

AV-CC

AUSFTA

Submission No: ...189.....

Australian Vice-Chancellors' Committee
the council of Australia's university presidents
(A.C.N. 008 502 930 – A.B.N. 53 008 502 930)

29 April 2004

Ms Julia Morris
Committee Secretary
Joint Standing Committee on Treaties
Department of House of Representatives
Parliament House
CANBERRA ACT 2600
AUSTRALIA

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Australia – United States Free Trade Agreement

Dear Julia

Attached is the AVCC's submission to your committee's review of the proposed Free Trade Agreement between Australia and the United States of America (AUSFTA).

Should you have any queries about our submission please do not hesitate to contact Paul Stubing, email p.stubing@avcc.edu.au or tel. 02 62858358.

Yours sincerely

John Mullarvey
Chief Executive Officer

AVCC submission to the Joint Standing Committee on Treaties Inquiry in to the proposed Australia-United States Free Trade Agreement

The Australian Vice-Chancellors' Committee (AVCC) provides this submission on the proposed Australia-United States Free Trade Agreement (AUSFTA) with a focus on two chapters in the proposed agreement – those on services and on intellectual property. The major AVCC concerns relate to the intellectual property provisions rather than to the services chapter.

Australia's universities have a significant stake in the outcome of multilateral and bilateral trade agreements. The internationalisation of Australian higher education is one of the AVCC's four main priorities for the next decade and beyond, as laid out in our 2002 policy statement, *Positioning Australia's Universities for 2020*.

Higher education is one of Australia's major export industries, and one of its top five service exports. All Australian universities provide education services to international students whether through students coming to Australia, by distance education, or through Australian university campuses and other facilities overseas. It is therefore essential for universities that they be able to operate in an open, fairly regulated market both internationally and in Australia.

Universities are also Australia's powerhouse of research and innovation. Research and innovation require an effective balance of reward for discoveries made and the capacity to take the work of others and build on it to make further discoveries. One part of this framework is copyright law, which must support that balance, not weight it one way or the other.

1. Services

Overall impact

On analysis, the services provisions of the Agreement provide for little substantive change in the operation of university education in both Australia and the United States.

This is due to both countries operating largely open regulatory environments, which in Australia, is set out in the National Protocols for Higher Education Approval Processes. These set down the process for assessing both non self-accrediting institutions applications for approval of courses and for applications to become a university or other self-accrediting institution. Protocol 2 relates to applications from international institutions which sets out criteria for assessment consistent with those applying to local institutions with the specific requirement that they operate consistent with Australian expectations and standards.

Of major importance to the AVCC is the exclusion of Government grants and subsidies from the provisions of the Agreement such that Government's in both countries continue to determine how and who they fund. This means that the recently

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enacted the *Higher Education Support Act 2003* can continue to operate without the need for change.

The AVCC also notes the commitments in the education side letter spelling out that the Agreement does not intrude on various higher education matters.

There are in addition other matters from the services chapter that we comment on below.

a. Recognition of qualifications

Australian educated and trained professionals in many fields often experience considerable difficulty in having their qualifications and experience acknowledged and accepted by US professional organisations, institutions, and licensing bodies. These restrictions tend to be enshrined in professional, state or federal regimes. There are also similar issues in reverse for US graduates gaining recognition in Australia.

It is in the interests of encouraging free movement between both countries and opening up opportunities for Australian graduates as well as for international students graduating from Australian universities to ensure effective recognition arrangements while retaining essential requirements for practice.

The importance of this issue has been acknowledged in the AUSFTA by the inclusion of provisions for a Working Group on Professional Services. The Working Group will examine issues such as recognition of qualifications, licensing and certification of professionals, and professional standards; however, it will not report on these issues for two years after the AUSFTA comes into force, and its recommendations will not be binding on either party to the AUSFTA, or on professional associations in either the US or Australia.

The AVCC will seek to contribute the Working Group on Professional Services. The higher education sector of both countries should be represented on the Working Group.

b. Access to the US market for Australian higher education providers

The agreement does not automatically remove all barriers to the participation of Australian education providers in the US market – or vice-versa. While national level issues can be addressed, state or territory legislation, regulations and standards are not affected by the agreement.

The AUSFTA does, however, commit the US Government to “a review of measures affecting cross-border trade in the higher education sub-sector for the purpose of providing greater transparency with respect to 18 specified American states. According to DFAT, the named states represent a cross-section of the US in terms of population, economic activity, and business and industrial profile. They also appear to represent the states with the largest public university systems. This review is to be conducted within three years of the AUSFTA coming in to effect, but it does not oblige to US Government – or the relevant states – to act on the findings of the review.

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Given the lack of barriers to US institutions entering the Australian market it is important that this review is thorough and leads to reductions in barriers to external entrants to the US market.

2. Intellectual property

The AVCC's main concern with the AUSFTA is its treatment of copyright. The AVCC sees copyright as a balance between the interests of copyright owners and users, with the universities being both. Australia's current copyright arrangements have been reasonably successful in achieving this objective, to the extent that many other countries consider our Copyright Act as a benchmark of effective statute. The USA Digital Millennium Copyright Act on the other hand, while similar to Australia's, is considered deficient in many respects and inferior to Australia's legislation. Yet the USA wants Australia to change its legislation so that it more closely aligns with the DMCA. The AVCC would argue that if anything the USA should alter its DCMA so it more closely aligns with our Copyright Act.

The Australian Government included the two statutory licences in the Copyright Act to give the education sector reasonable access to third party copyright material without having to necessarily obtain permission from the copyright owners. The education sector pays copyright owners a fair remuneration for this access, and in the case of the universities this amounts to more than \$20 million per annum. The Government put these licences in place because it rightly considered it to be in the national interest to do so – to accommodate and stimulate excellence in educational and research endeavour. This must continue to be the Government underlying objective if Australia is to achieve its economic and social objectives.

However, the AUSFTA is very much pitched at the interests of copyright owners at the expense of users to such an extent that it alters the balance mentioned earlier very much in favour of owners. There is no surprise that the USA would want to do this because most of the international publishers and major copyright owners are multinational organisations based in the USA, and combined they have been a formidable lobby both in the USA and internationally in changing the balance to suit owners. The so-called harmonisation outcome of the AUSFTA will benefit the USA and EU based multinational publishers but Australia will lose out – and the main losers will be the users of copyright material, notably the education sector.

If the balance between owners and users is upset it is not just a question of higher costs to users. The more significant loss will be the capacity for further creation through all researchers having open access to all source materials once passed a reasonable period of protection. If copyright becomes too strong, innovation will be shackled.

The AVCC strongly submits that the sector must be exempt from many of the changes proposed in the AUSFTA in respect of copyright if Australia is to achieve its underlying objective of accommodating and stimulating excellence in educational and research endeavour. The AVCC also argues that the Government should be seeking ways to further liberalise free access to copyright material, not to restrict it and to make it even more expensive.

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The AVCC is also deeply concerned about the nominated timeframe and consulting process under which the necessary legislative changes will be effected, given the level of detail and the extent of changes needed to Copyright Act and the implications that these changes will have on the daily operations of the universities. In the rush to consolidate the AUSFTA Australia risks introducing a serious imbalance between the interests of owners and users which it has achieved under current arrangements.

It is essential that the Commonwealth Government acknowledge and support the special needs of the education sector and that the AVCC and other user parties are included in a more inclusive and extensive consultative process to be adopted by the Government.

a. Term of copyright

The most obvious of these changes is the extension of the term of copyright protection by 20 years. The extension of copyright to basically 70 years after the death of the author has been actively pursued by the EU and the USA throughout the world in the interests of copyright owners. The very reason for copyright to be embodied in statute is being overlooked and compromised for excessive pecuniary demands. Let it be clear - the purpose of copyright is to provide a monopoly rent to copyright owners so that they can earn a fair return for their efforts. It was never intended to maximise the rents that copyright owners can accrue from products that are particularly saleable. Copyright should be about achieving a fair balance between creator and user.

It is notable that Canada had retained the 50 year provision despite its free trade arrangements with the USA.

There has been no argument put forward by the USA that copyright owners are not getting a fair return such that they are discouraged from the creation of copyright material.

The extension of the copyright term in Australia comes at a cost to the Australian economy because Australia is a net importer of third party copyright material. As noted earlier the universities and other institutions (such as libraries) are major consumers of copyright material.

Australia has a quite different approach to accommodating the needs of its education sector than the USA. Australia has limited "fair dealing" exemptions defined in the Copyright Act, as well as the two statutory licences mentioned earlier. The USA on the other hand has a more liberal "open ended" fair use system in its DMCA and this is underpinned by its Bill of Rights and a long history of case law. So the extension of the copyright term in the USA by 20 years a couple of years ago has had no direct effect on their education sector. But in Australia it is quite a different story in that our education institutions will now be required to pay licence fees under the statutory licences for the additional 20 years of copyright. In other words the USA education sector is not impacted by the FTA but the Australian sector is, and in a significant way.

The extension of the term of copyright means an increase in the net cost of access to copyrighted material – for universities, for libraries, and for all other users. In simple

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terms, universities and other users will now have to re-assess their copyright and information budgets. The actual increase in costs that they face is difficult to approximate – but given high demand and static funding it is likely that some trade-offs will be required.

The Government has acknowledged that some sectors of the Australian economy will not benefit from the AUSFTA. Various compensation and support packages have been mooted, to offset the impact of the AUSFTA.

The AVCC recommends:

- **that the term of copyright not be changed to maintain a suitable balance between the interests of owners and users of copyright material; and**
- **to the extent that this proposal does go ahead support must be provided to universities, libraries, research agencies and other organisations, public and private, to offset the increase in copyright costs which are a direct result of the AUSFTA.**

b. Internet services

The AUSFTA proposes environmental changes for internet service providers. These will affect the operations of universities which provide very large internet systems for their students and staff.

Universities are concerned that they do not now become subject to stringent disclosure requirements about users in the event of alleged breaches of copyright outside the existing court based process. The USA has arrangements which empower copyright owners to effect action against ISPs to release information about users outside the USA court system and any move to implement similar arrangements in Australia will be strongly resisted by the AVCC. The AVCC is also concerned about risks of “authorisation”, which the universities run in respect of any illegal actions by their students or staff, of which the universities are unaware.

The Government has proposed introduction of “Safe Harbour” provisions which the AVCC supports in principle but the detail of which have yet to be divulged.

The AVCC has addressed these matters in detail in its submission to the Attorney General’s recent Digital Agenda Review, which was conducted by Phillips Fox, a copy of which is attached.

The AVCC recommends that disclosure arrangements in respect of users continue to be a court based process and that the universities are specifically protected by any safe harbour provisions.

c. Temporary copies

The AUSFTA raises questions about the treatment of temporary copies in the electronic environment. This is an issue of particular interest to the AVCC, not least because it directly relates the common practice of caching. The AVCC supports the

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Copyright Act as it presently stands which allows for temporary copies for communications (ref s 43A). The AVCC detailed its concerns about caching in its submission Digital Agenda Review. It stated that if the Government is not minded to provide a blanket exception for caching then there is a strong case to be made for treating educational institutions as a special case for reasons which include the following:

- educational institutions undertake caching *not* for reasons of a commercial nature, but rather to ensure an efficient and effective delivery of educational services;
- because of the nature of educational use of internet material, caching by educational institutions is less likely than caching by commercial users to interfere with owners' legitimate interests or markets;
- an exception for caching will make educational institutions less susceptible to rent seeking by owners; and
- any continued restriction on the capacity of universities to engage in forward caching would impose an unreasonable cost burden on Australian universities and hamper their attempts to compete globally in the delivery of online teaching and learning.

Any arguments from owners that they should "share" in any benefit delivered by improved efficiency such as is achieved by caching is strongly rejected by the AVCC. As mentioned earlier, the AVCC notes that it has never been the case under Australian copyright law that the monopoly granted by copyright is intended to ensure to the owner a maximum economic return. The fact that copyright law could be restructured to deliver a greater economic return to copyright owners is irrelevant.

The AVCC recommends that the Copyright Act be amended to provide a non-remunerable licence to educational institutions to engage in forward or proxy caching, including mirror caching, for the educational purposes of the institution.

d. Use of circumvention devices

The AVCC is alarmed about the proposed prohibition of the use of circumvention devices as detailed in the AUSFTA. Specifically, it is concerned that the exceptions specified in the agreement do not extend to the Part VA or VB statutory educational licences contained in the Copyright Act.

Universities, along with the other educational institutions, rely on the Part VA and VB licences to reproduce and communicate third party copyright material for their educational purposes. For this right the universities pay the copyright owners a "fair" remuneration. In 2004 the universities will pay the declared collecting societies more than \$20 million in fees for these licences.

It is imperative that the universities continue to be able to exercise these statutory licences, including the right to use circumvention devices where technological systems prevent them from exercising this right.

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The AVCC recommended to the Digital Agenda Review, and it restates in this submission, that there is no need amend the Copyright Act as it presently stands in respect of use of circumvention devices.

3. Conclusion

In conclusion, the major issues for the AVCC in the Agreement relate to the proposed changes to Australia's copyright regime. It is essential that before any of these provisions are agreed to they are fully analysed to assess their impact and there where judged useful that there be appropriate safeguards for the interests of education providers in using copyright material effectively for the education of Australian students.

In summary, the main points of our submission are:

- that the services chapter poses no significant issues of concern to Australia's universities;
- that it is important that the proposed discussions concerning recognition of professional qualifications and to review US State laws concerning the approval of international education providers are carried through effectively;
- that copyright is a question of balance between the interests of owners and users of copyright material;
- that the Government ensure that it involves copyright users extensively and effectively in the consultative process leading to any changes to copyright law;
- that the term of copyright not be extended;
- that if the term of copyright is extended that the Government provide relief to universities and other major users of copyright materials;
- that disclosure requirements applying to internet service providers are set in court based procedures, and that "safe harbour" provisions extent to all universities;
- temporary copying arrangements are not change, except in respect of clarifying that caching for educational purposes should be a specified exception; and
- that current arrangements for the use of circumvention devices should continue.