AUSTRALIAN DIGITAL ALLIANCE

Korea-Australia Free Trade Agreement:

Submission to the Joint Standing Committee on Treaties (JSCOT) from the Australian Digital Alliance

Executive Summary

The Australian Digital Alliance (ADA) thanks the Joint Standing Committee on Treaties (JSCOT) for this opportunity to comment on the Korea-Australia Free Trade Agreement (KAFTA).

This submission is solely concerned with the Intellectual Property provisions of KAFTA, with particular focus on the copyright provisions. While we express no opinion on the overall benefit of KAFTA to the Australian population, we have some serious reservations about the IP Chapter. In particular we are concerned that KAFTA:

- **extends our international obligations;**
- **is being used as a means to change domestic policy;**
- **restrains our flexibility to adjust copyright policy in the future;**
- **lacks balance, or even a recognition that the public interest may not always align with the rigid enforcement of IP rights;**
- **is not based on any economic evidence or cost benefit analysis; and**
- **ignores recommendations from previous committees and reviews.**

Despite repeated recommendations from Parliamentary Committees[1], the Productivity Commission[2] and most recently a report commissioned by IP Australia[3] about the need to consider a cost benefit analysis when negotiating intellectual property (IP) in trade agreements, no economic or other analysis of the IP chapter in KAFTA has been provided, and there is no evidence that any has been conducted. Such analysis is even more essential when, as is the case with KAFTA, it appears that the treaty is being used to change domestic law (overturning the High Court decision in *Roadshow Films Pty Ltd v iiNet*[4]) and to extend our international obligations.

About the Australian Digital Alliance

The ADA is a non-profit 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 universities, schools, consumers, galleries, museums, IT companies, libraries, archives and charitable organisations.

Whilst the breadth of ADA membership spans various sectors, all members are united in their support of copyright law that appropriately balances the interests of rights holders with the interests of users of copyright material.

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[1] See for example Senate Select Committee on the Free Trade Agreement between Australia and the United States of America *Final Report* (2004) at 2 97; Joint Standing Committee on Treaties *Report on the Review into Treaty tabled on 21 November 2011* (ACTA) at 3.41

[2] Productivity Commission Research Report *Bilateral and Regional Trade Agreements* at 14.5

[3] Harris, T., Nicol, D., Gruen, N. 2013 *Pharmaceutical Patents Review Report*, Canberra recommendation 3.2

[4] Roadshow Films Pty Ltd v iiNet Ltd [2012] HCA 16 (20 April 2012)

Extension of international obligations

The IP chapter in KAFTA binds Australia to new international obligations. The National Interest Analysis (NIA) and Regulatory Impact Statement (RIS) make no mention of this. The RIS simply claims:

> KAFTA reinforces Australia and Korea's existing rights and obligations on intellectual property (IP) under the WTO Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS). The IP Chapter in KAFTA builds on TRIPS with provisions for the protection and enforcement of IP equivalent to that provided under AUSFTA[5].

As well as the TRIPS and AUSFTA agreements noted in the RIS, Australia is subject to a number of other multilateral and bilateral IP commitments, making a complicated field of overlapping commitments. To our knowledge however, in none of the previous agreements do the following appear:

- A requirement to 'provide measures to curtail repeated copyright and related right infringement on the Internet'
- Copyright protection for broadcasts
- 50 year copyright term for broadcasts
- Criminal sanctions against recording or distributing recordings made in an 'exhibition facility open to the public'

This is not an exhaustive list, further obligations and constraints are noted in the thorough assessment contributed by Associate Professor Kimberlee Weatherall.[6]

- **Internet infringement**

The requirement to 'curtail repeated infringement' is novel and unclear, with neither the NIA nor RIS making explicit reference to its intended effect. While the lack of specificity gives commendable leeway to apply this in an appropriate manner, the lack of any qualifying counter-balance (such as a requirement for commercial scale or requirement that it doesn't disrupt legitimate activity[7]) could encourage an overly restrictive interpretation, discussed further below.

This requirement is particularly problematic as under Australian law many common, non-commercial actions infringe copyright. Posting memes to facebook or forwarding an email can infringe copyright, even when there is no commercial harm or gain. Innovative uses, such as hosting a search engine or cloud computing, are not adequately covered by exceptions. Korea, in contrast, has a flexible 'fair use' type exception which will lessen the impact of this requirement. While the Australian Law Reform Commission (ALRC) has recently recommended updating the *Copyright Act* to include something similar,[8] the progress of those recommendations is unclear. Harmonisation of our exceptions to take advantage of fair use, already enjoyed by the USA and Korea, would lead to a more balanced implementation of our IP commitments, lessening the detrimental impacts on the

[5] Korea-Australia Free Trade Agreement Regulation Impact Statement 4 February 2013 at 80

[6] Kimberlee G Weatherall 2014. "Submission on the IP Chapter of the Korea-Australia Free Trade Agreement" The Selected Works of Kimberlee G Weatherall Appendix A

[7] See for example the more balanced approach in ACTA 27 2 'These procedures shall be implemented in a manner that avoids the creation of barriers to legitimate activity, including electronic commerce, and, consistent with that Party's law, preserves fundamental principles such as freedom of expression, fair process, and privacy'.

[8] ALRC *Copyright and the Digital Economy* ALRC Report 122

education sector, cultural institutions, tech companies, consumers and organisations assisting the blind and visually impaired. A recommendation to introduce fair use[9] was made by JSCOT following the signing of AUSFTA.

- **Broadcasts**

Copyright policies for broadcasts are in a state of flux. Discussions over a legal instrument at WIPO level are continuing in the Standing Committee on Copyright and Related Rights (SCCR), and the ALRC recently re-examined some aspects of the domestic framework in the *Copyright and the Digital Economy* inquiry. Notably the ALRC declined to make firm recommendations on broadcast issues, noting that it was an issue that should be decided 'in developing media and communications policy, and in responding to media convergence'. While KAFTA is consistent with current domestic legislation, it locks us into one approach to broadcasts at an international level, an approach that may become less tenable as media convergence progresses. ADA members, especially educational institutions and consumers, may be disadvantaged by a lack of flexibility in this area in the future, and would be happy to provide further information if required. The extension of copyright term for broadcasts (as an international commitment) may have a detrimental effect on preservation efforts in the future, a particular concern for cultural institutions.

- **Camcording**

The scope of article 27 is unclear. It appears to be a 'camcording' provision, designed as an extra enforcement remedy against making copies of films in movie theatres (conduct that is already an infringement of copyright, and criminalised when done on commercial scale in Australia[10]). The article on its face mandates 'criminal procedures and penalties' against 'any person' with no reference to commercial scale. However the footnote provides that a

> 'party may satisfy the obligation in this paragraph by providing for criminal procedures and penalties where the infringing conduct occurs on a commercial scale'.

If the obligation is solely for commercial scale infringement, it would be preferable for that to be reflected in the article itself, not merely a footnote. Additionally it is unclear why we need further criminalisation to apply to one subset of copyright infringement which is already adequately protected in our domestic legislation.

Changes to domestic legislation

The Regulatory Impact Statement notes (at 118) that implementation of KAFTA will require changes to the *Copyright Act 1968*, however it provides **no further detail on what those changes would be or any analysis of their effect**. In the section on intellectual property (80-82) it does not even note the necessity for changing domestic legislation.

The National Interest Analysis tabled with KAFTA contains the following

> Consistent with Australia's existing obligations in the Australia-US and Australia-Singapore FTAs, and to fully implement its obligations under KAFTA, the Copyright Act 1968 will require amendment in due course to provide a legal incentive for online service providers to cooperate with copyright owners in preventing infringement due to the High Court's

[9] Joint Standing Committee on Treaties *Report 61 the Australia-United States Free Trade Agreement* [2004]

[10] See *Copyright Act 1968* ss101, 116, 132AI, 132AL

decision in Roadshow Films Pty Ltd v iiNet Ltd[11], which found that ISPs are not liable for authorising the infringements of subscribers[12].

It is unclear from the wording whether the belief is that we require legislative change to comply with AUSFTA, the Singapore FTA and KAFTA, or whether it is just KAFTA that is spurring the legislative change. Either way, the assertion that legislative change is required is not supported.

If it is the first contention, that is that all three trade agreements require this legislative change, we presume (as both the RIS and NIA are silent on this point) that it is in response to the obligations to provide 'legal incentives' for 'service providers[13]' to 'cooperate with copyright owners in deterring the unauthorised storage and transmission of copyrighted materials'. [14] This provision in the agreements is coupled with a 'safe harbour' provision, protecting service providers with limitations on remedies.

There is nothing on the face of these provisions that is inconsistent with the High Court's decision in *Roadshow Films Pty Ltd v iiNet Ltd* (iiNet). Though iiNet was held not to be liable for authorising the copyright infringements of its users, the High Court made it clear that the case turned on the specific fact scenario, and did not propound a generalised principle that ISPs would never be found to authorise their subscribers' infringements. This is consistent with US law. There is no evidence in either the NIA or RIS to suggest that the USA's secondary liability is stricter than Australia's. Neither has there been protest against our implementation of AUSFTA, nor has Australia been added to the US Trade Representative's annual *Special 301 Report*[15] which details countries the USA considers have deficient IP implementation.

Through its extensive enforcement provisions (including authorisation provisions) and the safe harbour scheme, the *Copyright Act 1968* complies with the requirement to provide 'legal incentives' to 'service providers'.

If it is the second interpretation, that KAFTA itself requires this domestic change, it raises questions as to the appropriateness of negotiating this provision. We would further presume that it is in response to article 13.9.27, 'Each Party shall provide measures to curtail repeated copyright and related right infringement on the Internet'.

We raised issues above regarding the fact that, under Australian law, many non-commercial, non-harmful acts constitute infringement, not simply 'piracy' as it is commonly understood. However, that matter aside, Australia already has many provisions that can be used to curtail online copyright infringement. All infringement is a civil matter and rightsholders can enforce that right.[16] Further, commercial scale online infringement is protected against via additional criminal sanctions,[17] there are provisions to facilitate actions brought by rightsholders,[18] and ISPs and other service providers

[11] Roadshow Films Pty Ltd v iiNet Ltd [2012] HCA 16 (20 April 2012)

[12] *National Interest Analysis* [2014] ATNIA 8 Free Trade Agreement between the Government of Australia and the Government of the Republic of Korea at 17

[13] In KAFTA this is restricted to 'online service providers' and the safe harbour provisions are similarly constrained. While the safe harbour scheme is currently restricted to ISPs in Australia, this is currently under review by the Attorney-General's department and several submissions were made to extend the safe harbour protections to the wider 'service providers' allowed under AUSFTA. Any implication that KAFTA would restrict the classes of service providers allowed to be provided safe harbour protection under domestic legislation should be resisted.

[14] KAFTA 13.29, AUSFTA 17.11.29

[15] Office of the United States Trade Representative *2014 Special 301 Report*

[16] *Copyright Act 1968* s115

[17] *Copyright Act* s132AC

may potentially be held liable for authorisation of copyright infringement.[19] As such we cannot see that this provision in KAFTA necessitates the legislative changes foreshadowed in the NIA and RIS. Furthermore we note again that the exact nature of those legislative changes is not detailed, making a more comprehensive analysis of their impact impossible.

The appropriate response to internet piracy is a policy area that should be discussed at national level, due to its impact on consumers and key industries. Indeed, in discussions to date, the ADA has emphasised that we would hope any measures to internet piracy:

- are effective and proportional;
- recognise that consumers are stakeholders and is the result of a process that includes the input of consumer representatives;
- ensures proper implementation of the safe harbour regime in accordance with our international obligations (including extending it to cover universities, schools, libraries and internet intermediaries); and
- includes a commitment to increasing the opportunities for all Australians to access cultural works legally and, where commercially provided, at a reasonable price.

We would strongly caution against any of these matters being discarded in haste to conclude and ratify an international trade agreement.

Restraint on domestic copyright policy reform

Domestic copyright policy is currently under review. There are three reports awaiting response, the ALRC's *Copyright and the Digital Economy*, and the Attorney-General's Department (AGD) reviews into Technological Protection Measures (TPMs) and Safe Harbours. Additionally the Attorney-General has announced his intention for additional measures to combat internet piracy, and commitment to a 'thorough and exhaustive exercise in law reform' at the end of which 'the Copyright Act will be shorter, simpler and easier to use and understand'.[20]

Preserving space for these reforms to be made at national level is essential, and each time Australia signs up to another set of slightly different international obligations the space in which reforms can be successfully made is constrained. While it is pleasing to see some references to potential future reforms (such as the explicit recognition of 'fair use' recently recommended by the ALRC inquiry) it is concerning to see many new provisions of unclear and uncertain scope.[21]

KAFTA further locks in provisions that are bad policy. The copyright term extension (to 70 years after death of author) is a net cost to the Australian economy[22] and causes great headaches for Australian cultural institutions striving to preserve our heritage. The restriction on formalities and the pre-empting of a term for unpublished works[23] rule out many options that are being considered

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[18] *Copyright Act 1968* s115

[19] See for eg Universal Music Australia Pty Ltd v Sharman License Holdings Ltd [2005] FCA 1242; Cooper v Universal Music Australia Pty Ltd [2006] FCAFC 187

[20] Attorney-General, the Hon George Brandis *Address at the Opening of the Australian Digital Alliance Fair Use for the Future – A Practical Look at Copyright Reform Forum* February 2014

[21] See Kimberlee G Weatherall 2014. "Submission on the IP Chapter of the Korea-Australia Free Trade Agreement" The Selected Works of Kimberlee G Weatheral Appendix A at 12

[22] Dee, Dr Phillipa *The Australia – Us Free Trade Agreement An Assessment* [2004] Canberra at 22 estimated the net cost in royalties to be $88 million per year

[23] KAFTA 13.5 sets the terms for unpublished works calculated other then on the death of the author to be 70 after creation, unpublished works calculated on the life of the author will be compelled to be 70 years after author's death.

around the world in response to the growing orphan works problems. As a quick example, the National Library estimates that its collection holds over 2 million unpublished works[24], of which over half are orphans, and other libraries, museums, archives and galleries all face similar problems.

Lack of balance and protection for consumers

In its review of the Anti-Counterfeiting Trade Agreement (ACTA), JSCOT noted

> A principal focus of this Committee in assessing treaties has been the effect a treaty has on members of the community, regardless of whether those effects are caused by legislative change or not. The Committee would like NIAs to reflect on all possible effects on members of the community, including those that occur for reasons other than legislative change.[25]

The IP Chapter opens by noting the 'importance of adequate and effective protection of intellectual property rights' with none of the balancing language included in our other multilateral and bilateral agreements. For example even the trade treaty directed primarily at IP enforcement, ACTA, provides:

> In implementing the provisions of this Chapter, each Party shall take into account the need for proportionality between the seriousness of the infringement, the interests of third parties, and the applicable measures, remedies and penalties[26].

Lack of recognition of the interests of users of copyright material, and the importance of exceptions and limitations, is particularly concerning when combined with the fact that the IP chapter is subject to an ISDS provision. While acknowledging the public interest carve-outs provided under the ISDS, they are simply not wide enough to cover the various public policy areas that may require a change to copyright settings in the future. The lack of any language recognising that intellectual property rules need to balance protection for rightsholders with legitimate public interests in promoting innovation and accessing culture and knowledge, as well as legitimate consumer concerns around areas such as privacy, may weigh towards an enforcement heavy interpretation of any disputes.

Lack of cost/benefit analysis and implementation of recommendations from previous reviews

Parliamentary Committees[27], the Productivity Commission[28], a report commissioned by IP Australia[29] and others have all made recommendations about the importance of evidence and cost/benefit analysis if IP chapters are to be included in trade deals. There have been repeated findings against assuming that provisions compliant with our current legislation would be in the national interest.

When Australia signed AUSFTA, with its comprehensive IP Chapter, the Select Committee noted that it was:

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[24] ADA/ALCC *Submission 213* to the ALRC *Copyright and the Digital Economy Inquiry* [2012] at 53

[25] Joint Standing Committee on Treaties *Report on the Review into Treaty tabled on 21 November 2011* (ACTA) at 3.41

[26] Anti-Counterfeiting Trade Agreement at 6.3

[27] See for example Senate Select Committee on the Free Trade Agreement between Australia and the United States of America *Final Report* (2004) at 2.97; Joint Standing Committee on Treaties *Report on the Review into Treaty tabled on 21 November 2011* (ACTA) at 3.41

[28] Productivity Commission Research Report *Bilateral and Regional Trade Agreements* at 14.5

[29] Harris, T., Nicol, D., Gruen, N. 2013 *Pharmaceutical Patents Review Report*, Canberra recommendation 3.2

> alarmed by the lack of adequate research being undertaken prior to Australia committing itself to trade agreements. Balanced and comprehensive research on the economic, social, cultural and policy impacts of any trade treaty Australia proposes to enter into is a vital part of ensuring that there is proper scrutiny of the agreement and would contribute greatly to the quality of the public debate on these issues[30].

Meanwhile the Productivity Commission's research Report into Bilateral and Regional Trade Agreements (BRTAs) concluded that we should:

> avoid the inclusion of IP matters as an ordinary matter of course in future BRTAs. IP provisions should only be included in cases where a rigorous economic analysis shows that the provisions would likely generate overall net benefits for the agreement partners.[31]

Despite these recommendations, there is no evidence of economic analysis, or indeed any analysis of the impact of the IP Chapter in KAFTA. No particular problems Australian rights holders currently experience were identified (and indeed, Australian copyright holders are already protected by the provisions of the Korea-US Free Trade Agreement courtesy of the principles of national treatment and most-favoured nation.) Meanwhile the potential issues of extending our international obligations and constraining our domestic policy space are not analysed, despite their adverse effects on areas such as education, cultural institutions, disability services, tech and innovation sectors and consumers.

We would be happy to provide any further information that the committee would find useful.

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[30] Senate Select Committee on the Free Trade Agreement between Australia and the United States of America Final Report (2004) at 2.97

[31] Productivity Commission 2010, Bilateral and Regional Trade Agreements, Research Report, Canberra recommendation 4(b)