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

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Introduction

I confine my submission to Chapter 17 of the proposed US/Australia Free Trade Agreement, and specifically the copyright portions. The essence of the submission is that strengthening the currently very strong Australian Intellectual Property (IP) laws is misconceived, particularly in the context of the FTA since:

- The strengthening benefits the US and disadvantages Australia, as the former is mostly a producer of IP and the latter a consumer.
- Instituting US style copyright law without US style constitutional free speech protection will lead to gross miscarriage of justice.

Disproportionate Benefits to US

To my knowledge, the public perception of the rest of the agreement (excluding Chapter 17) is that it is on balance neutral or mildly favouring US interests. The public perception of the IP restrictions is that it is strictly neutral, giving each side equivalent rights, and therefore should be ignored in a "horse-trading" analysis of the agreement. This is incorrect. The IP portion of the agreement greatly serves US interests, and given the equivocal nature of the benefits from the rest of the agreement the IP portion should be seen as the part which grossly tilts the trade playing field to benefit the US.

The book: "Information Feudalism: Who Owns The Knowledge Economy?", by Peter Drahos and his collaborator John Braithwaite provides an analysis of the attitude of Australian trade negotiators and IP, in the context of the GATT agreement. They charge that Australian negotiators are almost wilfully blind to the overwhelming IP production disadvantage that Australia faces with respect to other countries. We can see this again in the statement that "Closer alignment in intellectual property laws and practices will provide Australian exporters with a more familiar and certain legal environment for the export of value-added goods to the US" — again our negotiators live in a fantasy

world where Australia has massive IP production. The argument of Drahos and Brathwaite is not a particularly difficult argument to follow. One first notes that there is a huge disparity between the IP produced in Australia and that produced overseas. Greater protection of foreign IP (which foreigners seem to be able to produce very efficiently) should therefore be accompanied with greater access for Australian goods, particularly farm produce, which we seem to be able to produce very efficiently. This will result in more efficient provision of goods all-round, which will be of mutual benefit. If there is no quid-pro-quo, where is the mutual benefit?

Specifically there are two measures which are objectionable:

- The increase of the copyright term to death of author plus 70 years, and
- the increased protection from "circumvention devices"

The increased term benefits only existing copyright holders, the additional impetus for producers of works to produce works on account of the additional term is infinitesimal. This therefore benefits existing copyright holders without changing the production of new works to any extent, and so greatly advantages the US.

Furthermore the ultimate objective of copyright is to encourage authors to create work which becomes part of the public domain, to help create our common cultural heritage. Nothing published in the USA since 1923 has had this opportunity to enrich all society, instead of just the copyright holders.

Inadequate Australian Constitutional Protection

The increased protection of "circumvention devices" is also of concern. I am a user of the "Linux" operating system, which I need for my work. There is no commercially available playback software for DVDs available for this operating system, but happily such software has been produced by volunteers and made freely available over the web. To play a DVD one needs to circumvent the internal DVD copy protection - to play any media one needs to circumvent the copy protection. "Playback" and "circumvention of protection" are unfortunately identical concepts, no matter how legislation is drafted. In the US, injunctions were obtained against those distributing the decryption potion of the DVD playback software (known as "DeCSS"), the cases "DVD Copy Control Assoc. v. Bunner, McLaughlin et al." and "Universal City Studios, Inc. v. Reimerdes" where thus far injunctions have been obtained for this software. Again, to reiterate, the primary purpose and current primary use of this software for which these cases were brought is playback of legitimately purchased DVDs. It is likely that similar lawsuits will be brought against Australians if these ill-conceived parts of the treaty are ratified.

Australia does not have the same constitutional "free speech" rights embedded in the US Constitution, and greatly respected by the US courts. Furthermore in the US there is a history of what we might describe as "judicial

activism" in aggressively protecting the free-speech rights of its citizens — witness the Sony case, where the court allowed home users to tape TV shows for later viewing, a right which was not previously recognized. Any equivalent legislation by both parties cannot be interpreted equally on account of these differing legal traditions. In particular, whereas broad "fair use" rights are given by US courts, narrow "fair dealing" rights are granted under Australian law. Making backup copies of media, and copying CDs to be used in car tape decks is permitted under the fair use doctrine, but illegal under fair dealing. Further Australia does not have the "limited times" restriction in its constitution for the granting of IP rights, nor the specific injunction that IP laws must be passed "to promote progress of science and the useful arts". In the absence of these restrictions and given the US court tradition of interpreting free speech rights broadly, apparently equivalent restrictions in both countries will be interpreted differently, restricting the activities of Australians far more than those in the US. Please note one of the stated purposes of the agreement is to "harmonize" US and Australian laws, but there is no attempt to harmonize the fair use/dealing exceptions.

Given this disparity, this will have again a chilling effect on the production of Australian IP and further distort the trade imbalance in IP between the two countries. Should it be decided that these extensions to copyright be permitted, then equivalent protections must also be instituted in Australian law to protect her citizens.

A simple mechanism would be this: a clause is added to the Copyright Act allowing the relevant Minister to publish a list of fair use exceptions. Should US courts find another exception, then the Minister will be obligated to add this exception to Australian regulation. This is admittedly unwieldy but the most direct way of accomplishing DFAT's stated objective of cohesion and similarity between the laws of the two nations. It would of course be better were we not to have agreed to such a foolish clause.

Recommendations:

- The FTA chapter 17 should not be ratified by the Australian government, or if this is not possible,
- US-style free speech protections should be introduced into Australian law, and
- a clause should be added to the treaty indicting that any fair use exception permitted by US courts should also be permitted under Australian regulation.