

**A SUBMISSION TO THE JOINT STANDING
COMMITTEE ON TREATIES**

**THE AUSTRALIA-CHILE FREE TRADE AGREEMENT 2008:
INTELLECTUAL PROPERTY AND DEVELOPMENT**

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“A major concern of Labor Senators is that Australia entered into the Intellectual Property (IP) obligations of the Agreement in a manner that cut across established processes for copyright law reform and which did not appear to be part of a strategic vision of intellectual property.”

Labor Party Senators 2004

“The Intellectual Property chapter locks in Australia and Chile’s current standards of intellectual property protection for patents, trademarks, geographical indications and copyright, including through appropriate enforcement mechanisms”

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“The public domain is of crucial importance for researchers, academics, teachers, artists, authors and enterprises, which require a rich base of content for their new creations, as well as for those institutions, the function of which is to preserve or disseminate knowledge, such as universities, research centers, libraries, information services, archives and museums.”

**Submission of the Government of Chile to the
World Intellectual Property Organization.**

“We do not want our trade representatives to negotiate on their own agreements that require changes in domestic copyright laws and then present the agreement after signature to the legislature as a fait d’accompli.”

William Patry, copyright commentator

EXECUTIVE SUMMARY

I am a senior lecturer and the director of Higher Degree Research at the Australian National University College of Law based in Canberra, Australia. I have a BA (Hons) and a University Medal in literature, and a LLB (Hons) from the Australian National University, and a PhD in law from the University of New South Wales. I am an associate director of the Australian Centre for Intellectual Property in Agriculture (ACIPA). I am a member of the Copyright and Intellectual Property Advisory Group of the Australian Library and Information Association, and a director of the Australian Digital Alliance. I am the author of two books, *Digital Copyright and the Consumer Revolution: Hands off my iPod*, and *Intellectual Property and Biotechnology: Biological Inventions*, and the editor of the collection, *Patent Law and Biological Inventions*. I have also published three book chapters and thirty-eighty refereed articles. This submission to the Joint Standing Committee on Treaties is made in a personal capacity. I would like to thank the ANU College of Law Director of Law Reform and Social Justice, Associate Professor Simon Rice, for his comments on the submission.

In the following submission, I make a number of arguments in respect of the Intellectual Property Chapter of the *Australia-Chile Free Trade Agreement 2008*:

- 1. The Australian Parliament should honour and implement its previous commitments to improve the process for the negotiation, evaluation, and adoption of international trade agreements relating to Intellectual Property.**
- 2. The Australian Parliament should implement its past recommendations in relation to the substantive reform of Australia's intellectual property laws, so as to mitigate and contain the harms caused by "TRIPs-Plus" agreements.**
- 3. The Intellectual Property Chapter of the *Australia-Chile Free Trade Agreement 2008* should not further "lock in" Australia and Chile's current standards of intellectual property protection for patents, trademarks, geographical indications and copyright. Instead, any agreement between the two**

countries should seek to take full advantage of the flexibilities allowed under international intellectual property law.

4. The Intellectual Property Chapter of the *Australia-Chile Free Trade Agreement 2008* should be subject to a comprehensive assessment of its economic, social, and political costs and benefits, by an independent assessor, such as the Productivity Commission.

5. The purposive statement of the *Australia-Chile Free Trade Agreement 2008* is biased and skewed towards intellectual property rights-holders. It should be revised in line with the broad statement of policy objectives in the *TRIPS Agreement 1994* and the World Intellectual Property Organization Internet treaties.

6. The *Australia-Chile Free Trade Agreement 2008* should not further entrench TRIPS-Plus standards in respect of copyright law. The Australian and the Chilean Governments should take advantage of the full flexibilities permitted in respect of copyright law under the allowable exceptions under international intellectual property. In particular, it would be advised to adopt a flexible, open-ended defence of fair use.

7. The *Australia-Chile Free Trade Agreement 2008* should not provide further reinforcement for the protection of well-known trade marks. It would be worthwhile for both the Australian and the Chilean Governments to adopt a general defence of fair use in respect of well-known and famous trade marks.

8. The *Australia-Chile Free Trade Agreement 2008* requires safeguards to facilitate access to essential medicines, and preventing “evergreening” of pharmaceutical drug patents. The Australian Government (and the Chilean Government) should provide a broad defence of experimental use, and a broad defence in respect of research into pharmaceutical drugs. The Australian Government needs to implement the *WTO General Council Decision 2003* to allow for the export of pharmaceutical drugs.

9. The *Australia-Chile Free Trade Agreement 2008* should not be solely focused upon ensuring that “the rights of Australian holders of intellectual property enforcement are protected effectively and enforced by binding Chile’s intellectual property regime”. There is a need for effective measures to prevent the over-enforcement and abuse of intellectual property rights. In accordance with the World Intellectual Property Development Agenda, it would be preferable “to approach intellectual property enforcement in the context of broader societal interests and especially development-oriented concerns”.

10. The Australian Government should develop a comprehensive policy agenda in respect of intellectual property and development. Such an agenda should inform its negotiations in respect of bilateral treaties, such as the *Australia-Chile Free Trade Agreement 2008*, proposed regional agreements like the *ASEAN Free Trade Agreement*, and multilateral forums, such as the World Intellectual Property Organization and the World Trade Organization.

11. The Australian Government should play a leadership role in the development of a treaty in respect of Access to Knowledge (A2K) in order to promote a “rich and accessible public domain”.

12. The Australian Government should seek to effectively implement the *Doha Declaration 2001* and the *WTO General Council Decision 2003*. There is also a need for the Australian Government to investigate alternative mechanisms – such as prizes, health impact funds, and open source licensing – to encourage research and development in respect of infectious diseases, such as HIV/AIDs, tuberculosis, malaria, and neglected diseases.

13. The Australian Government should “accelerate the process on the protection of genetic resources, traditional knowledge and folklore.” In particular, it should implement the articles of the *Declaration on the Rights of Indigenous Peoples 2007*, dealing with the protection of Indigenous intellectual property, cultural heritage, and traditional knowledge. Furthermore, the Australian Government should strengthen domestic protection of genetic

resources, and encourage its neighbours to effectively implement the *Rio Convention on Biological Diversity* 1992.

14. Given its deep concern with addressing climate change, the Australian Government should reform domestic and international patent laws to allow for the transfer of low emission patented technologies to developing countries.

15. As part of its Development Agenda, the Australian Government should also consider the “links between intellectual property and competition”. It should introduce stronger safeguards to prevent the abuse of intellectual property rights, such as the “evergreening” of pharmaceutical drugs.

PART 1

THE AUSTRALIA-UNITED STATES FREE TRADE AGREEMENT 2004

In 2004, the Australian Parliament adopted the *Australia-United States Free Trade Agreement 2004*, which included a gigantic Chapter on intellectual property. The treaty was a “TRIPs-Plus” agreement, because the obligations were much more extensive and prescriptive than those required under the multilateral framework established by the *TRIPS Agreement 1994*. A parliamentary report summarized the contents of the Intellectual Property Chapter of the *Australia-United States Free Trade Agreement 2004* thus:

Chapter 17 of the AUSFTA, the Intellectual Property (IP) Chapter, is the largest chapter in the AUSFTA in content and substance. It refers to all the major forms of intellectual property rights and their enforcement including copyright, trademarks, domain names, industrial designs and patents. The IP Chapter contains 29 Articles and 3 exchanges of letters. The exchanges of letters are in relation to Internet Service Provider (ISP) liability, various aspects of IP that apply to Australia, and national treatment in respect of phonograms. The IP Chapter contains several obligations concerning copyright. One of the key obligations requires Australia to extend its term of copyright protection by an additional 20 years. Australia is also committed to ratifying certain international IP agreements such as the World Intellectual Property Organisation (WIPO) Copyright Treaty 1996. Australia has already implemented most of its obligations under the WIPO Copyright Treaty, however the AUSFTA requires Australia to go further in some respects, to more closely align with US law. For example, Article 17.4.7 requires a ban on devices for circumventing technological protection measures (TPMs) and extends the scope of criminal offences relating to the manufacture and sale of circumvention devices.¹

There were significant qualms expressed about the inclusion of this “TRIPs-Plus” Intellectual Property chapter in the *Australia-United States Free Trade Agreement 2004*. The wider academic community expressed concerns, particularly about the extensive reforms in relation to copyright law and pharmaceutical drug patents.^{2 3}

¹ The Senate Select Committee on the Free Trade Agreement Between Australia and the United States of America. *Final Report*. Canberra: Parliament of Australia, 2004, http://www.aph.gov.au/senate_freetrade/report/final/index.htm

² Given, Jock. *America's Pie: Trade and Culture After 9/11*. Sydney: University of New South Wales Press, 2003; Weiss, Linda, Elizabeth Thurbon and John Mathews, *How To Kill A Country*:

There were a number of recommendations made by the Joint Standing Committee on Treaties and the Senate Select Committee on the Free Trade Agreement Between Australia and the United States of America in relation to both the process of treaty-making and the substance of the *Australia-United States Free Trade Agreement 2004*. It is worth recalling such concerns, before undertaking an analysis of the “TRIPS-Plus” Intellectual Property Chapter.

The Joint Standing Committee on Treaties

In 2004, the Joint Standing Committee on Treaties released an initial report on the *Australia-United States Free Trade Agreement 2004*.⁴

The majority report – written for the Liberal and National Party members of the Committee – made a number of recommendations to alleviate the hardships caused by the Intellectual Property Chapter of the *Australia-United States Free Trade Agreement 2004*.

There was a key concern that the *Australia-United States Free Trade Agreement 2004* could have adverse effects upon access to knowledge, and

Australia's Devastating Trade Deal with the United States. Sydney: Allen & Unwin, 2004; Capling, Ann. *All The Way With The USA: Australia, The US and Free Trade*. Sydney: University of New South Wales Press, 2005; Arup, C. 2004. “The United States–Australia Free Trade Agreement — The Intellectual Property Chapter,” *Australian Intellectual Property Journal*, 2004, Vol. 15 (4), p. 205; and Moore, C. 2005. “Creative Choices: Changes to Australian Copyright Law and the Future of the Public Domain,” *Media International Australia*, 2005, Vol. 114, p. 71; and Rimmer, M. “Robbery Under Arms: Copyright Law and the Australia-United States Free Trade Agreement”, *First Monday*, March 2006, Vol. 11 (3), URL: http://www.firstmonday.org/issues/issue11_3/rimmer/index.html.

³ Kate Jacob and Jacob Varghese, 2004. “The PBS and the Australia–US Free Trade Agreement,” Australian Parliamentary Library, at <http://www.aph.gov.au/library/pubs/rn/2004-05/05rn03.htm>; Charles Lawson and Catherine Pickering, 2004. “‘TRIPs–Plus’ Patent Privileges — An Intellectual Property ‘Cargo Cult’ in Australia,” *Prometheus*, volume 22, p. 355; Peter Drahos, Buddhima Lokuge, Tom Faunce, Martyn Goddard and David Henry, 2004. “Pharmaceuticals, Intellectual Property and Free Trade: The Case of the US–Australia Free Trade Agreement,” *Prometheus*, volume 22, p. 243; and Peter Sainsbury, 2004. “Australia–United States Free Trade Agreement and the Australian Pharmaceutical Benefits Scheme,” *Yale Journal of Health Policy, Law and Ethics*, volume 4, p. 387.

⁴ Joint Standing Committee on Treaties. *Report No. 61: The Australia-United States Free Trade Agreement*. Canberra: The Australian Parliament, 2004.

consumers' rights. In Recommendation 16, the Committee recommends that "the Government enshrine in copyright legislation the rights of universities, libraries, educational and research institutions to readily and cost effectively access material for academic and related purposes."⁵ In Recommendation 17, the Committee recommends "that the changes being made in respect of the *Copyright Act 1968* replace the Australian doctrine of fair dealing for a doctrine that resembles the United States' open-ended defence of fair-use, to counter the effects of the extension of copyright protection and to correct the legal anomaly of time shifting and space shifting that is currently absent".⁶ In Recommendation 18, the Committee recommends "that the Attorney General's Department and the Department of Communication, Information Technology and the Arts review the standard of originality applied to copyrighted material with a view to adopting a higher standard such as that in the United States."⁷ In Recommendation 19, the Committee "recommends that the Attorney General's Department and the Department of Communications, Information Technology and the Arts ensure that exceptions will be available to provide for the legitimate use and application of all legally purchased or acquired audio, video and software items on components, equipment and hardware, regardless of the place of acquisition."⁸

There were also concerns about the impact of the new regime upon a range of Internet intermediaries. In Recommendation 21, the Committee recommends that "a scheme that allows for copyright owners to engage with Internet Service Providers and subscribers to deal with allegedly infringing copyright material on the Internet be introduced in Australia that is consistent with the requirements of the AUSFTA".⁹ Indeed, it stressed that "the Attorney-General's Department and the Department of Communications, Information Technology and the Arts should take note of the issues encountered by the US as outlined in this Report; tailor a scheme to the Australian legal and social environment; and monitor the issue of peer to peer file sharing".¹⁰

⁵ Ibid.

⁶ Ibid.

⁷ Ibid.

⁸ Ibid.

⁹ Ibid.

¹⁰ Ibid.

Furthermore, there were also reservations about the effects of the *Australia-United States Free Trade Agreement 2004* upon the manufacturers of generic medicines. In Recommendation 20, the Committee recommends that “in respect of the changes to the *Therapeutic Goods Administration Act 1989* and with respect to the valuable input of the innovator companies, care is to be taken in the implementation to recognise the unique position that generic pharmaceutical companies provide to the Australian community through health programs”.¹¹ Indeed, it emphasized that “there should be no mechanism that will cause undue delay of the entry to the market of generic pharmaceuticals.”¹²

For their part, the dissenting Australian Labor Party Representatives and Senators commented: “A treaty of the magnitude of the Australia — United States Free Trade Agreement requires substantial analysis and consideration by the Committee and the Parliament in order to determine that the eventual outcome is in the national interest and that the associated consequential legislative, regulatory and administrative actions contemplated by the Treaty are also consistent with the national interest.”¹³ The Australian Labor Party also emphasized the need for “access by universities, educational institutions and libraries to copyright material under the proposed arrangements”.¹⁴ At this stage, the Australian Labor Party Representatives and Senators were of the view that it was premature to draw conclusions about the *Australia-United States Free Trade Agreement 2004*, before they had the opportunity to view the accompanying legislative amendments.

The Senate Select Committee on the Free Trade Agreement Between Australia and the United States of America

In 2004, the Senate Select Committee on the Free Trade Agreement Between Australia and the United States of America handed down its final report. The Australian Labor Party Senators expressed concern both about the process of treaty-

¹¹ Ibid.

¹² Ibid.

¹³ Ibid.

¹⁴ Ibid.

making, and the substantive content of the intellectual property chapter of the *Australia-United States Free Trade Agreement 2004*.¹⁵

In relation to the process of negotiating the *Australia-United States Free Trade Agreement 2004*, the Australian Labor Party Senators lamented the failure of the Government of the day to engage in a careful and circumspect economic analysis of the intellectual property chapter:

Again, the concerns that have arisen in relation to such crucial and complex areas as intellectual property would probably not have emerged if the Government, in its undue haste to secure an FTA with America, had not over-ridden the comprehensive review processes and recommendations that had been undertaken domestically to ensure a robust and fair intellectual property regime in Australia. The question of due process remains one of the outstanding failures of the whole AUSFTA business. Instead of ensuring that the Agreement was initiated and negotiated on the basis of a thorough and independent assessment of what was in Australia's national interest - through the Productivity Commission, for example - the Prime Minister launched an approach to the US government, and then committed Australian officials to an unprecedentedly short time frame in which to negotiate the most complex trade agreement Australia has ever pursued. It is no wonder that various assurances and commitments given by Government ministers at the outset were eroded as the US exerted its economic, political and negotiating muscle.¹⁶

The Australian Labor Party Senators observed: "There must be far greater involvement of the Parliament at every stage of the Agreement-making process, and sound proposals are set out in the Committee's report".¹⁷ Furthermore, the Australian Labor Party senators lamented: "The proliferation of these preferential agreements - although ostensibly promoted by the Government as encouraging 'competitive liberalisation' which sets benchmarks and aspirations for future World Trade Organisation (WTO) discussions - may well have precisely the opposite effect, sucking the oxygen out of multilateral trade negotiations when the multilateral process is universally acknowledged as the best way to liberalise global trade."¹⁸

¹⁵ The Senate Select Committee on the Free Trade Agreement Between Australia and the United States of America. *Final Report*. Canberra: Parliament of Australia, 2004, http://www.apf.gov.au/senate_freetrade/report/final/index.htm

¹⁶ Ibid.

¹⁷ Ibid.

¹⁸ Ibid.

The Australian Labor Party Senators made a number of recommendations in respect of the treaty-making process. In Recommendation 2, the party members advised that “the Prime Minister order a review of the Treaties Council with particular consideration to ensuring that when international agreements are being negotiated there is: timely consultation with States and Territories regarding National Interest Analyses, [and] a more systematic approach to consultation and consideration of when negotiations should be elevated to Ministerial level.”¹⁹ Furthermore, “because of the significant increase in negotiation of bilateral agreements, the review should consider mechanisms to ensure that current legislation/regulation across all jurisdictions, conforms and continues to conform to treaties.”²⁰ In Recommendation 3, “Labor Senators recommend that the Government introduce legislation to implement [a particular] process for parliamentary scrutiny and endorsement of proposed trade treaties”.²¹ In Recommendation 4, “Labor Senators recommend that Australian governments - prior to embarking on the pursuit of any bilateral trading or investment agreement - request the Productivity Commission to examine and report upon the proposed agreement”.²² They envisaged that “such a report should deliver a detailed econometric assessment of its impacts on Australia’s economic well-being, identifying any structural or institutional adjustments that might be required by such an agreement, as well as an assessment of the social, regulatory, cultural and environmental impacts of the agreement”.²³ A clear summary of potential costs and benefits should be included in the advice. In Recommendation 5, “Labor Senators recommend that all committees and working groups prescribed by and established under the AUSFTA report annually on their activities and outcomes.”²⁴

In respect of the content of the intellectual property chapter, the Labor Senators observed that “a major concern of Labor Senators is that Australia entered into the Intellectual Property (IP) obligations of the Agreement in a manner that cut across established processes for copyright law reform and which did not appear to be

¹⁹ Ibid.

²⁰ Ibid.

²¹ Ibid.

²² Ibid.

²³ Ibid.

²⁴ Ibid.

part of a strategic vision of intellectual property.”²⁵ The Labor Senators sought to redress such concerns, with ten main recommendations. In Recommendation 6, “Labor Senators recommend that the Senate establish a Select Committee on Intellectual Property to comprehensively investigate and make recommendations for an appropriate IP regime for Australia in light of the significant changes required to Australian IP law by the AUSFTA.”²⁶

A number of recommendations related to questions about access to copyright material, particularly for academic, research and related educational purposes. In Recommendation 7, “Labor Senators recommend that the Commonwealth Government enshrine in the *Copyright Act 1968* the rights of universities, libraries, educational and research institutions to readily and cost effectively access material for academic, research and related purposes.”²⁷ In Recommendation 8, “Labor Senators recommend that the Senate Select Committee on Intellectual Property investigate options for possible amendments to the *Copyright Act 1968* to expand the fair dealing exceptions to more closely reflect the ‘fair use’ doctrine that exists in the United States and to address the anomalies of ‘time shifting’ and ‘space shifting’ in Australia.”²⁸ In Recommendation 9, “Labor Senators recommend that the Senate Select Committee on IP review the standard of originality applied in Australia in relation to copyright material with a view to raising the threshold to a standard such as that in the United States.”²⁹ In Recommendation 10, “Labor Senators recommend that the Senate Select Committee on Intellectual Property should investigate the possibility of establishing in Australia a similar regime to that set out in the *Public Domain Enhancement Bill 2004 (US)*, with a view to addressing some of the impacts of the extension of the term of copyright, in particular the problems relating to ‘orphaned’ works.”³⁰ In Recommendation 11, “Labor Senators recommend that the Senate Select Committee on Intellectual Property investigate amendments to *Copyright Act 1968* to

²⁵ Ibid.

²⁶ Ibid.

²⁷ Ibid.

²⁸ Ibid.

²⁹ Ibid.

³⁰ Ibid.

provide that a contract that purports to exclude or modify exceptions to copyright infringement such as fair dealing is not enforceable.”³¹

There were a number of recommendations in respect of the implementation of technological protection measures. In Recommendation 12, “Labor Senators recommend that the Commonwealth Government use the two year implementation period applying to effective technological protection measures to ensure exceptions will be available to provide for fair dealing including temporary copies, research and study and the legitimate private use and application of all legally purchased or acquired audio, video, DVD and software items on components, equipment and hardware, regardless of the place of acquisition.”³² In Recommendation 13, “Labor Senators recommend that the Commonwealth Government use the two year implementation period applying to effective technological protection measures to ensure exceptions will be available to provide for the sale and distribution of legitimate audio, video, DVD and software items, as well as related components, equipment and hardware, regardless of the place of acquisition.”³³ In Recommendation 14, “Labor Senators recommend that the Commonwealth Government ensure that specific exceptions will be available in the implementation of Australia’s obligations in relation to Technological Protection Measures (TPMs) to provide for the manufacture of interoperable software products”.³⁴

In Recommendation 15, “Labor Senators recommend that the Commonwealth Government implement Recommendations 15 and 16 of the Digital Agenda Review report prepared by Phillips Fox to ensure that temporary reproductions and caching are explicitly protected under Australian law.”³⁵

A number of recommendations specifically addressed the question of intermediary liability, an issue of great significance. In Recommendation 16, “Labor Senators recommend that any notice and take-down scheme introduced by regulations should balance the interests of copyright owners while appropriately protecting the personal information of Internet users. Regulations should ensure that carriage service providers are not required to disclose personal information about their customers

³¹ Ibid.

³² Ibid.

³³ Ibid.

³⁴ Ibid.

³⁵ Ibid.

unless compelled to do so by a court order.”³⁶ In Recommendation 17, “Labor Senators recommend that the reasonable costs to internet service providers of complying with a notice and take-down procedure should be met by the issuer of the notice.”³⁷ In Recommendation 18, “Labor Senators recognise that assessing whether a copyright infringement has occurred is a complex issue, appropriately determined by a court. Any notice and take-down scheme should not require a carriage service provider to assess whether a copyright infringement has occurred, or the relative seriousness of any infringement.”³⁸

It is worth recounting those concerns in detail because they are relevant to an analysis of the *Australia-Chile Free Trade Agreement 2008*. The commitments and recommendations of the Australian Labor Party in respect of the negotiation and the substance of the trade agreements in respect of intellectual property should be honoured and implemented.

Recommendations

- 1. The Australian Parliament should honour and implement its previous commitments to improve the process for the negotiation, evaluation, and adoption of international trade agreements relating to Intellectual Property.**
- 2. The Australian Parliament should implement its past recommendations in relation to the substantive reform of Australia’s intellectual property laws, so as to mitigate and contain the harms caused by “TRIPs-Plus” agreements.**

³⁶ Ibid.

³⁷ Ibid.

³⁸ Ibid.

PART 2

THE AUSTRALIA-CHILE FREE TRADE AGREEMENT 2008

Unfortunately, the intellectual property chapter of the *Australia-Chile Free Trade Agreement* 2008 is dismal, to the mutual disadvantage of both Australia and Chile.

Far from alleviating or containing the ills of the *Australia-United States Free Trade Agreement* 2004 and the *Chile-United States Free Trade Agreement* 2004, it further mires both countries in the TRIPs-Plus standards agreed to in previous free trade agreements. As the press release of the new Minister, the Hon. Simon Crean, noted, “Transparent, high-standard protection has been locked in for intellectual property rights including patents, trademarks, geographical indications and copyright.”³⁹

It is a disappointment that the process and the content of the Intellectual Property Chapter of the *Australia-Chile Free Trade Agreement* 2008 has not matched the standards expressed previously by the Australian Labor Party in respect to its position on TRIPs-Plus trade agreements. It seems particularly imprudent to adopt such measures, before the Government has received its commissioned analysis of the benefits and costs of Australia’s recent free trade agreements (due in August 2008).

The Regulatory Impact Statement

The Regulatory Impact Statement takes a one-dimensional view that the sole negotiating objective of the *Australia-Chile Free Trade Agreement* 2008 was to “ensure the rights of Australian holders of intellectual property are protected effectively and enforced by binding Chile’s intellectual property regime.”⁴⁰ There is a fundamental failure here to recognise the diversity of interests of Australian users of intellectual property. It also reflects a failure of the Department of Foreign Affairs and Trade to consult widely on the impact of the *Australia-Chile Free Trade Agreement* 2008, beyond a limited group of representatives of intellectual property industries. The Regulatory Impact Statement notes: “The Intellectual Property chapter **locks in**

³⁹ The Hon. Simon Crean. “Australia and Chile Conclude Free Trade Agreement”, 27 May 2008, http://www.trademinister.gov.au/releases/2008/sc_040.html

Australia and Chile's current standards of intellectual property protection for patents, trademarks, geographical indications and copyright, including through appropriate enforcement mechanisms" (my emphasis).⁴¹ The *Australia-Chile Free Trade Agreement* 2008 should not further entrench the Australian and Chilean Governments into TRIPS-Plus standards, and deprive future Parliaments of options in respect of intellectual property policy-making.

In consultations with the Department of Foreign Affairs and Trade, public servants advised that there had been no econometric analysis of the possible economic impacts of the intellectual property chapter of the *Australia-Chile Free Trade Agreement* 2008. They also noted that the Productivity Commission had not been engaged to carry out an assessment of the possible economic impacts of the intellectual property chapter of the *Australia-Chile Free Trade Agreement* 2008. The National Impact Statement does not contain a clear summary of potential costs and benefits associated with the *Australia-Chile Free Trade Agreement* 2008.

The approach taken in negotiating the *Australia-Chile Free Trade Agreement* 2008 is at odds with the best practice represented by the Adelphi Charter.⁴² The Adelphi Charter notes: "In making decisions about intellectual property law, governments should adhere to these rules:

- There must be an automatic presumption against creating new areas of intellectual property protection, extending existing privileges or extending the duration of rights;
- The burden of proof in such cases must lie on the advocates of change;
- Change must be allowed only if a rigorous analysis clearly demonstrates that it will promote people's basic rights and economic well-being; and
- Throughout, there should be wide public consultation and a comprehensive, objective and transparent assessment of public benefits and detriments."⁴³

⁴⁰ Regulatory Impact Statement on the *Australia-Chile Free Trade Agreement* 2008, http://www.aph.gov.au/house/committee/jsct/17june2008/treaties/chile_ris.pdf

⁴¹ Ibid.

⁴² The Adelphi Charter on Creativity, Innovation and Intellectual Property, <http://www.ipcharter.org/>

⁴³ Ibid.

In the absence of comprehensive, objective and transparent assessment of public benefits and detriments of the bilateral agreement, it would be unwise to adopt the intellectual property chapter of the *Australia-Chile Free Trade Agreement* 2008.

Purposive Statement

Article 17.2 of the *Australia-Chile Free Trade Agreement* 2008 provides: “The Parties recognise that it is important to provide adequate and effective protection and enforcement of intellectual property rights, promote efficient and transparent intellectual property systems and achieve an appropriate balance between the legitimate interests of intellectual property right holders and of users in subject matter protected by intellectual property rights.”

The stated goals of the *Australia-Chile Free Trade Agreement* 2008 are lopsided. The focus is predominantly upon the “legitimate interests of intellectual property right holders” – emphasizing the need for “adequate and effective protection of intellectual property rights”, and the need for “efficient and transparent intellectual property rights.” The interests of “users in subject matter protected by intellectual property rights” are a mere afterthought. There is no discussion of the role of the *Australia-Chile Free Trade Agreement* 2008 in promoting education and learning, access to knowledge, development and technology transfer, access to essential medicines, consumer protection and competition in the context of intellectual property. The purposive statement displays a skewed, biased, and one-dimensional understanding of intellectual property.

It is striking that the purposive statement in the *Australia-Chile Free Trade Agreement* 2008 is much weaker than that found in the *TRIPS Agreement* 1994. Article 7 of the *TRIPS Agreement* 1994 provides: “The protection and enforcement of intellectual property rights should contribute to the promotion of technological innovation and to the transfer and dissemination of technology, to the mutual advantage of producers and users of technological knowledge and in a manner conducive to social and economic welfare, and to a balance of rights and obligations.” Article 8 (1) emphasizes: “Members may, in formulating or amending their laws and regulations, adopt measures necessary to protect public health and nutrition, and to promote the public interest in sectors of vital importance to their socio-economic and technological development, provided that such measures are consistent with the

provisions of this Agreement.” Article 8 (2) provides: “Appropriate measures, provided that they are consistent with the provisions of this Agreement, may be needed to prevent the abuse of intellectual property rights by right holders or the resort to practices which unreasonably restrain trade or adversely affect the international transfer of technology.”

The purposive statement in the *TRIPS Agreement* 1994 is far superior to the pallid, limited statement of goals in the *Australia-Chile Free Trade Agreement* 2008.

Similarly, the *WIPO Copyright Treaty* 1996 provides a much more full account of the interests at stake in the context of copyright law. The preamble recognises the “need to maintain a balance between the rights of authors and the larger public interest, particularly education, research and access to information, as reflected in the Berne Convention.” It should be noticed, in this multilateral agreement, the public interest is given predominance over the private interests of intellectual property holders. Again, this is a superior model to the *Australia-Chile Free Trade Agreement* 2008.

Copyright “TRIPS-Plus” Standards

The *Australia-Chile Free Trade Agreement* 2008 reinforces a number of the TRIPS-Plus standards contained in the *Australia-United States Free Trade Agreement* 2004 and the *Chile-United States Free Trade Agreement* 2004. However, it does so, in a less prescriptive and convoluted style than the earlier bilateral free trade agreements.

Article 17.27 further embeds the copyright term extension into both the regimes of Australia and Chile: “Each Party shall provide that where the term of protection of a work (including a photographic work), performance or phonogram is to be calculated: (a) on the basis of the life of a natural person, the term shall be not less than the life of the author and 70 years after the author’s death; and (b) on a basis other than the life of a natural person, the term shall be: (i) not less than 70 years from the end of the calendar year of the first authorised publication of the work, performance or phonogram; or (ii) failing such authorised publication within 50 years from the creation of the work, performance or phonogram, not less than 70 years from the end of the calendar year of the creation of the work, performance or phonogram.”

Article 17.28 captures the essence of the new heightened protection in respect of technological protection measures: “Each Party shall provide for civil remedies or

administrative measures and, when appropriate, criminal penalties, against the circumvention of effective technological measures that are used by authors, performers and producers of phonograms in connection with the exercise of their copyright and related rights, and that restrict acts in respect of their works, performances or phonograms, which are not authorised by those right holders, or permitted by law.”

Article 17.29 requires both parties to provide adequate and effective civil and criminal remedies in respect of Electronic Rights Management Information.

Article 17.33 provides for the protection of encrypted program carrying satellite signals.

Article 17.40 concerns service provider liability, noting first “each Party shall provide for a legislative scheme to limit remedies that may be available against service providers for infringement of copyright or related rights that they do not control, initiate or direct and that take place through their systems or networks”. Second, it is observed that “The scheme in paragraph 1 will only apply if a service provider meets conditions, including: (a) removing or disabling access to infringing material upon notification from the rights owner through a procedure established by each Party; and (b) no financial benefit is received by the service provider for the infringing activity in circumstances where it has the right and ability to control such activity.”

Article 17.31 of the *Australia-Chile Free Trade Agreement 2008* provides: “Each Party shall provide for exceptions or limitations to copyright and related rights included in this Chapter, in accordance with the *Berne Convention for the Protection of Literary and Artistic Works*, the *TRIPS Agreement*, the *WIPO Copyright Treaty* and/or the *WIPO Performances and Phonograms Treaty*.” However, the Australian Government has lacked the willingness to make the most of such flexibilities.

Despite modelling other aspects of United States copyright law, the Howard Government refused to recognise a general defence of fair use in respect of copyright infringement. The *Copyright Amendment Act 2006* (Cth) instead recognised a narrow range of new exceptions: there was a new defence of fair dealing for parody or satire; there were limited exceptions in respect of “format-shifting”; and there were some special provisions for libraries, archives, and cultural institutions. However, the full sum of such new exceptions was notably less than the breadth of immunity afforded by the United States defence of fair use.

S 107 of the *Copyright Act 1976* (US) provides for a broad and flexible defence of fair use in respect of actions for copyright infringement: “Notwithstanding the provisions of sections 106 and 106A, the fair use of a copyrighted work, including such use by reproduction in copies or phonorecords or by any other means specified by that section, for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright. In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include —

- (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
- (2) the nature of the copyrighted work;
- (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
- (4) the effect of the use upon the potential market for or value of the copyrighted work.

The fact that a work is unpublished shall not itself bar a finding of fair use if such finding is made upon consideration of all the above factors.”

The Supreme Court of the United States has interpreted the defence of fair use in such a way as to protect transformative uses of a work - such parody. The defence of fair use has been extended, in case law, to cover such various activities, as time-shifting, space-shifting and format-shifting; the use of thumbnail images and caching by search engines; and the creation of inter-operable computer software.

The value of the defence of fair use can be illustrated by litigation involving the great Chilean writer, Ariel Dorfman, the author of such famous works as the plays, *Death and the Maiden*, and *Speak Truth to Power*, the novel *The Nanny and the Iceberg*, the memoir, *Heading South, Looking North*, and the book, *Exorcising Terror: The Incredible, Unending Trial of General Augusto Pinochet*.

In 1971, Dorfman and his collaborator, Armand Mattelart, wrote, *How to Read Donald Duck: Imperialist Ideology in the Disney Comic*.⁴⁴ Both the authors fled Chile in the wake of the military coup in 1973. In 1975, the International General of New York sought to publish an English translation of the book – 3,950 copies were printed in England, and the works were imported into the United States. The Imports

⁴⁴ Dorfman, Ariel and Armand Mattelart. *How to Read Donald Duck: Imperialist Ideology in the Disney Comic*. New York: International General, 1984 (Second Edition).

Compliance Branch of the United States Customs seized the books on the basis that the book might infringe upon the copyrights of Disney. In representations to the United States Customs, the counsel for Disney, Franklin Waldheim, argued that the books were piratical infringements of Disney's copyright characters.⁴⁵ He denied that the work was fair use on the grounds that the use of illustrations was by no means necessary for the arguments of the book. In response, the Center for Constitutional Rights argued for the release of the book on the grounds of the defence of fair use and the First Amendment protections of freedom of speech. The Center's lawyers observed: "The book at issue, while a serious work of scholarship, is also a frankly political statement which is, or should be, of interest to a large number of readers."⁴⁶ The Center's lawyers contended: "In view of this, the greatest reticence should characterize its evaluation by an agency of the government, lest property rights be given preference over rights of free speech and political expression."⁴⁷ The Center's lawyers concluded: "In other words, only the grossest and most unambiguous case of piracy – such as clearly not present here – could possibly justify an assault on free speech in the guise of copyright protection."⁴⁸

In the end, the Customs Department concurred with the arguments about fair use and free speech advanced by the Center for Constitutional Rights. Nonetheless, the government body ruled that the shipment of books could not be accepted for importation because of the manufacturing clause of the copyright regulations.

John Shelton Lawrence comments upon the case: "A greater value of the Donald Duck case lies in its illumination of the residual powers and uses of copyright – as opposed to its normal justification emphasizing incentive and income for creators".⁴⁹ He notes that the case represents "censorship in the form of prior restraint with its usual attendant evils".⁵⁰

⁴⁵ Lawrence, John Shelton. "Donald Duck vs Chilian Socialism: A Fair Use Exchange", in Dorfman, Ariel and Armand Mattelart. *How to Read Donald Duck: Imperialist Ideology in the Disney Comic*. New York: International General, 1984 (Second Edition), p. 116.

⁴⁶ Ibid.

⁴⁷ Ibid.

⁴⁸ Ibid.

⁴⁹ Ibid, p. 118.

⁵⁰ Ibid, p. 119.

The intellectual property chapter of the *Australia-Chile Free Trade Agreement* 2008 is a miniature version of the intellectual property chapter of the *Australia-United States Free Trade Agreement* 2004. It further beds down the dramatic and sweeping obligations in respect of intellectual property wrought by the previous agreement. This is surprising, given the Australian Labor Party's past recommendations in respect of TRIPS-Plus standards. In any case, it must be questioned whether the Intellectual Property Chapter of the *Australia-Chile Free Trade Agreement* 2008 is entirely necessary. Both countries already have to accord, under the doctrine of national treatment, the same level of protection to both local citizens and foreigners alike. The necessity for an Intellectual Property Chapter of this ilk has not been explained or justified. It is lamentable that two net copyright importing countries, such as Australia and Chile, have failed to take advantage of the flexibilities and exceptions available under international intellectual property agreements.

Trade Mark Law and Geographical Indications

The *Australia-Chile Free Trade Agreement* 2008 also reinforces the protection afforded to trade mark owners. Article 17.9 provides that "Each Party shall provide that trade marks shall include trade marks in respect of goods and services, collective marks and certification marks". Moreover, it notes: "Each Party shall provide, in accordance with its domestic law, that a sound may constitute a sign, and a combination of colours may form all or part of a sign". However, "Each Party may provide trade mark protection for scents." Thus the free trade agreement provides recognition of protection of "new signs" – as currently protected under Australian law.

Article 17.10 of the *Australia-Chile Free Trade Agreement* 2008 provides that "Each Party shall provide that the owner of a registered trade mark shall have the exclusive right to prevent third parties not having the owner's consent from using in the course of trade identical or similar signs, including subsequent geographical indications, for goods or services that are related to those goods or services in respect of which the trade mark is registered, where such use would result in a likelihood of confusion."

Article 17.12 of the *Australia-Chile Free Trade Agreement* 2008 requires protection of well-known marks. Article 17.12 (1) provides: "Article 6bis of the *Paris*

Convention for the Protection of Industrial Property shall apply to goods or services that are not identical or similar to those identified by a well known trade mark, whether registered or not, provided that use of that trade mark in relation to those goods or services would indicate a connection between those goods or services and the owner of the trade mark, and provided that the interests of the owner of the trade mark are likely to be damaged by such use.” Article 17.12 (2) notes: “Each Party recognises the importance of the *Joint Recommendation Concerning Provisions on the Protection of Well-Known Marks* (1999) as adopted by the Assembly of the Paris Union for the Protection of Industrial Property and the General Assembly of WIPO, and shall be guided by the principles contained in this Recommendation.”

Article 17.11 of the *Australia-Chile Free Trade Agreement 2008*: “Each Party may provide limited exceptions to the rights conferred by a trade mark, such as fair use of descriptive terms, provided that such exceptions take account of the legitimate interest of the owner of the trade mark and of third parties.” However, the *Trade Marks Act 1995* (Cth) does not have a broad, open-ended defence of fair use in respect of trade mark infringement. Instead, it has a number of specific exceptions in respect of trade infringement.

By contrast, the United States Government has been positively acrobatic and gymnastic, when it comes to taking advantage of the flexibilities under various trade agreements. The *Trademark Dilution Revision Act 2006* (US) has recognised a defence of fair use in respect of actions for trade mark dilution – “Any fair use, including a nominative or descriptive fair use, or facilitation of such fair use, of a famous mark by another person other than as a designation of source for the person's own goods or services, including use in connection with - (i) advertising or promotion that permits consumers to compare goods or services; or (ii) identifying and parodying, criticizing, or commenting upon the famous mark owner or the goods or services of the famous mark owner.” Furthermore, there are exceptions for “all forms of news reporting and news commentary” and “Any noncommercial use of a mark”.

The Australian Government and the Chilean Government should not be frightened to adopt similarly flexible and open-ended defences in respect of the use of well-known trade marks.

The *Australia-Chile Free Trade Agreement 2008* also contains measures in respect of geographical indications. Article 17.17 provides that “each Party shall recognise that geographical indications may be protected through a trade mark or *sui*

generis system or other legal means” and “each Party shall provide the means for persons of the other Party to apply for protection of geographical indications.” In a side letter, the Minister for Trade, Simon Crean, noted: “The Parties recognise that Chilean geographical indications for wines are established by Decree 464 of the Ministry of Agriculture of December 14, 1994, and its amendments and by the Law 18.455.”

In respect of geographical indications, Australia and Chile share similar interests in respect of “New World” wines and food products. Perhaps more could be done in bilateral trade agreements such as the *Australia-Chile Free Trade Agreement* 2008 to counter the expansionist agenda of the European Union in respect of geographical indications and appellations of origin for both beverages and food.

Patent Law and Access to Essential Medicines

In consultations with the Department of Foreign Affairs and Trade, public officials suggested that the *Australia-Chile Free Trade Agreement* 2008 would be useful in preserving “flexibilities” in respect of exceptions to intellectual property rights.

Article 17.20 of the *Australia-Chile Free Trade Agreement* 2008 provides: “A Party may provide limited exceptions to the exclusive rights conferred by a patent, provided that such exceptions do not unreasonably conflict with a normal exploitation of the patent and do not unreasonably prejudice the legitimate interests of the patent owner, taking account of the legitimate interests of third parties.”

The Australian Law Reform Commission and the Advisory Council on Intellectual Property both recommended the establishment of a defence of experimental use in respect of patent law. The Howard Government did not respond to such recommendations. The *Intellectual Property Amendment Act* 2006 (Cth) did broaden the “springboarding” exception for pharmaceutical drug manufacturers. Nonetheless, the regulatory testing exception in Australia is much weaker than the broad, expansive “Bolar exception” in respect of pharmaceutical drugs in the United States.⁵¹

Both Australia and Chile signed free trade agreements with the United States Trade Representative, at the “high water” mark in 2004.

⁵¹ *Merck KGAA v. Integra Lifesciences I, Inc.*, 545 U.S. 193 (2005).

It is worth noting that the United States Trade Representative has since been forced to change its approach in its negotiations over bilateral agreements after pressure from Representative Henry Waxman and the Democratic Party in the United States Congress. In its context statement, the Democratic Party in the United States Government made a number of recommendations.⁵² First, the Democratic Party suggested that there should be greater scope for flexibility in respect of data exclusivity.⁵³ Second, the Democratic Party have argued that patent term extensions should not be a mandatory feature of free trade agreements.⁵⁴ Third, the Democratic Party have recommended that there be no linkage requirement between drug regulatory agencies and patent issues.⁵⁵ Fourth, the Democratic Party have recommended that future free trade agreements should clarify the commitment to the *Doha Declaration* 2001; recognise that the parties are able to take measures to protect public health; and include an exception to the data exclusivity obligation for measures to protect human health.⁵⁶ Fifth, the Democratic Party have recommended that future free trade agreements should “include a provision calling for the periodic review of the implementation of the IPR chapter, and giving the parties an opportunity to undertake further negotiations.”⁵⁷

Reflecting the influence of the Democratic Party in the United States Congress, the new *United States-Peru Free Trade Agreement* 2008 contains understandings regarding public health measures.⁵⁸ Article 16.13 (1) provides that “the Parties affirm their commitment to the Declaration on the TRIPS Agreement and Public Health.” Article 16.13 (2) (a) provides “The obligations of this Chapter do not and should not prevent a Party from taking measures to protect public health by promoting access to medicines for all, in particular concerning cases such as HIV/AIDS, tuberculosis, malaria, and other epidemics as well as circumstances of

⁵² The Democratic Party, “Peru and Panama Free Trade Agreements”, 2007, http://www.cpath.org/sitebuildercontent/sitebuilderfiles/2007_new_trade_policy_details5-10-07.pdf

⁵³ Ibid.

⁵⁴ Ibid.

⁵⁵ Ibid.

⁵⁶ Ibid.

⁵⁷ Ibid.

⁵⁸ *United States-Peru Free Trade Agreement* 2008, http://www.ustr.gov/Trade_Agreements/Bilateral/Peru_TPA/Final_Texts/Section_Index.html

extreme urgency or national emergency. Accordingly, while reiterating their commitment to this Chapter, the Parties affirm that this Chapter can and should be interpreted and implemented in a manner supportive of each Party's right to protect public health and, in particular, to promote access to medicines for all." Article 16.13 (2) (b) provides: "In recognition of the commitment to access to medicines that are supplied in accordance with the Decision of the General Council of 30 August 2003 on the Implementation of Paragraph Six of the Doha Declaration on the TRIPS Agreement and Public Health (WT/L/540) and the WTO General Council Chairman's statement accompanying the Decision (JOB(03)/177, WT/GC/M/82) (collectively, the "TRIPS/health solution"), this Chapter does not and should not prevent the effective utilization of the TRIPS/health solution." Article 16.13 (2)(c) provides: "With respect to the aforementioned matters, if an amendment of the TRIPS Agreement enters into force with respect to the Parties and a Party's application of a measure in conformity with that amendment violates this Chapter, the Parties shall immediately consult in order to adapt this Chapter as appropriate in the light of the amendment".

It is glaring that the *Australia-Chile Free Trade Agreement 2008* does not contain any similar safeguards.

It is also of concern, in Australia, that the relevant government departments have still not implemented the *WTO General Council Decision 2003*. In 2007, the Joint Standing Committee on Treaties "encourages the consultations to be coordinated by IP Australia later this year and urges the Government to actively support the provision of patented medicines to least developed and developing countries."⁵⁹ No such consultations have eventuated by the middle of 2008. The Advisory Council on Intellectual Property have not received a reference to consider the question of export of pharmaceutical drugs to address public health epidemics. The Federal Government has not provided notification of any bill to implement its obligations under the *WTO General Council Decision 2003*.

The Joint Standing Committee on Treaties should ask relevant Ministers and public servants in the Department of Foreign Affairs and Trade and IP Australia to explain the reasons for this unaccountable delay in reforming Australia's patent laws.

⁵⁹ Joint Standing Committee on Treaties. *Protocol Amending the TRIPS Agreement*, Canberra: Australian Parliament August 2007, <http://www.aph.gov.au/house/committee/jsct/9may2007/report/chapter9.pdf>

Enforcement

Of great concern has been the approach of the Australian Government to the question of intellectual property enforcement in a number of domestic and international forums – including disputes in the World Trade Organization, the *Australia-Chile Free Trade Agreement* 2008, and the proposed *Anti-Counterfeiting Trade Agreement* 2008.

In the recent dispute between China and the United States, the Australian Government has provided a third-party submission.⁶⁰ It has taken an aggressive interpretation of Article 61 of the *TRIPS Agreement* 1994, supporting the position of the United States:

Australia has noted that Article 61 of TRIPs establishes more onerous obligations in respect of “wilful trade mark counterfeiting or copyright piracy on a commercial scale”. Australia does not consider that the scope of a Member’s obligations in respect of such activity is limited or otherwise tempered by Articles 1.1 or 41.5. Those provisions relate to a Member’s rights in relation to the method of implementation of its obligations under the TRIPs Agreement, but do not affect the character of a Member’s obligations under Article 61, or indeed any other provision.⁶¹

In the written submission, it is stated that “it is Australia’s view that the issue of whether wilful counterfeiting or piracy is ‘on a commercial scale’ can only be determined case-by-case in a criminal procedure that can take account of all relevant circumstances, including the potential impact of digitally-based technologies”.⁶² Such arguments could rebound back upon Australia at a later date. They do not necessarily accurately represent the compromises reached in domestic legislation in Australia. Most notably, there was much concern during the *Copyright Amendment Act* 2006 (Cth) over the application of enforcement provisions to commercial developers, such

⁶⁰ *China - Measures Affecting the Protection and Enforcement of Intellectual Property Rights* (WT/DS362)

⁶¹ Australia. *Third Party Oral Statement in China - Measures Affecting the Protection and Enforcement of Intellectual Property Rights* (WT/DS362), http://www.dfat.gov.au/trade/negotiations/disputes/WT-DS362_oral.html

⁶² Australia. *Third Party Submission in China - Measures Affecting the Protection and Enforcement of Intellectual Property Rights*, WT/ DS362, 26 March 2008, http://www.dfat.gov.au/trade/negotiations/disputes/362_third_party_sub_aust.rtf

as Apple (the manufacturer of the iPod and the iPhone); and Google, the search engine, and YouTube, its Internet video site; and the users of digital technologies.

The regulatory impact statement assumes that the only meaningful purpose of the *Australia-Chile Free Trade Agreement 2008* was to “ensure the rights of Australian holders of intellectual property are protected effectively and enforced by binding Chile’s intellectual property regime.”⁶³ The *Australia-Chile Free Trade Agreement 2008* further reinforces the enforcement measures established by the *Australia-United States Free Trade Agreement 2004* and the *Copyright Amendment Act 2006*. Articles 17.34 to Article 17.39 provide for extensive obligations in respect of enforcement, presumptions, civil and administrative procedures, criminal procedures and remedies, and border measures.

The Australian Government has also been participating in negotiations over the highly controversial, proposed *Anti-Counterfeiting Trade Agreement 2008*. The commentator, Susan Sell, has observed that this is a “TRIPS Double Plus Agreement”, because it involves obligations and commitments, above and beyond those provided for in TRIPS-Plus Agreements, such as the *Australia-United States Free Trade Agreement 2004* and the *Chile-United States Free Trade Agreement 2004*.⁶⁴

The United States Trade Representative has promoted the *Anti-Counterfeiting Trade Agreement 2008* as a means of raising the levels of protection of intellectual property rights-holders. The agreement is being negotiated with the European Commission, Japan, Switzerland, Australia, New Zealand, South Korea, Canada, and Mexico. Business groups have made a number of substantive proposals in respect of the *Anti-Counterfeiting Trade Agreement 2008*. The Recording Industry Association of America has argued that there should be substantive provisions, dealing with customs and border officials, seizure and destruction of materials determined to be pirated or counterfeited, civil and criminal remedies, evidentiary matters, and online infringement.⁶⁵ Other intellectual property industry groups have made similarly

⁶³ Regulatory Impact Statement on the *Australia-Chile Free Trade Agreement 2008*, http://www.aph.gov.au/house/committee/jsct/17june2008/treaties/chile_ris.pdf

⁶⁴ Sell, S. “The Global IP Ratchet, Anti-Counterfeiting and Piracy Enforcement Efforts: The State of Play”, IP Watch, 9 June 2008, <http://www.ip-watch.org/files/SusanSellfinalversion.pdf>

⁶⁵ Recording Industry Association of America. “Suggestions for the Content of ACTA”, 26 June 2008, http://www.keionline.org/index.php?option=com_content&task=view&id=190

outlandish claims for intellectual property rights-holders. Susan Sell reflects: “This is no high-minded quest for the public good”.⁶⁶ She cites the comment of David Fewer of the Canadian Internet Policy and Public Interest Clinic and the University of Ottawa noted, “if Hollywood could order intellectual property laws for Christmas what would they look like? This is pretty close.”⁶⁷

There has been much criticism of both the process and the substance of the proposed *Anti-Counterfeiting Trade Agreement 2008*. The Australian academic, Kimberlee Weatherall, has observed that there have been concerns with both the secrecy and the subject matter of the proposed agreement.⁶⁸ The United States commentator, Wendy Seltzer, notes: “RIAA’s proposal is a compendium of everything they dislike about rulings that have gone against them: the lack of a “making available” right (*Atlantic v. Howell*); the requirement of knowledge before non-volitional actors such as ISPs can be held liable (*RTC v. Netcom*); the provisions of safe-harbor that let ISPs avoid liability (17 USC 512); the limitation of vicarious liability to situations where the proprietor has a right and ability to control; the possibility that non-infringing use could save a technology with infringing uses (*Betamax*); the status of hyperlinks (*Perfect 10 v. Amazon*).”⁶⁹ Furthermore, she notes: “Add in codification of stronger versions of rulings they like such as *Grokster*, and you’ve got a prescription for utterly insane copyright law!”⁷⁰

A United States commentator, William Patry, has lamented of the role of the United States Trade Representative in negotiating standards in respect of intellectual property:

The attitude of USTR toward copyright is a blinkered, one-sided view that copyright is good and therefore as much of it as possible is even better. But a view is just that unless there is political muscle to implement it, and here lies the systemic danger, the fact that USTR is in the driver’s seat in initiating and negotiating agreements that are cast as trade agreements, but

⁶⁶ Sell, S. “The Global IP Ratchet, Anti-Counterfeiting and Piracy Enforcement Efforts: The State of Play”, IP Watch, 9 June 2008, <http://www.ip-watch.org/files/SusanSellfinalversion.pdf>

⁶⁷ Ibid.

⁶⁸ Weatherall, K. “The Anti-Counterfeiting Treaty: What’s It All About”, Berkeley Electronic Press Selected Works, 2008, <http://works.bepress.com/kimweatherall/18/>

⁶⁹ Seltzer, W. “The RIAA Has an ACTA Wish-List”, [WendySeltzer.org](http://wendy.seltzer.org), 1 July 2008, <http://wendy.seltzer.org/blog/archives/2008/07/01/the-riaa-has-an-acta-wish-list.html>

⁷⁰ Ibid.

which are in fact agreements fundamentally reshaping substantive IP law. No trade official in any country, no matter how well intentioned, should have that authority. In the U.S., the power to make copyright policy vests exclusively in the Congress. We do not want our trade representatives to negotiate on their own agreements that require changes in domestic copyright laws and then present the agreement after signature to the legislature as a fait d'accompli.⁷¹

As such, it is very important that the Australian Government does not, once again, succumb to the demands of the United States Trade Representative, and adopt the “TRIPS Double Plus” standards of the proposed *Anti-Counterfeiting Trade Agreement* 2008.

The Australian Government has failed to grapple with the problems associated with the over-enforcement of intellectual property rights by rights-holders. There has been much controversy in the United States and other jurisdictions about the problems caused by “patent trolls” who hold technology developers to ransom – demanding license fees, and threatening litigation. In the 2006 case of *EBay Inc v. MercExchange LLC*, Justice Kennedy of the Supreme Court of the United States expressed his concerns about the rise of so-called “patent trolls”.⁷² He observed: “An industry has developed in which firms use patents not as a basis for producing and selling goods but, instead, primarily for obtaining licensing fees.”⁷³ The judge observed: “For these firms, an injunction, and the potentially serious sanctions arising from its violation, can be employed as a bargaining tool to charge exorbitant fees to companies that seek to buy licences to practice the patent.”⁷⁴ Justice Kennedy suggested: “When the patented invention is but a small component of the product the companies seek to produce and the threat of an injunction is employed simply for undue leverage in negotiations, legal damages may well be sufficient to compensate for the infringement and an injunction may not serve the public interest.”⁷⁵

In light of such concerns, it is important that governments and courts be careful and judicious about the remedies provided to intellectual property rights-

⁷¹ Patry, W. “An ACTA Call to Arms: No More Secret Government”, The Patry Blog, 3 June 2008, <http://williampatry.blogspot.com/2008/06/acta-call-to-arms-no-more-secret.html>

⁷² *eBay v. MercExchange* 126 S.Ct. 1837 (2006).

⁷³ Ibid.

⁷⁴ Ibid.

⁷⁵ Ibid.

holders. Susan Sell makes the excellent point that there is a need to be even-handed when dealing with matters of intellectual property enforcement: “Enforcement means not only enforcing IP holders’ rights, but it also means enforcing balance, exceptions and limitations, fair use, civil rights, privacy rights, and antitrust (or competition policy).”⁷⁶

Recommendations

3. The Intellectual Property Chapter of the *Australia-Chile Free Trade Agreement 2008* should not further “lock in” Australia and Chile’s current standards of intellectual property protection for patents, trademarks, geographical indications and copyright.

4. The Intellectual Property Chapter of the *Australia-Chile Free Trade Agreement 2008* should be subject to a comprehensive assessment of its economic, social, and political costs and benefits, by an independent assessor, such as the Productivity Commission.

5. The purposive statement of the *Australia-Chile Free Trade Agreement 2008* is biased and skewed towards intellectual property rights-holders. It should be revised in line with the broad statement of policy objectives in the *TRIPS Agreement 1994* and the World Intellectual Property Organization Internet treaties.

6. The *Australia-Chile Free Trade Agreement 2008* should not further entrench TRIPS-Plus standards in respect of copyright law. The Australian and the Chilean Governments should take advantage of the full flexibilities permitted in respect of copyright law under the allowable exceptions under international intellectual property. In particular, it would be advised to adopt a flexible, open-ended defence of fair use.

⁷⁶ Sell, S. “The Global IP Ratchet, Anti-Counterfeiting and Piracy Enforcement Efforts: The State of Play”, IP Watch, 9 June 2008, <http://www.ip-watch.org/files/SusanSellfinalversion.pdf>

7. The *Australia-Chile Free Trade Agreement 2008* should not provide further reinforcement for the protection of well-known trade marks. It would be worthwhile for both the Australian and the Chilean Governments to adopt a general defence of fair use in respect of well-known and famous trade marks.

8. The *Australia-Chile Free Trade Agreement 2008* requires safeguards to facilitate access to essential medicines, and preventing “evergreening” of pharmaceutical drug patents. The Australian Government (and the Chilean Government) should provide a broad defence of experimental use, and a broad defence in respect of research into pharmaceutical drugs. The Australian Government needs to implement the *WTO General Council Decision 2003* to allow for the export of pharmaceutical drugs.

9. The *Australia-Chile Free Trade Agreement 2008* should not be solely focused upon ensuring that “the rights of Australian holders of intellectual property enforcement are protected effectively and enforced by binding Chile’s intellectual property regime”. There is a need for effective measures to prevent the over-enforcement and abuse of intellectual property rights. In accordance with the World Intellectual Property Development Agenda, it would be preferable “to approach intellectual property enforcement in the context of broader societal interests and especially development-oriented concerns”.

**PART 3
THE WORLD INTELLECTUAL PROPERTY ORGANIZATION
DEVELOPMENT AGENDA**

Despite its status as a “Middle Power”, successive Australian Governments have neglected larger debates over intellectual property and development. At most, IP Australia has engaged in a limited range of technical assistance and capacity-building programmes. The Australian Government has failed to grapple with substantive development issues related to intellectual property in a variety of fora. This has been a feature of its negotiations with bilateral agreements, such as the *Australia-Chile Free Trade Agreement 2008*, proposed regional agreements like the *ASEAN Free Trade Area*, and multilateral forums, such as the World Intellectual Property Organization and the World Trade Organization. The Australian Government needs to develop a comprehensive policy framework on intellectual property and development to inform and guide its negotiations over bilateral, regional, and multilateral agreements.

The World Intellectual Property Organization Development Agenda

The United Nations' Millennium Development Goals aim to reduce hunger and poverty, improve health and education, and ensure environmental sustainability.⁷⁷ There has been much international debate about whether intellectual property rights could play an instrumental role in achieving these goals.

In 2003, civil society has issued a “Geneva Declaration on the Future of the World Intellectual Property Organization”, proclaiming:

Humanity stands at a crossroads - a fork in our moral code and a test of our ability to adapt and grow. Will we evaluate, learn and profit from the best of these new ideas and opportunities, or will we respond to the most unimaginative pleas to suppress all of this in favor of intellectually weak, ideologically rigid, and sometimes brutally unfair and inefficient policies? Much will depend upon the future direction of the World Intellectual Property Organization (WIPO), a global body setting standards that regulate the production, distribution and use of knowledge... As an intergovernmental organization, however, WIPO embraced a culture of creating and expanding monopoly privileges, often without regard to consequences.

⁷⁷ The United Nations Millennium Development Goals, <http://www.un.org/millenniumgoals/>

The continuous expansion of these privileges and their enforcement mechanisms has led to grave social and economic costs, and has hampered and threatened other important systems of creativity and innovation.⁷⁸

The Geneva Declaration observed: “WIPO must also express a more balanced view of the relative benefits of harmonization and diversity, and seek to impose global conformity only when it truly benefits all of humanity.”⁷⁹ It added: “A ‘one size fits all’ approach that embraces the highest levels of intellectual property protection for everyone leads to unjust and burdensome outcomes for countries that are struggling to meet the most basic needs of their citizens.”⁸⁰

In 2004, Brazil, Argentina, and 12 other countries proposed that World Intellectual Property Organization should adopt a Development Agenda, in line with the United Nation’s Millennium Development Goals:

A vision that promotes the absolute benefits of intellectual property protection without acknowledging public policy concerns undermines the very credibility of the IP system. Integrating the development dimension into the IP system and WIPO’s activities, on the other hand, will strengthen the credibility of the IP system and encourage its wider acceptance as an important tool for the promotion of innovation, creativity and development.⁸¹

The sponsors of the Agenda called for the amendment of the WIPO Convention, a reorientation of current treaty proposals, the establishment of new pro-development treaties and a change in WIPO’s technical assistance activities.

In contrast to this reform programme, the United States has argued that World Intellectual Property Organization should continue to “promote intellectual property

⁷⁸ Geneva Declaration on the Future of the World Intellectual Property Organization 2003, <http://www.cptech.org/ip/wipo/genevadeclaration.html>

⁷⁹ Ibid.

⁸⁰ Ibid.

⁸¹ Argentina and Brazil. “Proposal for the Establishment of a Development Agenda for the World Intellectual Property Organization”, WO/GA/31/11, Geneva: World Intellectual Property Organization, 27 August 2004, http://www.wipo.int/documents/en/document/govbody/wo_gb_ga/pdf/wo_ga_31_11.pdf

around the world” as its way of fostering development.⁸² It has proposed the creation of a ‘WIPO Partnership Program’, an Internet-based database to bring together “donors and recipients of IP development assistance”.⁸³ The United States contended: “WIPO's contribution to overall the UN development goals is best achieved not by diluting WIPO's role within the UN system but, rather, by strengthening WIPO's intellectual property expertise and its IP-related development assistance.”⁸⁴

The United Kingdom set up the Commission on Intellectual Property Rights to provide advice in respect of intellectual property and development. Professor John Barton of Stanford University, the chair of the Commission, observed:

Some argue strongly, particularly in business and government in developed countries, that IPRs help stimulate economic growth and reduce poverty. They say there is no reason why what works so well for developed countries could not do the same in developing countries. Others, particularly from developing countries and NGOs, argue the opposite equally vehemently. IP rights can do little to stimulate invention in developing countries, because the prerequisite human and technical capacity may be absent. Moreover, they increase the costs of essential medicines and agricultural inputs, hitting poor people and farmers particularly hard.⁸⁵

The United Kingdom submitted to the World Intellectual Property Organization: “One of the overriding messages that emerged from the IPR Commission Report was that IP regimes can and should be tailored to take into account individual country's circumstances within the framework of international agreements such as TRIPs”.⁸⁶

In the 2007 General Assembly, the World Intellectual Property Organization adopted 45 recommendations made by the Provisional Committee on Proposals

⁸² United States. “Proposal for the Establishment of a Partnership Programme within the World Intellectual Property Organization”, IIM/1/2, Geneva: World Intellectual Property Organization, 18 March 2005, http://www.wipo.int/edocs/mdocs/mdocs/en/iim_1/iim_1_6.doc

⁸³ Ibid.

⁸⁴ Ibid.

⁸⁵ Commission on Intellectual Property Rights. *Integrating Intellectual Property Rights and Development Policy*. London: United Kingdom Government, 2002.

⁸⁶ United Kingdom Government. *Intellectual Property and Development: Some Observations*, <http://www.cptech.org/ip/wipo/uk-iim.doc>

Related to a World Intellectual Property Organization Development Agenda.⁸⁷ The recommendations were organised into six clusters – including Cluster A: Technical Assistance and Capacity Building; Cluster B: Norm-setting, flexibilities, public policy and public domain; Cluster C: Technology Transfer, Information and Communication Technologies (ICT) and Access to Knowledge; Cluster D: Assessment, Evaluation and Impact Studies; Cluster E: Institutional Matters including Mandate and Governance; and Cluster F: Other Issues. The recommendations are listed in the appendix of this submission.

The Submission of the Government of Chile

In 2006, the Government of Chile made a submission to the World Intellectual Property Organization in respect of the Development Agenda.⁸⁸ The eloquent submission emphasized the importance of the public domain:

The public domain can be seen as a resource freely available to all members of society without the need for authorization or payment of a license, in contrast to the property subject to intellectual property rights, regulated by one or more holders of those rights.

The public domain is of crucial importance for researchers, academics, teachers, artists, authors and enterprises, which require a rich base of content for their new creations, as well as for those institutions, the function of which is to preserve or disseminate knowledge, such as universities, research centers, libraries, information services, archives and museums.

Thus, teachers may prepare materials for their classes, educational institutions may publish texts which are richer in content, researchers may build on existing works, journalists have access to information to enrich knowledge and public discourse, and training industries adapt and recreate works for new audiences.

The capacity of the public domain to increase the availability and dissemination of knowledge has been recognized by the international community, through different declarations and recommendations, especially within the sphere of the United Nations which recognizes the

⁸⁷ The World Intellectual Property Organization Development Agenda, <http://www.wipo.int/ip-development/en/agenda/>; and the 45 Adopted Recommendations under the World Intellectual Property Organization Development Agenda, <http://www.wipo.int/ip-development/en/agenda/recommendations.html>

⁸⁸ Chile. “Proposal Related to a World Intellectual Property Organization Development Agenda”, Geneva: World Intellectual Property Organization, 12 January 2006, http://www.wipo.int/edocs/mdocs/mdocs/en/pcda_1/pcda_1_2.doc

importance of the public domain, especially in the light of digital technologies and the Internet which facilitate the dissemination and distribution of knowledge for all.⁸⁹

The submission of the Government of Chile had three main arguments.

First, it submitted “that the public domain is fundamental for ensuring access to knowledge and promoting the creative processes of innovation”.⁹⁰ The Government of Chile contended that “the [World Intellectual Property Organization] should (i) deepen the analysis of the implications and benefits of a rich and accessible public domain, (ii) draw up proposals and models for the protection and identification of, and access to, the contents of the public domain, and (iii) consider the protection of the public domain within [World Intellectual Property Organization’s] normative processes”.⁹¹

Second, the Government of Chile proposed that the “[World Intellectual Property Organization] should set up a permanent area for analysis and discussion of incentives promoting creative activity, innovation and technology transfer in addition to the intellectual property system and, within this system, emerging exploitation models.”⁹² In particular, it noted: “Within such creations or innovations, the expansion of free software and other open licenses such as Creative Commons suggests the need to identify, study and disseminate the licensing options which co-exist within the intellectual property system.”⁹³

Third, the Government of Chile recommended further study of the “appropriate levels of intellectual property, considering the particular situation in each country, specifically its degree of development and institutional capacity.”⁹⁴ It suggested that the study should consider (1) the relationship between intellectual property policies and competition policies; (2) exceptions and limitations to the intellectual property system, which facilitate the implementation of innovation promotion and creation policies, based on the comparison of national models; and (3) the economic and social effects of changes on protection levels. The Government of Chile observed: “We propose the preparation of a study to assess what the appropriate

⁸⁹ Ibid.

⁹⁰ Ibid.

⁹¹ Ibid.

⁹² Ibid.

⁹³ Ibid.

levels of intellectual property are, taking into account the particular situation in each country, specifically its degree of development and institutional capacity”.⁹⁵

It is unfortunate that this range of development concerns about the public domain, access to knowledge, and transfer were not reflected in the content of the *Australia-Chile Free Trade Agreement* 2008.

A Development Agenda for the Australian Government

In contrast to the strong submission of the Chilean Government, the Australian Government does not yet have a clear, definable position on the Development Agenda in the World Intellectual Property Organization. At a recent meeting, it was noted:

The Delegation of Australia said that it was looking forward to working constructively and cooperatively with the Chair as well as the members of the Committee and the WIPO Secretariat to build on the work of the PCDA to deliver tangible outcomes for developing countries. The Delegation said that Australia had always been a strong supporter of the WIPO Development Agenda and continued to expand its own resources within the ASEAN region, particularly with technical assistance and capability programs to further contribute to WIPO’s efforts. The Delegation indicated that Australia was attempting to coordinate its activities with WIPO and other donor countries, so that their resources were mutually supportive of the WIPO Development Agenda and added that it had also had some recent successes in conducting joint activities between WIPO and regional partners, maximizing their different skills, expertise and resources.⁹⁶

However, the Australian Government articulated no clear position on the substantive proposals of the Development Agenda. There is a policy vacuum on this important subject. This is particularly unfortunate – given that the Australian Francis Gurry has been nominated to be the next director-general of the World Intellectual Property Organization, and has made the Development Agenda a key priority in his platform.

⁹⁴ Ibid.

⁹⁵ Ibid.

⁹⁶ World Intellectual Property Organization, *Committee on Development and Intellectual Property*, CDIP/1/4 Prov, Geneva: World Intellectual Property Organization, 11 April 2008, http://www.wipo.int/edocs/mdocs/mdocs/en/cdip_1/cdip_1_4_prov.doc

IP Australia has engaged in a limited range of co-operative development activities – mainly focused upon technical assistance and capacity-building.⁹⁷ The organisation has participated in the Asia-Pacific Economic Cooperation Intellectual Property Rights Experts’ Group. It has engaged in a public education and awareness programmes aimed at “promoting the effective use of the IPR system”. IP Australia, WIPO and AusAID have provided assistance to the Pacific Island Countries to help them develop a regional system for processing trademark applications. IP Australia has also been involved in training patent examiners, and design examiners in the region. The organisation has also helped the Tongan Intellectual Property Office and the Intellectual Property Organisation of Pakistan. The focus of such activities have been very much concentrated upon intellectual property administration.

All of IP Australia's activities are focused upon only Cluster A issues on intellectual property and development - namely, technical assistance and capacity-building. There is a lack of policy positions on the other key issues - such as Norm-setting, flexibilities, public policy and public domain (Cluster B); Technology Transfer, Information and Communication Technologies (ICT) and Access to Knowledge (Cluster C); Assessment, Evaluation and Impact Studies (Cluster D), Institutional Matters including Mandate and Governance (Cluster E), and Enforcement (Cluster F). The Australian Government clearly needs to development a policy position on Intellectual Property and Development to inform its trade negotiations at a bilateral, regional, and multilateral level. If the Chilean Government can play a constructive role in the debate, so can the Australian Government.

The Australian Government should develop a comprehensive policy agenda in respect of intellectual property and development to inform both current and future negotiations in intellectual property treaties. There are a number of priorities for the Australian Government in respect of intellectual property and development in the contexts of access to knowledge, health-care, the protection of genetic resources and traditional knowledge, technology transfer and climate change, and competition.

Given the depredations caused by the copyright term extension and other measures introduced by the *Australia-United States Free Trade Agreement 2004*, the Australian Government should taken measures to promote a “a rich and accessible

⁹⁷ IP Australia’s Development Co-operation Activities,
http://www.ipaustralia.gov.au/resources/international_dca.shtml

public domain”, to use the language of the Development Agenda. Civil society actors have supported a development agenda to promote access to knowledge. Ralph Nader’s Consumer Project on Technology (CP Tech) has taken the lead in the drafting of a *Treaty on Access to Knowledge* (the *A2K Treaty*).⁹⁸ Such an instrument would seek to protect, enhance and expand access to knowledge, and to facilitate the transfer of technology to developing countries.⁹⁹ There has been much theoretical and academic debate over the form and substance of the *A2K Treaty*. Yale Law School convened a conference to ‘help build an intellectual framework that will protect access to knowledge both as the basis for sustainable human development and to safeguard human rights.’¹⁰⁰ The Australian Government could help “to further facilitate access to knowledge and technology for developing countries”.

In the wake of the *Doha Declaration on the TRIPS Agreement and Public Health* 2001 and the *WTO General Council Decision* 2003, there is a need for industrialised nations to implement legislation to enable the export of pharmaceutical drugs to address public health concerns. Australia has still not amended its *Patents Act* 1990 (Cth). The Australian *Patents Act* 1990 (Cth) should also be amended to allow for the export of pharmaceutical drugs to developing countries, as allowed under Paragraph 6 of the *Doha Declaration on Public Health and the TRIPS Agreement* 2001. There is a need for a regime for access to medicines, which overcomes the limitations of existing models, such as the *Jean Chrétien Pledge To Africa Act* 2004 (Can). There should be a flexible mechanism to allow for the export of pharmaceutical drugs in an efficient and timely fashion. There is no need, though, for drugs manufacturers to have a first right of refusal. The definition of pharmaceutical drugs, vaccines and diagnostics should be broad. The definition of a national emergency and public health epidemic should be left to individual nations to determine. Furthermore, the legislation should include WTO members, as well as non-WTO members, such as East Timor. There is also a need for the Australian Government to investigate alternative mechanisms – such as prizes, health impact funds, and open source licensing – to encourage research and development in respect

⁹⁸ Consumer Project on Technology, <http://www.cptech.org/a2k/>

⁹⁹ *Draft Treaty on Access to Knowledge* (the *A2K Treaty*), <http://www.cptech.org/a2k/>

¹⁰⁰ Yale Law School, Access to Knowledge Conference, <http://research.yale.edu/isp/eventsa2k.html>

of infectious diseases, such as HIV/AIDs, tuberculosis, malaria, and neglected diseases.

The Australian Government should “accelerate the process on the protection of genetic resources, traditional knowledge and folklore, without prejudice to any outcome, including the possible development of an international instrument or instruments” (Recommendation 18). In particular, it should adopt the *Declaration on the Rights of Indigenous Peoples 2007*, and implement the articles dealing with the protection of indigenous intellectual property. In particular, Article 31 (1) provides: “Indigenous peoples have the right to maintain, control, protect and develop their cultural heritage, traditional knowledge and traditional cultural expressions, as well as the manifestations of their sciences, technologies and cultures, including human and genetic resources, seeds, medicines, knowledge of the properties of fauna and flora, oral traditions, literatures, designs, sports and traditional games and visual and performing arts. They also have the right to maintain, control, protect and develop their intellectual property over such cultural heritage, traditional knowledge, and traditional cultural expressions.” Furthermore, Article 31 (2) provides: “In conjunction with indigenous peoples, States shall take effective measures to recognize and protect the exercise of these rights.” The Australian Government should also strengthen the patchwork of federal and state laws regulating access to genetic resources (particularly the enforcement provisions, which are lamentably weak). It should provide technical assistance for its neighbours in Asia and the Pacific in the implementation of the *Rio Convention on Biological Diversity 1992*.

The Australian Government should also take a leadership role in exploring “intellectual property -related policies and initiatives necessary to promote the transfer and dissemination of technology, to the benefit of developing countries and to take appropriate measures to enable developing countries to fully understand and benefit from different provisions, pertaining to flexibilities provided for in international agreements, as appropriate” (Recommendation 25). The question of technology transfer is of particular importance in respect of the debate over climate change. Hutchinson has observed in a recent edition of the *University of Ottawa Law and Technology Journal*: “The development and widespread dissemination of climate change technologies are a key component in the battle to reduce global greenhouse

gas (GHG) emissions”.¹⁰¹ He notes: “As with many other multilateral environmental agreements, the climate change regime addresses the challenge of technology transfer by promoting two complementary approaches: active transfer by governments of developed countries (so-called “push factors”) and the creation of favourable conditions in developing countries to attract technology through trade and investment (so-called “pull factors”).”¹⁰² In this context, patent law plays a role in respect of creating incentives for enabling research and development in respect of green technologies. It also has mechanisms – such as technology transfer, and compulsory licensing – which allow for access to patented inventions in circumstances in which the patent holder refuses to license key technology. The Australian Government should seek to re-align intellectual property law in light of its new climate change policies.

As part of its Development Agenda, the Australian Government should also consider the “links between intellectual property and competition” – particularly with a view to deterring abuse practices in respect of intellectual property, such as the “evergreening” of pharmaceutical drugs. In particular, the Australian Government should “consider how to better promote pro-competitive intellectual property licensing practices, particularly with a view to fostering creativity, innovation and the transfer and dissemination of technology to interested countries, in particular developing countries and LDCs” (Recommendation 23). Moreover, there is a need “to approach intellectual property enforcement in the context of broader societal interests and especially development-oriented concerns, with a view that ‘the protection and enforcement of intellectual property rights should contribute to the promotion of technological innovation and to the transfer and dissemination of technology, to the mutual advantage of producers and users of technological knowledge and in a manner conducive to social and economic welfare, and to a balance of rights and obligations’, in accordance with Article 7 of the TRIPS Agreement” (Recommendation 45).

¹⁰¹ Hutchinson, C. “Does TRIPS Facilitate or Impede Climate Change Technology Transfer into Developing Countries?“, *University of Ottawa Law and Technology Journal*, 2006, Vol. 3 (2), p. 517-537, <http://www.uoltj.ca/articles/vol3.2/2006.3.2.uoltj.Hutchison.517-537.pdf>

Recommendations

10. The Australian Government should develop a comprehensive policy agenda in respect of intellectual property and development. Such an agenda should inform its negotiations in respect of bilateral treaties, such as the *Australia-Chile Free Trade Agreement 2008*, proposed regional agreements like the *ASEAN Free Trade Agreement*, and multilateral forums, such as the World Intellectual Property Organization and the World Trade Organization.

11. The Australian Government should play a leadership role in the development of a treaty in respect of Access to Knowledge (A2K) in order to promote a “rich and accessible public domain”.

12. The Australian Government should seek to effectively implement the *Doha Declaration 2001* and the *WTO General Council Decision 2003*. There is also a need for the Australian Government to investigate alternative mechanisms – such as prizes, health impact funds, and open source licensing – to encourage research and development in respect of infectious diseases, such as HIV/AIDs, tuberculosis, malaria, and neglected diseases.

13. The Australian Government should “accelerate the process on the protection of genetic resources, traditional knowledge and folklore.” In particular, it should implement the articles of the *Declaration on the Rights of Indigenous Peoples 2007*, dealing with the protection of Indigenous intellectual property, cultural heritage, and traditional knowledge. Furthermore, the Australian Government should strengthen domestic protection of genetic resources, and encourage its neighbours to effectively implement the *Rio Convention on Biological Diversity 1992*.

14. Given its deep concern with addressing climate change, the Australian Government should reform domestic and international patent laws to allow for the transfer of low emission patented technologies to developing countries.

15. As part of its Development Agenda, the Australian Government should also consider the “links between intellectual property and competition”. It should introduce stronger safeguards to prevent the abuse of intellectual property rights, such as the “evergreening” of pharmaceutical drugs.

APPENDIX

**THE 45 RECOMMENDATIONS OF THE WORLD INTELLECTUAL
PROPERTY ORGANIZATION DEVELOPMENT AGENDA**

Cluster A: Technical Assistance and Capacity Building

1. WIPO technical assistance shall be, *inter alia*, development-oriented, demand-driven and transparent, taking into account the priorities and the special needs of developing countries, especially LDCs, as well as the different levels of development of Member States and activities should include time frames for completion. In this regard, design, delivery mechanisms and evaluation processes of technical assistance programs should be country specific.
2. Provide additional assistance to WIPO through donor funding, and establish Trust-in-Funds or other voluntary funds within WIPO specifically for LDCs, while continuing to accord high priority to finance activities in Africa through budgetary and extra-budgetary resources, to promote, *inter alia*, the legal, commercial, cultural, and economic exploitation of intellectual property in these countries.”
3. Increase human and financial allocation for technical assistance programs in WIPO for promoting a, *inter alia*, development-oriented intellectual property culture, with an emphasis on introducing intellectual property at different academic levels and on generating greater public awareness on intellectual property.
4. Place particular emphasis on the needs of small and medium-sized enterprises (SMEs) and institutions dealing with scientific research and cultural industries and assist Member States, at their request, in setting-up appropriate national strategies in the field of intellectual property.
5. WIPO shall display general information on all technical assistance activities on its website, and shall provide, on request from Member States, details of specific activities, with the consent of the Member State(s) and other recipients concerned, for which the activity was implemented.

6. WIPO's technical assistance staff and consultants shall continue to be neutral and accountable, by paying particular attention to the existing Code of Ethics, and by avoiding potential conflicts of interest. WIPO shall draw up and make widely known to the Member States a roster of consultants for technical assistance available with WIPO.

7. Promote measures that will help countries deal with intellectual property-related anti-competitive practices, by providing technical cooperation to developing countries, especially LDCs, at their request, in order to better understand the interface between IPRs and competition policies.

8. Request WIPO to develop agreements with research institutions and with private enterprises with a view to facilitating the national offices of developing countries, especially LDCs, as well as their regional and sub-regional intellectual property organizations to access specialized databases for the purposes of patent searches.

9. Request WIPO to create, in coordination with Member States, a database to match specific intellectual property -related development needs with available resources, thereby expanding the scope of its technical assistance programs, aimed at bridging the digital divide.

10. To assist Member States to develop and improve national intellectual property institutional capacity through further development of infrastructure and other facilities with a view to making national intellectual property institutions more efficient and promote fair balance between intellectual property protection and the public interest. This technical assistance should also be extended to sub-regional and regional organizations dealing with intellectual property.

11. To assist Member States to strengthen national capacity for protection of domestic creations, innovations and inventions and to support development of national scientific and technological infrastructure, where appropriate, in accordance with WIPO's mandate.

* 12. To further mainstream development considerations into WIPO's substantive and technical assistance activities and debates, in accordance with its mandate.

13. WIPO's legislative assistance shall be, *inter alia*, development-oriented and demand-driven, taking into account the priorities and the special needs of developing countries, especially LDCs, as well as the different levels of development of Member States and activities should include time frames for completion.

14. Within the framework of the agreement between WIPO and the WTO, WIPO shall make available advice to developing countries and LDCs, on the implementation and operation of the rights and obligations and the understanding and use of flexibilities contained in the TRIPS Agreement.

CLUSTER B: NORM-SETTING, FLEXIBILITIES, PUBLIC POLICY AND PUBLIC DOMAIN

15. Norm-setting activities shall:

- be inclusive and member-driven;
- take into account different levels of development;
- take into consideration a balance between costs and benefits;
- be a participatory process, which takes into consideration the interests and priorities of all WIPO Member States and the viewpoints of other stakeholders, including accredited inter-governmental organizations (IGOs) and NGOs; and
- be in line with the principle of neutrality of the WIPO Secretariat.

16. Consider the preservation of the public domain within WIPO's normative processes and deepen the analysis of the implications and benefits of a rich and accessible public domain.

17. In its activities, including norm-setting, WIPO should take into account the flexibilities in international intellectual property agreements, especially those which are of interest to developing countries and LDCs.

18. To urge the IGC to accelerate the process on the protection of genetic resources, traditional knowledge and folklore, without prejudice to any outcome, including the possible development of an international instrument or instruments.

19. To initiate discussions on how, within WIPO's mandate, to further facilitate access to knowledge and technology for developing countries and LDCs to foster creativity and innovation and to strengthen such existing activities within WIPO.

20. To promote norm-setting activities related to IP that support a robust public domain in WIPO's Member States, including the possibility of preparing guidelines which could assist interested Member States in identifying subject matters that have fallen into the public domain within their respective jurisdictions.

21. WIPO shall conduct informal, open and balanced consultations, as appropriate, prior to any new norm-setting activities, through a member-driven process, promoting the participation of experts from Member States, particularly developing countries and LDCs.

22. WIPO's norm-setting activities should be supportive of the development goals agreed within the United Nations system, including those contained in the Millennium Declaration.

The WIPO Secretariat, without prejudice to the outcome of Member States considerations, should address in its working documents for norm-setting activities, as appropriate and as directed by Member States, issues such as: (a) safeguarding national implementation of intellectual property rules (b) links between intellectual property and competition (c) intellectual property -related transfer of technology (d) potential flexibilities, exceptions and limitations for Member States and (e) the possibility of additional special provisions for developing countries and LDCs.

23. To consider how to better promote pro-competitive intellectual property licensing practices, particularly with a view to fostering creativity, innovation and the transfer and dissemination of technology to interested countries, in particular developing countries and LDCs.

Cluster C: Technology Transfer, Information and Communication Technologies (ICT) and Access to Knowledge

24. To request WIPO, within its mandate, to expand the scope of its activities aimed at bridging the digital divide, in accordance with the outcomes of the World Summit on the Information Society (WSIS) also taking into account the significance of the Digital Solidarity Fund (DSF).

25. To explore intellectual property -related policies and initiatives necessary to promote the transfer and dissemination of technology, to the benefit of developing countries and to take appropriate measures to enable developing countries to fully understand and benefit from different provisions, pertaining to flexibilities provided for in international agreements, as appropriate.

26. To encourage Member States, especially developed countries, to urge their research and scientific institutions to enhance cooperation and exchange with research and development institutions in developing countries, especially LDCs.

27. Facilitating intellectual property -related aspects of ICT for growth and development: Provide for, in an appropriate WIPO body, discussions focused on the importance of intellectual property -related aspects of ICT, and its role in economic and cultural development, with specific attention focused on assisting Member States to identify practical intellectual property -related strategies to use ICT for economic, social and cultural development.

28. To explore supportive intellectual property -related policies and measures Member States, especially developed countries, could adopt for promoting transfer and dissemination of technology to developing countries.

29. To include discussions on intellectual property -related technology transfer issues within the mandate of an appropriate WIPO body.

30. WIPO should cooperate with other IGOs to provide to developing countries, including LDCs, upon request, advice on how to gain access to and make use of

intellectual property-related information on technology, particularly in areas of special interest to the requesting parties.

31. To undertake initiatives agreed by Member States, which contribute to transfer of technology to developing countries, such as requesting WIPO to facilitate better access to publicly available patent information.

32. To have within WIPO opportunity for exchange of national and regional experiences and information on the links between IPRs and competition policies.

Cluster D: Assessment, Evaluation and Impact Studies

33. To request WIPO to develop an effective yearly review and evaluation mechanism for the assessment of all its development-oriented activities, including those related to technical assistance, establishing for that purpose specific indicators and benchmarks, where appropriate.

34. With a view to assisting Member States in creating substantial national programs, to request WIPO to conduct a study on constraints to intellectual property protection in the informal economy, including the tangible costs and benefits of intellectual property protection in particular in relation to generation of employment.

35. To request WIPO to undertake, upon request of Member States, new studies to assess the economic, social and cultural impact of the use of intellectual property systems in these States.

36. To exchange experiences on open collaborative projects such as the Human Genome Project as well as on intellectual property models.

37. Upon request and as directed by Member States, WIPO may conduct studies on the protection of intellectual property, to identify the possible links and impacts between intellectual property and development.

38. To strengthen WIPO's capacity to perform objective assessments of the impact of the organization's activities on development.

Cluster E: Institutional Matters including Mandate and Governance

39. To request WIPO, within its core competence and mission, to assist developing countries, especially African countries, in cooperation with relevant international organizations, by conducting studies on brain drain and make recommendations accordingly.

40. To request WIPO to intensify its cooperation on IP related issues with United Nations agencies, according to Member States' orientation, in particular UNCTAD, UNEP, WHO, UNIDO, UNESCO and other relevant international organizations, especially the WTO in order to strengthen the coordination for maximum efficiency in undertaking development programs.

41. To conduct a review of current WIPO technical assistance activities in the area of cooperation and development.

42. To enhance measures that ensure wide participation of civil society at large in WIPO activities in accordance with its criteria regarding NGO acceptance and accreditation, keeping the issue under review.

43. To consider how to improve WIPO's role in finding partners to fund and execute projects for intellectual property -related assistance in a transparent and member-driven process and without prejudice to ongoing WIPO activities.

44. In accordance with WIPO's member-driven nature as a United Nations Specialized Agency, formal and informal meetings or consultations relating to norm-setting activities in WIPO, organized by the Secretariat, upon request of the Member States, should be held primarily in Geneva, in a manner open and transparent to all Members. Where such meetings are to take place outside of Geneva, Member States shall be informed through official channels, well in advance, and consulted on the draft agenda and program.

Cluster F: Other Issues

45. To approach intellectual property enforcement in the context of broader societal interests and especially development-oriented concerns, with a view that ‘the protection and enforcement of intellectual property rights should contribute to the promotion of technological innovation and to the transfer and dissemination of technology, to the mutual advantage of producers and users of technological knowledge and in a manner conducive to social and economic welfare, and to a balance of rights and obligations’, in accordance with Article 7 of the TRIPS Agreement.