

Copyright overboard?

The debate after the Australia–United States Free Trade Agreement

Colette Ormonde, ALIA copyright adviser

'...these [schedule 9 copyright and patents] amendments do not represent the wholesale adoption of the US intellectual property regime. We have not stepped back from best practice elements of Australia's copyright regime — but we have strengthened protection in certain circumstances — providing a platform for Australia to attract and incubate greater creativity and innovation.' [Hon Mark Vaile, Minister for Trade, introducing the US Free Trade Agreement Implementation Bill 2004 in the House of Representatives, 23 June 2004: 31218]

'The last time such significant changes were made to copyright law they took place after three years of consultation ... the change process in the trade agreement pre-empts the resolution of Australian discussion about how to get the balance right. In fact, the changes to copyright law in this bill undermine this important balance. By adopting the worst aspects of American law, we are undermining the creative potential of many industries and the creative enjoyment and participation of our citizens.' [Senator Kerry Nettle (Australian Greens) Senate Hansard 12 August 2004: 26405]

'IFAC [the US Industry Functional Advisory Committee on Intellectual Property Rights for Trade Policy Matters] applauded the [US] negotiators for convincing Australia to come into full step with and adhere to key provisions of those treaties, consistent with the manner in which they were implemented by the US in 1998 in their Digital Millennium Copyright Act. So the Americans have this very clear understanding that Aus-

tralia has agreed to come into line not only with America's copyright — all of the sectors within chapter 17 — but also with their position on digital format generally ... that is quite a huge step.' [Senator Len Harris (One Nation) Senate Hansard 12 August: 26422]

'Ironically, while Australia is being obliged to adopt IP laws that can disproportionately favour producer interests, US policy makers have taken a more critical stance on their IP laws. Late last year the US Federal Trade Commission (FTC) ... released a report on the proper balance between competition and patent laws. The FTC report, which follows a three-year investigation, highlighted the anti-competitive effects of two emerging problems in the US, namely the granting...of excessively broad patents...and the granting of too many trivial patents...' [evidence of Henry Ergas, former chair of the Intellectual Property and Competition Committee to the Senate Select Committee on the Free Trade Agreement, quoted by Senator Kate Lundy (ALP), Senate Hansard 12 August 2004: 26400]

'In many respects, the [US Free Trade Agreement] implementation bill... makes IP much more complicated than it already is. It makes consumers in this country — not the pirates any more — more likely to be both criminally and civilly liable, particularly when it makes consumers liable for copyright infringement for watching an unauthorised copy of a DVD. It makes our law more protective than US law in key respects. It introduces no measures to mitigate the shift of any copyright balance in favour of copyright owners. It makes no attempt to reduce the cost to society of copyright term extension, which is important when you consider the costs involved for institutions like universities, libraries, schools and so on...' [Senator Aden Ridgeway (Australian Democrats), debate on US Free Trade Agreement Implementation Bill 2004, Senate Hansard 12 August 2004: 26404–5]

'I have a whole team of experts here, and none of them can understand what this is about. None of them see the evil that Senator Ridgeway sees; they do not see the extension of civil liability to which he is referring.' [Reply from Senator Robert Hill, the Minister for Defence, guiding the US Free Trade Agreement Implementation Bill through the Senate: 26420]

'The Copyright Act amendments contained in Schedule 9 of the Bill propose some important, and in some cases radical, changes to the nature of copyright and copyright protections in Australia. In some instances, their effects and interactions with other aspects of copyright law are complex and unpredictable.'

Although the changes deal with several disparate areas of the Copyright Act certain themes can be observed. They include:

- *more generous protection of copyright, most notably an increase in the duration of copyright;*
- *greater use of criminal law, in addition to civil remedies, to enforce copyright;*
- *increased prohibitions on acts preparatory to copyright infringements, rather than the infringements themselves, such as distribution of devices that assist infringement;*
- *increasing prohibitions, or effective barriers, to the non-commercial use of infringing material;*
- *increased liability for end-users and consumers; and*
- *new laws to increase the protection of copyright in electronic material.'*

[Jacob Varghese: *Guide to copyright and patent law changes in the US Free Trade Agreement Implementation Bill 2004*. Commonwealth Parliamentary Library, Current issues brief n° 3, 2004:8]

New ALIA copyright adviser

Colette Ormonde

Former New South Wales parliamentary librarian, Rob Brian is ALIA's new copyright adviser. He was founding law librarian at the High Court (no, he's not 120 years old or, if he is, he's so fit that he should take out a patent under the Free Trade Agreement provisions!) and founding law librarian at the University of New South Wales. He thus has extensive experience in legislative, parliamentary and judicial processes and has an ongoing interest in the development of copyright law.

Rob Brian and Sarah Waladan, copyright officer of the Australian Libraries' Copyright Committee, both have Dutch antecedents, making a formidable team in the defence of library and information users.

ALIA members may contact Rob with copyright queries at: Rob Brian, 28 Lancaster Road, Dover Heights NSW 2030, ph 02 9371 8519, mob 0438 718 519, rob.brian@alia.org.au.

I am leaving ALIA National Office after seven years of intellectual stimulation and legal change. I wish to thank the many ALIA members throughout Australia, and the lawyers, researchers, and others (neither members nor librarians) in five countries who have helped to further the interests of Australian library and information users in copyright matters. Finally, as an ALIA member, I wish to pay tribute to the executive director, Jennefer Nicholson, and the National Office staff who work with great dedication to represent the interests of the library and information sector, from the part-time one-person special library to the great institutions, and their many and varied clients. ■