



AUSTRALIAN DIGITAL ALLIANCE

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Ms Elizabeth O'Shea  
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Information Technology and the Arts  
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CANBERRA ACT 2601

Dear Ms O'Shea

**Australian Digital Alliance Submission on the  
Duration of Copyright in Photographs**

Please find attached the submission of the ADA on this matter. We welcome the opportunity to comment.

We believe that there are two principal issues here: (i) the extension of the duration of copyright in photographs to the life of the author (the photographer); and (ii) the making of such an extension retroactive.

While (i) will cause difficulties for many users of photographs in Australia, particularly those who are engaged in making derivative works such as multimedia, it is (ii) that we particularly oppose. An unqualified retroactive extension of the duration of copyright in photographs will result in an arbitrary and unjust law that will ultimately only harm Australia's creative industries.

The ADA asks you to consider our submission and, in particular, we ask you to reject full retroactivity.

Yours sincerely

Nick Smith  
Executive Officer  
Australian Digital Alliance

## **SUBMISSION OF THE ADA ON THE PROPOSED EXTENSION OF THE DURATION OF COPYRIGHT IN PHOTOGRAPHS**

We propose to address this issue in several parts: (1) the actual extension of copyright protection itself; (2) the making of such an extension retroactive; and (3) the differing perspective of some Australian libraries.

### *(1) Extension of the Duration of Copyright Protection*

The ADA understands the attraction of treating photographer-authors the same as other types of authors and appreciates the obligations imposed by the World Intellectual Property Organisation (WIPO) Copyright Treaty (WCT). However, ultimately the test for such an extension of copyright protection is whether such a change is in the greater public interest.

### The Protection of Photographs as 'Artistic Works'

Although photographs have long been recognised as an artistic work, they contain an essential difference from other types of artistic works such as paintings or drawings. Not wishing to take anything away from the skill of the photographer, a photograph captures an image from the real world in a way that other artistic works do not. As such, photographs play an enormously important role in recording our history and current events.

A number of the world's most memorable photographs have been captured by amateur photographers who happened to be at the right place at the right time. Again, this is not to suggest that photographers possess less skill than other artists but rather that there is a competing policy concern that applies to photographs but not other types of artistic works.

It must be remembered in the context of this competing concern, that Australia's protection of photographs as artistic works is already quite generous. This country protects all images made through a 'process similar to photography' whether they are Olive Cotton photographs, holiday snapshots or even, theoretically at least, humble photocopies (the definition of 'photograph' includes a 'product of xerography').

In contrast to this, according to Sam Ricketson in his text *Intellectual Property – Cases, Materials and Commentary*: 'Many national copyright laws demonstrate a reluctance to extend protection on such an indiscriminate basis. For example, under German law only photographs which constitute 'personal intellectual creations' are protected as artistic works and lesser levels of (non-copyright) protection are given to photographs of a documentary nature and "simple snapshots"'.<sup>1</sup>

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<sup>1</sup> S, Ricketson. *Intellectual Property – Cases, Materials and Commentary*, p. 158  
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While the ADA would not necessarily advocate splitting Australia's copyright protection for photographs in this way, we submit that, for a copyright regime which automatically protects images regardless of their level of originality or creativity, 50 years from the date of publication is a perfectly satisfactory duration.

#### Effect upon Markets related to Photography

It is important to consider the possible effect upon the markets that are dependent upon copyright in photographs (ie, the making of photographs and their use in 'downstream' industries such as education and multimedia).

In contrast to many other creative industries, photography has a relatively low barrier to participation. While photography certainly can be a labour and capital intensive process (depending upon such things as equipment and location), a single photographic artistic work is typically much easier to produce than a film, a novel or an oil painting, for example. For this reason, an increase in the duration of copyright protection is unlikely to result in any additional incentive to photographers. 50 years from publications is still a long period of protection, despite its relative shortness compared to other periods of protection.

It is useful to reflect upon a study undertaken by the US Copyright Office on the duration of copyright in the 1950's<sup>2</sup>. The USCO studied the rate of renewal for all copyright works. Under US copyright law, copyright owners first had to register with the USCO to receive copyright protection for 28 years; they could then renew their registration with the USCO to receive a second 28 years. In 1954, just 0.3% of owners of copyright in photographs found it worthwhile to renew for a second 28 year period. It is important to note that this figure also excludes all photographs that were eligible for protection but were not registered in the first place (such as family portraits etc).

So that while an increase in protection is unlikely to increase the incentive to photographers, such an increase is likely to have an impact upon industries dependent upon the use of photographs. It is common for multimedia products, for example, to use hundreds and even thousands of images in a single work. Because of the opportunities afforded by new technologies, 'downstream' use of photographic images is greater than at any other time in history.

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<sup>2</sup> Guinan, Duration of Copyright, Append. A & B, Copyright Law Revision Study No. 30 (1957), reprinted in 1 Studies on Copyright 473 (1963).

Extension of the period of protection will harm industries based upon new technologies by greatly slowing the transfer of photographic works into the public domain, increasing costs for new media producers.

Creative industries based around new media are currently in the early stage of development as the world rapidly moves from analogue to digital. Such a radical alteration of the regulatory environment at this point in time could cause considerable harm.

#### Australia's International Obligations

Australia is still in the early stages of considering a possible accession to the WCT. If we decide that we should sign this Treaty then we are obliged to progress appropriately to ratification, ie, implementation of the Treaty in domestic law.

While the ADA appreciates the Government's extensive consultation on all matters relating to this Treaty, we wish to emphasise that there is no pressing need to implement obligations under this Treaty. It is preferable that Australia properly consider all ramifications of the WCT before implementation. It is certainly not necessary to contemplate amending the Copyright Act 1968 in advance of accession to this Treaty.

#### Untraceable Copyright Owners

The ADA is also concerned that the period of protection for a copyright work might be extended further without anything being done to address the problem of untraceable copyright owners. Copyright is intangible and therefore it is difficult to determine its scope, owner or duration. Such a degree of uncertainty is not tolerated with respect to other types of property (real estate and motor vehicles must be registered) or even with respect to other intellectual property (patents, trademarks and designs similarly must all be registered). Why is such an important form of IP subject to such a high level of uncertainty?

The ADA urges the Government to consider the recommendation of the Copyright Law Review Committee's Report on the Copyright Tribunal with respect to the granting of licences for the use of copyright material where the owner is unknown or untraceable.

#### Unpublished Photographs

The ADA does however support one aspect of the proposed change to the period of protection, namely the end of perpetual copyright for unpublished photographs taken after 1 May 1969. There is no reasonable rationale for the perpetual protection of copyright works of any description.

#### *(2) Retroactivity*

If the Government were to go ahead and extend the duration of copyright protection, the ADA is opposed to making such a change retroactive. In

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particular, ADA is strongly opposed to applying this new duration to pre-1968 photographs.

Currently, copyright in photographs last 50 years from publication except for photographs taken prior to 1 May 1969 where copyright lasts 50 years after the calendar year when the photograph was taken. This means that all photographs taken prior to 1 January 1950 are in the public domain and may be freely used.

#### Anomalies Caused by Retroactivity

If all photographic works that are still in copyright were to have their periods of copyright protection greatly increased, this would lead to an anomalous and unjust situation.

Consider this hypothetical example. Assume that the new term of protection is passed and becomes effective early next year 2000. In late 1950, a 22-year old free-lance photographer spends a week (28 December 1950 to 3 January 1951) taking photographs of the construction of the Snowy Mountains Hydro-Electric Scheme. The photographs he took on Thursday, Friday, Saturday and Sunday are now in the public domain and may be used freely. By contrast the photographs he took on Monday, Tuesday and Wednesday are still in copyright. Because the photographer is still alive today, these photographs will not enter the public domain until 2050 at the earliest. If this photographer should live to be 100 (ie, he dies in 2028), then copyright will not expire until 2078.

The proposed retroactivity will mean that photographs taken just days or weeks apart can easily have vastly different periods of protection.

#### Effect Upon Markets Related to Photography

Making the period of protection retroactive must necessarily have no effect on the incentive for photographers to produce more and better photographic images as the acts of creation have already occurred. However, the influence upon the market for downstream uses for photographs will be greatly affected. Obviously the existence of suitable images in the public domain is a great boon to new media producers. The retroactive elimination of this valuable resource may harm Australia's participation in the new economy.

#### Australia's Potential International Obligations

Australia is not presently obliged to retroactively extend the period of protection for photographs as it has not signed the WCT. However, if Australia were to accede to the WCT, the ADA questions whether it requires such retroactivity.

As the discussion paper points out, the WCT, article 13, requires contracting parties to apply Article 18 of Berne (requiring the new level of protection to be

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extended to all works currently protected by copyright). However, Article 18 of Berne also contains paragraph (3) which says:

‘The application of this principle [ie, retroactivity] shall be subject to any provisions contained in special conventions to that effect existing or to be concluded between countries of the Union. In the absence of such provisions, the respective countries shall determine, each in so far as it is concerned, the conditions of application of this principle.’

As there are no ‘provisions contained in special conventions’, it is up to each country to determine the application of this principle. This mechanism has been used since the 19<sup>th</sup> century by new and current members of the Berne Union to minimise harm to third-parties upon accession or the introduction of a new right.

Ricketson observes that:

‘the provisions [the provisions of paragraph (3)] leave considerable latitude to countries as to how they will implement the principle of retroactivity, enabling them to safeguard any rights which have been acquired in the previous situation where no legal protection applied...In consequence, wide differences are to be seen in the provisions adopted by member countries.’<sup>3</sup>

It is important to remember that this latitude exists in the relevant treaties and for this reason there is no need for Australia to implement retroactivity *carte blanche* in such a way as to harm Australia’s national interests.

The previous extension of copyright in photographs was not accompanied by retroactivity. When Australia’s period of copyright protection for photographs was increased from 50 years from when the photograph was taken to 50 years from publication in 1968 with the enactment of the current Act, the new period of protection was *not* retroactively applied to then existing photographs. It is unclear why it is currently assumed that there is no option except to apply such an extension retroactively.

### *Japan*

Furthermore, it is worth noting that while Japan has already ratified the WCT, it has declined to extend the period of protection for photographs. According to a Japanese intellectual property lawyer in contact with the ADA:

‘Japan had the same discussion after the amendment from “50 years after taken/published” to “50 years after the photographer’s death.” The subcommittee 1 of the Copyright Council issued last December a report to the

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<sup>3</sup> Ricketson, S.

Agency for the Cultural Affairs (governmental agency responsible for copyright law), recommending to deny the request by photographers, at least for the moment. (Unfortunately, available only in Japanese)'

'The majority view of the subcommittee was that the retroactive effect - would risk legal certainty and cause confusion in the use which has been and are being made based upon the expiration; and - would not provide incentive for creating new photographs for those the copyright of whose previous works has expired, nor lead to cultural developments. The subcommittee may revisit the issue if there arises a situation where leaving the loss by not providing the retroactive effect would be considered truly unjust.'

The ADA strongly urges the Government to reject the retroactive extension of the period of copyright protection for existing photographs.

### *(3) The Different Perspective of Some Australian Libraries*

It should be noted that not all Australian libraries oppose the proposed new term or its partial retrospective application. Some libraries, whose collection of photographs is 'photographer-based' (ie, works have been donated by photographers or their estates) believe that it is easier to determine the period of protection for photographs by using the lifespan of the author rather than the date of publication. In a number of instances, the date of publication is difficult to ascertain while the author's life-span is more readily known.

These libraries believe that the subtraction from the public domain that the additional period of protection represents would be offset by gains in administrative simplicity that they hope to achieve.

This view is not shared by libraries whose collections of images are not photographer-based but rather are based on their holdings of print publications such as newspapers etc.

However, it must be emphasised that all libraries oppose the application of this proposed new period of protection to pre-1 May 1968 photographs.

### **About the ADA**

The ADA is a coalition of public and private sector interests formed to promote balanced copyright law and provide an effective voice for a public interest perspective in the copyright debate. ADA members include schools, universities, consumer groups, major cultural institutions, IT companies, scientific and other research organisations, libraries and individuals.