Chapter 3

Intellectual Property

Introduction

3.1 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.

3.2 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.[1]

3.3 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.

3.4 DFAT advised the Joint Standing Committee on Treaties (JSCOT) that a large number of the obligations in the AUSFTA are drafted in a way that reflects the highly sophisticated IP regimes both in Australia and the US and to ensure consistency with the US template approach to its free trade agreements.[2]

Background

3.5 In general terms, IP rights are the legal rights which arise as a result of intellectual activity. There are two main reasons for the creation of these rights. The first is to give public recognition of the creative, moral and economic rights of the creator and the rules to govern the rights of the public for access. The second reason is

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1 DFAT, *Australia-United States Free Trade Agreement: Guide to the Agreement*, March 2004

2 Joint Standing Committee on Treaties, *Report 61: The Australia – United States Free Trade Agreement*, June 2004, p.225

to foster creativity and promote innovation by rewarding the creator a monopoly economic right for a limited period of time.[3]

3.6 The exclusive right to exploit the innovation quite often conflicts with the idea of competition policy which at its basic level seeks to remove impediments to the functioning of markets such as by minimising the power of monopolies. The crucial consideration in the creation of any IP rights is the balance between the incentive that those rights give to innovation or creativity and the impact that the creation or extension of a monopoly right will have on consumers. The IP Chapter of the AUSFTA reinforces IP rights, and in some places strengthens them to take account of developments in technology.[4]

3.7 The Paris Convention for the Protection of Industrial Property of 1883 (the Paris Convention) is the earliest multilateral treaty to recognise the value of intellectual property and its importance to protecting the value of ideas. The Paris Convention was closely followed by the Berne Convention for the Protection of Literary and Artistic Works in 1886. These two conventions recognise the two distinct branches of IP, namely industrial property and copyright.[5]

3.8 Since the Paris Convention, there are now more than 23 different IP multilateral treaties all administered by the World Intellectual Property Organization (WIPO).[6] Australia is a party to many of these treaties.

Rationale for inclusion of Intellectual Property in the Free Trade Agreement

3.9 There is some debate about whether it is appropriate to include IP in agreements that aim to advance free trade. The purpose of free trade is to eliminate or reduce government interference in trade across international borders. In contrast, stronger IP rights interfere in the market for the benefit of rights holders. The AUSFTA reinforces and, in Australia's case broadens, the protection given to holders of IP rights.[7]

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3 WIPO Intellectual Property Handbook: Policy, Law and Use, Chapter 1, p. 3 in Joint Standing Committee on Treaties, *Report 61: The Australia – United States Free Trade Agreement*, June 2004, p.226

4 Joint Standing Committee on Treaties, *Report 61: The Australia – United States Free Trade Agreement*, June 2004, p.226

5 Joint Standing Committee on Treaties, *Report 61: The Australia – United States Free Trade Agreement*, June 2004, p.226

6 http://www.wipo.int/about-wipo/en/gib.htm#P61_9104, accessed on 7 June 2004, in Joint Standing Committee on Treaties, *Report 61: The Australia – United States Free Trade Agreement*, June 2004, p.226

7 D Richardson, Parliamentary Library, *Intellectual property rights and the Australia-US Free Trade Agreement*, Research Paper No. 14 2003-04, 31 May 2004, p.1. The following section of Chapter 3 draws heavily on this paper.

3.10 Since IP rights are a restraint on commerce and can be used to preserve monopoly power and to inhibit technological developments, to some it is not clear why measures to strengthen these rights should be included in a free trade agreement.[8] Many believe that the IP Chapter of the AUSFTA will in fact limit free trade between Australia and the US by effectively expanding US barriers to cover Australia, rather than reducing barriers to trade.[9]

3.11 Although traditionally treated by many countries as a cultural issue not subject to negotiation, at the persuasion of the US, stronger IP protections are now often included in trade discussions and trade agreements. One example is the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) under the auspices of the World Trade Organisation. In addition, the coverage of IP rights has extended into new areas such as software and genetic material. Since TRIPS, the US has engaged in a series of free trade agreements in which it has promoted stronger IP rights than those provided under TRIPS.[10]

3.12 Professor Michael Geist, a Canadian IP law expert, has argued that:

> The delay in spreading the WIPO standard throughout the world has frustrated the U.S., which as a major producer of movies, music, and books, has long promoted stronger copyright protections. In response, it has begun to demand inclusion of copyright protections akin to those found within the WIPO treaties when negotiating bi-lateral free trade agreements.[11]

3.13 Australia's interests in this context need to be taken into account. While to date there has not been a comprehensive economic evaluation of IP rights in Australia, the Productivity Commission has found that, as a net importer of IP[12], Australia would lose more than it gains by strengthening IP rights. Further it suggests that strong IP rights are turning the terms of trade against Australia.[13]

3.14 A significant amount of evidence presented to the Committee throughout the course of its inquiry supported this proposition, arguing that extension of the copyright term in Australia, in particular, will come at a cost to the Australian

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8 D Richardson, Parliamentary Library, *Intellectual property rights and the Australia-US Free Trade Agreement*, Research Paper No. 14 2003-04, 31 May 2004, p.3

9 See, for example*, Submission 164,* (Linux Australia).

10 D Richardson, Parliamentary Library, *Intellectual property rights and the Australia-US Free Trade Agreement*, Research Paper No. 14 2003-04, 31 May 2004, p.3

11 *Submission 26*, p. 2 (Geist)

12 Australia is a net importer of IP as measured by the value of goods and services with IP content among Australia's imports and exports: D Richardson, Department of Parliamentary Services, *Intellectual property rights and the Australia-US Free Trade Agreement*, Research Paper No. 14 2003-04, 31 May 2004, footnote 26, p.23

13 D Richardson, Parliamentary Library, *Intellectual property rights and the Australia-US Free Trade Agreement*, Research Paper No. 14 2003-04, 31 May 2004, p.9-10

economy.[14] Since Australia is a net importer of IP and a small economy, it is likely to benefit from lower protection for IP while larger economies and exporters of IP, such as the United States, Japan and Europe, are likely to benefit from stronger protection.[15] The effect on a country like Australia may be to turn the terms of trade towards those countries that disproportionately hold IP rights.[16]

3.15 Professor Geist has also contended that:

> Developed countries such as Australia may recognize the importance of a balanced copyright policy to both their cultural and economic policies, but they are increasingly willing to treat intellectual property as little more than a bargaining chip as part of broader negotiation. Since most trade deals are judged by an analysis of the bottom-line, economic benefits that result from the agreement, and since quantifying the negative impact of excessive copyright controls is difficult, the policy implications of including copyright within trade agreements is often dismissed as inconsequential.[17]

3.16 DFAT has been dismissive of such arguments. Although conceding that extension of the copyright term 'is the single biggest concession that Australia made in the negotiations'[18], representatives from DFAT have stressed the positive aspects of the extension. For example, Ms Harmer told the Committee that

> … term extension applies to all copyright works, so it will apply also and equally to Australian authors, artists and musicians as it will to Disney corporation and their copyright works. I think that is an important issue to remember. I think our copyright industry is a growing industry. It remains a fact that currently we are a net importer of copyright material, but that may change in the future. Certainly, it is something which our copyright industry strongly supported through the negotiations. Term extension was something that they saw as being beneficial to them.[19]

3.17 Mr Stephen Deady from DFAT reiterated this view:

> … we are a net importer of copyright material—and that is not at issue—but at the same time we do have very active creative industries that would benefit from the copyright extension … There are some groups within the Australian community and economy that certainly see some of the benefits that accrue even from something like copyright extension. We had this

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14 For example, see *Submission 336*, p.4 (Australian Vice-Chancellors' Committee)

15 D Richardson, Parliamentary Library, *Intellectual property rights and the Australia-US Free Trade Agreement*, Research Paper No. 14 2003-04, 31 May 2004, p.4

16 D Richardson, Parliamentary Library, *Intellectual property rights and the Australia-US Free Trade Agreement*, Research Paper No. 14 2003-04, 31 May 2004, p.21

17 *Submission 26*, p.2 (Geist). The Committee notes in this context that Canada has consistently refused to extend duration of copyright beyond the Berne Convention requirement, despite a long record of bilateral trade agreements with the United States.

18 *Transcript of Evidence*, 6 July 2004, p.104, (Deady, DFAT)

19 *Transcript of Evidence*, 18 May 2004, p.104, (Harmer, DFAT)

> debate about what are the actual costs. There would be some—there is no doubt about that—with copyright extension, but we do not believe they would be that great, and there are those offsetting gains.[20]

3.18 The Commonwealth Government commissioned the Centre for International Economics (CIE) to undertake an economic analysis of the impact of the AUSFTA on certain outcomes in the negotiations, including changes to IP legislation. Although the CIE's report contains some discussion of IP in the AUSFTA it does not attempt to quantify its economic impact. For example, the report states that the copyright extension in the AUSFTA 'does not seem likely to provide additional incentives to create new works, but may in some cases impose costs on consumers.'[21] While in many cases 'the increased cost faced by consumers is not likely to be significant'[22] the report states that 'it is difficult to quantify the extent of this effect'.[23] The report also fails to quantify the other IP issues it identifies as arising under the AUSFTA.

3.19 The CIE's report[24], has been widely criticised because, amongst other things, it 'fails to contextualise the major changes that have taken place [in the AUSFTA] and fails to grapple with some of the main economic studies that have been done in relation to particular areas.'[25] It has also been described as 'utterly implausible',[26] on 'legal grounds or economic grounds or political grounds'[27], particularly because it puts forward the proposition 'that there will just be a marginal impact'[28] from the IP Chapter of the AUSFTA.

3.20 The US motive for the strong protection of IP rights is clear. The US has a disproportionately high share of IP rights and products that contain IP rights in its exports. It has therefore been proactive in promoting the rights of its own IP owners.

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20 *Transcript of Evidence*, 6 July 2004, p.105, (Deady, DFAT)

21 Centre for International Economics, *Economic analysis of AUSFTA: Impact of the bilateral free trade agreement with the United States*, Canberra and Sydney, April 2004, at http://www.intecon.com.au/reports/AUSFTA.pdf, p.39 (accessed 3 June 2004)

22 Centre for International Economics, *Economic analysis of AUSFTA: Impact of the bilateral free trade agreement with the United States*, Canberra and Sydney, April 2004, at http://www.intecon.com.au/reports/AUSFTA.pdf, p.39 (accessed 3 June 2004)

23 Centre for International Economics, *Economic analysis of AUSFTA: Impact of the bilateral free trade agreement with the United States*, Canberra and Sydney, April 2004, at http://www.intecon.com.au/reports/AUSFTA.pdf, p.39 (accessed 3 June 2004)

24 Centre for International Economics, *Economic analysis of AUSFTA: Impact of the bilateral free trade agreement with the United States*, Canberra and Sydney, April 2004

25 *Transcript of Evidence*, 17 May 2004, p.27 (Rimmer)

26 *Transcript of Evidence*, 17 May 2004, p.6 (Rimmer)

27 *Transcript of Evidence*, 17 May 2004, p.26 (Rimmer)

28 *Transcript of Evidence*, 17 May 2004, p.6 (Rimmer)

3.21 The US International Trade Commission's report *U.S.-Australia Free Trade Agreement: Potential Economywide and Selected Sectoral Effects*[29], has acknowledged that the IP Chapter of the AUSFTA addresses 'many of the most significant concerns that US industry representatives have expressed' about IP law in Australia. Tellingly, the report noted numerous advantages for the US, its economy and its corporate interests:

> The FTA is expected to result in increased revenues for U.S. industries dependent on copyrights, trademarks, patents, and trade secrets. However, owing to the much smaller size of the Australian economy compared to that of the United States, and the relatively small contribution of Australia to U.S. IPR receipts from the world …, any increase in revenues for the U.S IPR industries likely would have a limited effect on U.S IPR-related industries and the U.S economy as a whole.
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> Among the U.S copyright industries that would potentially benefit most due to the increased digital technology features of the FTA are the motion picture, sound recording, business software applications, entertainment software, and book publishing industries. Industries that might benefit from the greater patent and trade secret protections, including the protection of confidential data, are the pharmaceutical and agricultural chemicals industries. A broad range of U.S. industries should benefit from strengthened trademark and other IPR provisions of the FTA. By comparison, because the United States already meets the relatively high standards of IPR protection and enforcement included in the U.S.-Australia FTA, there would be little if any effect on U.S. industries or the U.S. economy based on U.S implementation of its obligations under the FTA provisions.[30]

3.22 Similarly, in a report entitled, *The U.S.-Australia Free Trade Agreement (FTA) The Intellectual Property Provisions*, the Industry Functional Advisory Committee on Intellectual Property Rights for Trade Policy Matters (IFAC-3) has highlighted the significant advantages garnered by the United States in the AUSFTA:

> The United States is the world's largest producer and exporter of copyrighted materials and at the same time loses more revenue from piracy and other inadequate copyright protection than any other country in the world. High levels of copyright protection and effective enforcement mean more revenue and more higher-paying jobs benefiting all Americans. The copyright industries account for over 5% of U.S. GDP and have employed

29 Investigation No. TA-2104-11, Publication 3697, May 2004

30 US International Trade Commission, *U.S.-Australia Free Trade Agreement: Potential Economywide and Selected Sectoral Effects*, Investigation No. TA-2104-11, Publication 3697, May 2004, pp.116-117

> new workers at over three times the rate of the economy as a whole over the last 25 years.[31]

3.23 In particular, the copyright extension under the AUSFTA is seen as a major 'win' for the United States. However, the IFAC-3 report states that the United States will push for even further extensions of the copyright term in future negotiations with Australia:

> In a major advance, Australia has agreed to extend its term of protection closer to that in the U.S.-to life of the author plus 70 years for most works. While industry sought to have the term of protection for sound recordings and audiovisual works extended from 50 years from publication to a term matching the U.S. law's 95 years, a compromise was struck at 70 years. We urge that future agreements move that level to the full 95 years …[32]

3.24 The report congratulates the United States negotiators on the outcomes they achieved in negotiations:

> Other than [a few perceived shortcomings], the substantive copyright text achieves all that U.S. industry sought in this negotiation and the negotiators are to be commended in achieving this most important result that expands U.S. economic opportunities for some of America's competitive industries.[33]

3.25 Dr Matthew Rimmer has argued that:

> … copyright term extension is not a final upper limit set by the Australian Government. Rather, it is a provisional standard that will be open to further negotiation in the future. Copyright law will be a moveable feast for the United States industry in the years to come … the free trade agreement represents a down payment on perpetual copyright on the instalment plan.[34]

3.26 The IP issues arising under the AUSFTA reflect the general tension between the goals of promoting competition in the economy at large and providing appropriate protection for new works. However, it is clear that those tensions take on new meaning in the context of commercial and trade relations between Australia and the United States. Not only does the AUSFTA push Australia further than it has

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31 Industry Functional Advisory Committee on Intellectual Property Rights for Trade Policy Matters (IFAC-3), *The U.S.-Australia Free Trade Agreement (FTA) The Intellectual Property Provisions*, 12 March 2004, p.8, at http://www.ustr.gov/new/fta/Australia/advisor/ifac03.pdf (accessed 28 June 2004)

32 IFAC-3, *The U.S.-Australia Free Trade Agreement (FTA) The Intellectual Property Provisions*, 12 March 2004, p.10, at http://www.ustr.gov/new/fta/Australia/advisor/ifac03.pdf (accessed 28 June 2004)

33 IFAC-3, *The U.S.-Australia Free Trade Agreement (FTA) The Intellectual Property Provisions*, 12 March 2004, p.10, at http://www.ustr.gov/new/fta/Australia/advisor/ifac03.pdf (accessed 28 June 2004)

34 *Submission 183*, p.61, (Rimmer)

previously gone in the past in relation to the protection of IP rights, there are also concerns that the AUSFTA prevents Australia from retreating from this position in future and implementing policies and laws which do not accord with the provisions of the AUSFTA.[35]

Objections to the process

3.27 Many submissions and witnesses raised strong objections to the process by which the IP Chapter has been formulated and negotiated, as well as the requirement of consequential major legislative changes in Australia. These objections were across the board and included creators, users, consumer protection organisations and economists.

3.28 For example, the Australian Vice-Chancellors' Committee (AVCC) expressed the following concerns:

> The AVCC is deeply concerned about the nominated timeframe and consulting process under which the necessary legislative changes will be effected, given the level of detail and the extent of changes needed to the Copyright Act and the implications that these changes will have on the daily operations of the universities. In the rush to consolidate the AUSFTA Australia risks introducing a serious imbalance between the interests of owners and users which it has achieved under current arrangements.[36]

3.29 The Music Council of Australia was also apprehensive:

> We have come to the view that regardless of the merit or demerit of the changes in [intellectual property rights] in AUSFTA, it was not the appropriate place to make these decisions. AUSFTA has displaced or forestalled a more democratic consideration of the issues within Australia and makes our position effectively irreversible regardless of success or failure of the measures, unless the US consents to change. The FTA seems to change Australian law to match United States law, possibly more for the benefit of the US than Australia.[37]

3.30 Similarly, the submission on behalf of the Australian film and television production industry by the Australian Writers Guild, the Australian Screen Directors Association and the Screen Producers Association of Australia stated that:

> We informed DFAT that the US audiovisual industry saw intellectual property as the 'main game' and that making concessions in this area should be seen as part of an overall concession in regards to audiovisual services.

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35 D Richardson, Department of Parliamentary Services, *Intellectual property rights and the Australia-US Free Trade Agreement*, Research Paper No. 14 2003-04, 31 May 2004, p.2

36 *Submission 336*, p.4, (Australian Vice-Chancellors' Committee)

37 *Submission 220*, p.7, (Music Council of Australia)

> DFAT indicated that the Government was unwilling to make any concessions to the US on intellectual property.[38]

3.31 In response to a question on notice from the Committee, the Australian Writers Guild reiterated this point:

> … a bilateral trade agreement is not the forum through which such monumental changes to Australian copyright policy should have been made and we had been assured by Australian negotiators throughout the negotiating period, that those changes would not be made. Indeed we were assured of this again in our meeting with the Prime Minister in November 2003.[39]

3.32 The ALCC stated that:

> The process of negotiating the FTA … 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. Current political developments have created unrealistic pressures in time and a climate that could lead to the enactment of rash and ill-considered legislation.[40]

3.33 Mr Peter Gallagher from Inquit Communications Pty Ltd told the Committee that the AUSFTA would result in Australia being a 'wealthier and more economically secure country'[41] and that 'the benefits plausibly outweigh the costs'[42]. However, he noted some problematic issues pertaining to, amongst other things, the inclusion of IP in the agreement:

> The copyright extension creates a new property right. It seems to me that no substantial decisions on intellectual property should be made on the basis merely of an economic exchange with a foreign government. The key consideration in the creation of any intellectual property is a balance to be struck between the interests of our society in the incentive that the IP right gives to innovation or creativity and the impact that the creation or extension of a monopoly right will have on the welfare of Australian consumers. Foreign commercial interests do not appear on either side of this ledger, because intellectual property is inherently a territorial right … Even the WTO TRIPS agreement provides only for the harmonisation of

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38 *Submission 163*, p.18, (Australian Writers Guild, Australian Screen Directors Association, Screen Producers Association of Australia)

39 *Answer to Question on Notice*, 4 May 2004, p.2, (Australian Writers Guild)

40 *Submission 298*, p.5 (Australian Libraries' Copyright Committee)

41 *Transcript of Evidence*, 7 June 2004, p.91 (Gallagher, Inquit Pty Ltd)

42 *Transcript of Evidence*, 7 June 2004, p.94 (Gallagher, Inquit Pty Ltd)

> procedures and minimum standards as they apply in the territory of individual member states.[43]

3.34 Mr Gallagher continued:

> In my view it was inappropriate for the Australian government to undertake to change this property right for reasons mainly of a balance of rights and obligations in a trade agreement rather than on the basis of an evaluation of a balance of rights and benefits in Australia of such an extension. Although I think it is possible given the benefits of integration … that the recommendation if they had made the judgment on this basis would have had the same effect, this does not allay my disquiet with the way in which this concession was made.[44]

3.35 The Australian Digital Alliance pointed out the IP Chapter's language is 'opaque' and its structure 'complex'. This means that 'some margin exists for different interpretations of the provisions.'[45] It is certainly clear, however, that overall the provisions in the IP Chapter significantly raise the level of IP rights protection if adopted into the current Australian IP regime. This is particularly apparent in the text of the AUSFTA:

> … the FTA is concerned solely with strengthening the rights of copyright owners, scarcely mentions the rights of users and makes no reference to the need for balance.

3.36 Ms Kimberlee Weatherall argued that IP law is a policy instrument designed to achieve certain social and economic aims. It must be flexible, and balanced, and subject to constant review for its appropriateness in light of technological developments. The AUSFTA is an overly detailed, inflexible agreement, containing many provisions which prevent Australia from introducing new exceptions or changes to its laws in the future.[46]

3.37 Ms Weatherall also argued that disputes may arise because of Australia's chosen form of implementation of its obligations under the IP Chapter. Her concern was that, since the provisions are largely modelled on United States law, it could be said that the United States has certain 'expectations' about what they mean, regardless of Australia's views of their legal effect and interpretation. In Australia, on the other hand, there is a lack of official information about what the legal effect of the FTA is because negotiations did not occur in public. Although DFAT has made some statements to the Committee in previous hearings, Ms Weatherall's view was that

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43 *Transcript of Evidence*, 7 June 2004, p.92 (Gallagher, Inquit Pty Ltd)

44 *Transcript of Evidence*, 7 June 2004, p.92 (Gallagher, Inquit Pty Ltd)

45 *Submission 299*, p. 6, (Australian Digital Alliance)

46 *Submission 294*, p.4 (Weatherall)

these statements have been 'vague', 'qualified' and 'too often [referred to as being] matters for implementation.'[47]

3.38 DFAT has expressed strong disagreement with this argument:

> Australia's implementing legislation is now in the public domain and negotiators have clearly stated Australia's understanding of its obligations to the Committee. These statements are available through Hansard.
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> …
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> The final text of the Agreement represents the negotiated outcome agreed by the two Governments. Should any dispute cases be taken under the dispute settlement provisions of the Agreement these will be considered by a panel on the facts of the particular case and in a manner consistent with the international law standards of treaty interpretation.
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> …
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> As is the case in any treaty level negotiations, the final text of the FTA represents the negotiated outcome agreed by the two Governments. Both Parties will implement the Agreement in good faith. Should any dispute cases be taken under the dispute settlement provisions of the Agreement these will be considered by a panel on the facts of the particular case and in a manner consistent with the international law standards of treaty interpretation.[48]

3.39 Further, Ms Weatherall submitted that any appearance of flexibility in the language used in provisions of the AUSFTA:

> … is likely to prove illusory in practice, in light of the proven attitude of IP Owners, particularly US IP Owners, who will, I believe, not hesitate to urge use of the Dispute Settlement Chapter (Chapter 21) if they do not agree with Australian implementation of the AUSFTA.
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> To the extent that IP Owners support provisions in this Agreement, as good policy for Australia, their submissions do not answer a more basic problem: that putting these provisions in a treaty is a very damaging way to implement that policy. Even if you thought these provisions were good IP policy – they shouldn't be in a treaty.[49]

3.40 Ms Weatherall also submitted that the negotiation of the IP chapter was a 'failure of sound and transparent policy making' and that it is 'far too detailed and will seriously hinder future IP policy making'.[50] Australia's lead negotiator, Ms Toni Harmer from DFAT, disagreed with this assessment:

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47 *Submission 294A*, p.4 (Weatherall)

48 DFAT, *Answers to Questions on Notice*, 15 July 2004, pp.5-6

49 *Submission 294*, p.4 (Weatherall)

50 *Submission 294*, p.4 (Weatherall)

> We certainly would disagree with that and we would argue that, whilst there are criticisms of the IP chapter, intellectual property is a very important sector of our economy, particularly in developing value added exports. I do not see somehow strengthening our IP protection at the same time as providing the ability to make exceptions where they are appropriate in the national interest as a bad policy outcome for Australia at all.[51]

3.41 Ms Harmer informed the Committee that DFAT consulted widely about the impact of the AUSFTA on IP law in Australia, and will continue to do so:

> We conducted very broad consultations across the community and industry in relation to the intellectual property chapter, as we did across the FTA.
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> …
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> It is fair to say that the response has been unsurprising in the sense that you can see continuing divergent views on some aspects of intellectual property. We have been at pains to explain to those music interests that are concerned that, whilst we have strengthened copyright in some areas, we have retained the ability to make exceptions and that, whilst we have agreed to adopt elements of United States law, we have not agreed to implement US law word for word. Therefore, continued consultations with industry about the most appropriate way to do that in the context of our regulatory and legal environment are important.[52]

Australia's obligations under the Intellectual Property Chapter

3.42 The most significant evidence received by the Committee in relation to the IP Chapter was the obligations relating to the extension of the term of copyright protection and technological protection measures (TPMs). The following section of the Committee's report will focus on these issues, as well as issues relating to 'contracting out' of exceptions to copyright infringement, temporary copying, ISP liability and patents.

Extension of the term of copyright protection

3.43 Article 17.4.4 of the AUSFTA sets out the obligations on both parties in relation to the term of copyright protection. Australia is required to extend the term of copyright protection by an additional 20 years, bringing it into closer conformity with the United States. The AUSFTA provides for an extension of the general term of copyright protection in Australia from 50 years from the death of the author to 70 years after the death of the author, in line with United States law. This is beyond the minimum international standard stipulated in the Berne Convention.

3.44 The United States extended copyright protection from 50 years to 70 years under the *Sonny Bono Copyright Extension Act 1998*. Several submissions and

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51 *Transcript of Evidence*, 18 May 2004, p.101 (Harmer, DFAT)

52 *Transcript of Evidence*, 18 May 2004, p.102.(Hammer, DFAT)

witnesses to the Committee noted that this legislation was the result of intense lobbying by the Motion Picture Association of America, the United States copyright owner group which represents such corporations as the Disney Corporation, Sony Pictures Entertainment, MGM, Paramount Pictures, Twentieth Century Fox, Universal Studios and Warner Brothers.[53] The main advocate for the copyright term extension was the Disney Corporation which was facing the expiration in 2003 of its copyright on Mickey Mouse and other characters.[54]

3.45 In 2000, the Australian Intellectual Property and Competition Review Committee (IPCRC) recommended that the current copyright protection term should not be extended and that no extension of the copyright term should be introduced in Australia in the future 'without a prior thorough and independent review of the resulting costs and benefits.'[55] The Commonwealth Government accepted that recommendation in 2001, stating that it 'has no plans to extend the general term for works'.[56] The AUSFTA will require Australia to extend its copyright term, without any significant independent analysis of the costs and benefits of the extension being undertaken.[57]

3.46 The Committee notes that the inclusion of extension of the copyright term contradicts assurances by the Commonwealth Government throughout the negotiation process that it was resistant to such an inclusion. The Trade Minister, the Hon Mark Vaile MP, is reported as saying that the copyright term extension was one of the 'standout issues' where Australia and the United States remained at odds in the IP part of negotiations. Specifically, he is quoted as saying that '(t)here is a whole constituency out there with a strong view against copyright term extension and we are arguing that case'.[58]

3.47 Evidence presented to the Committee expressed disappointment in relation to the Commonwealth Government's considerable 'about face' in relation to IP issues. For example, Create Australia noted that AUSFTA negotiators had 'informed cultural representatives a number of times that the government would not support an

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53 See, for example, *Submission 183*, pp:25-26, (Rimmer)

54 See, for example, *Submission 183,* p.12, (Rimmer)

55 Intellectual Property and Competition Review Committee, *Review of intellectual property legislation under the Competition Principles Agreement*, September 2000, p.13

56 *Government Response to Intellectual Property and Competition Review Recommendations - Information Package*, at http://www.ag.gov.au/www/securitylawHome.nsf/Web+Pages/A6C3825011D8A8B1CA256C330000CF9A?OpenDocument, p.1, accessed 7 June 2004

57 *Submission 294*, p.12, (Weatherall)

58 Australian Financial Review, 'Mickey Mouse holds key to the future', 8 December 2003

extension' of the copyright term.[59] The Music Council of Australia expressed a similar view.[60]

3.48 Evidence received by the Committee in relation to the copyright extension was split between those who support the copyright extension and those who strongly oppose it. The weight of evidence was overwhelmingly against the extension. The following discussion provides a summary of arguments for and against that were presented in the course of the Committee's inquiry.

Arguments for extension of copyright

3.49 Evidence supporting the extension of copyright was mainly from organisations which represent or protect the interests of copyright owners, such as the Copyright Agency Limited (CAL), the Australian Copyright Council (ACC), and the Australian Film Industry Coalition (AFIC). The main arguments presented to the Committee included advantages resulting from harmonisation with Australia's trading partners and the increased benefits for copyright owners ensuing from an extended term.

3.50 Mr Michael Fraser from CAL told the Committee that:

> CAL strongly supports the intellectual property chapter in respect of the copyright provisions in the free trade agreement, and we believe these provisions will benefit all copyright owners in Australian and ultimately the nation's long-term economic and social well-being … it is in the national interest for Australian society and the Australian economy to have strong copyright protection as provided for in this agreement.[61]

3.51 Mr Fraser also offered the following opinion:

> In my view it is an opportunity for Australian creators to have strong copyright laws. The US wants strong copyright laws, I presume in their own national interest. Their copyright based industries are worth more to their economy than agriculture. I think the fact that we are a net importer of copyright should not dictate to us a short-term view about copyright. I think the better and more productive argument is not to say that we should weaken copyright so we can get cheaper access to other creators' work, but to strengthen copyright so that we can support our own creative industries, giving them the security to create and produce and distribute product knowing that they can get a good return and compete with the international providers, both in providing material to our own community, education and readership in general, and create products and services that will compete successfully into our region.[62]

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59 *Submission 459*, p.8, (Create Australia)

60 *Submission 220*, p.7, (Music Council of Australia)

61 *Transcript of Evidence*, 4 May 2004, p.33, (Fraser, Copyright Agency Limited)

62 *Transcript of Evidence*, 4 May 2004, p.45, (Fraser, Copyright Agency Limited)

3.52 Several proponents of the extension referred to the report produced by the Allen Consulting Group in 2003 on the costs and benefits of a copyright extension to Australia (the Allen Report).[63] The Allen Report was commissioned by the Motion Picture Association and supported by Australian proponents for extension of the term of copyright such as the Australasian Performing Rights Association, the Copyright Agency Limited, and Screenrights.

3.53 The Allen Report recommended extending the term of copyright to harmonise Australian law with that of its major competitors, to encourage further foreign investment and create incentives to copyright owners whose protection has been undermined by technological developments. The Allen Report also stated that harmonisation would result in cost savings in managing IP rights, with portfolios expiring at the same time across Australia's major markets and argued that additional costs to users from an extension of the copyright term would be minimal.[64]

3.54 However, the Allen Report has been widely criticised and discredited. One submission received by the Committee argued that the Allen Report 'is deeply flawed in terms of its methodology and legal analysis' and 'fails to produce any empirical economic evidence that supports an extension of the copyright term.'[65]

3.55 A United States IP law expert, Professor Lawrence Lessig of Stanford University, has been highly critical of the Allen Report. On his website he wrote that '(t)he report is embarrassingly poorly done.'[66] Professor Lessig was particularly disparaging of the economic value of the Allen report:

> More frustrating is the pudginess of this argument that purports to be economics. There's lots saying that both sides exaggerate their claims, but nothing to provide any actual evidence to evaluate whether any claim is exaggerated. And then, after acknowledging there is no useful evidence at all, the report concludes that on balance, the effect of the extension would be neutral, and so Australia should do it.[67]

3.56 Professor Lessig has also been a sardonic observer of the effect of 'Australia's caving to United States pressure'[68] in relation to the copyright term extension in the AUSFTA:

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63 The Allen Consulting Group, *Copyright Term Extension: Australian Benefits and Costs*, July 2003, at http://www.allenconsult.com.au/resources/MPA_Draft_final.pdf accessed 23 June 2004

64 *Submission 309*, p.3, (Copyright Agency Limited)

65 *Submission 183*, p.29, (Rimmer)

66 L Lessig, 'Copyright Term Extension: does a bad report cost more than a good report?', at http://www.lessig.org/blog/archives/001522.shtml accessed 22 June 2004

67 L Lessig, 'Copyright Term Extension: does a bad report cost more than a good report?', at http://www.lessig.org/blog/archives/001522.shtml accessed 22 June 2004

68 L Lessig, 'Copyright Term Extension: does a bad report cost more than a good report?', at http://www.lessig.org/blog/archives/001522.shtml accessed 22 June 2004

> The result: Australian film and culture will be harder to spread and preserve; Hollywood will get richer. I hope the voters in Australia are ok with that, because god knows, we Americans need lots of help with our balance of trade debt.[69]

3.57 The Australian Digital Alliance has also been extremely critical of the Allen Report:

> Given the difficulty of accurately assessing such economic effects, it may be forgiven that the report presented little meaningful data. However, it remains baffling the manner in which its acknowledgement of the lack of evidence is reconciled into a conclusion that extension of term would be advantageous to the Australian economy.
>
> …
>
> The report is also alarmingly dismissive of what would seem to be an extremely important factor in the consideration of economic costs and benefits of copyright term extension in Australia; Australia remains by far a net importer of copyright materials. The report brushes over the point as if it were a pesky detail rather than a primary concern for Australia's present and future trading strategy and does not provide any basis for its assertions that copyright extension would be positive for the future of Australia's copyright industries.[70]

3.58 Some of the other arguments advanced in favour of the copyright extension were:

- harmonisation of the term of protection with that of Australia's major trading partners can assist copyright compliance with clearance of rights for material distributed or made available overseas, including online;[71]
- the benefits of harmonisation will assist in ease of negotiations for global contracts with living copyright creators;[72]
- standardised copyright term arrangements will reduce the costs associated with processing royalties, thereby increasing the proportion of royalties made available to copyright holders;[73] and
- counter-balancing the increased risk proposed by piracy and the losses it causes is assisted by an extension of the term.[74]

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69 L Lessig, 'Copyright Term Extension: does a bad report cost more than a good report?', at http://www.lessig.org/blog/archives/001522.shtml accessed 22 June 2004

70 M Lee, 'Copyright Term Extension: the pressure rises', *The Australian Digital Alliance Monthly Intellectual Property Wrap-Up*, October 2003, at http://www.digital.org.au/issue/ipwoct03.htm accessed 23 June 2004

71 *Submission 462*, p.3, (Australian Copyright Council).

72 *Submission 520*, p.2, (Viscopy)

73 *Submission 520*, p.2, (Viscopy)

3.59 Mr Fraser told the Committee that CAL was aware of concerns raised by the educational sector and libraries in relation to the copyright extension. CAL presented the results of its own research into copying of out-of-copyright materials in the education sector:

> We have looked at works that are currently over 50 years but less than 70 years from the death of the author, and asked what would be the impact of an extension tomorrow on the payments for copying to copyright owners from educational institutions and who would be the copyright owners that benefit.
>
> It is interesting to know that there has been a lot of comment about how it would be of benefit to foreign copyright owners and not to Australian copyright owners. The proportion of copying in the educational sector of out-of-copyright material within the period of extension–that is, 50 to 70 years–is 0.02 per cent. That would be the increase. These results have not surprised us because copying in schools and universities is of the most recent material, typically. It is mainly of books and journals which have recently been published.[75]

3.60 The Commonwealth Government argues that harmonisation with United States law will be economically beneficial to Australia through increased trade and investment.[76] The essence of this view has been summarised as meaning that a stronger IP rights regime will encourage growth through trade and investment, closer alignment of IP rights will increase exports to the United States, and closer alignment of IP rights will increase United States investment in Australia.[77]

3.61 Interestingly, Mr Stephen Deady from DFAT told the Committee that harmonisation under the AUSFTA does not actually oblige Australia to harmonise its laws with those of the United States:

> On the question of harmonised IP laws … If you look at that language, it talks about 'endeavouring to work together'. It is a best-endeavours clause; it does not commit Australia. There are no obligations there for Australia to harmonise anything but rather to work with the United States and where appropriate—if future governments decide it appropriate—to work together in those areas. It is a best-endeavours clause and there are no obligations there.[78]

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74 *Submission 178*, p.4 (Business Software Association of Australia)

75 *Transcript of Evidence*, 4 May 2004, p.35, (Fraser, Copyright Agency Limited)

76 See, for example, Attorney General, the Hon Philip Ruddock MP, 'Opening Address – Australian Centre for IP and Agriculture Conference: Copyright: Unlucky for Some', http://www.ag.gov.au/www/ministerruddockhome.nsf/Alldocs/RWP21E60A98ACC4ECE2CA256E3B0080AA84?OpenDocument&highlight=unlucky%20for%20some accessed 16 June 2004.

77 D Richardson, Department of Parliamentary Services, *Intellectual property rights and the Australia-US Free Trade Agreement*, Research Paper No. 14 2003-04, 31 May 2004, p.10

78 *Transcript of Evidence*, 21 June 2004, p.17, (Deady, DFAT)

Arguments against extension of copyright

3.62 The vast majority of evidence received by the Committee in relation to the extension of the copyright term expressed strong opposition towards it. Much of this evidence referred to the adverse economic impact on libraries, universities, cultural institutions, and the wider public. The main arguments against extension included the extended term of payment of royalties, increased costs through the statutory licenses issued to educational institutions by collecting societies, the increase in transactional and tracing costs for an extra twenty years, and the reduction of the incentive to create more works. Some submissions and witnesses focussed on broader IP policy issues, arguing that the copyright extension inappropriately alters the balance between the interests of copyright owners and users.

3.63 A number of submissions noted that the extended term of payment of copyright royalties will impose significant economic burdens on educational and research providers. For example, the Australian Vice-Chancellors' Committee (AVCC) stated that:

> … our education institutions will now be required to pay licence fees under the statutory licences for the additional 20 years of copyright … the USA education sector is not impacted by the FTA but the Australian sector is, and in a significant way.
>
> The extension of the term of copyright means an increase in the net cost of access to copyrighted material – for universities, for libraries, and for all other users. In simple terms, universities and other users will now have to re-assess their copyright and information budgets. The actual increase in costs that they are face is difficult to approximate – but given high demand and static funding it is likely that some trade-offs will be required.[79]

3.64 The AVCC also noted the considerable flow-on effects of the copyright extension:

> If the balance between owners and users is upset it is not just a question of higher costs to users. The more significant loss will be the capacity for further creation through all researchers having open access to all source materials once passed a reasonable period of protection. If copyright becomes too strong, innovation will be shackled.[80]

3.65 The Australian Digital Alliance (ADA) noted that:

> Chapter 17 creates obligations to amend the Australian copyright regime in ways that will reduce access to materials, increase costs for institutions which provide public access to knowledge, and ultimately curb innovation. The neglect is disturbing and unsatisfactory given that a balanced

79 *Submission 336*, p.5, (Australian Vice-Chancellors' Committee)

80 *Submission 336*, p.5, (Australian Vice-Chancellors' Committee)

> intellectual property regime forms the research and resource base upon which our knowledge and creative industries depend.[81]

3.66 The Australian Libraries' Copyright Committee (ALCC) expressed the following view:

> … 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 group of people who will be ultimately affected by the added burden of term extension include historians, scholars, teachers, writers, artists and researchers of all kinds.[82]

3.67 DFAT has admitted that there may be some increased costs involved for the education and research sector. Ms Harmer told the Committee:

> To the extent that the uses that people wish to make of that material … relate to exceptions for research and education, that will be no different. Certainly in relation to works that do not fall within those exceptions there may be some increased cost involved in seeking permission to use those works. That is not something that we were to know.[83]

3.68 The ALCC argued further that extension of the term of copyright is also likely to '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.'[84] Dr Matthew Rimmer pointed out that, in some cases, copyright works will be 'orphaned' because the owner of a copyright work will be impossible to trace.[85]

3.69 Dr Phillippa Dee's report also highlighted the significant estimated costs arising from extension of the copyright term:

> The DFAT/CIE report made some simplifying assumptions in order to quantify the benefits of extending the term of copyright protection. While the report was not able to make the same assumptions to quantify the costs, this has been done in Box 2. The net effect is that Australia could eventually pay 25 per cent more per year in net royalty payments, not just to US copyright holders, but to all copyright holders, since this provision is not preferential. This could amount to up to $88 million per year, or up to

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81 *Submission 299*, p.4, (Australian Digital Alliance)

82 *Submission 298*, p.8, (Australian Libraries' Copyright Committee)

83 *Transcript of Evidence*, 18 May 2004, p.104, (Harmer, DFAT)

84 *Transcript of Evidence*, 18 May 2004, p.104, (Harmer, DFAT)

85 *Submission 183*, p.43, (Rimmer)

> $700 million in net present value terms. And this is a pure transfer overseas, and hence pure cost to Australia.[86]

3.70 Dr Dee noted that 'even the current term of copyright protection is probably too long, from Australia's perspective.'[87]

3.71 The Committee notes that DFAT strongly disagrees with Dr Dee's assertions:

> Dr Dee took some of the assumptions that were cited in the CIE report—assumptions that were identified as unrealistic in the CIE report—and she came up with a figure of something like $88 million per annum as additional costs of extending the copyright from 50 to 70 years. However, this assumption overlooked what everybody involved in copyright knows, and that is that copyright material typically depreciates over time and has an economic life which typically is quite short. If we make allowance for that in our analysis, that $88 million becomes relatively insignificant.[88]

3.72 Nevertheless, the Committee considers the evidence expressing opposition to the copyright extension to be extremely valid. The Committee also notes that since the United States extended its term of copyright protection from life of the author plus 50 years to life of the author plus 70 years under the *Sonny Bono Copyright Term Extension Act 1998*, three constitutional challenges have been made.[89]

3.73 In the first of these, *Eldred v Ashcroft*,[90] Justice Breyer made a dissenting judgement and noted, amongst other things, the significant impact of transactional and tracing costs[91] and 'the serious public harm and the virtually nonexistent public benefit'[92] arising from the extension. Justice Breyer also observed that the economic effect of the copyright extension is to make copyright almost perpetual in nature:

> The economic effect of this 20-year extension – the longest blanket extension since the Nation's founding – is to make the copyright term not limited, but virtually perpetual. Its primary legal effect is to grant the extended term not to authors, but to their heirs, estates, or corporate successors. And most importantly, its practical effect is not to promote, but

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86 P Dee, *The Australia- US Free Trade Agreement: An Assessment*, paper prepared for the Senate Select Committee on the Free Trade Agreement between Australia and the United States, June 2004, p.31

87 P Dee, *The Australia- US Free Trade Agreement: An Assessment*, paper prepared for the Senate Select Committee on the Free Trade Agreement between Australia and the United States, June 2004, p.22

88 *Transcript of Evidence*, 6 July 2004, p.17, (Brown, DFAT)

89 Joint Standing Committee on Treaties, *Report 61: The Australia – United States Free Trade Agreement*, June 2004, p.231

90 (2003) 123 S. Ct. 769

91 *Eldred v Ashcroft* (2003) 123 S. Ct. 769 at 806.

92 *Eldred v Ashcroft* (2003) 123 S. Ct. 769 at 813.

> to inhibit, the progress of "Science" – by which work the Framers meant learning or knowledge.[93]

3.74 Dr Rimmer provided the Committee with a number of examples where the extension of copyright has had significant impacts on cultural and socially significant projects in the United States.[94] Dr Rimmer also pointed out that the Public Domain Enhancement Bill 2004 (US) was introduced into Congress in 2003 with a view to addressing some of the impacts of the *Sonny Bono Copyright Term Extension Act 1998*, in particular various concerns relating to 'orphaned' works.[95]

Harmonisation

3.75 Despite the Commonwealth Government's argument about the need for and benefits of international harmonisation in light of the 'International Standard … emerging amongst our major trading partners for a longer copyright term,[96] Dr Rimmer contested that the extension of the term of copyright is following an emerging international trend. Dr Rimmer argued that under the Berne Convention and the TRIPS Agreement, Australia is not obliged to provide any more protection than life of the author plus 50 years.[97] Further, Australia has not followed emerging international trends in other important fields and has not adopted, for example, *sui generis* database laws or traditional knowledge laws:

> Indeed Australia has preferred to wait for the development of multilateral agreements on such matters – before passing domestic legislation of its own.[98]

3.76 The Committee also notes that, despite the arguments promoting the concept of harmonisation, there do not appear to be any examples that show Australia has missed out, or evidence that it might miss out, on investment or trade opportunities through inadequate levels of protection for IP rights.[99]

3.77 Many submissions questioned the benefits of harmonisation. For example, the Australian Writers Guild (AWG) asked:

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93 *Eldred v Ashcroft* (2003) 123 S. Ct. 769 at 801

94 *Submission 183*, p.17, (Rimmer)

95 *Submission 183*, p.24, (Rimmer)

96 Attorney General, the Hon Philip Ruddock MP, 'Opening Address – Australian Centre for IP and Agriculture Conference: Copyright: Unlucky for Some', http://www.ag.gov.au/www/ministerruddockhome.nsf/Alldocs/RWP21E60A98ACC4ECE2CA256E3B0080AA84?OpenDocument&highlight=unlucky%20for%20some accessed 16 June 2004.

97 *Submission 183*, p.37, (Rimmer)

98 *Submission 183*, p.37, (Rimmer)

99 D Richardson, Department of Parliamentary Services, *Intellectual property rights and the Australia-US Free Trade Agreement*, Research Paper No. 14 2003-04, 31 May 2004, p.10.

> The AWG queries the fundamental use of the extension to copyright in a context where there will be little Australian product to protect for an additional twenty years. The AWG asks what is the point of harmonising our copyright laws with the US and the EU if the cultural material which is protected for an additional 20 years is primarily American in origin?[100]

3.78 The Australian Libraries' Copyright Committee (ALCC) submitted that:

> … 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.[101]

3.79 The Australian Digital Alliance (ADA) submitted that even though the Commonwealth Government has repeatedly run with the argument that the overall benefit of the IP Chapter is the harmonisation of Australian and United States copyright legislation, the AUSFTA provisions closely mirror the provisions of the United States legislation. Therefore, in reality, in the ADA's view:

> … 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 but one which is not recognised as providing a balance between the interests of users and copyright owners.[102]

3.80 Other witnesses agreed. For example, Mr Charles Britton from the Australian Consumers' Association told the Committee that Australian consumers would be the real losers under the AUSFTA:

> … the copyright clauses in the free trade agreement threaten consumer rights and upset the balance with producers' rights. It is difficult to discern the consumer benefit in a closer harmonisation of Australian and United States intellectual property rules. It is imperative to note some critical

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100 *Answer to Question on Notice*, 4 May 2004, p.2, (Australian Writers Guild)

101 *Submission 298*, p.7, (Australian Libraries' Copyright Committee)

102 *Submission 299*, pp.6-7, (Australian Digital Alliance)

> differences between the two systems. The United States has a constitutional guarantee of free speech; we do not. The United States has fair use provisions which provide some protection for consumers in home copying; we do not. The United States constitution establishes some ground rules for intellectual property; our Constitution does not. Therefore, adopting the more draconian United States line on intellectual property without attending to the crucial aspects of consumer protection would, in our view, deliver a bad result for Australian consumers.[103]

3.81 While the extension of copyright has been touted as being beneficial for creators, arguably the IP Chapter actually does little more than concentrate power in the hands of major IP-owning businesses. EFA was of the view that the extension of the copyright term:

> … comes not from a desire to promote innovation and enhance our nation's public domain, but rather from a corporate desire to enhance monopoly profits. In practice, given that the extra 20 years would be enjoyed long after the author's passing, it is large corporations that are most likely to benefit from the change.[104]

3.82 Ms Weatherall warned that 'copyright industries' should not be confused with Australian creators and innovators:

> We need to avoid "slippage" between copyright owners and managers and copyright creators – they are not the same thing and they quite often do not have the same interests.
>
> The only proper conclusion is that views from those involved in the creative industries are mixed. Some organisations support copyright extensions.
>
> Notably, however, many organisations representing creators and authors are not supportive of copyright term extension.[105]

3.83 Further, EFA argued that it is unlikely that the extension will have a significant impact on the creation of new works:

> [In the US] there is no evidence that the extension has resulted in increased innovation and creative effort. In fact, there is no evidence suggesting that further incentives are needed at all. Even if such a need were present, the very abstract benefit provided to creators by the proposed 20 year extension would be unlikely to have any real impact on rates of development.[106]

3.84 Indeed, the opposite effect may be more likely:

> … any lengthening of copyright terms would tend to impede creativity and development. In the next 20 years, the monopolies over many works are

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103 *Transcript of Evidence*, 7 June 2004, p:59, (Britton, Australian Consumers' Association)

104 *Submission 282*, p.8, (Electronic Frontiers Australia)

105 *Submission 294A*, p.13, (Weatherall)

106 *Submission 282*, p. 8, (Electronic Frontiers Australia)

> due to expire … Building upon public domain material is a rich source of creativity and anything that serves to further limit the public domain also serves to impede creativity.[107]

3.85 Some submissions and witnesses pointed out that implementation of the AUSFTA will not actually result in a complete harmonisation of Australian copyright laws with those of Australia's major trading partners such as the United States and the European Union. In fact, 'there will be a number of important discrepancies between the copyright duration in Australia and the term provided for in other countries.'[108] Dr Rimmer described the issue of international harmonisation with respect to the copyright extension as 'a myth'.[109]

3.86 A significant number of Australia's trading partners provide copyright protection for the life of the creator plus 50 years. The AUSFTA will not necessarily result in harmonisation between Australia and trading partners such as Asian countries, countries in the Middle East, Canada and South Africa. Indeed, Dr Rimmer submitted that 'the copyright term extension in Australia will only exacerbate the wide variations in the treatment of copyright duration.'[110]

3.87 DFAT told the Committee that the Commonwealth Government does not agree with this view:

> Enhancing 'harmonisation' reduces differences in law and practice so that owners and users of intellectual property may interact in a familiar legal environment, thereby reducing transaction costs. The fact that complete harmonisation is not achieved at any point in time does not lessen the value of movement towards greater harmonisation. Also so long as Australia remains consistent with its international obligations, then the AUSFTA does not constrain future government's abilities to make laws relevant to intellectual property to suit our social and legal environment.[111]

3.88 The Select Audio-Visual Distribution Company submitted that:

> The world has managed with different copyright regimes in different countries for a long time and will continue to manage without harmonization. If anything, in the interest of the consumer, copyright protection should be harmonized at the lowest level, which is prevailing in most of the developed world and not at the level prevailing in the United States.[112]

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107 *Submission 282*, p.8, (Electronic Frontiers Australia)

108 *Submission 183*, p.39, (Rimmer)

109 *Transcript of Evidence*, 17 May 2004, p.6, (Rimmer)

110 *Transcript of Evidence*, 17 May 2004, p.40, (Rimmer)

111 DFAT, *Answers to Questions on Notice*, 15 July 2004, p.1

112 *Submission 341*, p.3, (Select Audio-Visual Distribution Company)

3.89 The effect of the application of Article 18 of the Berne Convention is that there is no obligation on Australia to enact retrospective protection of copyright material that has already fallen into the public domain. This means that in Australia the copyright extension will be prospective so that the term of protection will be extended for works created after 1955. By contrast, the United States retrospectively extended copyright in 1998 to protect works created from 1928. Therefore, while the United States has provided copyright protection for works created between 1928 and 1954, Australia will not have equivalent protection.[113]

3.90 There will remain discrepancies in other important areas, including protection for works made for hire, anonymous works performers' rights and moral rights. In relation to moral rights, for example:

> The United States is very hostile to moral rights—the moral right of attribution and the moral right of integrity for creators. Australia will supposedly provide comprehensive protection of moral rights for the life of the author plus 70 years, but the United States will only provide protection for life in relation to the visual artists' rights regime. So there are fundamental and significant differences in the way harmonisation is dealt with.[114]

3.91 DFAT has rejected that this will be problematic:

> Moral rights are not specifically addressed in the IP chapter, so I have a lot of difficulty seeing how those rights could be somehow subject to dispute resolution under the FTA …
>
> …
>
> I have to say that I do not see any foundation for that concern at all.[115]

3.92 The Committee notes the views of DFAT in relation to the issue of moral rights and particularly acknowledges its statement that, under the AUSFTA, either party may wish to provide for more extensive protection than that provided for by the IP Chapter.[116] Moral rights provide important protection, particularly for Indigenous Australian interests, and the Committee is not convinced that such important protections currently enshrined in Australian law can be guaranteed under the AUSFTA, particularly in the event of any dispute arising between Australia and the United States in relation to them.

Standard of originality and 'fair dealing' v 'fair use'

3.93 The Committee heard evidence and received submissions that should the term of copyright protection be extended, consideration should be then given to extending

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113 *Submission 341*, p.3, (Select Audio-Visual Distribution Company)

114 *Transcript of Evidence*, 17 May 2004, p.29, (Rimmer)

115 *Transcript of Evidence*, 18 May 2004, p.105, (Harmer, DFAT)

116 DFAT, *Answers to Questions on Notice*, 15 July 2004, p.3

the fair dealing doctrine to a much more open-ended defence, similar to the situation in the United States. The arguments centred around the balance between copyright owners and users in the *Copyright Act* 1968, and the change in that balance under the AUSFTA.

3.94 In his submission, Dr Rimmer noted that the AUSFTA is very selective in its harmonisation of copyright laws between Australia and the United States:

> In this agreement, Australia has adopted the harsher measures of the *Digital Millennium Copyright Act* 1998 (US) and the *Sonny Bono Copyright Extension Act* 1998 (US). However, Australia has not adopted features of the United States law which support copyright users – such as the higher standard of originality or the open-ended fair use defence of United States law.[117]

3.95 Ms Kimberlee Weatherall agreed that the AUSFTA will distort the balance of interests between IP owners and IP users in Australia:

> One important reason why the provisions may not strike an appropriate balance of interests is that the Australia-US FTA seeks to introduce IP-protective US laws but does not "harmonise" aspects of US law protective of the interests of members of the public. The result of introducing these provisions in Australia without making appropriate adjustments to strengthen users' interests may be to skew IP law in Australia to be even more protective of IP owners than American law.[118]

3.96 For example, Australia has one of the lowest standards of originality in the world: it appears that copyright protection will be granted on the basis of the expenditure of skill and labour alone.[119] In the United States, however, the threshold of originality is much higher, requiring some degree of creativity.[120] This means that there will be a wider range of copyright material protected in Australia than in the United States. In particular, a greater amount of factual information which would not be protected by copyright law in the United States (or which would have only limited protection) is protected under copyright law in Australia.[121]

3.97 In evidence, Dr Rimmer told the Committee that the disparity in the standard of originality would have serious implications:

> That means that [in Australia] more material qualifies as copyright work and a whole range of junk, for instance, would be affected by the copyright term extension. The copyright term extension would apply to such things as the White Pages, the Yellow Pages, blank accounting systems and gambling

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117 DFAT, *Answers to Questions on Notice*, 15 July 2004, p.40

118 *Submission 294*, p.17, (Weatherall)

119 See *Desktop Marketing Systems v Telstra Corporation* (2002) 119 FCR 491

120 See *Feist Publications Inc v Rural Telephone Service* 499 US 340 (1991)

121 *Submission 183*, p.40, (Rimmer); *Submission 294*, p.17, (Weatherall)

> mechanisms and forms. Material that you would not think was particularly creative is being given very long protection and very strong protection. That is a very important difference between United States law and Australian law. That will have a quite significant impact … because a much wider range of material is going to be protected in Australia that will have an important impact in terms of what will happen.[122]

3.98 In her submission, Ms Weatherall made a similar argument:

> The effect of adopting the AUSFTA without addressing this difference may be to tip the balance too far in favour of copyright owners, and in particular, in favour of the compilers of collections of fact, at the expense of the interests of users. At the very least, this issue needs to be considered holistically.[123]

3.99 The Australian Vice-Chancellors' Committee (AVCC) was also concerned about upsetting the balance between the interests of copyright owners and users:

> … the AUSFTA is very much pitched at the interests of copyright owners at the expense of users to such an extent that it alters the balance … very much in favour of owners. There is no surprise that the USA would want to do this because most of the international publishers and major copyright owners are multinational organisations based in the USA, and combined they have been a formidable lobby both in the USA and internationally in changing the balance to suit owners. The so-called harmonisation outcome of the AUSFTA will benefit the USA and EU based multinational publishers but Australia will lose out – and the main losers will be the users of copyright material, notably the education sector.[124]

3.100 Likewise, the Australian Consumers' Association noted that the IP Chapter :

> … embod(ies) consumer detriment because of the way [it] shift(s) the balance in favour of the producer interest. This is illustrated by the extremely scant reference to users of IP in Chapter 17 – users are mentioned chiefly in terms of obligations and limitations, and never in terms of rights, exceptions or expectations. Consumers are not mentioned at all.[125]

3.101 Doctrines exist in both the Australian and United States copyright regimes which allow for exceptions to when copyrighted material may be used without payment of a royalty. In Australia this is known as 'fair dealing', and in the United States it is known as 'fair use'.

3.102 The 'fair use' defence to copyright infringement in the United States operates more broadly than the Australian 'fair dealing' defences to copyright infringement. In

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122 *Transcript of Evidence*, 17 May 2004, p.12, (Rimmer)

123 *Submission 294*, p.17, (Weatherall)

124 *Submission 336*, p.3, (Australian Vice-Chancellors' Committee)

125 *Submission 522*, p.11, (Australian Consumers' Association)

Australia, to gain the benefit of the defence, the alleged infringer is required to show that the purpose of their use of copyright material falls within one of those enumerated in the Copyright Act: criticism and review, research and study, news reporting, or judicial proceedings.[126] However, the defence is not confined to those purposes and there has been much confusion in Australia about the scope of 'fair dealing'.[127]

3.103 In the United States, a non-exhaustive, flexible list of purposes is provided which has allowed United States courts to find 'fair use' for uses such as parody or other transformative use, time-shifting, space-shifting and device-shifting.[128] Simply put, in the United States courts have the power to find new, or unforeseen but economically insignificant uses 'fair'. Australian courts do not have that power.

3.104 The Committee notes that, in 1998, the Copyright Law Review Committee (CLRC) recommended 'the expansion of fair dealing to an open-ended model that specifically refers to the current exclusive set of purposes … but is not confined to those purposes'.[129] However, this recommendation has not been adopted in Australian law. As a result, under the AUSFTA, Australian users of information will have more restricted access to copyright material than users in the United States due to the higher standards of copyright protection overall and the lesser usage rights available.

3.105 Nothing in the AUSFTA would prevent Australia from implementing legislation to raise the level of originality and to introduce a 'fair use' defence to copyright infringement. However, the Committee received evidence which suggested that IP owners would oppose any move to adopt a 'fair use' defence,[130] and comments from DFAT in the course of the inquiry have suggested a preference for a continued 'purpose-based' approach[131] which 'would not provide the kind of flexibility that is important if IP law is to be strengthened'.[132] In relation to raising the threshold for originality, the Attorney-General's Department did not indicate that the standard of originality in Australia would change.[133]

3.106 However, in its response to a question on notice from the Committee, DFAT stated that:

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126 *Submission 294*, pp.17-18, (Weatherall)

127 *Submission 183*, pp.40-41, (Rimmer)

128 *Submission 183*, p.41, (Rimmer); *Submission 294*, p.18, (Weatherall)

129 Copyright Law Review Committee, *Simplification of the Copyright Act 1968 Part 1: Exceptions to the Exclusive Rights of Copyright Owners*, September 1998, Recommendation 2.03

130 *Submission 294A*, p.6, (Weatherall)

131 *Transcript of Evidence*, 18 May 2004, p.93, (Harmer, DFAT)

132 *Submission 294A*, p.6, (Weatherall)

133 *Transcript of Evidence*, 18 May 2004, p.102, (Creswell, Attorney-General's Department)

> The Government is still considering this recommendation of the Copyright Law Review Committee … The report of the Joint Standing Committee on Treaties (JSCOT) on the AUSFTA has recommended consideration of the US 'fair use' defence to copyright infringement. The Government will be responding to that report.
>
> It is open to the Government to consider a fair use style exception or any other exceptions in the future provided that any exceptions comply with international treaty standards.
>
> The standard of originality in Australian copyright law is not an issue which is addressed in the AUSFTA. It is a matter for judicial interpretation on a case by case basis, according to a consideration of well established copyright principles. In examining the issue of originality the courts may have regard to legal precedents in other jurisdictions especially those of other common law countries such as the United States.
>
> The Government is currently considering its response to a recommendation in the JSCOT report on the AUSFTA that the present standard of originality under Australian copyright law be reviewed.[134]

3.107 Ms Weatherall argued that the Commonwealth Government should undertake a review to ascertain precisely how Australia's obligations under Chapter 17 of the AUSFTA will sit with its domestic legislation:

> … it is not appropriate to take on extensive obligations to enact further laws protective of IP interests without a full analysis of how these provisions will operate in the context of Australian law, which is – and under the AUSFTA provisions, will remain – different from US law in certain key respects. Any Australian government considering acceding to such a treaty should undertake to review those areas of Australian IP law is stronger than that provided elsewhere in the world, and undertake to redress that imbalance.[135]

3.108 Dr Rimmer told the Committee that the defence of 'fair use' should have been enunciated in the AUSFTA:

> It is such a fundamental doctrine that affects all the different areas of intellectual property, and its absence from the free trade agreement is very significant. Even if this government, for instance, made legislative changes and recommended that there should be a defence of fair use, they could be wound back. But if you tried to make changes in relation to the areas that are mentioned in the free trade agreement and you violated those articles, you would be subject to a trade action. So the failure to include the fair use provisions in the free trade agreement makes it very provisional. Even if this parliament makes those reforms, they can be very easily wound back by a later parliament. That is the real significance: what is included in the free trade agreement is then locked into that free trade agreement because it is subject to those very strong alternative dispute resolution mechanisms

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134 DFAT, *Answers to Questions on Notice*, 15 July 2004, pp:1-2

135 *Submission 294*, p.18, (Weatherall)

> and the possibility of trade sanctions if you violate a particular article or even if you violate the spirit of the agreement.[136]

3.109 Mr Charles Britton from the Australian Consumers' Association informed the Committee that a 'fair right' defence would guarantee the rights of consumers:

> At the very least, in the legislative changes required to implement the free trade agreement there should be an enactment of a fair use right for Australian consumers, which would harmonise the law with current consumer behaviour and protect consumers as the digital environment moves control from control of copying to control of access.[137]

3.110 However, the adoption of a 'fair use' defence in Australia to redress the imbalance that might be caused by AUSFTA implementation may not, according to some, provide a solution. The ADA articulated this view as follows:

> While the ADA recognises the merits and importance of the fair use exception within the U.S. copyright regime, careful thought must be given to the real impacts of such an introduction before foregoing our current mechanisms of balance. Although the fair use exception in the U.S regime offers a broad and flexible defence, its current operation in the U.S regime lacks the certainty that our "fair dealing" provisions provide within the Australian regime to users of copyright material. The ADA would support the introduction of a "fair use" type provision as an addition but not necessarily a replacement of our current "fair dealing" provisions.[138]

3.111 Similar concerns were raised by Viscopy:

> The broader US concept of 'fair use' is very different to the Australian concept of 'fair dealing'. To suddenly use the United States concept, as has been proposed by some user groups interested in free access to works of Australian copyright, would have many additional implications for Australian law.[139]

3.112 CAL told the Committee that these issues are 'for another day and another place' and said that it would be opposed to such a move.[140]

3.113 The Australian Record Industry Association (ARIA) expressed strong opposition to the introduction of a US-style 'fair use' exemption and argued that, amongst other things, it would constitute 'an unjustified abrogation of the rights of copyright owners'[141] and would 'significantly increase enforcement difficulties'.[142]

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136 *Transcript of Evidence*, 17 May 2004, p.14, (Rimmer)

137 *Transcript of Evidence*, 7 June 2004, p.60, (Britton, Australian Consumers' Association)

138 *Submission 299*, p.7, (Australian Digital Alliance)

139 *Submission 520*, p.4, (Viscopy)

140 *Transcript of Evidence*, 17 May 2004, p.15, (Fraser, Copyright Agency Ltd)

141 *Submission 133A*, p.2 (Australian Record Industry Association)

3.114 The Committee also heard evidence of an alternative balancing mechanism which would involve creating a system of registration for aging copyright material:

> … material deemed valuable could be registered for ongoing protection (at an escalating fee to recompense society for the deprivation of public access) while less valuable material would fall automatically into the public domain where it would benefit the culturally enriching processes of recycling and reuse.[143]

3.115 The Committee notes that a similar mechanism has been proposed by Landes and Posner[144] and in the Allen Report.[145]

3.116 The Committee also notes that the application of 'fair use' in the United States as determined by its legal system specifically provides for several unique copyright doctrines, namely time-shifting and space-shifting. An example of time-shifting is when consumers record a television program for later use, on a device such as a video recorder, or more recently other types of storage mediums.[146] Space-shifting is when digital content is recorded onto a different device than that for which it was originally assigned, for example purchasing a CD and copying it onto an MP3 player.[147]

3.117 Current Australian legislation makes these activities illegal. The Committee is of the view that the application of a broad, open-ended 'fair use' doctrine, similar to that in the United States, may resolve this long-standing legal anomaly in Australian copyright law and assist in legitimising several commonplace actions undertaken regularly by Australians perhaps unaware that they are infringing copyright. The Committee sees this as an opportunity to regulate the fair use environment to harmonise the activities of many Australians with the legal environment. In making its assessment, the Committee is particularly mindful of the recommendation by the CLRC in 1998 to adopt an open-ended United States-style 'fair use' approach.

3.118 The Committee acknowledges the comment in JSCOT's report that the term of copyright protection was defended vehemently by the Australian negotiators, but that the final outcome was necessary to secure the overall package.[148] However, the

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142 *Submission 133A*, p. 2 (Australian Record Industry Association)

143 *Submission 522*, p.13, (Australian Consumers' Association)

144 W M Landes and R A Posner, *Indefinitely Renewable Copyright*, University of Chicago Law School, John M Olin Law and Economics Working Paper, No. 154 (2D Series), 2002

145 The Allen Consulting Group, *Copyright Term Extension: Australian Benefits and Costs*, July 2003, Appendix A1, p.38, at http://www.allenconsult.com.au/resources/MPA_Draft_final.pdf accessed 23 June 2004

146 http://www.wordiq.com/definition/Time_shifting in Joint Standing Committee on Treaties, *Report 61: The Australia – United States Free Trade Agreement*, June 2004, p.236

147 http://www.webopedia.com/TERM/S/space_shifting.html in Joint Standing Committee on Treaties, *Report 61: The Australia – United States Free Trade Agreement*, June 2004, p.236

148 Joint Standing Committee on Treaties, *Report 61: The Australia – United States Free Trade Agreement*, June 2004, p.237

Committee is concerned that the balance of interests between copyright owners and users will be substantially altered under the AUSFTA, with potentially serious implications for Australian consumers. The Committee is also of the view that extending already very broad copyright protection is likely to increase anti-competitive effects in circumstances where it remains unclear that there are significant offsetting benefits.

3.119 At a Senate Foreign Affairs, Defence and Trade Committee Estimates hearing Mr Stephen Deady from the Department of Foreign Affairs and Trade, stated that the rights of consumers would remain appropriately balanced with those of copyright owners:

> Under the terms of the agreement we have commitments, which, whilst they require some legislative changes, still provide Australia with sufficient flexibility in these areas to ensure the very high level of intellectual property protection that we already have and balance that against consumer interests and other things. That is what the text of the agreement provides us as we go through this process of putting together the legislative changes required.[149]

3.120 A similar assurance was made by Ms Harmer of DFAT to the JSCOT in the course of its inquiry. Ms Harmer told that Committee that there is nothing in the AUSFTA to prevent Australia from creating exceptions which meet internationally agreed standards and which are, perhaps, comparable to United States-style exceptions if they are considered appropriate:

> … we can put in Australian specific exceptions so they may look something more like the US-style exceptions, or we may indeed choose to do something different that we think is better for Australia and the Australian market where we perceive that there is a need to provide more balance. In that way, we actually think that is a more preferable outcome than having just taken exceptions that have been designed for the US market and putting them in place in legislation.[150]

3.121 The concerns raised in submissions and by witnesses in relation to these issues were dismissed by DFAT as being unfounded. The Committee accepts assertions by DFAT that flexibility is retained under the AUSFTA to create appropriate exceptions which reflect the interests of Australian groups and which accord with Australia's legal and regulatory environment. However the Committee is concerned that the United States Free Trade Agreement Implementation Bill 2004 extends the term of copyright protection to 70 years with immediate effect, without including any additional exceptions to counteract the increased rights this gives to copyright owners.

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149 *Transcript of Evidence*, 3 June 2004, p.66, (Deady, DFAT)

150 Joint Standing Committee on Treaties, *Transcript of Evidence*, 14 May 2004, p.51 (Harmer, DFAT)

3.122 The Committee is of the view that such exceptions should have been considered as part of the initial AUSFTA implementation legislation package. The increased copyright protection term is a major amendment to the *Copyright Act* 1968 and, without amendments that correspondingly protect the interests of copyright users, the Committee believes that the changes tilt the balance towards copyright owners to an unacceptable degree. This is particularly in light of statements made by DFAT that, throughout the implementation process of translating the agreement into domestic legislation, the Commonwealth Government would be looking at maintaining the balance and how it fits within the Australian context.

3.123 Further, the Committee is not convinced by comments from DFAT that Australia's competition laws will protect against possible abuses of strengthened IP rights under the AUSFTA[151] The Committee has been informed that Australian competition law is less likely to impose controls on the use of IP than United States anti-trust laws, or the European Union authorities.[152] Without the Commonwealth Government changing the nature of competition law in Australia (which seems unlikely), the Committee cannot see how potential abuses of stronger IP rights under the AUSFTA can be adequately controlled in this way.

3.124 The Committee is also concerned about the general ability of DFAT, DCITA and Attorney-General's department officials to answer questions on the IP issues at the Committee's public hearings. The officials had to take on notice many questions that the Committee believes they should have been able to answer on the day, and took significant amounts of time to provide answers. When answers were eventually provided, they frequently lacked sufficient detail, were dismissive and opaque, and often did not appropriately correspond to the questions asked.

3.125 With IP law emerging as an important area of public policy as well as being a key aspect of the AUSFTA, the Committee considers that greater technical expertise should have been demonstrated. Whether the difficulties answering questions result from lack of departmental cooperation and coordination or from insufficient expertise within relevant departments, the Committee is of the view that the Commonwealth Government must upgrade its IP expertise and ensure that any future changes to IP law are based on a whole-of-government approach. The Committee considers that the performance of the relevant departments at hearings throughout the inquiry invites speculation that proper technical expertise may not have been brought to bear in the negotiation of the IP Chapter.

3.126 The Committee believes that there are measures, in relation to the issue of copyright extension, that can be taken that will assist in redressing the imbalance and ensuring the rights of Australian consumers are appropriately protected.

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151 *Transcript of Evidence*, 18 May 2004, p.93, (Harmer, DFAT). Although the Committee notes the response to a question on notice from DFAT in relation to the operation of the *Trade Practices Act 1974*.

152 *Submission 294A*, p.9, (Weatherall)

'Contracting out' of exceptions to copyright infringement

3.127 Article 17.4.6 of the AUSFTA allows copyright owners to transfer their rights by contract which would mean that contracts could prevail over exceptions to copyright infringement such as 'fair use'. However, there are some doubts as to whether the relevant provision in the AUSFTA actually achieves this intention.[153]

3.128 The Commonwealth Government has indicated that this provision is consistent with section 196 of the *Copyright Act*,[154] however it contradicts a recommendation of the Copyright Law Review Committee in its 2002 report, *Copyright and Contract*, that the *Copyright Act* 1968 should be amended to provide that a contract that purports to exclude or modify certain exceptions would not be enforceable.[155] The Commonwealth Government has not responded to this recommendation.

3.129 Dr Rimmer told the Committee that:

> The Copyright Law Review Committee recommended that you should not be able to contract out of the defence of fair dealing. They provide lots of evidence that publishers were including in their contracts clause which cut down what people could do legitimately in terms of the defence of fair dealing.[156]

3.130 DFAT told the Committee that:

> The contracts with which the recommendation in the CLRC report was concerned are contracts relating to the use of copyright material by consumers and other users. The contracts to which Article 17.4.6(a) refers are contracts relating to the transfer of ownership of copyright in a work or other subject matter, not to the use of that material. Thus that provision of the AUSFTA does not appear to contain any obligation with regard to contracting out of exceptions to copyright.[157]

3.131 Dr Rimmer told the Committee that contracting out of exceptions is a controversial issue and may be problematic when interlinked with issues relating to TPMs and 'fair dealing':

> I think the FTA is making it worse because there are strong interactions between technological protection measures and fair use. There are many arguments that the ability to engage in, say, fair dealing or fair use is cut

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153 P Dee, *The Australia – US Free Trade Agreement: An Assessment*, paper prepared for the Senate Select Committee on the Free Trade Agreement between Australia and the United States of America, June 2004, p.14

154 See DFAT, *Australia-United States Free Trade Agreement, Guide to the Agreement*, para. 5.3

155 Copyright Law Review Committee, *Copyright and Contract*, October 2002, Recommendation 7.49.

156 *Transcript of Evidence*, 17 May 2004, p.14, (Rimmer)

157 DFAT, *Answers to Questions on Notice*, 15 July 2004, p. 4

> down once you have technological protection measures happening and once you have contracts that try to do things like contract out of exceptions, which is also a very controversial matter. The Copyright Law Review Committee recommended that you should not be able to contract out of the defence of fair dealing. They provide lots of evidence that publishers were including in their contracts clauses which cut down what people could do legitimately in terms of the defence of fair dealing.[158]

3.132 DFAT's response to such concerns has been evasive:

> The interaction of copyright rights, exceptions to those rights and the extent to which those exceptions may be affected by contract, remains an on-going policy issue extending beyond the AUSFTA.[159]

Anti-circumvention provisions of the AUSFTA

3.133 TPMs or anti-circumvention devices are certain types of technology that are associated with copyright material.[160] The IP Chapter of the AUSFTA contains a set of obligations in relation to TPMs which will require significant legislative change in Australia. Under Article 17.12, Australia will have a two year period from date of entry into force of the AUSFTA to implement its obligations in relation to TPMs.

3.134 Article 17.4.7 limits the scope of exceptions in which TPMs may be used and extends the scope of criminal offences relating to the manufacture and sale of circumvention devices. It goes beyond the *Copyright Amendment (Digital Agenda) Act 2000* (Digital Agenda Act), by taking a much more expansive definition of 'controlling access' to a work than is currently embodied in the Digital Agenda Act. The Digital Agenda Act does not currently criminalise the actual use of TPMs, just the manufacture and distribution of them.

3.135 In short, the anti-circumvention provisions of the AUSFTA shift the focus from circumventing TPMs that achieves protection of copyright (through either the specific processes of access codes or through a copy control mechanism) to the distinctly different notion of 'controlling access' and the very broad notion of 'protecting copyright' (without specific reference to illegitimate copying).[161]

3.136 The TPM provisions of the AUSFTA have pre-empted the review of the Digital Agenda Act (the Digital Agenda Review), which was commissioned by the Attorney-General's Department and undertaken by the law firm Phillips Fox. Its report was released in April 2004.[162]

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158 *Transcript of Evidence*, 17 May 2004, p.14, (Rimmer)

159 DFAT, *Answers to Questions on Notice*, 13 July 2004, p.10

160 DFAT, *Australia-United States Free Trade Agreement, Guide to the Agreement*, para. 5.3

161 *Submission 299*, p.8, (Australian Digital Alliance)

162 Phillips Fox, *Digital Agenda Review: Report and recommendations*, January 2004, at http://www.ag.gov.au/DigitalAgendaReview/reportrecommendations accessed 7 June 2004

3.137 The report by Phillips Fox in the Digital Agenda Review stated that 'submissions to the review accept that, in general, the Digital Agenda Act is achieving its objectives and is working well.'[163] Some changes were recommended by the review, but the overall workings of the Digital Agenda Act were not criticised.[164] In particular, the review recommended that the *Copyright Act* 1968 be amended to expand the definition of 'permitted purpose' for use and sale of TPMs. This would add fair dealing and access to legitimately acquired non-pirated products and, under these circumstances, make end use an infringement unless for a permitted purpose.[165] The AUSFTA does not allow a blanket exemption for non-infringing uses, so it would not permit these recommendations to be enacted.

3.138 Under the AUSFTA, Australia is able to make certain classes of copyrighted work (for example, films on DVD, music, video games) exempt from the normal TPM circumvention prohibitions where the circumvention is for a non-infringing use. However, the decision to exempt these classes – which may be made by parliament or delegated to a minister or public servant – must be reviewed every four years.

3.139 This is similar to the process used in the United States in which the Librarian of Congress may determine that certain users or uses of TPM circumvention devices are legitimate. Notably, the AUSFTA does not require the adoption of certain criteria for determining whether or not a use should or should not be allowed, as in the United States. This leaves the Australian Parliament with some freedom to choose which criteria should be relevant, beyond the adverse effects suffered by non-infringing users.[166]

3.140 On the one hand, this exemption does allow that certain fair dealing and other non-infringing uses may be allowed. On the other hand, the AUSFTA requires that a non-infringing use be illegal until 'an actual or likely adverse impact on those non-infringing uses is credibly demonstrated'. In the absence of well-resourced or organised lobbies representing consumer interests, it is foreseeable that these processes could be dominated by those representing copyright holders. A blanket exemption from non-infringing uses would avoid this problem but is not allowed under the AUSFTA.[167]

3.141 The Australian Digital Alliance informed the Committee:

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163 Phillips Fox, *Digital Agenda Review: Report and recommendations*, January 2004, at http://www.ag.gov.au/DigitalAgendaReview/reportrecommendations accessed 7 June 2004

164 *Submission 294*, p.20, (Weatherall)

165 J Varghese, Parliamentary Library, *Guide to Copyright and Patent Law Changes in the US Free Trade Agreement Implementation Bill 2004*, Appendix 3, p.29.

166 J Varghese, Parliamentary Library, *Guide to Copyright and Patent Law Changes in the US Free Trade Agreement Implementation Bill 2004*, Appendix 3, p.30.

167 J Varghese, Parliamentary Library, *Guide to Copyright and Patent Law Changes in the US Free Trade Agreement Implementation Bill 2004*, Appendix 3, p.30.

> The Digital Agenda Review Report … considers the issues within the framework of Australian legal history and policy. Most of the recommendations made by the Report on topics common to the FTA in fact make suggestions for legislative change which can more or less be characterised as moving in the opposite direction to that contemplated by the FTA. The recommendations largely (and rightly) adhere to the underlying government policy for balance and does not recommend change in the absence of compelling evidence demonstrating a need.[168]

3.142 The Commonwealth Government has recently announced that:

> … [it] is now moving towards signing its Free Trade Agreement with the US and implementing its obligations. In some areas, the copyright provisions of the Free Trade Agreement supersede the recommendations made in the Phillips Fox report. Where relevant the Phillips Fox report is being used to inform the Government's implementation of the Free Trade Agreement obligations.
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> Following the implementation of the Free Trade Agreement obligations, the Government will conclude its broader review of the Digital Agenda reforms. The broader review will include analysis of the Phillips Fox report in relation to issues that were not considered in the implementation of the Free Trade Agreement as well as other Digital Agenda reform issues that were raised during the review.[169]

3.143 This was confirmed by DFAT which informed the Committee as follows:

> Phillips Fox conducted their research and analysis of the copyright Digital Agenda reforms independently of the FTA process being undertaken by the Government. The Phillips Fox report was received by the Attorney-General's Department in February 2004 by which time the bulk of the FTA negotiations had been concluded. Where possible, the Government is taking the Phillips Fox report into consideration in its implementation of the FTA obligations.
>
> In some areas, the copyright provisions of the AUSFTA supersede the recommendations made in the Phillips Fox report. For example, technological protection measures are dealt with in both the Phillips Fox report and the AUSFTA. In the event of inconsistencies between the Phillips Fox report recommendations and obligations under the FTA in relation to technological protection measures, the FTA will prevail.

3.144 However, DFAT also informed the Committee that the Digital Agenda Review process is ongoing and that the report by Phillips Fox was a consultancy paper

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168 *Submission 299*, p.5, (Australian Digital Alliance)

169 Attorney-General's Department, Review of Copyright Digital Agenda reforms, at http://www.ag.gov.au/www/securitylawHome.nsf/Alldocs/RWP18B3985DD6A0767FCA256D9D00815B56?OpenDocument&highlight=review%20of%20copyright%20digital%20agenda%20reforms accessed 7 June 2004.

intended to inform the Commonwealth Government's broader review of the reforms. Further:

> Where possible, the recommendations of the Phillips Fox Report have been used to inform Australia's implementation of the Agreement. This will continue to be the case in relation to the implementation of the TPM obligations under the Agreement. However, some of the recommendations relating to TPMs have effectively been superseded by the Agreement.[170]

3.145 The Committee remains concerned that the AUSFTA effectively displaces previous extensive public review processes, such as the Digital Agenda Review, which involved widespread consultation and participation. These processes rejected some of the very changes to Australian IP law that the AUSFTA now requires Australia to adopt. This suggests to the Committee that at least some of the changes required to Australian law under the AUSFTA are not desirable from an Australian policy perspective. The Committee considers it neither desirable nor appropriate that domestic law reform processes have been made virtually redundant by the AUSFTA negotiations.

3.146 The Committee received evidence reflecting a range of views, both supporting Australia's obligations in relation to TPMs and raising concerns on, for example, regional coding issues and possible adverse impacts on the open source software industry. Those organisations representing creators and copyright owners were generally supportive of TPM provisions.

3.147 For example, the Business Software Association of Australia argued that:

> Strong anti-circumvention provisions will become increasingly important as copyright owners in the digital environment rely on technological protection measures to protect their works and reduce piracy.[171]

3.148 CAL made the following argument:

> It is CAL's view that Australian content creators have been reluctant to develop electronic products, as opposed to their US counterparts, and that an important contributor to this has been the concern Australian content creators have with circumvention devices generally as well as a perception by them that the current Australian legislation does not afford them any protection.[172]

3.149 The AFIC were keen to see the implementation of tighter controls on anti-circumvention device as soon as possible:

> Given that the US and EU both protect access control measures, the Coalition considers that maintaining the current "gap" in Australia will give

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170 DFAT, *Answers to Questions on Notice*, 15 July 2004, p.5

171 *Submission 178*, p.3, (Business Software Association of Australia)

172 *Submission 309*, p.8, (Copyright Agency Ltd)

> rise to just the type of trade barriers that the FTA was designed to avoid, and will discourage online content providers from moving into the Australian market.
>
> …
>
> … the Coalition considers that the prejudice caused to Australia's content industries by failing to implement the extended definition in line with Australia's trading partners as soon as possible, is far greater than any possible prejudice that may be caused to users of copyright material.[173]

3.150 The provision relating to TPMs are based on the *Digital Millennium Copyright Act 1998* (DMCA). It has been an issue of international debate whether the US) is the appropriate model of compliance with the WIPO treaties.[174] The DMCA is quite different to the approach in Australia and has been widely criticised, even within the US. Australian copyright law is more pragmatic and regulated, depending less on litigation and the development of case law than in the United States. Some submissions pointed out that it may not be appropriate for Australia to adopt features of the DMCA. For example, concerns were expressed by the open source software industry that the DMCA has been used to stifle fair competition and to severely limit a consumers right to fair use:

> There is accelerating awareness in the United States that these laws are unbalanced, and that the interests of large producers have outweighed the interests of consumers (and smaller producers) in the crafting of these laws, and that they are doing real damage. Sites like chillingeffects.org document the effect of DMCA on the openness of speech and rights. The site catalogues the cease and desist notices and presents analyses of their claims to help recipients resist the prosecution of legitimate activities.[175]

3.151 Professor Michael Geist submitted:

> The reticence to adopt the WIPO standard is understandable. Many believe the U.S. experience illustrates the dangers of adopting copyright protections that may ultimately stifle innovation. The Digital Millennium Copyright Act, the U.S. statute that implements the WIPO standard, has led to scholars declining to publish their research out of fear of lawsuits, hundreds of individual Internet users having their privacy rights ignored, and copyright law being strangely applied to garage door openers and computer printers.[176]

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173 *Submission 300*, p.11, (Australian Film Industry Coalition)

174 P Dee, *The Australia – US Free Trade Agreement: An Assessment*, paper prepared for the Senate Select Committee on the Free Trade Agreement between Australia and the United States of America, June 2004, p.13

175 *Submission 164*, pp.8-9, (Linux Australia)

176 *Submission 26*, p.1, (Geist)

3.152 The Committee also heard evidence that the proposed changes to Australian laws in respect of TPMs would be significantly detrimental to some industries and to consumers. In its submission, Linux Australia argued that laws in the United States and Australia give a particular benefit to the producer. If something can be described as a TPM, it is illegal to circumvent it, even if the real purpose of the TPM is to restrict access to content.[177] In the United States, the DMCA has been used to hinder efforts of legitimate competitors to create interoperable products.[178]

3.153 The open source software industry is concerned that the provisions dealing with TPMs might be used to prevent the interoperability of data or the creation of software programs which can access other people's data. Mr Brendan Scott told the Committee that:

> I think the open source industry would see the inability to manipulate data that has been saved by other people acting as a barrier to competition to those people trying to put forward competitive products. Effectively, a customer's own data is used as a competitive weapon against competitors for the custom of that customer. If a competitor is not able to interoperate with the data that the customer has stored for however long, then the competitor's product, no matter how good it is, will not be taken up by the customer because all of their legacy data will effectively be lost. In short, the concern is that the chapter 17 provisions will substantially increase compliance costs and that means the engine that is used for the development of open source, which is a low compliance cost environment, may be gummed up and potentially stopped.[179]

3.154 The ADA argued that the AUSFTA provisions in relation to TPMs represent 'a dangerous transformation of our current law.'[180] In particular:

> The control of access restricts competition by giving copyright owners power to control markets and structure distribution streams to maximise profit. The provisions of article 17.4.7 create opportunities for abuse of copyright legislation to control access to material not for protection of copyright but for the purposes of market advantage (a current example of this practice is DVD zoning). This is at the cost of reducing the options through which users may access material that they have legitimately purchased or worse, to effectively prohibit *per se* the means by which consumers might access material which they have purchased but which may have become unavailable for various reasons. [181]

3.155 The ALCC submitted that:

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177 *Submission 164*, p.10, (Linux Australia)

178 *Submission 294*, p.24, (Weatherall)

179 *Transcript of Evidence*, 17 May 2004, pp:3-4 (Scott)

180 *Submission 299*, p.8 (Australian Digital Alliance)

181 *Submission 299*, p.8 (Australian Digital Alliance)

> 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. The disjunction created by this significant departure from current law is complicated by the lack of clarity and ambiguity of the provision.
>
> …
>
> The lack of clarity in the drafting makes it difficult to assess the impact of the provision and anticipate the standard of protection required to meet the obligations imposed by the FTA in relation to this issue.[182]

3.156 The Australian Consumers' Association warned that Australian consumers would be the big losers:

> … extending such measures would intrude into consumers' lives excessively, particularly given the unresolved and potentially very broad definition of Technological Protection Measures (TPM). We are concerned that TPM devices deliver rights and enforcement by assertion, with little room for consumer negotiation or appeal.[183]

3.157 The Committee received evidence expressing concern that the AUSFTA has the potential to entrench, and legally protect, anti-competitive and market segmentation practices of copyright owners, as well as undermine Australia's policies in favour of competition in the supply of legitimate copyright works as implemented through its parallel importation laws.[184] The Commonwealth Government has had an active policy of avoiding the price-inflating effects of market segmentation and has allowed parallel importation on the basis that this would benefit Australian consumers by reducing prices and increasing the availability of copyright material.[185]

3.158 The Australian Competition and Consumer Commission (ACCC) has strongly supported this position and has been vocally opposed to regional coding and to the Digital Agenda Act in general. For example, the ACCC has stated that:

> [It] believes region coding is detrimental to consumers as it severely limits their choice and, in some cases, access to competitively priced goods. The ACCC is disappointed that technology which can overcome these unfair restrictions will not be generally available for consumers' use.[186]

3.159 The Australian Consumers' Association explained its view on regional coding:

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182 *Submission 298*, p.9 (Australian Libraries' Copyright Committee)

183 *Submission 522*, p.13 (Australian Consumers' Association).

184 *Submission 294*, p.21 (Weatherall)

185 *Explanatory Memorandum* to the Parallel Importation Bill 2001 (Cwlth)

186 Australian Competition and Consumer Commission, 'Consumers Lose in Playstation Decision', 31 July 2003, at http://www.accc.gov.au/content/index.phtml/itemId/345939 accessed 7 June 2004.

> The zoning system is not designed to counter consumer-level *copying* but is intended to structure the global market to the advantage of the content producers.[187]

3.160 It went on to argue that:

> Zoning is a matter of indifference to the US because firstly it originates most of the material consumers want to access, and secondly because it is a huge market into which most product will be released. As a smaller satellite economy, Australia is affected. The system is an imposition on consumers and does control their *access* to material. It places an artificial barrier in the market place where a software product *legally* acquired by a consumer may not work with a hardware product expressly designed and advertised for the purpose of playing the software … consumers have not means or right to negotiate the nature of the arrangement or its enforcement, irrespective of the impact on them.[188]

3.161 In relation to the issue of parallel importation and regional coding, Ms Harmer from DFAT assured the Committee that:

> The anticircumvention provisions really go towards piracy rather than viewing what is a legitimate copy of copyright material. The anticircumvention provisions I think have to be seen in that context. They are not really aimed at stopping people from carrying out legitimate copyright activities.[189]

3.162 Ms Harmer reiterated:

> … there will be no change to Australia's parallel importation laws as a result of the FTA.[190]

3.163 Mr Deady made some very encouraging comments in relation to regional coding and parallel importation:

> It seems to me that there is the capacity for Australia to introduce exceptions to allow for the legitimate use of non-pirated material here. The agreement, I think, certainly allows for that through exceptions, and I think that is accepted. It does put restrictions on anticircumvention devices. But the agreement … does provide the government with the flexibility to introduce these exceptions and then to give effect to those exceptions. There is no point in our agreeing to exceptions to allow the 'fair use'—if that is the right term—of this material with the use of non-pirated material and then having no capacity whatsoever to allow that material to be viewed or used … The agreement clearly allows for exceptions for legitimate use; therefore, in order to give effect to that, to allow that to occur, we certainly

187 *Submission 522*, p.16 (Australian Consumers' Association)

188 *Submission 522*, p.16 (Australian Consumers' Association)

189 *Transcript of Evidence*, 6 July 2004, p.197 (Harmer, DFAT)

190 *Transcript of Evidence*, 6 July 2004, p.197 (Harmer, DFAT)

> believe that the use of certain devices is provided for under the agreement.[191]

3.164 In answers to questions on notice, DFAT also clarified the position on regional coding:

> The viewing of non-infringing material from other countries is a legitimate activity and the obligations of the FTA target piracy. We do not agree that permitting the sale of region-free DVD players in Australia would contravene the provisions of the AUSFTA provided that the legislation is implemented in a manner consistent with the FTA.
>
> The issue of multizone DVD players will be considered as part of the implementation process. The agreement also provides for a 2 year transitional period to implement these provisions, which will present the opportunity for public submissions in this area. It is also important to bear in mind that the IP Chapter does not alter competition law in Australia and competition law can be used to address anti-competitive conduct.[192]

3.165 In response to concerns relating to TPMs, Mr Simon Cordina from DCITA informed the Committee that:

> In terms of regional coding itself, if a person is playing a legitimate, non-pirated product, the government's intention would not be for that to fall foul of the laws in relation to technological protection measures. This issue of regional coding is one of the issues that the government will be looking at in terms of the implementation of our obligations under the free trade agreement whereby we can introduce exceptions to the protections we are providing to technological protection measures.[193]

3.166 DFAT repeatedly told the Committee that Australia has retained the ability under the AUSFTA to create appropriate exceptions to suit its own circumstances. Ms Harmer said:

> The anticircumvention provisions … include a list of specific exceptions that we can take advantage of and a mechanism for us to make further exceptions that we consider to be appropriate for the Australian circumstances … we very specifically negotiated a two-year transitional period for us to phase in our obligations so that we can take account of those concerns that are very specific to Australia. A broad point—and perhaps it is one that I should have made earlier with respect to the FTA in general and the copyright provisions—is that it is correct to characterise it as having strength in copyright in the FTA but we have also been very careful to ensure that we maintain the ability to put in place exceptions where we regard those to be appropriate to the Australian circumstances.[194]

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191 *Transcript of Evidence*, 6 July 2004, p.122 (Deady, DFAT)

192 DFAT, *Answers to Questions on Notice*, 13 July 2004, p.14

193 *Transcript of Evidence*, 18 May 2004, p.91-92 (Cordina, DCITA)

194 *Transcript of Evidence*, 18 May 2004, p.92 (Harmer, DFAT)

3.167 Ms Harmer stressed that the main aim of the TPMs provisions is to guard against piracy:

> … the point that I would like to make in relation to all of these issues is that the provisions are designed to assist copyright owners to enforce their copyright and target piracy, not to stop people from doing legitimate things with legitimate copyright material.[195]

3.168 DFAT has attempted to allay concerns raised by the open source software industry:

> These obligations do not stifle innovation or require that Australia must prevent consumers and industry from engaging in legitimate activity, including obtaining appropriate access to copyright material. The AUSFTA also allows for the continued development of innovative software products, including Australia's burgeoning open source software development industry.
>
> The Agreement provides for a specific exception to the anti-circumvention provisions which allows reverse engineering of computer software for the purposes of achieving interoperability. Further, the Agreement provides for a review process to be undertaken at least every four years for additional exceptions to those listed, to permit circumvention where the adverse impact or likely adverse impact on certain non-infringing uses is credibly demonstrated in a legislative or administrative review. This would allow the government to assess what other exceptions may be appropriate to put in place to allow interested parties, including the open source software industry to circumvent an access control measure.[196]

3.169 However, Mr Russell from Linux Australia was not convinced that the exceptions under the AUSFTA would allow Australia sufficient flexibility:

> The exceptions we can make are defined in these clauses, and they are not clear. The ones that are clear are not sufficient. The uncertainty is a very difficult issue to get around—without placing blanket bans on all use, basically, of these objects.
>
> …
>
> The one exception clause that everybody keeps pointing out is the one where you are allowed to set up a legislative or administrative review or proceeding whose exceptions must be specific to a class of works and renewed every four years. The problem with that is that it is reverse law. That clause is about being guilty until proven innocent. Just the fact that you are not infringing copyright is not a defence, and it can only be made a defence after a protracted and probably expensive procedure. That barrier itself will be high—legal advice at the very least, a submission for review

195 *Transcript of Evidence*, 18 May 2004, p. 95 (Harmer, DFAT)

196 DFAT, *Answers to Questions on Notice*, 13 July 2004, pp.8-9

> and argument against the same interests who have been pushing for control above and beyond copyright—and potentially against our competitors.[197]

3.170 DFAT insisted that the provisions relating to TPMs do not prevent the manufacture, distribution, sale or importation of all circumvention devices or services, nor do they necessarily restrict all commercial activities in relation to those devices or services.[198]

3.171 DFAT insisted that implementation of Australia's obligations in relation to TPMs will be 'in a manner consistent with Australia's legislative and regulatory framework.'[199] While recognising that these obligations represent a departure from the current law, DFAT has assured the Committee that 'there will be close consultation with stakeholders so as to minimise implementation problems, including any ambiguities that would make compliance problematic in practical terms.'[200]

3.172 Contrary to assertions made in submissions and in evidence at hearings, Mr Stephen Deady, Special Negotiator, Department of Foreign Affairs and Trade told Senate Foreign Affairs, Defence and Trade Committee Estimates hearing that the AUSFTA would not involve Australia being forced to adopt the DMCA:

> I know in some of the consultation and discussions we have had with you, and others on the committee and elsewhere, that there is a question about how much of that US legislation we need to bring into our own system. We have tried to explain that the commitments we have entered into in this chapter do not require us to bring into our legislation the Digital Millennium Copyright Act.[201]

3.173 Further:

> … these obligations apply as equally to the United States as they apply to Australia. We certainly have negotiated long and hard in this area to ensure that we have the flexibility in certain areas that are important to us to enable us to introduce legislation to meet the commitments under the agreement without changes to legislation to the maximum extent we could. Where we have changes, we will introduce them in a way which is consistent with the agreement but which still reflects the legal and regulatory framework that is important to Australians. That is certainly our objective in this.[202]

3.174 At one of the Committee's public hearings, Ms Harmer put forward a similar view:

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197 *Transcript of Evidence*, 17 May 2004, (Russell, Linux Australia)

198 DFAT, *Answers to Questions on Notice*, 13 July 2004, p.11

199 DFAT, *Answers to Questions on Notice*, 13 July 2004, p.7

200 DFAT, *Answers to Questions on Notice*, 13 July 2004, p.7

201 *Transcript of Evidence*, 3 June 2004, p.66 (Deady, DFAT)

202 *Transcript of Evidence*, 3 June 2004, p.67 (Deady, DFAT)

> … the IP chapter does contain elements of the US Digital Millennium Copyright Act. It also contains flexibility for us to implement that in a way that is appropriate for us. So I believe it is an incorrect reading of the IP chapter to think that it requires us to implement US law word for word in our system. Whilst we have treaty level obligations, we will be implementing those within our own legal context.[203]

3.175 However, the Committee remains concerned that the AUSFTA goes too far. TPM circumvention may be done for legitimate, non-infringing purposes, not simply piracy. A ban on TPM circumvention, while possibly assisting to curb some piracy, may also prevent many legitimate purposes. This severely interferes with the rights of consumers to do as they wish with property that they have legally purchased. It is important to ensure that certain classes of copyrighted work be exempt from the normal TPM circumvention prohibitions where the circumvention is for a non-infringing use.

Internet Service Provider Liability

3.176 Article 17.11.29 and Side Letter 1 cover Internet Service Provider (ISP) liability obligations. These obligations establish a system for dealing with allegedly infringing material on ISP systems and networks. An ISP will receive 'safe harbour' immunity when dealing with alleged copyright infringements on their system or networks if they comply with certain conditions.

3.177 DFAT explained the ISP liability provisions as follows:

> … what the agreement does is put in place a set of rules, if I can call it that, so that Internet service providers, copyright owners and users are clear about their rights and obligations …. I think we would see that very much as being of benefit to ISPs in providing certainty and of benefit to copyright owners in providing the ability for a take-down and notice regime. It would also assist users to have that certainty about how the system works. I would see the ISP provisions as being something that would certainly assist copyright owners to enforce their copyright at the same time as introducing appropriate safeguards for users and ISPs.[204]

3.178 The ADA argued that, while recognising the perceived problems of uncertainty associated with current Australian ISP provisions, the need for further clarity does not necessarily mean that the United States model should be adopted. Such a model, 'if followed closely, imposes unreasonable burdens upon ISPs, ignores the requirement for due process and privacy rights of individuals and enhances the already extensive powers of copyright holders.'[205]

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203 *Transcript of Evidence*, 18 May 2004, p.102 (Harmer, DFAT)

204 *Transcript of Evidence*, 18 May 2004, p.106 (Harmer, DFAT)

205 *Submission 299*, p.9 (Australian Digital Alliance)

3.179 The EFA stated that the way in which the provisions of the AUSFTA would 'effectively empower large copyright holders to control flows of information and impose various burdens upon ISPs'[206] was of major concern. The EFA also pointed out some particular problems it sees with the provisions:

> EFA is opposed the idea that mere linking to a website which allegedly contains infringing material is or should itself constitute infringement of copyright. EFA is also opposed to a system of take-down notices that allows copyright holders to exert such wide powers over internet content, forcing content offline without any actual evidence of infringement …
>
> A system of take-down notices like that proposed by Chapter 17 would subject a wide array of internet 'service providers' to burdensome compliance requirements, whilst empowering copyright holders to force content offline without evidence of infringement, and in situations where the law is unclear or untested. Such a system should be rejected, as it simply enhances the power of copyright holders to control the activities of others and, in practice, labels defendants as guilty unless proven innocent.[207]

3.180 The University of Melbourne submitted that there should be no liability for infringement for an ISP in circumstances where the ISP did not know of a particular infringement and that this principle should be affirmed in the AUSFTA implementation legislation.[208] It went on to stress the importance of allowing ISPs to cache materials 'without running the risk of being held liable for infringement of copyright or the payment of royalties to copyright owners'.[209] The ADA agreed with this point stating that ISPs should not be excluded from limitation of liability when engaging in 'the configuration of settings or maintenance activities that are designed to enhance the efficiency of networks'.[210]

3.181 The process of caching was explained to the Committee by Mr Peter Coroneos from the Internet Industry Association:

> It is essentially just temporary storage so that, if your users are requesting material off the Internet that is being hosted in another country, rather than going and dragging it back to Australia every time a new user wants it you bring it here once and store it in a temporary cache. The speed of delivery is quicker to the end user and you do not have to pay for the same content to be transited every time. Parliament recognised the public interest in allowing caching, because it recognised, for the reasons I have just said, that it is better for Internet users to have this material held here.[211]

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206 *Submission 282*, p.12 (Electronic Frontiers Australia)

207 *Submission 282*, p.14 (Electronic Frontiers Australia)

208 *Submission 493*, p.4 (The University of Melbourne)

209 *Submission 493*, p.5 (The University of Melbourne)

210 *Submission 299*, p.14 (Australian Digital Alliance)

211 *Transcript of Evidence*, 17 May 2004, p.85 (Coroneos, Internet Industry Association)

3.182 The Committee received submissions that expressed concerns that the failure to appropriately address the issue of temporary copying in the AUSFTA may disadvantage Australia's cultural and educational sectors, as well as consumers. Cultural and educational institutions undertake necessary and extensive caching of internet material to minimise external bandwidth limitation and to maintain security.[212]

3.183 Mr Coroneos from the Internet Industry Association noted that:

> When you look at the free trade agreement, it talks about caching carried out through an automatic process. The point I am trying to make is that our current Copyright Act makes no distinction between automatic and non-automatic caching..[213]

3.184 The Committee notes the recommendation in the IPCRC report that recognised the need for legislation to allow caching activities designed to enhance the efficiency of systems.[214]

3.185 DFAT addressed concerns raised in the course of the inquiry by informing the Committee that:

> The AUSFTA requires Australia to extend the definition of reproduction to cover all reproductions in any manner or form, permanent or temporary (including temporary storage in material form). Australia retains its ability to include specific exceptions to allow reproductions in certain circumstances. The AUSFTA will not limit the scope of the caching exception in the Copyright Act, which will continue to apply to temporary reproductions.[215]

3.186 Most submissions and witnesses who commented on the issue of ISP liability agreed that current Australian provisions relating to ISP liability are uncertain.[216] However, concern was expressed that the level of detail in the ISP liability provisions of the AUSFTA is inappropriate and does not allow for sufficient flexibility in implementation.[217]

3.187 The Phillips Fox report in the Digital Agenda Review determined that greater certainty is required as to what steps ISPs need to take to protect themselves from

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212 *Submission 298*, p.14 (Australian Libraries' Copyright Committee)

213 *Transcript of Evidence*, 17 May 2004, p.85 (Coroneos, Internet Industry Association)

214 Intellectual Property and Competition Review Committee, *Review of intellectual property legislation under the Competition Principles Agreement*, September 2000.

215 DFAT, *Answers to Questions on Notice*, 13 July 2004, p.4

216 See, for example, *Submission 294*, pp:27 (Weatherall); *Submission 282*, p.12 (Electronic Frontiers Australia)

217 See, for example, *Submission 294*, pp:27 (Weatherall); *Submission 282*, p.12 (Electronic Frontiers Australia)

liability, however it recommended that a 'co-regulatory' model be adopted.[218] This would mean that, while minimum standards would be prescribed in legislation, there would remain freedom for development of a flexible industry code of conduct. The Digital Agenda Review also noted this approach as the preference of Australian stakeholders.

3.188 Ms Anne Flahvin, on behalf of the AVCC, argued that:

> With respect to service provider liability, universities in particular need certainty. The current provisions do not provide the level of certainty that the education system requires in order to understand what its liability is for infringements taking place on its networks. We do, however, have some concerns with the highly prescriptive approach that is contained in the free trade agreement. In particular we are concerned that it provides little scope for Australia to develop appropriate safe harbour provisions and to avoid some of the flaws that we see apparent on the face of the Digital Millennium Copyright Act provisions on which these provisions appear to be based.[219]

3.189 Mr Peter Coroneos from the Internet Industry Association told the Committee that:

> What we would say is that perhaps the free trade agreement gives us the opportunity to pick up on some of those areas in [the Copyright Act] that may still be slightly ambiguous and give them further definition so that the immunities of the ISPs are very clear and it is very clear where their rights and responsibilities begin and end. There may also be scope to include a framework for a notice and take-down structure within the [Copyright Act].[220]

3.190 The Committee acknowledges that several organisations are highly in favour of the scheme set out under the AUSFTA.[221] For example, Mr Michael Williams, on behalf of the AFIC, explained its opinion as follows:

> We see … safe harbours as an essential trade-off for other obligations that we believe should be maintained and implemented to their fullest. They are the obligations to control or monitor to the extent possible activities of individual customers of ISPs and also to take appropriate action where that information comes to the knowledge of ISPs along the way. Perhaps some of the submissions that have been put forward raise more extreme, and in our experience hypothetical, examples of how Internet service providers

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218 Phillips Fox, *Digital Agenda Review: Report and recommendations*, January 2004, at http://www.ag.gov.au/DigitalAgendaReview/reportrecommendations accessed 7 June 2004

219 *Transcript of Evidence*, 17 May 2004, p.7 (Flahvin, AVCC)

220 *Transcript of Evidence*, 17 May 2004, p.83 (Coroneos, Internet Industry Association)

221 For example, *Submission 301* (Interactive Entertainment Association of Australia); *Submission 178* (Business Software Association of Australia); *Submission 520* (Viscopy).

> might be exposed to liability to their customers, when no real world examples have ever existed to our knowledge.[222]

3.191 In relation to the issue of self-regulation, Mr Williams stated that:

> In short, we do not believe that leaving the regulation of the online liability arena to the industries is the appropriate course. The industries have tried over many years to negotiate a code … Essentially, the FTA process is one which would enable a super-imposition of a scheme which has been operating in the United States and which will not be delayed by further negotiations between the industries.[223]

3.192 Mr Jorg Speck from Music Industry Piracy Investigations was highly critical of the Internet industry's approach in relation to liability:

> The Internet industry already submit themselves to a pro-forma take-down protocol. We have for five or six years sent a single document—a one-page letter—to ISPs in Australia and indeed many other countries around the world when we have identified sound recording copyright infringements, and invariably Australian ISPs take that material down without complaint within 24 hours. Yet they come to this committee and revisit the entire issue.
>
> They further accommodate their own concerns, and I suggest the most fanciful is their fear of being sued by a customer for wrongfully taking material down. Apart from the protection afforded by section 202 of the Copyright Act, most ISPs protect themselves with comprehensive terms and conditions. [224]

3.193 Mr Speck also highlighted the benefits derived for ISPs under the AUSFTA:

> Quite simply, the one thing they want is less responsibility than any other corporation for activity that takes place in their own infrastructure that they profit from. They already have protections in their contracts almost universally with their customers. They already take down material almost instantaneously on the provision of a letter asserting copyright infringement, contrary to what was said to this committee. They invariably can find customers when they are served with discovery or preliminary discovery orders, but they consistently take a position that there is an Internet cloud through which passes a stream of data into the ether and it is beyond their control—when otherwise it is likely to have the consequence of diminishing revenue opportunities for that industry. Nothing in this agreement should come as a surprise; nothing in this agreement does anything other than slightly improve their position. As a total package, it provides an effective balance.[225]

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222 *Transcript of Evidence*, 8 June 2004, p.4 (Williams, Australian Film Industry Coalition)

223 *Transcript of Evidence*, 8 June 2004, p.4 (Williams, Australian Film Industry Coalition)

224 *Transcript of Evidence*, 8 June 2004, pp.5-6 (Speck, Music Industry Piracy Investigations)

225 *Transcript of Evidence*, 8 June 2004, p.13 (Speck, Music Industry Piracy Investigations)

3.194 Several groups disputed claims that the AUSFTA would result in increased litigation. For example Mr Williams, on behalf of the AFIC, argued that the opposite would be true:

> The simplest example is that the notice and take-down procedures and the procedures for quick and easy discovery or production of names and identities of Internet infringers or alleged Internet infringers is all designed with one aim in mind: to reduce the number of cases that would otherwise be running. Our courts have the capacity right now, as has been demonstrated in Australian cases, to make orders across those different areas, but that is after you run a whole case with all the costs attendant upon that. So we see the FTA as actually part of the solution to what might otherwise be an environment with a lot of litigation.[226]

3.195 The Committee notes the assurance given to JSCOT that, although the wording in the AUSFTA closely resembles some of the provisions of the United States legislation, it is not the United States system and provides Australia some flexibility in implementation. JSCOT was informed that:

> … to some extent I think our implementation will be informed by some of the issues that the US have encountered domestically. We do not necessarily have to do it exactly the way that they do it.[227]

3.196 The Committee understands that the United States Free Trade Agreement Implementation Bill 2004 generally implements the prescriptive scheme required under the AUSFTA. An assessment of the approach taken to implementation of the ISP provisions is contained at Appendix 3. The Committee is unable to comment on the draft regulations required under the Bill because they have not been made public. The Committee notes that DFAT has not been forthcoming about what the regulations will contain and is concerned that the regulations will be enacted without proper consultation and debate. This is despite claims by the Commonwealth Government that the interests of the Internet industry would be taken into account in developing legislation to implement the AUSFTA.[228]The Committee also notes with some concern that it will not be possible to adopt the recommendations of Phillips Fox report in the Digital Agenda Review under the terms of the AUSFTA.

Temporary copying

3.197 Temporary copying has been the subject of debate in copyright circles since the emergence of computers, the internet, gaming machines and so forth. Questions have arisen as to the changing status of a copy in a temporary state, that is, at what

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226 *Transcript of Evidence*, 8 June 2004, p.15 (Williams, Australian Film Industry Coalition).

227 Joint Standing Committee on Treaties, *Transcript of Evidence*, 2 April, p. 69 (Harmer, DFAT)

228 Minister for Communications, the Hon Daryl Williams AM QC MP, 'The Year Past and the Year Ahead for the Internet: the Government's perspective', Internet Industry Association (IIA) annual gala dinner, at http://www.dcita.gov.au/Article/0,,0_7-2_4011-4_117825,00.html accessed 14 July 2004

point can the owner of the IP no longer determine what or how it should be used, or demand remuneration for it.[229]

3.198 The Committee notes the recommendations in the Digital Agenda Review report in relation to temporary copying. Recommendation 15 of the report provides that:

> That the sections [of the Digital Agenda Act] be further amended by inserting a new subsection to include a definition of 'temporary reproduction' for the purposes of the section, as meaning any transient, non-persistent reproduction that is incidental to the primary purpose or act for which the work is made available and which has no independent economic significance.[230]

3.199 Recommendation 16 of the Digital Agenda Review report states that:

> That the educational statutory licence provisions be amended to allow an educational institution to make active caches of copyright material for the purpose [of] a course of instruction by the educational institution, in return for a payment of equitable remuneration to the copyright owner.[231]

3.200 An assessment of the provisions of the United States Free Trade Agreement Implementation Bill 2004 is contained at Appendix 3. The Committee is pleased that some of the issues raised during its inquiry in relation to temporary copying are addressed and clarified in the Bill but is particularly concerned about the 'exception to the exception' anomaly which could lead to end users of infringing materials becoming infringers in their own right. This is a significant, perhaps unintentional, extension to the scope of copyright law in Australia. The Committee understands that removal of proposed subsections 43B(2) and 111B(2) would not be prevented by the AUSFTA.

Patents

3.201 Article 17.9 of the IP Chapter deals with Patents.

3.202 The Committee received and heard evidence raising concerns in relation to Article 17.9, specifically in relation to the granting of software patents. Software and related patents are often considered to be potentially damaging to commerce and the development of technology. In particular, the open source software industry expressed grave concerns, arguing that the provisions of the AUSFTA will have the effect of severely limiting the industry's ability to function and develop.

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229 Joint Standing Committee on Treaties, *Report 61: The Australia – United States Free Trade Agreement*, June 2004, p.242

230 Phillips Fox, *Digital Agenda Review: Report and recommendations*, January 2004, p.95 at http://www.ag.gov.au/DigitalAgendaReview/reportrecommendations accessed 7 June 2004

231 Phillips Fox, *Digital Agenda Review: Report and recommendations*, January 2004, p.98 at http://www.ag.gov.au/DigitalAgendaReview/reportrecommendations accessed 7 June 2004

3.203 The DFAT fact sheet issued shortly after the finalisation of negotiations referred to harmonisation and reducing differences in law and practice, including in the area of patents.

3.204 In a newspaper article, Mr Henry Ergas, the former Chair of the Intellectual Property and Competition Committee, predicted a worrying future for patent law in Australia:

> The FTA foreshadows further "harmonisation" in patent law, which most likely means future increases in patent protection.[232]

3.205 Further, Mr Ergas highlighted the problems with United States patent law:

> Ironically, while Australia is being obliged to adopt IP laws that can disproportionately favour producer interests, US policy-makers have taken a more critical stance on their IP laws. Late last year, the US Federal Trade Commission (the US counterpart to the ACCC) released a report on the proper balance between competition and patent laws.
>
> The FTC report, which follows a three-year investigation, highlighted the anti-competitive effects of two emerging problems in the US, namely the granting of excessively broad patents, that is, those that cover an excessively wide range of follow-on activities, and the granting of too many trivial patents.[233]

3.206 He made the following summation:

> … these misapplications of patent law can have an adverse effect on innovation, especially in those areas where innovation tends to be cumulative (in that each generation of innovations builds on the one before).
>
> Such problems could be materially greater in Australia given our status as a large net importer of IP.[234]

3.207 Concerns presented to the Committee generally related to the phrase 'in all fields of technology' in Article 17.9.1. The EFA expressed its apprehension as follows:

> … the FTA would commit Australia to making patents available "in all fields of technology", regardless of whether such monopolies are needed or are in our interests. Australia would only be permitted to exclude from patentability medical treatments and inventions that are against public order or morality.

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232 H Ergas, 'Patent protection an FTA complication', *Australian Financial Review*, 24 February 2004

233 H Ergas, 'Patent protection an FTA complication', *Australian Financial Review*, 24 February 2004

234 H Ergas, 'Patent protection an FTA complication', *Australian Financial Review*, 24 February 2004

> This would mean that Australia would be committed to a system of patents of processes, software and any yet to be conceived technology. There is no evidence to suggest that patents are at all necessary in order to promote innovation in business processes or computer software. The only apparent reason for such patents is to provide profit and power opportunities to those companies able to secure the strongest patents. This is an abuse of the proper purpose of the patent system and service only to raise the cost of dong business and reduce levels of innovation.[235]

3.208 Mr Paul Russell from Linux Australia, the peak body representing the wider open source and the Linux community in Australia, voiced concerns about the United States approach to patents:

> … we have serious doubts about the US tendency to broaden patent ability to cover software and business methods, doubts that are so strong that we believe binding ourselves, as we do in clause 17.9.1, to patents ability for 'any invention in all fields of technology' is a mistake as business methods and software patents are causing real harm in the United States, growing debate both in the United States and elsewhere, and it is in general a mistake to use these laws as a model.[236]

3.209 In its submission, Linux Australia argued that:

> Taking on the American system of software patents will stifle Open Source software initiatives and force Australian users and businesses into using costly and potentially inferior software, without the ability to alter it to suit their needs.[237]

3.210 Linux Australia asserted further that the AUSFTA binds Australia 'to a blanket statement that anything is patentable, despite widespread disagreement on the utility and wisdom of granting software and business method patents'.[238] It also pointed to the restriction under the FTA for 'future Australian lawmakers to support Open Source software innovation and infrastructure against patent claims, should the situation get out of control'.[239]

3.211 Mr Brendan Scott summarised his major concern as follows:

> The main issue I see for the open source industry in Australia is that the chapter 17 provisions are likely to create or increase compliance costs that these small enterprises are going to incur in the development of their software. Assuming that they are not infringing or intending to infringe on anyone else's material, they are still required to put in place processes to ensure compliance. For example, in the case of patents, to date they have

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235 *Submission 282*, p.14 (Electronic Frontiers Australia)

236 *Transcript of Evidence*, 17 May 2004, p.49 (Russell, Linux Australia)

237 *Submission 164*, p.1 (Linux Australia)

238 *Submission 164*, pp.17-18 (Linux Australia)

239 *Submission 164*, p.18 (Linux Australia)

> been able to rely on the structure of the copyright law, which says that if you have not copied something—if there is not a causal connection between something you have started and the ultimate copy—then you are safe. So these organisations could put processes in place which say, 'Develop everything in-house and you are safe.' However, patents do not allow you to put those processes in place, because independent creation is not a defence against a patent infringement.[240]

3.212 However, DFAT assured the Committee that the various concerns raised in relation to software patents will not eventuate under the AUSFTA and the AUSFTA will not change what is patentable in Australia under current law:

> The free trade agreement does not change in any way the scope of what we currently consider to be patentable or what would be patented in Australia. We currently allow patents for software, and there will be no change to that. We are not being required to take a United States approach in relation to that type of patent, so I do not think that that concern is well founded. It will be business as usual for IP Australia in terms of granting patents.[241]

3.213 And:

> In relation to the patentability issue, it is not envisaged that there will be any changes to our laws concerning what can be patented in Australia as a result of the Free Trade Agreement. Nor is it considered that the FTA requires or will lead to any change to Australian practice regarding the grant of patents in relation to business methods or software. Business methods and computer software inventions are already patentable in Australia provided they meet the patentability requirements set out in the Australian Patents Act. Nothing in the Free Trade Agreement requires Australia to adopt a US approach to the grant of such patents.[242]

3.214 The Committee is satisfied that fears about 'harmonisation' of Australian and United States patent law are probably unfounded. It bases this conclusion on DFAT's assurances that the AUSFTA will not change the nature of what is patentable in Australia. Further, the Committee considers that that many of the concerns expressed about the patent provisions might be assuaged by what is *not* articulated in the United States Free Trade Agreement Implementation Bill 2004.

3.215 It is clear from the Bill that the Commonwealth Government already considers that current patent law reflects the 'all fields of technology' element of the AUSFTA. The Committee notes also that the changes to the grounds of opposition to patents actually expand the grounds for opposition which, unlike most of the other

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240 *Transcript of Evidence*, 17 May 2004, p.105 (Scott)

241 *Transcript of Evidence*, 18 May 2004, p.105 (Harmer, DFAT)

242 DFAT, *Answers to Questions on Notice*, 13 July 2004, p.8

changes required under the IP Chapter, reduces the rights of IP rights holders in favour or competitors or consumers.[243]

243 See further J Varghese, Parliamentary Library, *Guide to Copyright and Patent Law Changes in the US Free Trade Agreement Implementation Bill 2004*, Appendix 3.