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Australian Libraries' Copyright Committee

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Submission to the Select Committee

Australia- United States Free Trade Agreement

April 2003

Executive Summary

This submission is made on behalf of the Australian Libraries' Copyright Committee (ALCC)

The ALCC does not support the ratification of the FTA on the basis that the provisions of Chapter 17 will result in substantial damage to our creative and innovative potential by restricting access to and increasing the costs of access to knowledge.

It is ALCC's submission that overall, the obligations created by the FTA will require change to Australia's copyright regime that will fundamentally alter the current balance in Australian law with detrimental impacts on our cultural, educational and information environments.

The adoption of measures drawn from U.S. DMCA as required by the FTA, is incongruent with our legislative history and framework and significantly raises the level of copyright protection in Australian copyright law without parallel measures to ensure reasonable access to works is maintained. As a result Australian copyright law will yield a level of copyright protection that will be even higher than that of the U.S.

The extension of copyright term will place a significant burden on libraries which will ultimately be borne by users and the Australian public.

The ALCC urges the Select Committee to **reject** the Government's view that the copyright provisions in Chapter 17 of the Free Trade Agreement (FTA) will produce rewards to Australia's trade and cultural environment.

The ALCC submits:

a) that the Government does not proceed with ratification of the FTA.
b) in the case that the Government decides to ratify the FTA, that implementation of Ch 17 provision be made on the basis of an interpretation of the FTA which minimises disturbance to our current copyright regime.
c) that any imminent implementing legislation make only changes to the current regime that are deemed necessary to satisfy FTA obligations at a minimum level.
d) that the introduction of flexible and broad "fair use" type exceptions be explored as an addition to existing exceptions and limitations to maintain balance within Australia's copyright regime.
e) that any implementation of DMCA type provisions be consistent with Australian cultural, legal and regulatory norms and values.
f) that any implementing legislation avoid use of terms or turn of phrases that are directly borrowed from the FTA or DMCA text.
g) That any economic models be carefully scrutinised and that consideration of the costs and benefits of contemplated changes give equal weight to factors not immediately quantifiable in strict economic terms.
h) That in keeping with the statutory nature of copyright, a narrow reading of the FTA provisions should be taken with the background assumption that unless specifically noted, users' rights of access are entrenched and given.

i) That extension of copyright term places unjustified burdens on libraries, cultural and educational institutions, and will result in a deleterious transfer of funds to the U.S giving no benefits in return.
j) That the adoption of a general ban on the use of circumvention devices and the expansive definition of "effective technological measure" potentially frustrates legitimate access to material.
k) That the replacement of current "permitted purposes" with exclusive, narrow exceptions effectively overhauls the balanced approach to accessing works in the digital environment.
l) That the anti-circumvention provisions of the FTA unjustifiably and dangerously shifts power of copyright owners from control of copying to control of access to works
m) That the provisions of article 17.4.7 (3)(viii) ("rule-making" procedure) provide an inadequate mechanism against the set of very limited exceptions to the general ban on use of circumvention devices and that an effective rulemaking procedure will need to avoid the restrictive and formulaic interpretation embodied by the corresponding U.S. procedure.
n) That it is of paramount importance that Australia retains the power to determine and define the scope of "temporary copies" and temporary copying

Introduction

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

The ALCC thanks the Committee for the opportunity to make this submission. The ALCC will limit this submission to comments relating to the copyright provisions within Chapter 17 of the draft text of Australia – United States Free Trade Agreement (FTA). The ALCC shares the concerns of the Australian Digital Alliance (ADA) and in parts of this submission defers comment to that made by the ADA in their submission to this inquiry.

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

Overview

The ALCC is disappointed to note that the importance of maintaining a balanced copyright regime is not properly reflected in the draft text of Chapter 17 of the FTA. Chapter 17 creates obligations to amend the Australian copyright regime in ways that will reduce access to materials, increase costs for libraries and archives which provide public access to knowledge and ultimately impede the flow of information. This neglect is disturbing given that a balanced copyright law forms the necessary foundation for fulfilling Australian government policy goals in building a "clever country". Overall, the provisions in Chapter 17 fail to provide a satisfactory level of balance. The ALCC does not believe that the provisions pertaining to copyright serve the interests of Australians and does not support the ratification of the FTA on that basis.

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

Procedural Matters

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

The ALCC notes that many of the issues addressed by the FTA were topics of inquiry in the Digital Agenda Review undertaken simultaneously with the FTA negotiations

in 2003. The Digital Agenda Review Report ("the 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 legislation 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.

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

If the Government elects to implement the provisions of the FTA regardless of the risks involved, the ALCC recommends that a "minimalist" approach be taken in respect of the copyright provisions. Implementing legislation should aim to make changes to satisfy only obligations which are deemed absolutely necessary to satisfy the treaty. Interpretation of the FTA text should be liberal to ensure that as far as possible our current domestic legislation remains unaffected to allow for a more thorough process of consultation and debate on the appropriate measures of copyright regulation.

Economic Impacts

The ALCC notes that the Centre for International Economics (CIE) was commissioned to create an economic model of gains on the basis of the draft text. The ALCC acknowledges the difficulties of assessing gains in the area of intellectual property. It is extremely difficult to forecast in any meaningful sense, trends in creating, distributing and gathering information against the background of rapid technological change. The ALCC urges the government to carefully scrutinise any model created to assess the economic impacts arising out of Chapter 17.

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

Distortion of Copyright Balance

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

The language in the current draft text of Chapter 17 is opaque and the structure of the chapter is complex. As a result, some margin exists for different interpretations of the provisions. It is not difficult to see however, that overall the provisions in Chapter 17 would significantly raise the level of copyright protection if implemented into the Australian copyright regime.

As stated repeatedly by negotiators from Australia and the U.S., the overall effect of Chapter 17 is the "harmonisation" of our respective copyright regimes. It is apparent however that many of the FTA provisions closely mirror those provisions already in the U.S. *Digital Millenium Copyright Act 1998* (DMCA) so that harmonisation equates to unilateral action to amend Australian copyright legislation to match 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. As a result, the U.S. copyright regime sets one of the highest standards of copyright protection in the world but one which has not been recognised as providing a balance between the interests of users and copyright owners. This consequently leads to a a great deal of expensive litigation.

Fundamental Differences

The U.S. and Australian copyright regimes contain some important differences in the manner in which each jurisdiction achieves its copyright balance. The Bill of Rights and open-ended "fair use" defences in American legislation provide important checks against over-reaching interpretations of the strong U.S. provisions. In Australian copyright law, limited "fair dealing" defences have to date, provided a balance against less expansive (relative to the U.S.) owners' rights. The adoption of "strong" U.S.-style copyright provisions must be therefore balanced by the adoption of reinforced checks within our current regime against any expansion of rights. An adoption of U.S.-type measures intended to protect users rights however, should be approached with the same caution as the U.S.-type measures which are aimed at raising the level of copyright protection.

The introduction of "fair use" type provisions in the Australian copyright regime has been suggested by some stakeholders as a possible way of redressing the imbalance likely to be caused by FTA implementation. While the ALCC 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 before foregoing our current mechanisms of balance. Although the fair use provisions 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 ALCC would support the introduction of a "fair use" type provision as an addition but not necessarily a replacement of our current "fair dealing" provisions.

To the extent of fulfilling our new obligations to "harmonise" our copyright laws with the U.S., we must ensure that Australian cultural, legal and regulatory norms and values are honoured. If ratification of the treaty is deemed necessary, the ALCC strongly recommends that any implementing legislation avoid directly using the

language of the FTA text (which are in turn, heavily borrowed from the DMCA). Instead, implementing legislation should meet FTA obligations through drafting that is true to the spirit of the treaty but that uses language that has established meaning and history within the Australian regime. This would be a positive first step against unnecessary confusion and blurring of distinct traditions through unintended importation of meaning of terms which have been solely developed and which have particular connotations within the U.S. regime.

Copyright Term Extension

Article 17.4.4 provides for an extension of copyright term to loosely parallel the term of copyright in the U.S. The ALCC strongly opposes the commitment to extend the term of copyright protection. No principled rationale exists which justifies the very real damage the extension presents to organisations which provide access to works and to the wider public whose ability to use works will be impoverished through the delay of entry of works into the public domain.

Copyright term extension undermines the foundation for creation of copyright. The legal and economic basis for copyright is that creators should be protected and rewarded for a set period in order to stimulate further creativity and innovation. Apart from financial reward, the stimulation of creativity and further works depends on the eventual entry of works into the public domain so that others can freely learn from and draw from a collective pool of knowledge and creativity. The extension of copyright term prejudices a generation of creators and users by denying access to a rich public domain.

Term extension has generated fierce debate within the U.S. where numerous successive extensions of copyright have effectively locked works out of the public domain and displaced the intended cycle of creation and contribution upon which copyright was originally justified. In the recent challenge posed to the U.S. *Copyright Term Extension Act 1998* (CTEA) in *Eldred v Ashcroft*[1] , the strong arguments made to the court for repealing the CTEA, such as the added costs to users, the minimal long term awards to owners and the speculative nature of predictions on creative incentives arising from extended monopoly were not disputed.

The costs and benefits of copyright term extension are difficult to estimate and given the lack of evidence which substantiates claimed benefits, legislative change should be avoided. The available reports on the topic such as the Allens report, *Copyright Term Extension: Australian Benefits and Costs* (July 2003) provides no clear evidence of any short or long term economic benefits of extension. In addition, no compelling rationale has have 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

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

harmonisation will be multinational companies, who are based mostly in the U.S. and European Union.

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

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

Term extension will also likely restrict traditional dissemination of copyrighted works, inhibit new forms of dissemination through the use of new technology, and threaten current efforts to preserve historical and cultural heritage.

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

Continual extension of copyright term has been one means through which the scope for public use has been progressively diminished. The effect is particularly grave in light of other developments (technological and legal) which have further enhanced the power of copyright owners to control their works.

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

Anti-circumvention Measures and Technological Protection Measures

The ALCC has serious concerns about the obligations created by the FTA on this issue. The anti-circumvention provisions in the FTA represent a substantial departure from our current law and impose obligations to amend our current regime that will have a dramatic and negative impact on the ability of libraries to access and make works available to the public. Our concerns are aggravated by the fact that increasingly, access to information is dependent on the ability to use and harness

technological tools; legal rights to access are frustrated if the practical means to exercise those rights such as access to technology are unavailable.

General prohibition on act of circumvention
Article 17.4.7 (a) (1) establishes a prohibition on any person who:

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

The 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[2]. The disjunction created by this significant departure from current law is complicated by the lack of clarity and ambiguity of the provision. For example it is unclear as to whose "authority" is relevant in the provision; a number of possible interpretations exist including the person or persons who holds rights to the content, the person who applied the technological protection measure (TPM), the person who created the TPM and the person who owns the physical item in which the content is embodied. Similarly, "protected" can be interpreted in a number of ways including protection by a TPM or protection by an entitlement granted by Ch 17.

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

Prohibition on the manufacture and trade of TPMs
Article 17.4.7 (b) prohibits various acts relating to trade in circumvention devices such as manufacture, import, distribution, offering to public, provision or otherwise traffic in devices or products or components. Although these acts are set out in s116A(1) (b) of the *Copyright Act 1968* ("the Act"), the FTA provision imposes a significant deviation from our present law through its focus on the characteristics of the device or service. This approach significantly raises the level of protection covering the use of TPMs. A number of other disparities with our current law unjustifiably raise the level of copyright protection:

a) Under our current legislation, the various acts that are set out in Art 17.4.7 (b) are subject to a test that the defendant knew or "ought reasonably to know" that the device would be used to circumvent the technological protection measure (s166A(c)). The provision in Art 17.4.7 (a) apportions liability on an arguably more objective basis of having "reasonable grounds to know" of the act of circumvention. It would appear that this phrase would impose liability where a person accidentally circumvented or had no subjective knowledge of having circumvented a TPM. The ALCC submits that actual (subjective) knowledge of circumvention should be required before liability attaches to avoid unwitting offenders. The ALCC notes that the U.S. –Chile FTA bans the act of knowingly circumventing a TPM so that a person can only be held liable

[2] *Copyright Amendment (Digital Agenda) Act 2000*

for intentionally circumventing a TPM; the ALCC submit that this achieves a fairer outcome in respect of users' rights and the practical reality of many technologies which masks from users the technical processes of circumvention and locks.

b) under current law, a device must actually be capable of circumventing a protection measure (through the operation of the current definition of "circumvention device" in s10 and the manufacturing provision in s116A(1)(b)(i)). The FTA provision requires only that devices or services are marketed or promoted "for the purpose of circumvention of any effective technological measure" regardless of whether they are actually capable of circumventing a TPM or not.

c) Art 17.4.7(b) (C) includes reference to a device or service being "primarily designed" for the purpose of circumvention. This again is absent from our current law; the reference in this article widens the types of things that may come under the TPM provisions.

d) Art 17.4.7 (b) (11) provides if any of the three subsections (A), (B), or (C) apply, the provision will be triggered. Therefore, even if a device or service has substantial or significant commercial purposes other than circumventing a technological protection, if it was originally designed for circumvention or is marketed for that purpose, selling or marketing of the device or service will still be prohibited.

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

"Effective Technological Measure"
The ALCC submits that the definition of "effective technological measure" ("ETM") in the FTA is unreasonably broad in its scope but that sufficient flexibility exists in the definition to enable the preservation of our current definition of a "technological protection measure", should the FTA be implemented.

Read in the most restrictive sense, implementation of the FTA definition of "effective technological measure" would displace the carefully crafted balance in our current regime which is intended to maximise innovation and competition in the IT market while enabling fair access to works. The adoption of the FTA definition in a strict sense would also curtail the progress made through ongoing domestic judicial consideration of the issue (*Sony v Stevens*[3]**).**

"Technological protection measure" in the *Copyright Act* is specifically limited to measures which achieve protection through either limiting access or by a copy control mechanism. The definition of an "effective technological measure" on the other hand is conceivably much broader and covers anything that "controls access" to a work *or*

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

"protects copyright". The ALCC submits that the definition of an ETM in the FTA should be read against the ordinary meaning of the terms; a technological measure must be "effective" that is, would actually "prevent or inhibit the infringement of copyright" to come under the definition.

Exceptions to General Ban

The FTA requires Australia to change the existing "permitted purposes" exceptions in section 116A of the *Copyright Act*, and replace it with a set of very narrow and specific exceptions which will dramatically erode access and eradicate rights to make non-infringing uses of copyrighted works.

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

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

(a) 47E (Correcting Errors in computer programs)

(b) 48A (Copying for Parliamentary Libraries)

(c) 49 (Communicating works by libraries and archives for users)

(d) 50 (Communicating works by libraries and archives to other libraries and archives)

(e) 51A (Reproducing works for the purposes of preservation)

(f) 183 (Use of copyright in service of the Crown)

(g) Part VB (Communicating works by educational institutions)

The blanket ban in respect of circumvention and TPMs dramatically diminishes important circumvention rights of libraries established under our current legislation such as using circumvention devices to facilitate access to works for library users, facilitating library to library requests and circumvention for the purposes of preserving works, replacing it, under the FTA, with an exception for libraries to circumvent only for the purpose of making acquisition decisions.

Most of the exceptions that are listed as permissible under 17.4.7 (e) are further subject to the requirement that the activity also be non-infringing. Given the wholesale eradication of balance provided by our current permitted purposes, the ALCC submits that a general exception for legitimate non-infringing purposes is required to ensure that the growing use of TPMs coupled with the restrictive legislative provisions do not prevent reasonable access to works. The ALCC notes also that the Digital Agenda Review Report recommended, in the event of a ban on use of circumvention devices, amendment to the Act which enables circumvention for the purposes of fair dealing and access to legitimately acquired works[4].

[4] Recommendation 17, Digital Agenda Review Recommendations and Report

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

a) exceptions to the prohibitions in relation to use;

b) exceptions to the prohibitions in respect of manufacturing, trading activities etc where the measure controls access; and

c) exceptions to the prohibitions in manufacturing, trading activities etc where the measure protects copyright.

Typically a TPM functions simultaneously as both a form of access control and as a means of protecting copyright. Where that is the case, an act can presumably only be made an exception if it is acceptable in all the relevant categories of exceptions (as outlined above). The uncertainty is not helped by the broad definition of "effective technological measure" in the FTA whose focus on access and indeterminate notion of "protecting copyright" renders the effectiveness of acceptable exceptions under Article 17.4.7 (e) doubtful.

The shift from regulation of technical measures that controls copying to control of access raises considerable concern. There may be any number of scenarios where an individual or institution might need to circumvent a TPM to gain access to legitimately acquired material which they have purchased or otherwise have rights to but which has become unavailable for various reasons. The conflation of access with copying as legitimised in the FTA in effect hands power to copyright owners to control not only copyright but the means of access to works; this shift has tremendous repercussions not only for libraries and archives for but the public at large and should not be adopted without thorough consultation and consideration of its effects.

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

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

If however, the anti circumvention provisions must be incorporated into the Australian regime, the ALCC urges the government to implement 17.4.7(e) (viii) in such a way as to avoid as far as possible, implementing an administrative process bearing resemblance to the rule making procedure currently in place in the U.S. The

ALCC is concerned however that this may prove difficult to avoid due to the drafting of the provision which contains built-in flaws.

Two rule-making proceedings have been completed in the U.S. thus far (in 2000 and 2003) which have been extensively and deservedly criticised for failing to preserve consumers' access rights under existing copyright exceptions and limitations, and failing to provide continued access to public domain works. A number of procedural weaknesses in the U.S. process have lead to those failures; replication of similar weaknesses must be avoided if possible, in the implementation of Article 17.4.7(2)(viii):

a) The article has limited practical use for consumer protection because it is available only in respect of the act of circumvention of certain technological measures but not for the tools, technologies and devices required to practically undertake the act. Any exemptions granted can effectively only be exercised by the small number of persons who have the expertise and resources to create their own tools and mechanisms;

b) The article requires that any exemptions made through the provision be for a "particular class of works". In the U.S. this has been interpreted to refer to subsets of "works" as defined in the U.S. *Copyright Act* only, rather than a flexible category of works by reference to a group of users or by the non-infringing nature of use of a work. This restrictive application of the provision has resulted in the rejection of proposed exemptions on the basis that the proposals failed to frame a "valid" class of works. Such an interpretation is unnecessarily formulistic and should not be adopted in administering the rule making procedure if the provision is implemented into Australian legislation;

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

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

ISP liability

In relation to Article 17.11.29, the ALCC supports comments made by the Australian Digital Alliance.

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

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

The ALCC notes that temporary copying (and the related issue of "material form") was a subject of inquiry in the Digital Agenda Review and stress the importance of maintaining the ability to determine the scope of temporary copying. The issue of "material form" has also been considered only recently in *Sony v Stevens*. It is arguable that if implemented, this paragraph of the FTA would have required a different outcome on the reproduction in RAM issue considered in the case.

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

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

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

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

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

Enforcement Measures

The ALCC supports the comments made by the Australian Digital Alliance in relation to provisions on enforcement measures.

Conclusion

Overall the copyright provisions in Chapter 17 create obligations that will erode public access to works and diminish the power of libraries and archives to carry out their mandate to preserve and provide access to cultural, intellectual and creative works. The obligations imposed by the FTA unilaterally raises the standard of protection of copyright owners in Australia by adopting DMCA-like measures which would fundamentally alter the balance struck in the *Copyright Act*. No parallel provisions similar to effective balancing mechanisms available to users in the U.S. copyright regime (within U.S copyright legislation and outside- such as the Bill of Rights) are however contemplated by the draft text. The effect of implementing the FTA in Australia will set a standard of copyright protection that is, in practice, even higher than in the U.S. Such an outcome is clearly not in the interests of Australians; the ALCC does not support adoption of Chapter 17 of the FTA.

As also stated in the ADA submission, in the case that the FTA proceeds to ratification, the enactment of implementing legislation should adopt as flexible an interpretation of the provisions as possible to minimise detrimental impact. In so far as ambiguities exist in the draft text of the FTA, the ALCC has made suggestions for interpretation of the various provisions which would minimise the distorting effects of implementing the agreement. Nonetheless, even given broad interpretations of the FTA text, implementation of the agreement will fundamentally shift the existing balance of rights and access. The ALCC submits that serious consideration be given to introduce measures that will redress the imbalance caused by the possible implementation of the FTA; foremost, the introduction of broad and flexible “fair use” exception and/or an increased number and application of limitations and exceptions that will ensure continued reasonable public access to copyrighted works. It is paramount however that any changes raising the level of protection or access are made with proper regard to and are consistent with Australian legal, regulatory and cultural histories.