

# How I learned to stop copying and love Robert Zoellick:

## Australia-US trade agreement destabilises Australian copyright law

Colette Ormonde, ALIA copyright advisory service

Australian consumers of information are losers in the Australia-United States trade agreement, even before the full text of the agreement is available to us. Dr Matthew Rimmer, Law Faculty, Australian National University, and member of ALIA's Copyright and Intellectual Property Advisory Group suggests that Australia may actually end up with a more restrictive copyright protection than the United States if this agreement goes ahead.

The Australian government has agreed to extend the copyright term to seventy years after the death of the author. It has reneged on promises not to extend the copyright term, in its uncritical adoption of the US copyright regime in the Australia-United States trade agreement.

By capitulating to US negotiators on digital copyright, the Government has pre-empted the review of the Digital Agenda amendments to the *Australian Copyright Act* and distorted the traditional balance of interests between copyright owners and users fundamental to the concept of intellectual property. The recommendations of the Copyright Law Review Committee on *Copyright and contract*, particularly the principal one, that contractual terms should not extinguish access to information permitted under the *Copyright Act*, are side-lined by this agreement.

The government has also failed Australian and American artists and creators by not insisting that the United States harmonise with international copyright treaties by adopting a comprehensive moral rights regime to acknowledge the rights of creators to protect the integrity of their work. This has implications for the drafting of Australian law on protection of indigenous intellectual property and it is further evidence of the Australian government's willingness to capitulate to US corporate interests where cultural heritage and information access are concerned.

The government has backed away from seeking a cultural exemption. If, as Prime Minister Howard and Trade Minister Vaile say, Australian cultural industries and local content rules are protected, why does Robert Zoellick, on the US trade department website, promise Americans that:

'The FTA contains important and *unprecedented* [emphasis added] provisions to improve market access for US films and television.'

They have ninety-six per cent of Australian cinema. Just how much more do they want?

Of major concern is the complete lack of information in the Department of Foreign Affairs and Trade (DFAT) documentation released on 8 February about the processes of dispute resolution. Other countries which have signed bilateral trade agreements with the United States have found the devil in the detail of these agreements when their companies and their governments have been sued by US corporations.

While we wait for release of the full text, (date of release not available at the time of writing this article), here are some points of concern for our sector:

### Extension of the copyright term

ALIA has made ongoing representations to Trade Minister Mark Vaile and to DFAT about the inadvisability of copyright term extension beyond the Berne Convention. The Australian Libraries Copyright Committee and academics have also argued for no extension of copyright protection. Extensions distort the copyright balance. There is no economic evidence to justify extension of the copyright term. Milton Friedman and seventeen other American economists said there was no evidence in their brief in the Eldred case. The Intellectual Property Competition Review (the Ergas report) said there was no evidence. The Allens Consulting Report (which said there might be) has been widely criticised.

Three months ago, a spokeswoman for the Minister for Communications, Information Technology and the Arts, Daryl Williams, said that the Government:

*'...appreciates the value of having material available in the public domain... 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.'*

Two months ago, Trade Minister 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.*' [emphasis added]

Now the Australian Government has capitulated to US government demands, which reflect the ongoing pressure of American corporations. Disney Corp and other major content producers support permanent copyright protection, with the traditional 'balance of interests' between copyright owners and users permanently extinguished.

The costs incurred by the extension of the copyright term will include not only the cost of twenty more years of information, but the expense of tracking down copyright owners and publishers who have gone out of business or passed into obscurity. These difficulties occur in the present term, without another twenty years to search.

Will the extension be retrospective? If not, what is the cut-off date? These are further costly questions which copyright users must clarify. It is difficult to judge in advance how great the costs to information consumers will be or whether one is breaching copyright in using information which suddenly passes from free public use to privatised protection. The US experience showed that there were sudden cost increases to musicians, professional and amateur, as composers like Rachmaninov and Bartok were swept back into copyright.

Whether retrospective or not, this is a loss of access for information users, a threat to the public domain of knowledge and it is unnecessary. World copyright treaties outline broad principles of agreement with plenty of scope for individual nations to satisfy the information needs of their own populations while acknowledging and rewarding the creativity of copyright owners.

The profits accruing to copyright owners over the extra twenty years were estimated by Friedman and other economists as less than one US cent a year.

### Digital Agenda Amendments versus the *Digital Millennium Copyright Act*

In drafting and refining the Digital Agenda Amendments (DAA) to the *Australian Copyright Act*, Senator Richard Alston and the then Attorney-General Daryl Williams produced legislation which carefully balanced competing interests. The DAA, for example,

permits the circumvention of technological devices for legitimate purposes, while banning their manufacture or sale. The *Digital Millennium Copyright Act* (DMCA) by contrast prohibits circumvention even for legitimate purposes. Academics have been imprisoned in the United States for testing software to see if it fulfils the promises of its manufacturers. The Dmitri Skyalov case is the most notorious, but it is not the only case.

The DMCA and the UCITA Acts of the United States criminalise activities which may be in the public interest.

#### **Australia's copyright laws may become stricter than US law**

Dr Rimmer points out that, if Australia adopts key features of the DMCA (controversial in the United States) such as the tighter technological protection measures and stronger regulation of Internet Service Providers for the actions of their users, the review process of the *Digital Agenda Act* will be undermined.

He adds:

*'I think that it is also important to emphasise that the agreement will not harmonise intellectual property laws between Australia and the United States. It is a very selective process. In this agreement, Australia has adopted the harsher measures*

*of the DMCA and the US Copyright Extension Act without accepting the higher standard of originality or the open-ended fair use defence of US law.'*

*'As a result, Australia will arguably have even higher standards of copyright protection than the United States.'*

Australian librarians and the users of libraries and information services need to read the full text of the agreement when it is published. In the discussion of the trade agreement in the media, intellectual property considerations are swamped by an examination of the impact on sugar, wheat, beef and other commodities.

And this brings us to Robert Zoellick.

Mr Zoellick is the US trade representative who has done an excellent deal for the United States government. He has consistently been praised by Jack Valenti of the Motion Picture Association of America and by the US Secretary of State Colin Powell for advancing US economic interests in bilateral trade deals. After the failure of the United States to entice South American countries into a bilateral trade deal, Zoellick and his team have captured a little prize in getting us to sign on to a copyright protection agenda which is tougher than the WIPO standard. The United States strategy

in getting individual countries to sign up to bilateral trade agreements ensures that US interests dominate future multi-lateral trade discussions. Mr Zoellick works effectively for those interests.

#### **What next?**

The debate on how Australian interests are served will begin when the full text of the agreement is published. The Minister and his parliamentary secretary De-Anne Kelly and government departmental representatives will hold public consultations and meetings with business and with state governments as promised.

The Joint Parliamentary Standing Committee on Treaties will examine the agreement and may also hold public hearings before reporting to the Parliament. The Senate will have a crucial role.

Finally the trade deal will be an election issue in both countries this year. Terms favourable to the other party have been struck down by the US Congress in the past, in response to local lobbying. The timing of our election is unknown and may precede the US presidential election in November, in which case Australian voters will not know if the trade deal terms that we support or reject and the concessions we have made will secure the support of American voters. ■

## Looking for more quality time at work?

Whether it's letting your colleagues know about new journal issues or providing a virtual library 24 / 7...

Softlink Liberty 3 will make everything easier



- ✓ fully web based
- ✓ automatic SDI alerts by email
- ✓ easy to use
- ✓ full-text searching throughout
- ✓ flexible web browser interface



The professional library management solution for professional librarians.

Discuss your library needs with us today, call 1800 777 037.

**Softlink**  
AUSTRALIA

visit us at [www.softlink.com.au](http://www.softlink.com.au)