**How access to knowledge may be restricted under the TPP – Australian experiences after AUSFTA**Notes for panel discussion, Sunday 4 March 2012 – Ellen Broad, Executive Officer, Australian Digital Alliance

At the recent G20 Ministerial in Los Cabos, Mexico, Secretary of State Hillary Clinton set out four attributes to characterise healthy economic competition and a healthy global economy:

*“It must be open, free, transparent, and fair. An open system is one where any person anywhere can participate in markets everywhere. A free system is one in which ideas, information, products, and capital can flow unimpeded by unnecessary or unjust barriers. A transparent system is one where rules and regulations are developed out in the open through wide consultation. And a fair system is one where companies compete on a level playing field based on agreed-upon rules, which sustains our faith in the system itself.*

*On the other hand, we also all agree that information and ideas need to be able to cross borders freely. Our countries have an opportunity to create a flexible framework that encourages rather than stifles, supports rather than suppresses, and connects rather than separates, innovators around the world.[[1]](#footnote-1)”*

These four attributes guide, or should guide, current negotiations of the Trans-Pacific Partnership Agreement.

You’re likely to hear a number of speakers today and over the course of negotiations seeking greater transparency regarding draft treaty texts and negotiating documents. Without lingering on this issue, I’d like to add the ADA’s voice to these calls, and note that the ability of stakeholders here today to contribute meaningfully to the negotiations is being constrained by the fact that they are commenting on text that is more than a year old.

In my presentation, I’m going to draw on the second half of Secretary Clinton’s remarks:

“*we also all agree that information and ideas need to be able to cross borders freely. Our countries have an opportunity to create a flexible framework that encourages rather than stifles, supports rather than suppresses, and connects rather than separates, innovators around the world.”[[2]](#footnote-2)*

The higher the standard of IP enforcement and protection measures in a country, the greater the risk that the free flow of information and innovation will be inadvertently restricted. Intellectual property laws must strike a balance between protection of the rights of the copyright holder, and the broader public interest in access to knowledge.

In my presentation I’ll be making reference to the draft February 2011 leaked IP chapter. I’ve chosen to focus on provisions of that chapter that could substantially restrict, and in some circumstances, make impossible, access to knowledge.

Specifically, I will focus on three aspects of the draft text that reflect some of the obligations Australia has implemented into domestic law as the result of the Australian US Free Trade Agreement. These are:

* Restrictions on parallel importation
* Technological Protection Measures
* Copyright term extension

The ADA represents libraries, archives and schools who use copyright materials within the boundaries of lawful use in Australian copyright law. I’m going to look at the implications and unintended consequences for users of copyright material in Australia, following the conclusion of AUSFTA.

**Comments on AUSFTA:**

Australia’s own high standards for IP enforcement and protection stem from obligations that arose under the Australian-United States Free Trade Agreement (AUSFTA), concluded in 2004. The conclusion of AUSFTA required the most significant changes to Australian IP law since the Digital Agenda amendments in 2000. The extremely detailed, enforcement-focused IP chapter of that agreement imported wholesale into our domestic regime aspects of the US IP model, regardless of its compatibility with Australian IP traditions. It also set in stone policies that were directly contrary to government recommendations for copyright reform at the time.

AUSFTA only required the adoption of US standards where the scope of IP protections was broadened:

*“The US has a much more generous definition of “fair use” than Australia, affecting access by libraries and researchers, but Australia has not been required to adopt the US definition. Similarly, the US has a much higher standard of originality for copyright protection than Australia, requiring “creative spark” not just “skill and labour”. Australia has not been required to adopt the US standard.* ***Thus Australia has been required to adopt US standards, but only when it broadens rather than narrows the scope of IP protection.[[3]](#footnote-3)*”**

In her report to the Senate Inquiry into AUSFTA, respected Australian economist Dr Phillipa Dee described the IP chapter of AUSFTA as a chapter that “restricts market opening”:

“*It contains provisions to tighten up the protections afforded the producers and/or performers of protected work, with the consequence that there is less access by users, or at a greater cost*”[[4]](#footnote-4).

**1. Technological Protection Measures**

Article 4.9(d) of the leaked US IP Chapter allows for limited exceptions to prohibitions on circumvention and trafficking circumvention devices. This list is exhaustive. Australia is subject to a very similar regime under AUSFTA, implemented in the *Copyright Act* Part V div 2A. There are subtle differences, however. Take the wording of Article 4.9(d)(viii) of the TPP proposal:

*“where ‘an actual or likely adverse impact on [other] non-infringing uses is demonstrated in a legislative or administrative proceeding by substantial evidence; provided that any limitation or exception adopted in reliance upon this clause shall have effect for a renewable period of not more than three years from the date of conclusion of such proceeding.’*

Under AUSFTA and Australian law:

* The impact on non infringing uses need only be ‘credibly’ demonstrated rather than “by substantial evidence”.
* Exceptions do not need to be renewed. Exceptions only end if a submission is made to vary or revoke the exception, and ‘an actual or likely adverse impact’ can no longer be credibly demonstrated.

**Prescriptive TPM measures pose an administrative burden for government agencies, and do not keep pace with changing technologies and practices**

Australia’s current provisions regarding limited exceptions for circumvention for TPM’s are not working. Although on passing the original implementation legislation in 2006 Australia did create a series of additional exceptions (*Copyright Regulations 1969 Schedule 10A)*, Schedule 10A has not been updated since. There has been no regular system for administrative reviews: in 2010 in a meeting with the ADA and ALCC the Attorney General’s Department indicated that a review of the TPM exceptions would take place as per the four yearly requirements under AUSFTA, but to date, no review has taken place. It should also be noted that submissions to the Attorney-General’s Department requesting the addition of further exceptions to Schedule 10A have not been actioned. Simply put, Australia’s TPM scheme poses a significant administrative burden on the agency responsible for copyright policy implementation.

In most countries, the relevant interest groups – libraries, non-government advocacy groups, universities and so on do not have the resources to undertake reviews of activities excluded by TPM provisions, or permitted and up for expiration, every three years and collate evidence of serious harm. Nor, for that matter, do many government agencies.

**What problems have libraries and educators encountered under the AUSFTA-imposed TPM regime in Australia?**

I’d like to quickly take you through some of the acts currently permitted under Schedule 10A in Australia, and the way these actually operate. Libraries and archives, for example, can only circumvent TPMs within the scope of library copying provisions: interlibrary loan, document supply and making of preservation copies. Acts prescribed in Schedule 10A do not include **format shifting for access to works** – i.e. to replace outdated formats (DVD to digital, for example). In addition, libraries and archives cannot circumvent TPMs for the purposes of exercising rights available to them under the Australian “**flexible dealing” provision, section 200AB**, which permits the use of copyright works for particular purposes in the public interest. (Note: the ADA requested an exception to enable libraries, archives and educational institutions to circumvent access control TPMs for the purposes of doing an act permitted under s200AB in July of 2008 – “We are seeking for the Minister to recommend that a use under section 200AB become a “prescribed act” for the purposes of sections 116AN and 132APC.” )

The ALCC has also requested an exception for making of backup copies of software programs[[5]](#footnote-5).

Schools, too, may encounter problems in the future as they embrace cost-effective open source systems, that can’t read many forms of DRM. Students accessing materials with TPMs using an open-source system, in the context of the leaked TPP provisions, risk either being criminalized for copyright infringement, or denied access to materials.

Problems with overly prescriptive TPM provisions will only increase as libraries and universities increasingly become licensees of digital information, and encounter digital rights management that restricts their ability to undertake activities permitted by the Copyright Act (library copying provisions, for example). It should also be noted that Article 4.9(d) of the leaked TPP chapter does not include circumvention of TPMs for the making of accessible format copies for the visually impaired, currently the focus of WIPO discussions.

**How can the TPP provisions be fixed?**

The TPM provisions of the TPP should avoid specificity where possible. A prescribed list of permitted tasks can be easily outdated and too limiting, and if Australia’s experiences under AUSFTA are anything to go by, very hard to change. Alternatively, language from Article 11 of the WIPO Copyright Treaty might be adopted; it provides flexibility, and allows domestic policy makers to adapt copyright laws to technological change.

***Article 11 -*** *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.[[6]](#footnote-6)*

Lastly, I’d like to draw your attention to further remarks made by Dr. Dee regarding TPMs in her analysis of AUSFTA, which lead into some brief comments about parallel importation restrictions in Australia.

*“The more stringent provisions (referring to the TPM restrictions) in AUSFTA could effectively reintroduce restrictions on parallel importing of DVDs through the back door, only a few years after Australia has relaxed these restrictions.[[7]](#footnote-7)”*

The ACCC has more general concerns about the anti-competitive consequences of effective technological measures.

**2. Restrictions on parallel importation**

Australia prohibits parallel importation of copyright works (ss37, 102) but has exceptions for software (s44E), music and e-books (s44F) and sound recordings (s112D) where the product is placed on the market overseas with the consent of the copyright owner in the relevant jurisdiction (ie parallel importation /grey market goods)[[8]](#footnote-8).

Article 4.2 of the leaked US proposal proposes that

*Each Party shall provide to authors, performers and producers of phonograms the right to authorize or prohibit the importation into that Party’s territory of copies of teh work, performance, or phonogram made without authorization, or made outside that Party’s territory with the authorization of the author, performer, or producer of that phonogram.*

*FN11: With respect to copies of works and phonograms that have been placed on the market by the relevant right holder, the obligations described in Article [4.2] apply only to books, journals, sheet music, sound recordings, computer programs, and audio and visual works (i.e., categories of products in which the value of the copyrighted material represents substantially all of the value of the product). Notwithstanding the foregoing, each Party may provide the protection described in Article [4.2] to a broader range of goods.*

Article 4.3 proposes that:

*Each Party shall provide to authors, performers, and producers of phonograms the right to authorize or prohibit the making available to the public of the original and copies of their works, performances, and phonograms through sale or other transfer of ownership.*

The adoption of this provision would be a significant constraint on Australian copyright policy making. The Productivity Commission, the Australian Government's independent research and advisory body on economic, social and environmental issues affecting Australians, has published several reports recommending the Australian government repeal PIR. It’s also been noted by several studies that Australian consumers, as a small but affluent market, pay consistently higher prices for copyright works than in other jurisdictions. The most recent PC report to recommend repeal was a 2009 study into the parallel importation of books. The same conclusion has previously been reached in the 1995 Inquiry into book prices and parallel imports by the Prices Surveillance Authority[[9]](#footnote-9); the Ergas Review[[10]](#footnote-10), commissioned by the Federal Government in 1999 to consider IP rights and competition principles; and the Australian Competition and Consumer Commission in 2000.

**Parallel Importation Restrictions on books may restrict access to knowledge**

Subject to certain conditions, Australian copyright law provides for an almost total ban on Australian retailers importing books from overseas if a version of the book has been published locally. However:

* Booksellers can parallel import books that do not comply with the 30 day release and 90 day resupply rules.
* Booksellers can parallel import books to fill a single order
* Customers can import books directly for personal use

In its 2009 report into parallel importation restrictions on books, the Productivity Commission made some key findings:

* th**e additional income flowing overseas is around 1.5 times that retained by local copyright holders (**50% greater benefit to foreign rights holders)
* **the magnitude of the return to rights holders under PIR is dependent on the willingness of others to pay for the work in the market place**…(In the digital environment, consumers are increasingly purchasing books from online retailers where prices are lower)[[11]](#footnote-11).
* **PIRs “lessen the imperative for the local book industry to operate at best practice**…and distort economic resources away from their highest value uses”

And:

**“In effect, PIRs impose a private, implicit tax on Australian consumers which is used largely to subsidise foreign copyright holders”[[12]](#footnote-12).**

Australia abolished PIRs on sound recordings in 1998, at the same time that New Zealand repealed PIRs on books. Australia’s decision to abolish PIRs in sound recordings was in part because of research that suggested the then relatively high prices for recorded music in Australia reflected an ability of record companies to use their market power to exploit local demand conditions[[13]](#footnote-13).

Benefits have been observed in Australia as a result of the repealing of PIRs. Leading trade economist Keith Maskus noted in a report in 2000 that:

* After Australia reduced limitations on parallel importation of books in 1991, by 1994 price differentials between AU and UK/US decreased to just above shipping costs, and speed of introduction of overseas titles increased
* After 1998 sound recordings – Woolworths announced it would stock parallel imported CDs from Indonesia for 40-50% less. Maskus notes that parallel importation can be an **export industry for developing countries.**

**What is the effect of Article 4.2 of the leaked TPP chapter?**

The leaked IP chapter for the TPP seems to require nationalexhaustion in copyright and gives rights holders the right to prevent importation of legitimate goods. TRIPS, on the other hand, deliberately leaves open the question as to whether national or international exhaustion should apply.

**How can it be balanced?**

Replace with the language from TRIPS, which affirms that exhaustion of rights is a matter for domestic law:

*‘Nothing in this Agreement shall be used to [taken to] address the issue of exhaustion of intellectual property rights’.*

The EU model for harmonization and their approach to PIRs may be an alternative to the current restrictions of the TPP. EU rules regarding PI are built on the doctrine of ‘exhaustion’, preventing owners from seeking to use IP rights to divide up the European market.

By selling or consenting to the sale of goods in any part of the EU, the owner exhausts‟ its rights and thereby loses its ability to prevent goods from being transported to or resold in any other part of the EU. In contrast, AUSFTA and TPP make no attempt to smooth the flow of IP goods across national boundaries.

**3. Copyright term limit**

The extension of the copyright term duration in Australia from 50 to 70 years as the result of AUSFTA has generated considerable controversy, as Australia is a net-IP importer.

*“The net effect [of the term extension] is that Australia could eventually pay 25 per cent more per year in net royalty payments, not just to US copyright holders, but to all copyright holders, since this provision is not preferential. This could amount to up to $88 million per year, or up to $700 million in net present value terms. And this is a pure transfer overseas, and hence pure cost to Australia”[[14]](#footnote-14)*

The perpetual extension of copyright terms has been criticised globally, and I know everyone here is familiar with this debate. I don’t have much time, so I’d just like to comment on the impact of extended copyright terms in the way students can access and interpret Australian works.

If I can speak candidly, I’d say that Australian creators have a bigger battle than for extended copyright terms, and that’s for relevance. Relevanceand longevity in an international market. Australian books, film, music and artistic works make up only one portion of a market that is increasingly dominated by US and UK products. Beyond the commercial shelf life of an Australian work, it strikes me that there would be great cultural and educational benefit in shorter copyright terms that allow students to access works at low cost, and use them, interpret them, make mash ups, slam poetry, plays, movies, songs, etc, in a variety of ways (example of Judith Wright and celebrated poem “My Country”).

1. <http://www.state.gov/secretary/rm/2012/02/184623.htm> [↑](#footnote-ref-1)
2. Ibid. [↑](#footnote-ref-2)
3. Dee, Philippa, The Australia-US Free Trade Agreement: *An Assessment*, June 2004, <http://www.aph.gov.au/Parliamentary_Business/Committees/Senate_Committees?url=freetrade_ctte/rel_links/index.htm> 10 [↑](#footnote-ref-3)
4. ibid [↑](#footnote-ref-4)
5. <http://www.ag.gov.au/Documents/MALOC.pdf> [↑](#footnote-ref-5)
6. Article 11, WIPO Copyright Treaty, adopted in Geneva on December 20, 1996, <http://www.wipo.int/treaties/en/ip/wct/trtdocs_wo033.html> [↑](#footnote-ref-6)
7. Above n 3, p 15 [↑](#footnote-ref-7)
8. Weatherall K, An Australian Analysis of the Feb 2011 Leaked US TPPA IP Chapter text – copyright and enforcement <http://works.bepress.com/cgi/viewcontent.cgi?article=1022&context=kimweatherall> p 5 [↑](#footnote-ref-8)
9. Inquiry into book prices and parallel imports, Prices Surveillance Authority, 1995, Melbourne, VIC [↑](#footnote-ref-9)
10. *Review of intellectual property legislation under the Competition Principles Agreement,* Final Report of the IP and Competition Review Committee, September 2000 <http://www.ag.gov.au/Documents/Review%20of%20intellectual%20property%20legislation%20under%20the%20Competition%20Principles%20Agreement,%20%28September%202000%29.pdf> [↑](#footnote-ref-10)
11. PC goes further to say “hence, like other property rights, copyright law does not seek to ensure that rights holders obtain any particular return for their rights; nor would it be well suited to doing so” (3.6) [↑](#footnote-ref-11)
12. Productivity Commission review of parallel importation of books, <http://www.pc.gov.au/__data/assets/pdf_file/0006/90267/02-overview.pdf> p 20 [↑](#footnote-ref-12)
13. It was Australia’s repeal of restrictions on parallel importing of sound recordings in 1998 that saw Australia that year included on the USTR’s special 301 watch list, as one of the countries found to have “denied adequate and effective protection of IP rights”. \*Note: compliance with TRIPS does not preclude inclusion on the Special 301 Watch list. [↑](#footnote-ref-13)
14. Dee, 31 [↑](#footnote-ref-14)