



AUSTRALIAN DIGITAL ALLIANCE

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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 Digital Alliance (ADA).

The ADA 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 simultaneously restricting access to and raising the cost of access to knowledge.

It is ADA'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 the law with detrimental impacts on our cultural, educational and information technology industries. The provisions of Chapter 17 significantly raises the level of copyright protection without parallel measures to ensure reasonable access to works. In particular, the adoption of measures drawn from U.S. law will create incongruities in our legislative framework so that the resulting regime may yield a level of copyright protection that will be even higher than that of the U.S.

The ADA 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 benefits to Australia's trade and cultural environment.

The ADA makes the following recommendations:

Recommendation 1: That the Government does not proceed with ratification of the FTA. In the case that the Government decides to ratify the FTA, that implementation of Ch 17 be made on the basis of an interpretation of the FTA which minimises disturbance to our current copyright regime.

Recommendation 2: That any imminent implementing legislation make only changes to the current regime that are deemed necessary to satisfy FTA obligations at a minimum level.

Recommendation 3: 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.

Recommendation 4: 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.

Recommendation 5: That the introduction of flexible and broad "fair use" type exception be explored as an addition to existing exceptions and limitations to maintain balance within Australia's copyright regime.

Recommendation 6: That any implementing legislation avoid use of terms or turn of phrases from the FTA or DMCA text.

Recommendation 7: That any implementing legislation in respect of ISP liability be incorporated into the framework provided by current provisions (s39B, s36) in the *Copyright Act*.

Recommendation 8: That the implementation of Article 17.11.29 give sufficient recognition to limitations in resource in managing networks and set reasonable standards that can be practically met by individuals and organisations seeking limitation of liability.

Recommendation 9: That the implementation of article 17.11.29(b)(v)(A) be subject to article 17.11.29 (b)(viii) which requires that eligibility for the limitations can't be conditioned on the service provider monitoring its service or affirmatively seeking facts indicating infringing activity.

Recommendation 10: That implementation of Article 17.11.29 (b)(xi) must elect to introduce a judicial process for access to personal information which incorporates robust procedural safeguards to protect subscribers' privacy rights.

Recommendation 11: That the any implementation of FTA obligations in relation to a notice and take-down procedure including the form of notice, follow as closely as possible the procedure modelled by the Digital Agenda Review Report.

Recommendation 12: That the implementation of article 17.11.29 (b)(i)(B) set a low standard for interpreting "automatic process" to ensure that the configuration of caching settings or maintenance activities that are designed to enhance the efficiency of networks do not operate to exclude ISPs from limitations in liability.

Recommendation 13: That any implementation of Article 17.11.29(b)(vi) does not inadvertently operate as a means to empower copyright owners to control access to communications of alleged infringers. To this end the implementation of the provision should entrench an interpretation of "repeat infringer" that is taken to mean an individual who has received a number of court orders in relation to copyright infringement and not merely individuals who have been the subject of infringement notices issued by copyright owners.

Recommendation 14: implementation of article 17.11.4 should require the copyright holder's name to be attached to or form part of a work to qualify for adequate notice of ownership.

Recommendation 15: that the implementation of article 17.11.7 minimise as far as possible the negative impacts of the unreasonable FTA requirement to entrench exemplary damages as standard.

Recommendation 16: that implementing legislation set a low standard of proof to be met by non-profit libraries, educational institutions etc. in respect of 17.11.13(b) to ensure that the intended protection afforded by this paragraph is effectively available.

Recommendation 17: that the implementation of article 17.11.29 recognise and maintain the existing distinctions between commercial and private, individual transgressions in Australian copyright law, and minimise as far as possible the criminalisation of end user copying.

Introduction

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

The ADA thanks the Select Committee for the opportunity to make this submission. The ADA limits this submission to comments relating to the copyright provisions within Chapter 17 of the draft text of Australia – United States Free Trade Agreement (FTA) .

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

Overview

The ADA is disappointed to see that the draft text of Chapter 17 of the FTA does not properly reflect the copyright balance that has to date been central to Australian copyright policy . Chapter 17 creates obligations to amend the Australian copyright regime in ways that will reduce access to materials, increase costs for institutions which provide public access to knowledge, and ultimately curb innovation. This neglect is disturbing and unsatisfactory given that a balanced intellectual property regime forms the research and resource base upon which our knowledge and creative industries depend. Overall, the provisions in Chapter 17 fail to provide a satisfactory level of balance. The ADA 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, business 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.

Recommendation 1: That the Government does not proceed with ratification of the FTA. In the case that the Government decides to ratify the FTA, that implementation of Ch 17 be made on the basis of an interpretation of the FTA which minimises disturbance to 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 ADA 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 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 ADA recommends that a "minimalist" approach be taken in respect of the copyright provisions. Implementing legislation should aim to make changes to meet only those obligations that 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 appropriate consideration of the Digital Agenda Review Report and allow for a more thorough process of consultation and debate on the appropriate measures of copyright regulation.

Recommendation 2: That any imminent implementing legislation make only changes to the current regime that are deemed necessary to satisfy FTA obligations at a minimum level.

Economic Impacts

The ADA notes that the Centre for International Economics (CIE) was been commissioned to create an economic model of gains on the basis of the draft text. The ADA 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 ADA urges the government to carefully scrutinise any model created to assess the economic impacts arising out of Chapter 17.

The ADA 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 costs and benefits of cultural, innovative and creative potential woven deep in the cycle of the sharing and creation of knowledge.

Recommendation 3: 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.

Distortion of Copyright Balance

The ADA acknowledges that the draft text is still undergoing “legal scrubbing” and that the 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.

The text of the FTA is concerned solely with strengthening the rights of copyright owners, scarcely mentions the rights of users and makes no reference to the need for balance. The ADA notes however that within Australian legal history, copyright subsists only as far as specifically granted by the *Copyright Act*¹ and that no claim of rights eg natural rights are valid. The ADA submits that this established rationale should be applied in interpreting the provisions of the FTA and the formulation of implementing legislation. The text of the FTA should be read in the context of the underlying understanding that access and freedom to use materials is assumed and established unless specifically addressed as being within the power of copyright owners.

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 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.

¹ See sec 8, *The Copyright Act 1968*

Consequently, the U.S. copyright regime sets one of the highest standards of copyright protection in the world but one which is not recognised as providing a balance between the interests of users and copyright owners.

Recommendation 4: 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.

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

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 ADA 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.

Recommendation 5: That the introduction of flexible and broad “fair use” type exception be explored as an addition to existing exceptions and limitations to maintain balance in Australia’s copyright regime.

Recommendation 6: That any implementing legislation avoid use of terms or turn of phrases from the FTA or DMCA text.

Copyright Term Extension

The ADA supports the comments made by the Australian Libraries’ Copyright Committee (ALCC) in relation to this issue.

Anti-circumvention Measures and Technological Protection Measures

The ADA supports the comments made by the ALCC on this issue with the following additional observations:

Access and Copyright

As noted in the ALCC submission, the FTA provisions in relation to anti-circumvention shifts the focus from circumventing TPMs that achieves protection of copyright (through either the specific processes of access codes or through a copy control mechanism) to the distinctly different notion of *controlling access* and very broad notion of “protecting copyright” (without specific reference to illegitimate copying).

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

Exceptions to General Ban

In relation to the exception under Article 17.4.7(e)(ii), it is uncertain what is meant by “appropriately qualified researcher”. An interpretation of this provision which limits the use of the exception to those with particular certification is an unjustified limitation which will stem important grassroots innovation. The area of software development is driven significantly by amateur hobbyists who have to date produced many of the technological breakthroughs which the IT industry have built upon. The ADA submits that any implementing legislation set a low standard for consideration of “appropriately qualified researcher” to include individuals undertaking private research activities outside of sanctioned institutionalised programs or work.

ISP liability

The ADA notes that the provisions relating to ISP liability (Art 17.11.29) in the FTA are closely modelled on ISP provisions in the DMCA. Since its introduction the ISP provisions in the DMCA have proved controversial and continue to be the subject of extensive litigation in the United States. We note the current litigation represents the development of interpretations of the DMCA which are a substantial deviation from original legislative intent. The U.S. subpoena procedures have in particular, been problematic and issues relating to access to information remain unresolved as litigation continues (*RIAA v Verizon*²). It is difficult to ascertain at this stage pending the outcome of various concurrent actions, what balance has been achieved in the United States copyright regime and to what extent the DMCA provisions limiting the liability of ISPs have been effective.

Article 17.11.29 is complex and introduces substantial new obligations on service providers. The extensive and specific provisions under that article frustrates the principle of “technological neutrality” which underlies the *Digital Agenda Amendments*³. The ADA recognises the perceived problems of certainty associated with the ISP provisions for authorisation under our current legislation. However, the need for further clarity does not necessarily require the imposition of a U.S. model which if followed closely, imposes unreasonable burdens upon ISPs, ignores the requirement for due process and privacy rights of individuals and enhances the already extensive powers of copyright holders.

The ISP provisions in the FTA however has scope for different interpretations; Australian legislative implementation of these provisions should be drafted to enable the broadest and most flexible interpretation of Article 17.11.29. The ADA suggests that the current provisions governing the authorisation liability of ISPs are not inconsistent with the obligations of the FTA and if implementation is required, the ADA recommends that current provisions (s39B, s36) be retained to provide the broad framework into which the FTA provisions are incorporated. As well as providing continuity in legislation and policy, this would minimise the difficulties associated with the prescriptive approach of the FTA provisions, particularly in light of the challenges presented by developing and upcoming technologies.

Recommendation 7: That any implementing legislation in respect of ISP liability be incorporated into the framework provided by current provisions (s39B, s36) in the *Copyright Act*.

Legal incentives

Art 17.11.29 (a) establishes a requirement to provide:

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

The parameters of this general obligation are unclear as to whether Article 17.11.29 (a) imposes an obligation to create further incentives than that process prescribed by

² Recording Industry Association of America v Verizon Internet Services, Inc DC No. 02 MS- 0323

³ Copyright Amendment (Digital Agenda) Act 2000

Article 17.11.29(b). In light of the onerous and specific process contained in Article 17.11.29, the ADA submits that Article 17.11.29 (a) should be read as having been satisfied if the provisions of Article 17.11.29 (b) are followed.

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

“Service Provider”

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

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

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

The ADA is concerned that any implementation of these provisions into our legislative regime give appropriate consideration to the range activities undertaken by organisations and individuals that may come under the provisions. Recognition must be given to the realities of resource limitations in managing networks, the necessity of undertaking activities such as caching and other technical processes which ensure efficient use of networks and the underlying need for legislation to encourage rather than stem innovation.

Recommendation 8: That the implementation of Article 17.11.29 give sufficient recognition to limitations in resource in managing networks and set reasonable standards that can be practically met by individuals and organisations seeking limitation of liability.

Limitations on Liability

Article 17.11.9 (b) (1) lists four functions which with some qualifications, would allow an individual or an organisation to limit their liability on certain conditions.

Article 17.11.29 (b)(1) (A), provides that the general function of transmitting material without “modification” of content will qualify for limitation without any clarification of what “modification” covers. A restrictive reading of “modification” could conceivably mean that even the basic technical processes that are a normal part of the carriage of information eg. encasing information in packets for the purposes of

transmission may be implicated. The ADA suggests that in keeping with underlying policy objectives of the *Digital Agenda Amendments*, the threshold for “modification” should be high if the FTA provisions are implemented. Changes to format or content to facilitate efficient use of resources, to allow content to be distributed on various platforms or to make material accessible (including accessibility for the disabled) should not be caught; a failure to set a high standard for interpretation of “modification” would necessarily discourage technological innovation.

Article 17.11.29(b)(i)(B) establishes the function of caching as qualifying for limitations in liability. This is discussed in detail below.

Article 17.11.29 (b)(i)(C) and (D) provide that storage and hyperlinking functions are eligible for limitations in liability with qualifications stated in 17.11.29 (b)(v). One of the qualifications is that the service provider must not receive a “financial benefit directly attributable to the infringing activity”. This would seem like an unrealistic requirement in that an ISP would arguably always be caught by the provision. The business of ISPs depends on financial return for the provision of the service and/or facility of housing websites (which then may be used in some cases, for infringing activity).

Another qualification (article 17.11.29(b)(v)(A)) is that the service provider must expeditiously remove or disable access to content on obtaining “actual knowledge” of the infringement or “becoming aware of the facts or circumstances from which the infringement was apparent”. A wide interpretation of the second part of the qualification would seem to imply that effective notification is only one of a number of ways in which an ISP may be compelled to remove material in order to qualify for the limitation. This creates a dangerous situation which places undue burden on ISPs and encourages ISPs to remove material on mere suspicion in order to meet the requirements for limiting liability. The ADA submits that the implementation of the provision should be subject to the implementation of article 17.11.29 (b)(viii) which requires that eligibility for the limitations can’t be conditioned on the service provider monitoring its service or affirmatively seeking facts indicating infringing activity.

Recommendation 9: That the implementation of article 17.11.29(b)(v)(A) be subject to article 17.11.29 (b)(viii) which requires that eligibility for the limitations can’t be conditioned on the service provider monitoring its service or affirmatively seeking facts indicating infringing activity.

Access to Information

Article 17.11.29 (b)(xi) provides that each party is to ensure that an administrative or judicial procedure is implemented through which copyright owners can obtain identifying information of alleged infringers from ISPs.

The ADA strongly recommends that any procedure through which information about individuals can be accessed must be a judicial process to avoid the potential for abuse of rights of individuals. An administrative procedure which enables a party to gain access to information is an inadequate mechanism against abuse of rights and vexatious claims as clearly demonstrated by the current U.S. experience.

The DMCA subpoena process fails to provide safeguards to protect the rights of individuals and ensure standards of due process are met. Under the DMCA ISP provisions, ISPs are under no obligation to notify the subscriber where his or her identifying information has been sought so that a subscriber may not have any notice of the subpoena. Even in instances where the subscriber has been notified of the subpoena, the DMCA provides no rights for the subscriber to be heard (in cases of mistaken identification) before his or her details are disclosed nor any statutory right of action against a mistaken copyright owner or ISP.

The lack of judicial oversight of the DMCA subpoena process opens the process up for abuse as a tool for intimidation or as a tool to source personal information without checks or requirement of a genuine intention to bring an action for copyright infringement.

The flaws in the administrative DMCA subpoena process are well publicised in the U.S. through current extensive litigation which contest the legitimacy and (U.S.)constitutionality of the process eg *RIAA v Verizon*. The claimed benefits of an administrative process such as “streamlining” are unrealistic due to the potential of indiscriminate abuse of individuals’ rights; this is not an acceptable risk and has been vehemently retaliated against through court action. Invariably the legitimacy of the administrative DMCA subpoena process has been contested and will be dealt with by the judiciary.

The implementation of article 17.11.29 should incorporate robust procedural safeguards to protect subscribers’ privacy rights and minimise the potential for and discourage erroneous and unjustifiable disclosure of subscribers’ identifying information. A party seeking access to information must be subject to checks and balances to ensure that information is only granted on reasonable and compelling grounds. As cumbersome as the court is perceived to be relative to an administrative procedure, the judiciary is the only authority uniquely equipped to make fair assessments as to whether claims meet standards required before information is released. The need for assessment on a case-by-case basis must not be overridden by insistence driven by commercial ambitions. A subpoena process that mirrors that of the U.S. has the dangerous potential to allow personal subscriber information to be accessed not only by copyright owners asserting claims but also misuse through claim of copyright infringement by others, such as debt collecting agents or fraudsters. The implementation of the FTA should not jeopardise in any way the strength and protections offered by our current privacy environment.

Recommendation 10: That implementation of article 17.11.29 (b)(xi) must elect to introduce a judicial process for access to personal information which incorporates robust procedural safeguards to protect subscribers’ privacy rights.

Notice and take-down process

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

“ expeditiously removing or disabling access to material residing on its system or network on obtaining actual knowledge or becoming aware of

facts or circumstances from which the infringement was apparent, such as through effective notification...”

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

The form of effective notice described by the Letters would create an environment whereby mere allegations of copyright infringement would be acted on by ISPs without sufficient consideration or respect for rights of the alleged infringer. The form of notice closely follows that already in the U.S. and contains inherent due process deficiencies. While the notice requires a statement, under oath, that the complainant is the owner of copyright, the statement of belief that the material infringes copyright is not. In addition, the notice is effective by assertion and requires no evidence that the alleged infringing act occurred at all, or even a statement that such evidence exists. The ADA notes that the Digital Agenda Review Report shares this concern and considers that “requiring complainants to support any complaint by evidence under oath is an appropriate mechanism to ensure that claims are properly supported and not made lightly”⁴.

The article provides that upon receipt of such a notice, the liability of ISPs for authorisation would be limited if the ISP removes the alleged infringing material. The procedure set out in the FTA provides little incentive for an ISP to resist the claim and ISPs are not required to notify the owner of the alleged infringing material before the it is removed. Further the article provides no balancing incentive for ISPs to restore material upon receipt of any counter-notification, even if infringement proceedings are not subsequently sought. In effect the provisions of the FTA encourages and codifies a reactive treatment of infringement claims that leans heavily on the side of complainants.

In the U.S. model of notice and take-down, the lack of protection for alleged infringers in relation to notification and the procedure for access to subscriber information (coupled with the fallibility of monitoring and tracking technologies) has created an environment that contains insufficient checks against vexatious and spurious claims. There have been many well publicised examples in the U.S. where material has been removed on the basis of a take-down notice where there had not been any clear evidence of infringement, or where the matter of law had been unclear. Although some of the provisions in article 17.11.29 provides monetary remedies against making knowing misrepresentations in notification, the provisions have failed to have practical effect because of uncertainty about liability for mistakes and negligence.

⁴ para 16.46, *Digital Agenda Review Report and Recommendations*, Jan 2004, Phillips Fox

The ADA notes the consideration given to and the recommendations made on the feasibility of a notice and take down process by the Digital Agenda Review Report, (acknowledging that the Report does not contemplate FTA obligations). The ADA submits that the recommendations⁵ made by the Report provide a fair model for implementing a notice and take-down procedure which respects due process and the privacy rights of individuals. The ADA recommends that the any implementation of FTA obligations in relation to a notice and take-down procedure follow as closely as possible the procedure modelled by the Report.

Recommendation 11: That the any implementation of FTA obligations in relation to a notice and take-down procedure including the form of notice, follow as closely as possible the procedure modelled by the Digital Agenda Review Report.

Caching

Article 17.11.29 (b)(i)(B) provides limitation on liability for ISPs in respect of “caching carried out through an automatic process” with certain qualifications as specified at 17.11.29 (b)(iv). It is unclear as to what “automatic process” encompasses although it appears on a general reading of the provision that it is intended to cover some form of algorithmic caching by a service provider rather than one which involves human selection or intervention. It is difficult however, to gauge how the differentiation is intended to operate in practice as at some point the decision to implement or undertake caching must be initiated by a person.

The ADA recommends that any implementation of this paragraph must give due regard to the underlying objectives of the *Digital Agenda Amendments* of ensuring that the technical processes which form the basis of the operation of the Internet are not jeopardised and also give due regard to the recommendation in the IPCRC report, *Review of intellectual property legislation under the Competition Principles Agreement*⁶ that recognised the need for legislation to allow caching activities designed to enhance the efficiency of systems. To this end, the implementation of this paragraph should set a low threshold for interpreting “automatic process” to ensure that the configuration of caching settings or maintenance activities that are designed to enhance the efficiency of networks do not operate to exclude ISPs from limitations in liability.

Article 17.11.29 (b)(iv) provides some qualifications for the caching function. The first of these is the requirement that the service provider only provide access to the cache “in significant part” to users of its system. The term “user” in the context of this paragraph connotes a direct contractual relationship between the person and the service provider which suggests on one reading that the provision may require the prohibition of sharing a cache between service providers. Conversely, if this not the intended meaning of the term “user”, it is hard to understand why the paragraph was included in the draft as the fact of use would be likely to qualify someone as a user which does not sit with the condition that the service provider be in the position to

⁵ see commentary (para 16.31-16.46) and recommendation 14, *Digital Agenda Review Report*, Phillips Fox, January 2004

⁶ Intellectual Property and Competition Review Committee (IPCRC), *Review of intellectual property legislation under the Competition Principles Agreement*, September 2000

“permit” (and by implication withhold permission of) access to a cache. The segmentation of the internet through restrictions on use of caches is one which is unenforceable and which unjustifiably interferes with communications via the internet at the behest of the commercial interests of copyright owners. The ADA notes that the term “user” appears throughout the draft text but is not defined; it appears that the meaning of the term is not used consistently throughout the document.

Recommendation 12: That the implementation of article 17.11.29 (b)(i)(B) set a low standard for interpreting “automatic process” to ensure that the configuration of caching settings or maintenance activities that are designed to enhance the efficiency of networks do not operate to exclude ISPs from limitations in liability.

General Conditions for Limitation of Liability

Article 17.11.29 (b)(vi) contains a “catch- all” twin set of conditions which apply to all of the functions and various limitations on liability. The first of the two is the requirement that the service provider adopt and reasonably implement a policy which “*provides for termination in appropriate circumstances of the accounts of repeat infringers*”. There are a number of points which require clarification in implementing the paragraph, for example what constitutes “appropriate circumstances” for termination and perhaps more importantly, what is meant by “repeat infringers”. The ADA strongly recommends that any implementation of this provision entrench an interpretation of “repeat infringer” that is taken to mean an individual who has received a number of court orders in relation to copyright infringement. An interpretation which falls short of this eg if “repeat infringer” were taken to mean those individuals who were the simply the subject of take-down notices issued by copyright owners, would give copyright owners disproportionate power to indirectly control the activities of individuals on mere allegations of infringement. This would be an unsatisfactory outcome from a public policy standpoint having particular regard to the fact that take-down notices (at least in the U.S. model) do not conform to requirements of due process and are issued, as a result of an automated process with a significant margin for technical failures and mistakes.

The second requirement for qualifying for limitation is that service providers do not interfere with technical measures that protect and identify copyrighted material as developed through “an open, voluntary process by a broad consensus of copyright owners and service providers”. The ADA regrets that the paragraph does not require any consideration of, participation or inclusion of users. The ADA suggests that the implementation of this provision be consistent with the underlying objectives of *Digital Agenda Amendments* to ensure that a balance is maintained between the interests of copyright owners and users.

Recommendation 13: That any implementation of article 17.11.29(b)(vi) does not inadvertently operate as a means to empower copyright owners to control access to communications of alleged infringers. To this end the implementation of the provision should entrench an interpretation of “repeat infringer” that is taken to mean an individual who has received a number of court orders in relation to copyright infringement and not merely individuals who have been the subject of infringement notices issued by copyright owners.

Temporary Copies

The ADA lends full support to comments made by the ALCC on the issue of temporary copies.

Enforcement Measures

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

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

Presumptions as to Copyright Subsistence and Holding

Article 17.11.4 provides for a presumption of copyright subsistence in the absence of evidence to the contrary, creating higher presumption than that in s126 of the *Copyright Act*. Where a plaintiff is actually aware that copyright does not subsist and that evidence is only available to the plaintiff (for example, as a result of an agreement with a third party), the plaintiff could bring an action knowing that they are not required to lead evidence as to the existence of copyright. The obligation created by this provision of the FTA makes for unsound policy. Given that plaintiffs in an action are asserting rights attached to works they claim to have created (or acquired), plaintiffs should at a minimum, be put to proof where his or her claim to ownership is at issue, particularly as defendants typically will not have access to that evidence and legitimate copyright owners would presumably be able to easily prove subsistence of copyright ownership.

The ADA finds unacceptable the application of this presumption to criminal convictions. The provision sidesteps long standing and basic protections for the accused in an action, in effect, offering a “fast-track” to plaintiffs without justification or reason.

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

Recommendation 14: That implementation of Article 17.11.4 should require the copyright holder's name to be attached to or form part of a work to qualify for adequate notice of ownership.

Determination of Damages

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

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

Statutory Damages and Additional Damages

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

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

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

Implementation of this provision of the FTA would run counter to long standing common law policy that in civil proceedings a plaintiff is only entitled to recover what damage it actually suffers. The ADA submits that such a digression from Australian legal norms should only be enacted where exceptional circumstances warrant it; no such justification exists in this case.

Implementation of 17.11.7 (b) as an alternative to the imposition of statutory damages is a preferable although not unproblematic. In basic terms, the provision effectively requires the legislature to interfere if it is perceived that the judiciary is not regularly inflating damages over what it considers reasonable to deter infringement.

Article 17.11.7 in effect requires award of exemplary damages to be standard and automatic in the assessment of damages for copyright infringement. The ADA rejects the routine inclusion of exemplary damages and submits that award of exemplary damages should lay, as has been the case in Australian legal history, at the discretion of the court. The implementation of article 17.11.7 will work to boost the intimidation

power of copyright owners in litigation against alleged infringers by creating and requiring risk of an inappropriately high level of damages.

Recommendation 15: That the implementation of article 17.11.7 minimise as far as possible the negative impacts of the unreasonable FTA requirement to entrench exemplary damages as standard.

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

Article 17.11.13 (b) permits an exemption from the payment of damages for certain categories of organisations (including non-profit libraries and educational institutions) if they can show that they weren't aware or had no reason to believe that *"its acts constituted a proscribed activity"*. The ADA welcomes the inclusion of this article but notes that it remains to be seen whether the paragraph will result in any real practical benefit given the requirement to prove a negative (lack of knowledge) in order to qualify for an exemption. The ADA recommends that the implementation of this paragraph set a low standard of proof to ensure that the intended protection afforded by this paragraph is effectively available.

Recommendation 16: That implementing legislation set a low standard of proof to be met by non-profit libraries, educational institutions etc. in respect of 17.11.13(b) to ensure that the intended protection afforded by this paragraph is effectively available.

"Wilful infringements of copyright"

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

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

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

The ADA notes that the term "piracy" is not legally defined and would be an inappropriate importation into Australian copyright law. The implementation of these provisions would unjustifiably and markedly broaden the range of acts which will be considered subject to criminal proceedings. This in turn has damaging repercussions

for the general regulation of copyright; the severity of the subsequent enforcement regime (if the FTA is implemented) coupled with existing general lack of knowledge about permissible uses may result in a reluctance to engage in non-infringing activities due to raised fear of breach or litigation. The ADA submits that the criminalisation of what is essentially end-user copying as required by the provisions makes for unsound policy and creates a “chilling effect” for the legitimate use of works.

Recommendation 17: That the implementation of article 17.11.29 recognise and maintain the existing distinctions between commercial and private, individual transgressions in Australian copyright law, and minimise as far as possible the criminalisation of end user copying.

Conclusion

Overall the copyright provisions in Chapter 17 create obligations to make changes to the Australian copyright regime which would fundamentally alter the balance struck in the *Copyright Act*. The obligations imposed by the FTA in effect unilaterally raises the standard of protection to copyright owners in Australia by adopting DMCA-like measures. The effective balancing measures available to users in the U.S. copyright regime (within U.S copyright legislation and outside- such as the Bill of Rights) are however not adopted. The effect of implementing the FTA in Australia will therefore, set a standard of copyright protection that is, in practice, even higher than in the U.S. Such an outcome is not in the interests of Australians; the ADA does not support adoption of Chapter 17 of the FTA.

As also stated in the ALCC submission, in the case that the FTA proceeds to ratification, the enactment of implementing legislation should adopt as flexible an interpretation of the FTA provisions as possible to minimise detrimental impact. In so far as ambiguities exist in the draft text of the FTA, the ADA 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 ADA 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.