SWINBURNE UNIVERSITY OF TECHNOLOGY

Submission to the Commonwealth Joint Standing Committee on Treaties in response to the Australia-US Free Trade Agreement

April 2004

Summary of submission

Swinburne's submission will address the following matters:

(a) Introduction
(b) Potential impact on Australia's current copyright balance
(c) Incorporating 'fair use' into Australia legislation
(d) Effects of term extension
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(f) ISP liabilities
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Introduction

Swinburne University of Technology ("Swinburne") is a dual sector institute of higher education with over 40,000 Australian and international students studying at five campuses in Melbourne. Swinburne's values include creativity, innovation, entrepreneurship and continuous improvement. It is a research intensive university which thrives on new ideas and knowledge.

Swinburne is therefore concerned that any amendments to Australian legislation resulting from the Australia-United States Free Trade Agreement ("FTA") should not restrict creativity, innovation or the free flow of information to the Australian community and the education sector in particular. It is also concerned about the potential for an increased economic burden being placed on the Australian education sector as a result of the proposed amendments to Australian intellectual property legislation. In light of this concern, Swinburne submits the following comments on Chapter 17, Intellectual Property Rights, in the draft of the treaty for the FTA as released on 1 March 2004.

Potential impact on Australia's current copyright balance

The changes proposed for copyright legislation under Chapter 17 have the potential to undermine the balance between copyright owners and users of copyright material as it is currently enacted in the Australian legislation. The proposals to strengthen protections provided to copyright owners contained in the FTA appear to have been drafted on the basis of the dramatically different structure of copyright legislation that exists in the USA.

In the US, recent legislative amendments which strengthen the rights of copyright owners (*Sonny Bono Copyright Term Extension Act*[1] and the *Digital Millennium Copyright Act*[2]) were drafted in light of the Constitutionally protected purpose of copyright legislation in the US to "Promote the Progress of Science and useful Arts"[3], the right to free speech available to US Citizens under the First Amendment[4] and the legislative definition and judicial interpretation of "fair use" in 17 USC § 107. None of these protections are currently available to Australian copyright users. Therefore to introduce similar provisions into Australian legislation without concomitant amendments to ensure that the rights of copyright users are provided with the necessary additional protection, would destabilise our existing legislative system and produce an overwhelming reduction in the rights of copyright users. This could potentially restrict access to scientific and other scholarly research, limit Australia's development in many areas of intellectual and cultural endeavor and inhibit future innovation.

Incorporating 'fair use' into Australian legislation

Swinburne proposes that the commitment that has been made to "harmonise" US and Australian copyright law should be extended to the "fair dealing" regime currently applying in Australia. The defence of "fair use" in US copyright law is different in emphasis and more liberal in intent than the current Australian fair dealing regime. We propose that Australian law be loosely harmonised with US law in this respect.

In particular, we propose that Australia's *Copyright Act* be amended to incorporate a much wider educational fair use than currently prevails.

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[1] 17 USC § 302 (1998)
[2] 17 USC §§ 1201-05 (1998)
[3] *United States Constitution* art I, § 8.
[4] *United States Constitution* amend 1.

Within Australia, more limited educational fair use applies. In its place, Parts VA and VB of the Copyright Act 1968 provide for educational licences. These involve substantial payments by Australian educational institutions – $18 million for the higher education sector, and much more for the schools and vocational education and training sector – to copyright interests, mainly overseas. Although the situations in the two countries are difficult to compare, the US education industry does not bear this impost, or at least not to the same degree, and hence a level playing field does not apply in the education industry.

Swinburne submits that some of the balance required for copyright law to operate effectively could be restored by broadening the "fair dealing" provisions in Australian law to approximate those of the US "fair use" provisions. We are aware that the scope of the educational licences within the Australian legislation is wider than the US "fair use" provisions, but believe that a better balance would be achieved nevertheless by widening the Australian fair dealing provisions. We propose that the education licences currently incorporated in the Australian *Copyright Act* be reviewed with a view to subsuming them, at least in part, in a general widening of the fair dealing rights available for Australians.

Broadening of fair dealing rights was also proposed in recommendation 6.35 of the Copyright Law Review Committee (CLRC) report '*Simplification of the Copyright Act 1968: Part 1 Exceptions to the Exclusive Rights of Copyright Owners*' [5]

> *Recommendation 6.35*
> *The Committee recommends the expansion of fair dealing to an open-ended model that specifically refers to the current exclusive set of purposes – such as research or study (ss.40 and 103C), criticism or review (ss 41 and 103A), reporting news (ss. 42 and 103B) and professional advice (s. 43(2)) – but is not confined to these purposes.*

Effects of term extension

The proposed extension of the term of copyright is unlikely to provide any economic benefit for Australian scholarly authors, and will significantly reduce material available in the public domain. This will produce a negative net effect for educational copyright users.

> *the public domain consists of a great, invaluable bounty of knowledge, art, and culture. Its value lies in the paradoxical fact that it is openly accessible to all. It is priceless, indeed, because the shared heritage that constitutes the public domain is indispensable to creativity. Without the ability to draw upon certain prior knowledge*

[5] CLRC, '*Simplification of the Copyright Act 1968: Part 1 Exceptions to the Exclusive Rights of Copyright Owners*', September 1998, 63.

and art – to quote past creativity, to modify it as one wishes, to express it in new ways to new audiences – future innovation is doomed.[6]

The extension of the term of copyright will reduce material available in the public domain and over the long term will increase costs for Australian universities through additional licensing payments. Universities currently purchase licensed access to scholarly journals through subscriptions to database providers who amalgamate the content they provide. Almost all of the owners of these database subscription services are overseas based companies. Australian scholarly authors who provide the content to these journals obtain no payment for their material and sign over their copyright completely to the companies in return for publication in peer-reviewed journals, which enhances their scholarly standing. Swinburne currently pays approximately $A1 million per annum for subscriptions to scholarly journals, an increasing number of which are provided through access to digital databases rather than in hard copy. The total cost to Australian universities of scholarly journals, now extensively online, is over A$125 million.

In addition the university pays approximately $A600,000 per annum to collecting societies to take advantage of the statutory educational licences contained in Parts VA and VB of the *Copyright Act*. This additional cost is not borne by US educational institutions which can undertake educational copying for no payment under the US "fair use" provisions.

Once material comes out of copyright it can be used by the university without payment. The intention of this limitation of the period of monopoly available to copyright owners was always to allow access to the community, thus encouraging learning and further innovation. In the area of scholarly research, an additional 20 years will result in a significant amount of material being unavailable for a long enough period to make a large proportion of it effectively useless.

Problems with re-drafting anti-circumvention provisions

The provisions contained in Article 17.4.7 reflect the contents of the much criticised US DMCA legislation.[7] There must be very careful consideration of how these provisions can be incorporated into the existing Australian legislation, contained predominantly in s.116A, due to the careful way in which the US legislation was

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[6] David Bollier, *Silent Theft: The Private Plunder of Our Common Wealth* (2002) 119.
[7] 17 USC §§ 1201-05 (1998)

drafted in order to protect "fair use". Article 17.4.7(a)(i) requires the introduction of a prohibition on the *act* of circumvention of a technological protection measure (TPM) which controls *access* to a work. The Australian legislation currently places no prohibition on the *act* of circumvention. The US legislators carefully restricted a prohibition on the *act* of circumventing TPMs to those that control *access* to a work. They did not prohibit the *act* of circumventing TPMs that protect one of the exclusive rights provided to a copyright owner under the legislation. The distinction was employed specifically to ensure that the public had the 'continued ability to make fair use of copyrighted works'.[8] This distinction would need to be carefully translated into Australian legislation in order to ensure that it does not produce an unintended reduction in the rights of copyright users due to the differences between the drafting structure of the s.116A and the definition of Technological Protection Measure under s.10 of the Australian Act and the US legislation including the definition of "fair use".

The prohibition on circumventing TPMs which control *access* to a work effectively provides a form of para-copyright which significant extends the rights available to copyright owners and allows them to control rights previously available to users. Although the application of a TPM to a work in the public domain would arguably not be subject to the anti-circumvention prohibition, the practical reality of a situation where copyright owners aggregate large collections of material under one subscription based access mechanism means that public domain material could be restricted from public access indefinitely. This means that for digital material owners can effectively control usages previously not controlled by copyright. It has also been noted that although "fair use" is formally protected within the drafting of the US legislation, the practical effect is that it is a right which in may cases is extremely difficult to exercise as the tools required to do so can not be easily obtained.[9]

Swinburne remains concerned that increasing the rights provided to copyright owners to use TPMs, without providing effecting balancing mechanisms to protect users' rights, may have negative effects including restricting innovation and creativity and increasing costs for all users of copyright material. In particular either copyright owners should be prohibited from applying TPMs to public domain material, or circumvention of TPMs should be allowed to access information held in the public domain.

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[8] US Copyright Office, *The Digital Millennium Copyright Act of 1998 US Copyright Office Summary*, (1998) 4 <http://www.copyright.gov/legislation/dmca.pdf> at 30 May 2003.

[9] *US v Elcom Ltd a.k.a. ElcomSoft Co Ltd and Sklyarov* 203 F. Supp. 2d 1111 (N.D. Cal 2002),11.

ISP liabilities

Swinburne is an educational institution that now undertakes a significant amount of its educational activity through the use of the Internet and digital technologies. As such it is concerned that if its activities fall within the definition of 'a provider or operator of facilities for online service or network access' under this Article, it could be subject to significant additional costs if it was required to conform to any new regulations placed on commercial Internet service providers ("ISPs"). This would particularly apply in relation to any requirements relating to co-operation with copyright owners, removal of material, termination of user services and provision of information. Swinburne considers that the activities of ISPs would be most appropriately governed by an industry code of conduct.

Swinburne is concerned about protecting the information held in its records and about its privacy obligations to Swinburne students.

Given the experience of Australia with effective industry-government co-regulation, the use of co-regulatory industry codes would be far more appropriate than legislation based on an overseas model which is widely acknowledged to be flawed in its effects. Swinburne proposes that educational institutions should either be specifically exempt from the definition of ISP or separately regulated in any legislation or industry code of conduct in order to ensure that they are not restricted in their ability to provide effective educational services through the use of new technologies.

Recent reviews of Australian legislation

A considerable body of work pertaining to recommendations on changes to the Australian copyright legislation is contained in the reports prepared by the CLRC which have been produced in the past few years. It would be beneficial to consult these reports when drafting legislative changes to ensure that, where possible, the changes are consistent with the considered recommendations from the Committee.

A number of educational institutions also made submissions to the recent review of the Digital Agenda copyright amendments conducted by Phillips Fox and the considerable amount of information prepared for this review should also be taken into account when considering changes to the Australian *Copyright Act*.

Transitional requirements

If Chapter 17 of the FTA is to be implemented, Swinburne considers it imperative that any such amendments should only be undertaken after careful consideration of all potential consequences, plus proper consideration of the outcomes of recent reviews of Australian copyright legislation particularly in relation to any changes to the anti-circumvention provisions in s. 116A of the Australian legislation.

Over recent years there have been a number of reviews of the Australian legislation, most recently the review of Crown Copyright by the CLCR. It is very important both that the benefit of these reviews and their recommendations not be lost, and that their implementation be undertaken in association with changes stemming from the FTA, and which are in many cases closely related.

In particular it is important that Australia takes full advantage of the 2 year transitional period provided in Article 17.12 for implementation of the obligations contained in Article 17.4.7.

Conclusion

The FTA substantially enhances the rights of copyright owners – in relation to term extension, anti-circumvention provisions, ISP liability, extension of criminal penalties, and other provisions. This submission makes several suggestions in relation to these provision. It also argues that for these changes to be fairly regarded as harmonising the copyright regimes of the two countries – rather than unbalancing ours – Australian legislation should incorporate more liberal fair dealing provisions. In particular, time should be taken to review the provisions for educational use with a view to enhancing fair dealing provisions.

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