

AL©C

Australian Libraries' Copyright Committee

PO Box E202, Kingston ACT 2604

ADA

Australian Digital Alliance

Tel: (02) 6262 1273 Fax: (02) 6273 2545

**Submission to
Joint Standing Committee on Treaties
on the
Australia- United States
Free Trade Agreement**

April 2003

Introduction

The Australian Digital Alliance (ADA) is a coalition of IT companies, scientific and research organizations, schools, universities, consumer groups, cultural institutions, libraries and individuals. ADA members are united by the common stand that intellectual property laws must strike a balance between providing appropriate incentives for creativity on the one hand, and reasonable and equitable access to knowledge on the other. The ADA believes copyright laws must balance effective protection of the interests of rightsholders against the wider public interest in the advancement of learning, innovation, research and knowledge.

The Australian Libraries' Copyright Committee (ALCC) is the cross-sectoral body acting on behalf of Australian libraries and archives on copyright and related matters. It seeks to have the interests of users of libraries and archives recognised and reflected in copyright legislation, and in so doing, help build and sustain a copyright regime which promotes learning, culture and the free flow of information and ideas in the interests of all Australians.

The ADA and the ALCC thank the Committee for the opportunity to make this submission. The ADA and the ALCC will limit this submission to comments relating to the copyright provisions within Chapter 17 of the draft text of Australia – United States Free Trade Agreement (FTA).

The ADA and the ALCC acknowledge the research conducted on Chapter 17 of the FTA by Brendan Scott of Open Source Law in preparing this submission.

Summary

The ADA and the ALCC are disappointed to note that the importance of maintaining a balanced copyright regime is not properly reflected in the draft text of Chapter 17 of the FTA. Chapter 17 creates obligations to amend the Australian copyright regime in ways that will ultimately reduce access to materials, increase costs for institutions which provide public access to knowledge and curb innovation. This neglect is disturbing and unsatisfactory given that a balanced intellectual property forms the research and resource base upon which our knowledge and creative industries, as well as many of the primary industries rely.

If however, the Australian government insists on ratification of the FTA, the agreement must be implemented in a way that minimises the possible damage to our cultural, educational, business and information industries. Most of the provisions in Chapter 17 provide some margin for flexibility in interpretation which should be utilized to maintain as much as possible, the balance struck in our current copyright regime.

Procedural Matters

The ADA and the ALCC note that many of the issues addressed by the FTA were topics of inquiry in the Digital Agenda Review undertaken simultaneously with the FTA negotiations in 2003. We note that although the report of the Review is currently

with the government, the public has as yet been unable to benefit from the insight and conclusions drawn by the Review consultant.

Australia's current copyright regime is looked upon by other jurisdictions as having achieved an appropriate and commendable balance. This balance has been distilled through a long process of debate and consultation with the public; it is commonly acknowledged that copyright is an extremely difficult area to regulate because of the fine balance that must be struck.

The process of negotiating the FTA on the other hand has been accelerated. Although some consultation processes took place throughout last year, the negotiation process had been closed; participants in consultation were not privy to information at an appropriate level of detail as to the nature of provisions being considered until the release of the draft text in March this year. The ADA and the ALCC submit that the pressures in time have created a climate that could lead to the enactment of rash and ill-considered legislation.

Economic Impacts

The ADA and the ALCC note that the Centre for International Economics (CIE) has been commissioned to create an economic model of gains on the basis of the draft text. The ADA and the ALCC acknowledge the difficulties of assessing gains in the area of intellectual property. It is extremely difficult to forecast in any meaningful sense, trends in creating, distributing and gathering information against the background of rapid technological change.

The ADA and ALCC urge the government to carefully scrutinise any economic model created to assess the economic impacts arising out of Chapter 17.

The ADA and the ALCC note that little information about the work undertaken by CIE has been available; there has been no opportunity to participate in the study nor assess or give input to the approach taken by CIE.

The ADA and the ALCC submit that a study of the economic impacts of the FTA must be considered in relation to the non-economic impacts of the agreement (which must be given equal weight). The mechanisms and impacts in the area of intellectual property are mostly unquantifiable in a strict economic sense. The paradigms of economic modelling are simply inadequate to assess the cost and benefits of cultural, innovative and creative potential woven deep in the cycle of the sharing and creation of knowledge.

Distortion of Copyright Balance

The ADA and ALCC acknowledge that the draft text is still undergoing "legal scrubbing" and that some further changes may be made for clarity and consistency.

The language in the current draft text of Chapter 17 is opaque and the chapter is complex. As a result some margin exists for different interpretations of the provisions.

It is not difficult to see however, that overall the provisions in Chapter 17 would significantly raise the level of copyright protection if implemented into the Australian copyright regime.

In contrast, there are very few references which concern the protection of users' rights. Those provisions that relate to users rights are ambiguous and their intended effect is difficult to gauge.

As stated repeatedly by negotiators from Australia and the U.S., the overall effect of Chapter 17 is the harmonisation of our respective copyright regimes. It is apparent however that many of the FTA provisions closely mirror those provisions already in the U.S. *Digital Millennium Copyright Act 1998* (DMCA) so that harmonisation equates to unilateral action to amend Australian copyright legislation to U.S. legislation. The alignment of our copyright legislation to meet obligations created by the FTA has dangerous potential to create severe distortions within our domestic regime. Although Australia and United States share a common law tradition, some divergence has developed in recent years, marked by the emergence of powerful U.S. copyright markets which have been extremely successful at legislative lobbying. Consequently, the U.S. copyright regime sets one of the highest standards of copyright protection in the world.

The U.S. and Australian copyright regime contain some important differences in the manner in which each jurisdiction achieves its copyright balance. The Bill of Rights and open-ended "fair use" defences in American legislation provide important checks against over-reaching interpretations of the strong U.S. provisions. In Australian copyright law, limited "fair dealing" defences have to date, provided a balance against less expansive (relative to the U.S.) owners' rights. The adoption of "strong" U.S.-style copyright provisions must therefore be balanced by the adoption of reinforced checks within our current regime against any expansion of rights. To the extent of fulfilling our new obligations to "harmonise" our copyright laws with the U.S., we must ensure that Australian cultural, legal and regulatory norms and values are honoured.

Copyright Term Extension

Article 17.4.4 provides for an extension of copyright term to loosely parallel the term of copyright in the U.S. The ADA and the ALCC strongly oppose the commitment to extend the term of copyright protection.

The legal and economic basis for the creation of copyright is that creators should be protected and rewarded for a set period in order stimulate further creativity and innovation. Apart from financial reward, the stimulation of creativity and further works depends on the eventual entry of works into the public domain so that others can freely learn from and draw from a collective pool of knowledge and creativity.

Term extension has generated fierce debate within the U.S. where numerous successive extensions of copyright have effectively locked works out of the public domain and displaced the intended cycle of creation and contribution upon which copyright was originally justified. The recent challenge posed to the U.S. *Copyright*

Term Extension Act 1998 (CTEA) in *Eldred v Ashcroft*¹ was only narrowly unsuccessful and won on constitutional grounds (particular to U.S. law). The strong arguments made to the court for repealing the CTEA, such as the added costs to users, the minimal long term awards to owners and the speculative nature of predictions of future creation and innovation arising from further monopoly were not disputed.

The costs and benefits of copyright term extension are difficult to estimate. The available reports on the topic such as the Allens report, *Copyright Term Extension: Australian Benefits and Costs* (July 2003) provides no clear evidence of any short or long term economic benefits of extension. In addition, no compelling rationale has been put forward to demonstrate how an extension of copyright might yield significant trade benefits; the vague position that term extension would encourage trade due to increased U.S. confidence in the strength of the Australian copyright protection is laboured. No claims have been made that the economic benefits of harmonisation with the U.S. is any more than marginal and no data has been presented to substantiate even this weak assertion. Although the benefits of harmonisation are theoretically plausible, the reality is that the beneficiaries of harmonisation will be multinational companies, who are based mostly in the U.S. and European Union.

A significant increase in the underlying incentive for the creation of works through an extended term of copyright is likewise difficult to sustain. No proponent of term extension has relied on an argument that an extra 20 years of protection *after* the death of the author will have any impact on the incentive to produce more work.

In addition, Australia is a net importer of copyright materials from the U.S. by a substantial margin; an extension of copyright term will, other things being equal, lead to a reallocation of resources and adversely affect our balance of trade. An extension of copyright term has serious consequences for libraries, cultural and educational institutions in relation to raised costs of maintaining access to information and increased costs associated with the already formidable and resource-intensive task of tracing copyright owners and requesting permissions. The groups of people who will be ultimately affected include historians, scholars, teachers, writers, artists and researchers of all kinds.

An increase in the term of copyright will also cause serious public harm in a non-economic sense. Term extension will likely restrict traditional dissemination of copyrighted works, inhibit new forms of dissemination through the use of new technology, and threaten current efforts to preserve historical and cultural heritage.

In particular, an extension of copyright term will have serious impacts on the development of electronic archives, and repositories which publish or make available public domain works. Electronic libraries such as the Internet Archive, and Project Gutenberg will face further obstacles in providing digital access to historical texts, audio-visual works and literary works which will remain in the control of copyright owners.

Continual extension of copyright term has been one means through which the scope for public use has been progressively diminished. The effect is particularly grave in

¹ *Eldred v Ashcroft* (2003) 123 S. Ct 769

light of other developments (technological and legal) which have further enhanced the power of copyright owners to control their works.

Article 17.4.4 allows little margin for flexible interpretation or implementation. The distorting effects of an extension of copyright term should be minimised through other mechanisms within the copyright regime and other non-legislative means (such as increased funding for libraries, educational institutions and cultural institutions that will face significant impacts as a result of such an extension).

Anti-circumvention Measures and Technological Protection Measures

The ADA and ALCC submit that the anti-circumvention provisions in the FTA represent a substantial departure from our current law and impose obligations to amend our current regime that will have a dramatic and negative impact on the balance required to encourage the development of new software, systems and products. Implementation of the provisions will create barriers to competition, interoperability, and the efficient operation of our IT industry.

General prohibition on act of circumvention

Article 17.4.7 (a) imposes a change in the regulation of circumvention devices which, if implemented, will represent a substantial deviation from current law. The creation of a blanket ban on the act of circumvention is effectively an overhaul of the careful approach to balance embodied in the Digital Agenda Amendments. Article 17.4.7 (a) (1) establishes a prohibition on any person who:

“ knowingly, or having reasonable grounds to know, circumvents without authority any effective technological measure that controls access to a protected work, performance or phonogram, or other subject matter;”

The disjunction created by this significant departure from current law is complicated by the lack of clarity and ambiguity of the provision. For example it is unclear as to whose “authority” is relevant in the provision; a number of possible interpretations exist including the person or persons who holds rights to the content, the person who applied the technological protection measure (TPM), the person who created the TPM and the person who owns the physical item in which the content is embodied. Similarly, “protected” can be interpreted in a number of ways including protection by a TPM or protection by an entitlement granted by Ch 17.

The lack of clarity in the drafting makes it difficult to assess the impact of the provision and the standard of protection required to meet the obligations imposed by FTA in relation to this issue.

Prohibition on the manufacture and trade of TPMs

Article 17.4.7 (b) prohibits various acts relating to trade in circumvention devices such as manufacture, import, distribution, offering to public, provision or otherwise traffic in devices or products or components. Although these acts are set out in s116A(1) (b) of the *Copyright Act 1968* (“the Act”), the FTA provision imposes a significant deviation from our present law through its focus on the characteristics of

the device or service. This approach significantly raises the level of protection covering the use of TPMs. A number of other disparities with our current law unjustifiably raise the level of copyright protection:

- a) Under our current legislation, the various acts that are set out in Art 17.4.7 (b) are subject to a test that the defendant knew or ought reasonably to know that the device would be used to circumvent the technological protection measure (s166A(c)). No such requirement appears in the FTA draft.
- b) under current law, a device must actually be capable of circumventing a protection measure (through the operation of the current definition of “circumvention device” in s10 and the manufacturing provision in s116A(1)(b)(i)). The FTA provision requires only that devices or services are marketed or promoted “for the purpose of circumvention of any effective technological measure” regardless of whether they are actually capable of circumventing a TPM or not.
- c) Art 17.4.7(b) (C) includes reference to a device or service being “primarily designed” for the purpose of circumvention. This again is absent from our current law; the reference in this article widens the types of things that may come under the TPM provisions.
- d) Art 17.4.7 (b) (11) provides if any of the three subsections (A), (B), or (C) apply, the provision will be triggered. Therefore, even if a device or service has substantial or significant commercial purposes other than circumventing a technological protection, if it was originally designed for circumvention or is marketed for that purpose, selling or marketing of the device or service will still be prohibited.

The ADA and ALCC submit that cumulatively, the distinctions of the FTA provisions from our current law impose significantly higher restrictions on the use of and availability of circumvention devices which will have serious adverse effects for continued lawful access to works.

“Effective Technological Measure”

The ADA and the ALCC submit that the definition of “effective technological measure” (“ETM”) in the FTA is unreasonably broad in its scope but that sufficient flexibility exists in the definition to enable the preservation of our current definition of a “technological protection measure”, should the FTA be implemented.

Read in the most restrictive sense, implementation of the FTA definition of “effective technological measure” would displace the carefully crafted balance in our current regime which is intended to maximise innovation and competition in the IT market. The adoption of the FTA definition in a strict sense would also curtail the progress made through ongoing domestic judicial consideration of the issue (*Sony v Stevens*²).

² *Kabushiki Kaisha Sony Computer Entertainment & Ors v Stevens* (2002) 55IPR 497 at first instance and the decision of the full court of the Federal Court of Australia [203] FCAFC 157 delivered on 30 July 2003

“Technological protection measure” in the *Copyright Act* is specifically limited to measures which achieve protection through either limiting access or by a copy control mechanism. The definition of an “effective technological measure” on the other hand is conceivably much broader and covers anything that “controls access” to a work *or* “protects copyright”. The ADA and the ALCC submit that the definition of an ETM in the FTA should be read against the ordinary meaning of the terms; a technological measure must be “effective” that is, would actually “prevent or inhibit the infringement of copyright” to come under the definition.

Exceptions to General Ban

The FTA requires Australia to change the existing “permitted purposes” exceptions in section 116A of the *Copyright Act*, and replace it with a set of very narrow and specific exceptions which will erode consumers’ rights to make non-infringing uses of copyrighted works and discourage research and innovation.

Article 17.4.7 (e) and (f) of the FTA defines the scope of permissible exceptions to the general circumvention ban. Where an activity is outside the seven activities in paragraph (e), it cannot be made an exception (pending processes described by Article 17.4.7 (e) (viii) as discussed below).

Current exceptions which appear to be eliminated by this provision are:

- (a) 47E (Correcting Errors in computer programs)
- (b) 48A (Copying for Parliamentary Libraries)
- (c) 49 (Communicating works by libraries and archives for users)
- (d) 50 (Communicating works by libraries and archives to other libraries and archives)
- (e) 51A (Reproducing works for the purposes of preservation)
- (f) 183 (Use of copyright in service of the Crown)
- (g) Part VB (Communicating works by educational institutions)

Most of the exceptions that are listed as permissible under 17.4.7 (e) are further subject to the requirement that the activity also be non-infringing. However, simply being non infringing of itself will not be sufficient to be considered an exception.

Article 17.4.7 (f) effectively sets out three categories of exceptions, although one exception may be in more than one category. The three categories are:

- a) exceptions to the prohibitions in relation to use;
- b) exceptions to the prohibitions in respect of manufacturing, trading activities etc where the measure controls access; and
- c) exceptions to the prohibitions in manufacturing, trading activities etc where the measure protects copyright.

Typically a TPM functions simultaneously as both a form of access control and as a means of protecting copyright. Where that is the case, an act can presumably only be made an exception if it is acceptable in all the relevant categories of exceptions (as outlined above). The uncertainty is not helped by the definition of “effective technological measure” in the FTA which essentially considers the function of access and copying as distinct when in fact the practical effect of some mechanisms makes the two functions indistinguishable.

Article 17.4.7 (e)(viii) – Rulemaking provision

Article 17.4.7 (e)(viii) of the FTA permits additional exemptions to be granted after a process of legislative or administrative review (limited to occur every 4 years) “where an actual or likely adverse impact on those non-infringing uses is credibly demonstrated”. The provision is modelled on a similar rule –making procedure in the DMCA.

Although the DMCA provisions were enacted as a catch-all to protect consumers from unforeseen adverse effects of the provisions relating to use of technological measures, the provisions have since been extensively criticized for its shortcomings. The ADA and the ALCC submit that article 17.4.7 (e)(viii) is a wholly inadequate mechanism to protect consumers’ rights and a weak gesture to redress the fundamentally flawed approach to achieving the balance required between copyright owners and users.

If however, the provision must be incorporated into the Australian regime, the ADA and the ALCC urge the government to do so in such a way as to avoid as far as possible, implementation of an administrative process bearing resemblance to that currently in place in the U.S. The ADA and the ALCC are concerned however that this may prove difficult to avoid due to the drafting of the provision which contains built-in flaws.

Two rule-making proceedings have been completed in the U.S. thus far (in 2000 and 2003) which have been extensively and deservedly criticised for failing to preserve consumers access rights under existing copyright exceptions and limitations, and failing to provide continued access to public domain works. A number of procedural weaknesses in the U.S. process have lead to those failures, these flaws find roots in the drafting of Article 17.4.7(e)(viii) and must be avoided if possible in implementation:

- a) The article has limited practical use for consumer protection because it permits exemption only of the act of circumvention of certain technological measures but not for the tools, technologies and devices required to make use of any exemption granted. As a result, any exemptions granted can effectively only be exercised by the small number of persons who have the expertise and resources to create their own tools and mechanisms;
- b) The article requires that any exemptions made through the provision be for a “particular class of works”. In the U.S. this has been interpreted to refer to subsets of “works” as defined in the U.S. *Copyright Act* only, rather than a flexible category of works by reference to a group of users or by the non-

infringing nature of use of a work. This restrictive application of the provision has resulted in the rejection of proposed exemptions on the basis that the proposals failed to frame a “valid” class of works. Such an interpretation is unnecessarily formulistic and should not be adopted if the provision is implemented into Australian legislation;

- c) The article requires that an actual or likely adverse impact be “credibly demonstrated” in order for an exemption to be granted. In the U.S., the procedures governing the rule making proceedings has required an untenably high standard of proof; the ADA and the ALCC suggest that any implementation of this provision give due consideration to the ability of parties to gather or access information. The burden of proof should not be set at a standard that cannot conceivably be met by requesting parties.

Through the imposition of legal and procedural obstacles as detailed above, the rule-making provision set out in article 17.4.7 (e) (viii) has failed to give effective balance to the very narrow exceptions to circumvention in the DMCA despite the clear indication within U.S. legislative history which establishes the purpose of the rule-making proceedings as protecting consumers’ rights to make non-infringing uses of copyrighted works. In any implementation of the article in the Australian regime, care must be taken to avoid a similar outcome. This can be achieved through taking a broad interpretation of the provision to ensure that the implementing legislation sets reasonable standards for proposals made in pursuance of the exemption.

ISP liability

The ADA and the ALCC note that the provisions relating to ISP liability (Art 17.11.29) in the FTA are closely modelled on ISP provisions in the DMCA. Since its introduction the ISP provisions in the DMCA have proved controversial and continue to be the subject of litigation in the United States. The U.S. subpoena procedures have in particular, been problematic and issues relating to access to information remain unresolved as litigation continues (*RIAA v Verizon*³). It is difficult to ascertain at this stage, what balance has been achieved in the United States, between the limitation of liability of ISPs and the protection of individuals.

Article 17.11.29 is complex and introduces substantial new obligations on service providers. The extensive and specific provisions under that article frustrates the principle of “technological neutrality” which underlies the Digital Agenda Amendments. The ISP provisions in the FTA however has scope for different interpretations; Australian legislative implementation of these provisions should be drafted to enable the broadest and most flexible interpretation of Article 17.11.29. This would minimise the difficulties associated with the prescriptive approach of the FTA provisions particularly in light of the challenges presented by developing and upcoming technologies.

Legal incentives

Art 17.11.29 (a) establishes a requirement to provide:

³ Recording Industry Association of America v Verizon Internet Services, Inc DC No. 02 MS- 0323

“legal incentives to service providers to cooperate with copyright owners in deterring the unauthorised storage and transmission of copyrighted material”

The parameters of this general obligation are unclear as to whether Article 17.11.29 (a) imposes an obligation to create further incentives than that process prescribed by Article 17.11.29(b). In light of the onerous and specific process contained in Article 17.11.29, the ADA and ALCC submit that Article 17.11.29 (a) should be read as having been satisfied if the provisions of Article 17.11.29 (b) are followed.

In the case that Article 17.11.29 (a) is interpreted to create obligations separate from paragraph Article 17.11.29(b), the ADA and the ALCC submit that compliance with s36(1A)(c) of the *Copyright Act* (which makes reference to reasonable steps and industry codes of conduct) should be taken to satisfy the requirement for creation of legal incentives.

“Service Provider”

The complexity of the numerous interconnecting provisions in Article 17.11.29 relating to function and qualifications affords a variety of interpretations as to the types of institutions or organisations that may qualify for the limitations provided by the article.

The two definitions of the term “service provider” in Article 17.11.29 (b) (xii) (relating to different functions) are broad and seemingly fluid; it is difficult to determine where the distinctions between the two definitions lie. It would seem on a literal reading of the Article that any organisation or person providing any information or communication facilities or service could fulfil the definition and incur liability even though such organizations or individuals may not have the technical ability to comply with these provisions.

On another reading of the Article, there is some uncertainty as to whether the distinction of functions is intended to be read restrictively ie to provide limitations on liability for service providers who undertake one function but intended to exclude others.

The ADA and the ALCC are concerned that any implementation of these provisions into our legislative regime give appropriate consideration to the range of organisations and individuals that may come under the provisions. Recognition must be given to the realities of resource limitations in managing networks and the necessity of undertaking activities such as caching and other technical processes which ensure efficient use of networks.

Access to Information

Article 17.11.29 (b)(xi) states that:

“Each party shall provide for an administrative or judicial procedure enabling copyright owners who have given effective notification of claimed infringement to obtain expeditiously from a service provider information in its possession identifying the alleged infringer”

The implementation of any procedure through which information about individuals can be accessed must be a judicial process to avoid rise of abuse of rights. A party seeking access to information must be subject to checks and balances to ensure that information is only granted on reasonable and compelling grounds. The court is the only forum uniquely equipped to make assessments as whether claims meet standards required before information is released as such an assessment can only be made on a case-by-case basis. An administrative procedure which enables a party to gain access to information is an inadequate mechanism against abuse of rights and vexatious claims.

The argument for implementing a judicial procedure in respect of access to information is supported by observing the current problems associated with the administrative procedure in place in the U.S. The administrative subpoena process sanctioned by the DMCA is currently the subject of long drawn and much publicised litigation (RIAA v Verizon). The perceived benefits of an administrative process eg “streamlining” are unrealistic given the sensitivity of and the paramount importance of the protection of rights of individuals. Invariably these matters will be dealt with by the courts as current events demonstrate.

Notice and take-down process

Article 17.11.29 (b) (v) (B) provides that service providers will qualify for limitations by

“ expeditiously removing or disabling access to material residing on its system or network on obtaining actual knowledge or becoming aware of facts or circumstances from which the infringement was apparent, such as through effective notification...”

It is conceivable that on one reading of this provision, some service providers have an obligation to act in certain circumstances independent of any “effective notification” process. The ADA and the ALCC urge that the interpretation and any implementation of this provision clarify the circumstances from which such an obligation to remove material will arise. The clarification should be consistent with Article 17.11.29 (b) (vii) which establishes that service providers are not required to monitor its services or affirmatively seek facts indicating infringing activity.

Temporary Copying

Article 17.4.1 imposes an obligation to provide authors, performers and producers of phonograms with

“the right to authorise or prohibit all reproductions, in any manner or form, permanent or temporary (including temporary storage in material form)”

The ADA and the ALCC note that temporary copying (and the related issue of “material form”) was a subject of inquiry in the Digital Agenda Review and stress the importance of maintaining the ability to determine the scope of temporary copying. The issue of “material form” has also been specifically been considered only recently in *Sony v Stevens*. It is arguable that if implemented, this paragraph of the FTA would

have required a different outcome on the reproduction in RAM issue considered in the case.

The issue of temporary copying with its implications for caching activities (upon which the efficiency and effectiveness of our information networks depend) is of primary concern to our cultural and educational sectors who undertake necessary and extensive caching of internet material to minimise external bandwidth limitations and to maintain security.

We note that the obligation created by Article 17.4.1 is however tempered by note 17-8 which states that it is:

“a matter for domestic legislation to prescribe that works and phonograms shall not be protected by copyright unless they have been fixed in some material form.”

In effect, note 17-8 permits a Party to apply a definition of “material form” for the purposes of determining subsistence of copyright. This qualifier however does not appear to operate in the case of infringements. That is, a reproduction apparently does not need to be in a material form under the FTA- a specific requirement of section 31(1) (a)(i) of the Act. The ADA and the ALCC submit that the requirement should be maintained and applied equally to protection and infringement.

Interpretation and implementation of Art 17.4.1 should entrench the intention of note 17-8; as far as possible implementation of art 17.4.1 should be made in a manner which minimises impact on the ability to determine the scope and operation the temporary copying provisions in our copyright regime. In any implementation of these provisions, the ADA and ALCC urge clarification that exemptions are permissible (so long as any exemptions meet the three-step test as per Art 17.4.10) and clarification that our current temporary copying exemptions (s 43A) satisfies that test.

Enforcement Measures

The provisions of the FTA create obligations that will significantly raise the standard and range of remedies available to copyright owners in the case of infringement. The increased severity of penalties are coupled with potentially dangerous lowering of standards in relation to presumptions of ownership and broadened category of acts which would be subject to penalties.

Together the provisions in Article 17.11 impose obligations that will significantly increase enforcement measures without serious consideration of the necessity and appropriateness of extra sanctions within the overall context of the criminal justice system and in light of Commonwealth criminal law policy generally.

Presumptions as to Copyright Subsistence and Holding

Article 17.11.4 provides for a presumption of copyright subsistence in the absence of evidence to the contrary, creating higher presumption than that in s126 of the *Copyright Act*. Where a plaintiff is actually aware that copyright does not subsist and that evidence is only available to the plaintiff (for example, as a result of an

agreement with a third party), the plaintiff could bring an action knowing that they are not required to lead evidence as to the existence of copyright. The obligation created by this provision of the FTA makes for unsound policy. Given that plaintiffs in an action are asserting rights attached to works they claim to have created (or acquired), plaintiffs should at a minimum, be put to proof where his or her claim to ownership is at issue, particularly as defendants typically will not have access to that evidence. The application of this provision to civil as well as criminal matters aggravates this concern.

Article 17.11.4 also states that a person is presumed to be the right holder in the work in the absence of evidence to the contrary if the name of a person is “*indicated in the usual manner is the right holder in the work, performance or phonogram as designated*”. The ADA and the ALCC submit that any implementation of this provision require that the name be attached to or form part of a particular work in order to ensure adequate notice of ownership.

Determination of Damages

The requirement imposed by Article 17.11.6(b) on the court to consider submissions made by a right holder including the suggested retail price is an unnecessary and nonsensical commitment.

Given that the retail price of goods must necessarily be greater than the damage suffered by a plaintiff (in that it includes components which are not solely attributable to copyright) it is unclear why a court ought to consider the suggested retail price of the item at all. The ADA and ALCC submit that this provision will create an incentive for vendors to inflate suggested retail prices for their products, coupled with discounts. This will interfere with price signalling in the market with no clear positive effects for enforcement of copyright.

Statutory Damages and Additional Damages

Article 17.11.7 provides that parties may elect to either establish a statutory entitlement to damages (as currently in place in the U.S.) or make provision for additional damages for flagrancy (which is currently available in the *Copyright Act* under s115(4)) .

The implementation of either option will increase the risk and margin of inflated damages that may be awarded by the court.

Article 17.11.7 (a), the option for statutory damages in civil proceedings will allow for set damages without regard to the actual loss caused by the infringement. Indeed, as the statutory damages must include a deterrent component, it necessarily also requires that these set damages be in fact in excess of actual loss suffered by plaintiff. The ADA and the ALCC also note that this provision is not limited to “wilful” infringements and there is no limitation on liability for infringements without knowledge.

Implementation of this provision of the FTA would run counter to long standing common law policy that in civil proceedings a plaintiff is only entitled to recover what damage it actually suffers. The ADA and the ALCC submit that such a

digression from Australian legal norms should only be enacted where exceptional circumstances warrant it; no such justification exists in this case.

Implementation of 17.11.7 (b) as an alternative to the imposition of statutory damages is a preferable although not unproblematic. In basic terms, the provision effectively requires the legislature to interfere if it is perceived that the judiciary is not regularly inflating damages over what the court considers reasonable to deter infringement. The election of either of the options significantly raises the level of damages without sufficient justification and is at odds with Australian legal norms.

Available civil remedies for breach of anti-circumvention and rights management provisions.

Article 17.11.13 (b) permits an exemption from the payment of damages for certain categories of persons (including non-profit libraries) if they can show that they weren't aware or had no reason to believe that "its acts constituted a proscribed activity". Although the exemption is intended to give some comfort to the eligible categories of persons, it is hard to envisage that the paragraph will result in any real practical benefit given that such persons are required to prove a negative (lack of knowledge) in order to qualify for an exemption.

"Wilful infringements of copyright"

Article 17.11.26(a) (i) and (ii) gives a very broad inclusive definition of wilful infringements of copyright which effectively inverts any ordinary meaning of those terms.

Article 17.11.26 (a) provides that "*wilful copyright piracy on a commercial scale*" includes "*significant wilful infringements of copyright that have no direct or indirect motivation of financial gain.*" In effect, "commercial scale" incorporates things which are clearly non-commercial. The requirement for the infringements to be "significant" is unlikely to place a high bar, given that the growing trend is to categorise any infringement as "significant".

On the other hand, Article 17.11.26 (b) provides that "*wilful copyright piracy on a commercial scale*" includes wilful infringements with the purpose of commercial advantage or financial gain. So, any advantage or gain, no matter how minor or insubstantial, will qualify as "on a commercial scale", so long as the intention for advantage or gain is present. Where there is such a purpose but no advantage or gain in fact, or even a significant loss, it will still be considered as coming within "commercial scale".

The ADA and the ALCC submit that implementation of these provisions would unjustifiably and markedly broaden the range of acts which will be considered subject to criminal proceedings. This in turn has damaging repercussions for the general regulation of copyright; the severity of the subsequent enforcement regime (if the FTA is implemented) coupled with existing general lack of knowledge about permissible uses may result in a reluctance to engage in non-infringing activities due to raised fear of breach or litigation.

Conclusion

Overall the copyright provisions in Chapter 17 create obligations to make changes to the Australian copyright regime which would fundamentally alter the balance struck in the *Copyright Act*. If the FTA proceeds to ratification, the enactment of implementing legislation should adopt as flexible an interpretation of the FTA provisions as possible to minimise this alteration.

The obligations imposed by the FTA in effect unilaterally raises the standard of protection to copyright owners in Australia by adopting DMCA-like measures. The effective balancing measures available to users in the U.S. copyright regime (within U.S copyright legislation and outside- such as the Bill of Rights) are however not adopted. The effect of implementing the FTA in Australia will therefore, set a standard of copyright protection that is, in practice, even higher than in the U.S.

Ambiguities exist in the draft text of the FTA. Pending further clarification as a result of the current “legal scrubbing”, the ADA and the ALCC have made suggestions for interpretation of the various provisions which would minimise the distorting effects of implementing the agreement. Nonetheless, even given broad interpretations of the FTA text, implementation of the agreement will fundamentally shift the existing balance of rights and access. The ADA and the ALCC submit that serious consideration be given to introduce measures that will redress the imbalance caused by the possible implementation of the FTA; foremost, the introduction of broad and flexible “fair use” exception and/or an increased number and application of limitations and exceptions that will ensure continued reasonable access to copyrighted works.