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Intellectual Property Rights and Electronic Commerce

IP Rights - Introduction

16.1 In the Committee's view, Chapter 17 on Intellectual Property Rights ('the IP Chapter') is the largest of the 23 chapters both in content and substance. The Chapter refers to all the major forms of intellectual property rights and their enforcement including copyright, trademarks, patents, industrial designs, domain-names and encrypted program-carrying satellite signals. The obligations will require legislative amendments to five pieces of legislation.[1]

16.2 The Chapter contains 29 Articles and 3 exchanges of letters. The exchanges of letters are on Internet Service Provider (ISP) liability; various aspects of intellectual property that apply to Australia; and national treatment in respect of phonograms.[2]

16.3 DFAT advised that a large number of the obligations are drafted in a way that reflects both Australia and the United States' highly sophisticated intellectual property regimes[3] and has been drafted this way to ensure consistency with the US template approach to its free trade agreements.[4]

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1 NIA, Annex 8.

2 DFAT, *Guide to the Agreement*, p. 93.

3 Ms Toni Harmer, *Committee Briefing*, 2 April 2004, p. 66.

4 Mr Stephen Deady, *Committee Briefing*, 2 April 2004, p. 70.

Background

16.4 In general terms, Intellectual Property Rights (IPRs) are the legal rights which arise as a result of intellectual activity. There are two main reasons for the creation of these rights. The first is to give public recognition of the creative, moral and economic rights of the creator and the rules to govern the rights of the public for access. The second reason is to foster creativity and promote innovation by rewarding the creator a monopoly economic right for a limited period of time.[5]

16.5 The exclusive right to exploit the innovation quite often conflicts with the idea of competition policy which at its basic level seeks to remove impediments to the functioning of markets such as minimising the power of monopolies. The IP Chapter is designed to reinforce these rights, and in some places strengthen them to take account of developments in technology.

16.6 It is not uncommon to see intellectual property included in trade agreements. The Paris Convention for the Protection of Industrial Property of 1883 (the Paris Convention) is the earliest multilateral treaty to recognise the value of intellectual property and its importance to protecting the value of ideas. The Paris Convention was closely followed by the Berne Convention for the Protection of Literary and Artistic Works in 1886. These two conventions recognise the two distinct branches of intellectual property, namely industrial property and copyright.

16.7 Since the Paris Convention, there are now more than 23 different intellectual property multilateral treaties all administered by the World Intellectual Property Organization (WIPO).[6] Australia recognises the value of protecting intellectual creativity and therefore is a party to many of them.

Obligations concerning copyright

16.8 The Agreement contains several obligations concerning copyright. The most significant in terms of the evidence received by the Committee, and therefore those which this section focuses on, are the obligations relating to the term of copyright protection and effective

5 WIPO Intellectual Property Handbook: Policy, Law and Use, Ch.1, p. 3.

6 http://www.wipo.int/about-wipo/en/gib.htm#P61_9104, viewed on 7 June 2004.

technological protection measures. This section will also briefly look at the ratification of the WIPO Internet treaties, temporary copies and IP rights for Indigenous peoples.

Extension to the term of copyright protection

16.9 In 1710, the United Kingdom passed the first piece of legislation (Statute of Anne) which bestows a limited period of exclusive ownership to the creator of the work. The debate about the length of time that someone should have exclusive ownership has ensued ever since.

16.10 Article 17.4.4 of the Agreement treaty sets out the obligations on both parties on the term of copyright protection. The term of protection covers works, photographs, performances and phonograms and

> on the basis of the life of a natural person, the term shall be not less than the life of the author and 70 years after the author's death …[7]

For all other terms where the life of a natural person is not used then the term is

> not less than 70 years from the end of the calendar year of the first authorized publication of the work, performance, or phonogram;[8] or
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> failing such authorized publication within 50 years from the creation of the work, performance, or phonogram, not less than 70 years from the end of the calendar year of the creation of the work, performance, or phonogram.[9]

16.11 Current Australian legislation specifies the term of copyright protection to be generally life of the author plus 50 years. Generally, the Agreement obliges Australia to increase its term of protection by an extra 20 years. This is beyond the minimum international standard stipulated in the Berne Convention. With some 50 plus countries including the EU and the US adopting life plus 70, this is emerging as an international standard.

16.12 The Committee received a considerable number of submissions and evidence supporting both sides of the argument. Along with the

7 AUSFTA, Article 17.4.4(a).
8 AUSFTA, Article 17.4.4(b)(i).
9 AUSFTA, Article 17.4.4(b)(ii).

arguments for and against, the Committee looked at the application of the United States' 'fair-use' regime.

The argument to extend

16.13 The Committee received submissions and evidence from a number of organisations supporting the argument to extend the term of copyright protection from life of the author plus 50 years to life of the author plus 70 years. The main arguments as presented to the Committee included harmonisation with our trading partners and owners benefiting from an extended term.

16.14 On extension of the term of protection it was clear from submissions and evidence received that bringing our term of copyright protection into line with those of our major trading partners, namely the United States and the European Union, would provide intellectual property owners a benefit that they currently do not receive.[10] There was also evidence to suggest that harmonisation would result in cost savings to collecting societies in managing those intellectual property rights.[11]

16.15 Some of the reasons that were presented to the Committee included the problems associated with obtaining copyright clearances in cross-border environments and that some services such as a digital music delivery system established in Australia may encounter problems with some works that are not protected because of the shorter duration of term, but are protected in other markets such as the United States and Europe.[12] Both the Australian Recording Industry Association and the Business Software Association of Australia noted that with the advent of digital services and online file sharing, there is a need to balance the increased risk posed by piracy.[13]

16.16 The Business Software Association of Australia along with proponents for extension referred[14] to the Allen Consulting Group report of July 2003 which concluded that

> Overall, the net financial impact of term extension in Australia is likely to be neutral; there are costs, and there are benefits, but to say that one is appreciably larger than the

10 Mr Scot Morris, *Transcript of Evidence,* 6 May 2004, p. 17.

11 Ms Caroline Morgan, *Transcript of Evidence,* 19 April 2004, p. 86.

12 Mr Scot Morris, *Transcript of Evidence*, 6 May 2004, p. 17.

13 Australian Recording Industry Association (ARIA), *Submission 155*, p. 2, and Business Software Association of Australia, *Submission 126*, p. 4.

14 Business Software Association of Australia, *Submission 126*, p. 4; Australian Copyright Council, *Submission 213;* Viscopy, *Submission 214.*

> other lacks credibility. The global trend to harmonisation around a longer copyright term suggests that there will be harmonisation benefits (i.e., costs foregone) in similarly adopting a longer copyright term comparable with Australia's major copyright trading partners.[15]

16.17 In terms of the actual cost to the Australian community of extending the term of protection, the Committee understands from most parties that estimating the economic impact is virtually impossible. The Committee noted that the Centre for International Economics' modelling did not place a dollar value on this cost.

> it is not possible to derive any indication of the magnitude of the costs that may stem from the restriction of new works being produced from existing works.[16]

16.18 The Copyright Agency Limited (CAL) presented evidence to the Committee in respect of the percentage of material copied by the educational sector of out-of-copyright material and noted that

> out-of-copyright material is 0.3 per cent of total copying…If you look at the period of 50 to 70 years it is 0.02 per cent, which is roughly two pages out of every 10,000 pages.[17]

16.19 However, Dr Philippa Dee in a report commissioned by the Senate Select Committee on the Free Trade Agreement between Australia and the United States said

> The DFAT/CIE report made some simplifying assumptions in order to quantify the benefits of extending the term of copyright protection. While the report was not able to make the same assumptions to quantify the costs, this has been done in Box 2 [not included in this report]. The net effect is that Australia could eventually pay 25 per cent more per year in net royalty payments, not just to US copyright holders, but to all copyright holders, since this provision is not preferential. This could amount to up to $88 million per year, or up to $700 million in net present value terms. And this is a pure transfer overseas, and hence pure cost to Australia.[18]

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15 Allen Consulting Group, *Copyright Term Extension, Australian Benefits and Costs*, July 2003, p. 36.

16 CIE, *Economic Analysis of AUSFTA*, p. 39.

17 Ms Caroline Morgan, *Transcript of Evidence,* 19 April 2004, p. 86.

18 AUSFTA – An Assessment, Dr Philippa Dee, June 2004, p. 31.

The argument not to extend

16.20 The Committee noted the significant amount of evidence received which opposed the extension of the copyright term by 20 years.[19] Most of the argument contained in this evidence referred to the economic impact on libraries and educational and research institutions. The main arguments against extension included the extended term of payment of royalties, increased costs through the statutory licenses issued to educational institutions by collecting societies, the extension of transactional and tracing costs, and the reduction of the incentive to create more works.

16.21 Along with the Australian Digital Alliance[20] and the Australian Library and Information Association[21] a number of submissions noted that the extended term of payment of royalties will impose significant economic burdens on educational and research providers. This will

> include increased costs for collecting agency statutory licences for universities and schools and in voluntary licenses such as those held by government departments and, of course, costs for the so-called orphaned works.[22]

16.22 The Australian Vice Chancellors' Committee also expressed similar concerns

> The extension of the copyright term in Australia comes at a cost to the Australian economy because Australia is a net importer of third party copyright material. As noted earlier

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19 The following Submissions all specifically expressed opposition to the extension of the term of copyright protection: Mr Matthew Rimmer, *Submission 27*; Mr Peter Youll, *Submission 32*; Ms Isabel Higgins, *Submission 46*; Electronic Frontiers Australia Inc., *Submission 50*; Mr Phillip Bradley, *Submission 84*; University of the Sunshine Coast, *Submission 63*; Ms Jacqueline Loney, *Submission 86*; NSW Government, *Submission 66;* Media Entertainment and Arts Alliance, *Submission 67*; Australian Fair Trade and Investment Network, *Submission 68*; Ms Annie Nielsen and Phil Bradley, *Submission 96*; Ms Vera Raymer OAM, *Submission 118*; Australian Nursing Federation, *Submission 120*; Colin & Catherine Dahl, *Submission 131*; National Tertiary Education Union, *Submission 129*; Mr Jock Given, *Submission 147*; Australia Council for the Arts, *Submission 157*; Combined Pensioners and Superannuants Association of NSW (Bathurst Branch), *Submission 163*; Uniting Care (NSW / ACT), *Submission 169*; Australian Vice Chancellors Committee, *Submission 189*; Australian Consumers Association, *Submission 195*; and Queensland Government, *Submission 206*.

20 Miss Miranda Lee, *Transcript of Evidence*, 3 May 2004, p. 47.

21 Ms Jennefer Nicholson, *Transcript of Evidence,* 4 May 2004, p. 63.

22 Ms Jennefer Nicholson, *Transcript of Evidence,* 4 May 2004, p. 63.

> the universities and other institutions (such as libraries) are major consumers of copyright material.[23]

16.23 The Australian Digital Alliance believed that copyright term extension will increase the 'transactional costs of seeking permissions from copyright owners'.[24]

16.24 The Music Council of Australia felt that these changes should not be the subject of trade agreements but should have been done within the domestic environment, noting in their submission that

> whether it is an advantage to introduce these changes in the context of an FTA with the USA is, at best, open to doubt.[25]

16.25 The Committee understands that these are not novel arguments. When the United States extended its term of copyright protection from life of the author plus 50 to life of the author plus 70 in 1998 under the *Sonny Bono Copyright Term Extension Act 1998 (US),* several constitutional challenges were made. In the first of these, *Eldred v Ashcroft,* Justice Breyers made a dissenting judgement, and noted the significant costs imposed by transactional and tracing costs.[26] Dr Matthew Rimmer provided the Committee with a number of examples in the United States where this cost has had significant impacts on cultural and socially important projects.[27]

16.26 Dr Rimmer provided evidence to the Committee that contested that extension of the term of copyright is following an emerging international trend. Dr Rimmer reminded the Committee that under the multilateral agreements, like the Berne Convention dealing with copyright, the obligation is life of the author plus 50 years. He further noted that Australia has not been willing to follow emerging trends in other areas of intellectual property protection such as the right of resale and that Australia has not enacted *sui generis* protection for traditional knowledge or data base laws.

16.27 Dr Rimmer also pointed out that the discrepancy in retrospectivity[28] between Australia, the United States and the EU will need to be

23 Australian Vice Chancellors' Committee, *Submission 189,* p. 4.

24 Miss Miranda Lee, *Transcript of Evidence,* 3 May 2004, p. 47.

25 Music Council of Australia, *Submission 31,* p. 4.

26 *Eldred v Ashcroft* (2003) 123 S. Ct. 769 at 806.

27 Dr Matthew Rimmer, *Submission 27,* p. 12.

28 When the extension of the term of copyright protection was enacted in the US and the EU, it was done retrospectively. That is, that all works that had been in the public domain were brought back into copyright under the extended term. The US enacted its legislation in 1998, bringing all works created from 1928 back into copyright. Australia

accounted for in transactional costs. Dr Rimmer specifically referred to the period between 1928 and 1954 where there will be some confusion.[29]

16.28 The Committee received a submission that observed

> This pressure to extend copyright duration clearly comes not from a desire to promote innovation and enhance our nation's public domain, but rather from a corporate desire to enhance monopoly profits.[30]

16.29 The Committee heard evidence from bodies that did not specifically point to where the costs fall but nonetheless noted areas of concern such as the impact on libraries, universities and schools[31] and Australian creators of new works.[32]

Copyright and competition

16.30 As noted in the Background to this section, copyright and competition policy are sometimes in conflict, with one assigning legal rights for a monopoly, the other attempting to minimise its disruption on markets. The Committee heard evidence and received submissions on the interaction with competition policy and the extension of the term of copyright.

16.31 The Committee was referred to the consideration of extending the term of copyright protection conducted by the Intellectual Property and Competition Review (IPCR) in 2000. Arguments presented in that review included the claim that such an extension would be 'anti-competitive and monopolistic'[33], and that there was no economic benefit for extension.[34] In its conclusions, the IPCR recommended that the current term should not be extended and that no extension should

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would not be required to enact retrospective action under the terms of the AUSFTA. If the Agreement enters into force in 2005, only works from where the author died in 1955 onwards will be protected.

29 Dr Matthew Rimmer, *Transcript of Evidence,* 4 May 2004, pp. 51-52.

30 Electronic Frontiers Australia Inc., *Submission 50,* p. 7.

31 NSW Government, *Submission 66,* p. 2.

32 Media Entertainment Arts Alliance, *Submission 67,* p. 18.

33 Dr Matthew Rimmer, *Submission 27,* p. 17.

34 Dr Matthew Rimmer, *Submission 27,* p. 17.

be introduced in the future without a prior thorough and independent review of the resulting costs and benefits.[35]

16.32 The Committee received evidence in respect of an amicus curiae submission made by seventeen economists including five Nobel Laureates in the United States' *Eldred v Ashcroft* case which noted 'a number of circumspect points about the economic effect of the legislation'.[36] Specifically it pointed out that there would be only a marginal increase in anticipated compensation for an author; the extension makes no significant contribution to the economic incentive; the extension increases the inefficiency of above-cost pricing and that the extension affects the creation of new works derived wholly or in party from those still in copyright.[37]

16.33 In 2003, the Allen Consulting Group produced a report on the economic effects of copyright term extension, which was presented as an exhibit to the Committee. This report, commissioned by the Motion Picture Association and supported by proponents for extension of the term of copyright, was noted in a submission received by the Committee to have 'been widely discredited'.[38] Of particular note was the fact that the Allen Report failed to take account of previous evidence presented to the Supreme Court of the United States that 'it is highly unlikely that the economic benefits from copyright extension under the Copyright Term Extension Act outweigh the additional costs'.[39]

16.34 While it may be easy to dismiss these arguments as being unique to events that occurred in the United States, and therefore irrelevant to the Australian legal environment, the Committee acknowledges evidence and submissions that as Australia is a net importer of copyright material, there is a suggestion that there will be a negative economic impact on users and consumers of copyrighted material.

Time for 'fair use'?

16.35 Doctrines exist in both the Australian and United States copyright regimes which allow for exceptions on when copyrighted material

35 Intellectual Property and Competition Review Committee, *Review of Intellectual Property Legislation Under the Competition Principles Agreement*, September 2000, p. 13.

36 Dr Matthew Rimmer, *Submission 27*, p. 18.

37 Dr Matthew Rimmer, *Submission 27*, p. 18.

38 Dr Matthew Rimmer, *Submission 27*, p. 19.

39 Dr Matthew Rimmer, *Submission 27*, p. 19, quoting Milton Friedman's testimony to the Supreme Court of the United States.

may be used without payment of a royalty. In Australia this is known as 'fair dealing', and in the United States 'fair use'.

16.36 The Australian legislation provides for four fair dealing purposes: research or study; criticism or review; reporting of news; and professional advice given by a legal practitioner or patent attorney. The US legislation provides also for four fair use aspects: the purpose of the use; the type of the work; the amount of the work used; and the impact on the market.

16.37 The US legislation allows for a much broader application than the limited Australian legislation where it is restricted to specific activities. The Committee understands that there is nothing in the Agreement that would prevent the Australian Government from accessing exceptions that meet internationally agreed standards.[40]

16.38 The Committee heard evidence and received submissions that should the term of copyright protection be extended, then consideration should be given to extending the fair dealing doctrine to a much more open-ended defence, similar to the US legislation.[41] The Committee only heard from one organisation that there was no need to consider extending the fair dealing doctrine.

16.39 The arguments presented to the Committee centred around the balance between users and owners in the *Copyright Act 1968*, and the change in balance under the obligations in the AUSFTA. One submission noted

> The primary balance provided by the United States to its citizens against strong IP rights is a broad exemption for 'fair use' of works … It has the benefit of coping far more flexibly with new technologies …[42]

whilst another submission said that

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40 Ms Toni Harmer, *Transcript of Evidence*, 14 May 2004, p. 51.

41 For the record the following Submissions all specifically expressed a desire for Australia to adopt a similar fair use doctrine as appears in US legislation; Dr Matthew Rimmer, *Submission* 27; Anthony Towns, *Submission 37*; Australian Digital Alliance / Australian Libraries Copyright Committee, *Submission 71*; Swinburne University of Technology, *Submission 103*; Professor Ian Lowe AO, *Submission 105*; WTO Watch, QLD, *Submission 112*; Macquarie University, *Submission 117*; National Tertiary Education Union, *Submission 129*; Mr Patrick Caldon, *Submission 138*; Australian Library and Information Association, *Submission 142*; Australian Coalition for Economic Justice, *Submission 151*; The Australian Vice -Chancellors Committee, *Submission 189*; Australian Consumers Association, *Submission 195*; The University of Queensland Library, *Submission 202.*

42 Mr Anthony Towns, *Submission 37*, p. 3.

> Instituting US style copyright law without US style constitutional free speech protection will lead to a gross miscarriage of justice.[43]

16.40 Dr Rimmer stated that Australia has

> adopted all the harsher measures of the Sonny Bono Copyright Term Extension Act and the Digital Millennium Copyright Act without any of the good features of the United States regime[44]

a view supported by peak bodies representing libraries and educational institutions.

> If it [the Agreement] comes in, we would have to look at different balancing mechanisms. One which has been raised by a number of the stakeholder groups is the introduction of fair use, which is a balancing mechanism to give broader rights for users. If we were to extend the copyright term, that would certainly be one thing that would be worth exploring in trying to maintain a balance.[45]

and

> if you were to go down the track of extending the Australian fair dealing to approximate the fair use of the US act, which includes copying for education, you would go some way to addressing some of the issues that are being, I suppose, undermined by increasing the protection through the FTA.[46]

16.41 The Committee also received two submissions that observed that the Australian standard of originality is low in comparison to the United States, in particularly noting the 'Full Federal Court decision in *Desktop Marketing Systems v Telstra Corporation* [which] pitched the threshold of originality very low, requiring mere skill and labour'[47], as in contrast to the Supreme Court of the United States in *Feist Publications Inc v Rural Telephone Service* which 'raised the threshold of originality much higher, requiring a creative spark'.[48]

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43 Mr Patrick Caldon, *Submission 138*, p. 1.

44 Dr Matthew Rimmer, *Transcript of Evidence*, 4 May 2004, p. 56.

45 Ms Miranda Lee, *Transcript of Evidence*, 3 May 2004, p. 49.

46 Mrs Eve Woodberry, *Transcript of Evidence*, 4 May 2004, p. 64.

47 Dr Matthew Rimmer, *Submission 27*, p. 30; Ms Kimberlee Weatherall, *Submission 92*, p. 11.

48 Dr Matthew Rimmer, *Submission* 27, p. 30.

16.42 The application of fair use in the United States as determined by their legal system specifically provides for several unique copyright doctrines, namely time shifting and space shifting.[49] An example of time shifting is when consumers record a television program for later use, on a device such as a video recorder, or more recently other types of storage mediums.[50] Space shifting is when digital content is recorded onto a different device than that for which it was originally assigned, e.g. purchasing a CD and copying it onto an MP3 player.[51]

16.43 Current Australian legislation makes these activities illegal. The debate as to whether there are exceptions in Australian legislation or case law is beyond the scope of this Committee's review. However, the Committee notes that the application of the US' fair use doctrine may resolve any confusion and correct a legal anomaly should Australia decide to adopt a similar regime.

16.44 The Committee heard evidence of an alternative balancing mechanism which would involve creating a system of registration for aging copyright material.

> … material deemed valuable could be registered for ongoing protection (at an escalating fee to recompense society for the deprivation of public access) while less valuable material would fall automatically into the public domain where it would benefit the culturally enriching processes of recycling and reuse.[52]

16.45 The Committee notes that a similar mechanism has been proposed by Landes and Posner[53] and in the Allen Consulting Group report of 2003.[54]

16.46 The Committee also learnt that the Public Domain Enhancement Act is currently proposed in the United States. The Bill requires a copyright holder to pay a USD$1 renewal fee fifty years after the work is first published, and every ten years after until the end of the copyright term, which in the United States is 95 years for corporations

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49 Dr Matthew Rimmer, *Submission 27*, p. 31.

50 http://www.wordiq.com/definition/Time_shifting

51 http://www.webopedia.com/TERM/S/space_shifting.html

52 Australian Consumers Association, *Submission 195*, p. 13.

53 William M Landes and Richard A Posner, *Indefinitely Renewable Copyright*, University of Chicago Law School, John M. Olin Law and Economics Working Paper, No.154 (2D Series), 2002.

54 Allen Consulting Group, *Copyright Term Extension, Australian Benefits and Costs*, July 2003, Appendix A1, p. 38.

and 70 years after death for an individual.[55] According to one commentator

> the bill seeks to increase works available in the public domain, which is the common pool of information and ideas upon which musicians, authors, filmmakers, etc. derive inspiration and materials for new works, leading to more creativity and innovation.[56]

16.47 The Committee heard from APRA / AMCOS contesting the argument of fair use in Australia saying that

> we believe the doctrine of fair use is quite vague and that it may require litigation to determine the boundaries of fair use. We support the existing fair dealing exceptions, the educational provisions and the exceptions as they currently are in the act.[57]

16.48 Similar concerns were raised by Viscopy.

> The broader US concept of 'fair use' is very different to the Australian concept of 'fair dealing'. To suddenly use the US concept, as has been proposed by some user groups interested in free access to works of Australian copyright, would have many additional implications for Australian law.[58]

16.49 In assessing the impact of these changes, the Committee takes note of Recommendation 6.35 of the Copyright Law Review Committee's report *Simplification of the Copyright Act*.

> The Committee recommends the expansion of fair dealing to an open-ended model that specifically refers to the current set of purposes … but is not confined to these purposes.[59]

16.50 The Committee recognises that Australian negotiators defended the term of copyright protection vehemently, but that the final outcome was necessary to secure the overall package.[60] In order to ensure that

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55 http://www.publicknowledge.org/content/introductions/legislation-pdea/view, viewed on 7 June 2004.

56 http://www.publicknowledge.org/content/introductions/legislation-pdea/view, viewed on 7 June 2004.

57 Mr Scot Morris, *Transcript of Evidence*, 6 May 2004, p. 18.

58 Viscopy, *Submission 214*, p. 4.

59 Copyright Law Review Committee (CLRC), *Simplification of the Copyright Act 1968*: *Part 1 Exceptions to the Exclusive Rights of Copyright Owners*, September 1998, p. 63.

60 Mr Stephen Deady, *Committee Briefing*, 2 April 2004, p. 71.

the balance of interests between users and owners is maintained (as the evidence suggests that it will be altered under the AUSFTA) the Committee is putting forth three recommendations that it believes will not only assist educational, libraries, research, and other similar institutions to discharge their function of providing community access to knowledge that will enhance the intellectual commons but also resolve a long standing legal anomaly in Australian copyright law.

Recommendation 16

The Committee recommends that the Government enshrine in copyright legislation the rights of universities, libraries, educational and research institutions to readily and cost effectively access material for academic and related purposes.

Recommendation 17

The Committee recommends that the changes being made in respect of the *Copyright Act 1968* replace the Australian doctrine of fair dealing for a doctrine that resembles the United States' open-ended defence of fair-use, to counter the effects of the extension of copyright protection and to correct the legal anomaly of time shifting and space shifting that is currently absent.

Recommendation 18

The Committee recommends that the Attorney General's Department and the Department of Communication, Information Technology and the Arts review the standard of originality applied to copyrighted material with a view to adopting a higher standard such as that in the United States.

Effective Technological Protection Measures

16.51 Effective Technological Protection Measures (TPMs) or Anti-circumvention devices are certain types of technology that are

associated with copyright material.[61] The AUSFTA contains a set of obligations on dealing with TPMs. It will require legislative change, however under the terms of the AUSFTA, there is a two year period from date of entry into force of the Agreement to implement those obligations.[62]

16.52 The Committee heard that as part of the exceptions which are codified in the Agreement, there is

> actually an ability to implement our own exceptions, which we would be looking at after a consultation period with various interests.[63]

16.53 The Committee notes that this is codified in Article 17.4.7(e)(viii) of the Agreement.

16.54 The Committee heard a range of views supporting these obligations, and concerns on this provision focusing on issues such as DVD region coding and possible harm to the Free and Open Source Software Industry (FOSS).

16.55 The Committee recognises that copyright owners have a right to protect their works and this is apparent in the body of evidence taken, such as

> strong anti-circumvention provisions will become increasingly important as copyright owners in the digital environment rely on technological protection measures to protect their works and reduce piracy.[64]

and

> it is CAL's view that Australian content creators have been reluctant to develop electronic products, as opposed to their US counterparts, and that an important contributor to this has been the concern Australian content creators have with circumvention devices generally as well as a perception by them that the current Australian legislation does not afford them any protection.[65]

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61 DFAT, *Guide to the Agreement*, p. 97.

62 AUSFTA, Article 17.12.

63 Mr Simon Cordina, *Transcript of Evidence*, 14 May 2004, p. 53.

64 Business Software Association of Australia, *Submission 126*, p. 3.

65 Copyright Agency Ltd (CAL), *Submission 197*, p. 4.

16.56 The Committee recognises that due to the online environment, the music[66] and film[67] industries have a unique challenge and thus they have supported the implementation of these obligations. Furthermore, the film industry were keen to see the implementation of these measures incorporated into the *Copyright Act 1968* prior to the end of the two year phase end period.[68]

16.57 The Committee recognises that attached with these provisions are obligations in respect of increased remedies in the civil and criminal codes. The Committee heard that Commercial Television Australia

> supports the FTA requirements for legislative change to provide increased remedies against circumvention of technological protection measures[69]…

and some submissions sought more than what is required under the AUSFTA where they believe that current legislation leaves loop holes, such as in pay per view movies.[70]

16.58 The Committee also heard evidence that the proposed changes in AUSFTA will be significantly detrimental to some industries and to consumers. The Committee was concerned with submissions from the open source software industry on the effect of the technological protection measures that exist in the United States under their Digital Millennium Copyright Act and that noted

> the United States has seen their DMCA legislation used to stifle fair competition and, the creation of interoperable products and to severely limit a consumers right to fair use.[71]

16.59 The Committee received submissions from other interested parties that felt that the TPM provisions in the AUSFTA were too onerous and that it 'would intrude into consumers' lives excessively'.[72]

16.60 Of particular note were submissions to the Committee stating that the provisions may affect consumers' rights to play legally purchased DVDs on their legally purchased multi region DVD players because

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66 Australian Recording Industry Association (ARIA), *Submission 155.*

67 Australian Film Industry Coalition, *Submission 161.*

68 Australian Film Industry Coalition, *Submission 161.*

69 Commercial Television Australia (CTVA), *Submission 145,* p. 3.

70 Australian Film Industry Coalition, *Submission 161.*

71 Linux Australia, *Submission 183,* p. 1.

72 Australian Consumers Association, *Submission 195,* p. 13.

of region coding, not just in movies but in software.[73] The Committee notes

> the ACCC is involved in that case [the upcoming High Court case of *Sony v Stevens*] because they are concerned, essentially, about copyright owners engaging in a regional division of material by devices like mod chips.[74]

16.61 The Committee received submissions that noted some consequences of the United States' DMCA legislation in respect of the arrest of the Russian programmer Sklyarov[75] and the District Court ruling on the use of the Linux DeCSS code, as well as concerns about reverse engineering for interoperability in areas such as printer cartridges and garage doors.[76]

16.62 The Committee notes that the advice received from the Government provides for sufficient exceptions that can be crafted to suit Australia's domestic regime, and has been informed that the two year transitional period will flesh out these concerns in much greater depth so as to ensure that no sector, including consumers, will be disadvantaged.

Recommendation 19

The Committee recommends that the Attorney General's Department and the Department of Communications, Information Technology and the Arts ensure that exceptions will be available to provide for the legitimate use and application of all legally purchased or acquired audio, video and software items on components, equipment and hardware, regardless of the place of acquisition.

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73 Dr Matthew Rimmer, *Transcript of* Evidence, 4 May 2004, p. 56; Mr Anthony Towns, *Submission 37*; Mr Alan Isherwood, *Submission* 77; Cybersource, *Submission 85*; Linux Australia, *Submission 183*; Australian Consumers Association, *Submission 195*.

74 Dr Matthew Rimmer, *Transcript of Evidence*, 4 May 2004, p. 56.

75 Linux Australia, *Submission 183*; Cybersource, *Transcript of Evidence*, 20 April 2004, p. 89.

76 Cybersource, *Transcript of Evidence*, 20 April 2004, pp. 89-90.

Ratification of the WIPO Internet Treaties

16.63 The Committee received several submissions[77] supporting Australia's ratification of the World Intellectual Property Organization (WIPO) Internet Treaties, or more specifically, the WIPO Performances and Phonograms Treaty (WPPT) and the WIPO Copyright Treaty (WCT).

16.64 The Committee was informed that

> we have agreed to implement the WIPO Internet treaties by the entering into force of the Agreement. We made a commitment to do that within four years in the Singapore FTA, in any event.[78]

16.65 The Committee notes that one submission expressed a strong concern that as part of the WPPT implementation they would strongly oppose any extension of performers' rights to audiovisual works.[79]

Temporary Copies

16.66 Temporary copies have been the subject of some debate in copyright circles since the emergence of computers, the Internet, gaming machines and so forth. Questions have arisen as to the changing status of a copy in a temporary state, that is, at what point can the owner of the intellectual property no longer determine what or how it should be used, or demand remuneration for it.

16.67 The Committee received submissions that expressed concerns that the issue of temporary copies should receive appropriate attention and that failure to do so may disadvantage educational institutions and consumers.[80] Several submissions specifically raised the issue of forward or proxy caching, including mirror caching for educational purposes.[81] Other factors that need to be considered in this context are buffering, pipelining, virtual paging, context swapping and RAID arrays.[82]

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77 Music Council of Australia, *Submission 31*; Commercial Television Australia (CTVA), *Submission 145*; Australian Recording Industry of Australia (ARIA), *Submission 155*; Copyright Agency Ltd. (CAL), *Submission 197;* Australian Copyright Council, *Submission 213;* Viscopy, *Submission 214.*

78 Ms Toni Harmer, *Committee Briefing*, 2 April 2004, p. 66.

79 Commercial Television Australia, *Submission 145*, p. 8.

80 Australian Digital Alliance / Australian Libraries Copyright Committee, *Submission 71*, p. 12.

81 Australian Vice-Chancellors' Committee, *Submission 189*, p. 7.

82 Australian Consumers Association, *Submission 195*, p. 12.

16.68 However, the Committee notes that this issue is being dealt with in the context of the Phillips Fox report of the Digital Agenda Review commissioned by the Attorney-General's Department as part of the *Copyright Amendment (Digital Agenda) Act 2000*. Furthermore, in respect of temporary copies, the Committee notes that two of the recommendations of the Phillips Fox review will address some of the concerns presented to the Committee, namely Recommendation 15, which states

> that the sections be further amended by inserting a new subsection to include a definition of 'temporary reproduction' for the purposes of the section, as meaning any transient, non-persistent reproduction that is incidental to the primary purpose or act for which the work is made available and which has no independent economic significance. [83]

and Recommendation 16, which states

> That the educational statutory licence provisions be amended to allow an educational institution to make active caches of copyright material for the purpose [of] a course of instruction by the educational institution, in return for a payment of equitable remuneration to the copyright owner. [84]

IP rights for Indigenous peoples

16.69 The Committee was pleased to receive submissions and evidence from bodies interested in IP rights for Indigenous Australians. The Committee is aware that protection of Indigenous intellectual property through current legislation has limitations and requires further reform, especially in respect of collective rights, duration of copyright in relation to cultural expression, access to traditional knowledge and benefit sharing, development and patenting of products derived from traditional knowledge, resale royalty and breach of confidence in relation to Indigenous knowledge or cultural expression.[85]

16.70 The Committee heard concerns that because Indigenous intellectual property rights were not addressed in the IP chapter, communities

83 Phillips Fox, *Digital Agenda Review, Report and Recommendations*, January 2004, p. 95.

84 Phillips Fox, *Digital Agenda Review, Report and Recommendations*, January 2004, p. 98.

85 Jumbunna Indigenous House of Learning, *Submission 106*.

may not benefit from the financial rewards of their culture and creativity,[86] or that it may

> limit or discourage Australian parliamentary capacity to increase legislative protection and promotion of Indigenous cultural expression and traditional knowledge.[87]

16.71 Other concerns included that future forms of IP may be covered under the existing provisions and that it is difficult to gauge the full effect of the change, and that it should be monitored.[88]

16.72 The Committee was informed by Aboriginal and Torres Strait Islander Services (ATSIS) that

> the Minister made it clear to ATSIC that there is nothing in AUSFTA that will affect in any way Australia's ability to take whatever action is necessary to protect Indigenous interests should the need arise.[89]

Trade marks, including geographical indications

16.73 The IP Chapter contains a section on trade marks, including geographical indications. The Committee understands that

> this Article reaffirms both Parties' commitment to providing world class trademark services. Australia already largely complies with this Article, and it is therefore, in most instances, a reaffirmation of current legislative requirements, policy and / or practice.[90]

16.74 However, the Committee understands that there will be two minor changes required to the Australian Wine and Brandy Corporation Act.

> … in relation to cancellation procedures and grounds for refusing an application for a geographical indication to codify current practice.[91]

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86 Jumbunna Indigenous House of Learning, *Submission 106.*

87 Jumbunna Indigenous House of Learning, *Submission 106,* p. 6; In similar terms, Ms Ann Penteado, *Submission 177.*

88 Australia Council for the Arts, *Submission 157,* p. 1.

89 Aboriginal and Torres Strait Islander Services, *Submission 188,* p. 1.

90 DFAT, *Guide to the Agreement,* p. 94.

91 DFAT, *Guide to the Agreement,* p. 94.

16.75 The Committee heard that industries that will be affected by these changes are supportive.

> Under the Free Trade Agreement that legislation will be required to be changed to enable that, and we support that as an industry.[92]

16.76 These changes have also been supported by the body that administers the Australian Wine and Brandy Corporation Act.[93]

Patents

16.77 The AUSFTA contains a section on Patents.

16.78 The Committee understands that the Article on patents

> generally reflects Australia's current laws and it is not anticipated that major changes to the *Patents Act 1990* will be needed to implement the FTA.[94]

16.79 However, the Committee heard and received a body of evidence and that has raised some quite serious concerns, specifically in respect of the granting of software and process patents.

16.80 According to the DFAT fact sheet on Intellectual Property issued shortly after the finalisation of negotiations, there are several references to harmonisation and reducing differences in law and practice across areas, such as patents.[95] Based on material in these factsheets, the Committee heard evidence such as

> these proposed changes will actually increase the strength of those laws to the point that they are no longer protecting the open source industry but are actually preventing it from doing business. In particular I refer to the granting of patents to software.[96]

and

> My concerns relate to the braking effect that it will have on small IT companies like mine on innovation and providing

92 Mr Stephen Strachan, *Transcript of Evidence*, 22 April 2004, p. 5.

93 Australian Wine and Brandy Corporation, *Submission 154.*

94 DFAT, *Guide to the Agreement*, p. 99.

95 www.dfat.gov.au/trade/negotiations/us_fta/outcomes/08_intellectual_property.html, viewed on 7 June 2004.

96 Mr Steven D'Aprano, *Transcript of Evidence*, 20 April 2004, p. 78.

> solutions for clients. It is a brake on the way that we do business.[97]

16.81 The Committee also heard evidence to suggest that

> There is an attempt by the US government to impose extensions to patent law in Australia as well, which will also be to the serious detriment of the information industries, particularly the e-commerce and e-business arenas.[98]

and

> the only use of patents against such technology can be to eliminate Open Source projects as competition, reducing consumer choice and doing significant damage to Australian competitiveness and infrastructure.[99]

Business as usual

16.82 The Committee understands that these concerns relate specifically to the process, approach and standards that are used to apply patents by the United States Patent and Trademark Office (USPTO).[100]

> I think some of the concerns may relate to the US Patent Office and how they may grant patents, but we are not required to take on board any of those practices in Australia.[101]

16.83 However, the Committee is satisfied that the use of the word 'harmonisation' in the DFAT fact sheet has led to some confusion in the general community and that the claims made by the various individuals and organisations will not eventuate.

> I want to make it very clear, particularly in terms of the issue of patents and what will be patentable in Australia, that the FTA text is completely consistent with our current law. We will not be changing what it is that can be patented in Australia as a result of the FTA.[102]

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97 Dr Christopher Pudney, *Transcript of Evidence,* 23 April 2004, p. 35.

98 Dr Roger Clarke, *Transcript of Evidence,* 4 May 2004, p. 22.

99 Linux Australia, *Submission 183,* p. 3.

100 Federation of Australian Scientific and Technological Societies, *Submission 190*; Australian Centre for Intellectual Property in Agriculture, *Submission 191.*

101 Ms Toni Harmer, *Transcript of Evidence,* 14 May 2004, p. 52.

102 Ms Toni Harmer, *Transcript of Evidence,* 14 May 2004, p. 51.

Measures related to certain Regulated Products

16.84 There is a section in the AUSFTA that deals with regulated products. In the context of the Agreement, this refers to pharmaceutical products and Agriculture/Veterinary chemicals. There will be some changes needed to the *Therapeutic Goods Administration Act 1989* in respect of marketing of a generic version of a patented medicine during the patent term and notification of intent to market during the patent term.[103]

16.85 The Committee notes that

> The Article does not require Australia to make changes to its regime for the protection of test data for pharmaceutical products or its existing pharmaceutical patent extension regime.[104]

and

> current springboarding arrangements have been preserved.[105]

and that

> there is no change required to our springboarding provisions that flows on from the agreement.[106]

16.86 Furthermore the Committee notes the advice from the Department of Health and Ageing that

> there are no changes to our [pharmaceutical] patent term extension regime as a result of the Agreement. In fact, it was not an area where we were being pressed to make changes.[107]

and

> of itself, the Agreement does not change the existing practices that each country has in the patents area.[108]

103 DFAT, *Guide to the Agreement*, p. 101.
104 DFAT, *Guide to the Agreement*, p. 100.
105 DFAT, *Guide to the Agreement*, p. 99.
106 Ms Carolyn Smith, *Committee Briefing*, 2 April 2004, p. 49.
107 Ms Carolyn Smith, *Committee Briefing*, 2 April 2004, p. 49.
108 Ms Carolyn Smith, *Committee Briefing*, 2 April 2004, p. 50.

Pharmaceutical products

16.87 The impact on the health sector, particularly the Pharmaceutical Benefits Scheme (PBS), has received considerable attention during the Committee's inquiry. This section will deal specifically with the changes that are required to pharmaceutical products and the relationship between innovative and generic products on the PBS.[109]

Delay of entry?

16.88 The Committee heard evidence that some of the proposed changes in this area may impact on the entry to the market of generic pharmaceutical products, which in turn may increase the cost of the PBS.

16.89 Specifically the Committee heard that

> the free trade agreement proposes changes to Australian patent laws which I believe will delay the introduction of cost-effective generic drugs on the Pharmaceutical Benefits Scheme.[110]

and that

> Any delay caused to the entry of generic medicines by these free trade provisions will have quite deleterious effects on the pricing and availability of drugs.[111]

16.90 The Doctors Reform Society stated that

> the increased patent rights for pharmaceutical companies will delay the entry of new generic drugs onto the market from the generic industry, maintaining higher prices for longer and thus higher costs for the PBS and ultimately to the Australian people.[112]

Evergreening

16.91 The Committee received submissions raising concerns of evergreening, which is the name given to the process in which patent

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109 The DFAT Factsheet on the PBS can be found at http://www.dfat.gov.au/trade/negotiations/us_fta/backgrounder/pbs.html, viewed on 13 June 2004.

110 Dr Ken Harvey, *Transcript of Evidence*, 20 April 2004, p. 4. This view was echoed in *Submission 70*, from the Australia Institute.

111 Dr Ken Harvey, *Transcript of Evidence*, 20 April 2004, p. 4.

112 Dr Tracy Schrader, *Transcript of Evidence*, 5 May 2004, p. 22.

holders maintain exclusivity by progressively filing a series of use patents based around the product, thereby delaying generic manufacturers entering the market. The Committee understands that this process will effectively extend the patent holder's monopoly.

> A literal interpretation of Article 17.10.5(a)(ii) would suggest that abuse of the system through the 'evergreening' of patents will be further encouraged.[113]

16.92 Practices such as evergreening as a result of notification by generic producers are a significant problem in the United States, specifically

> Experience in the United States shows that manufacturers routinely use this requirement to take legal action against would-be competitors in a bid to protect prices and market share.[114]

No delay for Generics

16.93 The Committee notes that some of the concerns about the impact of the entry onto the market by generics may have arisen because of evergreening and the use and effect of Bolar provisions in the United States. For the Australasian Society for HIV Medicine, one of their main concerns with the Agreement is

> that it potentially undermines the use of 'Bolar Provisions', which were included in TRIPS and allow for the immediate release of generic products upon the expiration of a patent.[115]

16.94 The Committee accepts however that the situation in Australia will be different due to our different legal and regulatory environment, based on evidence from Medicines Australia, who stated in their submission that

> these provisions merely clarify that a generic medicine cannot be marketed while a patent is on foot – this is the existing law with an element of greater transparency … Notification provisions on their own do not delay or impede the capacity of generic manufacturers to prepare for generic production. The rules for this are set out in the Intellectual Property laws, and these rules are unchanged by the FTA.[116]

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113 Generic Medicines Industry Association Pty Ltd., *Submission 83*, p. 2.

114 National Association of People Living with HIV / AIDS, *Submission 14*, p. 3.

115 Australasian Society for HIV Medicine, *Submission 75*, p. 3.

116 Medicines Australia, *Submission 28*, p. 19, p. 22.

16.95 The Committee received advice from Mr Deady that noted Australia's awareness of the potential impact on the generics industry which may have been caused by the AUSFTA.

> We certainly were very conscious in the IP negotiations to ensure that, regarding any commitments we entered into in the patents area in relation to the marketing approval processes for generic drugs, this would not in any way damage the generics industry in Australia and feed into delays that could impact on the Pharmaceutical Benefits Scheme.[117]

16.96 The Committee recognises the concerns expressed by the community in respect of this important matter and are mindful of the impact that it may have on our world class health system.

Recommendation 20

The Committee recommends that in respect of the changes to the *Therapeutic Goods Administration Act 1989* and with respect to the valuable input of the innovator companies, care is to be taken in the implementation to recognise the unique position that generic pharmaceutical companies provide to the Australian community through health programs.

And, accordingly it is essential that in drafting the legislation, there should be no mechanism that will cause undue delay of the entry to the market of generic pharmaceuticals.

Agriculture and Veterinary Chemicals

16.97 The Committee understands that some changes will be needed to the *Agriculture and Veterinary Chemicals Act 1994* 'to change the scheme currently in place, including in relation to the time period for protection of agriculture chemical test data'.[118]

16.98 The Committee received a submission that noted

> The WA Farmers Federation and generic agricultural chemical manufacturers have expressed concern that the Intellectual Property Chapter of the Agreement extends the

117 Mr Stephen Deady, *Committee Briefing*, 2 April 2004, p. 47.

118 NIA, Annex 8.

> data protection for new data to 10 years and that is not consistent with proposed new data protection legislation.[119]

16.99 However, the Committee notes that in the same submission

> The Commonwealth Department of Agriculture Fisheries and Forestry, has advised, however, that the AUSFTA is consistent with the proposed new data protection legislation and that the obligation extends to eight years only for new data, where it is not accompanied by the conjoint approvals of certain new uses, which in the proposal attracts the three additional one-year extensions.[120]

16.100 Similar concerns were expressed to the Committee by the National Farmers Federation (NFF).

> Moreover, NFF was concerned that significant pressure may be forthcoming from the US to extend the period of data protection for agricultural and veterinary chemicals under current proposed legislative amendments being considered by the Australian Government. NFF believes there is strong justification for Australia maintaining shorter phases of data protection than in the US, helping to ensure generic market competition and cost effective access to chemicals for Australian farmers. NFF understands this outcome was achieved under the negotiated agreement.[121]

16.101 The Committee notes that 'these changes are in line with a scheme already under consideration'.[122] This was restated to the Committee.

> The change is consistent with the scheme that the Department of Agriculture has been working on for some time which is the eight plus one plus one plus one scheme …[123]

Enforcement

16.102 The enforcement articles in the AUSFTA relate to the entire IP Chapter and include obligations in respect of civil and administrative procedures and remedies, provisional measures, border measures,

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119 WA Government, *Submission 128,* p. 4.

120 WA Government, *Submission 128,* p. 4.

121 National Farmers Federation, *Submission 153,* p. 7.

122 DFAT, *Guide to the Agreement,* p. 100.

123 Ms Toni Harmer, *Committee Briefing,* 2 April 2004, p. 65.

criminal procedures and procedures in relation to Internet Service Provider (ISP) liability.[124]

16.103 The Committee recognises that the enforcement of intellectual property rights is just as important as the legal rights of ownership. The Committee also notes that some of the changes are consistent with some of the recommendations in the House of Representatives Standing Committee on Legal and Constitutional Affairs' December 2000 report *Cracking down on copycats: enforcement of copyright in Australia*.[125]

16.104 In the course of the inquiry, the Committee generally heard positive comments about the changes to enforcement.[126] Ms Caroline Morgan, from CAL, expressed support for the requirement that Australia strengthen its enforcement measures to combat piracy. This was a view also outlined in CAL's written submission.[127]

16.105 Other organisations, while supportive of the new enforcement provisions, made comments to the Committee on specific drafting issues such as ex-officio actions in border measures, presumptions in relation to copyright material and additional damages and statutory damages.[128]

16.106 The Committee expressed a concern early in the inquiry that the new provisions may lead to arrests where there has been no commercial element, or scenarios such as in the United States where adolescents have had recorded criminal convictions of what would be considered in Australia as minor copyright infringements. The Committee was reassured that 'the provisions for the criminal sanctions are for significant, wilful infringements done essentially for profit'.[129]

16.107 One organisation was concerned that

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124 DFAT, *Guide to the Agreement*, p. 102.

125 This Report is available electronically at http://www.aph.gov.au/house/committee/laca/copyrightenforcement/contents.htm (viewed on 14 June 2004).

126 The following organisations support the changes in this area: Australian Information Industry Association, *Transcript of Evidence*, 19 April 2004, p. 26; Business Software Association of Australia, *Submission 126*; APRA/AMCOS, *Submission 156*.

127 Ms Caroline Morgan, *Transcript of Evidence*, 19 April 2004, p. 87, and Copyright Agency Ltd., *Submission 196*.

128 Australian Film Industry Coalition, *Submission 161*.

129 Mr Stephen Fox, *Committee Briefing*, 2 April 2004, p. 70.

> criminalisation of consumer behaviour as a response to monopoly market failure is in our view poor public policy.[130]

16.108 The Committee is satisfied that the provisions of the AUSFTA will be implemented in a such a way as that it will only combat infringements made for significant and wilful commercial gain.

Internet Service Provider (ISP) Liability

16.109 The Internet has no doubt provided society with a new medium by which to communicate ideas and disseminate information. In the context of copyright infringements, it has also allowed for wider and more frequent illegal non-remunerated copying. As consumers log onto the Internet through a Service Provider there has been considerable debate as to the legal liability of who is at fault should an infringement occur. This issue has been addressed in part by current legislation; however it has not addressed the concerns of all parties.

16.110 The AUSFTA contains a framework which will require legislative change for

> a scheme for immunity of Internet Service Providers (ISPs) for potential copyright infringement in return for compliance with a scheme for the removal of allegedly infringing material on their networks.[131]

16.111 The Attorney-General's Department advised the Committee that the scheme will balance the interests of right holders and the interests of the service providers, [132] but the Committee is aware of some concerns that such a scheme's introduction may cause similar privacy issues as have been encountered in the US, some of which are continuing to receive legal attention and social debate.[133]

16.112 The Committee was assured that although the wording in the AUSFTA closely resembles some of the provisions of the US legislation it is not the US system and provides Australia some flexibility in implementation. The Committee was informed that

> to some extent I think our implementation will be informed by some of the issues that the US have encountered

130 Australian Consumers Association, *Submission 195*, p. 16.

131 NIA, Annex 8.

132 Mr Stephen Fox, *Committee Briefing*, 2 April 2004, p. 68.

133 Dr Matthew Rimmer, *Transcript of Evidence*, 4 May 2004, p. 57.

> domestically. We do not necessarily have to do it exactly the way that they do it.[134]

16.113 The Committee acknowledges that several organisations are highly in favour of this scheme,[135] noting that the absence of such schemes is a detriment to consumers, and even to investment.

> First, the penetration of online gaming is being impeded because the absence of ISP liability provides distributors with little protection; hence Australian consumers are not gaining access to the latest form of games distribution as readily as their counterparts elsewhere in the developed world, meanwhile developers are not investing as much into the local production of online games as the market does not justify such investment.[136]

16.114 Some organisations were concerned that the framework contained in the AUSFTA does not address the emerging issue of illegal peer to peer file sharing,[137] while other organisations supported the current arrangements in that 'disclosure arrangements in respect of users continue to be a court based process'.[138] Of some concern was the possible infringement on consumer's privacy and that allowing access to personal details may provide a dangerous precedent by other claimants such as debt collectors, credit referees and other commercial agents.[139]

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134 Ms Toni Harmer, *Committee Briefing*, 2 April 2004, p. 69.

135 Interactive Entertainment Association of Australia, *Submission 56*; Business Software Association of Australia, *Submission 126*; Commercial Television Australia, *Submission 145*; APRA / AMCOS, *Submission 156*; Australian Film Industry Coalition, *Submission 161*; Copyright Agency Ltd, *Submission 195*; Viscopy, *Submission 214*.

136 Interactive Entertainment Association of Australia, *Submission* 56, p. 2.

137 Business Software Association of Australia, *Submission 126*; Commercial Television Australia, *Submission 145*; APRA / AMCOS, *Submission 156*; Australian Film Industry Coalition, *Submission 161*.

138 Australian Vice-Chancellors' Committee, *Submission 189*, p. 6.

139 Australian Consumers Association, *Submission 195*, p. 18.

Recommendation 21

The Committee recommends that a scheme that allows for copyright owners to engage with Internet Service Providers and subscribers to deal with allegedly infringing copyright material on the Internet be introduced in Australia that is consistent with the requirements of the AUSFTA. In doing so, the Attorney-General's Department and the Department of Communications, Information Technology and the Arts should

- **take note of the issues encountered by the US as outlined in this Report**
- **tailor a scheme to the Australian legal and social environment**
- **monitor the issue of peer to peer file sharing.**

E-Commerce

16.115 Chapter 16 of the Agreement sets out a number of provisions designed to ensure that trade conducted electronically between Australia and the US remains free. The Chapter consists of nine articles dealing with the electronic supply of services, customs duties, non-discriminatory treatment of digital products, authentication and digital certificates, online consumer protection, paperless trading and definition of terms.

16.116 The Committee understands that the underlying rationale for the E-commerce chapter is reflected in the text of Article 16.1, which states

> the Parties recognise the economic growth and opportunity that electronic commerce provides, the importance of avoiding barriers to its use and development, and the applicability of the WTO Agreement to measures affecting electronic commerce.[140]

16.117 The *Guide to the Agreement* states that the Chapter also establishes useful precedents for developing a liberal trading environment for electronic commerce in the region and globally.[141]

140 AUSFTA, Article 16.1.

141 DFAT, *Guide to the Agreement*, p. 89.

16.118 The Committee received one submission that noted

> we are anxious that the FTA does not interfere with any established international projects and protocols in this area, undertaken to preserve visual copyright in the new internet and digital circumstances.[142]

16.119 The NIA states that Australia will still be able to regulate for public policy purposes.[143]

142 Viscopy, *Submission 214,* p. 3.

143 NIA, para. 8.