C·A·U·L
COUNCIL OF
AUSTRALIAN UNIVERSITY LIBRARIANS

Submission
To the

Senate Select Committee on the Free Trade Agreement between Australia and the United States of America

April 2004

Secretary
Senate Select Committee on the Free Trade Agreement
Between Australia and the United States of America
Suite S1.30.1
The Senate
Parliament House
CANBERRA ACT 2600
AUSTRALIA

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

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

CAUL members operate in an educational environment which produces a significant amount of copyright material, while their core business is the provision of access to information. Consequently, copyright is integral to the work of university libraries and CAUL has an abiding interest in the development of balanced and effective copyright legislation.

As part of the negotiating process regarding the Free Trade Agreement, CAUL contacted the Department of Foreign Affairs and Trade (DFAT) to discuss issues of concern regarding intellectual property. In late 2003 the President of CAUL, Madeleine McPherson, the Deputy President Evelyn Woodberry, together with Paul Stubing from the AVCC and Miranda Lee from the Australian Libraries Copyright Committee, met with Mr Deady, and representatives from DFAT. The discussions centred on the impact that the proposed extension of the term of copyright and the 'harmonisation' of the Australian Act with the US Act would have on libraries and higher education. The meeting was followed up with the material which supported the problems encountered in the US as a consequence of the implementation of the DMCA.

While the opportunity to present the views of higher education and libraries was appreciated, the impact of the decision to discount these views as part of the process will have a negative impact on the higher education sector. The submission below highlights the impact the Free Trade Agreement will have on libraries in higher education.

This submission, expresses the serious concern of those responsible for Australia's research and academic information services at the copyright changes identified in **Chapter 17 of the Free Trade Agreement with the USA**, and offers suggestions for ways to address the issues raised. The concern of members is eloquently expressed in the article provided by Alex Byrne, University Librarian at UTS, in his article which is appended in full to this submission. (1)

CAUL is cognisant of the fact that Australia has developed a Copyright Act which, while meeting Australia's obligations to the WIPO treaties, also balances the needs of the copyright creators and the users. The Act has received worldwide recognition as a model of best practice.

US copyright legislation is significantly different to that in Australia. These differences are due to a very different history and the fact that in the US copyright is driven by sustained lobbying from large corporations and powerful industry associations, especially the entertainment and media industries. The differences which CAUL wishes to highlight are:

- The 'balance' between copyright owners and users, which in the US is tipped in favour of owners,
- The lack of moral rights legislation in the US.
- The cost to higher education
- The differences between the US 'fair use 'and Australian 'fair dealing ' provisions.

Balance between owners and users

The 'balance' of the Digital Millennium Copyright Act (DMCA) is tipped firmly in favour of copyright owners, as demonstrated by the extension yet again of the term of copyright, and continues to attract criticism as it is considered to be cumbersome, punitive and highly supportive of big corporations in opposition to individual creators, researchers, students and the general public.

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

Moral rights

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

Cost to higher education

The term of copyright in Australian law, death of the author plus 50 years, fulfils Australia's obligations to WIPO and protects the interests of Australian creators and their dependents. The extension of a further 20 years subverts the intention of copyright legislation to ensure that, after a reasonable period of time during which the copyright owner obtains a return for their efforts, the material moves into the public domain for the benefit of everyone. The extension was opposed in the USA by representatives of user groups as contradictory to the interests of the community – its adoption in Australia will compound the problem.

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

Specifically, the impact on higher education in Australia will be to raise the cost of compliance on an annual basis. In addition, researchers, who – in Newton's words - 'stand on the shoulders of giants', will be required to pay for information which would under current Australian law have come into the public domain.

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

'Fair use' and 'Fair dealing'

A significant difference for education involves the US 'fair use' provisions which are much broader than the Australian 'fair dealing' provisions.

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

> ... US copyright law qualifies the rights of copyright – holders with 'fair use' provisions that are much more substantial than the Australian law's 'fair dealing' clauses. There appears to be nothing in the FTA that requires strengthening of consumer protection, and hence Australians would suffer the worst excesses of the US legislation without even the limited countermeasures that US consumers have available to them. (2)

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

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

The extension of 'fair dealing' is supported by the recommendation in the CLRC report '*Simplification of the Copyright Act 1968: Part 1 Exceptions to the Exclusive Rights of Copyright Owners*' which includes an extensive section on fair dealing on pages 31-92. As part of its deliberations the Committee includes: (3)

> Recommendation 6.35
> The Committee recommends the expansion of fair dealing to an open-ended model that specifically refers to the current exclusive set of purposes – such as research or

study (ss.40 and 103C), criticism or review (ss 41 and 103A), reporting news (ss. 42 and 103B) and professional advice (s. 43(2)) – but is not confined to these purposes.

Copyright Law Review Committee (CLRC) Reports

A considerable body of work pertaining to recommendations on changes to the Australian copyright legislation is contained in the CLRC reports which have been produced as a consequence of broad consultation. CAUL and other interested parties have contributed substantially to this process. It would be beneficial to consult these reports when drafting legislative changes to ensure that, where possible, the changes are consistent with the considered recommendations from the Committee.

Caching

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

ISP Liability

CAUL is also concerned about the increased criminalisation of issues relating to ISPs and telecommunications and supports the Australian Digital Alliance (ADA) submission relating to these issues. This measure is unnecessary as existing legislative provisions are stringent and its effect is likely to constrain the full exploitation of new media by Australians.

References

1. Byrne, Alex "Peanuts for culture: The Free Trade Agreement: Power, Trade and Copyright" U:, March 2004, pp6 -7
2. Clarke, Roger The Economic and Cultural Impacts of the Free Trade Agreement Provisions relating to Copyright and Patent Law. http://www.anu.edu.au/people/Roger.Clarke/II/FTA17.html (13 April 2004)
3. CLRC "Simplification of the Copyright Act 1968: Part 1 Exceptions to the Exclusive Rights of Copyright Owners" Canberra, 1998. p63.

Council of Australian University Librarians
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Peanuts for Culture: the Free Trade Agreement: Power, Trade and Copyright

Alex Byrne
University Librarian, UTS, President-elect, International Federation of Library Associations and Institutions (IFLA)

The Australia-United States Free Trade Agreement delivers greater access to the US economy for our manufacturers, but at what cost to intellectual property and our culture, asks Alex Byrne.

Heralded as a landmark for Australia's trade, the Australia-United States Free Trade Agreement delivers greater access to the US economy for Australian manufactures, primary produce and services, and vice versa. We should be able to sell more Holden utes and peanuts even if they won't buy our sugar and are hesitant about our beef. US interests will be able to invest more easily in Australia and compete in many sectors, but the big costs for Australia lie in culture and intellectual property protection.

The Minister, Mark Vaile, claims that "Our right to ensure local content in Australian broadcasting and audiovisual services, including in new media formats, is retained". But the summary hedges "The Government will also be able to take measures to ensure that Australian content on new media platforms is not unreasonably denied to Australian consumers, should it determine that Australian material is not readily available to them." Even in this half promise, there is nothing to protect the print media, book publishing or to ensure that investment in new media to tell Australian stories, hear Australian voices and smell Australian scents will be viable. The danger to our cultural industries is highlighted by the US claim that "the FTA contains important and unprecedented provisions to improve market access for US films and television programs over a variety of media including cable, satellite, and the Internet".

"That big boy doesn't recognise the moral rights of creators as do European and Australian IP laws."

The intellectual property provision "Harmonises our intellectual property laws more closely with the largest intellectual property market in the world, which is recognised as a global leader in innovation and creative products". It promises to enhance "the ability of Australian innovators to attract investment from the US". This will be achieved by extending the term of copyright to life plus 70 years and other provisions. Although no details have been released yet confirming the extent and categories of works affected, the Australian Digital Alliance has suggested that the provisions will mirror that of the US-Singapore FTA to cover "a work (including a photographic work), performance or phonogram" but it is not clear yet how they will affect subject matter other than "works" ie films, broadcasts etc. In addition the Agreement includes criminalisation of anti-circumvention laws and tighter controls for "allegedly infringing copyright material on the Internet".

Why is this a bad thing? Won't longer copyright terms benefit creators? Isn't it better to have stronger controls over the Internet? Shouldn't we march in step with world intellectual property law?

To take the last question first: yes, it is desirable to be consistent with world intellectual property laws because it makes it much easier to access and use protected materials and to be confident that our creations will be protected. But US intellectual property laws are not the global standard. Even the summary quoted above doesn't claim that they are, only that it would be beneficial to be consistent "with the largest intellectual property market ... a global leader in innovation and creative products". In other words, to get cosy with the big bloke on the block. But that big boy doesn't recognise the moral rights of creators as do European and Australian IP laws. US IP laws are driven by the big

industry organisations, notably the Motion Picture Association of America. It is they who have repeatedly had the term of copyright extended, just before Mickey Mouse came out of copyright. It is they and their partners who want ever tighter provisions to control reuse and to restrict the public domain.

Life plus 70 years might benefit the grandchildren or great-grandchildren of a creator, if they have hung on to the rights, but it will certainly benefit big corporations which invest in intellectual property. It will safeguard the assets of those which hold collections of film titles, photographs, music, plays, scholarly journals, databases, ... They will continue to be able to extract a rent from users of those materials and to maximise the value of their assets when they wish to sell them to another proprietor.

But this will not benefit creators. They will have to pay (or get libraries to pay on their behalf) when they want to use intellectual property. Even normal artistic appropriation, which artists such as Mozart and Shakespeare have used since the birth of creation, becomes subject to licence and fee. This has become the norm in music and is becoming prevalent in the use of images. Access to scholarly information, which is to a degree facilitated in Australia by statutory licences for those working and studying in universities and schools, is vulnerable. Pay per use is the goal of the intellectual property entrepreneurs with fair dealing and the public domain squeezed out. The emphasis is on rent to the copyright owners not recognition of the rights of the creators, market access for peanuts and cable television at the expense of cultural heritage and free access to information.