AUSTRALIAN DIGITAL ALLIANCE

Submission on the Australia-European Union Free Trade Agreement

The Australian Digital Alliance (ADA) welcomes the opportunity to provide comments on the Australia-European Union Free Trade Agreement (AEUFTA).

The ADA is a non-profit coalition of public and private sector interests formed to provide an effective voice for a public interest perspective in copyright policy. It was founded by former Chief Justice of the High Court of Australia, Sir Anthony Mason in February 1999, to unite those who seek copyright laws that both provide reasonable incentives for creators and support the wider public interest in the advancement of learning, innovation and culture. ADA members include universities, schools, disability groups, libraries, archives, galleries, museums, technology companies and individuals. The ADA advocates for copyright legislation that provides a balance between strong protection of copyright and reasonable and equitable access to information in the public interest.

The ADA would like to provide the following comments in relation to the AEUFTA:

1. We welcome the consultation and transparency of the AEUFTA process so far, which is vastly improved from previous FTAs. We urge Australia to adopt the EU policy of releasing chapter proposals during the negotiation;
2. We believe that the primary goal of the government in approaching the negotiations around the IP chapter should be to avoid any agreement that would require Australia to change its copyright law. The government should also avoid overly prescriptive terms, which would "lock in" our laws and prevent sensible changes in response to future technological and cultural change.
3. With the above in mind, the draft EU IP chapter (the EU IP Chapter) is a good starting point for negotiations, as it is not overly prescriptive and would not require many significant changes to Australian legislation. However, it is vital that the government negotiate on the following:
    - Article X.11.5, which would requirement Australia to extend the term of protection for cinematographic and audiovisual works to the life of the author plus 70 years;
    - Article X.3, which would require Australia to extend its prohibition on parallel importation for literary works; and
    - Article X.6.4, which would require the resurrection of rental rights for works.

Detailed discussion of each of these points follows.

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1. Improved transparency and consultation welcomed

First, the ADA strongly supports the EU's policy of publishing its chapters during the negotiation process, and calls on Australia to adopt a similar policy for future trade agreements. This significantly improves the ability of stakeholders to contribute to the negotiations and provide feedback on the benefits and potential pitfalls of proposed language.

We would also like to applaud the improved approach to stakeholder consultation that the Australian government has adopted in relation to the AEUFTA. There has been a marked increase in meetings aimed at soliciting stakeholder input to the agreement, and there is clear goodwill towards incorporating this feedback into the negotiation positions.

However, there is still room to improve the transparency associated with the negotiation by Australia of free trade agreements. We also encourage the Australian government to adopt a more rigorous assessment process for treaties.[1] As well as adopting the EU policy of releasing chapter proposals during negotiations, other valuable steps Australia could take in this regard include:

- independent assessments of the projected costs and benefits of all agreements
- public release of Australian government proposals and discussion papers
- public release and parliamentary discussion of the final text before it is authorised for signing by Cabinet.

2. Principal goals - avoid changes and lock in

Secondly, we strongly support the stated principle in Australia's negotiating aims and approaches that:

> Australia will protect its right to regulate in important public policy areas. We will preserve flexibility to ensure our intellectual property settings can continue to provide an appropriate level of incentives for innovation, investment and the production of creative works.

[1] See Submission 56, Senate Standing Committees on Foreign Affairs and Trade inquiry into the proposed Trans-Pacific Partnership (TPP) Agreement, https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Foreign_Affairs_Defence_and_Trade/TPP/Submissions and Submission 78, Senate Standing Committees on Foreign Affairs and Trade inquiry into the Commonwealth's treaty-making process, https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Foreign_Affairs_Defence_and_Trade/Treaty-making_process/Submissions.

We strongly believe that one of the principle goals of Australia's AEUFTA negotiations should be to avoid any commitments that would require Australia to alter its copyright laws to "match" the EUs, as we have seen in the past in agreements such as the AUSFTA. Based on previous EU free trade agreements with parties other than Australia, we have high hopes that this is achievable. Both Australia and the EU have robust copyright systems, that find their own compromises to achieve similar aims. Both parties have to date been compliant with the global standards arising from the major WIPO and WTO treaties, and in fact provide protection far above the minimums required by such systems. Seeking to layer the standards of one system on top of the standards of another inevitably results in a system that is complex, confusing and overly strict, to the detriment of creators, educators, innovators and the general public.

Furthermore, to retain flexibility in the system as the government is aiming for, it is essential that Australia avoid overly prescriptive language in the agreement, which would "lock in" our law to a particular course, removing Australia's ability to adjust its copyright system in future. The last few decades have made it clear how vital it is for copyright law to adapt as technologies and social norms change. But highly prescriptive text and inflexible mandates will effectively lock Australia into copyright laws that will quickly date and inevitably fail to achieve their aims.[2]

The problem of lock in will only be heightened in relation to the AEUFTA, due to the long and complex process of adjusting EU agreements. With truly bilateral agreements (eg the AUSFTA) changes can in theory be renegotiated relatively simply with a single other party. But the AEUFTA is likely to be far harder to adjust, due the large number of sovereign states that need to agree before the EU can change its own commitments. Once the provisions are enshrined in the domestic law of 27 countries, it will be even more difficult for even the smallest and most sensible of changes to be made.

Detailed and prescriptive obligations are therefore inappropriate for such agreements, as they rapidly become outdated. 30 years ago we could never have predicted the technologies that exist today, with search engines, social media platforms, 3D printing, cloud storage and virtual reality. But prescriptive agreements try to do exactly that - set rigid rules for future generations. In doing so, they inhibit rather than encourage agility and innovation.

3. EU IP Chapter

Thirdly, in general, we believe the EU IP Chapter provides a good starting point for negotiation, as it does not require changes to Australian law on most matters. It also avoids the use of overly

[2] See, for example, the evidence of constraints on Australian governments' freedom to shape copyright policy caused by the AUSFTA in Weatherall, Kimberlee Gai, The Australia-US Free Trade Agreement's Impact on Australia's Copyright Trade Policy (September 7, 2015). Australian Journal of International Affairs, Vol. 69, No. 5, pp. 538-558, 2015; Sydney Law School Research Paper No. 15/70. Available at SSRN: https://ssrn.com/abstract=2656945 pages 5-7

prescriptive text on issues such as technological protection measures that we have seen in past agreements like the AUSFTA.

We do however have the concerns with the text of the EU IP Chapter in the following areas:

- Article X.11.5, which would require Australia to extend the term of protection for cinematographic and audiovisual works to the life of the author plus 70 years - this extension would clearly be in excess of global standards on protection of such materials, which instead align with Australia's own "creation plus 70" term. Australia is a net importer of copyright material by a large margin,[3] meaning that any extension beyond global norms will only be to the detriment of the Australian economy. Evidence for this is provided by the experience of the 20 year extension under the AUSFTA, with studies conducted both at the time of the extension[4] and more recently[5] indicating that this imposed a significant cost on Australia. The majority of copyright materials are either noncommercial in nature (eg home videos and oral histories) or have a very short commercial lifetime (with the Australian Bureau of Statistic estimating that most copyright materials lose their value after 2-5 years).[6] Extending copyright terms therefore has the practical impact of imposing costs on educators, cultural institutions and society at large, without providing commensurate benefits to creators. It also contributes substantially to the problem of orphan works (ie copyright materials that cannot be used because their copyright owners cannot be located), which has been estimated by Ernst and Young to cost Australian cultural institutions between $10.3 million and $20.6 million a year in sear.[7]
- Article X.3, which would require Australia to extend its prohibition on parallel importation for literary works. We note that numerous reviews and government reports have looked at the issue of the parallel importation over the last 20 years, and have universally recommended that Australia remove its final parallel importation laws, on the basis that the restrictions put Australian booksellers at a competitive disadvantage and result in

[3] Productivity Commission Inquiry Report, *Intellectual Property Arrangements* (No. 78, 23 September 2016) pp.98 and 107 available at https://www.pc.gov.au/inquiries/completed/intellectual-property/report/intellectual-property.pdf

[4] Philippa Dee, *The Australia–US Free Trade Agreement: An Assessment*, (Pacific Economic Papers, No. 345, 2005), p.21 available at https://crawford.anu.edu.au/pdf/pep/pep-345.pdf

[5] Productivity Commission Inquiry Report, *Intellectual Property Arrangements* (No. 78, 23 September 2016) pp.127-128 available at https://www.pc.gov.au/inquiries/completed/intellectual-property/report/intellectual-property.pdf

[6] Australian Bureau of Statistics, 5216.0 - *Australian System of National Accounts: Concepts, Sources and Methods*, pp. 374 available at http://www.ausstats.abs.gov.au/Ausstats/subscriber.nsf/0/C5ACA29422243B56CA257F7D00177D09/$File/52160_2015_.pdf

[7] Ernst and Young, *Cost benefit analysis of changes to the Copyright Act 1968* (Department of Communications and the Arts 2016) pp.72-77 available at https://www.communications.gov.au/documents/cost-benefit-analysis-changes-copyright-act-1968

Australians paying higher prices for books.[8] We also note that the Government has adopted this as formal policy since 2015.[9] Accepting an agreement that requires us to strengthen these laws therefore would defy the best evidence available on the issue, the recommendations of the government's advisers, and the government's long-held policy.

- Articles X.6.4, X.7.6, and X.8.4, which would require the adoption of rental rights for works - rental rights have specifically never been granted in Australia for materials other than sound recordings and computer programs, as required by the TRIPs agreement. The adoption of rental rights would be a backwards step for Australian copyright law that would put us in significant excess of our obligations under the global WIPO system. It would potentially cause significant problems for Australia's libraries and undermine our well established and respected Public Lending Rights scheme.
- We would be concerned if the reference to the protection of "temporary" reproductions at various places in the agreement (eg art X.6) were interpreted as requiring any adjustment to the current Australian rules on what constitutes a reproduction, or the exceptions for temporary copies which are made in the course of a communication (ss43A and 43B).
- We note that the current language may also require adjustment of Australia's resale royalty system. The ADA again emphasises that Australia should be aiming for an agreement which does not require significant changes to our own laws. However, we do not have a strong view on the specific language or policy on this issue.

[8] See the findings of these reports summarised Productivity Commission Inquiry Report, *Intellectual Property Arrangements* (No. 78, 23 September 2016) p.147 available at https://www.pc.gov.au/inquiries/completed/intellectual-property/report/intellectual-property.pdf

[9] Australian Government Response to the Competition Policy Review (2015) Canberra, p.13 available at https://treasury.gov.au/publication/government-response-to-the-competition-policy-review/