

# Free trade agreement may cost Australian information users \$88 million a year

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Australian library and information users will be significantly disadvantaged when the Coalition and the Australian Labor Party pass the United States Free Trade Agreement Implementation Bill.

The Bill contains, in schedule 9, amendments to the *Australian Copyright Act* which radically extend copyright protections, sometimes beyond the requirements of the US-Australia Free Trade Agreement, and which create a confused and costly regime for copyright users.

The amendments include:

**Performers' rights.** Performers will own copyright in the sound recordings of their performances. Their rights are added to the right of other owners of copyright in the same recording. The rights may be managed by an agent or under an implied licence with the recording studio. Moral rights are extended to performers on sound recordings.

The definition of 'performance' is expanded to include 'an expression of folklore'.

Importantly, the royalty-free blanket exemption for the indirect sound recording of performances for the purposes of education or the aiding of people with disabilities will be removed. Instead, such activities will be covered by a statutory license scheme requiring institutions to pay equitable remuneration to a collecting society.

These changes, which include further complexities for compensating owners of copyright other than performers, or for the deaths of individual performers or for individual breaches of moral rights which do not affect all performers, are contained in Parts 1-4.

If these amendments are passed, performers will have more protection under Australian law than under United States, British, Canadian or New Zealand copyright law.

There will be significantly greater costs for users of sound recordings, including users for non-profit and/or educational purposes.

**Copyright of photographs.** The present term of copyright in photographs (fifty years after the date of first publication) will be extended to match the duration of copyright protection in other works. As required by the FTA, this term extension is retrospective in that all works presently copyrighted will benefit from the extension. A photograph which may have gone into the public domain next year might now have its protection extended until 2060.

This will greatly increase the costs of copyright permissions, not only in the extension of the time period, but in tracking the life and death of the photographer or finding out whether the photograph is owned by the original photographer or by an employer or corporation. [Part 5].

**Copyright term extension.** Part 6 of the amendments contains the much-publicised twenty-year extension of the copyright term to death of the author plus seventy years.

There is provision for a scheme to compensate those who have entered into agreements to use material which, but for this Act, would have entered into the public domain.

Significant costs will be added to the tracking of older material for permission to use. There is no defence available for the use of 'orphaned' material — that is, copyrighted information for which an owner cannot be found.

**Electronic rights management information (ERMI).** Presently, the *Copyright Act* prohibits the removal of information identifying the author and/or copyright owner and the terms of use, the distribution or importing, for commercial purposes, of copyright material which is known to have had ERMI removed or altered, and communication to the public of such material.

The offences have been broadened, under this Bill, by the removal of 'commercial purposes' with added civil and criminal coverage of non-commercial infringement.

Not-for-profit libraries, educational institutions and public and community broadcasters are given a defence [Part 8].

**Reproductions.** A work must be in 'material form' to receive copyright protection. The concept of material form has been extended to include all forms of storage of a work, whether or not further reproductions can be made. This appears to be a response to the *Sony v. Stevens* case, as well as satisfying the FTA requirements that all reproductions whether permanent or temporary should have copyright protection. There is an exception for reproductions made as part of an incidental technical process [Part 10].

**Limitations on remedies available against carriage service providers.** The liability of carriage service providers (CSP) for copyright infringement by third parties continues to be limited but, in addition to the present tests (such as the power of the CSP to prevent the infringement or the relationship between the CSP and the infringer),

a new regime requires CSPs (if they wish to claim immunity from compensation) to disable access to an online location (if outside Australia), terminate a specified account, or remove or disable access to copyright material, where infringement is identified by a court. CSPs will be expected to terminate the accounts of repeat infringers. Take-down notice procedures still appear to be subject to court action [Part 11].

**Technological protection measures (TPM).** While the Bill contains no specific tightening of the provisions for circumventing TPMs, the FTA does require the prohibition of the use of such devices. TPMs are used to prevent piracy. However, their use may result in monopoly (for example, having to buy a particular brand of hardware to play legally-acquired software such as music or DVDs or computer games). They have also been criticised as interfering with the government's reforms concerning parallel importing.

**Effect on users**

As predicted, the proposed changes to the *Copyright Act* as a result of the Free Trade Agreement will significantly alter the balance between copyright owners and users. Both the government-dominated Joint Standing Committee on Treaties and the Opposition-dominated Senate Select Committee inquiry into the Free Trade Agreement acknowledge that Australian information users lose in this deal, as did trade minister Mark Vaile when he said last December that he would not accept the copyright proposals.

**Comparison of political responses**

The Australian Greens, the Australian Democrats and the One Nation senator oppose the US-Australia Free Trade Agreement.

For the Democrats, senator Aden Ridgeway gave a detailed dissenting report in the Senate inquiry. To ameliorate the copyright effects the Democrats are examining a broadening of user access through 'fair use' to match the access of American users.

Queensland One Nation Senator Len Harris, a member of the Senate committee, also opposed the FTA. He supports legislative power to protect and preserve Australian culture and affordable access to information which will stimulate Australian scientific research and development.

The provisions of Schedule 9 of the Bill outlined above embody the official Government response in relation to copyright. They do not include the mitigating recommendations of the Parliamentary Committees investigating the effects of the FTA.

In its report on the FTA, the Joint Standing Committee on Treaties recommended that:

- the Act enshrine the rights of universities, libraries, education and research institutions to ready and cost-effective access to material for academic and related purposes;
- the low standard of originality in Australian copyright be reviewed to match the higher standards of United States law, thus allowing information created by the 'sweat of the brow' but without any additional skill or originality to remain publicly-accessible;
- we adopt a broad, open-ended fair use defence to replace the narrowly-defined fair-dealing provisions; and that
- exceptions be provided for the legitimate use and application of all legally-purchased or acquired digital and audio-visual products.

For the full report, see <http://www.aph.gov.au/house/committee/jsct/usafat/report.htm>.

The Senate Committee provided extensive analysis of the arguments for and against the intellectual property (and other chapters) of the FTA, but split along party lines as to its response, apart from a majority decision to support the Agreement. See [http://www.aph.gov.au/Senate/committee/freetrade\\_cte/report/final/index.htm](http://www.aph.gov.au/Senate/committee/freetrade_cte/report/final/index.htm).

Opposition leader Mark Latham, in a press statement on 4 August, endorsed recommendations by Labor senators that:

- a new legislative process for Commonwealth-State consultation and Parliamentary scrutiny of proposed trade treaties be adopted;
- the Commonwealth Government enshrine in the *Copyright Act 1968* the rights of universities, libraries, educational and research institutions to readily and cost-effectively access material for academic, research and related purposes; and
- a Senate Select Committee on Intellectual Property be appointed to investigate comprehensively and make recommendations for an appropriate intellectual property regime for Australia in the light of the US-A FTA, including: a review of the options for expanding the 'fair-dealing' provisions to match the United States doctrine of 'fair use'; a review of the low standard of originality; and the monitoring of the impacts of the extension of the term of copyright, perhaps adopting the 'access to orphaned works proposals' contained in the *Public Domain Enhancement Bill 2004 (US)*.

Mr Latham said that, if a Labor government was elected, it would require the Attorney-General to report annually to

Parliament on the impact of changes to the *Copyright Act* on universities, libraries and educational and public research institutions. He also promised to ensure that it would be permissible to sell, purchase and use legally-manufactured video, DVD and related software and hardware items, regardless of the place of purchase.

#### Election lobbying

ALIA is lobbying members of Parliament regarding implementation of the above proposals for mitigating the adverse effects on library users and budgets of the trade agreement with the United States. Our submissions to the Parliamentary committees are available on our website.

The intellectual property changes resulting from the Free Trade Agreement will impact in additional costs for all Australians. It is, therefore, important in the upcoming Federal election for individual voters and other interest groups to inform their local candidates of the issues discussed above and obtain their responses to the recommendations outlined above.

The Country Public Libraries Association of New South Wales, through Lithgow librarian Penny Hall and Association chair and Bogan Shire councillor Ewan Tolhurst have sent a letter to local Members of Parliament on the effect of the FTA on library and educational service costs. ■



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