Sidley, Kristine (REPS)

AUSFTA
Submission No: 138

From: Patrick Caldon [patc@cse.unsw.edu.au]
Sent: Friday, 16 April 2004 4:36 PM
To: Committee, Treaties (REPS)
Subject: Sumission for Australia - United States FTA

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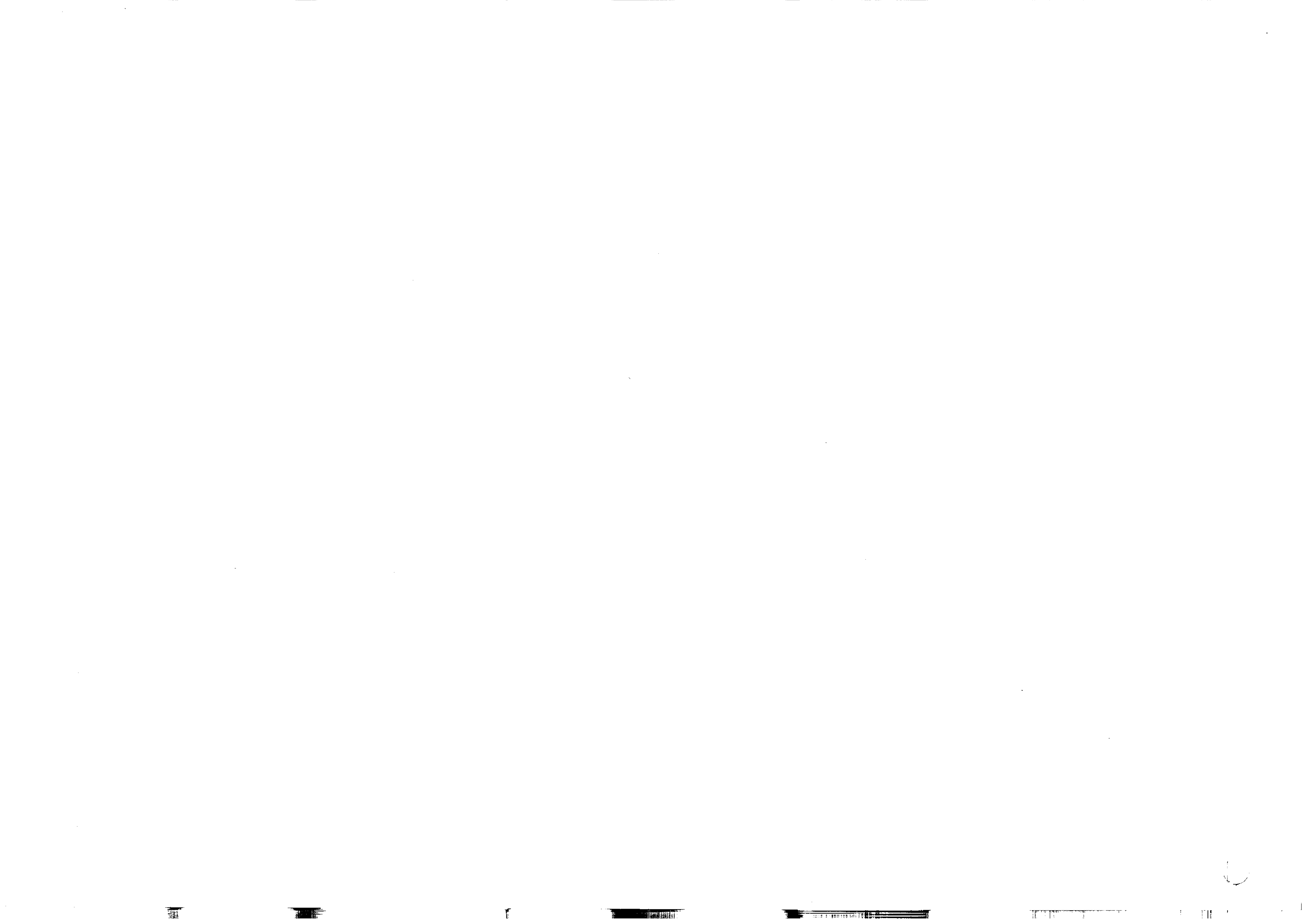
Dear secretary,

Here is my submission to the JSCT on the US/Australia FTA.

Reagrds,
Patrick Caldon.



Submission to the Joint Standing Committee on Treaties

Patrick Caldon

April 16, 2004

Introduction

I confine my submission to Chapter 17 of the proposed US/Australia Free Trade Agreement, and specifically the copyright portions. The essence of the submission is that strengthening the currently very strong Australian Intellectual Property (IP) laws is misconceived, particularly in the context of the FTA since:

- The strengthening benefits the US and disadvantages Australia, as the former is mostly a producer of IP and the latter a consumer.
- Instituting US style copyright law without US style constitutional free speech protection will lead to gross miscarriage of justice.

To my knowledge, the public perception of the rest of the agreement (excluding Chapter 17) is that it is on balance neutral or mildly favouring US interests. The public perception of the IP restrictions is that it is strictly neutral, giving each side equivalent rights, and therefore should be ignored in a "horse-trading" analysis of the agreement. This is incorrect. The IP portion of the agreement greatly serves US interests, and given the equivocal nature of the benefits from the rest of the agreement the IP portion should be seen as the part which grossly tilts the trade playing field to benefit the US.

The book: "Information Feudalism: Who Owns The Knowledge Economy?", by Peter Drahos and his collaborator John Braithwaite provides an analysis of the attitude of Australian trade negotiators and IP, in the context of the GATT agreement. They charge that Australian negotiators are almost wilfully blind to the overwhelming IP production disadvantage that Australia faces with respect to other countries. The argument of Drahos and Brathwaite is not a particularly difficult argument to follow. One first notes that there is a huge disparity between the IP produced in Australia and that produced overseas. Greater protection of foreign IP (which foreigners seem to be able to produce very efficiently) should therefore be accompanied with greater access for Australian goods, particularly farm produce, which we seem to be able to produce very efficiently. This will result in more efficient provision of goods all-round, which will be of mutual benefit. If there is no quid-pro-quo, where is the mutual benefit?

In particular I'd draw your attention to the follwing paragraph from the regulation impact statement:

> The harmonisation of our laws with the world s largest intellectual property market will provide Australian exporters with a more familiar environment and certain legal environment for the export of value-added goods to the United States.

If DFAT were living on this planet and had the barest knowedge of Australian trade, they would realise that our exports of primary production is massive, and our exports of intellectual property (and products derived from IP processes) incrementally more than sod all. I congratulate all of the 3 (or maybe 4 or 5) exporters who are encouraged by DFAT's careful attention to their plight, but perhaps they sould realize that stronger IP protection benefits exactly one party in this game.

Specifically, in Chapter 17 there are two measures which are objectionable:

- The increase of the copyright term to death of author plus 70 years, and
- the increased protection from "circumvention devices"

The increased term benefits only existing copyright holders, the additional impetus for producers of works to produce works on account of the additional term is infinitesimal. This therefore benefits existing copyright holders without changing the production of new works to any extent, and so greatly advantages the US.

Furthermore the ultimate objective of copyright is to encourage authors to create work which becomes part of the public domain, to help create our common cultural heritage. Nothing published in the USA since 1923 has had this opportunity to enrich all society, instead of just the copyright holders.

The increased protection of "circumvention devices" is also of concern. I am a user of the "Linux" operating system, which I need for my work. There is no commercially available playback software for DVDs available for this operating system, but happily such software has been produced by volunteers and made freely available over the web. To play a DVD one needs to circumvent the internal DVD copy protection - to play any media one needs to circumvent the copy protection. "Playback" and "circumvention of protection" are unfortunately identical concepts, no matter how legislation is drafted. In the US, injunctions were obtained against those distributing the decryption potion of the DVD playback software (known as "DeCSS"), the cases "DVD Copy Control Assoc. v. Bunner, McLaughlin et al." and "Universal City Studios, Inc. v. Reimerdes" where thus far injunctions have been obtained for this software. Again, to reiterate, the primary purpose and current primary use of this software for which these cases were brought is playback of legitimately purchased DVDs. It is likely that similar lawsuits will be brought against Australians if these ill-conceived parts of the treaty are ratified.

Recommendations:

- The FTA chapter 17 should not be ratified by the Australian government, or if this is not possible,
- US-style free speech protections should be introduced into Australian law.