Kate Makowiecka
Copyright Coordinator
Murdoch University
South Street, Murdoch
Western Australia 6150
phone: (08) 9360 7491
fax: (08) 9310 2780
email: k.makowiecka@murdoch.edu.au

30th April 2004

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

Australia - United States Free Trade Agreement

This is a submission made on behalf of Murdoch University by Kate Makowiecka, Copyright Coordinator, and authorised by Professor Jan Thomas, Pro Vice Chancellor Academic. The submission is made in regard to the proposed Australia - United States Free Trade Agreement, focussing in particular on Chapter 17: Intellectual Property Rights.

In order to support points that will have been made in other submissions addressing the text of Chapter 17 of the FTA, this submission concentrates primarily on a statement made by an advisory committee to the U.S. Government, and specifies and underscores the implications, anomalies, and shortcomings for Australia that will abound in the "harmonisation" of our laws with those of the U.S.

The notion of 'copyright' carries an implication of balance between the interests of creators and users, or between the rights and needs of the individual and those of the community. This implication is apparent in those legal systems deriving from English common law, and is specifically referenced in the U.S. Constitution. But now it is the interests of the so-called IP industry which define the parameters of law. It is corporate owners, rather than individual creators, who primarily benefit from, most loudly call for, and directly influence the creation and implementation of new and evermore proscriptive laws. The interests and requirements of the public, and any sense of reciprocity or identity between owner and user, diminish with each extension of copyright duration, and each accusation of 'piracy' and 'theft' used to describe an individual's fair dealing with online materials.

University communities are both creators and consumers of knowledge. But it should be clear that 'consume' in this context does not imply 'use up'. Creation, whether scientific or artistic, is always a process of re-creation, dependent on an encounter with, potentially, all previously created works. The newly created work, in turn, becomes a resource for future creative acts. There is no necessary conflict between the interests of a creator and those of a user: a balance can be attained, not least because the two are often to be identified in the same individual.
When ownership of an individual creator's work transfers, for whatever reason, to a corporate copyright holder these mutual interests are subsumed in economic and political demands. Treaties, such as the FTA, between countries with differing cultural and economic requirements only emphasise the lack of balance between what have become competing interests.

Australia is already a signatory to multilateral agreements such as WIPO, the Berne Convention, and TRIPS, as well having enacted domestic regulation in response to changing cultural environments. The FTA requires changes to Australian copyright and intellectual property law in order to bring us into line with American practice. The Department of Foreign Affairs and Trade, in its outcomes statement concerning Intellectual Property, states that the FTA "[h]armonises our intellectual property market more closely with the largest intellectual property market in the world.[…] The inclusion of the Intellectual Property Chapter recognises the importance of a strong intellectual property regime to economic growth through trade and

investment." [i] With Australia as a net importer of IP, and the U.S. as a net exporter, it is doubtful whether such 'harmonisation' can be of mutual and reciprocal benefit.

This economic and corporate valuation of the creative life of a nation is further emphasised by the Office of the United States Trade Representative's paper 'Free Trade "Down Under"' [ii].

This report, prepared by a policy advisory committee reporting to the President, the U.S. Trade Representative, and Congress, and which "advised U.S. negotiators during the course of the negotiation,"[iii] repeatedly "applauds the U.S. negotiators". In relation to multilateral treaties such as the WIPO Copyright Treaty and the WIPO Performances and Phonograms Treaty, 'applause' is offered to the negotiators for "convincing Australia to adhere to, and come into full step with, key provisions of those treaties consistent with the manner these were implemented in the U.S. in 1998 in the DMCA."[iv] The Committee also notes that "Australia had strayed in a particularly key area from what industry and the U.S. government considered to be full and correct implementation of the obligations of those treaties."[v] Not that Australia's provisions were inconsistent with the multilateral agreement, but that they should be consistent with the requirements of the U.S. IP industry. Not that Australia had 'strayed' from the obligations of these treaties, but that it had failed to correctly implement them according to the requirements of "industry and U.S. government".[vi]

These requirements have meant that the provisions of the DMCA are more proscriptive than those of the treaties; the Committee itself describes them as "going beyond the existing TRIPS obligations"[vii]. Despite its implementation, the DMCA is seen as flawed and is currently under review; will U.S. alterations to their laws mean that Australia will be subject to these laws under the FTA, even though they will not have been through our Parliamentary system? [1]

The IFAC-3 paper emphasises the fact that "the FTA contains important and unprecedented provisions to improve market access for US films and television programs [...] as well as the right to invest and establish a local services presence".

---

[1] It is not irrelevant to note here that, subsequent to the appearance of the Attorney General's Digital Agenda Review (which seems to recommend greater accessibility to digital material than that permitted by the DMCA), Philip Ruddock and Daryl Williams stated jointly that "the copyright obligations of Australia's Free Trade Agreement with the United States supersede the recommendations made in the report." (http://www.ag.gov.au/www/MinisterRuddockHome.nsf/Web+Pages/030344D50B116C4DCA256E8400161D47?OpenDocument)
How is it possible to state that recommendations proposed by the A.G.'s own review are already superseded by a treaty that has not yet been ratified?

This element is of particular concern to the US, not only because it provides for an even greater penetration of the Australian market than is already available, but more so because both the government and industry perceive this FTA as "establish[ing] key precedential provisions to be included in the other FTAs now being negotiated"[viii].

The IFAC-3 Committee notes that the "negotiation of an individual FTA provides the opportunity to deal with specific intellectual property concerns that U.S. industry may have in the particular negotiation partner [and] should set a new baseline for future FTAs"[ix]. IFAC-3 is "particularly gratified" with the 'new baseline' that treating with Australia provides for future U.S. negotiations[x]. Australia's participation in this FTA means that it is performing as a guinea-pig in the U.S. treaty stakes.

IFAC-3 observes that "the substantive copyright text achieves all that U.S. industry sought in this negotiation and the negotiators are to be commended in achieving this most important result that expands U.S. economic opportunities for some of America's most competitive industries."[xi] So much for copyright achieving a fair balance between the needs of creators and users, let alone between trade partners!

DFAT's summary states that the process of 'harmonising' our laws with those of the U.S. will nevertheless "allow Australia considerable flexibility to implement the Agreement in a way that reflects the interests of our domestic interest groups and Australia's legal and regulatory environment."[xii]

Whilst some independent domestic interpretations have seen the 'flexibility' of the treaty as providing room to move for Australia, this will also provide room for the US to prosecute any perceived failure of implementation on Australia's part. IFAC-3 "will not hesitate to recommend U.S. action under the provisions of the dispute settlement chapter should Australia's implementation of the agreement fall short of its commitments made in this agreement."[xiii]

Despite this caveat, "IFAC-3 believes that, taken as a whole, this agreement is very strong …[and] wishes to underscore the importance that it attaches to a close working relationship between IFAC-3 and industry, on the one hand, and U.S. negotiators, on the other, in the development of a model FTA intellectual property text"[xiv]. The committee notes that "high levels of copyright protection and effective enforcement mean more revenue and more higher-paying jobs benefiting all Americans."[xv]

The Senate Foreign Affairs, Defence, and Trade Committee observes, in their report 'Voting on trade: The General Agreement on Trade in Services and an Australia-US Free Trade Agreement', that:

> in the Committee's view, Australia's pursuit of a free trade agreement with America has as much, if not more, to do with Australia's broader foreign policy objectives as it does with pure trade and investment goals. Certainly for the United States administration, free trade agreements can only be situated with a particular foreign policy setting. This was made clear in a widely-reported speech (May 2003) by USTR Zoellick [the US negotiator in the AUSFTA]:
> "countries that seek free-trade agreements with the United States must pass muster on more than trade and economic criteria in order to be eligible. At a minimum, … the U.S. seeks 'cooperation – or better – on foreign policy and security issues,' Zoellick said."[xvi]

The requirements of U.S. industry – specifically, in the case of Chapter 17, the IP industry - and those of U.S. domestic and foreign policies are the crucial requirements of the FTA.

Australia will undergo a wide range of legislative change in order to comply with the requirements of the FTA. It would seem unfortunate that laws pertaining to the particular intellectual, cultural, and economic interests of Australia are to be manipulated in order to confirm our suitability as a trading partner when that suitability depends on our compliance with the overarching needs of American domestic and foreign policy.

Signed by

Kate Makowiecka

Copyright Coordinator
Murdoch University
Perth, W.A.

References

[i] 'Australia-United States Free Trade Agreement: Intellectual Property', DFAT, p.1. www.dfat.gov.au/tradenegotiations/us_fta/outcomes/08_intellectual_property [hereafter cited as DFAT]
[ii] 'The U.S.-Australia Free Trade Agreement (FTA): The Intellectual Property Provisions' Report of the Industry Functions Advisory Committee on Intellectual Property Rights for Trade Policy Matters (IFAC-3), March 12, 2004. http://www.ustr.gov/new/fta/Australia/advisor/ifac03.pdf [hereafter cited as IFAC-3]
[iii] IFAC-3, p.3.
[iv] IFAC-3, p.4.
[v] IFAC-3, p.8.
[vi] IFAC-3, p.8.
[vii] IFAC-3, p.9.
[viii] IFAC-3, p.3.
[ix] IFAC-3 pp. 4-5.
[x] IFAC-3, p.4.
[xi] IFAC-3, p.10.
[xii] DFAT, p.1.
[xiii] IFAC-3, p.4.
[xiv] IFAC-3, p.5.
[xv] IFAC-3, p.8.
[xvi] Quoted in *Inside US Trade*, 16 May 2003, in Senate Foreign Affairs, Defence and Trade Committee: Voting on trade. The General Agreement on Trade in Services and an Australia-US Free Trade Agreement, November 2003, p. 111.
http://www.aph.gov.au/Senate/committee/fadt_ctte/gats/report/report