Australian Libraries Copyright Committee

Australian Digital Alliance

BILATERAL AND REGIONAL TRADE AGREEMENTS

PRODUCTIVITY COMMISSION DRAFT RESEARCH REPORT

Joint Submission of the
Australian Digital Alliance and the
Australian Libraries Copyright Committee

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EXECUTIVE SUMMARY

We strongly support the recommendations made in the draft research report, particularly: recommendation 4, regarding a cautious approach to IP matters; recommendation 6, regarding an independent assessment of the impact of agreements; and recommendation 7, regarding transparency on costs incurred by the Department of Foreign Affairs and Trade.

This submission gives detailed consideration to the negotiation of the Australia-United States Free Trade Agreement (**AUSFTA**) and its impact on the balance of Australian copyright law. The experience of negotiating AUSFTA, as Australia's major Bilateral and Regional Trade Agreement (**BRTA**), is used to draw conclusions and make recommendations to improve the process of negotiating future BRTAs.

AUSFTA significantly raised the level of copyright protection in Australia without parallel measures to ensure reasonable access to copyright material. This unbalanced copyright law and resulted in substantial damage to our creative and innovative potential by simultaneously restricting access to, and raising the cost of, knowledge.

The greatest issue with the negotiation of AUSFTA was procedural. There is a 'democratic deficit' inherit in the Australian system that marginalises the ability of Parliament to scrutinise BRTAs. Parliament is unable to influence the negotiation process, the terms, or even the decision of ratification. Parliament is presented with a *fait accompli* at the finalisation of negotiations as it only has the limited ability to influence any implementing legislation.

The procedural issues with the negotiation of AUSFTA resulted in obligations to amend our copyright law which have distorted the balance between copyright owners and users. AUSFTA extended the duration of copyright protection which cost Australia in terms of access to knowledge and reallocation of resources, strengthened technological protection measures to the disadvantage of consumers and competition, increased the criminalisation of copyright infringement to the detriment of individuals and taxpayers, and amplified the obligations of ISPs and content hosts to comply with the demands of copyright owners.

The democratic deficit should be rectified by giving Parliament an active role in the negotiation of BRTAs that ensures an independent and transparent assessment of Australia's national interests in economic and noneconomic terms. The Joint Standing Committee on Treaties should be involved in negotiations from an early stage to fulfil its role of scrutinising treaties. Maximum transparency should be provided on any IP provisions under negotiation to facilitate a fulsome debate by the public, which is crucial to achieving the delicate balance that must be struck by copyright law.

An independent body should consider the impact of the proposed terms of BRTAs on Australia's national interests. Great importance should be placed on the role of a balanced copyright regime in forming the research and resource base upon which our knowledge and creative industries depend. The paradigms of economic modelling are simply inadequate to assess the costs and benefits of cultural, innovative and creative potential woven deep in the cycle of sharing and creating of knowledge. As a net importer of IP, Australia should treat calls to increase IP protection, or lock in current levels of IP protection, with caution.

The recommendations made herein aim to significantly strengthen and enhance the BRTA negotiation process which will benefit Australia's national interests by ensuring that future changes to Australian laws and policies have a firm evidentiary basis and sound rationale. Particularly, they will ensure that the delicate balance in our domestic copyright regime is not further distorted by future BRTAs.

SUMMARY OF RECOMMENDATIONS

Recommendation 1: JSCOT, as the representative of Parliament, should be given greater powers to play an active role in the negotiation process, including but not limited to, the mandate of public servants responsible for the negotiations.

Recommendation 2: regular independent and transparent assessments of Australia's national interests, economic and noneconomic, should be a key part of the negotiation process. An assessment should be made of early proposals, the draft text, and the final concluded text and provided to JSCOT. The Productivity Commission would be best placed to make such assessments.

Recommendation 3: IP provisions should not be included in BRTAs where the negotiation process will be kept confidential, or alternatively, maximum transparency should be provided on the articles that include IP matters. Public and parliamentary scrutiny and input is essential to maintaining the fine balance of interests required by copyright and other associated IP rights.

Recommendation 4: the value of balanced IP provisions and their fundamental importance to cultural, social and economic advancement in Australia should be given due precedence in national interest analyses.

Recommendation 5: when considering the benefits to the Australian economy from encouraging other countries to reach commensurate levels of IP protection, national interest analyses should consider the true contribution of IP industries to the Australian economy in terms of the percentage of this industry that consists of exports, and the percentage of these exports that are to countries with poor IP protection.

Recommendation 6: if any amendments to Australian legislation or policy are required by BRTAs, a national interest analysis should be conducted three years after they are implemented.

Recommendation 7: an independent and transparent national interest analysis of the impact of changes required by AUSFTA should be conducted, including but not limited to, changes to copyright law.

PRODUCTIVITY COMMISSION DRAFT RESEARCH REPORT: BILATERAL AND REGIONAL TRADE AGREEMENTS

A. WHO WE ARE

The Australian Digital Alliance (**ADA**) is a non-profit cross-sectoral coalition founded to represent the public interest perspective in copyright reform and is Australia's major body advocating for balanced copyright law. The ADA's members include universities, schools, ICT companies, individuals, galleries, libraries, archives, and museums.

The ADA is a respected and active participant in the Australian copyright debate with a high level of recognition from government, copyright holders and media. The ADA's voice is strengthened by its diverse membership. All members are united by the common principle that copyright laws must strike a balance between providing reasonable incentives for creativity on the one hand, and the wider public interest in the advancement of learning, innovation, research and knowledge on the other. The ADA plays an important role by advocating for a more appropriately weighted balance between these two competing interests.

The ADA works closely with its sister organisation, the Australian Libraries Copyright Committee (**ALCC**). The ALCC is the peak consultative body and policy forum for the discussion of copyright issues affecting Australian libraries and archives. It considers the impact of copyright law on its members, develops policy and provides an effective and unified voice for the sector. The ALCC advocates action to support the role of libraries as information providers and preservers, and the wider public interest in balanced copyright law.

The ALCC is a cross-sectoral committee which represents the National Library of Australia and all State Libraries, the Australian Library and Information Association, the Council of Australian University Librarians, the National Archives of Australia and other representative organisations.

B. BALANCED COPYRIGHT LAW

The *Copyright Act 1968* embodies two competing public interests, broadly identified as those of copyright owners and those who seek to use their works. The central philosophy underpinning copyright law is to reward creation and thereby encourage continued innovation, and by this means, provide society with access to a richer cultural and informational foundation for enjoyment and the development of knowledge.

The 'high objective' of copyright law is to ensure that its overall impact on creators and those who seek to use their works is 'balanced'. Sir Anthony Mason, former Chief Justice of the High Court and founding patron of the Australian Digital Alliance, considers that balanced copyright law is 'fundamental to the free flow of knowledge, ideas and information in this country, a mater vital to the political, intellectual, economic and social life as well as the education, of all Australians.'[1]

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1 Sir Anthony Mason, 'The Users' Perspective on Issues Arising in Proposals for the Reform of the Law of Copyright', (1997) 19(1) *Sydney Law Review* 65, at 71.

Balanced copyright law maximises total community welfare by ensuring maximum knowledge is created and by providing maximum access to that knowledge. Copyright exists because of a need to correct the market failure created by the ability of people to 'free-ride' on the intellectual efforts of others without paying. However, copyright protection costs society because it creates a price barrier that limits access to knowledge. If copyright is abused to maximise payments in excess of correcting market failure, the overall impact of copyright will reduce total community welfare. Thus, copyright should ensure remuneration only to the extent that it provides an incentive for future creation.

Unbalanced copyright protection is contrary to both objectives of copyright because it reduces future creativity and access to knowledge. New creations are built upon the knowledge of old creations, so stifling access to knowledge stifles this creative process – an effect long acknowledged by prominent free-market economists.[2] Further, creation and innovation are nurtured by education, which is dependent upon access to knowledge, and allowing creators to access the works of others and use their material in new and innovative ways. Sir Hugh Laddie has criticised the 'lust' for excessive copyright protection as 'undermining the system itself'.[3]

Balanced copyright law necessitates a trade off between copyright owners and copyright users, which is achieved through:

- Limitations—which limit the scope and strength of copyright protection in terms of what is protected by copyright and the duration of the copyright term; and
- Exceptions—which create circumstances where specific uses of copyright material will not infringe copyright.

C. REFLECTIONS ON THE AUSFTA EXPERIENCE

Australia's obligations under the 2004 Australia-United States Free Trade Agreement (**AUSFTA**)[4] required significant changes to our copyright law which increased protection[5] but did not include sufficient parallel measures to ensure reasonable access to works. This resulted in substantial damage to our creative and innovative potential by simultaneously restricting access to, and raising the cost of, knowledge. When implementing the agreement, government failed to enact legislation which supported a flexible interpretation of its requirements and in some cases went further than necessary[6] or failed to take advantage of permitted exceptions and limitations.[7]

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2 For example see: Lionel Charles Robbins, *The Economic Basis of Class Conflict and Other Essays,* (Macmillan, 1939) at 74; Friedrich A Hayek, *Individualism and Economic Order*, (University of Chicago Press, 1948) at 113-14; Milton Friedman, *Capitalism and Freedom,* (University of Chicago Press, 1962) at 127 and G. A. Akerlof et al., *Brief in Support of Petitioners, in Eldred v. Ashcroft, Attorney General, Supreme Court of the United States*, 20 May 2002, <http://cyber.law.harvard.edu/openlaw/eldredvashcroft/supct/amici/economists.pdf>.

3 Sir Hugh Laddie, 'The Insatiable Appetite for Intellectual Property Rights', University College London; quoted in William Patry, *What does it mean to be pro-IP?*, The Patry Copyright Blog <http://williampatry.blogspot.com/2007/12/what-does-it-mean-to-be-pro-ip.html>.

4 AUSFTA, Chapter 17.

5 *US Free Trade Agreement Implementation Act 2004*, Schedule 9 (USFTA Act).

6 For example, article 17.11.26(a)(i) of AUSFTA required Australia to criminalise 'significant wilful infringements of copyright, that have no direct or indirect motivation of financial gain'. This was implemented by Item 154, Schedule 9 of the USFTA Act by adding subsections 5DB and 5DC to section 132. The offences in section 132

AUSFTA does not properly reflect the copyright balance that has to date been central to Australian copyright policy. It created obligations to amend the Australian copyright regime in ways that reduced access to knowledge, increased costs for institutions which provide public access, and ultimately stifled innovation. The neglect to pay closer attention to the intellectual property chapter of AUSFTA was disturbing and unsatisfactory given that Australia is a net importer of intellectual property and a balanced regime underpins the research and resource base upon which our knowledge and creative industries depend. Overall, the requirements in AUSFTA failed to provide a satisfactory level of balance and did not serve the interests of all Australians.

The concern *today* is that standards drawn from the AUSFTA, now embodied in Australian law, are being, or will be used by Australian trade negotiators as the starting point for IP chapters in future agreements. Provisions that we believe were not in Australia's interests ought not to be 'locked in' through further trade agreements. In this respect, we are of the view that few benefits, and significant costs, inure to Australia when Australia seeks, or agrees to, higher substantive or enforcement standards in IP agreements. However, we would go further and argue that there are actual *costs* to Australia when Australia agrees even to provisions that match current Australian law – because every new agreement reduces Australia's flexibility to make changes to its domestic regime.

Procedural Concerns

There are significant procedural concerns surrounding the negotiation of copyright in the context of BRTAs, particularly when they require significant increases in protection and enforcement. Concerns arise because trade negotiations are typically confidential with minimal transparency and opportunity for public comment. In contrast, the negotiation of agreements which solely concern intellectual property in traditional multilateral forums such as the World Intellectual Property Organisation (**WIPO**) and the World Trade Organisation (**WTO**) have significantly more transparency.[8] Thus, by including intellectual property in BRTAs the transparency and scope for public comment traditionally afforded in intellectual property negotiations is circumvented.

Prior to the AUSFTA experience, the balance in Australia's copyright regime was distilled over many years with each reform of the law going through a long process of debate and

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were repealed by the *Copyright Amendment Act 2006* and replaced by section 132AC (these amendments were a local initiative and significantly extended the role of criminal law in copyright enforcement by adding a raft of strict liability offences). The offences Australia introduced required that the criminal conduct 'result in' infringement – which is an extremely low threshold because a person need only be 'reckless' as to the infringement occurring. Arguably, the requirements of AUSFTA would have been satisfied by only criminalising conduct that 'caused' infringement or was 'intended' to result in infringement.

7 For example, article 17.11.13(b) of AUSFTA provides that Australia may make laws so that 'damages shall not be available against a non-profit library, archive, education institution, or public non-commercial broadcasting entity that sustains the burden of proving that it was not aware or had no reason to believe that its acts constituted a proscribed activity' for circumventing technological protection measures (**TPMs**) or removing rights management information (**RMI**). For civil infringements there is no limitation for damages under section 116AQ for TPMs or section 116D for RMI. For criminal offences, the phrase used in Part V, Division 5, Subdivision E and F of the *Copyright Act 1968* only limits fines for 'anything lawfully done by [libraries etc] in performing their functions' – which is much stricter than the standard permissible under AUSFTA.

8 For a comparison between the levels of transparency in BRTAs and negotiations focusing solely on intellectual property, see letter from the Electronic Frontier Foundation et al, to the United States Trade Representative, 'Transparency in Negotiations Involving Norms for Knowledge Goods: What Should USTR Do?' (22 July 2009) <http://www.keionline.org/misc-docs/4/ustr_transparency_asks_22jul2009_final.pdf>.

consultation with the public. This consultative process acknowledged that copyright is an extremely complex area to regulate because of the fine balance that must be struck.

The negotiation of AUSFTA and the *Digital Agenda Review* were both undertaken simultaneously in 2003 and addressed many of the same matters. As opposed to AUSFTA, the *Digital Agenda Review* was an open consultative process that considered the impact of significant amendments to the copyright law in 2000 within the framework of Australian legal history and policy.[9] However, the closed negotiation of copyright matters in AUSFTA superseded the public inquiry of the same matters in the *Digital Agenda Review*. Consequently, most of the recommendations made in the *Digital Agenda Review* suggested legislative change that can be characterised as moving in the opposite direction to that required by AUSFTA.[10] The recommendations largely (and rightly) adhere to the underlying government policy for balanced laws, and do not recommend change in the absence of compelling evidence demonstrating a need.

The process of negotiating AUSFTA was closed and accelerated. Although some consultation processes took place throughout 2003, participants in the consultations were not privy to information at an appropriate level of detail so as to fully comment on the nature of the provisions being considered. When the draft text was released in March 2004, its content was largely settled between the parties and was substantially different to assurances given during the consultation process. Political developments in 2004, namely the Federal election, created unrealistic time pressures and a climate that ultimately led to the enactment of rash and ill-considered legislation.

The bills implementing AUSFTA were passed in the House of Representatives by the Coalition on 24 June 2004 with little time for debate. The passage of the bills was stalled in the Senate by the Labor Party, which used its majority to withhold making a decision on whether or not to pass the bills until the Select Committee completed its report on the agreement.[11] Somewhat surprisingly for Labor, the Select Committee recommended ratifying the agreement. This committed Labor to passing the bills, which resulted in a public backlash. In return for passing the bills Labor was able to secure minor changes to the implementing legislation for media content and the Pharmaceutical Benefits Scheme.

Notably, the problems created by poor transparency have continued with the present negotiations over the Anti-Counterfeiting Trade Agreement (**ACTA**). While not itself a BRTA, ACTA is touted as a trade agreement, and negotiated the same way. Negotiations of the ACTA have not been as transparent as preferable, and, as far as we can tell at present, negotiations over the Trans-Pacific Partnership are following the same worrying pattern.

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9 The 2003 Digital Agenda Review was a review of the impact of the significant amendments to the *Copyright Act 1968* contained in the *Copyright Amendment (Digital Agenda) Act* 2000, 3 years after its enactment; Philips Fox, 'Digital Agenda Review Report and Recommendations', Attorney-General's Department, January 2004, <http://www.ag.gov.au/www/agd/rwpattach.nsf/VAP/%28CFD7369FCAE9B8F32F341DBE097801FF%29~FOX+Final+reportpassword.pdf/$file/FOX+Final+reportpassword.pdf>.

10 For example, article 17.11.29 of AUSFTA required Australia to adopt a regime to provide for limited liability for intermediaries that was: based on United States legislation, lacked due process and overly favoured rights holders. However, the *Digital Agenda Review* recommended a much more considered regime which had an appropriate balance between copyright users and owners (at pages 85-86). Unfortunately, Australia was prevented from enacting the preferable regime recommended in the *Digital Agenda Review* by the onerous and prescriptive requirements of AUSFTA.

11 See discussion in Hilary Charlesworth et al, *No Country is an Island: Australia and International Law* (UNSW Press, 2006) at 137.

Distortion of Australian Copyright Balance

Many of the AUSFTA provisions closely mirror those of the United States *Digital Millennium Copyright Act 1998* (**DMCA**). Thus, by implementing AUSFTA Australia effectively took unilateral action to harmonise Australian copyright legislation with United States legislation. Generally, AUSFTA required changes to:

- Increase the rights protected by copyright by: extending the duration of protection; expanding performers' rights, including the creation of performers' copyright in sound recordings; and including all temporary reproductions.
- Excessive protection of technological protection measures and electronic rights management information.
- Increasing the criminalisation of infringing conduct to give criminal law a greater role in copyright, in addition to civil remedies.
- Introducing a new regime to determine the liability of intermediaries such as ISPs which greatly increased their obligations.
- Increased prohibitions on acts preparatory to copyright infringement and the non-commercial use of infringing material.
- Increased liability for end-users and consumers.

Implementing the DMCA copyright protection and enforcement requirements in Australia created severe distortions within our domestic regime. Although Australia and the United States share a common law tradition, some divergence has developed in recent years, marked by the emergence of powerful United States copyright markets which have been extremely successful at lobbying for increased legislative protection. Consequently, the United States copyright regime has one of the highest levels of copyright protection in the world.

The United States and Australian copyright regimes have important differences in the manner in which each jurisdiction achieves its copyright balance. The United States legal landscape provides important checks against over-reaching interpretations of copyright law through: the Constitution, which implies copyright law should be balanced,[12] the Bill of Rights, which tempers laws with respect to copyright;[13] and the broad 'fair use' exception.[14] These checks are necessary given the high level of protection in the United States. In contrast, in Australia: the Constitution does not imply copyright law should be balanced;[15] there is no Bill of Rights; and the 'fair dealing' exceptions are much more limited than fair use.

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12 *United States Constitution*, Article I, Section 8, Clause 8: Congress may make laws 'To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.' Arguably, this article implies that the United States only has the power to make balanced copyright laws that 'promote progress'.

13 The various amendments to the United States Constitution such as Amendment 1 - Freedom of Religion, Press, Expression act to temper the application of copyright laws.

14 *Copyright Act of 1976* (US) 17 U.S.C. § 107.

15 *Commonwealth of Australia Constitution Act*, section 51(xviii) gives Parliament the power to make laws with respect to 'Copyrights, patents of inventions and designs, and trade marks'.

Prior to AUSFTA, the Australian legal landscape was capable of achieving an appropriate balance because the level of copyright protection was much lower. However, when Australia implemented AUSFTA it was required to adopt the same high levels of protection as the United States, but neglected to introduce additional measures to counterbalance the negative impact of increasing protection (such as the United States concept of 'fair use' or stronger competition provisions).

The net impact of implementing AUSFTA in Australia was to set a level of copyright protection that is, in practice, even higher than that in the United States. This is because we matched their higher level of copyright protection, but have maintained our lower level of copyright users' rights. Thus, the balance of interests favours copyright owners to a greater extent in Australia than in the United States.

Extension of the Copyright Term

Article 17.4.4 of AUSFTA required Australia to extend the term of copyright protection by 20 years, to a term of 70 years after the occurrence of a catalysing event,[16] loosely parallel to the term of copyright in the United States.

Term extension has generated fierce debate in the United States where numerous successive extensions of copyright have effectively locked works out of the public domain and displaced the intended cycle of creation and contribution. The *Eldred v Ashcroft*[17] case in the United States Supreme Court mounted a constitutional challenge against the extension of the copyright term from 50 to 70 years by the *Copyright Term Extension Act 1998* (US) (**CTEA**). The case was narrowly lost on grounds particular to United States. Strong arguments in favour of repealing the CTEA were not disputed by the majority and were given significant consideration in dissenting judgements, such as the added costs to users, the minimal long term awards to owners and the speculative nature of predictions of future creation and innovation arising from increased monopoly.[18]

Incentive for Creativity

The legal and economic basis for the creation of copyright is that creators should be protected and rewarded for a limited period, so as to stimulate further creativity and innovation. Apart from financial reward, the stimulation of creativity depends on the eventual entry of works into the public domain so that others can freely learn and draw from a collective pool of knowledge and creativity – known as the creation and contribution cycle.

Extending the term of copyright protection was not in accordance with the principle of providing an incentive for creativity for two reasons. First, cash flows received at increasingly distant times in the future have a diminishing present value. There is no difference in present value terms between the return earned on a copyright that lasts 50 years, 70 years, or perpetually.[19] Thus, extending the term from 50 to 70 years does not provide an incentive for

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16 Copyright is for a limited term, however, the starting of the limited term and the countdown to the expiry of copyright only begins after a catalysing event occurs, which is typically publication or the death of the author.

17 *Eric Eldred, et al., Petitioners v John D. Ashcroft, Attorney General,* 537 U. S. (2003).

18 Ibid, see judgment of Justice Breyer.

19 G. A. Akerlof et al., *Brief in Support of Petitioners, in Eldred v. Ashcroft, Attorney General, Supreme Court of the United States*, 20 May 2002, <http://cyber.law.harvard.edu/openlaw/eldredvashcroft/supct/amici/economists.pdf>, at 8. In the *Eldred v Ashcroft* case, 17 eminent economists including five Nobel Laureates, appeared as a friend

creativity because its impact on the value of the copyright to the owner is trivial. Further, when the term extension is applied to existing works it is 'simply a windfall'.[20] Second, the economic value of copyright material, as determined by consumer demand and its relevance to society, also declines as it ages. It is estimated that only 1-2% of material aged over 55 years retains any commercial value.[21]

Net Economic Cost to Australia

The costs and benefits of copyright term extension are difficult to estimate and the justifications for including it in AUSFTA were tenuous at best as most conclusions pointed to a large net loss to Australia. No compelling rationale was ever put forward to demonstrate how an extension of copyright might yield significant trade benefits; the vague position that term extension would encourage trade due to increased United States confidence in the strength of Australian copyright protection is laboured. No claims were made that the economic benefits of harmonisation with the United States were any more than marginal and no data was presented to substantiate even this weak assertion. Although the benefits of harmonisation are theoretically plausible, the reality is that the beneficiaries of harmonisation were be multinational companies who are based mostly in the United States and European Union.

Sir Anthony Mason considers that given the value of Australia's imports of IP far outweigh its exports, it is hard to see how Australia could ever benefit from an extension of the term of copyright protection because it would create a reallocation of resources and adversely affect our balance of trade.[22] The trade imbalance for royalties and licence fees has increased by millions of dollars over time, as shown by the table below:[23]

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of the court to make submissions on this point. Through economic analysis they established that extending the copyright term would have a trivial impact on incentives for creativity.

20 Ibid, at 8.

21 Ibid, per Justice Breyer, at paras 7, 13, 28, in part, citing a report of the Congressional Research Service. By finding against the rationale for the extension Justice Breyer noted at para 7 that: 'only about 2% of copyrights between 55 and 75 years old retain commercial value—i.e., still generate royalties after that time'; HM Treasury, 'Gowers Review of Intellectual Property', November 2006, 69; and R. Posner and W. Landes, *The Economic Structure of Intellectual Property Law*, 2003, Source: American Library Annual and Book Trade Almanac for 1872–1957 - in the year 1930, 10,027 books were published in the United States, but by 2001 only 174 were still in print – about 1% of the total.

22 Sir Anthony Mason 'The Users' Perspective on Issues Arising in Proposals for the Reform of the Law of Copyright' (1997) 19(1) *Sydney Law Review* 65, at 71-72; citing NSW Office of Regulation Review, 'An economic analysis of copyright reform, submission to CLRC Review,' 1995, at 39. At the time of writing the annual net outflow for 1993-94 was $1.2 billion.

23 Table compiled from ABS Time Series Spreadsheets: 5302.0 Balance of Payments and International Investment Position, Australia, 'TABLE 15. SERVICES CREDITS: ORIGINAL – QUARTER' <http://www.abs.gov.au/ausstats/meisubs.NSF/log?openagent&5302015.xls&5302.0&Time%20Series%20Spreadsheet&EACB4A3D5F9A048CCA257623001CE0F1&0&Jun%202009&01.09.2009&Latest>; 5302.0 Balance of Payments and International Investment Position, Australia, 'TABLE 16. SERVICES DEBITS: ORIGINAL – QUARTER' <http://www.abs.gov.au/ausstats/meisubs.NSF/log?openagent&5302016.xls&5302.0&Time%20Series%20Spreadsheet&F1F5B262DD79D1C2CA257623001CE653&0&Jun%202009&01.09.2009&Latest>.

Table 1 Trade cash flows for royalties and licence fees

Year	Export ($m)	Import ($m)	Net flow ($m)
2002-03	631	-2145	-1514
2003-04	660	-2332	-1672
2004-05	696	-2402	-1706
2005-06	749	-2681	-1932
2006-07	862	-3034	-2172
2007-08	801	-3459	-2658
2008-09	820	-3537	-2717

The Intellectual Property and Competition Review Committee (**IPCRC**) in its report *Review of Intellectual Property Legislation under the Competition Principles Agreement*, concluded that:[24]

> It is highly questionable whether there would be a material supply response. However, as protection would be extended on the existing stock, the near-term infra-marginal transfers associated with extension would be significant. A substantial share of these transfers would flow overseas, and take the form of an effective deterioration in Australia's terms of trade.

The IPCRC recommended that: 'no extension of the copyright term be introduced in future without a prior thorough and independent review of the resulting costs and benefits.'[25] Government agreed to this recommendation in its response to the review.[26]

The review recommended by the IPCRC never occurred. The reports on AUSFTA commissioned by government made only weak assessments, which nevertheless were not in favour of extending the term. The Centre for International Economics, criticised for failing to even attempt a quantitative analysis,[27] concluded that: 'the copyright extension in the agreement will, at most, provide a minor additional incentive for the creation of new works.'[28] The Allen Consulting Group report provided no clear evidence of any short or long term economic benefits of extension.[29] An independent assessment estimated that the cost in net

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24 Intellectual Property and Competition Review Committee, '*Review of Intellectual Property Legislation under the Competition Principles Agreement*', September 2000, at 83.

25 Ibid, at 84.

26 Government response to the Intellectual Property and Competition Review recommendations, Australian Government, August 2001 <http://www.ag.gov.au/www/agd/agd.nsf/Page/Publications_GovernmentsresponsetotheErgasreport-August2001> at 2.

27 David Richardson, 'Intellectual property rights and the Australia—US Free Trade Agreement', *Information, Analysis and Advice for the Parliament*, Research Paper No. 14 2003–04, at 11.

28 Centre for International Economics, *Economic Analysis of AUSFTA: Impact of the bilateral free trade agreement with the United States*, prepared for the Department of Foreign Affairs and Trade, Canberra and Sydney, April 2004, p. 37

29 The Allen Consulting Group, 'Copyright Term Extension: Australian Benefits and Costs', July 2003, <http://www.allenconsult.com.au/resources/MPA_Draft_final.pdf>

transfers overseas could be up to $88 million per year with a net present value of up to $700 million in total costs.[30]

Knowledge Cost to Australia

All of the reports on AUSFTA failed to adequately consider the true cost of the lost access to knowledge caused by preventing the progress of works into the public domain for a further 20 years. This cost cannot be measured by economic analysis, yet, the negative impact on access and ultimately creative innovation is easy to perceive.

Extending the copyright term had serious consequences for library, cultural and educational institutions both in an economic and non-economic sense. It increased the cost of maintaining access to information and the already formidable and resource-intensive task of tracing copyright owners and requesting permissions. The groups of people who were ultimately affected include historians, scholars, teachers, writers, artists and researchers of all kinds.

Term extension has restricted the traditional dissemination of copyright works, inhibited new technology enabled forms of dissemination and threatened current efforts to preserve historical and cultural heritage. It has had a serious impact on the development of electronic archives and repositories which publish or make available public domain works. Take for example, the various newspaper digitisation projects run by the National Library of Australia.[31] Following the implementation of AUSFTA, these projects may only include newspapers up to 31 December 1954. For existing works, the term extension only applies to those that were in copyright in 2005 when the AUSFTA amendment came into force. For 1954 era works that were out of copyright in 2005, the term of copyright protection is 50 years. The impact of the term extension is that 1955 era newspapers, in which copyright would have expired in 2006, will remain in copyright until the end of 2025. At this point in time, Australians have lost access to an additional 5 years of newspapers (under a 50 year term we would currently have access to 1959 era newspapers).

The impact of the term extension has been to create a 20 year cessation in the progress of digitisation projects. Australians have access to 1954 era material through initiatives like National Library of Australia's newspaper digitisation and Project Gutenberg Australia,[32] but absurdly, will not have access to material from the next year, 1955, for a further 15 years – in 2025.

Technological Protection Measures

The AUSFTA provisions on Technological Protection Measures (**TPMs**) ostensibly extended the protection of copyright and required a substantial departure from Australia's previous laws and international standards.[33] These obligations had a dramatic and negative impact on the

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30 Dee, P., *The Australia-US Free Trade Agreement — An Assessment*, Australian National University, Canberra, at 31.

31 See National Library of Australia, 'Trove' <http://trove.nla.gov.au/newspaper>.

32 Project Gutenberg Australia provides free ebooks for out of copyright works whose authors who died before 1955 <http://gutenberg.net.au/>.

33 WIPO Copyright Treaty, (adopted in Geneva on December 20, 1996), <http://www.wipo.int/treaties/en/ip/wct/trtdocs_wo033.html>. This treaty originally provided for the protection against the circumvention of TPMs. originally created TPMs. Its language indicates that the intention was to protect copyright law in its entirety, that is, the protective provisions as well as the public interest exceptions.

balance required to encourage the development of new software, systems and products. Implementation of the TPM provisions created barriers to competition, interoperability, and the efficient operation of Australia's IT industry. It was a sub-optimal outcome of AUSFTA that distorted the balance created through various consultative processes in the past and indeed risks being challenged in the future on Constitutional grounds.[34]

Prohibit Legitimate Non-infringing Uses

The TPM provisions under AUSFTA and Australian law allow copyright holders to prevent the ability of copyright users to rely on exceptions like fair dealing and other non-infringing uses permitted by law. The fair dealing exceptions are of great value to Australia in terms of the access to knowledge and economic resources that they provide and are the primary balancing aspect of the *Copyright Act*, as such they should not be inhibited by TPMs.[35] Allowing circumvention of TPMs for fair dealing purposes would not adversely impact on the effectiveness of anti-circumvention laws as it would only allow circumvention in very limited circumstances, namely, the set of non-infringing uses set out in those provisions.

The *Digital Agenda Review* of the *Copyright Act* (pre-AUSFTA) recognised this and recommended an amendment to allow the circumvention of TPMs for non-infringing uses of material.[36] The *Digital Agenda Review* went further to ensure that copyright owners could not force users to 'contract out' of this exception. It recommended prohibiting any licensing requirements that would prevent users from circumventing TPMs for fair dealing purposes.[37] Australia's obligations under AUSFTA arguably prevent it from enacting the blanket 'permitted purposes' for circumventing TPMs recommended in the *Digital Agenda Review*.[38]

Allowing TPMs to prohibit non-infringing uses also violates the rights of consumers by curtailing their right to enjoy and use legally purchased property as they so wish.[39] Consistent

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TPMs may only be used to protect rights in the copyright and do not apply where the use is otherwise permitted. Article 11 provides:

Contracting Parties shall provide adequate legal protection and effective legal remedies against the circumvention of effective technological measures that are used by authors in connection with the exercise of their rights under this Treaty or the Berne Convention and that restrict acts, in respect of their works, which are not authorized by the authors concerned or **permitted by law**. [Emphasis added]

34 *Stevens v Kabushiki Kaisha Sony Computer Entertainment* [2005] HCA 58 (6 October 2005); per Kirby J at 218.

35 See Senate Committee, Free Trade Agreement, Australia- United States Agreement 2004, p. 90.

36 Digital Agenda Review, above n 12, recommendation 17.

37 Ibid, recommendation 19.

38 See analysis in Jacob Varghese, 'Guide to copyright and patent law changes in the US Free Trade Agreement Implementation Bill 2004', Information, Analysis and Advice for the Parliament, Current Issues Brief No. 3 2004–05, at 30-31.

39 This was recognised by the House of Representatives Select Committee inquiry into AUSFTA indicated that the breadth of the definition of TPM may result in 'devices' such as geographical market segmentation being considered to be 'TPMs', with the result that these laws may prevent consumers accessing lawfully acquired property, see Information paper, Inquiry into Technological Protection Measures Exceptions, House of Representatives Committee on Legal and Constitutional Affairs <http://www.aph.gov.au/house/committee/laca/protection/infopaper.pdf>. When implementing AUSFTA Australia chose to exclude geographical market segmentation from being a TPM, see *Copyright Act 1968*, section 10. However, the impact of other restrictions on devices that circumvent TPMs means that consumers still cannot readily circumvent region coding on DVDs – even though it is not protected.

with the *Stevens v Sony*[40] decision, copyright law should not oust the ordinary rights that consumers acquire upon purchasing property.

Extension of Monopoly Rights

The TPM provisions under AUSFTA and Australian law also allow copyright holders to control the right to access content, which is not a right protected by copyright and removes the nexus between the TPM and the creator's rights. The impact of these provisions has been to lessen competition and extend the monopoly of copyright holders beyond the original intention of the *Copyright Act* – to the detriment of consumers in terms of cost and choice. The ability to control access has given copyright holders the *de facto* ability to create and exploit competition monopolies in terms of market power.[41]

The *Stevens v Sony* decision confirms that TPMs should not provide a tool for rights holders to engage in anti-competitive conduct.[42] To the extent that the new TPM provisions effectively provide copyright holders with stronger rights of exclusion, and through exclusion a substantial degree of market power, they may allow copyright holders to charge economic rents because they will not be restricted by competition or countervailing power from other market participants. The IPCRC warned that allowing copyright holders to use TPMs to claim economic rents and avoid competition laws would lead to a loss of the overall benefits of knowledge creation for society as a whole.[43]

The primary anti-competitive use of TPMs is geographical market segmentation which allows copyright holders to impose differential price structures, such as region coding on PC games and DVD movies. Copyright holders then engage in price gouging in each region by extracting the maximum price it is willing to pay. This is done by preventing media purchased in one region from playing on devices purchased in a different region. As Kirby J points out in *Stevens v Sony*, this is inconsistent with the balances ordinarily inherent in copyright legislation.[44]

TPMs also allow copyright holders to create serial monopolies where they control the markets for accessories associated with a primary product, and so charge higher prices for those accessories than a competitive market would.

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40 *Stevens v Kabushiki Kaisha Sony Computer Entertainment* [2005] HCA 58.

41 The use of the word 'monopoly' to describe market positions in competition law, and ownership in copyright law, is fundamentally different. A monopoly in competition terms is a market participant that possesses a substantial degree of market power. A monopoly may act in a manner unconstrained by competition from rivals or countervailing power from other market participants. Competition law concerns preventing monopolists from taking advantage of their market power. A monopoly in copyright law is merely the exclusive right to exploit a creative work. See Robertson Wright SC and Julia Baird SC, 'The intersection of competition and intellectual property law and the 'new economy'' (2008) 16 *Commonwealth Competition Law Journal* 143, at 32.

42 *Stevens v Sony*, per Kirby J at para 175:
… Sony sought to impose restrictions on the ordinary rights of owners, respectively of the CD ROMS and consoles, beyond those relevant to any copyright infringement as such. In effect, and apparently intentionally, those restrictions reduce global market competition. They inhibit rights ordinarily acquired by Australian owners of chattels to use and adapt the same, once acquired, to their advantage and for their use as they see fit.

43 Intellectual Property and Competition Review Committee, 'Review of intellectual property legislation under the Competition Principles Agreement', September 2000, at 24-27.

44 *Stevens v Sony*, per Kirby J at para 215.

Limitations to ISP Liability

Article 17.11.29 of AUSFTA required Australia to adopt safe harbours for ISP liability that were closely modelled on provisions of the DMCA. The DMCA provisions have proved controversial since their introduction and continue to be the subject of extensive litigation in the United States and it is difficult to ascertain at this stage what balance has been achieved.[45] We note the current litigation represents the development of interpretations of the DMCA which are a substantial deviation from the original legislative intent.

The DMCA provisions have been comprehensively criticised as lacking due process in their administration and overly favouring rights holders. For example, in order for content hosts to qualify for protection, the safe harbour regime obliges them to act 'expeditiously' to remove infringing content once notified of its existence.[46] Due process is trampled in the administration of this requirement as a result of imposing a duty on 'gatekeeper-intermediaries', which care more about avoiding liability than about the rights of their users.[47] Thus, intermediaries will always favour the copyright holder complainant[48] because there is 'no incentive to investigate or resist the notice', as doing so would only create 'potential liability'.[49] Equivalent provisions exist in Australian legislation.[50]

The *Digital Agenda Review* recommended a much more considered regime which had a more appropriate balance between copyright users and owners and was tailored to Australia's domestic circumstances.[51] AUSFTA prevented Australia from enacting this superior regime because of its extensive, specific and onerous provisions. By creating different classes of intermediaries AUSFTA also frustrated the principle of 'technological neutrality' which undermined the carefully considered principles of the *Digital Agenda Amendments* on which the *Digital Agenda Review* was based.[52]

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45 For example the ongoing litigation in the United States see *Viacom v. YouTube*, Inc., Case No. 07 CV 2103 (Southern District New York, 2007). Viacom sued YouTube for failing to remove alleged infringing content hosted on its servers. YouTube won at summary judgment with the suit being dismissed as the Judge ruled it qualified for the United States safe harbour limitations to liability. However, Viacom has since appealed this ruling. For an example of the ongoing litigation in Australia see *Roadshow Films Pty Ltd v iiNet Limited (No. 3)* [2010] FCA 24. A coalition of United States movie studios, represented by AFACT, initiated proceedings against ISP iiNet for failing to take reasonable steps to prevent its subscribers from downloading infringing content. iiNet won at trial on the basis that it did not authorise the infringement of its subscribers under section 101 of the *Copyright Act*. However, at the time of the writing of this submission an appeal is under consideration by the Full Federal Court.

46 17 USC §512(e); article of 17.11.29 AUSFTA; Part V, Division 2AA of the *Copyright Act 1968*.

47 Marjorie Heins and Tricia Beckles, 'Will Fair Use Survive? Free Expression in the Age of Copyright Control', Brennan Centre for Justice, New York University School of Law <http://www.fepproject.org/policyreports/WillFairUseSurvive.pdf> at 28 October 2008.

48 Jennifer Urban and Laura Quilter, 'Efficient Process or "Chilling Effects"? Takedown Notices Under Section 512', (2006) 22(4) *Santa Clara Computer and High-Technology Law Journal* 621, 648.

49 Malla Pollack, 'Rebalancing Section 512 To Protect Fair Users From Herds Of Mice-Trampling Elephants, or a Little Due Process is Not Such a Dangerous Thing', (2006) 22(3) *Santa Clara Computer and High-Technology Law Journal* 547, 560–1.

50 Section 116AH Item 4 of the *Copyright Act 1968*.

51 Digital Agenda Review, above n 12, at 85-86.

52 *Copyright Amendment (Digital Agenda) Act* 2000; AUSFTA required Australia to categorise the types of activity that qualify for the safe harbours, which goes against the principle of technological neutrality because it means additional categories will have to be added for new technologies. Section 116AC covers 'providing facilities or services for transmitting, routing or providing connections for copyright material', section 116AD covers 'caching copyright material through an automatic process', section 116AE covers 'storing, at the direction of a user,

Criminal Offences

The provisions of AUSFTA created obligations that significantly raised the standard and range of remedies available to copyright owners for infringement. The increased severity of penalties is coupled with the potentially dangerous lowering of standards in relation to presumptions of ownership and a broadened category of acts which are be subject to criminalisation. This occurred without due consideration of the necessity and appropriateness of extra sanctions within the overall context of the criminal justice system and in light of Australian policy on criminal law generally.

Australia enacted a plethora of new criminal offences under AUSFTA and the *Copyright Amendment Act 2006* with low thresholds for liability that criminalised non-commercial infringement and significantly extended the roll of the taxpayer in enforcing privately held copyrights. When implementing AUSFTA domestically, there was a significant public outcry and a concerted effort to ensure that Australian copyright law would not impose criminal liability for purely 'private' acts.[53] A private act is an act that typically occurs within the home, is non-commercial and lacks a public distributive effect. In 2004, the ADA submitted that:[54]

> criminalisation of what is essentially end-user copying as required by the provisions makes for unsound policy and creates a "chilling effect" for the legitimate use of works … the implementation of article 17.11.29 [should] recognise and maintain the existing distinctions between commercial and private, individual transgressions in Australian copyright law, and minimise as far as possible the criminalisation of end user copying.

The changes required by AUSFTA do not align with the general principle that criminal enforcement of copyright is only justified where the infringement is for commercial gain, intentional and on such a large scale that it could be considered a wrong against society because it will significantly reduce the creation of knowledge and there is a paramount need for deterrence.

Economic and Other Impacts

We acknowledge the difficulties of assessing gains in the area of copyright. It is extremely difficult to forecast in any meaningful sense, trends in creating, distributing and gathering information against the background of rapid technological change. The Centre for International Economics (**CIE**) was commissioned to create an economic model of gains on the basis of the draft AUSFTA text, however the model created to assess the economic impacts arising out of the IP articles in chapter 17 was not fulsome enough or sufficiently scrutinised by government.

The study of the impact of AUSFTA should have considered and given equal weight to the non-economic impacts of the agreement. The mechanisms and impacts in the area of copyright are mostly unquantifiable in a strict economic sense. The paradigms of economic

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copyright material on a system', and section 116AF covers 'referring users to an online location using information location tools or technology'.

53 Kimberlee Weatherall, 'The Anti-Counterfeiting Trade Agreement: An updated analysis', November 2009 <http://works.bepress.com/kimweatherall/19/>, 13.

54 Australian Digital Alliance, 'Submission to the Select Committee: Australia- United States Free Trade Agreement', April 2004, <http://www.digital.org.au/downloads/Subsenateselect.doc>.

modelling are simply inadequate to assess the costs and benefits of cultural, innovative and creative potential woven deep in the cycle of the sharing and creation of knowledge.

D. FUTURE BRTAs

Procedural Concerns

The Role of Parliament

The deficiencies in the negotiation, scrutiny and ratification of AUSFTA are true for all treaties. Hilary Charlesworth and George Williams consider that:[55]

> The parliamentary dispute over the AUSFTA implementing legislation highlights the shortcomings in a treaty-making system where the only option available to parliamentarians (and through them the public) to exert influence over Australia's entry into a treaty lies with the drafting and passage of implementing legislation.

Parliament has a limited role in treaty making: it is unable to influence the negotiation process, the terms, or even the decision of ratification. The ability of Parliament to influence the implementing legislation is too little too late. It gives no ability to influence the terms of the treaty and limits public discourse to whatever flexibility may be found within the interpretation of those terms.

With respect to AUSFTA, the major parliamentary and public debate took place after the agreement had already been drafted and essentially agreed upon. The decisions made during the negotiating process, largely by public servants under a mandate from the executive government, were not subject external scrutiny yet had a distinct impact on the development of Australia's law and economy. 'The confidentiality of the negotiating process locks both the public and Parliament out of the negotiations and into a situation where they have to accept the agreement as a whole, or not at all.'[56] The result of the closed door negotiations is a 'democratic deficit' in Australia's treaty making process.[57]

Joint Standing Committee on Treaties

The Joint Standing Committee on Treaties (**JSCOT**) was created to improve the openness and transparency of the treaty making process in Australia. However, it suffers from the same democratic deficit as Parliament and in its present form, is an ineffective means of scrutinising treaties. JSCOT:

- is excluded from the most important decisions during the negotiation stage;
- is limited to reviewing treaties only after the conclusion of negotiations when the terms have been agreed;
- typically has too few parliamentary sitting days (15 to 20) to inquire and report on complex treaties;

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55 Hilary Charlesworth et al, *No Country is an Island: Australia and International Law* (UNSW Press, 2006) at 137.

56 Ibid, at 139.

57 Ibid, at 139.

- while a joint committee, the balance is held by government and it has generally made recommendations following government policy; and
- largely plays the role of a rubber stamp that 'legitimises government decision-making about treaties, without offering a genuine opportunity to critique or to influence government policy.'[58]

Democratic Deficit

We strongly support recommendation 4 of the Draft Research Report with regard to adopting a cautious approach to including IP in BRTAs and recommendation 6 with regard to the assessment of proposed BRTAs. We recommend enhancement of these two positions so as to reduce the negative impact of the democratic deficit. A cautious approach and an impartial assessment will yield minimal results if they are limited to the finalised text of an agreement because the outcome will nevertheless be a *fait accompli* and a binary decision to either reject or affirm the entire BRTA with no meaningful public discourse or parliamentary debate.

The Parliament should be involved in the negotiation process through the JSCOT, which in turn should be advised by an independent and transparent assessment of the terms under negotiation. An organisation such as the Productivity Commission, as government's independent research and advisory body, would be best placed to comment on the economic and social impacts of any changes required by BRTAs. Its assessment process could be public or confidential depending on the situation, and should be used to inform the decision making of JSCOT. This should apply to any BRTA or any agreement that purports to be a trade agreement, such as ACTA.

Recommendation 1: JSCOT, as the representative of Parliament, should be given greater powers to play an active role in the negotiation process, including but not limited to, the mandate of public servants responsible for the negotiations.

Recommendation 2: regular independent and transparent assessments of Australia's national interests, economic and noneconomic, should be a key part of the negotiation process. An assessment should be made of early proposals, the draft text, and the final concluded text and provided to JSCOT. The Productivity Commission would be best placed to make such assessments.

Inclusion and Negotiation of IP Provisions

Including the negotiation of IP provisions in BRTAs creates procedural issues. BRTAs substantially concern trade matters, the negotiation of which has traditionally been afforded a great deal of secrecy.[59] There is however, no justification for maintaining the secrecy of IP negotiations, particularly those that concern copyright.

The main objective of copyright is to provide an incentive for creativity and access to knowledge. Even the smallest changes to copyright law can have significant effects on the

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58 Ibid, at 48.

59 Negotiators frequently make the argument that secrecy on the discussion of trade matters is necessary to reach an agreement on politically sensitive issues and that early public consultation on proposals that are considered but not acted on could negatively affect internal decision making and the negotiation process.

community. The negotiation of amendments to copyright should have maximum transparency because they have great potential to affect the public interest. In order to maintain the fine balance required by copyright law, the public must be openly consulted at the earliest stage possible. Thus, it is inappropriate to include IP in negotiations that are not transparent because it does not serve the public interest and inhibits public consultation which can lead to poor outcomes, as evidenced by AUSFTA.

Recommendation 3: IP provisions should not be included in BRTAs where the negotiation process will be kept confidential, or alternatively, maximum transparency should be provided on the articles that include IP matters. Public and parliamentary scrutiny and input is essential to maintaining the fine balance of interests required by copyright and other associated IP rights.

National Interest Analyses

Assessment of IP Provisions

The assessment of IP provisions for national interest analyses is a challenging task. It is difficult to rationalise the gains and losses created by IP provisions on a purely economic basis. IP, particularly copyright, requires consideration of noneconomic factors that are difficult to quantify, but have a very real impact on the Australian economy and social ecology.

Recommendation 4: the value of balanced IP provisions and their fundamental importance to cultural, social and economic advancement in Australia should be given due precedence in national interest analyses.

Linking IP Provisions to Trade Matters

Caution should be given to attempts to link IP provisions to trade matters. There is little value to Australia to increasing IP protection in terms of the security of the domestic and export markets of its creative industries.

Inclusion of IP provisions in BRTAs is not an effective means of helping other countries and trading partners to reach commensurate levels of IP protection. The influence of domestic politics and interests on the process of implementing treaties through domestic legislation means that true harmonisation is not achievable.

Any assertions that increasing global levels of IP protection will benefit Australia should be rejected – unless the benefits of a specific provision can be empirically established in advance. Australia is a net importer of IP rights – almost $3 billion in 2008-09[60] – from largely western countries such is the United Kingdom, European Union and the United States which have existing strong IP protection regimes. These countries are also the likely sources of Australia's export markets for IP goods.

Australia will not receive a competitive benefit from encouraging other countries to reach a commensurate level of IP enforcement, doing so will not facilitate the ability of Australian businesses to export IP goods with confidence. Of Australia's top ten export markets, only

[60] See table above on page 8.

China, India and Thailand could be said to have poor IP protection and the majority of exports to these countries are resources which require no IP protection.[61]

Recommendation 5: when considering the benefits to the Australian economy from encouraging other countries to reach commensurate levels of IP protection, national interest analyses should consider the true contribution of IP industries to the Australian economy in terms of the percentage of this industry that consists of exports, and the percentage of these exports that are to countries with poor IP protection.

Review of Changes

If BRTAs require amendments to either Australian legislation or policy, a national interest analysis on the impact of these changes should be conducted after three years. This will provide data to enable evidence based policy to guide future BRTA negotiations on the same subject matter.

We strongly consider that a review of the changes required by AUSFTA should be conducted. We note that a review of changes to copyright law by the *Copyright Amendment (Digital Agenda) Act* 2000 was carried out three years later in the *Digital Agenda Review*. A review of the impact of AUSFTA, as a major force of change in the Australian copyright regime, would provide excellent guidance on the future negotiation of BRTAs that cover copyright maters.

Recommendation 6: if any amendments to Australian legislation or policy are required by BRTAs, a national interest analysis should be conducted three years after they are implemented.

Recommendation 7: an independent and transparent national interest analysis of the impact of changes required by AUSFTA should be conducted, including but not limited to, changes to copyright law.

61 See statistics by Department of Foreign Affairs, *Trade at a Glance 2009*, <http://www.dfat.gov.au/publications/taag/index.html>.