

ALCC

Australian Libraries' Copyright Committee

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ADA

Australian Digital Alliance

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The Hon Philip Ruddock MP
Attorney-General
Parliament House
Canberra ACT 2600

20 August 2004

Dear Attorney-General,

Copyright Law and the Expansion of Fair Use

There is an urgent need for the Government to amend the *Copyright Act 1968 (Cth)* to recognise an open ended defence of fair use. Such reforms are necessary in light of the deleterious impact of the *US Free Trade Agreement Implementation Act 2004 (Cth)* upon libraries, universities, cultural institutions, and software developers.

This submission is made on behalf of the Australian Libraries' Copyright Committee (ALCC) and the Australian Digital Alliance (ADA). The ADA is a coalition of public and private sector interests formed to promote balanced copyright law. ADA members include universities, software companies, libraries, schools, museums, galleries and individuals. The ALCC is a cross-sectoral committee formed to consider the impact of copyright law reform on Australian libraries. The ADA and the ALCC are united by the idea that copyright law must balance a fair return to creators with a reasonable level of access to knowledge for the public.

The ADA and ALCC recognise the hard work of the Government in finalising the AUSFTA and commend the Government for this. However, the ADA and ALCC view the status quo as unacceptable, and urge the Government to initiate processes to urgently amend the *Copyright Act 1968*.

During AUSFTA negotiations, the Government outlined the benefits of harmonisation of intellectual property laws between Australia and the US. For example, DFAT provided evidence to the Senate Select Committee on the AUSFTA that 'harmonisation reduces differences in law and practice so that owners and users of intellectual property may interact in a familiar legal environment, thereby reducing transaction costs'. The ADA and ALCC however, are concerned and disappointed that harmonisation has not been effected across the board in the implementation bill, but only selectively, at the expense of users of copyrighted material.

A broader fair use style doctrine, such as exists in the US in order to balance the strong owner-protective provisions of the US Copyright legislation, has not been incorporated into Australian law. The law in relation to copyright which is currently scheduled to take effect on or about January 2005, harmonises only those aspects of US law which favour copyright owners.

Rather than aligning the US and Australian copyright law through the harmonisation process, the result with respect to fair use provisions will put Australians at a significant disadvantage to US citizens.

The detrimental consequences of this will be felt broadly amongst educational, consumer, cultural and research institutions. Without expansion of the fair dealing provisions to balance the stronger copyright owner rights, institutions functioning for the benefit of the public, will bear the burden of a longer copyright term, more stringent copyright owner rights, and tougher penalties for incidental, minor and non-commercial breaches of Copyright. This will expose institutions to greater costs and greater risks. Ultimately this will adversely affect the end users of these institutions, who will not be able to access the same level of knowledge via copyrighted material.

There have been numerous recommendations to date which have called for implementation of broader protective legislation for copyright users, both prior to and in response to the AUSFTA.

In its 1998 report entitled, "*Simplification of the Copyright Act 1968*" the Copyright Law Review Committee put forward several recommendations in relation to broadening the ability of users of copyright to be able to access that material. Particularly relevant in this context is recommendation 2.03, in which the Committee recommended the expansion of fair dealing to an open-ended model which refers to the current exclusive set of purposes but is not confined to those purposes.

In June 2004, the Joint Standing Committee on Treaties reported specifically on the AUSFTA and made several recommendations in relation to intellectual property, including recommendations that the Government replace the Australian doctrine of fair dealing with a doctrine 'that resembles the US' 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'. It also recommended that a higher standard of originality be adopted and applied to copyrighted material, such as in the US.

In August 2004, the Senate Select Committee on the Free Trade Agreement between Australia and the US, released its report. It noted that as a result of the abovementioned CLRC report not yet having been adopted in Australian law, the AUSFTA will result in Australian users of information 'having more restricted access to copyright material than users in the US due to the higher standards of copyright protection overall and the lesser usage rights available'. It put forward its view that 'the application of a broad, open-ended 'fair-use' doctrine, similar to that in the US, may resolve this long-standing legal anomaly in Australian copyright law and assist in legitimising several commonplace actions undertaken regularly by Australians perhaps unaware that they are infringing copyright. The Committee sees this as an opportunity to regulate the fair use environment to harmonise the activities of many Australians with the legal environment'.

The ADA and ALCC would like to draw the Government's attention to these Reports, and particularly to the common view of the later two reports that whilst the AUSFTA overall is beneficial to Australia, without appropriate amendments, the changes envisaged by the FTA will tip the copyright balance unacceptably in favour of copyright owners.

The ADA and ALCC recognise the importance of the parliamentary processes which exist to investigate and report on matters of national interest, and endorse the abovementioned views of the CLRC, JSCOT, and Senate Select Committee.

The ADA and ALCC were pleased that before both the JSCOT Committee, and the Senate Select Committee, Government representatives provided evidence that the option to expand fair dealing in order to address issues of inequity in copyright law was open.

Recommendation

Given that the Implementation Bill has now passed through the Senate, and amendments which extend the rights of copyright owners may be enshrined in law as early as January 2005, the ADA and ALCC submit that urgent Governmental action is necessary to negate the effects of the AUSFTA by enacting an open-ended fair dealing defence.

The ADA and ALCC wish to thank the Government for considering this submission.

Yours sincerely

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Sarah Waladan

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