

14 May 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

Email: FTA@aph.gov.au

Dear Sir

Supplementary submission to the Joint Standing Committee on Treaties Inquiry into the proposed Australia-United States Free Trade Agreement

The University of Melbourne provides this short supplementary submission in addition to the submission put forth by the Australian Vice-Chancellors' Committee (AVCC) concerning the IP Chapter of the Australia-United States Free Trade Agreement (AUSFTA). The University shares the concerns expressed in the submission of the AVCC, but wishes also to make a number of additional points.

Overview

The University of Melbourne is concerned about the potential impacts of the IP Chapter of the AUSFTA on educational institutions, researchers and students.

The University submits that the IP Chapter will have a significant impact on the university sector. If the AUSFTA is to be implemented, the following issues must be addressed:

1. **Implementation of Chapter 17 must be undertaken:**
 - a. **with proper public consultation processes;**
 - b. **in a way that minimises disruption to Australia's current copyright regime; and**
 - c. **in a way that reflects the balance drawn in Australian copyright law between the interests of users and the interests of IP owners.**
2. **The Australian Government should consider, in the course of any implementation of the AUSFTA, the need to broaden existing exceptions to**

copyright infringement, to balance out the increased protections granted to copyright owners as a result of the Agreement;

3. **In the implementation of any Safe Harbour provisions regarding ISP liability for copyright infringement, it is crucial that proper checks and balances be put in place to avoid abuse of the procedure. The processes by which copyright owners are to obtain personal information about subscribers or users of the system must be overseen by a judicial process, not an administrative one.**
4. **It must be made clear, whether via clarification of the exceptions in ss43A and 111A of the *Copyright Act* 1968 (Cth) or otherwise, that temporary copies that occur via caching processes are not infringements of copyright, and that network managers are not required to pay any royalties for such copies to copyright owners.**

1. Consultation Process

Significant changes to Australia's IP laws, and particularly its copyright laws, will be required if the AUSFTA is implemented. The provisions, while detailed, do allow Australia to interpret and implement the provisions in a way that at least minimises the disruption to Australian copyright law.

The University of Melbourne wishes to emphasise that, if implementation *does* occur, there must be adequate opportunity for stakeholders in the system to have input into the shape of those laws. There must be an opportunity to make both written submissions and participate in discussions about the changes required.

2. The Copyright Balance

As the submissions of many other parties have noted, the IP Chapter of the AUSFTA in many respects strengthens the rights of IP owners. On the other hand, the provisions of the IP Chapter, taken alone, do not offer any corresponding broadening of *exceptions* to copyright. Notably, there is no requirement in the AUSFTA that Australia adopt the broader "fair use" defence available under US law.

The University of Melbourne supports the comments by the AVCC as to the need to ensure that the existing balance between the interests of owners and users is not upset. As the Intellectual Property and Competition Review Committee has pointed out:

It is ... a fallacy to suggest that policies conferring more income on copyright owners are in and of themselves socially desirable relative to those that confer less. Rather, the goal of the intellectual property system is to provide a sufficient incentive for socially useful investment in creative effort. This requires that compensation flowing to rights owners be enough to encourage investments whose social benefits exceed their costs.

Over-compensating rights owners is as harmful, and perhaps even more harmful, than under-compensating them. Copyright protection has therefore always involved a balance between the incentives to invest in creative effort and the incentives for disseminating or providing access to the material created. In the

*Committee's view, this balancing element that underpins copyright law is of critical importance.*¹

The AVCC has submitted that in order to redress the imbalance that will result from the changes made to copyright law in the AUSFTA, the education sector should get additional support from the Commonwealth Government.

The University of Melbourne submits that the Committee should also recommend that, *if* the AUSFTA is to be implemented, the Government must consider whether it is necessary to broaden the various exceptions to copyright infringement. This would balance the increased rights to be granted to copyright owners as a result of the Agreement.

University researchers and students regularly need to be able to rely on exceptions available under the *Copyright Act* 1968 (Cth).

For example, one important set of exceptions relates to the defence of “fair dealing”. University students and researchers frequently rely on these exceptions. Currently, under the Act, to gain the benefit of the defence of fair dealing, the alleged infringer is required to show that the purpose of their use falls within one of those enumerated in the Act. This exhaustive list includes only four purposes: criticism and review (ss 41, 103A), research and study (ss 40, 103C), news reporting (ss 42, 103B) or judicial proceedings (ss 43, 104). The definition of “fair use” under US copyright law, by contrast, sets out a non-exhaustive list of purposes,² which has allowed US courts to find “fair use” for uses which may not fall within an exception under Australia’s current provisions.³ In light of the general strengthening of IP owners’ rights under the AUSFTA, the Government should also consider whether Australia’s exceptions to copyright infringement should be broadened.

3. Copyright term extension

The University of Melbourne supports the AVCC in opposing copyright term extension, and agrees that the extension of the term of copyright will lead to an increase in the net cost of access to copyright material, not only for universities and libraries but all users.

In addition, the University wishes to emphasise a further concern regarding copyright term extension. The Committee should be aware that the costs of copyright term extension are not only the increase in royalties that will be faced by universities, but also the transaction costs involved in gaining permission to use older materials. This point is made in some detail in the submission of Dr Matthew Rimmer to JSCOT.⁴ While the need to get permission will not apply to all uses possible under the statutory license that is available to universities,⁵ not all uses made by university researchers will be covered by that statutory licence.

¹ Intellectual Property and Competition Review Committee, *Final Report: Review of Intellectual Property Legislation under the Competition Principles Agreement*, September 2000, at 34

² See 17 U.S.C. §107

³ For example, in relation to some personal uses (such as time-shifting): *Sony Corporation v Universal City Studios* 464 US 417 (1984); and in relation to certain parodic uses: *Suntrust Bank v Houghton Mifflin* 268 F.3d 1257 (11th Cir. 2001)

⁴ Matthew Rimmer’s JSCOT submission can be accessed here:
<http://www.aph.gov.au/house/committee/jsct/usafta/subs/SUB027.pdf>

⁵ Part VB of the *Copyright Act* 1968 (Cth).

4. Safe Harbour provisions

ISP liability for copyright infringement is an issue of some concern to the universities. The University of Melbourne is concerned that there must be certainty for network managers as to what steps they must take in order to avoid liability for copyright infringement, and that the principle should be affirmed that there should be no liability for infringement for network providers in circumstances where the network provider did not know of the particular infringement. This principle must be affirmed in any implementing legislation.

The need for judicial oversight

The University of Melbourne has recently been involved in litigation where copyright owners have sought access to information on the University network.⁶ From that process the University has learned that the judicial process provides a valuable means of oversight in the obtaining of information about alleged infringers of copyright, and will act as a check to prevent any possible abuse of the process, as well as to enable a public monitoring of how often, and in what circumstances, the procedure is being used.

The University of Melbourne notes that Article 17.11.29 allows each party “to provide for an administrative **or judicial** procedure enabling copyright owners ... to obtain expeditiously from a service provider information in its possession identifying the alleged infringer.” The University of Melbourne urges the Committee to emphasise that if implementation is to occur, any such process must be judicial, not administrative, in order to ensure proper oversight and protection of the privacy interests of individual network users.

Caching

The AVCC has referred, in its submission, to the issue of caching; an issue which is raised by the inclusion of “all reproductions, in any manner or form, permanent or temporary” in the AUSFTA (Article 17.4.1).

The University of Melbourne would like to submit that, subject to the existence a proper notice and takedown regime, caching is, as the Intellectual Property and Competition Review Committee (IPCRC) found,

“of considerable significance to the efficiency of the Internet; and that the transaction costs to secure licences to cache could be prohibitive for ISPs. As a result, Government policy should help ensure that this efficiency-enhancing activity is not prohibited.”⁷

The University draws to the attention of the Committee the ongoing litigation in Canada, where ISPs are seeking royalties for reproductions made in the computers of ISPs. The case has been heard by the Canadian Supreme Court, and judgment is expected this year.⁸ The case makes it clear that, in the absence of a proper exception for caching activities, IP

⁶ *Sony Music Entertainment (Australia) Ltd v University of Tasmania* (2003) 57 IPR 77

⁷ Intellectual Property and Competition Review Committee, *Final Report: Review of Intellectual Property Legislation under the Competition Principles Agreement*, September 2000, at 14

⁸ *Society of Composers, Authors and Music Publishers of Canada v Canadian Association of Internet Providers et al* [2002] 4 F.C. 3

owners *will* seek royalties from ISPs. This would be contrary to the intention and recommendations of the IPCRC.

The University urges the Senate Select Committee to recommend that, in any implementation of the AUSFTA, the ability of network providers to cache materials without running the risk of being held liable for infringement of copyright or the payment of royalties to copyright owners should be protected and, if necessary, strengthened and clarified.

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The University requests that you take these matters into account in your review of the IP Chapter of AUSFTA. Please let the undersigned know if you require any further information on the matters raised in this submission.

The University also wishes to acknowledge the generous assistance of the Intellectual Property Research Institute of Australia which is part of the Law School of the University, and its Associate Director, Kimberlee Weatherall, in the preparation of this submission.

Yours faithfully

A handwritten signature in black ink, appearing to read 'Chris Penman', with a stylized flourish at the end.

Chris Penman
Vice-Principal & General Counsel

cc Professor Kwong Lee Dow, Vice Chancellor
Mr Ian Marshman, Senior Vice-Principal
Ms Linda O'Brien, Vice-Principal (Information)
Ms Kimberlee Weatherall, Associate Director, IPRIA