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Intellectual property rights and the Australia—US Free Trade Agreement

The Australia US Free Trade Agreement (AUSFTA) covers a number of issues and this paper deals with Chapter 17 on Intellectual Property Rights (IPRs). It first examines AUSFTA's attempts to entrench or enhance Australia's already strong IPRs. The general economic arguments are examined as well as the Australian and US interests in stronger IPRs. Stronger IPRs protect rights holders from competition and so sit awkwardly with the aims of free trade. Some specific concerns have been expressed such as AUSFTA's implications when producers use copyright protection measures to practice price discrimination around the world and against the interests of Australian consumers.

David Richardson
Economics, Commerce and Industrial Relations Section
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Enquiries

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Contents

Executive summary

The purpose of this paper is to examine the provisions on intellectual property rights (IPRs) in the Australia United States Free Trade Agreement (AUSFTA). IPRs are a temporary means of giving the creator of a 'work' the exclusive right to benefit from that 'work'. A 'work' here refers to expressions and inventions. The justification for IPRs is that rewards to the creator and protection from competition are necessary to encourage innovation and creativity. Anti-competitive conduct is tolerated for that reason. IPRs fit awkwardly in an agreement that has the aim of advancing free trade. Free trade aims to eliminate or reduce government interference in trade across international borders. By contrast, stronger IPRs interfere in the market for the benefit of rights holders. Generally the AUSFTA aims to strengthen the protection given to holders of IPRs.

There has been an international trend towards more protection for IPRs and the US has been a prime mover in this. The US has been able to persuade other countries to include IPRs in trade negotiations. One result was the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) under the auspices of the World Trade Organisation. In addition the coverage of IPRs has extended into new areas such as software and genetic material. Since TRIPS, the US has engaged in a series of free trade agreements in which it has promoted stronger IPRs than provided under TRIPS.

The economic arguments are generally concerned with the anti-competitive nature of IPRs and how they have been abused in the past. Where IPRs are given there has also been a long history of foreign competition against the IPR holders from countries in which IPRs may not be respected. The US itself was a case in point and its failure to protect IPRs was a concern to Europeans in the 19th century. More recently, the US in particular has been concerned about 'unfair' infringement of IPRs on the part of less developed Asian economies.

Australia's interests need to be taken into account. While there has not been a comprehensive economic evaluation of IPRs, the Productivity Commission has found that, as a net importer of IPRs, Australia would lose more than it gains by strengthening IPRs. The net economic impact is thus likely to be negative. Unfortunately the economic analysis of the AUSFTA that the Government commissioned did not attempt to quantify the impact of IPRs. For example, the AUSFTA would extend the duration of copyright by 20 years, but the analysis does not discuss what the net benefits or costs might be. The Australian position is to assert that there are benefits in harmonising legislation with such a large economy as that of the US.

The US motive for stronger IPRs seems clearer, especially in statements from the US Trade Representative and business interests. The US has a disproportionately high share of IPRs and products that contain IPRs in its exports. The US has (naturally) been keen to promote the fortunes of its own IPR holders; for example, it had extended the duration of copyright protection in the US to continue protection for early Mickey Mouse works

whose protection was about to expire. The US has long been concerned about Australia's liberal approach to 'parallel importation', which refers to the importation of protected works by someone other than the rights owner or agent of the rights owner. Yet there is overwhelming evidence to the effect that Australian consumers are worse off to the benefit of overseas copyright holders and licensees when parallel important is prevented.

The issues that arise in the context of the AUSFTA reflect the general tension between the goals of promoting competition in the economy at large and providing protection for new 'works'. However, those tensions take on new meaning in the context of commercial relations between Australia and the US. There are more detailed arguments about specific areas and industries that are affected by the AUSFTA. Areas of concern include the breadth and coverage of IPRs including in new areas such as gene patents. Some of the concerns are not so much that the AUSFTA pushes Australia further than it has gone in the past, but that the agreement would prevent any retreat from the present protection for IPRs and its attendant anti-competitive features.

Technical protection measures have been a concern in Australia because copyright holders have been able to use technological measures and Australia's laws against circumvention to discriminate against Australian consumers. For example, the prices charged for some computer games in Australia are much higher than the prices paid by consumers overseas. To a large extent the AUSFTA facilitates these practices. Technological measures that permit such things as 'regional coding' of DVDs prevent access to cheaper overseas alternatives and are a departure from the Australian trend towards permitting more parallel importation of copyright material. Recent Australian legislation and the AUSFTA entrench the ability of copyright owners to use technological measures against parallel importation. This is happening despite concerns from the Australian Competition and Consumer Commission (ACCC) and recommendations from the Digital Agenda Review in favour of the circumvention of technical measures for legitimate purposes.

In other respects there are trends in the opposite direction. Courts in the US and Europe have forced Microsoft to open up its technology to allow competitors to offer Windows-compatible products. Big business, the Australian Government and international standards promote interoperability so that, at least in principle, everything can plug into everything else. Having bought one brand should not preclude choice in the future. Interoperability goals are being frustrated by strong IPRs that allow manufacturers to prevent their products being used in conjunction with cheaper alternatives.

IPRs have always been acknowledged as a temporary protection from competition. There is seen to be a trade-off between the anti-competitive aspects of IPRs on the one hand and the desirability of encouraging innovation on the other. There is no simple answer to balancing those competing objectives. However, the issue is that Australia, and the rest of the world, will be pushed too far in the direction of IPRs that promote monopoly power. The AUSFTA treatment of IPRs seems to be detrimental to Australia's interests. However, IPRs are only one aspect of the agreement, albeit an important one.

Introduction

On 8 February 2004 Trade Minister, Mark Vaile announced that Australia and the US had agreed to the Australia United States Free Trade Agreement (AUSFTA).[1] The full text was released on 4 March 2004.[2] An important part of the agreement is chapter 17 on intellectual property rights (IPRs), which covers copyright, trademarks, patents and industrial design. [3]

From Australia's perspective some of the main developments in chapter 17 are:

- commitments to reduce differences in law and practice and participate in international harmonisation efforts with respect to trademarks (article 17.2.11)
- an increase in the duration of copyright protection, for individuals to the life of the author, plus 70 years (currently 50 years), with similar increases for corporations (17.4.4)
- strengthened protection and remedies against the circumvention of technological measures used by authors and others to restrict access to their work (17.4.7), such as coding of CDs to restrict how and where they might be used
- protection of encrypted 'program-carrying satellite signals', thereby extending the present regime to include foreign and other transmissions not now covered by the *Broadcasting Services Act 1992* (17.7) and to criminalise end-users of unauthorised decryptions, and
- additional remedies for copyright infringements.

Generally the agreement aims to strengthen the protection given to holders of IPRs.

According to the OECD, IPRs give 'the innovator an exclusive legal right to the economic exploitation of his [sic] invention for a period of time … the ability to exclude imitation is the most important aspect of the property rights granted to the innovator'.[4] Policy towards IPRs seeks to balance two competing objectives. On the one hand, IPRs are a restraint on commerce and it is not immediately obvious why measures to strengthen IPRs should be included in a free trade agreement (FTA) unless the aim is to weaken them. IPRs can be, and have been, used to preserve monopoly power on the part of big business and to inhibit technological developments. On the other hand, IPRs are designed to encourage innovation and the introduction of new products and processes that tend to benefit the community as a whole. Advocates of IPRs see temporary monopolies as the incentive required to elicit innovation. Those arguments are discussed further below.

This paper begins by briefly discussing recent international experience in the protection of IPRs. Generally IPRs have been strengthened by including new areas, extending periods of protection and similar means. The paper then examines the economic arguments

surrounding the protection of IPRs. Traditionally there has been strong scepticism about the desirability of granting IPRs. IPRs are a pragmatic means of stimulating innovation and creativity by enabling owners to earn an income that might not be earned if their IPRs were not protected. However, domestic IPRs can be undermined if other countries do not also protect them. On balance, as argued below, a small country like Australia is likely to benefit from lower protection for IPRs while larger economies, such as the US, Japan and Europe, are likely to benefit from higher protection for IPRs. This is, no doubt, one of the motives behind the US push for encouraging IPRs. An examination of those motives suggests that the present agreement is, at least in part, an important precedent for subsequent free trade agreements (FTAs) likely to be concluded by the US. The AUSFTA is the first bilateral agreement the US has negotiated with a 'developed' economy. There are also important implications for the present World Trade Organisation (WTO) Doha round of trade negotiations.[5] The paper then considers some of the more specific issues in more detail.

Recent experience

The OECD has pointed out that the trend in the main OECD countries has been to provide stronger patent rights through reinforcing the exclusive rights held by patent holders, expanding the subject matter they cover and providing for easier enforcement.[6] This trend has coincided with a harmonisation of patent regimes especially between the US, Japan and Europe. Thus, harmonisation has involved moving to the higher level of protection for IPRs. The OECD offers the following summary of the main developments:

> *Extended coverage of intellectual property protection.* Areas that used to fall outside the patent subject matter are now partially or totally included, notably software, business methods and some inventions close to basic science, although differences remain across jurisdictions (which are significant in the case of business methods).
>
> *Patents confer broader protection, especially in new areas.* Patent claims in new areas often cover far more than what the inventor actually discovered or invented. Some of the current patenting practices in new areas may extend protection to a broad range of applications unknown at the time of patenting (e.g. uses of genes).
>
> *Filing procedures are increasingly flexible and less costly, notably at the international level.* Several mechanisms to defer filing and examination procedures at patent offices, such as the system introduced by the Patent Cooperation Treaty (PCT), have transformed the initial application into a sort of option to patent that allows inventors to retain the right to patent in foreign countries for longer periods of time.
>
> *The rights of patent holders are more frequently and strongly enforced in court.* Since the creation of [the US centralised Court of Appeal of the Federal Circuit (CAFC)] in 1982, the rate of invalidation of patents by courts has substantially decreased in the United States. Efforts to create specialised courts are ongoing in other jurisdictions: legislation is expected to be passed next year in Japan in order to create a high court specialised in IPRs, and the implementation of a centralised patent litigation system is

> currently under discussion in Europe. Moreover, damage awards in patent litigation trials have substantially increased in recent years.
>
> *Restrictions on the exemption for research use*. Recent developments indicate that the conditions to apply research exemptions may become increasingly restrictive in the future. In 2002, the CAFC held that research exemptions would be granted in the United States when research is solely for amusement, to satisfy idle curiosity, or for strict philosophical inquiry.[7]

These developments have raised a good deal of concern about less rigorous patenting requirements. Tests are easier to pass and the subject matter has widened considerably. The extension of patents to software-related 'inventions' has generated very heated debate. Software applications in the US are subject to lower requirements than in Japan and Europe. 'Business methods' have been awarded patents in the US but not in Japan and Europe. In the latter they are not deemed 'sufficiently technical in nature'.[8]

The OECD is concerned that the interaction of patents and copyright may be an obstacle to the diffusion of technology in the software area since 'patents protect the invention whereas copyright forbids the publicity of the way in which the invention is implemented by forbidding reverse engineering, [especially since] software patents do not have to reveal their source code'.[9]

Not only is there concern about the tendency for stronger patent protection, but the OECD also laments the 'paucity of economic evaluation of the patent system' and points out that most of the 'changes to patent regimes implemented over the past two decades were not based on hard evidence or economic analysis'.[10] The theme of stronger patent protection is taken up below.

So far this section has concentrated on patents; however, there has also been a parallel tendency to toughen up protections for other IPRs. The European Union (EU) position on the duration of copyright protection is a good case study showing that harmonisation initiatives tend to strengthen IPRs. The Berne Convention on copyright, which goes back to 1886, provides for a term of protection for the life of the author and 50 years after the author's death. Before harmonisation many EU members used the Berne Convention minimum, but some offered more protection. Germany was the highest and used life plus 70 years. The EU members wanted to harmonise their laws. The debate on harmonisation settled on the strongest regime, 70 years, rather than on the Berne model. This was implemented in 1995. In 1998 the US also moved to life plus 70.[11]

The trend towards greater protection of IPRs generally has been reinforced by the WTO's Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS), which was negotiated as part of the Uruguay Round (1986–94).[12] This agreement put the full range of IPRs into the WTO rules for the first time, and those are the rules under which the multilateral trading system operates. While the rules are administered by the WTO, they reflect the negotiations among members and any agreements they reach. The WTO claims

that, as intellectual property became more important in world trade, the differences in the extent and enforcement of IPR protection became a source of tension in international economic relations. Hence the aim of introducing more order and predictability through internationally agreed rules for IPRs and for the systematic settlement of disputes. The US played a significant role in this development. One observer has reminded us that, 'in 1982 the United States was alone in calling for developing GATT disciplines against trade in counterfeit products, an idea that was viewed as an irritation by most countries'.[13] Developing countries wanted the opposite, to tilt the balance in favour of the free dissemination of technologies that could be useful in the development agenda. The US was able to enlist the support of the EU and Japan and won the day. By 1986 the US obtained commitments to include IPRs in the new Uruguay Round of negotiations. The result of that was TRIPS, as mentioned above.

The incorporation of IPRs into the WTO agenda has not been without its critics. One critic, who is also one of the world's most influential advocates of free trade, is Professor Jagdish Bhagwati, a Professor of Economics at Columbia University. Bhagwati has also served as Economic Policy Advisor to the Director-General, GATT (1991–93), Special Adviser to the UN on Globalization and External Adviser to the WTO (2002–03). In his view, intellectual property protection is:

> …a transfer from most of the poor countries to the rich ones and hence as an item that does not belong to the WTO, whose organising principle should be the inclusion of *mutually gainful* transactions, as indeed noncoercive trade is …[14]

The case of developing economies is complicated, however, because without an established body of antitrust law, there is nothing to keep in check the monopoly powers that are difficult enough to control in developed economies. As a result, according to another observer, 'countries expose themselves to potential anticompetitive tactics by patent-wielding monopolists'.[15]

The economic arguments

As noted, IPRs have long been recognised as a pragmatic way of encouraging innovation and creativity. However, they have also long been recognised as a means of impeding competition and encouraging anti-competitive practices. That tension between the general goal of a competitive economic system and the pragmatic notion of protecting a 'work' is a consistent theme in the discussion of IPRs. For example, it is alleged that big corporations used patents as a means of getting around the *Sherman Antitrust Act* (1890), which prohibited corporations from acting together in an anti-competitive manner.[16] Through devices such as 'patent pools', companies were able to collude, divide up the market and exclude new competitors. 'Patent pools' are arrangements between a group of companies for the sharing of IPRs through cross-licensing and other means. IPRs have been criticised by two of last century's most prominent free-market economists, Fredrick Hayek and Milton Friedman, and one from the previous century, Alfred Marshall. In 1948 Hayek said:

> The problem of the prevention of monopoly … is raised much more acutely in certain other fields to which the concept of property has been extended only in recent times. I am thinking here of the extensions of the concept of property to such rights and privileges as patents for inventions, copyright, trade-marks, and the like. It seems to me beyond doubt that in these fields a slavish application of the concept of property as it has been developed for material things has done a great deal to foster the growth of monopoly and that here drastic reforms may be required if competition is to be made to work. [17]

In a similar vein, Milton Friedman wrote in 1962:

> There are costs involved [in the patent system]. For one thing, there are many 'inventions' that are not patentable … Insofar as the same kind of ability is required for the one kind of invention as the other, the existence of patents tends to divert activity to patentable inventions. For another, trivial patents, or patents that would be of dubious legality if contested in court, are often used as a device for maintaining private collusive arrangements that would otherwise be more difficult or impossible to maintain.[18]

This raises an extremely important issue to do with the role of pure or basic research. It is arguable that many universities these days are captured by incentive structures and seek to promote scientific and other pursuits that make money ahead of contributions to basic scientific and other knowledge. The difficulties that Universities have in obtaining funds from more traditional sources may reinforce this decision. Activities are directed therefore into areas that earn immediate rewards. These may overwhelm incentives to pursue the pure research that might be behind advances that have no immediate application, but have potentially massive benefits in the future. An early example is the work on quantum mechanics in the early twentieth century that became the basis of the transistor and computer chip many years later. The incentive structures encourage secrecy on the part of researchers and work against the collaborative approach to science.[19] The changes in incentives that alter the type of research and development (R&D) undertaken in society raise very important issues. The OECD's major macroeconomic study on the sources of economic growth points to very strong contributions from R&D. However, there are still no answers to basic questions about the type of R&D that should be performed in universities, whether IPRs are required and whether they encourage the 'right' directions for R&D.[20]

To take the arguments on bias in the direction of R&D further is beyond the scope of this paper, but the role of IPRs has to be taken into account in the context of the totality of the pressures and opportunities facing the scientific community as a whole. The other main point Friedman makes is that patents can be used as a legal tactic to intimidate competitors and so preserve monopoly positions on the part of an incumbent producer. This point is taken up further below.

Alfred Marshall, in his *Principles of Economics*, first published in 1890, discussed the issue of technological development driving out small manufacturers. He was also able to put the issue of patents in an international context:

> If one patent is taken out, it is often necessary to 'block' it, by patenting other methods of arriving at the same result; the patentee does not expect to use them himself, but he wants to prevent others from using them. All this involves worry and loss of time and money: and the large manufacturer prefers to keep his improvement to himself and get what benefit he can by using it. While if the small manufacturer takes out a patent, he is likely to be harassed by infringements: and even though he may win 'with costs' the actions in which he tries to defend himself, he is sure to be ruined by them if they are numerous. It is generally in the public interest that an improvement should be published, even though it is at the same time patented. But if it is patented in England and not in other countries, as is often the case, English manufacturers may not use it, even though they were just on the point of finding it out for themselves before it was patented; while foreign manufacturers learn all about it and can use it freely.[21]

Marshall's comments apply equally today. In fact, each of the above authors expressed very serious concern that IPRs were open to abuse. The international aspect offered by Marshall is also interesting. In Marshall's time England seems to have been the country most developed in the protection of IPRs. Certainly patents were in part motivated by the aim of encouraging inventors to make their discoveries available to other researchers. The monopoly rights they earned were an incentive for researchers to reveal their innovations. However, English patent and other IPRs did not always apply in other jurisdictions, giving rise to the 'free-rider' problem from overseas. For example, the US itself failed to respect patents until the end of the 19th century. Its behaviour was one of the motivations for the 1883 Paris Convention on patents, trade marks and designs as well as the 1886 Berne Convention on copyright.[22]

The argument in the paper to this point has concentrated on patents. However, there is an analogous set of arguments associated with copyright protection. Some of those arguments were put in a petition to the US Supreme Court against the application of the Copyright Term Extension Act of 1998. The argument was put on behalf of 17 leading economist who included five Nobel Laureates. There was particular concern about the additional 'incentive' to creators due to the additional term of copyright. In an example they used the generous assumption that there would be a constant annual flow of revenue for the next 80 years prior to the change and 100 years after the extension. It goes without saying that the prospect of a dollar in 100 years time must be so uncertain as to warrant a very heavy discount factor. However, to be generous to the incentive argument, the authors used a modest discount factor of 7 per cent. On that basis, for every $1 per annum, the present value of the stream of income would increase from $14.22 to $14.27. For the individual creator the extra 'incentive' is trivial.[23] Against that, for the monopolist with a work still in demand and with copyright about to expire, the extension of copyright does not provide any incentive to create, it merely prevents others from distributing the work and so permits the copyright owner to enjoy maximum monopoly profit. The fact that the extension is made retrospectively to benefit the owners of works that already exist suggests that the real concern on the part of policy-makers is not necessarily the incentive to create.

Over the last few decades a concern has been that IPRs have not been respected in today's 'newly industrialising countries', such as China, Vietnam and other developing countries. This was part of the motivation for initiating and finally agreeing to the TRIPS, which came into effect in January 1995.

It is possible that many people might accept temporary market dominance, and perhaps the Friedman-bias in research in exchange for the promise of more innovation and discovery. However, there are numerous instances in history where patents have been used to stifle innovation along the lines that Marshall identified. A leading author in this area, Professor Michael Perelman, has documented the stifling effects that patents have had on industries, including the radio, aircraft and semiconductor industries. The Wright Brothers are credited with the birth of powered air flight; however, they immediately patented their ideas and were responsible for inhibiting competitors until, during World War I, the US Navy forced a licensing arrangement on them that allowed others to enter the industry. After that, aircraft development accelerated.[24] The US military has intervened in other industries in order to prevent patents stifling development in areas in which it has an interest. Those examples could be multiplied, but for present purposes it is only necessary to note the effects that patents may have in critical areas. Of course, Australia is akin to the foreign manufacturers that Marshall mentioned in the quotation above. Australia can join the US and enforce strong patent rights that may stifle innovation or it can resist stronger-than-necessary IPRs. Australia may well achieve some competitive advantage through weaker IPRs, just as the foreign countries did against Marshall's England. Indeed, the efforts of the US Administration presumably are predicated on the belief that the US competitive advantage is enhanced if IPRs are enforced as strongly in the rest of the world as they are in the US.

Australian interests

At this point it is useful to examine some of the Productivity Commission's empirical work on IPRs.[25] Essentially, the commission found that, as a net importer of IPRs, Australia would lose more than it gained by granting stronger IPRs.[26] Specifically, the share of copyright content in Australia's imports in 1996–97 was 0.38 per cent of GDP while the share of copyright in Australia's exports was 0.16 per cent of GDP. Similarly, the patent content of imports was 0.19 per cent of GDP compared with 0.07 per cent of GDP for exports.[27] This gives general support to the view that, in the case of a small country like Australia, there are likely to be negative economic effects as a result of any attempt to strengthen IPRs, whether that involves:

- lengthening the period of the protection
- broadening the scope of IPRs, or
- easing requirements for obtaining IPRs.

The Productivity Commission suggests that strong IPRs are turning the terms of trade against Australia. An observation on the commission's work may be in order. As they are presented, the estimates of the intellectual content of the goods and services examined seem modest. However, most of Australia's merchandise imports, worth 18 per cent of GDP, are manufactured goods that presumably would be protected by some form of IPR. (US merchandise exports to Australia are 3 per cent of Australian GDP.) On the other hand, Australia's exports of machinery, transport equipment and other manufactures are a more modest 3.6 per cent of GDP. The rest of Australia's goods exports are 11.8 per cent of GDP, most of which are commodities or simply transformed commodities such as animal skins, sugar and coal and metal ores.[28] These figures suggests that goods likely to have some sort of IPR content dominate Australia's goods imports, but are a modest share of Australia's goods exports. The ratio is of the order of five to one.

For present purposes it is also useful to look at the actual value of royalties and licence fees as recorded in Australia's balance of payments.[29] In 2002–03 Australia paid royalties and licence fees of $1.82 billion to the rest of the world. In return it received royalties and licence fees of $618 million. Those figures represented 0.24 and 0.08 per cent of GDP respectively.[30] This reinforces the Productivity Commission's findings.

Against all of the arguments put here and elsewhere, the Australian Government has put the following view:

> The inclusion of the Intellectual Property Chapter recognises the importance of a strong intellectual property regime to economic growth through trade and investment. Australians will benefit through closer harmonisation of our already strong intellectual property regime with that of the largest intellectual property market in the world.
>
> 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. Likewise, the ability of Australian innovators to attract investment from the US will be enhanced through greater familiarity and confidence of those investors with our legal system.[31]

The essence of the above seems to be that:

- a stronger IPR regime will encourage 'growth through trade and investment',
- closer alignment of IPRs will increase exports to the US, and
- closer alignment of IPRs will increase US investment in Australia.

Despite these propositions, there does not appear to be any examples that show Australia has missed out, or evidence that it might miss out, on investment or trade opportunities through inadequate levels of protection for IPRs.

While the above are some of the main themes of the economic debate on IPRs, it is beyond the scope of this paper to provide the full economic analysis that, as noted above, the OECD found missing. In any case, the arguments in this section are in the abstract and do not directly answer the immediate questions, such as: 'are there net benefits to Australia from the extension of the copyright duration by 20 years?' The work of the Productivity Commission allows a fairly good guess, but it is still just that.

The Australian Government commissioned some economic modelling on the AUSFTA. The Centre for International Economics prepared two reports, the first of which was released before the agreement and so did not explicitly examine IPRs. The only aspect of IPRs discussed in the first report was parallel importation but, since it was not possible to anticipate the content of the agreement, the report did not model possible changes in parallel importation.[32] In the second report, which was written after the details were known, there is some discussion of IPRs but no quantification. For example, in discussing the extension of the term of copyright protection, mention is made of the lack of any additional 'significant incentive' and the costs to consumers. But the report then notes 'it is difficult to quantify the extent of this effect'.[33] The second report also fails to quantify the other IPR issues it identifies.

So what is the US motive?

It is important to recognise that many of the measures included in the AUSFTA are not necessarily seen as addressing a problem in the Australia–US bilateral relationship. Rather, there appear to have been pressures on the US negotiators to establish strong IPR regimes as precedents for further free-trade agreements that the US may want to negotiate. A very important one coming up is the Free Trade Area of the Americas, which is intended to include the 34 countries in the continent. The Industry Functional Advisory Committee on Intellectual Property Rights for Trade Policy Matters (IFAC-3) has been working closely with the US negotiators. This body includes representatives of the Recording Industry Association of America, the Intellectual Property Owners Association, Levi Strauss and Company, Pfizer, Inc., Eli Lilly and Company, Merck & Company Inc., and Time Warner. The committee's role was to give the President and Congress an 'advisory opinion as to whether and to what extent the agreement [AUSFTA] promotes the economic interests of the United States'. The IFAC-3 commented on the AUSFTA, saying:

> IFAC-3 strongly supports the chapter on intellectual property and believes that, on the whole, it establishes key precedential provisions to be included in the other FTAs now being negotiated, including the FTAA. IFAC-3 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 ensuring that the model FTA intellectual property text, which has been carefully developed through the course of negotiation of six FTAs, continues to form the basis for these other agreements.[34]

Moreover, the IFAC-3 observes that while FTAs are a labour-intensive means of negotiating:

> FTA negotiations provide the most effective approach currently available to the United States for improving global intellectual property protection. 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 negotiating partner.[35]

In an important opinion piece, US Trade Representative Robert Zoellick reinforced this theme and made it clear that US frustration with multilateral negotiations has caused it to pursue FTAs and so win concessions on items that have been hard to win in multilateral fora.[36]

The US has long expressed concern about parallel imports of copyright goods in Australia. Parallel importation involves an importer who is unrelated to the copyright holder importing copyright goods that have been legally purchased in another country. Provided they are purchased legally, the copyright owner would have received any consideration that was legally due. Parallel importation is now allowed in the case of sound recordings, books (if not released within a month of overseas release), and software (see below). However, the US wants Australia to ban parallel importation so that only the copyright holder can import or authorise the importation of copyright material. US concerns about Australia's IPR regime had been spelt out in the annual US Trade Representative Reports.[37] However, earlier work by the Prices Surveillance Authority established that the restrictions that then applied to parallel importation had the effect of artificially increasing prices in Australia relative to the rest of the world.[38] There is something of a paradox in all this. The push towards free trade, starting with the Bretton Woods agreement in 1944, involved lowering or eliminating government barriers to trade across national borders. However, permitting restrictions on parallel importation means permitting private interests to impose barriers to trade across national borders—a privatised protectionism.

When the US Government argues for restrictions on parallel importation, it can be interpreted as putting the right of copyright owners to practise price discrimination—charging whatever the market will bear in different jurisdictions. This is often referred to as 'price gouging' which is defined as 'pricing above the market when no alternative retailer is available'.[39] Competition from parallel importers can undermine the ability of copyright owners to price gouge. Price gouging is more likely to occur in markets where there is less competition, where incomes are reasonably high and where there might be less countervailing power on the part of retailers. In different conditions and in different countries the effects of restrictions on parallel importation may well be different. For example, they may mean that lower-income countries benefit because copyrighters can sell there at lower prices, safe in the knowledge that cheaper copies will not find their way back into higher priced markets.[40] Nevertheless, it appears that price discrimination through restrictions on parallel imports normally acts to the detriment of Australian consumers (see below).

While there had been debate in Australia and other countries on the American push for stronger IPRs, there is also debate within the US over stronger domestic IPRs. The petition mentioned earlier, by the five Nobel Laureates and other economists, against the extension of copyright protection was a case in point. Web sites have sprung up dealing with IPRs in copyright and information and communications technology and there are many sources referred to in the endnotes to this paper.

Some of the other specific issues arising in the AUSFTA

It is not possible here to go into all the detail and all of the issues arising out of the AUSFTA chapter on IPRs. However, the following issues are some of the most important. That said, many of the issues identified below should be taken as provisional pending any legislation that is introduced to give effect to chapter 17 of the AUSFTA, especially given that much of the language of the AUSFTA currently is rather vague. Generally the issues arising reflect the tension referred to earlier between the goals of competition and the protection of 'works'. The earlier TRIPS agreement recognises the tension between protecting IPRs and fostering competition. The WTO says:

> Article 40 of the TRIPS Agreement recognizes that some licensing practices or conditions pertaining to intellectual property rights which restrain competition may have adverse effects on trade and may impede the transfer and dissemination of technology (paragraph 1). Member countries may adopt, consistently with the other provisions of the Agreement, appropriate measures to prevent or control practices in the licensing of intellectual property rights which are abusive and anti-competitive (paragraph 2).[41]

The AUSFTA does permit some use of patents without authorisation when the rights holder is engaging in anti-competitive practices.

One other general observation needs to be made. In some areas Australia's existing IPRs may be as strong as those in the AUSFTA. However, the AUSFTA would limit any attempts in the future to ease the existing IPRs, for example, those on parallel importing of pharmaceuticals.

The duration and breadth of copyright protection

As pointed out above, the AUSFTA extends the duration of protection for copyright material, with article 17.4.4 requiring protection for 70 years after the death of the creator rather than the 50 years protection in Australia at present. The US extended copyright protection from 50 years to 70 years in 1998 with the passage of the Sonny Bono Copyright Extension Act 1998. Apparently the main motivation for the extension was that Disney's rights to Mickey Mouse were due to expire in 2003.[42] By now Mickey Mouse would have been in the public domain, there would be genuine competition in the supply of the copyright item and the use of the item in other works.

In December 2003 Trade Minister Mark Vaile called article 17.4.4 the 'Mickey Mouse clause' and was resisting its inclusion in the agreement. He is reported as saying: 'there is a whole constituency out there with a strong view against copyright term extension and we are arguing that case'.[43] That constituency will be disappointed with the result. Incidentally, the earlier Intellectual Property and Competition Review Committee's September 2000 *Review of Intellectual Property Legislation under the Competition Principles Agreement* had recommended against extending the duration of copyright protection and the Government had accepted that recommendation. The review also recommended that there be *no* extension of the copyright term in the future without a 'prior and thorough and independent review of the resulting costs and benefits'.[44] Evidence to the review included findings of the Australian Government's Office of Regulatory Review that the increased protection of 70 years:

- would represent an unjustifiable redirection of funds (rents) from Australian consumers without commensurate benefit
- would result in net royalty flows to overseas authors and publishers, and
- would not necessarily provide incentive to produce works not already being produced.[45]

Some owners of copyright have a large library of old but valuable product: the Disney Corporation is obviously one of them. They have an interest in extending their rights as long as possible, but would be hard pressed to argue that they need that sort of incentive to produce new work. The review also pointed out that the present value of any possible benefit to the creator of a work at the time of the creation is trivial. Indeed, that point could be taken further: the idea that there is an actual benefit to an individual from anything that might happen 70 years after death is difficult to conceptualise. Certainly there can be no retrospective incentive.

The breadth of an IPR raises similar issues to its duration in that both are means of strengthening the owner's rights. The example of the Wright Brothers referred to above illustrates the possible damage that can follow the granting of very broad rights under IPRs. The extension of IPRs to new areas has raised concerns, also mentioned above. A particularly important issue is the trend towards IPRs in biotechnology, which have raised a number of concerns in the international community. One in particular is the US acceptance of patents on naturally occurring genes and gene sequences. The OECD has referred to beliefs that, 'in a number of cases the criteria of novelty and inventive step are not being met, and that broad patents are issued that could give the patent holders an overly-strong negotiating position vis-à-vis possible licensees'.[46]

The Australian Law Reform Commission (ALRC) recently released a major discussion paper on gene patenting. Some of the concerns raised include ethical considerations, whether discoveries are being patented as opposed to inventions, the breadth of the patents and the ease of obtaining patents. Several concerns were expressed about the manner in

which gene patents are exploited in the marketplace by a patent holder or its licensee. These included:

> Restrictive licensing practices limit access to medical genetic testing, and compromise the quality of such testing, to the detriment of public health.
>
> Exploitation of the monopoly rights conferred by gene patents drives up the cost of medical genetic testing beyond a fair and equitable level, to the detriment of public health.
>
> Licensing practices restrict access to genetic materials and technologies for research purposes. Negotiating licences for a large number of related or overlapping gene patents is problematic due to the high transaction costs and the lack of expertise of many researchers.
>
> The use of gene patents in research should be exempt from claims of patent infringement, so as to facilitate research, not hinder it.[47]

These issues go beyond the scope of this paper. That said, the AUSFTA cuts across any initiatives that might come out of the ALRC process and limits the ability to respond to the concerns being examined by the ALRC. Harmonisation issues are problematic in some aspects of biotechnology, especially in areas like IPRs covering stem cell research. Harmonisation is likely to be especially difficult in areas in which different people are going to take different positions for moral, ethical and religious reasons.

Technical protection measures

A particularly important theme comes out of the US experience with 'technical protection measures' or 'effective technological measures'. Article 17.4.7 of the AUSFTA, which attempts to protect 'effective technological measures' (ETM), is based on the US Digital Millennium Copyright Act 1998 (DMCA). An 'effective technological measure' is defined so that it:

> means any technology, device or component that, in the normal course of its operation, controls access to a protected work, performance, phonogram, or other subject matter, or protects any copyright.

Article 17.4.7 appears to go beyond the *Copyright Amendment (Digital Agenda) Act 2000*, which is Australia's version of the DMCA. According to legal firm Blake Dawson Waldron, the AUSFTA would limit the scope of exceptions in which circumvention devices may be used and would extend the scope of criminal offences relating to the manufacture and sale of circumvention devices.[48] Article 17.4.7 also pre-empted the review of the Australian Act, which was undertaken by the law firm Phillips Fox and released in April 2004. The Attorney-General's web site now announces that:

> The Government is now moving towards signing its Free Trade Agreement with the US and implementing its obligations. In some areas, the copyright provisions of the Free Trade Agreement supersede the recommendations made in the Phillips Fox report.[49]

The major problem with ETMs is that they give rights well beyond the rights normally associated with copyright. There are allegations that, for example, the DMCA has been abused by big business in the US. Rather than being used to counter piracy as it was intended, the allegations are that the DMCA is being used to preserve monopoly power on the part of copyright holders. In Australia there has been much concern about the practice of regional coding, by which a manufacturer divides the world into regions so that CDs and players can work together only if purchased in the same region. CDs purchased in one region will not work in another region. Australian consumers were briefly able to overcome those restrictions on Sony Playstations by purchasing a 'mod chip' that overcame the region coding. Sony took action, but the Federal Court accepted that the effect of regional coding was to restrict the playing of games, not to restrict copying of games and was therefore not worthy of protection under law.[50] That decision was overturned by the Full Court on appeal. ACCC chairman Graeme Samuel expressed disappointment, saying: 'this decision now means Australian consumers will be unable to enjoy games legitimately bought overseas, as well as legitimate back-up copies'.[51] He also expressed concern that the decision may have the unintended consequence of eroding the gains on parallel imports (see section headed 'Parallel importation' at p. 18). Using rights management information, such things as computer programs could also be sold as an Australian version playable on Australian delivered computers and made inoperable if used with software purchased overseas.

Sony has also been active in the US, using DMCA litigation or the threat of it to stop software developers allowing Sony games to be played on ordinary PCs, and likewise for other games to be played on Sony Playstations.[52] Restrictions on encryption have the immediate effect of denying a lot of the 'fair use' exemptions that normally apply under copyright legislation, such as making back-ups and recording for later viewing, as well as 'activities undertaken for purposes such as criticism, comment, news reporting, teaching, scholarship or research'.[53] In the past, former ACCC chair Professor Allan Fels has expressed concern about the emerging practice of inserting copy protection measures into CDs, which has the effect of making illegal copying more difficult but also prevents the use of back-up copies and makes CDs unplayable on some equipment.[54]

Whatever the legal issues involved, it is clear that at least some of the industry practices are designed more to maximise profits than prevent piracy. A quick, unscientific survey of two on-line sites showed that on 30 March 2004 the Sony PlayStation game 'Harry Potter and the Chamber of Secrets' could be purchased on-line for $US19.99 from the US or $A99.95 in Australia. Another, '007 Nightfire', cost $US49.99 or $A99.95 respectively.[55] Looking at the list of prices, $US49.99 seems to be the top price in the US, while most prices are around $A99.95 in Australia. Using the exchange rate on that day the Australian dollar equivalents are shown together with the Australian prices in the following table.

	Price in Australia $A	Price in US $A equivalent
Harry Potter and the Chamber of Secrets	99.95	26.83
007 Nightfire	99.95	67.10

The 'Harry Potter' game may well be discounted in the US and '007' may represent the normal difference of a new release. However, this quick comparison suggests that normal prices are around 50 per cent higher in Australia and Australians might miss out on substantial discounts.

The economic argument would be overwhelming if such things as region coding were to make CDs and players from different Australian states or different Australian retailers unable to operate with each other. However, when national borders are involved the economic arguments seem to be missed.

There have been other overseas examples where the MDCA approach has had the effect of stifling innovation and/or competition. For example, an adaptation that allowed users of Apple Macintosh computers to work with external DVD recorders meant that users did not need to buy a new Apple Macintosh in order to use a DVD recorder. Apple claimed that this was a violation of the MDCA and stopped the sale of the upgrade.[56] That had the effect of forcing Apple Macintosh users to buy the latest model computer if they wanted the DVD capabilities. The evidence suggests copyright owners are using these technological restrictions for much more than protecting themselves against piracy. Against that, there has been some progress against the Information and Communications Technology (ICT) industry's use of IPRs to enhance its market power.

In the legal dispute with Microsoft in the US, Microsoft was required to grant free access to some of its Windows operating system code to enable other companies to develop add-ons that work well on Windows. There is debate about how well the settlement is working. For example, the US Department of Justice has 'complained that the settlement had fallen short on a key provision designed to ensure that rivals can make their server software work properly with the Windows operating system'. In response, Microsoft has reportedly offered a number of changes it plans to implement to facilitate competitors' access to the necessary computer code.[57]

Another landmark occurred on 25 March 2004 when the European Commission made an antitrust ruling against Microsoft ordering it to share information with competitors in the server and other applications business so that the competitors could offer competitive products that work as easily on Windows as Microsoft's own applications.[58] The point here is that Microsoft is being forced to open up its technology to allow competitors to operate on it, yet others are being allowed to use anti-piracy provisions to prevent competitors making interoperable products. More recently, commercial pressures have forced Microsoft and Sun into an agreement that provides each other with sufficient access to their technologies so that Sun's products will integrate more seamlessly with the

Windows environment. Sun's chief executive officer Scott McNealy, is reported as saying that the deal 'will stimulate new products, delivering great choices for customers who want to combine server products from multiple vendors and achieve seamless computing in a heterogeneous computing environment'.[59]

In other respects the computer industry has been at the forefront of pushing for common standards and interoperability, the ability of products from different vendors to be able to operate together. The Australian Government has a strong position on interoperability. For its own purposes it has published the *Interoperability Technical Framework for the Australian Government*, and believes that 'achieving interoperability will improve efficiency, reduce costs to business and government and will enhance government agencies' capacity to respond to public policy developments'.[60] In the main the policy involves adopting the relevant international standards, which themselves reflect the pressure to make ICT software and hardware that can plug into each other without causing major problems for business. It appears that business and other large users have been able to make gains with common standards and interoperability. However, interoperability seems to elude items designed for retail consumers.

The Phillips Fox report mentioned earlier did in fact recommend amending the *Copyright Act 1968* to permit ETM circumvention devices so as to allow fair dealing and access to legitimately acquired non-pirate copies of a work. However, 17.4.7(e) of the AUSFTA severely limits the ability of the Government to allow wide exemptions for non-infringing uses.

Parallel importation

A particularly important issue that also goes back to the time of Alfred Marshall is the question of controls over imports. The IFAC-3 was pleased to see that the AUSFTA included provisions 'to enhance the ability of patent owners to prohibit international exhaustion of patent rights'.[61] This refers to article 17.9.4, which reads:

> Each Party shall provide that the exclusive right of the patent owner to prevent importation of a patented product, or a product that results from a patented process, without the consent of the patent owner shall not be limited by the sale or distribution of that product outside its territory at least where the patentee has placed restrictions on import by contract or other means.

Patent rights are normally said to be exhausted when the good or service that includes the patent is sold. Subsequent use of the good or service by the holder would not normally generate any additional benefit for the patent holder and so the rights are said to be 'exhausted'. However, article 17.9.4 would mean that patent rights are not exhausted if the purchaser then tries to export the good or service to Australia. Australian patents do provide exclusive rights to import at the moment, but there may be a concern if those rights are entrenched by the agreement. It is important to note in this respect that the trend in Australia over the last decade and a half has been towards relaxing restrictions on

parallel importation. That trend began with the Prices Surveillance Authority report into book prices in 1989.[62]

There is another important aspect of the exercise of IPRs that goes to the heart of the subject matter of AUSFTA. While import restrictions can prevent Australian consumers having access to competitively priced goods and services, IPRs can also be used to restrict exports from Australia to other countries, thereby defeating any industry development ambitions that Australia may have. A 1984 OECD report examined export restrictions implicit in the use of IPR licensing and the territorial arrangements that they involve. It was particularly concerned about the terms and conditions in the licensing of IPRs that 'unreasonably allocate markets, control re-exports or foreclose competition; i.e. practices which can restrict trade flows'.[63] The OECD observed that in some countries, particularly the US, competition laws are often applied to abuses in which companies impose terms and conditions that go beyond IPRs and unduly restrict competition. Some practices produced results such as the allocation and division of worldwide markets, output limitations and entry foreclosure. It is apparently considered illegal in the US for a rights holder to use territorial restraints in agreements between competitors as a device to allocate world markets among them. Similarly the European Commission opposed licensing conditions that ban exports and so restricted the free movement of goods and services in the European Union.[64]

The issue of export franchise limitations has been taken up a number of times over the years in Australia. Generally the Australian Federal Government has been very concerned to overcome any restrictions that multinationals may have on the ability of the Australian subsidiary to export into other markets. To give just a few examples, in 1983 the then Treasurer, Paul Keating, announced changes to the foreign investment policy to explicitly include 'the benefits and costs to Australia of any export franchise limitations'.[65] Export restrictions on the Australian branch or subsidiary would be a negative factor to take into account when considering a foreign investment application. In 1984, during Australia/European Economic Community discussions, the then Minister for Trade, Lionel Bowen, said Australia 'expressed concern to the EC about the operation of non-tariff barriers such as export franchise restrictions…'[66] Senator Robert Hill speaking in the Senate quoted figures showing that there were 900 companies in Australia 'which are subject to export franchise restrictions covering some 5400 exportable profit areas'.[67] He went on to cite a view 'that perhaps a policy of incentives should be provided to encourage multinationals to liberalise franchise restrictions'.

The stronger IPRs are the more likely they are to be used both in intended and in unintended ways that may well limit international competition. Australia allows patent holders to prohibit parallel imports and we know that this and other issues will be used as precedents by the US in other FTAs. It will be a Pyrrhic victory indeed if Australia ever manages to eliminate export franchise limitations only to find that they are matched by import restrictions by IPR holders in Australia's export markets. Of course, by agreeing to the article Australia increases the chances it will be used again. Given the upcoming

schedule of free trade agreements about to be negotiated,0 that could soon mean that Australian industry might be frustrated by IPR holders in the whole of the American continent as well as the South African Customs Union.

Work for hire

Another aspect of the AUSFTA that has had little attention relates to performers' rights. The aim of IPRs is supposed to be to protect and encourage the creator of works and innovations. The US Labor Advisory Committee, a body that the US Congress has asked to give its views on trade negotiations and outcomes, has drawn attention to article 17.4.6.a, which includes the controversial 'work for hire' provision that 'would permit transfer by the performer, upon signing his/her contract, all of the rights including moral rights and remuneration rights to the employer'.[68] The US legislation also provides that copyright ownership 'vests initially in the author or authors of the work'. Generally the author is the one who actually creates the work that is subject to copyright protection. But the Act provides an important exception for 'works made for hire'. If the work is for hire, the employer owns the copyright, unless there is a written agreement to the contrary.[69]

Health issues

The US Labor Advisory Committee has expressed concern:

> that the Australia FTA undermines the protections for public health contained in TRIPs and the Doha declaration. This not only violates congressional negotiating objectives, it sets a terrible precedent for pending free trade agreements with developing countries in Southern Africa and elsewhere. In countries facing devastating public health crises, governments must have adequate flexibility under international trade rules to provide their people with access to essential medicines.[70]

The issue here is that the original TRIPs agreement adopted at the Doha, Qatar, conference included some important provisions for public health that would allow countries to grant compulsory licences in a national emergency so that patented medicines could be made available. The flexibility that governments may need to address public health issues may be eroded by some of the provisions in article 17.10: 'Measures related to certain regulated products'. The article entrenches strong new protection for pharmaceutical test data so that generic producers would have to wait five years for access to the data. That could delay access to affordable medicines and make their production more costly. In addition, patent holders could use the limits on how governments provide marketing approval and safety permits to block production of essential generic medicines during a health crisis.

IPRs and foreign investment

Other parts of the AUSFTA may also have implications for the chapter on IPRs. For example, chapter 11 on foreign investment, contains a reference to expropriation and says: 'Neither Party may expropriate or nationalise a covered investment either directly or

indirectly through measures equivalent to expropriation or nationalisation'.[71] The agreement does not define 'equivalent to'. However, it is possible that some future government action may be interpreted as something that erodes IPRs and so is equivalent to expropriation. In other FTAs the US has managed to obtain agreement to adopt controversial investor–state dispute settlement measures. While there are no investor–state dispute settlement mechanisms in the AUSFTA as it stands, there is provision for developing such procedures in the event of 'a change in circumstances'.[72] In the event of a dispute with the Australian Government, those provisions would provide measures for American IPR holders operating in Australia that are not available to other IPR holders.

Conclusion

The economic analysis of the AUSFTA commissioned by the Government claims Australia will experience large benefits from the agreement.[73] The purpose of this paper is to examine the issues arising out of the intellectual property chapter of the AUSFTA. It is widely taken for granted that a strong IPR regime will generate important benefits in the form of innovation and creativity. These in turn are expected to generate higher productivity and economic growth. Against that, economists have long had a sceptical view of IPRs since they imply a period of monopoly control over an innovation. In some cutting edge industries, as the earlier reference to the Wright Brothers reveals, there is a history of abuse of IPRs, especially the use of patents to prevent or slow down competition. That threat increases as lower orders of innovation are rewarded with IPRs. However, the international experience is that IPRs are getting stronger and Australia is part of that trend. The likely effect on a country like Australia is to turn the terms of trade against it and in favour of those countries that disproportionately hold IPRs.

This paper has examined some issues arising out of the inclusion of IPRs in the AUSFTA. For example, new measures recently introduced into the IPRs debates, such as the technological protection of 'rights management information' have had the effect of introducing parallel importation restrictions through the back door. Developments in Australia and elsewhere have made it clear that technological protection measures seem to have more to do with discriminatory pricing than genuine anti-piracy measures. The AUSFTA further reinforces anti-competitive practice in those respects. Other specific measures included in chapter 17 are also problematic insofar as they enshrine and enhance anti-competitive behaviour on the part of IPR holders in Australia.

In a sense all this is well-known. IPRs have always been acknowledged as at least a temporary protection from competition. There is seen to be a trade-off between the anti-competitive aspects of IPRs on the one hand and the desirability of encouraging innovation on the other. There is no simple answer to balancing those competing objectives. However, the issue is that Australia, and the rest of the world, will be pushed too far in the direction of IPRs that promote monopoly power.

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