forever."

Mary Bono

EXECUTIVE SUMMARY

- **The first modern copyright legislation - the Statute of Anne - was an "Act for the encouragement of learning". The private interest in obtaining a reward for the production of creative works was subordinate to the greater public interest in supporting education and learning.**

- **The extension of the copyright term as part of the free trade agreement inhibits the original purpose of copyright to encourage learning and education.**

- **The extension of the copyright term as part of the free trade agreement also undermines the doctrinal notion that copyright protection is for "limited times" - rather than for in perpeutity.**

- **The *Sonny Bono Copyright Term Extension Act* 1998 (US) is a poor legislative model for Australia to adopt as part of the United States-Australia Free Trade Agreement.**

- **The main advocate for the copyright term extension was the Motion Picture Association of America - the United States copyright owner group, which represents firms such as Walt Disney, Sony Pictures Entertainment, MGM, Paramount Pictures, Twentieth Century Fox, Universal Studios and Warner Brothers.**

- **The Supreme Court of the United States decision in *Eldred* v *Ashcroft* (2003) raises significant issues about the impact of copyright term extension upon competition policy, cultural heritage, and international trade.**

- **The Federal Court litigation in *Golan* v *Ashcroft* (2004) raises further concerns about the impact of copyright term extension upon public welfare.**

- **The District Court case of *Kahle* v *Ashcroft* (2004) highlights that the copyright term extension will create a large class of "orphaned" works.**

- **The *Public Domain Enhancement Bill* 2004 (US) - or a mechanism like it - will be necessary to deal with the large number of "orphaned" works created by the copyright term extension in Australia.**

- **The Australian Government did not follow the processes set out in the Competition Principles Agreement in assessing the impact of the copyright term extension.**

- **The Australian Government failed to take account the recommendations of the Ergas Intellectual Property and Competition Review.**

- **The Australian Government failed to account of the amicus brief by economists, including five Nobel Laureates - such as Milton Friedman.**

- **The Allens Consulting Report provides no empirical evidence that would support the extension of the copyright term in Australia.**

- **The United States-Australia Free Trade Agreement will not provide uniform standards with respect to copyright duration in Australia and the United States.**

- **There will be discrepancies in respect of works made by authors who died between 1928-1954; works made for hire; anonymous and pseudonymous works; moral rights; and performers' rights.**

- **The copyright term of Australia will not be harmonised with major trading partners in Asia, the Middle East, Canada and New Zealand.**

- **The United States-Australia Free Trade Agreement does not provide international harmonisation with respect to user privileges.**

- **Most notably, Australia has not adopted the higher standard of originality, and the open-ended defence of fair use that is present in the United States. As a result, Australia will provide higher levels of copyright protection than the United States.**

- **The United States-Australia Free Trade Agreement will have a deleterious impact upon culture in Australia.**

- **The Australian Library and Information Association has reported: "The outcome is bad for libraries. It is bad for students. It is bad for researchers. It is bad for all information users."**

- **The Australian Vice-Chancellors' Committee expects a significant increase in the copyright fees that universities currently pay.**

- **The electronic publisher, Project Gutenberg Australia, will find it difficult to enhance its on-line collection of books - because no copyright work will fall into the public domain for the next twenty years.**

- **Australian children will pay more for storybooks. The works of AA Milne - the author of the Winnie-the-Pooh books - would have fallen into the public domain in 2006. They are now subject to copyright fees until 2026. Winnie-the-Pooh generates annual revenue of $1 billion for Disney and $6 billion at retail.**

- **The scientific and non-scientific writings of Albert Einstein would have fallen into the public domain in Australia in 2005. Now schools and scientific institutions will have to negotiate permission to use the work and pay royalties for another twenty years.**

- **Neil Armfield and Company B will face the possibility of artistic censorship for putting on innovative productions of the copyright works of Bertolt Brecht and Samuel Beckett.**

- **Richard Tognetti and the Australian Chamber Orchestra will continue to have problems in performing classical music such as the work of Bartok because of the copyright term extension.**

- **Screensound Australia will find it difficult to preserve significant films and sound recordings - such as *Robbery Under Arms* and the compositions of Percy Grainger.**

- **The Australian Broadcasting Corporation will find it difficult to complete its Digital Conversion Project, because of the extension of the copyright term.**

- **The extension of the copyright term is unnecessary given the short commercial lifespan of much copyright works. This is particularly evident in IT - with computer software such as Microsoft Windows 95.**

- **The United States-Australia Free Trade Agreement does not provide for the protection of traditional knowledge.**

PART ONE
AN ACT FOR THE
ENCOURAGEMENT OF LEARNING

The first modern copyright statute - the Statute of Anne - was enacted in the United Kingdom in 1710. The preamble stated that this legislation was "An Act for the Encouragement of Learning, by vesting the Copies of printed Books in the Authors or Purchases of such Copes, during the Times therein mentioned".

Tyler Ochoa and Mark Rose have provided a historical account of copyright law and literary property in England during the 18th century.[1] They considered the industry lobbying and the parliamentary debates which lead to enactment of the Statute of Anne. Ochoa and Rose commented that Parliament sought to prevent booksellers from turning literary classics into perpetual private estates:

> The Statute of Anne acted in two ways to break the booksellers' monopolies. First, the Act established authors as the original proprietors of copyrights. Thus, for the instance, one no longer had to be a member of the Stationers' Company to own copyrights. Second, the proposed legislation was amended to impose term limits modelled on those in the Statute of Monopolies. The term of copyright in new works was limited to fourteen years, with the possibility of renewal for a second fourteen-year term. For books that were already in print, including such valuable old properties as the works of Shakespeare and Milton, the act provided a single twenty-one-year term.[2]

In the past, booksellers had assumed that they had a perpetual common law copyright in relation to books. In effect, the Statute of Anne served to turn copyright law into a "creature of statute" and set temporal limits on the duration of copyright protection.

In 1735 the publishers unsuccessfully sought to extend the copyright term for all books, An anonymous English pamphleteer feared that the legislation would have a detrimental impact upon the welfare of consumers. He argued against the legislative

---

[1] Tyler Ochoa, and Mark Rose. "The Anti-Monopoly Origins of the Patent and Copyright Clause," *Journal of the Copyright Society of the U.S.A,* 2002, Vol. 84, pp. 675-706. See also Rose, M. *Authors And Owners: The Invention Of Copyright*. Cambridge: Harvard University Press, 1993; and Mark Rose. "The Author As Proprietor: *Donaldson* v *Becket* and the Genealogy Of Modern Authorship", in Brad Sherman, and Alain Strowel, (eds) *Of Authors and Origins: Essays on Copyright Law*. Oxford: Clarendon Press, 1994, p. 23-55.

[2] Tyler Ochoa, and Mark Rose. "The Anti-Monopoly Origins of the Patent and Copyright Clause," *Journal of the Copyright Society of the U.S.A,* 2002, Vol. 84, pp. 675-706.

push by booksellers to extend the copyright term for literary property in 1735: "I see no Reason for granting a further Term now, which will not hold as well for granting it again and again, as often as the Old ones Expire; so that should this Bill pass, it will in Effect be establishing a perpetual Monopoly, a Thing deservedly odious in the Eye of the Law; it will be a great Cramp to Trade, a Discouragement to Learning, no Benefit to Authors, but a general Tax on the Publick; and all this only to increase the private Gain of the Booksellers."[3]

In the 1730s and 1740s, a number of Scottish booksellers began printing editions of books, which had fallen into the public domain. In response, London booksellers took legal action to establish the illegality of such works. They argued that copyright was a matter of common law, rather than statutory law. As such, they maintained that copyright works should receive perpetual protection, not just protection set for the terms established by the Statute of Anne. In 1769, the Court of the King's Bench ruled in *Millar* v *Taylor* by a majority of three to one that a perpetual common law copyright survived the Statute of Anne. However, in *Hinton* v *Donaldson* in 1773, the Scottish Court of Session held by a majority of eleven to one that there was no common law right outside the limited rights conferred by the Statute of Anne. In 1774, in the case of *Donaldson* v *Beckett*, the House of Lords decisively rejected the claim of perpetual common law copyright and established that the only basis for copyright was the Statute of Anne.

Nonetheless, publishers continued to push for extensions of the copyright term set down by statute. Catherine Seville explores the debate over the *Copyright Act* 1842 (UK).[4] Serjeant Talfourd's first Copyright Bill was presented in 1837, and generated great public and Parliamentary controversy. He demanded not only a considerable extension of copyright term, but also international protection. Versions of the bill were presented every year after this until 1842 when it was passed. In addition to the debate as to the nature of literary property and the economic effects on the publishing trade, discussion of copyright law raised broader questions - such as

---

[3] A Letter To A Member of Parliament Concerning the Bill Now Depending In The House of Commons, 1735.

[4] Catherine Seville. *Literary Copyright Reform in Early Victorian England: The Framing of the 1842 Copyright Act*. Cambridge: Cambridge University Press, 1999; and see also Catherine Seville. "Talford And His Contemporaries: The Making Of The Copyright Act 1842", in Alison Firth. (ed.) *The Prehistory And Development Of Intellectual Property Systems: Volume 1 of Perspectives On Intellectual Property*. London: Sweet And Maxwell, 1997, p 47-80.

the relative values of literature and science, the importance of public education, the dangers of monopolies, and the nature of public interest. Although the 1842 legislation formed the basis of modern copyright law, it failed to provide a coherent rationale for the system. Seville concludes: "The justification for copyright law must be better defined and more widely understood, and it is to be hoped that latter-day interest groups will co-operate in an attempt to achieve this".[5]

Brad Sherman argues that the bilateral copyright agreements that were negotiated between Britain and other European countries in the 1840s and 1850s played an important role in the formation of British copyright law.[6] He maintains that the process of comparing and contrasting British law with the law in Prussia, Saxony and France played an important role in the crystallisation of a discrete branch of jurisprudence known as copyright law. Sherman concludes: "The image of copyright law that developed during the 19th century and the narrative of identity which this engendered not only play an important role in influencing the way we think of copyright law, they also restrict the questions we ask of the subject."[7]

Samuel Ricketson neatly summarizes the historical background to the present copyright term:

> From a maximum period of 28 years under the Statute of Anne in respect of books, it was enlarged in 1814 to the term of the author's life if still living at the end of 28 years. In 1842, after a prolonged parliamentary struggle, it was finally changed to the life of the author plus seven years or 42 years, whichever was longer... Nevertheless, the period fixed by the 1842 Act remained in force until the 1911 Act.[8]

In response to the Berne Convention, the United Kingdom provided in 1911 for a general term of copyright lasting for the life of protection plus 50 years after death. It provided for a term of copyright for special subject matter for 50 years from first publication.

---

[5] Catherine Seville. "Talford And His Contemporaries: The Making Of The Copyright Act 1842", in Alison Firth. (ed.) *The Prehistory And Development Of Intellectual Property Systems: Volume 1 of Perspectives On Intellectual Property*. London: Sweet And Maxwell, 1997, p 47-80.

[6] Brad Sherman. "Remembering And Forgetting: The Birth of Modern Copyright Law", *Intellectual Property Journal*, 1996, Vol. 10 (1), p. 1-34.

[7] Brad Sherman. "Remembering And Forgetting: The Birth of Modern Copyright Law", *Intellectual Property Journal*, 1996, Vol. 10 (1), p. 1-34.

[8] Samuel Ricketson. *The Law Of Intellectual Property: Copyright, Designs and Confidential Information, 2nd edition*. Sydney: LBC Information Services, 1999, [6.50].

Copyright protection in Australia was originally extended to authors under various United Kingdom copyright statutes. The Commonwealth enacted a Copyright Act in 1905, but this operated concurrently with existing state and imperial copyright legislation. The *Copyright Act* 1912 (Cth) passed comprehensive legislation with respect to copyright, and repealed the State Acts. However, the *Copyright Act* 1912 simply adopted the *Copyright Act* 1911 (UK) and provided that it should be in force in Australia. In consequence, when the 1911 Act was repealed in the United Kingdom in 1956, it continued in force in Australia and other Commonwealth countries. The *Copyright Act* 1968 (Cth) followed the 1956 British Act but there were a number of significant differences as well. In general, it provides for the duration of protection to be the life of the author plus 50 years or 50 years from the date in which certain specified events, such as publication, occur. Much depends upon the class of the work or subject matter in question, and whether certain acts have occurred. The Act has been extensively amended since then in 1980, 1984, 1989, 1997, and 2000.

- **The first modern copyright legislation - the Statute of Anne - was an "Act for the encouragement of learning". The private interest in obtaining a reward for the production of creative works was subordinate to the greater public interest in supporting education and learning.**

- **The extension of the copyright term as part of the free trade agreement inhibits the original purpose of copyright to encourage learning and education.**

- **The extension of the copyright term as part of the free trade agreement also undermines the doctrinal notion that copyright protection is for "limited times" - rather than for in perpeutity.**

PART TWO
FREE MICKEY:
THE COPYRIGHT TERM AND THE PUBLIC DOMAIN

The *Sonny Bono Copyright Term Extension Act* 1998 (US) was literally a "Mickey Mouse Bill". The 1998 statute was the result of intense lobbying by a group of powerful corporate copyright holders, most visibly the Walt Disney Company, which faced the imminent expiration of copyrights on Mickey Mouse and its other famous cartoon characters.[9] The legislation extended the term of copyright protection for copyright works from the life of the author plus 50 years to the life of the author plus 70 years, in line with the European Union. It also extended the term of copyright protection for works made for hire, and existing works, to at least 95 years. Thus Mickey Mickey, a work for hire first copyrighted in 1928, will now pass into the public domain in 2023 - instead of 2003 under the previous law.

Sonny Bono, from the 1970s pop group and variety show Sonny and Cher, believed that copyright should be extended, if not made perpetual. As a Florida Senator he introduced the legislation. However, the politician died in a skiing accident before the legislation came to pass. The tragic irony is that the legislation he sponsored was intended to provide a longer term of copyright protection to benefit the estate of deceased copyright owners. In the consideration of the bill, Sonny's widow, Mary Bono, provided this elegy, which was in part a memorial and in part a polemic:

> Copyright term extension is a very fitting memorial for Sonny. This is not only because of his experience as a pioneer in the music and television industries. The most important reason for me was that he was a legislator who understood the delicate balance of the constitutional interests at stake. Last year he sponsored the term extension bill, H.R. 1621, in conjunction with Sen. Hatch. He was active on intellectual property issues because he truly understood the goals of the Framers of the Constitution: that by maximizing the incentives for original creation, we help expand the public store-house of art, films, music, books and now also, software. It is said that 'it all starts with a song,' and these works have defined our culture to audiences world-wide.

---

[9] Associated Press. "Disney Lobbying for Copyright Extension No Mickey Mouse Effort Congress OKs Bill Granting Creators 20 More Years", *The Chicago Tribune*, 17 October 1998; and Chris Sprigman. "The Mouse That Ate The Public Domain: Disney, the Copyright Term Extension Act and Eldred v Ashcroft", Findlaw, 5 March 2002, URL: http://writ.news.findlaw.com/commentary/20020305_sprigman.html

> Actually, Sonny wanted the term of copyright protection to last forever. I am informed by staff that such a change would violate the Constitution. I invite all of you to work with me to strengthen our copyright laws in all of the ways available to us. As you know, there is also Jack Valenti's proposal for term to last forever less one day. Perhaps the Committee may look at that next Congress.[10]

In life and even in death, Sonny Bono served as an ideal figurehead for a number of copyright industries. He was able to lend credence to the pretence that the main beneficiaries of the legislation were artists and musicians, rather than the multinational media companies who distributed and transmitted copyright works.

Eldred* v *Ashcroft

An electronic publisher, Eric Eldred, was concerned that the *Sony Bono Copyright Term Extension Act* would prevent him from publishing books that had been previously in the public domain. Eldred started Eldritch Press — a free site devoted to publishing HTML versions of public domain works. With the help of a relatively cheap computer and an inexpensive scanner, Eldred took books that had fallen into the public domain and made them available for others on the Internet. Soon his Web site had pulled together an extraordinary collection of work including Hawthorne's *The Scarlet Letter,* English translations of the work of Anton Chekhov, scientific papers by T.H. Huxley, and a large collection of the works of Oliver Wendell Holmes Sr. Eldred was concerned that the legislation would delay the entry of literary works into the public domain. He was particularly aggrieved that the poems of Robert Frost would remain in copyright.

Eric Eldred decided to launch a legal action against the constitutional validity of the *Sony Bono Copyright Term Extension Act* 1998 (US). First of all, he argued that the extension of the copyright term went beyond the scope of the Copyright Power under the United States constitution. That clause provides that the Congress has the power to "promote the Progress of Science… by securing for limited Times to Authors… the exclusive Right to their respective writings". Second, the electronic publisher maintained that the legislation violated the freedom of speech guaranteed under the First Amendment.

---

[10] Mary Bono. "Sonny Bono Copyright Term Extension Act", 144 Congressional Record H9946, at p. 9952, 7 October 1998.

The petitioner Eric Eldred was supported by nine additional plaintiffs - organisations which provided public access to songs, books, and films.[11] He was also bolstered by a number of amicus curiae submissions by historians, intellectual property academics, economists, cultural institutions, various copyright users, and members of the new economy.[12] For the respondents, there were a number of amicus curiae - including members of Congress, copyright owners and professional organisations, as well as intellectual property lawyers and academics.[13]

The legal challenge by Eric Eldred against the *Sonny Bono Copyright Term Extension Act* 1998 (US) was pursued all the way up to the Supreme Court of the United States. In the United States District Court of Columbia, Justice Green brusquely dismissed the argument that the *Sonny Bono Copyright Term Extension Act* 1998 (US) was unconstitutional.[14] In the Court of Appeals, the majority of the circuit judges were more circumspect in the finding the *Sonny Bono Copyright Term Extension Act* 1998 (US) was constitutional.[15] However, Justice Sentelle dissented. The Supreme Court of the United States in *Eldred* v *Ashcroft*[16]rejected a constitutional challenge to the validity of the *Sonny Bono Copyright Term Extension Act* 1998 (US) by a majority of seven to two.[17] In the leading judgment, Justice

---

11 The other nine plaintiffs were Eldritch Press, Higginson Book Company, Jill A. Crandall, Tri-Horn International, Luck's Music Library, Inc., Edwin F. Kalmus & Co., Inc., American Film Heritage Association, Moviecraft, Inc., and Dover Publications, Inc.

12 Fourteen amici supported Eric Eldred in the Supreme Court, including: College Art Association, Visual Resources Association, National Humanities Alliance, Consortium of College and University Media Centers and National Initiative for a Networked Cultural Heritage; Five Constitutional Law Professors; Eagle Forum Education & Legal Defense Fund and Association of American Physicians and Surgeons; seventeen Economists; Free Software Foundation; Hal Roach Studios and Michael Agee; Intel Corporation; fifty-three Intellectual Property Law Professors; Internet Archive, Prelinger Archives, and Project Gutenberg Literary Archive Foundation; Fifteen Library Associations; National Writers Union et al; Tyler T. Ochoa, Mark Rose, Edward C. Walterscheid, Organization of American Historians, H-Net; Malla Pollack; and Progressive Intellectual Property Law Association and Union for the Public Domain.

13 Twenty amici supported the government in the Supreme Court, including: American Intellectual Property Law Association; ASCAP, BMI, et al; Amsong, Inc; AOL Time Warner, Inc; Association of American Publishers et al; The Bureau of National Affairs, Inc; Symphonic and Concert Composers; Directors Guild of America et al; Dr. Seuss Enterprises, L.P. et al; Senator Orrin G. Hatch; Intellectual Property Owners Association; International Coalition for Copyright Protection; Motion Picture Association of America; The Nashville Songwriters Association International; New York Intellectual Property Law Association; Recording Artists Coalition; Recording Industry Association of America; New York Law School Professor Edward Samuels; House Judiciary Committee Members; and the Songwriters Guild of America.

14 *Eldred* v *Reno* (1999) 74 F. Supp. 2d 1.

15 *Eldred* v *Reno* (2001) 239 Fd. 3d 372; 2001 US App Lexis 2335.

16 *Eldred* v *Ashcroft* (2003) 123 S. Ct. 769.

17 Linda Greenhouse. "Supreme Court To Intervene In Internet Copyright Dispute", *The New York Times*, 19 February 2002.

Ginsburg opined that Congress had the authority under the Copyright Clause to extend the term of copyright protection.[18] She maintained that the monopolies granted by copyright law were compatible with the freedom of speech and said a successful constitutional challenge could render all past copyright extensions similarly vulnerable. Justice Breyer and Stevens strongly dissented against the ruling.

In the leading majority judgment, Justice Ginsburg engaged in a defence of judicial quietism: "Rather than subjecting Congress' legislative choices in the copyright area to heightened judicial scrutiny, we have stressed that 'it is not our role to alter the delicate balance Congress has labored to achieve'."[19] Elaborating upon academic arguments about the role of the judiciary, Justice Ginsburg concludes:

> As we read the Framers' instruction, the Copyright Clause empowers Congress to determine the intellectual property regimes that, overall, in that body's judgment, will serve the ends of the Clause. Beneath the facade of their inventive constitutional interpretation, petitioners forcefully urge that Congress pursued very bad policy in prescribing the CTEA's long terms. The wisdom of Congress' action, however, is not within our province to second guess. Satisfied that the legislation before us remains inside the domain the Constitution assigns to the First Branch, we affirm the judgment of the Court of Appeals.[20]

Justice Ginsburg opined that Congress had the authority under the Copyright Clause to extend the term of copyright protection: 'Text, history and precedent, we conclude, confirm that the Copyright Clause empowers Congress to prescribe 'limited times' for copyright protection and to secure the same level and duration of protection for all copyright holders, present, and future'. She maintained that the monopolies granted by copyright law were compatible with the freedom of speech and said a successful constitutional challenge could render all past copyright extensions similarly vulnerable.

In his dissent, Justice Breyer addressed the concern of his colleagues that "our holding in this case not inhibit the broad decisionmaking leeway that the Copyright Clause grants Congress".[21] His Honour maintained that the Supreme Court of the

---

[18] Justice Ginsburg delivered the opinion of the majority of the court. She was joined by Rehnquist CJ, and O'Connor, Scalia, Kennedy, Souter and Thomas JJ.

[19] *Eldred* v *Ashcroft* (2003) 123 S. Ct. 769 at 781.

[20] *Eldred* v *Ashcroft* (2003) 123 S. Ct. 769 at 790.

[21] *Eldred* v *Ashcroft* (2003) 123 S. Ct. 769 at 812.

United States was perfectly entitled to rule that the statute in question was unconstitutional:

> We cannot avoid the need to examine the statute carefully by saying that "Congress has not altered the traditional contours of copyright protection," for the sentence points to the question, rather than the answer. Nor should we avoid that examination here. That degree of judicial vigilance - at the far outer boundaries of the Clause - is warranted if we are to avoid the monopolies and consequent restrictions of expression that the Clause, read consistently with the First Amendment, seeks to preclude. And that vigilance is all the more necessary in a new Century that will see intellectual property rights and the forms of expression that underlie them play an ever more important role in the Nation's economy and the lives of its citizens.[22]

Justice Stevens also dissented that there is a need for greater judicial scrutiny of Congress in this field: "Fairly read, the Court has stated that Congress' actions under the Copyright/Patent Clause are, for all intents and purposes, judicially unreviewable. That result cannot be squared with the basic tenets of our constitutional structure".[23] He recalled the trenchant words of Chief Justice John Marshall: "It is emphatically the province and duty of the judicial department to say what the law is."[24] It should not be taken for granted that copyright law is compatible with freedom of speech.

In his dissenting judgment, Justice Breyer discusses the serious cultural costs of the copyright term extension. His Honour comments:

> This statute will cause serious expression-related harm. It will likely restrict traditional dissemination of copyrighted works. It will likely inhibit new forms of dissemination through the use of new technology. It threatens to interfere with efforts to preserve our Nation's historical and cultural heritage and efforts to use that heritage, say, to educate our Nation's children. It is easy to understand how the statute might benefit the private financial interests of corporations or heirs who own existing copyrights. But I cannot find any constitutionally legitimate, copyright-related way in which the statute will benefit the public. Indeed, in respect to existing works, the serious public harm and the virtually nonexistent public benefit could not be more clear.[25]

The judge emphasizes that the statute imposes two kinds of public expression-related

---

22 *Eldred* v *Ashcroft* (2003) 123 S. Ct. 769 at 812.
23 *Eldred* v *Ashcroft* (2003) 123 S. Ct. 769 at 801.
24 *Eldred* v *Ashcroft* (2003) 123 S. Ct. 769 at 801.
25 *Eldred* v *Ashcroft* (2003) 123 S. Ct. 769 at 813.

costs, which relate to the capacity of the copyright owner to deny permission to use a copyright work, or else charge an impost of royalties upon a copyright user.

The legislation will have a severe impact upon cultural institutions - such as libraries, galleries, orchestras. It will interfere with the activities of electronic publishers of public domain works - such as Eric Eldred's Eldritch Press, the Internet Archive, and Project Gutenberg. In his dissenting judgment, Justice Breyer observes:

> Similarly, the costs of obtaining permission, now perhaps ranging in the millions of dollars, will multiply as the number of holders of affected copyrights increases from several hundred thousand to several million. The costs to the users of nonprofit databases, now numbering in the low millions, will multiply as the use of those computer-assisted databases becomes more prevalent. And the qualitative costs to education, learning, and research will multiply as our children become ever more dependent for the content of their knowledge upon computer-accessible databases - thereby condemning that which is not so accessible, say, the cultural content of early 20th-century history, to a kind of intellectual purgatory from which it will not easily emerge.[26]

Thus, the American Association of Law Libraries points out that the clearance process associated with creating an electronic archive, Documenting the American South, "consumed approximately a dozen man-hours" per work.[27] The College Art Association says that the costs of obtaining permission for use of single images, short excerpts, and other short works can become prohibitively high.[28] The National Writers Union provides similar examples.[29] Petitioners point to music fees that may prevent youth or community orchestras, or church choirs, from performing early 20th-century music.[30] Copyright extension caused abandonment of plans to sell sheet music of Maurice Ravel's Alborada Del Gracioso.[31] Furthermore electronic libraries such as the Internet Archive, Prelinger Archives and Project Gutenberg will find it difficult to provide digital access to historical texts, audio-visual works, and literary works,

---

[26] *Eldred* v *Ashcroft* (2003) 123 S. Ct. 769 at 806.

[27] Arnold Lutzer. "Brief for American Association of Law Libraries et al as Amici Curiae Supporting Petitioners", 20 May 2002, p. 20.

[28] Jeffrey Cunard. "Brief for College Art Association et al. as Amici Curiae Supporting Petitioners ", 20 May 2002, p. 7-13.

[29] Peter Jaszi. "Brief for the National Writers Union et al as Amici Curiae Supporting Petitioners ", 20 May 2002, p. 25-27.

[30] Lawrence Lessig and others. "Brief For Petitioners in *Eldred* v *Ashcroft*", 20 May 2002, p 3-5.

[31] Caroline Arms. "Getting the Picture: Observations from the Library of Congress on Providing Online Access to Pictorial Images", *Library Trends*, 1999, Vol. 48, p. 379, 405.

which are subject to the control of copyright owners.

Justice Breyer nevertheless insists that the "economic effect" of the *Copyright Term Extension Act* 1998 (US) is to make the copyright term "virtually perpetual."[32] He observes that the legislation creates a copyright term worth 99.8% of the value of a perpetual copyright:

> The economic effect of this 20-year extension - the longest blanket extension since the Nation's founding - is to make the copyright term not limited, but virtually perpetual. Its primary legal effect is to grant the extended term not to authors, but to their heirs, estates, or corporate successors. And most importantly, its practical effect is not to promote, but to inhibit, the progress of "Science' - by which word the Framers meant learning or knowledge.[33]

His Honour Justice Stevens also dissented on similar grounds: "It is important to note, however, that a categorical rule prohibiting retroactive extensions would effectively preclude perpetual copyrights. More importantly, as the House of Lords recognized when it refused to amend the Statute of Anne in 1735, unless the Clause is construed to embody such a categorical rule, Congress may extend existing monopoly privileges *ad infinitum* under the majority's analysis".[34] It is a strange regression that the law should lapse back into providing virtually perpetual protection of copyright works - when the Statute of Anne was supposed to guard against such a fate.

Golan* v *Ashcroft

There remains much lively debate over the impact of the *Sonny Bono Copyright Term Extension Act* 1998 (US) upon public welfare. As Parker Bagley and Renee Sekino comment:

> Despite the Supreme Court's decision, the issue of copyright term extension is still a lively topic of debate, and not just within legal circles. Because of the Internet and its direct involvement in the outcome of Eldred, the decision has touched the public consciousness more intimately than most intellectual property cases. Although the Eldred opinion was clear in its constitutional analysis of the Copyright Term Extension Act, it was noticeably silent on how the statute affects the public welfare. Thus, the Supreme Court has left the question of whether

---

32 *Eldred* v *Ashcroft* (2003) 123 S. Ct. 769 at 801.
33 *Eldred* v *Ashcroft* (2003) 123 S. Ct. 769 at 801.
34 *Eldred* v *Ashcroft* (2003) 123 S. Ct. 769 at 801.

> the Copyright Term Extension Act serves the interests of the public to be determined in the aftermath of Eldred. [35]

Indeed, there remain a number of legal challenges still on foot against the legality of the *Sonny Bono Copyright Term Extension Act* 1998 (US).

The case of *Golan* v *Ashcroft* has just been recently heard in the United States District Court of Colorado.[36] In this case, the conductor Lawrence Golan and other artists launched a constitutional challenge against the validity of the *Sonny Bono Copyright Term Extension Act* 1998 (US) and the *Uruguay Round Agreements Act* 1994 (US). Lawrence Golan is the Director of Orchestral Studies, Conductor, and Professor of Conducting at the University of Denver's Lamont School of Music. He has been forced by copyright law to avoid even considering for public performance whole classes of orchestral works from great American and foreign composers, including George Gershwin, Aaron Copland, Prokofiev, Dimitri Shostakovich, Igor Stravinsky, Jean Sibelius, and Maurice Ravel. The plaintiffs maintained that the *Sonny Bono Copyright Term Extension Act* 1998 (US) was unconstitutional because it violated the requirement that copyright be for "limited times" under the Copyright Clause. They also argued that section 514 of the *Uruguay Round Agreements Act* 1994 (US) was unconstitutional because the restoration of copyright works does not promote progress as required by the Copyright Clause, abridges speech in violation of the First Amendment and violates Due Process by depriving the public of the free availability of public domain works.

The plaintiffs are represented by Elizabeth Rader and Lawrence Lessig from Stanford Law School, Jonathan Zittrain and Charles Nesson of Harvard Law School, Edward Lee of Ohio State University, along with the Denver law firm of Wheeler Trigg & Kennedy. The lawyers comment upon the sweeping effect of the *Uruguay Round Agreements Act* 1994 (US) upon the public domain: "Section 514 has resulted in the removal of thousands, if not millions of works, from the public domain". They provide ample illustrations of the songs, motion pictures, paintings, books, literary works and photographs affected by the restoration:

---

[35] Parker Bagley and Renee Sekino. "Supreme Court Sides With Copyright Holders In Eldred v Ashcroft", *Entertainment Industry Litigation Reporter*, 25 November 2003, Vol. 15 (10).

[36] *Golan* v *Ashcroft* (2004) No. 01-B-1854

> The works claimed from the public domain for copyright restoration include, for example, several hundred paintings of Picasso; the collection of works by J.R.R. Tolkien including *The Hobbit, The Fellowship of the Ring, The Two Towers,* and *The Return of the King;* Virginia Woolf's *A Room of One's Own;* several books by H.G. Wells; numerous educational and literary books including *Dante, George Orwell, Jane Austen Practising, Joseph Conrad, Robinson* Crusoe, and *The Wasteland;* hundreds of songs and sheet music, including such favorites by the Russian composer Serge Prokofiev *as Six Pieces from Cinderella, Romeo and Juliet,* and *Three Children's Songs for Piano;* a collection of photographs of the Beatles; and still photographs from the Japanese film *Godzilla.* These are just a few of the thousands of works claimed for copyright restoration.

Moreover, the lawyers stress that the *Sonny Bono Copyright Term Extension Act* 1998 (US) has similarly harmful effects in preventing the natural progression of works into the public domain for a twenty year period. They observe: "This radical depletion of the public domain severely harms not just Plaintiffs, but the very foundation of our democratic society. The wide availability of works envisaged by the Copyright Clause depends on the ability of authors, musicians, performers, and other artists to use freely works in the public domain for both the creation of new works and the further dissemination of the public domain works".

In March 2004, Justice Lewis Babcock of the United States District Court of Colorado considered the motion from the United States Attorney General John Ashcroft to dismiss the action. His Honour considered the arguments of the plaintiffs that the framers of the Constitution would have viewed extension of the copyright term to the life of the author plus seventy years as "effectively or virtually perpetual" in light of economic realities. Justice Babock agreed with the Attorney-General that the claim relating to the *Sonny Bono Copyright Term Extension Act* 1998 (US) was foreclosed by the decision in *Eldred* v *Ashcroft*. Nonetheless, his Honour held that the constitutional challenge to section 514 of the *Uruguay Round Agreements Act* 1994 (US) could proceed. His Honour held: "Plaintiffs claim that section 514 of the *Uruguay Round Agreements Act* violates the Copyright and Patent Clause because Congress cannot pass a copyright law that removes works from the public domain, is not legally foreclosed". [37]

---

[37] *Golan* v *Ashcroft* (2004) No. 01-B-1854

The prospects of the legal action taken by Lawrence Golan against section 514 of the *Uruguay Round Agreements Act* 1994 (US) are good. The conductor has a strong argument that the retroactive nature of the legislation is contrary to the findings of previous United States Supreme Court precedents. However, the United States Government could make a decent case that section 514 of the *Uruguay Round Agreements Act* 1994 (US) was justified by the need for compliance with its obligations under the Berne Convention and the TRIPS Agreement.

Kahle* v *Ashcroft

The case of *Kahle* v *Ashcroft* in the United States District Court of California is one of a number of constitutional challenges still underway against the *Sonny Bono Copyright Term Extension Act* 1998 (US).[38]

The plaintiffs in this case include the Internet Archive and its chairman Brewster Kahle and the Prelinger Film Archive, and its President, Richard Prelinger.

The Internet Archive hopes to build an "Internet library," with the purpose of offering permanent and free access for researchers, historians, and scholars to works that exist in digital format.[39] The Archive is currently working with the governments of India and China on the "One Million Book Project", which is an effort to create a digital archive of one million books in fully-readable online text format. The Archive also operates the "Internet Bookmobile", a mobile Internet bookstore that downloads, prints and binds public domain books for $1 each.[40]

Prelinger Archives aims to collect, preserve, and facilitate access to films of historical significance that have not been collected elsewhere, or made commercially available elsewhere. It provides stock footage to media and entertainment industries through its authorised sales representative. The collection contains a large number of ephemeral films.

The plaintiffs were particularly concerned that the extension of the copyright term had resulted in the appearance of "orphaned" copyright works. The complaint observes:

---

38 *Kahle* v *Ascroft* (2004) C 04-1127 BZ

39 http://www.archive.org/

40 http://www.archive.org/texts/bookmobile.php

> Some of these changes in the law have importantly strengthened the rights of creators to control and profit from the distribution of their works. That is the proper aim of copyright, with which Plaintiffs have no quarrel. But because of the radically indiscriminate nature of the most recent of these changes, the law has also produced an extraordinary "orphan class" of creative work - work that the author has no continuing interest to control, but which, because of the burdens of the law, no one else can effectively and efficiently archive, preserve, or build upon in the digital environment for a term now reaching half a century.

The plaintiffs argue that the unnecessary increase in copyright regulation "blocks the cultivation of our culture and the spread of knowledge".

The plaintiffs were concerned about the removal of formalities from United States copyright law - such as the requirements of registration, notice, and renewal. Chris Sprigman from the Stanford Center for Internet and Society explains: "From the first US Copyright Statute in 1790 until the Copyright Act of 1976, the US had a conditional copyright system that limited copyright protection to those who took affirmative steps to claim it - by, for example, registering their copyright, marking copies of their work with copyright notice, and renewing their copyright after a relatively short initial period of protection." He observes: "Our current unconditional system grants copyright protection whether or not the work is registered, marked, or renewed. Formalities, where they have been retained at all, are voluntary and do not effect the existence or continuation of copyright. Protection is indiscriminate, and automatic".

The plaintiffs have four main arguments. First, the plaintiffs argue that the *Sonny Bono Copyright Term Extension Act* 1998 (US) and the *Copyright Renewal Act* 1992 (US) are unconstitutional by virtue of the First Amendment. The plaintiffs assert that the removal of formalities - such as registration and renewal - have a number of unintended consequences:

> By eliminating the renewal requirement, Congress eliminated the mechanism by which unnecessary copyrights can be removed. By eliminating the registration, deposit, and notice requirements, Congress has brought within the domain of copyright entire classes of work for which protection was never desired, and then compounded the damage to speech by removing the traditional means by which the owners of copyrighted material can be identified.
>
> All of these changes burden speech. Eliminating the renewal requirement burdens the speech of Plaintiffs by limiting their ability to exploit material no longer exploited by the copyright holder. Eliminating the registration and notice requirements burdens the speech of

> Plaintiffs by extending copyright's domain to a large amount of work for which no protection is desired, while significantly increasing the cost of identifying the owners of creative work.

Kahle draws upon the statement of the majority of the Supreme Court in *Eldred* v *Ashcroft* that "when Congress has not altered the traditional contours of copyright protection, further First Amendment scrutiny is unnecessary".[41] He maintains that, by implication, where Congress has altered the traditional contours of copyright, First Amendment scrutiny is necessary. The plaintiffs maintain that such changes should be declared unconstitutional because "they instead impose substantial burdens on speech without advancing the only legitimate interest the government might have - namely, to benefit the small minority of work that continues to have commercial value".

Second, Kahle maintains that the *Sonny Bono Copyright Term Extension Act* 1998 (US) and the *Copyright Renewal Act* 1992 (US) have violated the "limited times" prescription of the Constitution by establishing copyright terms that are so long as to be effectively perpetual. He observes: "The Court in *Eldred* did not, however, indicate the standard to determine whether a term is so long as to be effectively perpetual". Kahle submits: "At least with respect to work first published on or after January 1, 1964 and before January 1, 1978, and that has not been renewed, this term has become effectively perpetual. It if therefore not 'limited' under the ordinary and obvious meaning that the Framers intended". However, it is doubtful whether this argument will proceed given the Supreme Court ruling in *Eldred* v *Ashcroft*.[42]

Third, the plaintiffs claim that the *Sonny Bono Copyright Term Extension Act* 1998 (US), the *Copyright Renewal Act* 1992 (US), and the *Berne Convention Implementation Act* are unconstitutional for failing "to promote Progress". Kahle comments:

> In sum, in moving from a conditional to an unconditional copyright system, Congress has failed to promote progress, and thus has acted beyond the scope of its power under the Progress Clause. In particular, extending the term of works that are not filtered by the formalities of a conditional copyright regime - in light of the extraordinary opportunity cost

---

41 *Eldred* v *Ashcroft* (2003) 53 US 186

42 *Eldred* v *Ashcroft* (2003) 53 US 186

> that has arisen as the Internet has removed non-copyright barriers to creation, preservation, and dissemination of creative works - is beyond the power of Congress.

Finally, the plaintiffs contend that the *Sonny Bono Copyright Term Extension Act* 1998 (US) and the *Copyright Renewal Act* 1992 (US) are unconstitutional to the extent that they extend the term of copyrights that have not and will not be renewed. This ground of complaint echoes the legal action in *Golan* v *Ashcroft*.[43]

This legal action is perhaps unlikely to succeed - especially as few countries require formalities for copyright protection because of international treaties. Nonetheless, the argument that the copyright term extension creates a new class of "orphaned" copyright works is an important one, which needs to be addressed.

The Public Domain Enhancement Bill

In response to such concerns about "orphaned" works, Democrat Representative Zoe Lofgren introduced the *Public Domain Enhancement Bill* 2004 (US) into Congress in June 2003. She observed:

> The public domain has always been a vital source for creativity and innovation. But with the advent of the Internet, it is now more important than ever. No longer are out-of-print books or forgotten songs automatically sentenced to the ash-heaps of our cultural history. The emergence of digital technology and the World Wide Web has created a way to reawaken these hidden treasures, and has empowered more and more of us to become creators in our own right.[44]

The co-sponsor of the Bill, Republican John Doolittle added: "Opening access to historical works for restoration and rehabilitation is essential toward ensuring that classics will be appreciated and cherished for future generations to come."[45]

The Bill seeks to amend the *Copyright Act* 1976 (US) to allow abandoned copyrighted works enter the public domain after fifty years. It requires the Register of Copyrights to charge a fee of $1 for maintaining in force the copyright in any published U.S. work. It requires the fee to be due 50 years after the date of first

---

43 *Golan* v *Ashcroft* (2004) No. 01-B-1854

44 Statement Of Congresswoman Zoe Lofgren (Ca-16th) Upon Introduction Of The Public Domain Enhancement Act, 25 June 2003, http://zoelofgren.house.gov/iss_pubdomain_statement.shtml

45 Representatives Lofgren and Doolittle Announce the *Public Domain Enhancement Act* to Address the Need for Copyright Reform, 25 June 2003.

publication or on December 31, 2004, whichever occurs later, and every ten years thereafter until the end of the copyright term. It terminates the copyright unless payment of the applicable maintenance fee is received in the Copyright Office on or before its due date or within a grace period of six months thereafter. It deems any ancillary or promotional work used in connection with the maintained work, such as an advertisement for a motion picture, also to be maintained in force.

The legislation has been supported by such organisations as the American Library Association, the Association of Research Libraries, the American Association of Law Libraries, Public Knowledge, the Internet Archive, the San Francisco Center for the Book, and the Electronic Frontier Foundation.

However, Jack Valenti and the Motion Picture Association of America have opposed the *Public Domain Enhancement Bill* 2004 (US). Rich Taylor, a spokesman for the copyright owner group, maintained that consumers are not necessarily better off when copyrighted works lapse into the public domain:

> Especially in the case of movies, those works are more available for public consumption when their owners have an economic incentive to preserve and market them. Once those works fall into the public domain, those incentives are removed and consumers end up being the losers.[46]

The legislation has been referred to the Subcommittee on Courts, the Internet, and Intellectual Property for further consideration.

In light of the extension of the copyright term in Australia, there is a need for a serious contemplation of the model of the *Public Domain Enhancement Bill* 2004 (US). There needs to be a mechanism to deal with the creation of a large number of "orphaned" works under the United States-Australia Free Trade Agreement.

- **The *Sonny Bono Copyright Term Extension Act* 1998 (US) is a poor legislative model for Australia to adopt as part of the United States-Australia Free Trade Agreement.**

- **The main advocate for the copyright term extension was the Motion Picture Association of America - the United States copyright owner**

---

[46] Brian Krebs. "Bill Seeks To Loosen Copyright's Grip", *The Washington Post*, 25 June 2003.

group, which represents firms such as Walt Disney, Sony Pictures Entertainment, MGM, Paramount Pictures, Twentieth Century Fox, Universal Studios and Warner Brothers.

- **The Supreme Court of the United States decision in *Eldred* v *Ashcroft* (2003) raises significant issues about the impact of copyright term extension upon competition policy, cultural heritage, and international trade.**

- **The Federal Court litigation in *Golan* v *Ashcroft* (2004) raises further concerns about the impact of copyright term extension upon public welfare.**

- **The District Court case of *Kahle* v *Ashcroft* (2004) highlights that the copyright term extension will create a large class of "orphaned" works.**

- **The *Public Domain Enhancement Bill* 2004 (US) - or a mechanism like it - will be necessary to deal with the large number of "orphaned" works created by the copyright term extension in Australia.**

PART THREE
A GIFT TO IP PRODUCERS:
THE COPYRIGHT TERM AND COMPETITION POLICY

The Australian Federal Government has reneged on past promises that it would not extend the copyright term.

In 2000, the Intellectual Property and Competition Review considered whether it was appropriate to extend the term of copyright extension to the same duration as the United States and the European Union.[47] A number of copyright owners argued in favour of extension of term, pursuing the general theme that Australia's competitiveness is linked to maintaining parity with our trading partners in an increasingly globalised market. For instance, the Australian Copyright Council stated in principle support for the extension of the term of protection from 50 to 70 years, and argued that 'the main argument in favour of extending the term of protection in Australia is harmonisation of standards with Australia's major trading partners. Australian rights owners would then benefit from the extended term of protection in the EU and the US'. The Copyright Agency Limited, the Phonographic Performance Company of Australia, and the Australian Publishers' Association put forward complementary submissions.

However, other submissions were also put that such an extension would be 'anti-competitive and monopolistic' and that the additional period would impose unnecessary transactional costs for business and ultimately consumers—it would create significant barriers to access and innovation The Australian Digital Alliance submitted that there is no good case for any extension of the term of copyright protection, and that Australia should not follow the European or United States' lead in doing 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. Consequently, the Committee was not convinced of the merit in proposals to extend the term of copyright protection, and recommends

---

47 Intellectual Property and Competition Review Committee. "The Copyright Term", *Review Of Intellectual Property Legislation Under The Competition Principles Agreement*. Canberra: Australian Government, 2000, p. 80-84, http://www.ipcr.gov.au/ipcr/

that the current term should not be extended. It also recommended that no extension of the copyright term should be introduced in future without a prior thorough and independent review of the resulting costs and benefits.

In 2003, a group of seventeen economists led by Roy Englert Junior and including five Nobel Laureates made an amicus curiae submission in the *Eldred* v *Ashcroft* case.[48] In a keynote address, Lessig observed:

> In our case, in *Eldred v. Ashcroft*, we have this brief filed by 17 economists, including Milton Freedman, James Buchanan, Ronald Kost, Ken Arrow, you know, lunatics, right? Left-wing liberals, right? Freedman said he'd only join if the word "no-brainer" existed in the brief somewhere, like this was a complete no-brainer for him. This is not about left and right. This is about right and wrong. That's what this battle is. [49]

The amicus curiae submission made a number of circumspect points about the economic effect of the legislation. First, the longer term for new works provides only a marginal increase in anticipated compensation for an author. Second, the term extension for existing works makes no significant contribution to an author's economic incentive to create, since in this case the additional compensation was granted after the relevant investment had already been made. Third, the legislation extends the period during which a copyright holder determines the quantity produced of a work, and thus increases the inefficiency from above-cost pricing that is by lengthening its duration. Finally, the legislation extends the period during which a copyright holder determines the production of derivative works, which affects the creation of new works that are built in part out of materials from existing works.

The Allens Consulting Report

In 2003, copyright owners pushed for an extension of the copyright term in the course of the free trade negotiations. The report by Allens Consulting considers the costs and benefits for a copyright term extension.[50] The submission was commissioned by the

---

[48] Roy Englert. "Brief of George Akerlof et al as *amici curiae* in Support of Petitioners", 20 May 2002.

[49] Lawrence Lessig, "Free Culture", Keynote Address at Oscon 2002, August 2002, http://www.oreillynet.com/pub/a/policy/2002/08/15/lessig.html

[50] Allens Consulting. *Copyright Term Extension: Australian Benefits and Costs*. A Report Commissioned by the Motion Pictures Association of America, Copyright Agency Limited, APRA and Screenrights. July 2003, http://www.allenconsult.com.au/resources/MPA_Draft_final.pdf

Motion Picture Association of America - the United States copyright owner group, which represents such firms as Walt Disney, Sony Pictures Entertainment, MGM, Paramount Pictures, Twentieth Century Fox, Universal Studios and Warner Brothers. It was also supported by local copyright collecting societies - such as the Copyright Agency Limited, the Australasian Peforming Rights Association and Screenrights.

However, this report is deeply flawed in terms of its methodology and legal analysis. It also fails to produce any empirical economic evidence that support an extension of the copyright term. The Allens Consulting Report has been widely discredited. There are strong arguments that there is not the economic evidence to support a copyright term extension. Professor Lawrence Lessig of Stanford University was highly critical of this paper: "The report is embarrassingly poorly done."[51] He was particularly damning of the economic value of the work:

> More frustrating is the pudginess of this argument that purports to be economics. There's lots saying that both sides exaggerate their claims, but nothing to provide any actual evidence to evaluate whether any claim is exaggerated. And then, after acknowledging there is no useful actual evidence at all, the report concludes that on balance, the effect of the extension would be neutral, and so Australia should do it.[52]

Lessig found it surprising that the Allens Report failed to address the evidence of Nobel Laureates about the copyright term extension Noble-prize winning economist Milton Friedman testified before the Supreme Court of the United States that "it is highly unlikely that the economic benefits from copyright extension under the Copyright Term Extension Act outweigh the additional costs".[53] He feared that the legislation would have a detrimental impact upon the welfare of consumers.

Similarly, the Australian Digital Alliance has also provided a critique of the deficiencies of the Allens Consulting Report. Miranda Lee observes:

> Given the difficulty of accurately assessing such economic effects, it may be forgiven that the report presented little meaningful data. However, it remains baffling the manner in which its acknowledgement of the lack of evidence is reconciled into a conclusion that extension of

---

51 http://www.lessig.org/blog/archives/001522.shtml
52 http://www.lessig.org/blog/archives/001522.shtml
53 http://www.lessig.org/blog/archives/001522.shtml

term would be advantageous for the Australian economy.[54]

Moreover, Lee notes that "the report fails to distinguish and take account of the distinction between retrospective and prospective costs and benefits of copyright term extension".[55] She observes: "One result of the omission is that the paper conveniently avoids discussion about the effect (or lack thereof) of term extension in existing works - ie that extending the term will provide no further incentive for dead authors to produce more works nor benefit them".[56] Finally she concludes: "The report is also alarmingly dismissive of what would seem to be an extremely important factor in the consideration of economic costs and benefits of copyright term extension in Australia; Australia remains by far a net importer of copyright materials. The report brushes over the point as if it were pesky detail rather than a primary concern for Australia's present and future trading strategy and does not provide any basis for its assertions that copyright extension would be positive for the future of Australia's copyright industries".[57]

Government Commitment

In November 2003, a spokeswoman for the Minister for Communications, IT and the Arts, Daryl Williams said that the Government "appreciates the value of having material available in the public domain".[58] She told the Sydney Morning Herald: "The Government will consider any proposals for increased copyright protection in light of the fact that Australia is a net importer of content. Australian copyright laws currently promote innovation and investment in the content and cultural industries, while at the same time providing Australian consumers, educators and researchers with reasonable access to copyright material." [59]

---

[54] Miranda Lee. "The Copyright Term Extension: The Pressure Rises", October 2003, http://www.digital.org.au/issue/ipwoct03.htm

[55] Miranda Lee. "The Copyright Term Extension: The Pressure Rises", October 2003, http://www.digital.org.au/issue/ipwoct03.htm

[56] Miranda Lee. "The Copyright Term Extension: The Pressure Rises", October 2003, http://www.digital.org.au/issue/ipwoct03.htm

[57] Miranda Lee. "The Copyright Term Extension: The Pressure Rises", October 2003, http://www.digital.org.au/issue/ipwoct03.htm

[58] Nathan Cochrane. "Free Trade At A Price", *The Sydney Morning Herald*, 11 November 2003.

[59] Nathan Cochrane. "Free Trade At A Price", *The Sydney Morning Herald*, 11 November 2003.

In December 2003, Trade Minister Mark Vaile pledged to defend the copyright term in Australia: "It is a very important issue, particularly in terms of cost to libraries, educational institutions and the like here in Australia," he told The Australian Financial Review. "There is a whole constituency out there with a strong view against copyright term extension and we are arguing that case."[60]

Two months later, it seems that the Australian Federal Government acceded to the demands of the United States of America. A key point of the new chapter on intellectual property in the Free Trade Agreement promises "an increased term of protection for copyright material".[61] This was an abrupt affront to the Intellectual Property and Competition Review recommendations.

A spokesman for the Trade Minister Mark Vaile said the extension would come into force on January 1, 2005, and copyright fees would not apply to past use. He said Australian intellectual property holders would be pleased by the change. "Our position was that we did not think we needed to go the extra 20 years . . . but in the context of the overall agreement we were happy to," the spokesman said.[62] Such was the closed and secretive nature of the negotiations.

The Federal Government has argued that the decision would boost Australia's competitiveness by giving it access to the United States economy. The chief negotiator Stephen Deady told the Senate Estimates Committee:

> There are certainly some benefits for the Australian economy, and that is why this does come down very much to an issue of looking at the arrangements, the balance, and the future prospects for the Australian economy in these areas. It does potentially provide a boost to investment in these areas. That is a factor that has to be taken into account. One of the numbers I have seen is that between 1996 and 2000 Australia's exports in this area—IP type areas, copyright industries—grew faster than the national economy, with an average growth rate of about 5.7 per cent. Exports grew by around nine per cent. So there are certainly some advantages in this area of copyright extension.[63]

---

60 Mark Davis. "Mickey Mouse Holds Key To The Future", *Australian Financial Review*, 8 December 2003, p 8.

61 Article 17.4.4 of United States-Australia Free Trade Agreement

62 Fergus Shiel. "Libraries Caught In Copyright Changes", *The Age*, 11 February 2004, http://www.theage.com.au/articles/2004/02/10/1076388365432.html

63 Senate Estimates Committee. "Foreign Affairs, Defence And Trade", Australian Parliament, Tuesday 2 March 2004.

The chief negotiator ignores the obvious point that Australia is a net importer of copyright works, and will continue to be so with the United States. Any marginal gains by Australian exporters must be weighed against the costs associated with those imports. Moreover, the chief negotiator has no economic evidence to support his highly contentious assertion that the copyright term extension will provide benefits for the Australian economy overall.

Indeed, the chief negotiator Stephen Deady confessed to the Senate Estimates Committee that the Government had not engaged in any economic research of its own into the impact of the copyright term extension:

> Senator Conroy—Was any analysis undertaken on the impact of this particular change? I appreciate this was a bit rushed at the end and it was pretty cold over in Washington, but did you get a chance to look at the consequences of this?
>
> Mr Deady—We have not done any particular work on this question of copyright extension. I mentioned, and the minister mentioned it again, that these are the sorts of issues you look at in this area: what are the additional costs, if any; how do they spread across the community; and what are the potential gains for Australia moving into this area. Again, this is a question that was certainly thought about and looked at by us as we went through these negotiations. It is an on-balance question. The costs are difficult to really measure, particularly as they accrue over a very long period of time. Certainly, across the wider community, the impact on a particular book or record is probably very low. There are other clear pluses, such as what it does for encouraging investment and encouraging the creative sector to look at". [64]

What is more Stephen Deady had not personally acquainted himself with any of the available research in the area. He told the Senate that he had not perused the Ergas Intellectual Property and Competition Review: "I was not aware of that recommendation, but that is not to say that members of the team were not".[65] It appears that the Australian Government had no idea of the value of what they were trading away in terms of the copyright term extension in the free trade agreement.

Moreover, Deady appeared to be unfamiliar with the amicus brief supplied by a number of economists in the Eldred case. He seemed not to care that a number of

---

[64] Senate Estimates Committee. "Foreign Affairs, Defence And Trade", Australian Parliament, Tuesday 2 March 2004.

[65] Senate Estimates Committee. "Foreign Affairs, Defence And Trade", Australian Parliament, Tuesday 2 March 2004.

Nobel Laureates in economics were of the firm view that a copyright term extension in the United States would be a bad thing - let alone in Australia:

> Senator Conroy—I understand that work by an eminent group of US economists, including Milton Friedman, on the US Copyright Term Extension Act of 1998 showed that the profit for the creator in the extended term was, at the most, a few cents and often a percentage of a cent. Are you familiar with that study?
>
> Mr Deady—No.
>
> Senator Conroy—I assume those few extra cents go to the creator's estate and the copyright owner.
>
> Mr Deady—I said I am not familiar with that study. ...
>
> Senator Conroy—That study argued that the creators are barely getting a cent, literally. The copyright owners are doing pretty good. So, and I hesitate to use the words, the dynamic benefit from those creative juices flowing is pretty minimal. The copyright owners are doing okay but the creators, who are the ones by definition who must enjoy this dynamic benefit, are not.[66]

The study is an important one - because it shows that authors and creators do not receive significant benefits from the copyright term extension.

The respected economist, Henry Ergas, was disappointed that the Federal Government did not engage in any economic research into the copyright term extension. He laments:

> The most important factor here is that the FTA obliges Australia to increase the term of copyright protection by 20 years, in line with the US regime. For most products, this means copyright protection will now be available for 70 years after the author's death. This change is a gift to IP producers since it comes without the broader usage rights that US consumers enjoy because of the more generous manner in which non-infringing uses of IP products (e.g. copying for research purposes) is interpreted. Furthermore, it is inconsistent with the recommendation of the Australian Intellectual Property and Competition Review Committee that any extension of the copyright term should only occur after a public inquiry. [67]

---

[66] Senate Estimates Committee. "Foreign Affairs, Defence And Trade", Australian Parliament, Tuesday 2 March 2004.

[67] Henry Ergas. "Patent Protection An FTA Complication", Australian Financial Review, 24 February 2004, p. 63.

The assessment of the copyright term extension was not conducted according to the processes set out in the *Competition Principles Agreement*, as it should have been The Independent Committee of Inquiry into Competition Policy in Australia (the Hilmer Report) recommended that Australian Governments should not place "regulatory restrictions on competition unless clearly demonstrated to be in the public interest". Furthermore, "proposals for new regulation that have the potential to restrict competition should include evidence that the competitive effects of the regulation have been considered; that the benefits of the proposed restriction outweigh the likely costs; and that the restriction is no more restrictive than necessary in the public interest". Moreover, "existing regulation that imposes a significant restriction on competition" should "clearly be demonstrated" to be in the "public interest". The Department of Foreign Affairs and Trade did not follow these processes with respect to the United States-Australia Free Trade Agreement in its decision to extend the copyright term. It agreed to engage in the evergreening of copyright protection without any economic evidence to support such an initiative.

In the wake of the agreement with the United States, the Australian Government has commissioned the Centre for International Economics to undertake economic analysis, including econometric modelling, of the impact of the Free Trade Agreement, taking into account the outcomes of the final negotiated package. The results of that analysis will be provided to the Parliament as an addendum to the National Interest Analysis and the Regulatory Impact Statement by the commencement of the Winter Session of Parliament in 2004. In addition to estimating the possible impact of the Free Trade Agreement on key economic indicators, using both static and dynamic multi-country computable general equilibrium models, the analysis will examine impacts on specific sectors (including the automotive sector, financial services, beef and dairy, and metals), as well as the potential environmental impacts and impacts on the States and Territories. It will seek to assess the impact on certain outcomes in the negotiations, including changes to intellectual property legislation, such as the impact of extending copyright term protection, and the method of assessing the Rules of Origin for determining which goods will qualify from the more liberal access set out in the Agreement.

The Centre for International Economics has not any particular expertise in intellectual property. So it will be interesting to see what conclusions they form in

this area. One can only hope that such research will not just be a post-facto rationalisation of the political decisions of the Australian Government.

- **The Australian Government did not follow the processes set out in the Competition Principles Agreement in assessing the impact of the copyright term extension.**

- **The Australian Government failed to take account the recommendations of the Ergas Intellectual Property and Competition Review.**

- **The Australian Government failed to account of the amicus brief by economists, including five Nobel Laureates - such as Milton Friedman.**

- **The Allens Consulting Report provides no empirical evidence that would support the extension of the copyright term in Australia.**

PART FOUR
"EMERGING STANDARDS":
COPYRIGHT LAW AND INTERNATIONAL HARMONISATION

The Australian Attorney General Philip Ruddock defended the copyright term extension at a conference in Brisbane on Friday the 13th February:

> It is important that I say something about Australia's agreement to increase the term of protection for copyright works by an additional 20 years. Australia generally does not advocate higher standards of intellectual property protection than those determined internationally. However, it is sometimes in Australia's interest not to lag behind emerging standards of important trading countries. It is clear that an international standard is emerging amongst out major trading partners for a longer copyright term. In these circumstances, term extension is a necessary and positive thing. It will ensure that Australia remains a competitive destination for cultural investment. It will also ensure that Australians are better able to trade their interests in an increasingly global market. [68]

Such arguments can be contested on a number of grounds. It must be remembered that the Australian Government was not compelled to extend the copyright term because of any obligations under multilateral agreements - such as the Berne Convention or the TRIPS Agreement. Indeed, the country is only required to provide protection for life of the author plus fifty years under those multilateral agreements. Moreover, the United States-Australia Free Trade Agreement does not in fact provide harmonisation of copyright duration. There is a lack of uniformity as to the length of duration of copyright works between the two countries. There are also important differences with other major trading partners. Furthermore, the United States-Australia Free Trade Agreement engages in selective harmonisation of copyright law. Australia has not adopted United States law which is favourable to users - such as the higher standard of originality, and the open-ended defence of fair use. As a result, Australia provides stronger protection of copyright works than even the United States.

---

[68] Attorney General Philip Ruddock. "Opening Address: Unlucky For Some", ACIPA Conference, 13 February 2004, http://www.ag.gov.au/www/MinisterRuddockHome.nsf/Alldocs/RWP21E60A98ACC4ECE2CA256E3B0080AA84?OpenDocument

Multilateral and Regional Agreements

The Berne Convention for the Protection of Literary and Artistic Works (1886) is the main multilateral treaty dealing with copyright law. Article 7 lays down the minimum requirements for the term of protection. Article 7 (1) provides that "the term of protection granted by this Convention shall be the life of the author and fifty years after his death". Article 7 (2) deals with cinematographic films. Article 7 (3) provides that "in the case of anonymous or pseudonymous works, the term of protection granted by this Convention shall expire fifty years after the work has been lawfully made available to the public". Article 7 (4) concerns photographic works and applied art. Article 7 (5) deals with the starting date of computation for term. Article 7 (6) establishes that "the countries of the Union may grant a term of protection in excess of those provided by the preceding paragraphs".

The Agreement on Trade Related Aspects of Intellectual Property Rights (1994) (the TRIPS Agreement) follows the lead of the Berne Convention. Article 12 provides that "whenever the term of protection of a work, other than a photographic work or a work of applied art, is calculated on a basis other than the life of a natural person, such term shall be no less than 50 years from the end of the calendar year of authorized publication, or failing such authorized publication within 50 years from the making of the work, 50 years from the end of the calendar year of the making".

The Berne Convention and the TRIPS Agreement do not oblige Australia to provide anymore protection than life of the author plus fifty years. Nonetheless, the Attorney-General Philip Ruddock argued that Australia should adopt greater protection because of an "emerging international trend". He maintained that Australia was nonetheless respecting the multilateral system for intellectual property rights. However, Australia has not followed emerging international trends in other important fields. So for instance we have not adopted sui generis database laws, comprehensive performers' rights or traditional knowledge laws. Indeed Australia has preferred to wait for the development of multilateral agreements on such matters - before passing domestic legislation of its own.

In 1995 the European Union extended the copyright term for its member states to the life of the author plus 70 years. The change was a consequence of a Directive of the European Commission in 1993, which required member states to increase their basic term of protection. Ostensibly, the purpose of the Directive was to harmonise the laws of European Union members, as national laws ranged from between life plus

50 years to life plus 70 years. However, as one commentator observes: "Rather than shifting down to the Berne standard, the Directive has gravitated to the term adopted under German law. It seems that this was done with limited substantive debate of the costs and benefits involved in adopting a longer term of protection."[69] There is some academic comment that such a harmonisation of the copyright term was only accomplished in the European Union after intensive lobbying from copyright owners.[70]

In United States congressional hearings into the extension of the copyright term, committee members were of the consensus that the goal of copyright law is to improve the competitive position of companies that have significant investments in inventories of copyright works.[71] Jack Valenti of the Motion Picture Association of America in 1995 observed:

> Copyright term extension has a simple but compelling enticement: it is very much in America's economic interests. At a time when our marketplace is besieged by an avalanche of imports, at a time when the phrase 'surplus balance of trade' is seldom heard in the corridors of Congress, at a time when our ability to compete in international markets is under assault, whatever can be done ought to be done to amplify America's export dexterity in the global arena.[72]

The resulting legislation extended the term of copyright protection for copyright works from the life of the author plus 50 years to the life of the author plus 70 years, in line with the European Union. It also extended the term of copyright protection for works made for hire, and existing works, to at least 95 years.

However, the North American Free Trade Agreement (NAFTA) only obliges members to provide protection for life of the author plus fifty years. Article 17.5.4 provides that "each Party shall provide that, where the term of protection of a work,

---

69 Justine Antill, and Peter Coles. "Copyright Duration: The European Community Adopts 'Three Score Years and Ten'", *European Intellectual Property Review*, 1996, Vol. 18 (7), p. 379.

70 Patrick Parrinder. "Literary Copyright and the Public Domain" in Patrick Parrinder and Warren Chernaik (editors), *Textual Monopolies Literary Copyright and the Public Domain*. London: Office for Humanities Communication, 1997, p. 1.

71 Peter Jaszi. "Goodbye To All That: A Reluctant (And Perhaps Premature) Adieu To A Constitutionally-Grounded Discourse Of Public Interest In Copyright Law", *Vanderbilt Journal Of Transnational Law*, 1996, Vol. 29, p. 595.

72 Jack Valenti. "Testimony before the Subcommittee on Courts and Intellectual Property Committee on the Judiciary U.S. House of Representatives Hearing on Copyright Term Extension Act -- H.R. 989", 1 June 1995, URL: http://www.house.gov/judiciary/447.htm

other than a photographic work or a work of applied art, is to be calculated on a basis other than the life of a natural person, the term shall be not less than 50 years from the end of the calendar year of the first authorized publication of the work, or, failing such authorized publication within 50 years from the making of the work, 50 years from the end of the calendar year of making". Thus the United States' nearest neighbour, Canada, provides protection for the life of the author plus 50 years - or from publication plus 50 years.

Lack Of Uniformity With Major Trading Partners

In spite of the rhetoric about the need for international harmonisation, the Australian Government will not be exactly harmonised with major trading partners such as the United States and the European Union (see Appendix One). There will be a number of important discrepancies between the copyright duration in Australia and the term provided for in other countries. The Australian Government decided on a prospective copyright term extension, so that the term of works will be extended after 1955. By contrast, the United States of America retrospectively extended the copyright term in 1998, so that works will be in copyright protection from 1928. That means, at present, the United States has provided protection for works between 1928 and 1954 - but Australia will not provide equivalent protection in the same period.

Furthermore, the Australian Government has not provided additional protection for works made for hire - works made in employment. With respect to those works the American statute produces an extended term of 95 years while comparable Australian rights last for life plus 70 years. Neither does the statute create uniformity with respect to anonymous or pseudonymous works. Moreover, the Australian Government provides comprehensive protection of moral rights. One would expect that the term of copyright protection for such moral rights will also be extended for life plus 70 years. By contrast, the United States Government does not provide comprehensive protection of moral rights. Indeed, the *Visual Artists Rights Act* 1990 (US) provides protection just for life of artist. Moreover, the Australian Government offers some protection for performers' rights. The United States, though, has resisted providing comprehensive protection of performers' rights. It is doubtful what, if any, benefit this partial future uniformity might achieve.

Moreover, there remain a significant number of our trading partners who provide copyright protection for the life of the author plus fifty years, or from

publication plus fifty years. Such nations include members of the Asia Pacific such as China, Indonesia, Malaysia, New Zealand, the Phillipines, the Republic of Korea, and Taiwan. Australia will not be harmonised with some of its nearest neighbours - and members of the Cairns Group. Furthermore, Australia will not be harmonised with Middle Eastern nations such as Egypt, Qatar and the United Arab Emirates. It will not be harmonised with important trading partners such as Canada and South Africa.

Thus the United States-Australia Free Trade Agreement will not necessarily bring about harmonisation between Australia and trading partners - such as the United States, the European Union, Asian-Pacific countries, Middle Eastern nations, and important countries such as Canada and South Africa. Indeed, the copyright term extension in Australia will only exacerbate the wide variations in the treatment of copyright duration.

Failure To Harmonise User Privileges

Moreover, it also important to emphasise that the Free Trade Agreement is very selective in the harmonisation of copyright laws between Australia and the United States. It is a very selective process. In this agreement, Australia has adopted the harsher measures of the *Digital Millennium Copyright Act* 1998 (US) and the *Sonny Bono Copyright Extension Act* 1998 (US). However, Australia has not adopted features of the United States law which support copyright users - such as the higher standard of originality or the open-ended fair use defence of United States law.

In Australia, the Full Federal Court in *Desktop Marketing Systems v Telstra Corporation* pitched the threshold of originality very low, requiring mere skill and labour.[73] By contrast, the Supreme Court of the United States in *Feist Publications Inc* v *Rural Telephone Service* has raised the threshold of originality much higher, requiring a creative spark.[74] As a result, there will be a wider range of copyright material protected in Australia than the United States. In particular, there will be a much greater amount of factual information protected under copyright law.

Furthermore, the Australian defence of fair dealing is limited to particular purposes - such as research or study (ss. 40 and 103C), criticism or review (ss. 41 and 103A), reporting news (ss. 42 and 103B) and professional advice (s. 43(2)) - but is not

---

73 *Desktop Marketing Systems Pty Ltd* v *Telstra Corporation Limited* (2002) 55 IPR 1

74 *Feist Publications Inc* v *Rural Telephone Service* (1991) 499 US 340

confined to those purposes. There has been much confusion about the scope of fair dealing, as revealed in the recent *Panel Cases*.[75] The Copyright Law Review Committee has recommended that Australia adopt an open-ended defence of fair use, like the United States.[76] The United States defence of fair use protects transformative uses of a work - such parody.[77] The defence of fair use also specifically includes time-shifting,[78] space-shifting[79] and device-shifting. However, the Federal Government has not adopted this recommendation in domestic law. Moreover, it did not seek to raise the matter in the United States-Australia Free Trade Agreement. Consequently, Australian users of information will have less access to copyright material than their counterparts in the United States. Overall, Australia will provide higher standards of copyright protection than the United States.

There is a need for Australia to adopt a higher standard of originality and a defence of fair use if it is going to adopt features of the *Digital Millennium Copyright Act* 1998 (US) and the *Sonny Bono Copyright Term Extension Act* 1998 (US). The editorial in the Australian Financial Review observes:

> The US wants Australia to bring the Digital Agenda Act closer to its US equivalent, the Digital Millennium Copyright Act. The problem is that US copyright laws also include constitutionally based safeguards that ameliorate the more draconian effects of the DMCA. Most notable are the "fair use" rights, which free up consumption of copyrighted material so that, for example, home copying of CDs and DVDs is legal. Australia lacks such balancing rights; our "fair dealing" rights are much more limited. If we align the Digital Agenda Act with the DMCA without aligning fair dealing with fair use, we will have the bad without the good. Yet fair dealing, according to participants in the review, is off the agenda.[80]

Such reforms to the fair dealing exception are in line with international treaties — including the so-called 3-step test that provides: 'limitations and exceptions to exclusive rights [be confined] to certain special cases which do not conflict with a

---

75 *TCN Channel Nine Pty Ltd v Network Ten Pty Ltd* [2002] FCAFC 146 (22 May 2002) and *Network Ten Pty Ltd v TCN Channel Nine Pty Ltd* [2004] HCA 14.

76 Copyright Law Review Committee, *Simplification of the Copyright Act 1968* (2002) paragraph 6.35.

77 *Campbell v. Acuff -Rose Music*, 510 US 569 (1994); and *Suntrust Bank* v *Houghton Mifflin Company* ["Gone with the Wind" case] (2001) 268 F. 3d 1257.

78 *Sony Corp of America v Universal Studios, Inc* 464 US 417 (1984).

79 *Recording Industry Association of America v. Diamond Multimedia* 180 F.3d 1072 (9th Cir., June 15, 1999).

80 "Challenge of the Digital Age", *Australian Financial Review*, 26 September 2003.

normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the rights holder'.[81]

- **The United States-Australia Free Trade Agreement will not provide uniform standards with respect to copyright duration in Australia and the United States.**

- **There will be discrepancies in respect of works made by authors who died between 1928-1954; works made for hire; anonymous and pseudonymous works; moral rights; and performers' rights.**

- **The copyright term of Australia will not be harmonised with major trading partners in Asia, the Middle East, Canada and New Zealand.**

- **The United States-Australia Free Trade Agreement does not provide international harmonisation with respect to user privileges.**

- **Most notably, Australia has not adopted the higher standard of originality, and the open-ended defence of fair use that is present in the United States. As a result, Australia will provide higher levels of copyright protection than the United States.**

---

[81] *Agreement on Trade-Related Aspects of Intellectual Property Rights* [1995] ATS 38, Article 13. See also, *The Berne Convention for the Protection of Literary and Artistic Works* and the *WIPO Copyright Treaty*.

PART FIVE
ROBBERY UNDER ARMS:
THE COPYRIGHT TERM AND CULTURAL HERITAGE

In the Senate Estimates Committee, the chief Australian negotiator in the free trade agreement., Stephen Deady, discussed the impact of the copyright term extension on libraries and educational institutions. He conceded to Stephen Conroy, the Shadow Minister for Trade, that there would indeed be additional costs in these sectors:

> Mr Deady—To the extent that this extends the copyright terms, there would be some additional costs to the users of the copyright material. Again, that is true.
> Senator Conroy—So universities and libraries will end up paying more?
> Mr Deady—To the extent that this material is being drawn on and used by those libraries and to the extent that it does have a shelf life that runs out to 70 years, there would be some impact. So there are costs, but they are difficult to quantify. But, as I said, there is an issue of balance here and what this means for creative industries in Australia. It is an on-balance issue and, in the context of the overall agreement, the government decided that it was prepared to sign on to an extension of that 50 years out to 70 years.
> Senator Conroy—Senator Hill, are we looking at a sugar- style compensation package for libraries and universities to offset the increased costs you have imposed on them?
> Senator Hill—No, we do not have that in mind…
> Senator Cook—A tax on knowledge.
> Senator Conroy—In all seriousness, I think the only implication you can draw is that there is an increased cost to universities. Anyway, that is one for you to ponder on.[82]

The extension of the copyright term will impose a number of costs upon libraries, universities, cultural institutions and the wider public. Such groups will have higher transaction costs because they will need to negotiate permission to use copyright works for an extra twenty years. In some cases, the copyright work will be orphaned because the owner of a copyright work is impossible to trace. Such cultural actors may have to pay higher royalties in respect of copyright works - again because of the longer duration of protection. They may also be denied permission altogether to use copyright works - especially if the estate is hostile to the project. It is worth exploring the cultural impact of the United States-Australia Free Trade Agreement.

---

[82] Senate Estimates Committee. "Foreign Affairs, Defence And Trade", Australian Parliament, Tuesday 2 March 2004.

Libraries and Universities

The copyright officer of the Australian Libraries and Information Association, Colette Ormonde, commented upon the impact of the copyright term extension upon libraries:

> The outcome is bad for libraries. It is bad for students. It is bad for researchers. It is bad for all information users. We have agreed to a very restrictive US copyright regime with no clear dispute mechanism . . . it will cause huge problems. People who have been using information that is in the public domain will suddenly have to pay for it.[83]

Ms Ormonde said Trade Minister Mark Vaile had signed Australia up to a US copyright regime that went well beyond international norms. "We are a small country that consumes enormous amounts of information. The US, on the other hand, is an exporter of copyright material," she said. "Two months ago, Mark Vaile said he was arguing the case of a whole constituency out there with a strong view against copyright term extension. Now he has totally capitulated." [84]

In the past, the National Library of Australia has expressed its opposition to the extension of the copyright term. It has consistently maintained that such a move would be detrimental to the public benefit and artistic creativity:

> Moves to increase the term of copyright protection granted to owners of copyright, as is the position of the European Union where the standard term of protection is the life of the author plus 70 years, would not be supported by the National Library. We submit that this would have adverse consequences for the public interest. The purpose of copyright is dual: to advance learning as well as to recompense creators. The public domain is an integral part of the creative process and allows the public access to the fruits of an artist's labours after the expiry of the copyright term. This is particularly true for creators of works such as reference books, CD-ROMs, multimedia material, and documentary and educational films, all of which draw heavily on public domain material. Because the copyright regime exists to serve everyone, not just specialist interest groups, the National Library would regard any extension of the copyright term, and the consequent reduced access to a large portion of our common

---

[83] Fergus Shiel. "Libraries Caught In Copyright Changes", *The Age*, 11 February 2004, http://www.theage.com.au/articles/2004/02/10/1076388365432.html

[84] Fergus Shiel. "Libraries Caught In Copyright Changes", *The Age*, 11 February 2004, http://www.theage.com.au/articles/2004/02/10/1076388365432.html

> heritage, as detrimental to creativity and against the public benefit. For these reasons, we support a reduction in the duration of existing copyright terms.[85]

The National Library of Australia recommended that the term of copyright protection for published works needed be reduced. It also advised that for unpublished works the term of copyright protection be the same as that for published works.

The executive director of the Australian Vice-Chancellors' Committee, John Mullarvey, said that Australian universities now paid $20 million a year in copyright fees and adding 20 years to the period of copyright protection would add to that sum. "How much I couldn't even guess," he said.[86] Copyright lawyer Catherine Ekambi, a senior associate with Coudert Brothers, also believes that the copyright changes will have "real cost implications" for universities. "Universities will need to do an audit of their existing copyright material, particularly in relation to material from US companies," Ms Ekambi said. [87] The extension of copyright will affect material such as articles, journals and research publications which Australian universities purchase from US sources. And, given that Australian copyright will also be extended, any material bought from Australian sources will also be affected.

Col Choate of Project Gutenberg Australia has commented on the impact of the copyright term extension on electronic publishing initiatives.[88] He discussed the nature of Project Gutenberg:

> Project Gutenberg was started by a fellow named Michael Hart in the United States, I think it was about 30 years ago now and he had some computer space and for whatever reason decided to start keying in some documents. I believe he started with the American Declaration of Independence and went on with a few others with the idea that by making these into digital documents they'd be able to be freely transferred over the then embryonic internet and after that others followed and they put on The Bible and The Complete Works of Shakespeare and that was really how it started... Not long ago Project Gutenberg in the U.S. posted their 10,000th electronic text freely available for no price on the net - just download it. Now all of

---

85 National Library of Australia. "Submission to the Copyright Law Review Committee on Reference to Review and Simplify the Copyright Act 1968", http://www.nla.gov.au/policy/clrc.html#twelve

86 Tim Dodd, "Trade Deal Bites Unis On Copyright Costs", *The Australian Financial Review*, 14 February 2004, p. 16.

87 Tim Dodd, Trade Deal Bites Unis On Copyright Costs, *The Australian Financial Review*, 14 February 2004, p. 16.

88 Terry Lane. "Taking George Orwell Offline", The National Interest, Radio National, 15 February 2004, http://www.abc.net.au/rn/talks/natint/stories/s1045288.htm

> these books are out of copyright because that's the idea of it, there's no fee to be charged and volunteers generally just choose the books that they might like to see made available.[89]

Choate feared that the prospective extension of the copyright term would mean that no new public domain material would be available for the next twenty years. As a result, the electronic publisher would be unable to expand its range of electronic texts. Choate commented that the decision will particularly affect those in rural and remote communities - "the obvious people might be people in remote areas who don't have a library, like a comprehensive library, so that might be one reason they'd download it".[90] He also said that the copyright term extension would impact upon access to educational materials by schoolchildren, students, and researchers.

Literary Works

A number of classical works of children's literature will be affected by the prospective extension of the copyright term. A.A. Milne (1882 - 1956) is the author of the famous series of books - including *When We Were Very Young*, *Winnie-the-Pooh*, *Now We Are Six*, and *The House at Pooh Corner*. Disney has been engaged in legal dispute Stephen Slesinger Inc., over the rights to Winnie-the-Pooh, using the *Sonny Bono Copyright Term Extension Act* 1998 (US) that allows heirs of copyrighted works to reclaim the rights within two years of giving notice to existing owners. Stephen Slesinger Inc, which bought the rights from the estate of Pooh creator A.A.Milne in 1929 and then licenced them to Disney in 1961, claims that Disney did not pay all the royalties on the characters. Disney says the heirs to Milne and Shepard (Pooh's illustrator) estates came to it wanting to make a deal to get the character rights back and reassign in full to Disney. The United States court dismissed the claims of Slesinger Inc. that Disney owes Slesinger money.[91] The works of Winnie the Pooh continue to make Disney an estimated $3 - $6 billion a year. The books of AA Milne were about to enter into the public domain in Australia in 2006 - but now it will not be until 2026 that the classic stories will be available.

---

[89] Terry Lane. "Taking George Orwell Offline", The National Interest, Radio National, 15 February 2004, http://www.abc.net.au/rn/talks/natint/stories/s1045288.htm

[90] Terry Lane. "Taking George Orwell Offline", The National Interest, Radio National, 15 February 2004, http://www.abc.net.au/rn/talks/natint/stories/s1045288.htm

[91] AFP. "Disney Wins The Winnie The Pooh Royalty Case", The Times of India, 31 March 2004, http://timesofindia.indiatimes.com/articleshow/591583.cms; and *Milne* v *Slesinger Inc.* (8 May 2003) No. CV02-08508FMC(PLAX).

Lucy Maud Montgomery (1874-1942) was the author of the popular and lucrative *Anne of Green Gables* novels. Her heirs wish to retain control over her unpublished writings. For posthumous unpublished works in Canada, the Copyright Act limited protection to the author's estate for 50 years after the death of the writer, plus a six-year "window" for the estate to either publish or communicate its intention to publish the material. Before 1997 perpetual copyright was granted to an estate for posthumous unpublished writings. Marian Hebb, a lawyer for the Montgomery estate, argued that "with respect to the Lucy Maud Montgomery diaries, there is material that would cause offence to living people, and that's why it hasn't been published." The Liberal Government pushed for amendments to the Copyright Act in Bill C-36, which would add anywhere from 14 years to 34 years of copyright to previously unpublished works of authors who died between Jan. 1, 1930 and Jan. 1, 1949. Canadian Alliance MP Chuck Strahl successfully stopped the "Lucy Maud Montgomery provision" from being passed through the Canadian Parliament. The House of Commons rejected the bill to extend copyright protection for unpublished works in April 2004.[92] Such issues surrounding copyright law and unpublished work remain pertinent in Australia, because there is potentially perpetual protection for unpublished writings.

A number of canonical literary and scientific works will be affected by the extension of the copyright term. A few illustrations will give a sense of this impact. The great German modernist novelist, Thomas Manne (1875-1955), wrote such classic works as *Buddenbrooks*, *Death In Venice*, and *The Magic Mountain*, and received the Nobel Prize in 1929. Such novels were due to fall into the public domain next year - but now they will be subject to copyright protection for another twenty years. Albert Einstein (1879-1955) was the famous physicist and mathematician who won the Nobel Prize in 1921. The estate of Einstein places strict conditions on access to the use of his scientific and non-scientific writings:

> If you wish to reproduce material for publication in electronic or any other form, including but not limited to the uses listed below, you must obtain the written permission of the Albert Einstein Archives or Princeton University Press in advance.
>
> - Publication in any hard copy form (i.e. book, periodical).
> - Use in television, film or video.
> - Publication in any electronic form.

---

92 Simon Tuck. "Lucy Maud Provision Fades Out", *Globe And Mail*, 1 April 2004, R1.

- Duplication in any networked or public site, or in any "virtual library" (but you may incorporate the URL for certain material, though not the material itself, in your personal hypertext).
- Public display in any form of electronic or hard copy (except for a single copy for use in an academic lecture of seminar).
- Duplication by photocopying or any other means for use in any teaching pack. [93]

Such material would have fallen into the public domain in Australia next year in 2005. However, it seems that permissions will have to be negotiated and fees and royalties will have to paid in respect of his scientific and non-scientific writings for another two decades.

Performing Arts

Leader and artistic director of the Australian Chamber Orchestra, Richard Tognetti, has told of an altercation with the son of Hungarian composer Bela Bartok, Peter, who prevented the orchestra from performing an arrangement of his Fourth String Quartet:

> I'm very, very frustrated that I'll be old by the time I can play it in the States and Europe. I'm upset because I do believe that we have done his father's music justice and the composer had begun an arrangement himself, planning to call it Symphony for Strings. This estate is getting in the way of performances of the music. Bartok's music isn't as widely known as it ought to be and, furthermore, this serves to expand the very limited string orchestra repertoire.[94]

Richard Tognetti comments: "It's an interesting concept that estates are not about ensuring quality performances, but rather about maintaining the artist's original form".[95] He concludes "I am a strong believer in allowing works in all art forms to evolve unencumbered by such prosaic institutions as estates. The legacies of Shakespeare, Mozart or Renoir have not suffered from a lack of estates."[96] Unfortunately, artists such as Richard Tognetti will face greater burdens from copyright estates because of the prospective extension of the copyright term in Australia.

---

93 http://www.alberteinstein.info/terms_of_use/

94 Sue Williams. "Family Pain", *Australian Financial Review*, 6 November 2003, p. 28.

95 Sue Williams. "Family Pain", *Australian Financial Review*, 6 November 2003, p. 28.

96 Sue Williams. "Family Pain", *Australian Financial Review*, 6 November 2003, p. 28.

Control by executors of an estate prevents many writers and composers from staging plays in Australia, according to the Sydney Theatre Company's artistic development manager Nick Marchand.[97] He says even in writing the programs and magazines, permission has to be sought for extracts or quotes, a process made even harder because theatre does not have a collecting society: "Most of the time you are having to deal with the trustees or the trustee's agent, directly. This can mean lengthy delays, and that a number of opinions can come into play that might not be quite so vociferous, should the opinion have come from the living playwright! And the US tends to be much more protective than the rest of the world. Any images, quotes, extracts or music tend to be far more expensive to obtain."[98]

The copyright term extension will mean that theatre productions in Australia will have to seek permission and pay royalties to copyright estates in respect of some classical work. Bertolt Brecht (1898-1956) is one of the most significant figures in European Theatre. He wrote forty plays in his lifetime - including *The Threepenny Opera*, *The Life of Galileo*, *Mother Courage and her Children*, *The Good Woman of Setzuan*, and *The Caucasian Chalk Circle*. Acclaimed Company B wanted to perform Bertolt Brecht's classic *The Threepenny Opera* at Sydney's Belvoir Street Theatre.[99] The company was nearly prevented after the Brecht estate, which owns the rights to the work, attempted to stop the play after an addition of music. Rachel Healy, the general manager of Company B, observed of her dealings with the estate: "They manage the process very tightly and clearly to give permission for the play to be performed, and they always have the final authority. They're known around the world for being ferocious".[100] Such works would have fallen into the public domain in 2006 under the old copyright regime in Australia. They will not be available now for free use until 2026. There could be further complications concerning copyright subsisting in the translations of his dramatic works. It is ironic that such a committed socialist should be the unlikely beneficiary of this capitalist bonanza.

The estate of Samuel Beckett, the Irish playwright and Nobel Laureate, have been aggressive in taking legal action against productions, which depart from the

---

97 Sue Williams. "Family Pain", *Australian Financial Review*, 6 November 2003, p. 28.
98 Sue Williams. "Family Pain", *Australian Financial Review*, 6 November 2003, p. 28.
99 Sue Williams. "Family Pain", *Australian Financial Review*, 6 November 2003, p. 28.
100 Sue Williams. "Family Pain", *Australian Financial Review*, 6 November 2003, p. 28.

author's strict instructions.[101] Famously, in 1988, Beckett brought legal action against a Dutch theatre company, which wanted to stage a production of *Waiting for Godot*, with women acting all the roles. His lawyer argued that the integrity of the text was violated because actresses were substituted for the male actors asked for in the text. The judge in the Haarlem court ruled that the integrity of the play had not been violated, because the performance showed fidelity to the dialogue and the stage directions of the play. By contrast, in 1992, a French court held a stage director was liable for an infringement of Beckett's moral right of integrity because the director had staged *Waiting for Godot* with the two lead roles played by women. In 1998, a United States production of *Waiting for Godot* with a racially mixed cast attracted legal threats amid accusations it had 'injected race into the play'. In 2003, the playwright's nephew and executor, Edward Beckett, threatened to bring a legal action against the Sydney company, Company B, for breach of contract on the grounds that unauthorised music appeared in the production. The Company B production denied that the contract made any such express provisions. The director Neil Armfield complained: "In coming here with its narrow prescriptions, its dead controlling hand, the Beckett estate seems to me to be the enemy of art". So how long will the Beckett estate be able to control the productions of Samuel Beckett? In Australia, the term of copyright protection for dramatic works will now be for the life of the author plus seventy years. Given that Samuel Beckett died in 1989, the copyright in his works will expire in 2059 in Australia. That means the estate will be able to control innovative productions of the work of Samuel Beckett.

Eugene Goossens (1893-1962) was the famous Sydney Symphony Orchestra conductor and composer. He made a new will 11 days before he died, leaving "the whole residue of my assets, copyright and royalties to my faithful companion and assistant, Miss Pamela Main".[102] Pamela Main has threatened legal action against playwright Louis Nowra's play *The Devil Is A Woman* in 2004.[103] Her lawyers accuse him of breaching the copyright she holds over Goossens' letters and literary works. Nowra refused to let Main and her laywers vet the story. Pamela Main also objected

---

[101] Matthew Rimmer. "Damned To Fame: The Moral Rights of the Beckett Estate", *Incite*, May 2003, Vol. 24 (5), http://www.alia.org.au/incite/2003/05/beckett.html

[102] Valerie Lawson. "Goossens, Witches, Opera, Lawyers Love It", *Sydney Morning Herald*, 17 January 2004.

[103] Sharon Verghis. "Conductor and the witch tale casts another legal spell", *Sydney Morning Herald*, 28 October 2003.

to Sydney composer Drew Crawford's opera, *Eugene and Roie* which depicted the relationship between Goossens and Rosaleen Norton, the so-called "Witch of Kings Cross".[104] She claimed copyright over certain letters she thought may have been quoted in the libretto. Drew Crawford remained defiant: "Before Christmas I was getting one or two letters a week. It really has slowed me down. I should have been finished weeks ago. But damn them, we're going on."[105] The work of Eugene Goossens would have entered the public domain in 2012 - but now will not available until 2032. The bizarre disputes over the works of Eugene Goossens highlight the potential for estates to refuse permission to use copyright works in respect of new creative productions.

Film and Television

Screensound Australia, the National Screen and Sound Archive, is the national audiovisual archive. It plays a key role in documenting and interpreting the Australian experience and actively contributing to the development of Australia's audiovisual industry. Screensound Australia collect, store, preserve and make available screen and sound material relevant to Australia's culture. A number of significant films - protected under copyright law as a series of photographs - were due to come into the public domain - including *King of the Coral Sea* and *Walk into Paradise* (directed by Lee Robinson), *Jedda* (Charles Chauvel), *The Back of Beyond* (John Heyer), *Smiley* and *Smiley Gets a Gun* (Anthony Kimmins), *Robbery Under Arms* (Jack Lee), *The Shiralee* and *Summer of the Seventeenth Doll* (Leslie Norman), *Three in One* (Cecil Holmes), and Cinesound and Movietone newsreels. In addition, a number of significant sound recordings were due to fall into the public domain - including the compositions of Percy Grainger, Alfred Hill, Eugene Goossens, and Varney Monk. The organisation will be particularly affected by the extension of the copyright term.

Screensound will no doubt experience similar problems to its counterparts in the United States. In particular, it will have to grapple with a greater number of "orphaned" films - films that cannot be restored and distributed by the copyright

---

[104] Valerie Lawson. "Goossens, Witches, Opera, Lawyers Love It", *Sydney Morning Herald*, 17 January 2004.

[105] Harriet Cunningham. "Another Tilt At The Dark Genius", *Sydney Morning Herald*, 16 January 2004.

owners because the owners cannot be identified. The American Film Heritage Association argued that film makers and new authors who produce historical film documentaries will lose a great deal of valuable public domain footage through copyright extension:

> Films from the 1920's could contain as much as 75% of motion picture works no longer owned by anyone, with no traceable lineage, called Orphan works. The studios own a very small portion of films produced in this period. Orphan films comprise the bulk of this film era. Those Orphan films now owned by defunct companies and under copyright are ready for preservation by commercial archives. Commercial archives preserve orphan works at no cost to the public, in exchange for the right to market the works through public domain. Those non-studio Orphan films presently preserved by commercial archives will be abandoned because public domain allowed the economic incentive to preserve them.[106]

Similarly, Michael Agee and Hal Roach Studios, restorers of fragile and classic film and television productions, such as the entire Laurel and Hardy "talking" body of work, made a submission to the court.[107] They complained the Copyright Term Extension Act frustrates the process of film preservation and restoration, impedes commercial and non-commercial attempts to give access to the nation's film heritage.

The producer Jane Scott experienced difficulties with the copyright term extension in the United Kingdom when she was making the film *Shine*.[108] Scott believed that the musical work of Sergei Rachmaninov would have fallen outside the period of copyright duration, which in Australia was for the life of the author plus 50 years. She noted that the film was made in 1996, more than 50 years after the death of the composer Sergei Rachmaninov in 1943. However, Scott found that the United Kingdom had just extended the duration of copyright protection from the life of the author plus 50 years to 70 years in line with the European Union Term Directive. As a result, she was forced to negotiate with the copyright owners to gain a licence. This example illustrated that the extension of the copyright term created great commercial uncertainty in the context of the European Union. The prospective extension of

---

[106] Larry Urbanski, Chairman of the American Film Heritage Association. "Letter To Senator Strom Thurmand Opposing Copyright Extension", 31 March 1997, URL: http://www.law.asu.edu/HomePages/Karjala/OpposingCopyrightExtension/letters/AFH.html

[107] Jefferson Powell. "Brief of Hal Roach Studios and Michael Agee as Amici Curiae Supporting Petitioners", 20 May 2002.

[108] Matthew Rimmer. "Shine: Copyright Law And Film", *Australian Intellectual Property Journal*, August 2001, Vol. 12, No. 3, p 129-142.

copyright term in Australia will raise commercial problems - especially in terms of transaction costs and locating copyright material.

The academy award winning *Lord of the Rings* series might not have been made had the estate had their way. Christopher Reuel Tolkien refused to have anything to do with the Lord of the Rings series of films, since he wasn't given complete control after his father, J.R.R., sold the film rights for a pittance more than 30 years ago.[109] The Tolkein Estate refused to let the director Peter Jackson establish a museum of artefacts taken from the film. Negotiations are continuing over the film rights to *The Hobbitt* - the prequel to the *Lord of the Rings*.

The Australian Broadcasting Corporation are concerned about the effect of the copyright term extension on a special Digital Conversion Project. The Archives and Library Services section is working with Technology and Distribution to implement the Digital Conversion Project which will convert 120 000 hours of analog television and audio archived programming to digital online and hardcopy formats, using special purpose funding. They had hoped: "70 Years of Radio History and 47 Years of Television History to be Digitised by the Australian Broadcasting Corporation".[110] There is an urgent need to archive television and radio broadcasts of the twentieth century. As Lawrence Lessig comments: "While much of twentieth-century culture was constructed through television, only a tiny proportion of that culture is available for anyone to see today".[111] He queries: "Why is it that the part of our culture that is recorded in newspapers remains perpetually accessible, while the part that is recorded on videotape is not? How is it that we've created a world where researchers trying to understand the effect of media on nineteenth-century America will have an easier time than researchers trying to understand the effect of media on twentieth-century America?".[112] The extension of the copyright term will jeopardize such important initiatives, such as the Digital Conversion Project

---

[109] Chris Suellentrop. "Dead Man Writing: How To Keep Writing Your Late Father's Books", Slate, 20 February 2003.

[110] http://www.abc.net.au/ra/feedback/stories/s952783.htm

[111] Lawrence Lessig. *Free Culture: How Big Media Uses Technology And Law To Lockdown Culture And Control Creativity*. New York: Penguin Books, 2004, p 110, http://free-culture.org/

[112] Lawrence Lessig. *Free Culture: How Big Media Uses Technology And Law To Lockdown*

Computer Software and Interactive Media

The extension of the copyright term is not justified by the commercial life of most cultural works. Indeed, in some industries, there is planned obsolescence of copyright works. Thus, IT companies encourage consumers to buy new updates of computer software. Failure to heed such concerns could result in incompatible, out-of-date software. Electronic Frontiers Australia comments in its submission to the Joint Standing Committee on Treaties:

> Further consideration of modern uses of copyright also militates against the proposed lengthening of copyright terms. The vast bulk of copyrighted works earn income, if any, for their creators in the years immediately following publication. This is especially so in the case of software. For example, Microsoft's Windows 95 would be protected by copyright until the year 2065 under the FTA proposals. Given the nature of software development, intellectual property such as Windows 95 already has very limited usefulness to society. What contribution would Windows 95 make to the public domain in 2065? There is simply no need for such extensive protection.[113]

The practices of the IT industry highlight that, if anything, there is a need for the copyright term to be shortened, rather than lengthened.

A director of the Australian Interactive Media Industry Association, Peter Higgs, commented upon the impact of the copyright term extension upon the reuse of material for digital works and interactive media:

> Within the FTA's intellectual property clauses, the 20-year extension is thoroughly grounded in the US media channels—not the creators but the distribution channels—wanting to continue to mine those. That means, effectively, that the US benefits from that but we do not, necessarily. We do not have a Disney, as such. What is of concern is that it substantially increases the friction for the reuse of existing content that might have been around for quite some time. Every time you change the period of these laws or make it harder, it dramatically increases the cost and reduces the likelihood of material being reused, which will be so highly important for digital content in the future.[114]

Culture And Control Creativity. New York: Penguin Books, 2004, p 111.

[113] Electronic Frontiers Australia. "Submission to the Joint Standing Committee on Treaties: Australia-United States Free Trade Agreement", 13 April 2004.

[114] Peter Higgs. "Australia-United States Free Trade Agreement", Joint Standing Committee on Treaties, Sydney Hearing, 19 April 2004, p 5, http://www.aph.gov.au/house/committee/jsct/usafta/transcripts/syd19april04p.pdf

He concludes: "The Digital Millennium Copyright Act is also highly toxic. That is about the only word I could use for it. How you can make sense and grow your markets and customer loyalty by suing all of your potential customers, including 12-year old boys, I do not know. And I actually speak as a content owner".[115]

Traditional Knowledge

The United States-Australia Free Trade Agreement does nothing to provide protection for traditional knowledge. Research fellow, Megan Davis, from the University of New South Wales, commented upon the impact of the United-States Australia Free Trade Agreement upon Indigenous Australia:

> Indigenous culture contributes billions to the Australian economy yet because of intellectual property laws much of this money does not go to Indigenous communities. Given the amount of work done internationally on TRIPS it is surprising there has been so little attention paid to the potentially disastrous impact of stricter and tighter intellectual property laws as inherited through the US FTA for Indigenous Australians.[116]

Thus, for instance, there is no requirement on the United States to provide for recognition of communal ownership of Australian Indigenous cultural works. This is a significant set back - given that New York in particular is a hub of the art market.

Albert Namatjira was Australia's first Indigenous professional artist. He adapted Western-style painting to express his cultural knowledge of the Arrernte country, for which he was a traditional custodian.[117] The copyright in the artistic works of Albert Namatjira has not been passed onto his family descendants. In June 1957, Namatjira entered into a copyright agreement with John Brackenreg, the owner of a publishing company by the name of Legend Press, and the associated Artarmon Galleries in Sydney. It was agreed that Legend Press would pay royalties to Namatjira for the sole right to reproduce all of his paintings. Following Namatjira's death in 1959, the administration of his estate passed to the Public Trustee for the Northern

---

[115] Peter Higgs. "Australia-United States Free Trade Agreement", Joint Standing Committee on Treaties, Sydney Hearing, 19 April 2004, p 5, http://www.aph.gov.au/house/committee/jsct/usafta/transcripts/syd19april04p.pdf

[116] Megan Davis. "Indigenous Australia And The Australia-United States Free Trade Agreement", *Indigenous Law Bulletin*, 2004, Vol. 5 (30), p. 20-22.

[117] Matthew Rimmer. "Albert Namatjira: Copyright Estates and Traditional Knowledge", *Incite*, June 2003, Vol. 24 (6), p. 6, http://www.alia.org.au/publishing/incite/2003/06/albert.namatjira.html

Territory Government. The Public Trustee of the Northern Territory Government authorised the sale of Namatjira's copyright to Legend Press in 1983, thereby ending the ability of the descendents of Namatjira to benefit from on-going income from the reproduction of his works. The legal protection of Namatjira's works provided by the *Copyright Act 1968 (Cth)* was set to expire in 2009, fifty years after the death of the author. The extension of the copyright term will mean that Legend Press will enjoy the exclusive rights to use and reproduce the works of Namatjira until 2029 in return for financial benefit. There is no guarantee that any of the royalties will flow back to the Namatjira family. The case illustrates how the copyright term extension does not necessarily benefit authors or their families - because of prior assignments of copyright. Furthermore, it highlights the need for sui generis protection of Indigenous cultural property - given the temporal limits of copyright law.

- **The United States-Australia Free Trade Agreement will have a deleterious impact upon culture in Australia.**

- **The Australian Library and Information Association has reported: "The outcome is bad for libraries. It is bad for students. It is bad for researchers. It is bad for all information users."**

- **The Australian Vice-Chancellors' Committee expects a significant increase in the copyright fees that universities currently pay.**

- **The electronic publisher, Project Gutenberg Australia, will find it difficult to enhance its on-line collection of books - because no copyright work will fall into the public domain for the next twenty years.**

- **Australian children will pay more for storybooks. The works of AA Milne - the author of the Winnie-the-Pooh books - would have fallen into the public domain in 2006. They are now subject to copyright fees until 2026. Winnie-the-Pooh generates annual revenue of $1 billion for Disney and $6 billion at retail.**

- **The scientific and non-scientific writings of Albert Einstein would have fallen into the public domain in Australia in 2005. Now schools and scientific institutions will have to negotiate permission to use the work and pay royalties for another twenty years.**

- **Neil Armfield and Company B will face the possibility of artistic censorship for putting on innovative productions of the copyright works of Bertolt Brecht and Samuel Beckett.**

- **Richard Tognetti and the Australian Chamber Orchestra will continue to have problems in performing classical music such as the work of Bartok because of the copyright term extension.**

- **Screensound Australia will find it difficult to preserve significant films and sound recordings - such as *Robbery Under Arms* and the compositions of Percy Grainger.**

- **The Australian Broadcasting Corporation will find it difficult to complete its Digital Conversion Project, because of the extension of the copyright term.**

- **The extension of the copyright term is unnecessary given the short commercial lifespan of much copyright works. This is particularly evident in IT - with computer software such as Microsoft Windows 95.**

- **The United States-Australia Free Trade Agreement does not provide for the protection of traditional knowledge.**

CONCLUSION

There is widespread consensus amongst intellectual property scholars that the copyright term extension is a distortion of the internal logic of copyright law, and a

Emma Caine, Professor Andrew Christie and Peter Eckersley of the Intellectual Property Research Institute Of Australia (IPRIA) based at the University of Melbourne comment:

> Extending our copyright term by 20 years doesn't really protect our authors, yet it still taxes our readers. In Australia, we've hardly debated the issue, yet it's almost a *fait accompli*. Conforming might seem an easier option, but it's certainly not the right one. Rather, it is simply an unthinking submission to the will of a stronger nation, and it's our film-buffs, our literature-lovers and our art-enthusiasts who will foot the bill.[118]

Another member of IPRIA, Kim Weatherall, comments that Australia agreed to a copyright term extension "despite the fact that there seems to be little economic justification for a longer (life plus 70) term - as many economists testified in the *Eldred* case in the US and despite the fact that past Australian inquiries have found little justification for the idea".[119]

The eminent scholar on the Berne Convention, Professor Samuel Ricketson, of the University of Melbourne was critical of the push for the extension of the copyright term.[120] He has commented:

> So far as authors are concerned, it may be preferable for national and international reform to focus on the formulation of appropriate safeguards for the licensing and assignment of their rights. Shorter minimum terms might therefore be just as efficacious in stimulating decisions to invest, as well as the initial decision of an author to undertake an act of creation. [121]

He even suggests that there should be some investigation as to whether the term of 50 years after the death of the author should be shortened. Given these sentiments, it is

---

[118] Emma Caine, Andrew Christie and Peter Eckersley. "Copyright Protection 70 Years After Death Does Not Encourage Creativity", *Online Opinion*, 25 November 2003, http://www.onlineopinion.com.au/view.asp?article=889

[119] http://weatherall.blogspot.com/2004_02_01_weatherall_archive.html

[120] Sam Ricketson. "The Copyright Term," IIC, 1992, Volume 23 (6), p. 783.

[121] Sam Ricketson. "The Copyright Term," IIC, 1992, Volume 23 (6), p. 783.

strange, then, that the Allens Consulting Report should rely upon this article in its argument that a copyright term extension is a good thing.

Professor Peter Drahos of Regnet at the Australian National University has observed that the copyright term extension has enormous social costs:

> The social costs of this are huge. When a classic copyright work falls out of protection, as did HG Wells' *The Time Machine* in 1951 in the US, cheaper editions and a wave of innovation follows. Since *The Time Machine* came into the public domain it has continuously been in print and has been the subject of five sequels, five films, two musicals, a ballet, video games and comic books. The copyright extension term applies to a whole range of lucrative works like Fitzgerald's *The Great Gatsby*, Gershwin's *Rhapsody in Blue* and films such as *Gone with the Wind* and *Casablanca*. This represents a significant wealth transfer. The annual earnings from a nationwide licence for a Gershwin song, for example, are around the US$250,000 mark. The Midas touch begins to pale when compared to the copyright touch. [122]

He concludes that the agreement is very much in favour of companies in the United States, because Australia is a net importer of intellectual property.

A Canadian chair in e-commerce, Professor Michael Geist, of the University of Ottawa considers the negotiating strategy of the United States in bi-lateral agreements:

> [The United States] has begun to demand inclusion of copyright protections akin to those found within the WIPO treaties when negotiating bi-lateral free trade agreements. The strategy appears to be working as in recent months countries worldwide, including Singapore, Australia, and the Dominican Republic, have all indicated that they are receptive to including copyright within their trade agreements. Developing countries such as the Dominican Republic view the inclusion of stronger copyright protections as a costless choice. For those countries, the harm that may result from excessive copyright controls pales in comparison to more fundamental development concerns and they are therefore willing to surrender copyright policy decisions in return for tangible benefits in other trade areas. Developed countries such as Australia may recognize the importance of a balanced copyright policy to both their cultural and economic policies, but they are increasingly willing to treat intellectual property as little more than a bargaining chip as part of broader negotiation.[123]

---

[122] Peter Drahos. "Creative Pursuit", Consuming Interest, Winter 2003, p. 26-27, http://www.choice.com.au/goArticle.aspx?id=103898&p=1

[123] Michael Geist. "Why We Must Stand Guard Over Copyright", *Toronto Star*, 20 October 2003; and Free Trade Agreement of The Americas Negotiations, http://www.ftaa-alca.org/alca_e.asp

Geist observes: "Current drafts of the Free Trade Area of the Americas Agreement, which would broaden the North American Free Trade Agreement to include countries such as Chile, feature provisions that mandate stronger copyright protections".[124] He fears "Canadian copyright concerns may ultimately amount to little more than an issue to be sacrificed at the negotiation table for gains to fisheries, forestry, and farmers".[125]

Professor Lawrence Lessig of Stanford University has been a tireless critic of the *Sonny Bono Copyright Term Extension Act* 1998 (US). He observes in his latest book that the legislation was a form of piracy of the public domain:

> By insisting on the Constitution's limits to copyright, obviously Eldred was not endorsing piracy. Indeed, in an obvious sense, he was fighting against a kind of piracy - piracy of the public domain. When Robert Frost wrote his work and when Walt Disney created Mickey Mouse, the maximum copyright term was just fifty-six years. Because of interim changes, Frost and Disney had already enjoyed a seventy-five monopoly for their work. They had gotten the benefit of the bargain that the Constitution envisions: In exchange for a monopoly protected for fifty-six years, they created new work. But now these entities were using their power - expressed through the power of lobbyists' money - to get another twenty-year dollop of monopoly. Eric Eldred was fighting a piracy that affects us all.[126]

Lessig has sardonically observed of the copyright term extension brought about as a result of the United States-Australia Free Trade Agreement: "The result: Australian film and culture will be harder to spread and preserve; Hollywood will get richer. I hope the voters in Australia are ok with that, because god knows, we Americans need lots of help with our balance of trade debt".[127] This is one act of piracy that one does not expect Michael Speck and the Music Industry Piracy Investigations to pay close attention to.

Perhaps the final word should go to an academic from Washington University. In Congressional hearings a decade ago in 1995, Peter Jaszi succinctly summarized

---

[124] Michael Geist. "Why We Must Stand Guard Over Copyright", *Toronto Star*, 20 October 2003; and Free Trade Agreement of The Americas Negotiations, http://www.ftaa-alca.org/alca_e.asp

[125] Michael Geist. "Why We Must Stand Guard Over Copyright", *Toronto Star*, 20 October 2003; and Free Trade Agreement of The Americas Negotiations, http://www.ftaa-alca.org/alca_e.asp

[126] Lawrence Lessig. *Free Culture: How Big Media Uses Technology And Law To Lockdown Culture And Control Creativity*. New York: Penguin Books, 2004, p 220, http://free-culture.org/

[127] http://www.lessig.org/blog/archives/001733.shtml

the threat posed by the imminent *Sonny Bono Copyright Term Extension Act* 1998 (US):

> A cynical observer might be forgiven the suspicion that it represents a down payment on perpetual copyright on the instalment plan, thus raising obvious and substantial constitutional issues. Nor does the legislation in its present form appear to satisfy the constitutional mandate to promote science and the useful arts. But even if these constitutional concerns are put to one side, the legislation, as it stands, cannot be justified within the framework of the sound approach to evaluating copyright reform proposals, which have served Congress so well for more than two centuries.[128]

Similar sentiments could by expressed about the copyright term extension raised by the United-States-Australia Free Trade Agreement.

The United States Trade Representative has announced its intention to push for further extensions of the copyright term in future negotiations with Australia:

> In a major advance, Australia has agreed to extend its term of protection closer to that in the U.S.—to life of the author plus 70 years for most works. While industry sought to have the term of protection for sound recordings and audiovisual works extended from 50 years from publication to a term matching the U.S. law's 95 years, a compromise was struck at 70 years. We urge that future agreements move that level to the full 95 years (Article 17.4.4).[129]

Thus the copyright term extension is not a final upper limit set by the Australian Government. Rather, it is a provisional standard that will be open to further negotiation in the future. Copyright law will be a moveable feast for the United States industry in the years to come. To echo Peter Jaszi, the free trade agreement represents a down payment on perpetual copyright on the instalment plan.

---

[128] Peter Jaszi. "The Copyright Term Extension Act of 1995: Testimony before the Senate Committee on the Judiciary," 104th U.S. Congress, 1st Session, 20 September, 1995.

[129] Report of the Industry Functional Advisory Committee on Intellectual Property Rights for Trade Policy Matters (IFAC-3). "The U.S.-Australia Free Trade Agreement (FTA) The Intellectual Property Provisions", 12 March 2004.

APPENDIX ONE
COMPARISON OF COPYRIGHT DURATION:
UNITED STATES, EUROPEAN UNION, AND AUSTRALIA

#	Nature of Work and Author	Sonny Bono Copyright Term Extension	European Directive Term	Australia After Free Trade Agreement	Harmonized?
1	Natural persons >1977	70 PMA	70 PMA	70 PMA	Yes
2	Natural persons <1978, works published 1950-1963	28;67	70 PMA	70 PMA (after 1955) 50 PMA (before 1955)	No
3	Natural persons <1978, works published 1964-1977	95	70 PMA	70 PMA	No
4	Natural persons <1978, works published <1950	95 (if still in renewal term on 10/27/98, effective date of the CTEA)	70 PMA	70 PMA (after 1955) 50 PMA (before 1955)	No
5	Joint Authors >1977	70 PMA (last surviving author)	70 PMA (last surviving author)	70 PMA	Yes
6	Joint Authors <1978, works published 1950-1963	28:67	70 PMA (last surviving author)	70 PMA (after 1955) 50 PMA (before 1955)	No
7	Joint Authors <1978, works published 1964-1977	95	70 PMA (last surviving author)	70 PMA	No
8	Joint Authors <1978, works published <1950	95 (if still in renewal term on 10/27/98, effective date of the CTEA)	70 PMA (last surviving author)	70 PMA (after 1955) 50 PMA (before 1955)	No
9	Anonymous or Pseudonymous	Lessor of 95 from publication or 120	70 from time made available to public (or	70 years from publication (or 70	No

	Authors >1977	from creation	70 PMA if author's name becomes known within 70)	PMA if author of the work is generally known or can be identified by reasonable inquiries)	
10	Works made for hire >1977	Lesser of 95 from publication or 120 from creation	70 PMA (70 if individual author not identified in released version)	70 years	No
11	Works made for hire <1978 (same as 2, 3, & 4 above)	28;67 (1950-1963) 95 (1964-1977) 95 (<1950)	70 PMA (70 if individual author not identified in released version)	70 PMA	No
12	Audiovisual works >1977, created as works made for hire	Lesser of 95 from publication or 120 from creation	70 PMA of principal director, screenplay author, dialogue author, or composer	70 PMA	No
13	Audiovisual works <1978, created as works made for hire	28;67 (1950-1963) 95 (1964-1977) 95 (<1950)(if in renewal term on 10/27/98)	70 PMA of principal director, screenplay author, dialogue author, or composer	70 PMA	No
14	Film Producers	No rights under copyright unless authors or assignees of authors	"Related rights" expire at sooner of 50 years from first publication or first communication to public	70 years from publication	No
15	Broadcasting Organizations	No rights under copyright unless authors or assignees of authors	"Related rights" expire 50 years after transmission	70 years from publication	No
16	Sound Recordings >1977	95 or 70 PMA, depending on nature of author	"Related rights" expire 50 years from sooner of first publication or first communication to public	70 years from publication	No
17	Sound Recordings 1972-1977	95	"Related rights" expire 50 years from sooner	70 years from publication	No

			of first publication or first communication to public		
18	Sound Recordings <1972	State law until 2067	"Related rights" expire 50 years from sooner of first publication or first communication to public	70 years from publication (Sound recordings recognised in 1968)	No
19	Unpublished works on which copyright has expired	0	25 from publication	0	No
20	Unpublished works <1978 not previously copyrighted or in the public domain	Greater of 70 PMA or until 2003; if published before 2003, greater of 70 PMA or until 2048	70 PMA	70 from publication (or indefinite if remains unpublished)	Partially (harmonized for relatively recent works, not for older works)
21	Moral Rights	*Visual Artists Rights Act* 1990 (US) provides protection just for life of artist.	Germany (same as economic rights) France (perpetual)	70 PMA (except for the moral right of integrity in relation to film which only lasts for the author's life-time)	No
22	Performers Rights	Lack of comprehensive protection	50 years from date of performance	70 years after death of the author	No

PMA - Post-Mortem Auctoris (After the author's death).

Adapted from Professor Dennis Karjala, the University of Arizona, (2002), http://homepages.law.asu.edu/~dkarjala/OpposingCopyrightExtension/legmats/HarmonizationChartDSK.html