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16 January 2007

Japan FTA Task Force  
Department of Foreign Affairs and Trade  
RG Casey Building  
John McEwen Crescent  
BARTON ACT 0221

Dear Members of the Japan FTA Task Force

## **PROPOSED AUSTRALIA – JAPAN FREE TRADE AGREEMENT**

### **Introduction**

1. The Copyright Agency Limited (CAL) is a copyright collecting society that administers, on a non-exclusive basis, the copyright controlled by its members.
2. CAL is a not for profit company limited by guarantee.
3. CAL currently represents the reproduction rights of over 9000 direct “author” and “publisher” members who, in turn, represent many thousands of authors and publishers. CAL also represents thousands of other copyright owners through reciprocal agreements with overseas collecting societies.
4. CAL has been declared by the Attorney-General to be the collecting society for the reproduction and communication of works by educational institutions under Part VB of the *Copyright Act* 1968 (the Act). CAL has also been declared by the Copyright Tribunal to be the collecting society for government copying for the purposes of Part 2 of Division VII of the Act.
5. Pursuant to these declarations, CAL administers statutory licences through which educational institutions and Commonwealth, State and Territory governments remunerate copyright owners for the copying of their works.
6. In addition, CAL offers voluntary licences to the public and corporations for the right to copy and communicate published works. As a single resource, CAL can provide copyright clearances for hundreds of thousands of books, articles and artistic works through its licences to copy.
7. CAL strongly supports legislative provisions in relation to copyright, which will benefit all copyright owners in Australia and internationally.

8. CAL notes that the Feasibility Report finalised in December 2006 concluded that 'there would be significant benefits for both countries in including intellectual property commitments in an EPA/FTA'<sup>1</sup> CAL agrees that as the combination of copyright and intellectual property industries is of increasing value to both Japan and Australia these aspects will form part of any agreed FTA. CAL also supports the position expressed in the Feasibility Study that obligations in relation to IP contained in any Australia-Japan FTA (FTA) should go beyond those contained in TRIPS to promote high standards of protection across the Asia-Pacific region.

### **International Trade Agreements**

9. The reason for entering into international agreements such as the proposed FTA is to facilitate international trade between the countries that are parties to the agreement. This is achieved by lowering barriers to trade through reducing domestic trade subsidies and import tariffs and ensuring economic cooperation.
11. Intellectual property and in particular copyright goods are assuming a greater importance across the Asia-Pacific Region.
12. The book publishing industry in Australia generated income of around AU\$1.5 billion in the 2002/2003 financial year to the Australian economy.
13. The most recent study of the contribution of the copyright industries to the Australian economy was conducted prior to 2001 and showed that the percentage was approximately 3.3%, but growing at over 5% per year.<sup>2</sup>
14. In addition to the trading of copyright goods, the licensing of copyright works through collecting societies is an important component of the trade in copyright goods, both within economies, and across international borders.
15. Collecting societies are formed by copyright owners when the individual management of their copyright is not practical due to mass use. Collective management of copyright creates efficiency and lowers cost to all parties through the economy of scale it offers. The major collecting societies in Australia had a combined income of \$240,000,000 in the 2004 financial year.<sup>3</sup>
16. Of particular interest to CAL's members in this context is the growth in the export of Australian educational services across the Asia Pacific region including to Japan. The demand for Australian educational and literary texts is increasing and managing the trade in those copyright works is of great interest and importance to Australian copyright owners.

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<sup>1</sup> Australia and Japan Joint Consultative Committee, Joint Study for Enhancing Economic Relations between Japan and Australia, including the Feasibility or Pros and Cons of a Free Trade Agreement, p. 15

<sup>2</sup> The Allen Consulting Group, The Economic Contribution of Australia's Copyright Industries, 2001, pp. ii-iii.

<sup>3</sup> Zoe Rodriguez, *Australian Copyright Management Organisations*, Australian Intellectual Property Law Bulletin, Butterworths 2005, pp 138-9

17. This is even more so the case as a consequence of the move by the copyright industries to the digital delivery of copyright works and the adoption of this technology by educational institutions. The particular circumstances and particular nature of the use of copyright works in a digital environment, such as perfect reproduction and ease of copying make copyright owners even more concerned that their rights should be protected when trading in their copyright goods.

### **Multi-Lateral Agreements**

18. CAL supports Australia entering into multi-lateral agreements which contain appropriate copyright provisions, on the basis that they set benchmarks for signatory countries. CAL recognises the great value of multi-lateral agreements, such as the proposed Australia-ASEAN-NZ FTA on the basis that they lead to greater harmonization of laws and standards across regions. Greater harmonization of laws relevant to commerce simplifies business dealings across borders which in turn makes trade among signatories more efficient.
19. Nonetheless, where bi-lateral agreements are in prospect, such as with the recent Australia-US FTA, CAL supports bilateral agreements if they contain copyright provisions consistent with the terms of international treaties to which Australia has acceded, such as the Berne Convention, and also enforcement provisions, such as those contained in TRIPS, and more recently, the WIPO Internet Treaty.

### **Consistent Copyright Laws**

22. Australia is a signatory to the Berne Convention and any trade agreement which it enters into must comply with the terms contained in it. As a consequence of this, Australia can only enter into trade agreements which cover copyright with countries which have copyright laws in place which are compliant with the Berne Convention, or which are progressing towards compliance.
23. CAL supports the implementation of national copyright laws which are consistent with world treaties, such as the Berne Convention and the WIPO Internet Treaties, in all regions. This is premised on the argument that copyright owners' interests must be sufficiently protected to guarantee future production of copyright works, which is obviously in the public interest and the commercial interest of all nations.
24. Of particular importance is the protection of works in the digital environment. In this regard, CAL considers the FTA should require the protection of Digital Rights Management (DRM) measures comparable with the provisions contained in the WIPO Copyright Treaty. Without such provisions, creators do not have sufficient security or confidence to invest in the creation of digital works. This was a requirement contained in the recently adopted Australia-US FTA.

25. Any exceptions in national laws to the authors' exclusive copyright rights should be limited in accordance with the three step test contained in Article 9 of the Berne Convention so that they are limited to certain special cases which do not conflict with normal exploitation of the work or the author's legitimate interests in the work, restated in Article 13 of TRIPS and Article 10 of the WIPO Copyright Treaty.
26. CAL supports the development of market based solutions to determine optimal tariffs for copying of works. However, CAL believes there is a lack of transparency around the operation of Reproduction Rights Organisations (RROs) and their setting of tariffs for copying of works in Japan. One contributor to this lack of transparency is the registration system for Reproduction Rights Organisations (RROs) in place in Japan.
27. RROs are designed to enhance efficiency in the trade of copyright works – both domestically and across borders by linking large numbers of users with a vast repertoire of works. This efficiency is maximised where operations of RROs are transparent and simple for users and owners alike to understand and where duplication of operations is avoided. In this regard, CAL was recently made aware that there are perhaps as many as five organisations collectively administering the copyright in literary works in Japan. This must create confusion for domestic copyright owners and users. For overseas RROs this is a hindrance to entering into bilateral agreements in order to license the use of Japanese works in their jurisdictions, and to ensure that the rights in their members' works are being represented in Japan.
28. Of particular concern, and CAL believes an outcome of the registration system for RROs and the lack of clarity about their operations is that tariffs set for the commercial sector to copy Science, Technical and Medical publications are far below the tariffs set by other developed nations for similar uses of works. In this way CAL believes the market for copying of works is not operating efficiently – copyright owners are being remunerated at rates below what a true market would adopt. This undermines authors' and publishers' legitimate interests and therefore acts as a disincentive to the creation of new works.
29. CAL suggests that any FTA build on the requirements for RROs already contained in the Japanese Copyright Law. CAL suggests that regulations in relation to RROs ensure that duplication of activities of these organisations is minimised, and that the functions of different RROs are required to be clearly defined for any parties interacting with them.
30. Additionally, CAL notes that under Japanese law the duration of copyright in literary works is fifty years from the death of the author. CAL is aware that the duration of copyright for cinematograph films was recently increased to seventy years from the death of the author. CAL submits that both for harmonisation of provisions contained in Japanese law, and also in order to be consistent with the laws in force in Australia and other developed nations, Japan should adopt a copyright duration for literary texts for the life of the

author of the work plus seventy years. Greater harmonisation of this sort of detail in copyright laws minimises the barriers and costs to trade.

31. The provisions of the Japanese law which relate to Technological Protection Measures must comply with the terms of the WIPO Internet Treaties to ensure that adequate protection is given to copyright owners to provide their works in the digital environment. There must be sufficient penalties for unauthorised trafficking, manufacturing and use of circumventing TPMs to deter infringement of copyright owners' rights.
32. Exceptions should be limited to only those consistent with the three step test contained in the *Berne Convention*, and restated in TRIPS and the *1996 WIPO Internet Treaties*. In this regard, special attention should be paid to the educational exceptions contained in the Japanese law – particularly in Article 35, which are not clearly defined and are therefore open to broader interpretation than permitted under these international treaties.
33. CAL is also aware of suggested exceptions for the pharmaceutical industry to allow unremunerated use of journal articles used in the patent applications. CAL notes that remunerable exceptions exist in the US and UK that are licensed by CAL's counterparts in those jurisdictions, the Copyright Clearance Center and the Copyright Licensing Agency. CAL urges that any such limitation adopted in Japan be subject to payment of remuneration to the copyright owners – preferably through a reproduction rights organisation.
34. CAL submits that strong copyright law and practice are a requisite for the development of local writing and publishing in each country. A strong copyright framework will benefit individual creators. In turn it will promote the growth of local creative industries and also the trade in cultural productions. This will serve to increase the cultural awareness and wealth of each nation and of the region.

### **Countering Piracy**

35. Some of the countries of the Asia Pacific are noted for their mass piracy of copyright works. Several are recent signatories of the *Berne Convention* and the *WIPO Internet Treaties*. This shows a clear commitment from these countries to reform their copyright laws and enforcement to support their local creative industries.
36. CAL believes the adoption of more robust copyright laws in this region are crucial not only for the local creative industries, but also to avoid these countries becoming pirate territories which undermine the economic interests of all copyright creators. Japan as a developed nation in the region with established copyright laws and general compliance with their terms is in a position to be a template jurisdiction from which to inform other countries in the region on issues related to copyright practice and compliance.

## **Dispute Resolution**

37. Where a dispute arises between signatories to the FTA in relation to compliance with the provisions contained in the FTA , there must be an adequate mechanism for the resolution of the dispute.

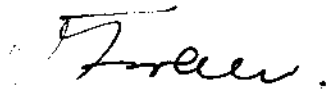
## **IFRRO's Development Fund and the Asia-Pacific region**

38. The International Federation of Reproduction Rights Organisations (IFRRO) is an international non-government organisation of copyright collective management organisations, such as CAL, and rightsowner organisations. It promotes international bilateral agreements It is also active in establishing Reproduction Rights Organisations (RROs), and promoting awareness of copyright and the role of RROs.
39. Part of IFRRO's work is in the field of assisting in the establishment of RROs in each country through IFRRO's Development Fund.
40. I am the chair of IFRRO's Asia-Pacific committee which is dedicated to monitoring copyright practices, and assisting in the establishment and operation of RROs in the region. It has been a region of significant growth and success for IFRRO.

## **Traditional Knowledge**

41. CAL submits that any FTA should contain provisions which protect traditional knowledge. This is of particular concern to many Asia Pacific nations and should be included so that use and exploitation of cultural productions can be rewarded.
42. CAL believes that an FTA is achievable and desirable for enhancing cultural and trade exchange between nations, and ultimately in playing a role in promoting and creating mutual understanding, stability and peace in the region.

Yours sincerely



Michael Fraser  
Chief Executive