Submission to Senate Select Committee on the Free Trade Agreement between Australia and the USA (AUSFTA)

Jock Given

About the author

Jock Given is the 2003/04 CH Currey Fellow of the State Library of NSW, where he is researching the life of Australian wireless pioneer Ernest Fisk. His books *America's Pie: trade and culture after 9/11* and *Turning off the Television: broadcasting's uncertain future* were published in 2003 by UNSW Press. He was previously Senior Research Fellow at Swinburne University's Institute for Social Research (2000-2004), Director of the Communications Law Centre (1995-2000) and Policy Advisor at the Australian Film Commission (1989-94).

America's Pie: trade and culture after 9/11 sets out the background to the old tension between free trade and government intervention to support domestic cultural activities. It explores recent and likely future developments in the audiovisual industry and strategies which might be adopted by Australian governments.

Overview

This submission addresses the impact of the draft text of AUSFTA on Australian audiovisual and cultural activities.

AUSFTA introduces new constraints on the ability of all levels of government in Australia to maintain and adopt policy measures to support audiovisual and cultural industries and activities. Although in some areas it is not as constraining as the Closer Economic Relations agreement with New Zealand (CER), it is much more limiting than the bilateral free trade agreements signed in 2003 with Singapore (SAFTA) and Thailand (ATFTA). It does not contain any provisions likely to result in an appreciable increase in Australian audiovisual and cultural exports to the US. The precise impact of AUSFTA will depend on how 'new media' replaces, subsumes or supplements 'old media', and how quickly.

AUSFTA institutionalises much lower aspirations about the level of Australian content in emerging media systems than Australians have come to expect in broadcast television. Some will interpret this simply as an articulation of the policy impotence which will inevitably flow from technological change. Others will recognise it as a partial, but historic, concession of Australian policy capacity and a broad acceptance of the long-standing US agenda for the information economy - long and tough protections for intellectual property rights, but increasingly liberal global markets for trading them.

Overall, this author:

- questions the net benefits which will flow to Australia as a result of AUSFTA;
- believes that Australia should not make concessions in a bilateral agreement with the US which it is unlikely to be required to make multilaterally; and
- believes that, at least, the reservations drafted by Australia should be amended in several ways to provide broader policy flexibility for the future.

Context: why Australia did it

The Australian government sees both direct and indirect advantages in a free trade agreement with the US. The government commissioned economic modeling in 2001 which showed Australian GDP would eventually increase 0.33 per cent and US GDP 0.02 per cent if all trade barriers between the two countries were removed. (Centre for International Economics) The deal actually done leaves in place some barriers whose removal was very important to the overall gains for Australia, or removes them only over a long period. The government concedes that any direct economic gains from the agreement are not as great as they had hoped. (Deady) Others have suggested that they may be negative. This begs the question of whether the acknowledged costs of the agreement for Australia in areas like audiovisual and intellectual property are justified by the gains made elsewhere. Any complete assessment of the impact of the draft agreement must await the revised modeling being undertaken by the Centre for International Economics. At best, the economy-wide gains for Australia will be small and for the US miniscule, although the gains for particular sectors may be substantial.

The government also placed heavy emphasis on the indirect advantages of a deeper relationship with the US which might not be captured in economic models. (Australian APEC Study Centre) With a population of around 300 million, an economy making up a third of the global economy, world leadership of the Information Economy, and its status as Australia's largest trading and investment partner, the US was *the* economy with which Australia needed to build a closer and deeper relationship. After the announcement of the deal, Paul Kelly said the real argument for its approval was that it would 'make Australia a more globalised economy and nation'. Supporters of this view argue that investment is at least as important for long term export performance as cross border trade in goods and services, and investment comes from strong, close relationships. There is, however, already extensive foreign involvement in Australian media, even in sectors where such involvement is formally restricted - newspapers (News Limited), free-to-air TV (CanWest) and pay TV (Austar, Singtel/Optus and News Limited with a 25% stake and management control of Foxtel).

Another major reason some are supporting a less-than-perfect agreement is the lack of progress in multilateral trade liberalisation through the World Trade Organisation. A country like Australia, whose governments since the mid 1980s have seen its economic interests best served by open global trade, has to get its liberalisation wherever it can. For the audiovisual sector, however, AUSFTA makes concessions on long-standing Australian government policy which Australia has not yet been required to make multilaterally.

While Australian and US trade officials were negotiating their bilateral deal, the member states of UNESCO (United Nations Educational, Scientific and Cultural Organisation), including Australia and the US, were beginning the process of drafting a new international convention about cultural diversity. This convention is motivated by concerns about the marginalisation of cultural issues in a regime of global governance dominated by the trade liberalisation agenda of the WTO. Australia has not been enthusiastic about this UNESCO initiative. It has preferred to safeguard any capacity for cultural policy-making flexibility through targeted reservations in trade agreements – broad in the case of SAFTA and ATFTA, narrow in the case of AUSFTA. The draft AUSFTA embodies more extensive concessions about future cultural policies than the multilateral UNESCO process seems likely to settle on.

What AUSFTA means for audiovisual and cultural activities

There are four broad areas of impact for audiovisual and cultural activities: cross border trade in services, investment, electronic commerce and intellectual property.

Cross border trade in services

The agreement adopts the 'top-down' or 'negative list' structure of CER and SAFTA. This means the central obligations under the agreement generally must be accepted in all areas of the economy except those where the US and Australian governments separately choose to list 'non-conforming measures'. Those obligations are to treat US companies, goods and services no less favourably than those from other countries ('non-discrimination' or 'Most Favoured Nation') and no less favourably than those from Australia ('national treatment'), and to offer 'Market Access'. It is a crucial structural distinction from the WTO General Agreement on Trade in Services. Under that agreement, countries are only required to offer most-favoured nation, national treatment and market access in the areas where they choose to list 'commitments' – a 'positive list' approach. Australia and most other countries have made no commitments in broadcasting and audiovisual services in the WTO. Under AUSFTA, all non-conforming government policy measures not listed in the Annexes must be removed.

Quotas

Australia has reservations in both Annex I and II which affect its ability to maintain and adopt quotas. It can retain its existing commercial television transmission quotas. These require 80% of advertising and 55% of programs to be Australian, and minimum amounts of adult and children's drama and documentary ('subquotas'). (Annex I-14) Similar quotas can be imposed on at least one, and a maximum of two, further free-to-air 'multichannel' services provided by a commercial operator. If current policy changed to allow commercial operators to offer multichannel services using their digital capacity, the practical impact, given existing technology, is that 2-3 of the 4-5 services each operator could offer would have to be quota-free. (Annex II-6(a)) Where a quota channel is rebroadcast over another transmission platform or moved to another platform, the same quota can still be applied. (Annex II-6(b) and (c)) On current wording, it does not appear possible for Australia to increase or introduce new forms of subquota.

The agreement also allows domestic content quotas for commercial radio of up to 25%. Currently, local music targets up to this level are set in the commercial radio industry's codes of practice though not in the more immediately-enforceable Australian Broadcasting Authority (ABA) standards which apply to television programs. (Annex II-7(e))

Subscription television broadcasting (pay TV) services are currently required to spend 10% of the program budgets of drama and general entertainment channels on new Australian drama. The agreement would allow this requirement to be increased to 20% (a change already formally rejected by government), and a 10% requirement to be imposed on some new channel genres – arts, children's, documentary, educational. Because of the high relative cost of Australian programs, however, the 10% requirement is currently only delivering a much smaller proportion of the transmission time of affected channels. (Annex II-6 to II-8)

Australia's right to introduce local content requirements (though not all other policy measures) on 'new media' services is tightly circumscribed. Measures can be imposed on 'interactive audio and/or video services', but only so as to ensure Australian content or genres are 'not unreasonably denied' to Australian consumers, and only on companies that carry on business in Australia. (Annex II-6 to II-8)

The four elements of the limits to quota-style measures on 'new media' are worth exploring. First, the definition of the services to which measures may be applied, 'interactive video and/or audio services', appears to cover most forms of internet, mobile and video-on-demand services but not digitally-delivered 'e-cinema'. Even if the delivery of cinema services to customers is still done in the future by a local service provider, there may be no interactivity involved. 'Datacasting', as currently defined under the Broadcasting Services Act, would be covered to the extent that it was interactive, but not to the extent that it wasn't. (see Section 6 and Schedule 6) This is potentially significant given the broadcast-style content which is able to be transmitted under a datacasting licence. (Williams, 17 March 2004)

Second, 'measures to ensure that…Australian audiovisual content or genres…is *not unreasonably denied* to Australian audiences' – may be a very tough test to satisfy. One might argue, for example, that Australian material is already 'not unreasonably denied' to television audiences in the US, despite its very low visibility. In the future, Australian material might be technically available to Australian audiences online via servers, but the search engines and electronic program guides generally used to make viewing/using choices might not readily lead the user to it.

Third, the combined effect of the Chapter 10 prohibition on either party requiring the establishment of a Australian commercial presence to undertake any particular activity (Article 10.5) and the Annex II commitment only to apply any new measures to companies carrying on business in Australia, means that services directly transmitted from outside Australia without any local presence cannot have even the measures of the kind referred to in Annex II imposed.

Fourth, there are procedural pre-conditions to any expansion of the pay TV quotas or introduction of measures affecting interactive services. Although the language of

these sounds very tough, they are similar to the ABA's existing consultative requirements.

Overall, the market share targets – 80% of advertising, 55% of TV programs, 25% of radio programs, 20% of pay TV drama expenditure, 10% of pay TV arts, children's, documentary and educational program expenditure, and 'Australian content and genres 'not unreasonably denied' on interactive media – show the declining aspirations about the level of Australian content in emerging media systems.

The constraints on future policy-making flexibility which Australia has accepted in this area are greater than those it has accepted in its free trade agreements with Singapore and Thailand, but less than those it has accepted under CER with New Zealand. CER generally requires Australia to treat New Zealand services, including TV programs, no less favourably than Australian ones. Since 1999, New Zealand programs have been able to qualify for Australian content quotas. When reviewing the quotas in 2001 and 2002, the Australian Broadcasting Authority concluded that the inclusion of New Zealand in the standard 'did not appear to have had any appreciable impact on the broadcast of Australian programs on commercial television' (Australian Broadcasting Authority: 49). New Zealand, however, is a much smaller audiovisual producer than the US, and the Australian networks have all resisted being the first to tempt the ire of the local production industry by commissioning a New Zealand-based show for domestic quota purposes.

Assessment and recommendation

AUSFTA provides a fairly solid safeguard about quotas for services already in place like commercial TV and radio, but not much safeguard at all for emerging services including pay TV. The precise impact will depend on how 'new media' replaces, subsumes or supplements 'old media' and how quickly.

Recommendation: That Australia's Annex II reservations be changed to allow:

- complete flexibility in modifying and introducing new sub-quotas within existing commercial TV quotas; and
- measures affecting subscription TV, interactive video and/or audio and other audiovisual services to ensure that Australian content or genres *is reasonably accessible* [instead of *not unreasonably denied*] to Australian audiences.

Subsidies, grants and tax concessions

Unlike quotas, subsidies and grants affecting services, investment and electronic commerce are able to be maintained without identifying them in the Annexes. (Articles 10.1.4(d), 11.13.5(b) and 16.4.3(c)) Although certain kinds of taxation concessions might otherwise be subject to the obligations under the agreement, Australia's Annex II reservation allows it to maintain or adopt 'taxation concessions for investment in Australian cultural activity where eligibility for the concession is subject to local content or production requirements'. This includes existing culturally-motivated tax concessions, such as Division 10BA and 10B of the Income Tax Assessment Act which support investment in Australian film and television productions, and the refundable tax offset established to encourage big budget feature

film production and post-production in Australia. The Annex II reservation appears to be sufficient to allow tax concessions to be extended to other forms of audiovisual production. This might, for example, include electronic games.

A problem, however, is that much of the direct federal and state government support for individual film and TV projects is provided not by way of subsidies and grants, but as investments in intellectual property assets. Both subsidies and grants *and* investments are subject to *performance requirements* which limit the kinds of local content obligations that can attach to them. This is discussed further below under 'Investment'.

Public services and enterprises

Another common government policy measure which is excluded from the coverage of the cross border trade in services and electronic commerce chapters is 'services supplied in the exercise of government authority within the territory of each respective party'. (Article 10.1.4(e) and 16.4.3(d)) These are defined as 'any service which is supplied neither on a commercial basis, nor in competition with one or more service suppliers'. The effect is that the Parties are not obliged to accord the elements of the services chapter (national treatment, most favoured nation, market access) and the electronic commerce chapter (most favoured nation/national treatment, see below) in relation to services which fit this definition.

The Australian government explains the implication of this as 'The AUSFTA will not affect the ability of either Party to provide public services, including in relation to cultural activities, such as public broadcasters (ABC and SBS), public libraries or archives'. (DFAT Audiovisual Outcomes) However, the definition of 'services supplied in the exercise of government authority' might not include all the services supplied by some organisations which are generally thought of as providing public services. It would appear to include, for example, the services provided by the National Film and Sound Archive, the Australian Centre for the Moving Image and the Australian Film Institute. It is more difficult to see it covering all aspects of the ABC's services (such as music recording, book publishing, ABC shops), very difficult to see it covering all the SBS' services (such as subtitling services and especially the sale of commercial television airtime) and impossible to see it covering all aspects of the Commonwealth-owned production, distribution and facilities company, Film Australia Pty Ltd.

The definitional problem exists already in the WTO/GATS, from which the definition is taken, but it has limited impact there because of the 'positive list' structure of the agreement. Few countries have made commitments about broadcasting so as to limit their ability to maintain and adapt the roles of public service broadcasters and other public enterprises. Under AUSFTA, however, the problem has immediate impact because measures affecting services which don't comply with the obligations of national treatment, MFN and market access can only be maintained if they are expressly identified in the Annexes as 'non-conforming'. Australia has not taken out any reservations in this area.

Assessment and recommendation

The practical implications of this interpretation might not be great. The services that matter most to policy, free-to-air TV and radio, can be argued to fit the definition because the special charters of the ABC and the SBS mean their free-to-air offerings are neither commercial nor competing with commercial services. After AUSFTA, the public broadcasters might not be free to impose local purchasing preferences or local content targets in other areas like music recording, book publishing, ABC shops, subtitling services and the sale of commercial television airtime, but they may not wish to. It is, however, an argument that governments and their public enterprises might prefer not to have with American trade negotiators acting on behalf of potentially aggrieved US service providers. It is a thorny area open to unintended consequences, if 'public agencies' find themselves unable to retain operational policies which previously seemed unremarkable and irrelevant to trade negotiations.

Recommendation: This issue should be clarified by adding a new Annex II reservation preserving Australia's capacity to maintain and adopt measures affecting:

> The activities of Australian public cultural ['enterprises'] or ['undertakings'].
>
> The definition of public cultural enterprises or undertakings might be adapted from the September 2002 model International Agreement on Cultural Diversity developed by the Canadian Cultural Industries Sectoral Advisory Group on International Trade (SAGIT): 'persons organisations and firms that produce, publish, distribute, exhibit or provide cultural content'. See http://www.dfait-maeci.gc.ca/tna-nac/diversity_culture-en.asp

Spectrum allocation

Australia's Annex II reservation appears intended to preserve Australia's current spectrum allocation policy. It may not completely do so.

First, Annex II-7(g) (Aust) allows Australia to impose spectrum management measures inconsistent with the Article on Market Access. This allows rules to restrict the total number of licences available (for example, the existing restriction on more than 3 commercial TV services in a market) or to require 'specific types of legal entity or joint venture through which a service supplier may supply a service' (for example, non-profit corporations, which are the only kinds of entities which can hold community broadcasting licences). The US has also preserved its ability to adopt certain measures about spectrum allocation. (Annex II-3) Australia's Annex II-7(g) reservation however does not preserve the ability to impose measures inconsistent with obligations other than Market Access, such as National Treatment, Most-Favoured Nation, and Local Presence, although the Annex I-15 reservation preserves the existing media-specific foreign ownership, control and directorship restrictions.

A small 'gap' may exist between Australia's two reservations about spectrum allocation and foreign ownership and control. The outcome appears to require Australia to allow US organisations which choose to establish an Australian company representing a 'community interest' to be able to demand the same access as other Australian community organisations to spectrum for community broadcasting.

Second, Chapter 12 'Telecommunications' requires Parties 'to rely generally on market-based approaches in assigning spectrum for terrestrial non-government telecommunications services'. [12.20.4] The chapter generally does not apply to measures relating to broadcasting. [12.1.2] Current non-government, non-broadcast uses of spectrum include not only private, commercial uses (eg. mobile telephony), for which high value spectrum bands are already generally allocated by market-based means, but also community and volunteer uses (eg. rural fire fighting and State emergency services, St John's Ambulance, surf life saving clubs, Royal Flying Doctor Service), for which spectrum is made available free or at concessional rates.

Assessment and recommendation

The 'gap' between the two reservations about spectrum allocation and foreign ownership and control may seem far-fetched, but it might not be beyond the imagination of some American NGO's, such as religious organisations. The wording of the Chapter 12 provision does not appear to be strong enough to require any change to current law or practice by the Australian Communications Authority. Both issues, however, may benefit from clearer language to ensure both the preservation of existing measures and policy flexibility in these areas in the future.

Other areas

Australia's capacity to retain and adopt several other common audiovisual policy instruments is preserved in various ways: *international co-production agreements* providing preferential treatment for projects co-produced between Australia and certain other countries (Annex II-9), support for *indigenous people and enterprises* (Annex II-2), and telecommunications *universal service* arrangements (Article 12.18). The agreement as a whole does not impose any obligations on the parties regarding their *immigration* measures. This means the existing arrangements for temporary migration into Australia for work on film, TV and other cultural work are not affected. (Article 10.1.5, Exchange of Letters on Immigration Measures)

Investment

AUSFTA goes well beyond existing commitments in CER, SAFTA, ATFTA and the WTO in this area. It requires substantial liberalisation of Australia's existing foreign investment regime across the whole economy, broadly removing the need for Foreign Investment Review Board notification of proposed investments in Australian companies with assets of up to $800 million. In the media and telecommunications sectors, however, Australian reservations preserve the existing broadcast, newspaper and Telstra limits. They also preserve the requirement for notification and 'national interest' scrutiny under the Foreign Acquisitions and Takeovers Act of all direct media investments irrespective of size, portfolio media investments of 5% or more, and all investments in telecommunications businesses with total assets of more than $A50 million. There is no capacity to introduce new limits and a 'ratchet' provision on existing measures means that any reduction or removal of these limits would be irreversible. (Chapter 11, Annex I-3 to I-5, I-13, 1-15, I-16 and see Richardson) The

US has also preserved its ability to retain its restrictions on electronic media ownership. (Annex I-16 and II-4)

Although the agreement does not require any change to the current majority Commonwealth ownership of Telstra, the Letter from Australia on the Privatisation of Telstra confirms the present government's 'long-standing commitment' to full privatisation. It says responsibility for the corporation's business decisions rest with its Board and the government meaning all future governments) 'will continue to ensure that its interest in Telstra does not affect…regulatory independence'.

AUSFTA also sets important new restrictions called 'performance requirements' on government measures imposing local content, purchasing or similar obligations on individual foreign investors and investments. This could include Melbourne's Docklands, Sydney's Fox and Warner Roadshow's Gold Coast studio complexes, depending on the precise legal form of any government support. Broadly, existing State government measures can be retained, though not made more onerous. As existing contracts or perhaps legislative provisions expire, an important question will be whether the renewal of existing arrangements represents a new or grandfathered measure. For new measures, requirements such as domestic content, export, local purchasing or technology transfer requirements cannot generally be imposed on investors. However, the 'receipt of an advantage' in connection with an investment can be made conditional on compliance with a requirement to 'locate production, supply a service, train or employ workers, construct or expand particular facilities, or carry out research and development'. This appears to require any 'local' obligations to be cast in more general and less specific, measurable terms than may currently be the case. (Article 11.9)

As noted earlier, a critical implication of the investment chapter comes from the inclusion of investments in intellectual property in the definition of 'investments'. (Article 11.17.4(f)) Much of the direct financial support provided to film, TV and multimedia projects by film agencies is directed not as grants and subsidies, but as investments in intellectual property. This occurs with development and production deals, where the agencies acquire rights and earn returns, and, for SBS Independent, which acquires broadcast rights.

Investments of this kind, as well as grants and subsidies, are subject to the restrictions on 'performance requirements'. Although, as noted above, certain kinds of performance requirements can be imposed to condition the 'receipt or continued receipt of an advantage' in connection with an investment, (Article 11.9.3) other kinds of requirements cannot. In particular, a requirement 'to achieve a given level or percentage of domestic content' can't be imposed (Article 11.9.2(a)). This would appear to preclude the kind of local content test covering subject matter, place of production and post-production, source of finance, copyright ownership and personnel, which is a precondition for Film Finance Corporation and Australian Film Commission investment.

Assessment and recommendation

The implication is that, without additional wording in Australia's Annex II reservations, the most common form of film and TV 'subsidy' used in Australia to

support local audiovisual production may in practice be constrained, not unconstrained as argued by the government.

Recommendation: That a new Annex II reservation be added, drawing on the wording already in place to preserve Australia's capacity to retain and adopt tax concessions for cultural purposes (Annex II-7(h)):

> Grants, subsidies and investments in Australian cultural activity where eligibility for the concession is subject to local content or production requirements.

Electronic commerce

Chapter 16 of AUSFTA is an expansive provision based on the models in the US free trade agreements with Singapore and Chile. It is designed to ensure that local content obligations and customs duties cannot be imposed on physical (eg. CD's, DVD's, games) or electronically delivered (eg. broadcast, mobile telephone, online) digital products.

Broadly, it prevents local content requirements being imposed on suppliers of 'digital products' other than those identified under the Annex I and II audiovisual and broadcasting services and other reservations. (Article 16.4.4) This means, in particular, that the ability Australia has retained to impose quota-like measures on 'interactive audio and/or video services', discussed above, is not compromised by wider obligations which would otherwise have been imposed under the Electronic Commerce chapter. 'Digital products' extends well beyond media, communications and cultural products, to include 'the digitised form, or encoding of, computer programs, text, video, images, sound recordings and other products, regardless of whether they are fixed on a carrier medium [a physical product] or transmitted electronically'. (Article 16.8)

The relationship of this chapter to other parts of the agreement is complex and confusing. Its inclusion responds to the strong US desire for wording that articulates its ambition for markets in new media and other products to evolve without the government interventions which have been so common in the markets for film since the 1920s and television since the 1950s. The confusion comes from the creation of a new category of 'digital products', which can be either goods or services, and thus blurs the long-established distinction between these categories in trade agreements. However, Chapter 16 goes on to exclude 'the supply of a service employing computer processing' from its coverage. According to the Australian government, the means 'services delivered electronically remain just that – services. The purpose is to emphasise that if a service – such as an architectural consultancy or a university degree by coursework – is delivered electronically (such as by email, or online), it should not be treated any differently than if it was delivered by post or in person'. (DFAT Guide to AUSFTA) Even more confusingly, the chapter states that the definition of digital products is 'without prejudice to the on-going discussions at the WTO on whether trade in digital products transmitted electronically is trade in goods or trade in services'. (Note 16-5)

Assessment and recommendation

Given similar exclusions from the coverage of this chapter and the chapters on cross border trade in services and investment, the Electronic Commerce chapter may not add greatly to the obligations in those chapters for media products. However, because 'digital products' covers a wider range of material than the free-to-air TV, pay TV and 'interactive audio and/or video services' included in Australia's Annex II reservations, it ensures that audiovisual products not falling within the scope of those reservations cannot be the subject of measures that discriminate against US and other overseas producers and suppliers. This would prevent, for example, 'shelf-space' quotas being imposed on local video/DVD stores.

Australia has accepted the idea of 'digital products' but ensured that it does not result in a greater degree of liberalisation in broadcasting and audiovisual services and investment than it has committed itself to under those parts of the agreement. For now, the main impact of the electronic commerce chapter seems to be to ensure the very open Australian market for 'digital goods' stays that way. Longer term, the chapter establishes the principle that any audiovisual goods and services that haven't been thought of at the time of drafting AUSFTA should trade freely.

The recommendation proposed under 'Quotas' above is also intended to address the concerns identified here.

Intellectual property

AUSFTA requires Australia to adopt major elements of US copyright law, including longer copyright terms, stronger enforcement provisions and new obligations for internet service providers dealing with allegedly infringing material on their systems and networks. (Chapter 17)

Copyright terms must be extended by 20 years to life-of-the-author-plus-70-years (for works such as books, photographs, artworks, sheet music) and 70 years after publication (for films/TV programs and sound recordings. (Article 17.4.4) This need not be done for material in which copyright has already expired. (Article 17.4.5)

Some changes will be required to Australian law to tighten protections for 'technological measures' and encrypted satellite program signals, including the introduction of criminal and civil sanctions for certain activities relating to devices or systems for decoding satellite signals without permission. (Articles 17.4.7, 17.7)

The agreement sets out certain conditions under which ISP's can qualify for immunity when dealing with allegedly infringing material carried over their networks or systems. (Article 17.11.29) The Exchange of Letters on ISP Liability provides model notices which may be served on an ISP by a copyright owner or their agent, and, in response to such a notice, by a subscriber.

Assessment

These provisions will improve the ability of Australian and non-Australian copyright holders to enforce their existing rights. They will also increase the period during which the producers of copyright material will be able to control commercial use of their work. The practical implication is that Australia, as a net importer of audiovisual material with a growing trade deficit reflecting the growth of pay TV and DVD in recent years (Australian Film Commission), will have to continue to pay for some old material which would otherwise have entered the public domain and become freely available. For creators of new works which make use of archival material, such as documentary and web producers, longer copyright terms represent a formidable practical and financial obstacle.

This author opposes the extension of copyright terms but supports the intellectual property provisions of AUSFTA which help rights-holders to enforce existing rights.

Changes to domestic law

It is understood that no legislative changes are proposed to implement the new limits on the ABA's powers implicit in Australia's reservations about audiovisual quotas. This seems surprising. When the ABA's obligation to perform its functions consistent with Australia's *international* obligations (*Broadcasting Services Act*, original version of s 160(d)) was narrowed in 1999 to a requirement for it to perform its functions consistent only with the CER Trade in Services Protocol (*Broadcasting Services Amendment Act (No. 3) 1999*), the Minister's second reading speech explained the purpose very clearly. It was to ensure the 'special position' of New Zealand was retained, 'while making it clear that there are no flow-ons…to other treaties'. (McGauran) An ABA which reaches a future decision in part by having regard to AUSFTA should be treated, under administrative law, as having taken into account an irrelevant consideration. If the government wants to constrain its regulator to exercising its powers consistent with the limits contemplated by AUSFTA, it needs to get the Parliament to do it by amending the legislation.

Jock Given
21 April 2004
d.given@pgrad.unimelb.edu.au

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