

# The cost of free trade

**The Australian-US Free Trade Agreement is on track for implementation: Sarah Waladan asks, 'At what cost to copyright law?'**

The traditional balance that copyright law exists to maintain is set to be fundamentally altered in favour of copyright owners. On 13 August 2004, following prolonged debate, the Senate passed the Australia-US Free Trade Agreement (AUSFTA) Implementation Bill. This enables Australia and the United States to work towards the agreed date of implementation of the AUSFTA — 1 January 2005.

Copyright law has always existed to promote innovation, creation and improvement. It does this through maintaining a fair balance between providing users with reasonable access to the growing information economy on the one hand, and providing recognition and rewards for creators on the other. The consequences of a shift in this balance are clear: a decrease in the scope of information accessible in the public domain will act as a disincentive to innovation and improvement.

To date, copyright law has been translated into a set of exclusive rights for copyright owners which seek to provide reward and recognition. These rights have been tempered with the defence of 'fair dealing', which balances owner rights by allowing free access to works for limited purposes such as research, development and improvement. Such access is allowed where social aims outweigh private rights, and where it would be costly to purchase copyrighted works.

As of 1 January 2005, the changes envisaged by the AUSFTA Bill which relate to copyright law (and can be found in Schedule 9 of the Bill), will seriously alter the balance between owners and users in favour of owners. These changes will reverse the hard work undertaken by those working in this arena in past years to attain balanced copyright law. The Bill significantly strengthens the rights of copyright owners, whilst at the same time failing to strengthen the protection of the rights of users.

Without a re-balancing of rights, the changes as they currently stand will have a detrimental impact upon education, consumer, cultural and research institutions. Such institutions will bear the burden of more-stringent copyright owner rights, including extension of the copyright term by twenty years, broadening of the definition of what constitutes a copy (that is, the change in the definition of 'material form'), new performers' rights, expansion of protection of encoded broadcasts, and tougher penalties for breaches, including incidental, minor and non-commercial breaches of copyright. This extension of owners rights has not been tempered by any extension of our 'fair dealing' provisions. Fair dealing in Australia remains narrow and prescriptive.

Currently the 'fair dealing' exceptions in Australia enable copying (within the limitations of reasonableness) for the purposes of research or study, criticism or review, reporting the news, or for judicial proceedings or professional advice. These situations are expressly stated to be 'fair dealings' in division three of the *Copyright Act 1968*. There is however currently no room in the Act for new circumstances to be classified as 'fair dealing' by the courts as they arise. Activities such as taping a movie from your television onto a video cassette for later use ('time-shifting') or copying a compact disc onto a digital player for personal use ('space-shifting') are therefore still illegal in Australia. This is in contrast to the United States where the open-ended nature of their exception to copyright ('fair use') enables the United States courts to be progressive in law-making through defining new circumstances as falling within 'fair use' as they arise. This also enables the United States courts to more closely align the law with constantly-evolving technologies.

A broad exception to copyright is now long over-due in Australia. There have been several governmental inquiries which have recommended that a broader exception be incorporated into Australian legislation, the two most recent being the Joint Standing Committee on Treaties (JSCOT), and the Senate Select Committee on the AUSFTA. Both closely examined how the AUSFTA would affect intellectual property law in Australia and recognised the detrimental effects of the AUSFTA on balanced Australian Copyright Law. Although both Committees saw the AUSFTA agreement as being overall in the national interest, both recommended that if the agreement is ratified, steps should be taken by the government to re-balance copyright law, and that such steps should particularly include implementing an open-ended defence of fair use in Australia.

The Committees also both noted that given the Government's arguments for harmonisation of Australian law with United States law, such harmonisation should include copyright user rights as well as owner rights. Without affecting harmonisation on both sides of the balance, Australian copyright law will be even more skewed towards the interests of owners than United States law, which contains the broader open-ended 'fair use' defence, as opposed to Australia's prescriptive 'fair dealing' defence. This is of particular concern given that Australia is a net importer of intellectual property (IP), and therefore will be particularly disadvantaged by laws skewed in favour of rights owners, in the context of a bi-lateral agreement with a huge IP producer such as the United States.

In response to these reports, and the pas-

*Without a re-balancing of rights, the changes as they currently stand will have a detrimental impact upon education, consumer, cultural and research institutions...*

sage of the AUSFTA Bill through the Senate on 13 August 2004, the Australian Digital Alliance and the Australian Libraries Copyright Committee made a joint submission to the government requesting that the *Copyright Act 1968* be amended to recognise an open-ended defence of fair use, similar to the current position in the United States, where the Courts have power to find new uses 'fair' as and when they arise. Such an amendment would to some extent address the detrimental shift in the balance between copyright owners and users, which has been brought about by the AUSFTA Bill. It is an amendment which is necessary in light of the deleterious impact of the AUSFTA upon libraries, universities, cultural institutions and software developers. This has been recognised by some members of Parliament, and the Australian Democrats recently moved that such an amendment be effected.

Whilst the Government gave evidence before JSCOT and the Senate Select Committee that it was not adverse to extending fair dealing, it has not yet indicated whether and to what extent it will remedy the current situation. With the AUSFTA Bill scheduled to

come into effect in less than four months, it would seem that the time for action is now.

Copyright law has traditionally provided a way of balancing the interests of owners and users of copyrighted material. In amending this body of law, it is necessary to be mindful of the basis for its existence — to give public recognition to creators, and, of equal importance, to foster innovation and improvement. This necessarily requires striking a fine balance between the rights of owners and users, such that both are provided with sufficient incentives and knowledge to continue creating. Laws which are not mindful of this rationale, will have a negative impact, not only on libraries, educational and cultural institutions, but on society as a whole.

The ADA and ALCC joint submission to Government in relation to fair use, as well as the media release pertaining to this, can be viewed at both websites: <http://www.digital.org.au> and <http://www.digital.org.au/alcc>.

**Sarah Waladan is the newly-appointed executive officer for the Australian Digital Alliance and copyright adviser (law and policy) for the Australian Libraries Copyright Committee. She can be contacted at [swaladan@nla.gov.au](mailto:swaladan@nla.gov.au).**

*Such an amendment would to some extent address the detrimental shift in the balance between copyright owners and users...*



# Give yourself a break ...

Stop wasting time fixing your library automation system, you've got better things to do.

Liberty3 will make your staff more efficient, their time more effective, and your borrowers more empowered. So get excited and get

**Liberty3 for your Public library.**

Also available for Tertiary and Special libraries.

**Softlink**  
AUSTRALIA

Call Glen on 1800 777 037 to discuss the possibilities

Email: [glen.french@softlink.com.au](mailto:glen.french@softlink.com.au)