

USFTA  
Submission No: .....115.....

**From:** Evelyn Woodberry [eve.woodberry@une.edu.au]  
**Sent:** Wednesday, 14 April 2004 2:40 PM  
**To:** Committee, Treaties (REPS)  
**Subject:** CAUL submission on the USFTA

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CAUL submission  
USFTA final.do...

Dear Sir,

Attached please find the submission by the Council of Australian University Librarians on the Australia-US Free Trade Agreement.

Please contact me for clarification or if there are any questions which arise as a result of the submission.

Regards

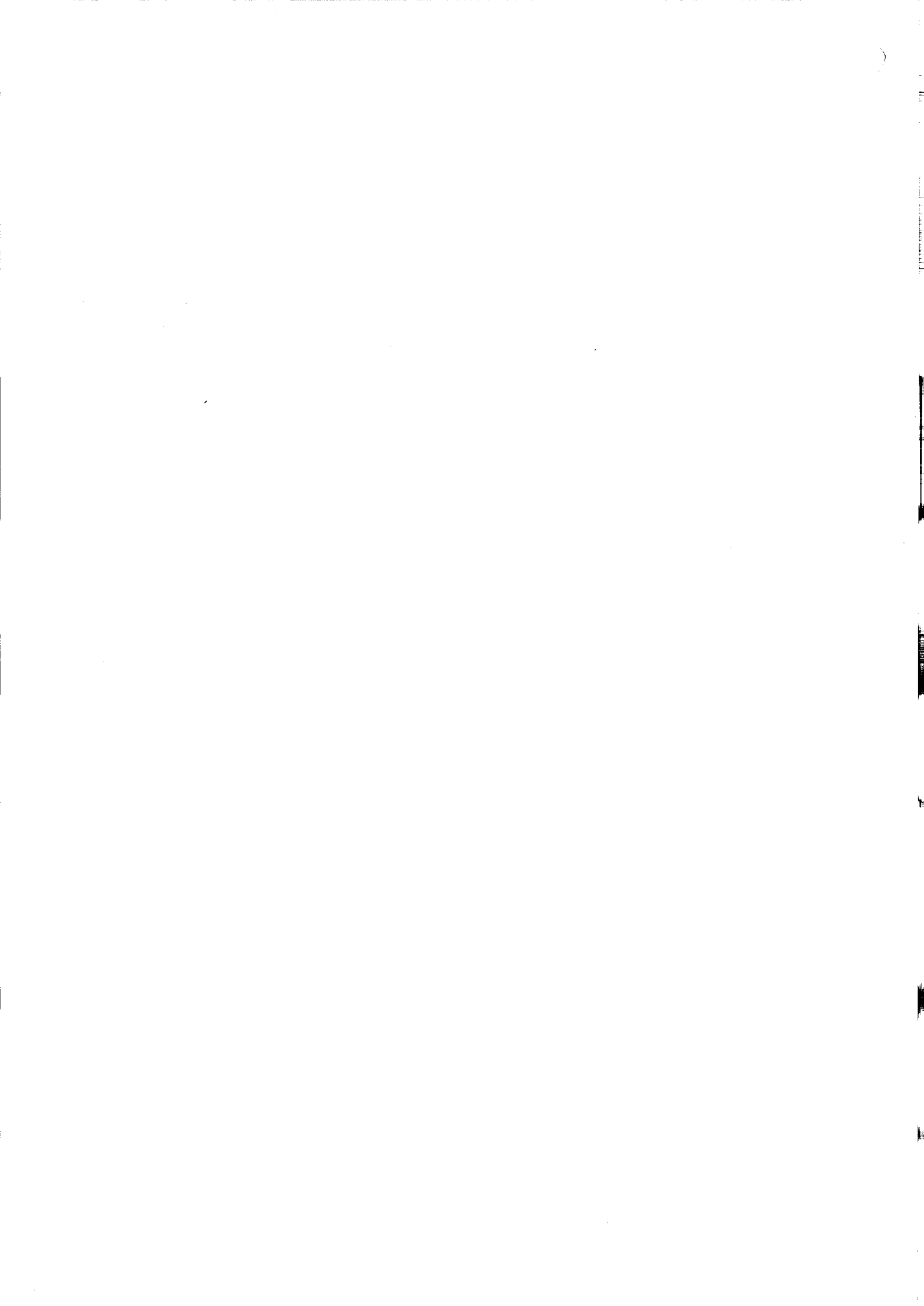
Eve

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# C·A·U·L

COUNCIL OF

AUSTRALIAN UNIVERSITY LIBRARIANS

13 April 2004

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

## **Australia - United States Free Trade Agreement**

The following submission, provided by the Council of Australian University Librarians (CAUL), expresses the serious concern of those responsible for Australia's research and academic information services at the copyright changes identified in the documentation on the Free Trade Agreement with the USA, and offers suggestions for ways to address the issues raised.

CAUL members operate in an educational environment which produces a significant amount of copyright material, while their core business is the provision of access to information. Copyright is integral to the work of university libraries and CAUL has an abiding interest in the development of balanced and effective copyright legislation. CAUL has contributed substantially to the process of evaluation and amendment of the Australia's copyright legislation through submissions to the Copyright Law Review Committee (CLRC) and involvement in the three year review of the Copyright Amendment (Digital Agenda) Act.

As a consequence of its consultative and considered approach Australia has developed an Act which, while meeting Australia's obligations to the WIPO treaties, also balances the needs of the copyright creators and the users. The Act has received worldwide recognition as a model of best practice.

### **Dangers for Australian creators**

Copyright legislation in the US has significant differences to Australia due to a very different history and sustained lobbying by large corporations and powerful industry associations. The 'balance' of the Digital Millennium Copyright Act (DMCA) is tipped firmly in favour of copyright owners and continues to attract criticism as it is considered to be cumbersome, punitive and highly supportive of big corporations in opposition to individual creators, researchers, students and the general public.

In proposing to 'harmonise' the well respected Australian copyright legislation with that of the problematic USA legislation under Chapter 17 of the FTA, the carefully developed balance between the interest of copyright owners and users will be destroyed and tipped firmly in favour of the owners. This outcome will be to the disadvantage of writers, artists and filmmakers, as well as the general public, who all depend on using copyright materials to create, to learn and to participate in community life.

Moral rights provisions are recognised in Australian and European intellectual property law but are not by the USA. Although not signalled in the documentation to date, it appears likely that those provisions will be vulnerable to challenge under the dispute provisions of the FTA. This will again jeopardise the interests of Australian creators in favour of corporate media interests.

### **Cost to Australian universities, researchers and learners**

The term of copyright in Australian law, death of the author plus 50 years, fulfils Australia's obligations to WIPO. The extension of a further 20 years was opposed in the USA by representatives of user groups as contradictory to the philosophy which underlies copyright legislation. The intention of copyright legislation is, that after a reasonable period of time during which the copyright owner obtains a return for their efforts, the material moves into the public domain for the benefit of everyone.

Specifically, the impact on higher education in Australia will be to raise the cost of compliance on an annual basis and increase the cost to research as researchers, who traditionally 'stand on the shoulders of giants', will be required to pay for information which would under current Australian law have come into the public domain.

The cost to higher education will be through the AVCC/ CAL agreement which is negotiated under Part VB of the Copyright Act. The agreement currently in place requires universities to pay around \$18,000,000 per annum for reuse of works by photocopying or scanning of materials which have already been purchased by the universities and therefore for which the copyright owners have been remunerated. As the AVCC moves into negotiations for the extension of the current agreement costs will rise due to the necessity to pay copyright owners for an additional 20 years. This cost will be paid by the universities, taking funds from teaching and research to remit them substantially to overseas copyright owners.

As copyright ownership in the main lies with large overseas publishers, extending the period of protection to death plus 70 years benefits these publishers and also those global entertainment corporations such as Disney and Sony whose primary interest in copyright law is protection. This will result in an increase in the flow of funds from Australia to overseas corporations.

### **'Fair use' and 'Fair dealing'**

One of the major differences in the copyright law involves the US 'fair use' provisions which are much broader than the Australian 'fair dealing' provisions.

Roger Clarke in his recent article on the impact of the FTA states

... US copyright law qualifies the rights of copyright - holders with 'fair use' provisions that are much more substantial than the Australian law's 'fair dealing' clauses. There appears to be nothing in the FTA that requires strengthening of consumer protection, and hence Australians would suffer the worst excesses of the US legislation without even the limited countermeasures that US consumers have available to them. (1)

In the US there is a body of case law relating to the principle of 'fair use' and the US Copyright Office specifically recognises 'fair use' for educational purposes in their Circular 21 (<http://www.copyright.gov/circs/circ21.pdf>). While such use is not unlimited, it gives US educational institutions much greater privileges than is the case in Australia.

CAUL submits that some of the balance can be restored by broadening the 'fair dealing' provisions in Australian law to approximate those of the US provisions. Specifically we seek the extension of fair dealing to the use of protected works for educational purposes, limited only to the extent that applies in the US.

The extension of 'fair dealing' is supported by the recommendation in the CLRC report '*Simplification of the Copyright Act 1968: Part 1 Exceptions to the Exclusive Rights of Copyright Owners*' which includes an extensive section on fair dealing on pages 31-92. As part of its deliberations the Committee includes: (2)

#### 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.

### **Copyright Law Review Committee (CLRC) Reports**

As mentioned previously a considerable body of work pertaining to recommendations on changes to the Australian copyright legislation, is contained in the CLRC reports 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.

### **Caching**

In respect to caching CAUL submits that Australian universities and their libraries rely heavily on caching techniques to reduce transmission costs and improve internet use efficiencies. The proposed caching provisions could imperil current arrangements, which are, in themselves, of no harm to copyright owner interests.

### **ISP Liability**

CAUL is also concerned about the increased criminalisation of issues relating to ISPs and telecommunications and supports the Australian Digital Alliance (ADA) submission relating to these issues.

## References

1. Clarke, Roger The Economic and Cultural Impacts of the Free Trade Agreement Provisions relating to Copyright and Patent Law.  
<http://www.anu.edu.au/people/Roger.Clarke/II/FTA17.html> (13 April 2004)
2. CLRC "Simplification of the Copyright Act 1968: Part 1 Exceptions to the Exclusive Rights of Copyright Owners" Canberra, 1998. p63.

Council of Australian University Librarians  
April 2004

**The Council of Australian University Librarians (CAUL)** represents all Australian university libraries and works in collaboration with other library and higher education organisations in Australia and internationally. CAUL's current strategic priorities include:

- maximising access to information resources and services,
- transforming the current scholarly communication system,
- promoting continuous improvement in university libraries, and
- advocating effective policies and an appropriate legal and regulatory environment.

### **Contact in regard to this submission:**

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