EXPORTING CONTROVERSY? REACTIONS TO THE COPYRIGHT PROVISIONS OF THE U.S.-AUSTRALIA FREE TRADE AGREEMENT: LESSONS FOR U.S. TRADE POLICY

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O wad some Power the giftie gie us
To see oursels as ithers see us![1]

I. INTRODUCTION

For those interested in Australian copyright law, February 8, 2004 was a watershed date. On that day, the United States and Australia concluded the Australia-United States Free Trade Agreement ("AUSFTA"), which contains a large and detailed intellectual property ("IP") chapter, the bulk of which relates to copyright.[2] Australian copyright law has now gone through three waves of amendments to bring the country into compliance with AUSFTA, with the final stage of implementation only being completed in December 2006.[3] But while momentous in Australia, AUSFTA seems to have gone largely unnoticed in U.S. copyright circles. One consequence of AUSFTA that may not be widely appreciated in the United States is the political controversy caused by

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1. ROBERT BURNS, *To a Louse, in* THE COMPLETE WORKS OF ROBERT BURNS 121 (Allen Cunningham ed., 1873).

2. United States-Australia Free Trade Agreement, U.S.-Austl., art. 17.4, May 18, 2004, 43 I.L.M. 1248 [hereinafter AUSFTA], *available at* http://www.dfat.gov.au/trade/negotiations/us_fta/final-text/index.html.

3. AUSTL. COPYRIGHT COUNCIL, INFORMATION SHEET NO. G085V5: FREE TRADE AGREEMENT AMENDMENTS 1 (2007), *available at* http://www.copyright.org.au/publications/infosheets.htm (follow "Free Trade Agreement Amendments" hyperlink).

the IP chapter of the agreement.[4] Some of this controversy was caused by concerns over the effects of the provisions of AUSFTA relating to pharmaceutical patents, concerns that were bound up with broader disquiet about the potential impact of AUSFTA on the operation of Australia's Pharmaceutical Benefits Scheme.[5] Much of the controversy, however, and the issues that attracted the most sustained attention, related to the copyright provisions of the agreement.[6] One limited aim of this Article is to provide an overview of the effects of the IP chapter of AUSFTA, and to explain to an American audience why such a broad spectrum of Australian opinion found the provisions of the agreement relating to copyright, in particular, so troubling.

Much more importantly, however, this Article demonstrates that the Australian reaction to the copyright provisions of AUSFTA raises questions about the wisdom of recent U.S. trade strategy. We believe that, leaving to one side whether the provisions are good for Australia or are "good copyright policy," the current strategy is irrational, even when judged solely against U.S. interests. We demonstrate that these provisions contributed significantly to an increase in anti-American sentiment in Australia—an effect diametrically opposed to the stated aim of using the agreement to foster good relations with a long-standing ally and partner. More specifically, we argue that the attitude with which the United States approached its negotiations with Australia over copyright, and its apparent disregard for Australian traditions, helped generate a perception of U.S. unilateralism, double standards, and high-handed ignorance. As a consequence, it may be less likely that Australia's political class and the Australian public, generally, will be prepared to support the United States' agenda on the international stage. In short, we demonstrate that the United States' approach to IP in bilateral free trade agreements is damaging the United States' broader political interests in entering into such agreements. This damage must be counted as a significant cost.

The question, thus, becomes whether the agreement secures sufficient benefits, particularly economic benefits, to offset the costs identified. It would be easy to assume from the text of the copyright provisions that the United States had made significant gains: the text was, after all, almost entirely drafted

4. Staff Writers, *Australian Linux Bodies Blast US Free-Trade Deal*, ZDNET AUSTL. Aug. 6, 2004, http://www.zdnet.com.au/news/business/soa/Australian-Linux-bodies-blast-US-free-trade-deal/0,139023166,139155631,00.htm.

5. The Australian government uses the Pharmaceutical Benefit Scheme to lower the price of pharmaceuticals. Clive Hamilton et al., *Barrier to Trade or Barrier to Profit? Why Australia's Pharmaceutical Benefits Scheme Worries US Drug Companies*, 4 YALE J. HEALTH POL'Y L. & ETHICS 373, 375 (2004). Under the Pharmaceutical Benefits Scheme, the federal government pays any difference between the maximum "'co-payment"' that a patient can be required to make and the price paid to the manufacturer (the "list price"). *Id.* The government uses its bargaining power to keep list prices as low as possible, but does not require drugs to be listed in order for them to be sold in Australia. *Id.* The AUSFTA gives pharmaceutical companies a greater voice in listing decisions and strengthens rights over test data, thereby securing a *de facto* extension of patent term. *Id.* The concern has been expressed that taken together, these developments might pose a serious threat to the future viability of the PBS. *See* Peter Drahos et al., *The FTA and the PBS*, EVATT FOUND., http://www.evatt.labor.net.au/publications/papers/126.html (last visited Nov. 16, 2008) (discussing PBS post-AUSFTA).

6. Staff Writers, *supra* note 4.

by the United States.[7] Through a detailed analysis of the changes wrought to Australian copyright law, however, we demonstrate that in the copyright sphere, the gains produced by the agreement were limited, at best. If Australia is any guide, current U.S. strategy (a strategy also reflected in agreements signed with a range of other countries)[8] will not secure substantive harmonization of copyright, will not build support for future multilateralization of the United States' preferred copyright standards, and will produce only a limited increase in returns for copyright owners. Moreover, the small increase in protection that has been secured has to be weighed against other costs for copyright owners. Weighing even more emphatically against current strategy is the fact that a very different form of agreement on copyright could have secured the same benefits, without incurring either the costs for copyright owners or the broader political costs. Thus, while we do not provide a definitive answer to the question of whether the benefits secured by AUSFTA outweigh its costs, we do show, in one key area, that current policy has incurred significant and unnecessary costs for only limited gains. We believe that this lends a new dimension to the argument that there needs to be a fundamental reassessment of U.S. trade policy. At the very least there needs to be a much more sophisticated cost-benefit analysis of the likely impact of agreements on partner countries. This requires a willingness to engage with the details. It is primarily for this reason that we describe and critique the substantive provisions of the IP chapter of AUSFTA and the Australian implementing legislation at some length in the course of this Article.

II. AUSFTA: AN OVERVIEW

A. Background to the Agreement

Proposals for a free trade agreement between Australia and the United

7. *See* GRAHAM GREENLEAF ET AL, NOT A FAIR TRADE: AUSTRALIA'S TPM PROTECTION AND AUSFTA-INSPIRED REFORMS 3 (2007) *available at* http://law.bepress.com/cgi/viewcontent.cgi?article=1021&context=unswwps (noting that the AUSFTA mirrors the United States Digital Millennium Copyright Act of 1998 by design).

8. Since 2001 the United States has negotiated a series of bilateral or plurilateral trade agreements containing similar IP provisions. Apart from AUSFTA, the following are already in force: U.S.-Singapore Agreement (signed May 6, 2003; in force January 1, 2004); U.S.-Chile Agreement (signed June 6, 2003; in force January 1, 2004); U.S.-Morocco Agreement (signed June 15, 2004; in force January 1, 2006); U.S.-C.A.F.T.A.-D.R. Agreement (signed May 28, 2004; in force March 1 2006 (El Salvador), April 1, 2006 (Honduras and Nicaragua), July 1, 2006 (Guatemala), March 1, 2007 (Dominican Republic)); and the U.S.-Bahrain Agreement (signed September 14, 2004; in force August 1, 2006). *See* Office of the United States Trade Representative, USTR Press Releases Home, http://www.ustr.gov/Document_Library/Press_Releases/Section_Index.html (last visited Nov. 16, 2008) (providing press releases for each of the implemented free trade agreements listed). Implementing legislation for the U.S.-Oman Agreement (signed January 19, 2006) and the U.S-Peru Agreement (signed December 14, 2007) has been passed by Congress. *Id.* At the time of writing, several other agreements containing similar provisions are pending Congressional approval; U.S.-Colombia Agreement (signed February 27, 2006, amendments agreed June 28, 2007); U.S.-Panama Agreement (signed June 28, 2007); U.S.-Republic of South Korea Agreement (signed June 30, 2007). *See* Office of the United States Trade Representative, Trade Agreements Home, http://www.ustr.gov/Trade_Agreements/Section_Index.html (last visited Nov. 16, 2008) (providing a country-by-country list of U.S. free trade agreements).

States date back many years.[9] However, the recent push for such an agreement can be traced to a decision taken by the Australian Cabinet in November 2000 to pursue negotiations with the United States, and a subsequent speech delivered by Australia's ambassador to the United States that same year.[10] It became an official proposal from the Australian Trade Minister in April 2001.[11] Talks between Australia and the United States about the possibility of negotiating an agreement occurred throughout 2001 and 2002.[12] In November 2002, the President notified Congress of his intention to negotiate such an agreement, with formal negotiations beginning in March of 2003.[13] The first round of these negotiations commenced on March 17, 2003.[14] By international standards, the negotiations proceeded rapidly—the agreement was concluded some eleven months later on February 8, 2004.[15] The parties also adopted a tight timetable for implementation, aiming for a commencement date of January 1, 2005.[16]

Australia's desire for a free trade agreement seems to have been motivated by a number of factors: there was growing concern that Australia was being disadvantaged in trade into Asia;[17] the Howard government was, in any event, less Asia-centric in its focus than its predecessor and was, hence, more prepared to seek to build closer economic and political ties with the United States;[18] the apparent stalling of the World Trade Organization ("WTO") talks left the government less willing to focus on multilateral trade negotiations alone;[19] the imposition by the United States of punitive tariffs

9. It seems that the idea of a preferential trade deal between the two countries was first raised by the United States in the 1930s. Tor Krever, *The U.S.-Australia Free Trade Agreement: The Interface Between Partisan Politics and National Objectives*, 41 AUSTL. J. POL. SCI. 51, 52–53 (2006).

10. Ross Garnaut, *An Australia-United States Free Trade Agreement*, 56 AUSTL. J. INT'L. AFF. 123, 124 (2002).

11. SENATE SELECT COMMITTEE, THE FREE TRADE AGREEMENT BETWEEN AUSTRALIA AND THE UNITED STATES OF AMERICA, FINAL REPORT 2 (2004) (Austl.), *available at* http://www.aph.gov.au/Senate_freetrade/report/final/index.htm.

12. Jane Andrew, *AUSFTA: Linking War, Free Trade and the Environment*, 9 NEWS J. OF THE ASIA PAC. CENTRE FOR ENVTL. ACCOUNTABILITY 5, 5 (2003), *available at* http://ro.vow.edu.au/cgi/viewcontent.cgi?argicle=1192&context=commpapers.

13. Letter from Robert Zoellick, U.S. Trade Representative, to J. Dennis Hastert, Speaker, U.S. House of Representatives (Nov. 11, 2002), *available at* http://www.ustr.gov/Document_Library/Letters_to_Congress/2002/USTR_Zoellick_Notifies_Congress_of_Intent_To_Initiate_Free_Trade_Negotiations_With_Australia.html.

14. DEP'T OF FOREIGN AFFAIRS & TRADE, 1.1.5 BILATERAL, REGIONAL AND MULTILATERAL TRADE NEGOTIATIONS, ANNUAL REPORT 2002–2003 (Austl.), *available at* http://www.dfat.gov.au/dept/annual_reports/02_03/performance/1/1.1.5.html.

15. U.S. DEP'T OF AGRIC., FACT SHEET: U.S.-AUSTRALIA FREE TRADE AGREEMENT (2006), *available at* http://www.fas.usda.gov/info/factsheets/ausfta/australiaFTA-06.pdf

16. *Id.* However, in the copyright context, it might be noted that the AUSFTA allowed a two-year "grace period" for implementation of the anticircumvention provisions of the agreement. AUSFTA, *supra* note 2, arts. 17.4.7, 17.12. More generally, it might be noted that many of the provisions relating to agricultural products allow for a long and gradual process of implementation. *See* U.S. DEP'T OF AGRIC., *supra* note 15 (discussing the phasing out of tariffs under AUSFTA).

17. CHRISTOPHER M. DENT, NEW FREE TRADE AGREEMENTS IN THE ASIA-PACIFIC 66 (2006); Garnaut, *supra* note 10, at 124.

18. Mark Davis, *Bilateral Thinking's Rise from the Ashes of WTO Firefights*, AUSTL. FIN. REV., Jan. 6, 2005, at 44, 44–45.

19. Krever, *supra* note 9, at 54–55.

against the Australian wine industry in June 2000,[20] and the dispute about U.S. tariffs on lamb imports[21] left some agricultural producers keen to lock the United States into a bilateral free trade agreement;[22] and finally, the Howard Government believed it was likely to enjoy good access to senior figures within the Bush administration, making an agreement seem timely.[23] On the American side, the willingness to negotiate a free trade agreement with Australia represented a continuation of a policy begun in the mid-1980s[24] to pursue bilateral as well as multilateral trade negotiations.[25] Australia had been identified since that time as a potential partner to a bilateral agreement.[26] More immediately, however, after the events of September 11, 2001, the Bush administration expanded the use of bilateral trade instruments as a tool to secure support for America's security and general foreign policy agendas.[27] In this climate, Australia's staunch support of U.S. military intervention in Afghanistan and Iraq did much to bolster the case for an agreement.[28]

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20. These tariffs were imposed after the Dispute Settlement Body of the WTO ruled that the Australian government had provided unlawful export assistance to a domestic manufacturer of leather intended for use in automobiles. *See* Panel Report, *Australia–Subsidies Provided to Producers and Exporters of Automotive Leather*, WT/DS126/R (May 25, 1999) (finding payments to the manufacturer constituted improper subsidies).

21. Patricia Ranald, *The Australia-US Free Trade Agreement: A Contest of Interests*, 57 J. AUSTL. POL. ECON. 30, 36 (2007); *see also* Appellate Body Report, *United State—Safeguard Measures on Imports of Fresh, Chilled or Frozen Lamb Meat from New Zealand and Australia*, WT/DS177/AB/R, WT/DS/178/AB/R (May 1, 2001) (finding that the tariff in question breached WTO rules).

22. Mark Davis, *Forging a New Trade Route*, AUSTL. FIN. REV., Jan. 5, 2005, at 44 (emphasizing, in particular, the key role played by major actors in the Australian wine industry).

23. Garnaut, *supra* note 10, at 124; Krever, *supra* note 9, at 56. It may not, therefore, be a matter of pure coincidence that Michael Thawley (then Australian ambassador to the United States) first aired in public Australia's desire to negotiate a free trade agreement on December 13, 2000, the day after the Supreme Court declared George W. Bush to be the winner of the 2000 Presidential Election. Meg Gurry, *Perspectives on Australian Foreign Policy, 2000*, 55 AUSTL. J. INT'L. AFF. 7, 13 (2001).

24. For the background to this change, see, e.g., ANDREW STOECKEL, DAVID PEARCE & GARY BANKS, WESTERN TRADE BLOCS: GAME, SET OR MATCH FOR ASIA-PACIFIC AND THE WORLD ECONOMY 55 (1990) (discussing the various attempts by the United States to establish a trade agreement with Australia from 1980 to the early 1990s); *What Bilateral Deals Mean for Trade*, ECONOMIST, Feb. 6, 1988, at 67 (discussing the increasing prevalence of bilateral agreements).

25. It is notable that in the United States, as in Australia, concerns were expressed during the debate on extending the trade promotion authority of President Bush that the United States was "falling behind" in the negotiation of trade agreements, which would disadvantage U.S. producers. *See, e.g.*, 147 CONG. REC. H8972-74 (daily ed. Dec. 6, 2001) (statement of Rep. Reynolds) (commenting that there were more than 130 regional trade agreements in force, only three of which included the United States).

26. Garnaut, *supra* note 10, at 123; Davis, *supra* note 18, at 44.

27. Elizabeth Becker, *Bush Signs Trade Pact with Singapore, a Wartime Ally*, N.Y. TIMES, May 7, 2003, at C4; Gregory White, *Free Trade as a Strategic Instrument in the War on Terror?: The 2004 US-Moroccan Free Trade Agreement*, 59 MIDDLE E. J. 597, 597–98 (2005); Robert Zoellick, *When Trade Leads to Tolerance*, N.Y. TIMES, June 12, 2004, at A13 (this article is particularly noteworthy as Zoellick was the U.S. Trade Representative at the time). The need to promote security interests through economic integration formed a constant theme during the debate over the extension of trade promotion authority in the Trade Act 2002. *See, e.g.*, 147 CONG. REC. H8972-02 (daily ed. Dec. 6, 2001) (statement of Rep. Reynolds) ("Never has it been more apparent that we need to enhance and strengthen friendships around the world, and what better way to build coalitions than with free trade.").

28. In his message on the AUSFTA to Congress, President Bush claimed that approving the agreement would "advance U.S. economic, security, and political interests." Press Release, President Bush, Message to the Congress of the United States: United States-Australia Free Trade Agreement (July 6, 2004), *available at* http://www.state.gov/p/eap/rls/rm/2004/34174.htm. Many members of Congress made explicit mention of the Australia-U.S. military alliance during the debate on the agreement. *See, e.g.*, 150 CONG. REC. H5660, H5662–69, H5700–5718 (daily ed. July 14, 2004) (statements of Reps. Drier, Linder, Crowley, Cardin, McDermott, Dunn, Shaw, Cunningham, Kolbe, and Bereuter). Most striking are the comments of Rohrabacher who noted

Domestic political factors also seem to have played an important role during the final stages of the negotiations. The Australian government and George W. Bush both faced elections in late 2004, and the Australian government, in particular, was keen to go to the polls with an agreement in place.[29] Indeed, it has been suggested that political considerations ultimately forced many within the Australian government to swallow their reservations about the deal.[30] This was because, on the one hand, they were keen to avoid the impression that the effort put into negotiating the agreement had been wasted or that the Howard government enjoyed little influence in Washington and, on the other hand, because they knew that the successful conclusion of an agreement was likely to create division within the opposition Labor Party and leave it open to a charge of being anti-American.[31]

B. The Copyright Content of the Agreement

AUSFTA covers a diverse range of issues, but this Article takes as its case study the copyright provisions of the agreement. These are found primarily in chapter 17 of AUSFTA, which deals with IP rights generally, although this chapter needs to be read alongside three "side letters" that contain further obligations and clarifications relating to copyright and other IP matters.[32] The complexity of the copyright provisions means that it is not easy to provide a satisfactory summary of their effects, but it may, nevertheless, be useful to group the provisions into four categories.

The first category relates to the multilateral IP framework. The agreement requires the parties to affirm their commitment to a series of multilateral treaties, including the Berne Convention, the Convention Relating to the Distribution of Programme-Carrying Signals Transmitted by Satellite, the Agreement on Trade-Related Aspects of Intellectual Property Rights ("TRIPS"), and the World Intellectual Property Organization ("WIPO")

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that "in terms of this vote today, we owe it to our Australian friends. They have been with us through thick and thin, and this vote today and this free trade agreement is our way of saying to our Australian friends, thanks, mates." *Id.* at 5713. Similar sentiments were expressed in the Senate. *See, e.g.*, 150 CONG. REC. S8199 (statement of Sen. McCain) (supporting the agreement despite misgivings about the agreement overall); *see also* Joseph M. Siracusa, *John Howard, Australia, and the Coalition of the Willing*, 1 YALE J. INT'L. AFF. 39, 45–46 (2006) (discussing the successes of the treaty).

29. The Australian federal election was held in October 2004. Federal Election 2004, Australian Broadcasting Corporation (ABC), http://www.abc.net.au/elections/federal/2004 (last visited Sept. 24, 2008). The U.S. Presidential election was held a month later on November 2, 2004. CNN.com Election 2004, http://www.cnn.com/ELECTION/2004 (last visited Sept. 24, 2008). The President signed the measure into law on August 3, 2004. *Australia-United States Free Trade Agreement*, WIKIPEDIA: THE FREE ENCYCLOPEDIA (Sept. 24, 2008) http//en.wikipedia.org/wiki/Australia-United_States_Free_Trade_Agreement.

30. The final deal was considered disappointing by many Australian commentators, particularly given the long phase-in periods for tariff reductions on agricultural products and the total exclusion of sugar from the agreement. It was widely reported that people close to the negotiations wanted to walk away, but the deal was concluded in a personal telephone call between Prime Minister Howard and President Bush. ANN CAPLING, ALL THE WAY WITH THE USA: AUSTRALIA, THE US, AND FREE TRADE 73 (2005); John Garnaut, *What's the Big Deal?*, SYDNEY MORNING HERALD, July 31, 2004, at 32; Ross Gittins, *FTA: Bad Politics Drives out Good Economics*, SYDNEY MORNING HERALD, Aug. 9, 2004, at 44.

31. Krever, *supra* note 9, at 63–67.

32. Letter from Mark Vaile, Austl. Minister for Trade, to Robert B. Zoellick, U.S. Trade Representative (Mar. 1, 2004), *available at* http://www.sice.oas.org/TPD/USA_AUS/US-Ausfta/text-letter-aspectsip.pdf.

Copyright, and WIPO Performances and Phonograms Treaties.[33] It also reaffirms some of the core principles that underpin the international copyright system, including national treatment,[34] and the requirement that treaty provisions be applied retrospectively to copyright content already in existence and not yet out of copyright.[35] With the exception of the 1996 WIPO treaties,[36] Australia was already party to all the multilateral conventions in question. Insisting on compliance with earlier multilateral treaties might have been thought desirable because, by so doing, the provisions of these treaties were brought within AUSFTA's dispute settlement regime.[37] However, if this was the rationale, this was never explained. By requiring Australia to comply with multilateral treaties that Australia had long been a member of, these provisions helped to create the impression that Australia was not being presented with a bespoke agreement on copyright matters, but rather with something more like a standard form contract that was being put forward by negotiators who had little interest in familiarizing themselves with Australia's copyright tradition. This impression may be unfair,[38] but it has certainly been pervasive.[39]

The second type of copyright provision in AUSFTA can be grouped under the rubric "multilateral-plus," that is, provisions that expand on the obligations found in TRIPS and/or in the 1996 WIPO treaties, or that reduce or remove flexibilities found in these multilateral instruments. These include

33. AUSFTA, *supra* note 2, art. 17.1.2.

34. *Id.* art. 17.1.6. *Accord* Agreement on Trade-Related Aspects of Intellectual Property Rights art. 3, Apr. 15, 1994, 33 I.L.M. 1197, 1199 (1994) [hereinafter TRIPS] (providing for national treatment); Berne Convention for the Protection of Literary and Artistic Works art. 5.1, July 10, 1974, 828 U.N.T.S. 221, 231 [hereinafter Berne Convention] (same).

35. AUSFTA, supra note 2, arts. 17.1.9, 17.4.5. *Accord* World Intellectual Property Organization Copyright Treaty art. 13, Dec. 20, 1996, 36 I.L.M. 65, 72 (1996) [hereinafter WCT]; World Intellectual Property Organization Performances and Phonograms Treaty art. 22, Dec. 20, 1996, 36 I.L.M. 76, 87 (1996) [hereinafter WPPT]; TRIPS, *supra* note 34, art., 14(6); Berne Convention, *supra* note 34, art. 18.

36. Matthew Rimmer, *Robbery Under Arms: Copyright Law and the Australia-United States Free Trade Agreement*, FIRST MONDAY, Nov.-Mar. 2006, http://www.uic.edu/htbin/cgiwrap/bin/ojs/ index.php/fm/ issue/view/194.

37. *See* AUSFTA, *supra* note 2, art. 21.2 (requiring the Joint Committee to "facilitate the avoidance and settlement of disputes . . . .").

38. In particular, it might be noted in this context that the express requirement that the parties comply with the Berne Convention may have been included at Australia's insistence, since many of the other recent bilateral free trade agreements entered into by the United States do not contain an equivalent provision. *See, e.g.*, United States–Bahrain Free Trade Agreements, U.S.–Bahr., Sept. 14, 2004 [hereinafter U.S.-Bahrain], *available at http://www.ustr.gov/Trade_Agreements/Bilateral/Bahrain_FTA/ final_texts/Section_Index.html*; United States-Chile Free Trade Agreement, U.S.-Chile, June 6, 2003 [hereinafter U.S.-Chile], *available at* http://www.ustr.gov/Trade_Agreements/Bilateral/Chile_FTA/ Final_Texts/Section_Index.html; United States-Singapore Free Trade Agreement, U.S. Sing., May 6, 2003 [hereinafter U.S.-Singapore], *available at http://www.ustr.gov/Trade_Agreements/Bilateral/Singapore_FTA/Final_Texts/Section_Index.html*. Australian negotiators may have insisted on this provision in the knowledge that there are elements of U.S. law that fail to comply with the requirements of Berne (see below), such that this provision would give Australia leverage in any future disputes between the two countries. On the other hand, it might be noted that the U.S.-Korea Agreement does contain such a provision, but it is perfectly possible that this was included at Korea's insistence. United States-Korea Free Trade Agreement, U.S.-Korea, art. 1.2, June 30, 2007, 8 U.S.T. 2217 [hereinafter U.S.-Korea], *available at* http://www.ustr.gov/Trade_Agreements/Bilateral/ Republic_of_Korea_FTA/Final_Texts/Section_Index.html.

39. *See, e.g.*, Rimmer, *supra* note 36 ("[R]adical, sweeping changes to Australian copyright law wrought by the [AUSFTA].").

obligations:

- to extend the copyright term to the life of the author plus seventy years in the cases where the term is calculated by reference to the author's life, and, in other cases, to seventy years from publication, provided such publication occurs within fifty years of creation;[40]
- to make available civil remedies and to introduce criminal penalties in relation to the decoding and distribution of encoded broadcasts, and the manufacture of, or dealing with, devices for decoding encoded broadcasts without authorization;[41]
- to comply with detailed provisions relating to the enforcement of IP rights. The obligations in question cover such matters as payment and calculation of damages, award of costs, seizure and destruction of infringing goods, border measures, and criminal liability for commercial-scale copyright infringement;[42] and
- to ensure that central government agencies do not use infringing copies of computer software and only use computer software in accordance with the terms of the relevant license.[43]

The third "'category"' is really one provision, but it is one worthy of singling out for specific mention. Article 17.4.6(a) of AUSFTA requires that all economic rights in copyright be "freely and separately" transferable by contract, and that persons acquiring copyright by contract shall be able to exercise that right in their own name and shall "enjoy fully the benefits derived from that right."[44] More or less identical provisions are to be found in other recent bilateral free trade agreements entered into by the United States.[45] These provisions appear to be aimed squarely at preventing trade partners from introducing unwaivable or unassignable rights of a type that enjoy some currency in Europe.[46] Most obviously, the requirement that copyright be "freely and separately" transferable by contract would prevent a partner

40. AUSFTA, *supra* note 2, art. 17.4.4.

41. *Id.* art. 17.7.

42. *Id.* art. 17.11. Although these provisions serve in part to restate the procedural requirements of TRIPS, they also go beyond the requirements of TRIPS in various respects. *Compare* TRIPS, *supra* note 34, arts. 42–61 (containing an obligation to make criminal sanctions available "at least in cases of willful . . . copyright piracy on a commercial scale . . . ."), *with* AUSFTA, *supra* note 2, art. 17.11.26(a) (extending the reach of this obligation by providing a broad definition of "commercial scale").

43. AUSFTA, *supra* note 2, art. 17.4.9.

44. *Id.* art. 17.4.6(a).

45. *See, e.g.*, U.S.-Bahrain, *supra* note 38, art. 14.4.6 (containing language similar to the AUSFTA); U.S.-Chile, *supra* note 38, art. 17.7.2 (same); U.S.-Korea, *supra* note 38, art.18.4.6 (same); U.S.-Singapore, *supra* note 38, art.16.4.6 (same). It might be noted, however, that the U.S.-Chile agreement contains a qualification that allows the parties to put in place "reasonable limits to the provisions in paragraph 2(a) to protect the interests of the original right holders, taking into account the legitimate interests of the transferees." U.S.-Chile, *supra* note 38, art. 17.7.2(b).

46. *See* Report, INDUS. FUNCTIONAL ADVISORY COMM. ON INTELLECTUAL PROP. RIGHTS FOR TRADE POLICY MATTERS, THE U.S.-AUSTRALIA FREE TRADE AGREEMENT: THE INTELLECTUAL PROPERTY PROVISIONS 10 (2004), *available at* http://www.ustr.gov/assets/Trade_Agreements/Bilateral/Australia_FTA/Reports/asset_upload_file813_3398.pdf ("[AUSFTA] safeguards the freedom of contract and ensures that Australian law may not undermine the intent of the parties to such contracts. This has been a controversial issue with the European Union (and some other countries, though not with Australia to date), and we hope the agreement of Australia to this language will help establish a global precedent in this important area . . . .").

country from prohibiting the outright assignment of copyright (as, for example, is the case in Germany and Austria).[47] In addition, and in practice perhaps rather more importantly, this language is arguably sufficient to prevent the introduction of unwaivable rights to equitable remuneration such as those created by the European Union's Rental Rights Directive.[48] This language might also be treated as excluding the compulsory collective administration of rights[49]—a form of control on the exploitation of copyright that also enjoys some popularity in European copyright policy making circles.[50] Admittedly, it is difficult to be certain of these conclusions because the provision in question presents a number of difficulties of interpretation. Nevertheless, it is striking that at a time when respected international copyright scholars have pointed to the need to protect individual authors, the United States is excluding such measures both for itself and its trade partners.[51]

The fourth category in AUSFTA is the set of provisions addressing copyright in the online environment.[52] These provisions are both detailed and highly prescriptive, even compared to other provisions in chapter 17:

- Each party is required to have anticircumvention laws (that is, laws giving protection to technical measures used by copyright owners to limit use of their works) in accordance with the detailed model set out in the agreement.[53] This model closely mirrors the basic provisions in the WIPO Copyright Treaty ("WCT"), the WIPO Performances and Phonograms Treaty ("WPPT"), and section 1201 of the U.S. Digital Millennium Copyright Act ("DMCA") of 1998.[54] Liability must be

47. J. ADRIAN STERLING, WORLD COPYRIGHT LAW ¶ 12.02 (2d ed. 2003).

48. *See* Council Directive 92/100, art. 5, 1992 O.J. (L 346) 61, 63–64 (EC) (discussing rental and lending right and certain rights related to copyright in the field of IP).

49. That is, cases where a right can only be exercised through a collecting society.

50. *See* Council Directive 93/83, art. 9, 1993 O.J. (L 248) 15, 20 (EC) (discussing the coordination of certain rules concerning copyright and rights related to copyright applicable to satellite broadcasting and cable retransmission); Council Directive 92/100, *supra* note 48, art. 5 (discussing a rental and lending right and certain rights related to copyright in the field of IP); Directive 2001/84, art. 6(2), 2001 O.J. (L 272) 32, 35 (EC) (discussing the resale right for the benefit of the author of an original work of art). It must be emphasized, however, that the question of whether the AUSFTA would prevent the compulsory collective administration of a *droit de suite* is particularly complex, since, in addition to the general difficulties of interpretation presented by article 17.4.6, there is room for doubt as to whether a *droit de suite* would be classified as a pure economic right (such rights are often thought of as having something of a mixed economic and moral rights character) and there would be scope for argument as to the correct interpretation of the relationship between article 17.4.6(a) and article 17.4.6(b) of AUSFTA, as the latter provision expressly preserves the right of the contracting parties to introduce a *droit de suite*. AUSFTA, *supra* note 2, arts. 17.4.6(a)-(b).

51. *See* William Cornish, *The Author as Risk-Sharer*, 26 COLUM. J.L. & ARTS 1, 4–6 (2002) (comparing U.S. doctrine to that of the European Community).

52. Under the U.S. Trade Act of 2002, the negotiating objectives of the United States regarding IP include "ensuring that standards of protection . . . keep pace with technological developments, and in particular ensuring that rightholders have the legal and technological means to control the use of their works through the Internet and other global communication media, and to prevent the unauthorized use of their works . . . ." 19 U.S.C.A § 3802(b)(4) (2005).

53. AUSFTA, *supra* note 2, art. 17.4.7.

54. Under the AUSFTA provisions, members must "provide adequate legal protection and effective legal remedies against the circumvention of effective technological measures" that are used by owners in "connection with the exercise of their rights." *Id.*; *see also* Digital Millennium Copyright Act, 17 U.S.C. § 1201 (2000) (requiring legal protection and remedies against circumvention of protected works): WCT, *supra* note 35, art. 11 (same); WPPT, *supra* note 35, art. 18 (same).

imposed both for the act of circumventing access controls (that is, circumventing technological measures that protect access to copyright material), and for dealing in circumvention devices and services.[55] Both criminal (where conduct is willful and for the purposes of commercial gain) and civil penalties must be provided.[56]

- The parties are obliged to "provide adequate and effective legal remedies to protect rights management information" by prohibiting the knowing removal or alteration of such information, the knowing distribution or importation of rights management information removed from a copyright work, and the distribution of copyright content with knowledge that rights management information has been removed.[57] These obligations apply where the person knows that her act "would induce, enable, or conceal infringement of any copyright."[58] Again, both criminal and civil penalties are required.[59]

- The parties must adopt a "safe harbor" regime for online service providers whose networks or facilities are used for copyright infringement. As under U.S. law,[60] the safe harbor provisions only apply to service providers who do not control or initiate the relevant acts, or select the material or its recipients,[61] and whose activities fall within one of four exhaustive categories.[62] Provided the service provider fulfils the detailed conditions set out in the agreement, including acting expeditiously to remove or disable access to material on becoming aware of the infringement (for example, through notification by the copyright owner),[63] the safe harbor provisions serve to limit online service provider liability. More specifically, the provisions exclude financial liability and limit the copyright owner's remedies to orders compelling acts such as terminating specified user accounts.[64]

- The parties must ensure that the exclusive right to authorize reproductions extends to "all reproductions, in any manner or form,

55. These are further defined in the AUSFTA, as devices that are primarily promoted or designed to circumvent access and/or copyright controls or that have "only a limited commercially significant purpose other than circumvention." AUSFTA, *supra* note 2, art. 17.4.7. The Digital Millennium Copyright Act of 1998 proscribes the act of circumvention as it relates to access controls, as well as devices for circumventing both access and copy controls. 17 U.S.C. §§ 1201(a)(1)(A), 1201(a)(2) (2000).

56. *See* AUSFTA, *supra* note 2, art. 17.4.7; 17 U.S.C. §§ 1201, 1203–1204 (2006) (providing for such penalties).

57. AUSFTA, *supra* note 2, art. 17.4.8.

58. *Id.* art. 17.4.8(a).

59. *Id.*

60. 17 U.S.C. § 512.

61. AUSFTA, *supra* note 2, art. 17.11.29(b)(ii).

62. *Id.* art. 17.11.29(b)(i). The categories match—down to the particular form of words chosen—those set out in 17 U.S.C. § 512: for "transitory digital network communications," "caching . . . through an automatic process," information "residing on system[s] or network[s at direction of a user of material that resides on a system/network] controlled or operated by [] the service provider," and "referring or linking users to an online location by using information location tools, including hyperlinks and directories" (search engines).

63. The system set out in article 17.1.29 of AUSFTA is for "notice and take down," but an affected party may issue a counter-notice to have material reinstated. AUSFTA, *supra* note 2, art. 17.11.29(b)(ix).

64. *Id.* arts. 17.11.29(b)(viii), (b)(i).

> permanent or temporary (including temporary storage in material form) . . . ."[65]
>
> • In a complex set of provisions, the parties are prevented from extending statutory licenses that currently allow the retransmission of broadcasts via cable,[66] to retransmission via the Internet.[67] This removes the general freedom of parties to the WCT and WPPT "to carry forward and appropriately extend into the digital environment limitations and exceptions in their national laws which have been considered acceptable under the Berne Convention."[68] The relevant provisions of AUSFTA thus seek to pre-empt decisions on how best to regulate Web sites (such as YouTube) that offer alternative means of accessing television.

In relation to this fourth category of provisions (dealing with the online environment), it should also be noted that the agreement attempts to define not only the nature and scope of the rights the copyright owner is to enjoy, but also to set up specific, exhaustive lists of exceptions.[69] For example, again following the approach adopted by the DMCA, AUSFTA only allows a limited range of exceptions to the anticircumvention provisions.[70] Admittedly, in relation to the act of circumvention, there is a further limited freedom to introduce new exceptions to safeguard non-infringing uses following an administrative review process, but even here, AUSFTA attempts to establish limits on how such review processes are to be conducted.[71] Still more importantly, as with the DMCA, this ability to introduce new exceptions does not apply to the prohibition on dealing with circumvention devices, a limitation that caused particular controversy in Australia.[72] Similarly, the provisions of AUSFTA relating to copyright management information set up a limited list of exceptions and leave no capacity to introduce new exceptions.[73] In relation to the right to control the making of temporary copies, while the text of AUSFTA itself does not limit the exceptions that may be created to the temporary

65. *Id.* art. 17.4.1.

66. Both countries have such licenses. Copyright Act, 1968, pt. VC (Austl.); 17 U.S.C. § 111 (2000).

67. The key provision is article 17.4.10 of AUSFTA, which provides that neither party may permit retransmission of broadcasts on the Internet without the authorization of all rights-holders in the content and, in Australia's case, the broadcast signal. AUSFTA, *supra* note 2, art. 17.4.10(b). Unlike the United States, Australia recognizes a separate copyright in the broadcast signal. Copyright Act, 1968, § 91 (Austl.).

68. World Intellectual Property Organization, Agreed Statement Concerning the WIPR Copyright Treaty, http://wipo.int/treaties/en/ip/wct/statements.html (last visited Nov. 17, 2008).

69. This contrasts with the other copyright provisions in chapter seventeen, which confine exceptions and limitations by reference to the three-step test. AUSFTA, *supra* note 2, art. 17.4.10(a). *Cf.* WCT, *supra* note 35, art. 10; WPPT, *supra* note 35, art. 16; TRIPS, *supra* note 34, art. 13; Berne Convention, *supra* note 34, art. 9.

70. AUSFTA, *supra* note 2, art. 17.4.7(e).

71. Requiring reviews to be conducted at least once every four years, and requiring that "an actual or likely adverse impact on those non-infringing uses [be] credibly demonstrated." *Id.* art. 17.4.7(e)(viii).

72. A committee of the Australian House of Representatives referred to this as a "lamentable and inexcusable flaw . . . that verges on absurdity" and one that converts the exceptions to "empty promises." HOUSE OF REPRESENTATIVES STANDING COMMITTEE ON LEGAL AND CONSTITUTIONAL AFFAIRS, REVIEW OF TECHNOLOGICAL PROTECTION MEASURES EXCEPTIONS ¶ 3.118 (2006) (Austl.) [hereinafter TECHNOLOGICAL PROTECTION MEASURES EXCEPTIONS], *available at* http://www.aph.gov.au/house/committee/laca/protection/report/fullreport.pdf.

73. AUSFTA, *supra* note 2, art. 17.4.8(b). This list is similar to that in 17 U.S.C. § 1202(d) (2000).

copying right, an exchange of letters in November 2004 deals with this issue in some detail.[74]

Much of what has been described in this section would sound familiar to an audience conversant with U.S. copyright law. It is hard, however, to over-emphasize the detailed nature of the provisions just described—unusual in an international treaty. *Despite* this detail, the provisions of AUSFTA have gone through a process of implementation into domestic law that has, at times, produced outcomes that diverge significantly from the position in the United States.[75] Taken together with the fact that significant conceptual and structural differences remain between U.S. and Australian copyright law (to say nothing of the broader differences between the legal systems of the two countries), and with the fact that implementing AUSFTA required various political compromises that led to changes in areas of copyright law untouched by the agreement, it will be seen that AUSFTA has done very little to bring the copyright systems of the two countries closer together.[76] We will come back to this point in considering the benefits that the United States obtained from AUSFTA, but we turn first to outline the process of Australian implementation and the nature and causes of Australian reaction to the agreement.

C. Australian Implementation

As noted earlier, implementation of chapter 17 required no changes to U.S. copyright law.[77] On the Australian side, however, transposing AUSFTA's copyright obligations into domestic law was a complex process extending over three years and three separate pieces of legislation.[78] The purpose here is not to provide an exhaustive examination of the changes that were necessary, but rather to give a picture of the scope and detail of the changes required, and to highlight some aspects of the implementation that might be unexpected to an American audience.

Implementation of much of AUSFTA, and in particular the bulk of chapter 17, had to begin in good faith by the January 1, 2005 effective date of

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74. The United States indicated that it was proceeding with the AUSFTA "based on the Australian Government's commitment" to limit exceptions to the right to control the making of temporary copies. Letter from Robert B. Zoellick, U.S. Trade Representative, to Mark Vaile, Austl. Minister for Trade (Nov. 17, 2004), at 1 [hereinafter Letter from Robert B. Zoellick], *available at* http://www.ustr.gov/assets/Trade_Agreements/Bilateral/Australia_FTA/Implementation/asset_upload_file393_6951.pdf. The letters in question are available on the USTR Web site. Office of the United States Trade Representative, Exchange of Letters on Implementation of the U.S.-Australia Free Trade Agreement, http://www.ustr.gov/Trade_Agreements/Bilateral/Australia_FTA/Implementation/Section_Index.html?ht= (last visited Sept. 24, 2008).

75. *See* discussion *infra* Part II.C.

76. *Compare* AUSFTA, *supra* note 2, art. 17 (dealing with IP rights), *with* 17 U.S.C. §§ 101–1332 (the United States Copyright Code).

77. *See* Bipartisan Trade Promotion Authority act of 2002, 19 U.S.C.A § 3805(a)(1)(C)(ii) (2005) (providing that the President must submit "a statement of any administrative action proposed to implement the trade agreement . . . ."); United States-Australia Free Trade Agreement Implementation Act, Pub. L. No. 108-286, § 102(a)(1), 118 Stat. 919, 920 (2004) ("No provision of the Agreement, nor the application of any such provision to any person or circumstance, which is inconsistent with any law of the United States shall have effect.").

78. *See* Rimmer, *supra* note 36 (discussing the process of enacting the agreement and amendments required to successfully enact the copyright provisions).

the agreement.[79] Omnibus legislation covering the majority of the changes required by the agreement was passed in mid-August 2004.[80] Before turning to the details, it is worth noting the unusual process of its passage, which curtailed ordinary parliamentary processes, as this is relevant to Australian reactions to the agreement. Under the Australian Constitution, Parliamentary approval of treaties is not formally required: treaty-making power lies with the executive.[81] As a matter of practice, however, treaties signed by the government are referred to a Parliamentary committee, the Joint Standing Committee on Treaties ("JSCOT"),[82] which may offer recommendations both on ratification and implementation. The Senate may also establish its own committee, which in the case of AUSFTA it did.[83] Parliament then has a further opportunity for scrutiny when it considers and passes legislation necessary to implement a treaty.[84]

In the case of AUSFTA, the political imperative to bring the treaty into effect within an election year compressed this process. The draft text of the agreement was released on March 4, 2004.[85] Both JSCOT and the Senate Committee held hearings in May and June of 2004.[86] The large number of submissions received by these committees illustrated a high level of interest in the agreement.[87] Simultaneous with these hearings, the government was drafting implementing legislation.[88] JSCOT reported the same day that the

79. Letter from Mark Vaile, Austl. Minister for Trade, to Robert B. Zoellick, U.S. Trade Representative (Nov. 17, 2004) [hereinafter Letter from Mark Vaile], *available at* http://www.ustr.gov/assets/Trade_Agreements/Bilateral/Australia_FTA/Implementation/asset_upload_file337_6947.pdf; Letter from Robert B. Zoellick, *supra* note 74, at 1–3.

80. Letter from Mark Vaile, *supra* note 79.

81. Australian Constitution, §§ 61, 51 Cl. xxix.

82. HILARY CHALESWORTH ET AL., NO COUNTRY IS AN ISLAND 43 (2006). JSCOT is a joint committee of the House of Representatives and the Senate. *Id.* The Australian government is ordinarily formed by the party that can command a majority in the House of Representatives. DEP'T OF FOREIGN AFFAIRS & TRADE, ABOUT AUSTRALIA: SYSTEM OF GOVERNMENT 2 (2008), *available at* http://www.dfat.gov.au/facts/sys_gov.pdf. Because membership of JSCOT reflects the membership of both houses, it tends to have a majority of members from the governing party. CHALESWORTH ET AL., *supra* note 82, at 76.

83. The Senate committee was formed by resolution of the Senate in part because the Senate, unlike the House, was not controlled by the government at the time. Membership of Senate committees follows numbers in the Senate, meaning that, unlike JSCOT, members of the governing Liberal Party formed only a minority on the Senate Select Committee. Kate Lundy, *Review of Draft Free Trade Agreement: Australia's Cultural Identity and Intellectual Property Under the Proposed FTA*, May 20, 2004, http://www.katelundy.com.au/FTAimpact.htm.

84. PARLIAMENT OF VICTORIA, FEDERAL-STATE RELATIONS COMMITTEE, REPORT ON INTERNATIONAL TREATY MAKING AND THE ROLE OF THE STATES § 1.3 (1997), *available at* http://www.parliament.vic.gov.au/fsrc/ report1/body/chapter1.htm.

85. United States-Austrialia – Free Trade Agreement – Domestic Approval Process for an Australia-United States Free Trade Agreement (AUSFTA), http://www.dfat.gov.au/trade/negotiations/us_fta/outcomes/21_domestic_approval.html (last visited Dec. 11, 2008).

86. SELECT COMMITTEE ON THE FREE TRADE AGREEMENT BETWEEN AUSTRALIA AND THE UNITED STATES OF AMERICA, FINAL REPORT xi, 25 (2004) [hereinafter SENATE FINAL REPORT], *available at* http://www.aph.gov.au/senate_freetrade/report/final/report.pdf.

87. JSCOT received over 215 submissions. PARL. S. DEB., 40th Parl., 1st Sess. 24697 (June 23, 2004) (remarks of Sen. Brandis) (Austl.), *available at* http://www.aph.gov.au/hansard/senate/dailys/ ds230604.pdf. The Senate Select Committee received 548 submissions. SENATE FINAL REPORT, *supra* note 86.

88. Dr. Ian Heath, Director General, IP Austl., Address at Recent Developments in Protecting and Commercialising Intellectual Property (Aug. 10, 2004), *available at* http://www.ipaustralia.gov.au/pdfs/news/ausfta.pdf.

omnibus implementing legislation, the US Free Trade Agreement Implementation Act ("USFTA Implementation Act"), was introduced into Parliament, and the House of Representatives passed the legislation the very next day.[89] The Senate Committee reported on August 5—a mere 7 days prior to the final passage of the legislation by the Senate on August 13.[90] Parliament was prorogued on August 31, pending the October 2004 election.[91] The Senate committee referred to this truncated process as "self-evidently a mockery of the process that was set up by the parliament ostensibly to ensure that a proper examination of international treaties and agreements took place."[92] While the timetable was largely outside U.S. control, the limited opportunities for consultation exacerbated concerns about the agreement itself.[93] This was particularly the case in relation to copyright, where the lengthy consultations with competing stakeholders that typify copyright reform were bypassed.

Turning to the detail of implementation, it is important to note first that there were parts of chapter 17 that required no change to Australian copyright law; in particular, several provisions restate basic copyright requirements reflecting existing multilateral treaties of which Australia was already a member, or basic systems of enforcement that Australia already provided.[94] For present purposes, it is sufficient to focus on three areas where change was required. First, the term of copyright was extended from the Berne Convention standard of life of the author plus fifty years, to life of the author plus seventy years.[95] This term applies, in Australian law, irrespective of whether the author is the first owner of copyright or of any subsequent transfers. For films and sound recordings, copyright was altered from fifty years after the date of publication to seventy years after that date.[96] The extension applies to material still in copyright as of January 1, 2005; complex transitional provisions were introduced to mitigate and require benefiting copyright owners to compensate for any disruption the extension might cause, for example, to contractual arrangements made in the expectation that works would fall into the public domain.[97]

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89. *Id.*; Matt Wade, *House Passes Free Trade Law, Senate Vote on Hold*, SYDNEY MORNING HERALD, June 25, 2004, *available at* http://www.smh.com.au/articles/2004/06/24/1088046224381.html.

90. IP AUSTL., OFFICIAL NOTICE: FREE TRADE AGREEMENT BETWEEN AUSTRALIA AND THE UNITED STATES OF AMERICA (2005), *available at* http://www.ipaustralia.gov.au/pdfs/news/ON%20All%20journals%20FTA%203%20Feb%2005.pdf.

91. Parliament of Australia: House of Representative, Parliamentary Sittings—2004 (2004), http://www.aph.gov.au/house/info/sittings/rsp04text.htm.

92. SENATE SELECT COMMITTEE, *supra* note 11, at ¶ 2.10.

93. Letter from Jeff Smith, Director, Austl. Network of Envtl. Defenders Offices, Inc. (Dec. 1, 2003), *available at* http://www.edo.org.au/policy/ausftasub.htm.

94. AUSFTA, *supra* note 2, arts. 17.4.1–17.4.3, 17.4.6, 17.4.11. The fact that these provisions required no *change* did not detract from the sense, explored in Part III. below, that Australia was being "spoken down to" by their incorporation.

95. AUSTFA, *supra* note 2, art. 17.4.4.b.i; Berne Convention, *supra* note 34, art. 7

96. AUSTFA, *supra* note 2, art. 17.4.4.b.i; Berne Convention, *supra* note 34, art. 7

97. Part IV of this paper contains a detailed discussion of the continued differences between the calculation of term in Australia and the United States. However, it might be noted here that the implementation date of January 1, 2005 means that some works received the benefit of term extension in the United States in 1998 but were out of copyright by the time of the Australian term extension.

Second, the implementing legislation introduced economic and moral rights for performers in sound recordings of their performances.[98] The introduction of a new regime of performers' rights was considered necessary to enable Australia to fulfill its obligation under section 17.2.4 of AUSFTA to ratify the WPPT.[99] Prior to these amendments, performers' rights under Australian law were limited to the right to prevent unauthorized recording of their performances, and dealing with such recordings:[100] performers had no rights once a recording was made with their consent. Following the USFTA Implementation Act, the starting point under the Act is that all "performers" (that is, anyone who "contributed sounds of the performance," plus the conductor)[101] share the economic rights in sound recordings of their live performances equally with the producer.[102] Thus, subject to any contractual arrangement to the contrary,[103] the permission of all performers is required for dealings with sound recordings of live performances. In order to avoid a proliferation in the number of permissions required, the Act allows permission to be presumed or inferred in certain circumstances.[104] In addition to the economic rights just outlined, performers have also been given a set of non-transferable,[105] unwaivable[106] moral rights[107]—namely, a right to be

98. US-Australia Free Trade Agreement Implementation Act 2004, schedule 9, Part 2 (2004) (Austl.), *available at* http://www.sice.oas.org/TPD/USA_AUS/Negotiations/AUSlaw1202004_e.pdf. The provisions do not apply to audio-visual recordings of live performances, which continue to be owned by producers. The performers' rights provisions are examined in more detail in Kimberlee Weatherall, *Pretend-y Rights: On the Insanely Complicated New Regime for Performers' Rights in Australia, and How Australian Performers Got Ripped Off*, *in* 3 NEW DIRECTIONS IN COPYRIGHT LAW (Michael Blakeney, Kathy Bowrey & Fiona MacMillan eds., 2006).

99. Australia was in any event required to ratify the WPPT by its Free Trade Agreement with Singapore, which predates AUSFTA. Singapore-Australia Free Trade Agreement, Austl.-Sing., § 13, art. 2.3, Austl.-Sing., Feb. 17, 2003, *available at* http://www.austlii.edu.au/cgi-bin/sinodisp/au/other/dfat/treaties/2003/16.html. Laws for performers' rights were originally due to be introduced into Parliament in 2003 but were held up awaiting the results of the AUSFTA negotiations.

100. Copyright Act, 1968, Part XIA (Austl.). In other words, these were "anti-bootlegging" laws.

101. *Id*. § 22(7). In U.S. law, only performers who contribute protectable expression would be considered "co-authors" of the recording. Capital Records v. Mercury Records Corp., 221 F.2d 657, 660 (1955); Mary LaFrance, *Authorship and Termination Rights in Sound Recordings*, 75 S. CAL. L. REV. 375, 377 (2002).

102. Copyright Act, 1968, §§ 22(3A), 97 (Austl.). Note the limitation to "live" performances: copyright in other sound recordings, including those made by mixing live performances, continues to belong to the producer. However, no audience is required for a "live performance"—the recording simply needs to be made "at the time of" the performance. *Id.* § 22(7).

103. The Copyright Act creates a presumption that commissioned recordings and recordings made in the course of employment will be owned by the commissioner or employer respectively. *Id*. § 97(3).

104. *Id*. § 113A. A performer is also taken to have granted a license where they consent to the recording of their performance for some purpose. *Id*. § 113B. In case of unlocatable owners (a significant issue where there are multiple performers), the other owners can give permission but must hold a share of the proceeds for four years for the unlocatable owners. *Id*. § 113C.

105. *Id*. § 195ANB(3).

106. A performer's moral rights will not, however, be infringed if "the act or omission is within the scope of a written consent given by the performer or a person representing the performer." *Id*. § 195AXJ. Generally speaking, consent can be given in relation to "specified performances" or "performances of a particular description," but employee performers can grant a broader consent for the benefit of their employers. *Id*. §§ 195AXJ(3)-(4).

107. These provisions came into force on July 26, 2007. It is important to note that these rights, unlike the economic rights just described, apply both to "live" and "recorded" performances. *See, e.g., id.* §§ 195ABA, 95AHA (specifying both live and recorded performances).

attributed as performer,[108] a right of integrity in the performance (that is, a right to prevent the performance being subjected to a derogatory treatment),[109] and a right against being falsely attributed as a performer.[110]

The third key area amended in mid-2004 was the law relating to temporary copies. Prior to these amendments, making a copy of a work under Australian law would only infringe copyright where the copy was in "material form," which was defined to include forms of storage from which the work could be reproduced.[111] Courts in Australia had held that this covered most short-term copies made in computer memory, but excluded temporary electronic copies made in the buffer memory of "black box" devices (such as DVD players), which did not allow for an extraction of further copies from temporary memory.[112] The omnibus legislation altered the definition of "material form" to remove the requirement that the work be able to be reproduced (thus expanding the copyright owner's rights to all temporary copies, however inaccessible),[113] and inserted specific exceptions so that copies "incidentally made as a necessary part of a technical process of using a copy of the work" would not infringe, provided they are not made from an infringing copy.[114] The result is that playing a legitimate electronic copy of a work is allowed, but playing a "pirate" copy, where playing results in temporary copies in the memory of a computer, is an infringement.

The United States Trade Representative ("USTR") was not satisfied with all aspects of Australia's implementation of AUSFTA.[115] Most notably, the USTR took the view that the exceptions to the right to control the making of temporary copies were too wide and that the Internet service provider ("ISP") safe harbor provisions were inconsistent with the agreement (the USTR was concerned, in particular, about Australia's attempt to ensure that ISPs would not be considered to be benefiting financially from infringement merely because of "increased activity" on their networks).[116] Negotiations ensued, with Australia required to provide detailed written explanations of how aspects of Australian copyright law operate.[117] In November 2004, the USTR consented to the exchange of diplomatic notes necessary to bring the agreement into effect,[118] on terms that made it clear that U.S. approval was conditional on further amendments.

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108. *Id.* §§ 195ABA–195ABB.

109. *Id.* §§ 195ALA–195ALB.

110. *Id.* §§ 195AHA–195AHB.

111. Austl. Video Retailers Ass'n v. Warner Home Video [2001] 114 F.C.R. 324, 345 (Austl.); Microsoft Corp. v. Business Boost PtyLtd [2000] 49 I.P.R. 573 (¶ 10) (Austl.).

112. Stevens v. Kabushiki Kaisha Sony Computer Entm't [2005] 224 C.L.R. 193 (¶ 71) (Austl.); *Austl. Video Retailers Ass'n*, 114 F.C.R. at 345–46; *Microsoft Corp*., 49 I.P.R. at ¶ 14.

113. Copyright Act, 1968, § 10 (Austl.) (defining "material form").

114. *Id.* §§ 43B, 111B.

115. Mark Davis, *US Forces FTA Change to Copyright*, AUSTL. FIN. REV., Nov. 16, 2004, at 4.

116. *Id.*; Letter from Mark Vaile, *supra* note 79.

117. United States Trade Representative, Exchange of Letters on Implementation of the U.S.-Australia Free Trade Agreement, http://www.ustr.gov/Trade_Agreements/Bilateral/Australia_FTA/Implementation/Section_Index.html (last visited Sept. 25, 2008).

118. AUSFTA, *supra* note 2, art. 23.4; Letter from Robert B. Zoellick, *supra* note 74.

The level of detail in this November exchange is striking:[119] it effectively made the agreement conditional on a specified form (at that time, a draft) of implementing legislation. Even more remarkable, however, is the overtly grudging, even threatening tone of the USTR letter. The letter stated expressly that the United States was proceeding "based on the Australian government's commitment to introduce [amending] legislation and have it enacted into law expeditiously"—which is itself an interesting comment given that Parliament still, at that time, had the right to reject or amend that legislation.[120] The letter also stated that the United States "remained concerned" about some provisions and "intend[ed] to monitor" their effect,[121] and that if subsequent practice "reveal[ed] problems with the full exercise of [U.S.] rights . . . Australia should expect that [the United States] will take appropriate remedial action."[122] This attitude, showing a disregard for Australian parliamentary processes and only curmudgeonly accepting Australia's right to choose how to implement treaty provisions, had implications for the Australian response to the agreement.[123]

Following this exchange, Australia passed legislation making the changes required: amending several aspects of the new copyright laws in December 2004, refining the ISP safe harbor provisions, and limiting the scope of the exception for temporary copies made as part of a technical process of using an electronic copy of a work.[124] Again, the process in Australia was rushed, apparently in compliance with the desire of the United States for the implementation to be "fixed" prior to the agreement coming into effect. In order to ensure the legislation could be passed before the end of the year, a Parliamentary committee convened to conduct an "inquiry" and was given twenty-four hours to report.[125] The committee in turn gave stakeholders approximately three hours notice of the hearing, and rather than writing a formal report, simply tendered the transcript of the hearing and evidence to

119. For example, the Australian letter sets out an undertaking to add two confining words to the exception to the copyright owner's rights over temporary copies ("'temporary"' and "'necessary"'), and to provide that there is no exception where the source copy was made overseas but would be infringing if made in Australia (an anti-parallel importation provision). Letter from Mark Vaile, *supra* note 79. Given the right of parties to a treaty to translate provisions into domestic law, engagement with this level of detail is unusual. *See* Vienna Convention on the Law of Treaties art. 2, Jan. 27, 1980, 1155 U.N.T.S. 331 (discussing the ability of states to make reservations before ratification, unilateral statements that modify the legal effect of certain provisions of treaties).

120. Letter from Robert B. Zoellick, *supra* note 74, at 2, 4.

121. For example, the transitional provisions introduced to address the disruptive effects of copyright term extension, which the United States considered "unwarranted and burdensome to right holders." *Id.* at 2.

122. *Id.* at 2, 4.

123. It did not help that similar comments had been issued by the USTR reserving all rights to approve the implementing legislation, as passed in August 2004, particularly as it related to IP: a comment widely interpreted in Australia as a "warning." *US Warns Australia over FTA Amendments*, ABC NEWS ONLINE, Aug. 13, 2004, http://www.abc.net.au/news/newsitems/200408/ s1175531.htm.

124. Copyright Legislation Amendment Act, 2004, § 3, sched. 1 (Austl.). The changes to the ISP provisions were particularly controversial, in part due to concern that they went further than required by the AUSFTA. Commonwealth of Austl. Attorney General's Dep't., AUSFTA Free Trade Agreement, http://www.ag.gov.au/www/agd/agd.nsf/Page/Copyright_IssuesandReviews_AUSFTAFreeTradeAgreement (last visited Sept. 25, 2008).

125. SENATE, LEGAL & CONSTITUTIONAL LEGISLATION COMMITTEE, INQUIRY INTO THE COPYRIGHT LEGISLATION AMENDMENT BILL 2004 1 (2004) (Austl.); PARL. S. DEB. 41st Parl. 1st Sess. 116 (Dec. 7, 2004) (remarks of Sen. Nettle) (Austl.).

Parliament.[126] The truncated process once again elicited considerable concern and protest from members of Parliament.[127]

The passage of these amendments in December 2004 left one key area to be implemented: the anticircumvention provisions, which under the agreement were not required to be in force until January 1, 2007.[128] Australia already had its own anticircumvention laws, negotiated through an extensive domestic consultation process over the period 1997–2000, and reviewed in 2003; but the model was quite different from the U.S. model reflected in article 17.4.7 of AUSFTA.[129] Australia had chosen in 2000 not to ban the act of circumvention of technical protections, on the basis that the real harm to copyright owners occurred through the creation of a market for circumvention devices, and that banning circumvention intruded too significantly into the private sphere.[130] Following a further set of Parliamentary committee hearings in late 2005, which provided another opportunity for extensive public criticism of the agreement, new anticircumvention provisions were passed in December 2006.[131] As a consequence, Australian anticircumvention law now looks superficially much more like its U.S. counterpart. However, it would be erroneous to assume that this change has produced any noticeable benefit for copyright owners, and it is also notable that a deliberate decision was taken to depart from the U.S. model as embodied in the DMCA in various respects.[132]

One final unexpected twist occurred during Australia's implementation: the agreement ignited a local debate that led to an expansion of the exceptions to copyright infringement, in particular, as regards the personal use of copyright material.[133] During the process of implementation, two things happened. First, politicians' attention was focused on Australian copyright law.[134] This happens relatively rarely, and when it does, critics can take the opportunity to point out all the areas where they see problems. Thus, opponents were able to point out the fact that under Australian law most acts of personal copying—including recording a television program to watch at a later time and copying music from a lawfully purchased CD onto an iPod—involved infringement of copyright.[135] Since politicians tend to record television, and

126. PARL. S. DEB. 41st Parl. 1st Sess. 117 (Dec. 7, 2004) (remarks of Sen. Conroy) (Austl.).

127. *E.g.*, *id.* (describing the process as a "farce").

128. AUSFTA, *supra* note 2, art. 17.12.

129. *See id.* art. 17.4.7 (reflecting the U.S. model).

130. HOUSE OF REPRESENTATIVES STANDING COMMITTEE ON LEGAL & CONSTITUTIONAL AFFAIRS, INQUIRY INTO TECHNOLOGICAL PROTECTION MEASURES (TPM) EXCEPTIONS 15–16, 27 (Austl.), *available at* http://www.aph.gov.au/House///committee/laca/protection/report.htm (Committee reporting in early 2006).

131. *See generally id.* (examining whether additional exceptions are needed to the liability scheme for circumvention in AUSFTA).

132. *See infra* Part IV.A (discussing the minimal changes AUSFTA required of Australian IP law).

133. *See* Media Release, Australian Digital Alliance, Copyright Fanatics Threaten Australia's Way of Humor (Nov. 27, 2006), *available at* http://www.digital.org.au media/documents/MediaRelease27Nov06.pdf (calling for a broad defense of fair use).

134. *Proposed Changes to Australian Copyright Laws Could Make iPod Users into Criminals*, INT'L HERALD TRIB., Nov. 21, 2006 [hereinafter *Proposed Changes*], *available at* http://www.iht.com/articles/ap/2006/11/21/ technology/AS_TEC_Australia_Copyright_Crime.php.

135. *Id.*

they or their children have iPods, this was met with dismay.[136]

Second, this domestic debate interacted with a widespread—and justified—perception amongst legislators, policy-makers, and groups representing user interests (such as libraries, galleries, archives, and educational institutions) that the amendments required by the agreement were all tending in one direction: increasing the level of copyright protection.[137] U.S. readers would be familiar, however, with the way that copyright reform tends to work: for political purposes, it is always necessary to present reforms, at least rhetorically, as giving something to both users and owners. This is as true in Australia as it is in the United States. Because the provisions in AUSFTA were all aimed at increasing protection, opponents were able to claim that the effect was to change the copyright "balance" in favor of copyright owners.[138] At the same time, in Committee hearings, members of Parliament were told that the U.S. fair use defense allowed activities such as limited personal copying and using copyright material for the purposes of parody, that were unlawful in Australia.[139] During this period, even counsel for the U.S. Recording Industry in the *Grokster* case conceding in argument that copying sound recordings to portable players was likely to be fair use, even as the Web site of the Australian Record Industry Association continued to state that copying music to MP3 players was an infringement of copyright.[140] It is therefore unsurprising that both Committees made specific recommendations that Australia should either introduce a fair use defense or broaden the existing exceptions in some other way.[141] The government sought to defuse this issue going into the 2004 election by promising to review Australia's copyright exceptions regime.[142]

The promised review of the exceptions commenced in May 2005.[143] The

136. *See, e.g.*, PARL. S. COMM. DEB. 40th Parl. 1st Sess. 87 (May 18, 2004) (remarks of Sen. Cook) (Austl.) (declaring that it is technically copyright infringement when the senators record football games from television).

137. *See Proposed Changes*, *supra* note 134 (quoting Brian Fitzgerald, head of Queensland University's law school, who stated that the changes "have the potential to make everyday Australians . . . into criminals on a scale that we have not witnessed before").

138. Thus, as often occurs, the language of balance provided a useful metaphor for pro-user groups who were arguing for specific reforms to offset impending increases copyright protection, but in adopting this language, these groups also implicitly conceded that the law, as it existed at the time, was more or less satisfactory. ROBERT BURRELL & ALLISON COLEMAN, COPYRIGHT EXCEPTIONS: THE DIGITAL IMPACT 187–91 (2005).

139. COMMONWEALTH OF AUSTL. ATTORNEY-GENERAL'S DEP'T, FAIR USE AND OTHER COPYRIGHT EXCEPTIONS: AN EXAMINATION OF FAIR USE, FAIR DEALING AND OTHER EXCEPTIONS IN THE DIGITAL AGE 16 (2005), *available at* http://www.ag.gov.au/www/agd/rwpattach.nsf/VAP/(CFD7369FCAE9B8F32F341DBE097801FF)~FairUseIssuesPaper050505.pdf/$file/FairUseIssuesPaper050505.pdf.

140. *See* Mike Prevatt, *Burning Question: Is Copying Music Legal?*, LAS VEGAS MERCURY, Sep. 9, 2004, http://www.lasvegasmercury.com/2004/MERC-Sep-09-Thu-2004/24716663.html (discussing what rights consumers have in purchased music).

141. COMMONWEALTH OF AUSTL. JOINT STANDING COMM. ON TREATIES, REPORT 61: AUSTRALIA-UNITED STATES FREE TRADE AGREEMENT 240 (2004); SENATE SELECT COMMITTEE, *supra* note 11, at 230.

142. LIBERAL PARTY OF AUSTL., STRENGTHENING AUSTRALIAN ARTS 22 (2004).

143. Australian Government Attorneys General's Department, The AGD e-News on Copyright, http://www.ag.gov.au/agd/WWW/enewsCopyrightHome.nsf/Page/RWP202CE7576726DAF0CA256FC8001E3EB1 (last visited Sept. 25, 2008).

government ended up rejecting the introduction of an open-ended fair use defense, on the basis that it would lead to uncertainty.[144] Instead, in the interests of "equal treatment" with American consumers, it chose to enact a series of specific new exceptions to allow for:

- home taping (i.e., recording a broadcast in order to watch it or listen to it at a more convenient time);[145]
- "format shifting" or "space shifting" for "private and domestic use" (this exception allows, for example, the public to copy music from a CD onto a computer or portable music device);[146]
- use for the purposes of "parody or satire;"[147] and
- certain noncommercial uses by libraries, archives, educational institutions, or by or for persons with a disability.[148]

None of these exceptions require remuneration to rights holders.[149] The private copying exceptions are not qualified, as the U.S. defense of fair use is, by any reference to the market impact on copyright owners.[150] Their introduction is a direct result of the way that domestic political considerations impacted on implementation of that agreement and, in particular, of the rhetorical power of demands that Australian users be left no worse off than their U.S. counterparts. Such demands would always have had force, but in the climate of hostility that developed towards the copyright provisions of the agreement, these demands were irresistible.

Because AUSFTA required few changes to U.S. law generally, and no changes to U.S. copyright law at all, it is understandable that a U.S. audience would lose sight of the processes that followed on from its conclusion. However, in Australia the implementation process was drawn-out over three years, complicated, involved changes of minute detail in Australian law, and was carried out under the continuing supervision of the USTR.[151] As we show in the next section, this had important implications for the Australian reaction to AUSFTA over time.

III. THE COST OF INCLUDING COPYRIGHT IN AUSFTA

A. Australian Reaction to the Copyright Provisions

Having outlined the effects of the agreement and the process of Australian implementation, in this section we seek to chart the nature of Australian reaction to the copyright provisions of the agreement, show how

144. Philip Ruddock, *Fair Use and Copyright in Australia*, 25 COMM. L. BULL. 4, 6 (2007).
145. Copyright Act, 1968, § 111 (Austl.).
146. *Id.* §§ 43C, 47J, 109A, 110AA.
147. *Id.* §§ 41A, 103AA.
148. *Id.* § 200AB.
149. *Id.* §§ 41A, 43C, 47S, 103AA, 109A, 110AA, 111, 200AB.
150. 17 U.S.C. § 107 (2000).
151. *See supra* notes 77– 150 and accompanying text (describing Australia's implementation process of the AUSTA).

this reaction fed a more general anti-American sentiment, and try to explain why this reaction was so overwhelmingly negative. Before doing so, however, it is important to acknowledge that there is an argument to be had about cause and effect. A segment of Australian society believes that Australia is not sufficiently assertive of its own interests, and has long been much too ready to align itself unthinkingly with the interests of larger Western powers.[152] Holders of this view incline naturally to an anti-American stance and were almost inevitably going to oppose AUSFTA, regardless of its content. For some of these critics, the copyright aspects of the agreement were one of several tools used in an attempt to marshal opposition more generally.[153] Copyright is useful for these purposes precisely because concerns about the scope and expansion of IP rights were already matters of public interest and political concern. In our view, however, the copyright provisions were a major independent source of hostility. As we will show, a great deal of alarm was caused in political and policy circles, and in the Australian media, by the style of chapter 17 in particular, and by the tone of the accompanying official correspondence.[154] These misgivings about the copyright provisions served to recruit new opponents to the anti-copyright cause, to increase opposition to AUSFTA generally, and in the longer term, to increase suspicion and hostility towards the United States itself.

The role which the copyright provisions would play was not fully evident in the immediate period following the conclusion of AUSFTA: at that time, the bulk of media attention and debate in Australia was directed at agricultural trade, relaxation of foreign investment rules, Australian media content quotas, and the potential impact of the agreement on Australia's Pharmaceutical Benefits Scheme.[155] However, a review of mainstream media coverage at the

152. See, for example, Manning Clarke's influential, but highly controversial, account of Australian history, in which Clarke takes a withering view of Australia's willingness to embroil itself in the Boer and First World Wars. MANNING CLARK, A HISTORY OF AUSTRALIA, VOL. V: THE PEOPLE MAKE LAWS, 1888–1915, 169– 73, 369–88 (1999). In relation to more recent events, this concern has been expressed, in particular, over Australia's willingness to lend its support to U.S.-led military interventions in Vietnam and Iraq. *See, e.g.*, JOHN MURPHY, HARVEST OF FEAR: A HISTORY OF AUSTRALIA'S VIETNAM WAR 61–81 (1993) (discussing Australian intervention in the Vietnam war); Brendon O'Connor, *Perspectives on Australian Foreign Policy, 2003*, 58 AUSTL. J. INT'L AFF. 207, 207–14 (2003) (discussing Australian policy on Iraq).

153. Perhaps the clearest example of an attempt to use the IP chapter to mobilize opposition to the AUSFTA, and the thrust of Australia's foreign policy, generally, is provided by Linda Weiss. LINDA WEISS ET AL., HOW TO KILL A COUNTRY: AUSTRALIA'S DEVASTATING TRADE DEAL WITH THE UNITED STATES 113–29 (2004). The authors of that book chose four areas, namely, IP, quarantine, the pharmaceutical benefit scheme, and government procurement rules to make the case that "this FTA will turn us into an appendage of the United States . . . a kind of Pacific Puerto Rico." *Id.* at vi. They devote a whole chapter to making some hysterical claims about IP protection: it will "throttle [Australia's] remaining innovative industries, forcing them to navigate around the patent claims of foreign corporations rather than staking fresh claims themselves . . . suppress competition for IP-protected goods by making it impossibly hard for generic versions of these products to be introduced . . . drastically ratchet up sanctions against IP 'violators.' . . . Send [Australia's] own citizens to jail for interfering—wittingly or not—with the technological gismos of foreign IP holders." *Id.* at 113. The authors also argues that the copyright provisions will "take us back to the days of the debtors' prison." *Id.* at 3.

154. *See infra* notes 155–181 and accompanying text (discussing Australian opposition to the IP provisions of AUSFTA).

155. *See* Global Trade Watch, An Explanation of Some Key Elements of the Australia-US Free Trade Agreement, and Predicated on Impacts on Australia, http://www.tradewatchoz.org/AUSFTA/Index.html (last visited Sept. 25, 2008) (listing 2004 articles focusing on agriculture, foreign investment, and Australia's

time reveals that whenever the copyright provisions were mentioned, the commentary was almost universally negative, even in news outlets that were supportive of the agreement overall.[156]

It would be easy to dismiss negative commentary on the copyright provisions of AUSFTA as an inevitable interest group reaction: copyright is a famously politicized area with vocal and active stakeholders. Such a view would not only be simplistic, it would be incorrect. In fact, the most notable thing about Australian reactions to the copyright provisions of the agreement is that criticism was not confined to longstanding critics of the copyright regime, that is, left-leaning members of the legal academy, non-governmental organizations, librarians, educational establishment representatives and campaigners for "digital freedoms." These groups were, of course, actively involved in protesting the effects of the copyright provisions of the agreement.[157] In addition, an entirely different set of critics emerged. Among them were press commentators not normally concerned with or involved in IP debates,[158] union officials,[159] senior academic economists,[160] and the chief economics editors of the main broadsheet newspapers in both Sydney and Melbourne.[161]

Pharmaceutical Benefits Scheme).

156. *E.g.* Henry Ergas, *Patent Protection an FTA Complication*, AUSTL. FIN. REV., Feb. 24, 2004, at 63; Peter Martin, *The FTA Clause that Stifles Creativity*, SYDNEY MORNING HERALD, April 14, 2004, at 13; Bruce McCabe, *FTA Leaves Us Second Among Equals*, Jan. 1, 2004, http://www.bilaterals.org/article.php3?id_article=520. Even in an otherwise positive editorial, the editor had little or nothing favorable to say about the copyright provisions of the AUSFTA. Editorial, *Making the Case for the US Trade Deal*, AUSTRALIAN, July 27, 2004, at 18.

157. *See, e.g.*, Christopher Arup, *The United States-Australia Free Trade Agreement—The Intellectual Property Chapter*, 15 AUSTL. INTELL. PROP. J. 205, 206 ("[T]he chapter gives all the appearance of a United States shopping list . . . [the provisions] lock in future governments and the local electorate, reducing their autonomy to fashion regulatory options responsive to changes in circumstances."); Matthew Rimmer, *Robbery Under Arms: Copyright Law and the Australia-United States Free Trade Agreement*, FIRST MONDAY, Mar. 6, 2006, http://www.firstmonday.org/issues/issue11_3/rimmer/index.html ("[T]he *AUSFTA* would produce what, Lawrence Lessig has memorably, called a 'piracy of the public domain.' The new order will prove to be a windfall for multinational entertainment companies, much to the detriment of copyright users and consumers.").

158. *See, e.g*, Alan Ramsey, *Brave Few Overrun by Unlikely Allies*, SYDNEY MORNING HERALD, Aug. 14, 2004, *available at* http://www.smh.com.au/articles/2004/08/13/1092340464904.html (describing the political battle over passage of the Free Trade Agreement); *see also* Kenneth Davidson, *How the FTA Will Stunt our Industrial Growth*, THE AGE, Aug. 12, 2004, at 13 (pointing to Canada as an example of how free trade agreements work towards eradicating a country's national sovereignty in IP rights).

159. Letter from Anne Williams, Secretary, Gulgong Branch of the Austl. Labor Party, to the Senate Select Committee on the Free Trade Agreement between Australia and the United States of America (Apr. 24, 2004), *available at* http://www.aph.gov.au/senate_freetrade/submissions/sub342.htm; Letter from Gay Hawksworth, Secretary, Queensland Nurses' Union, to the Senate Select Committee on the Free Trade Agreement between Australia and the United States of America (Apr. 8, 2004), *available at* http://www.aph.gov.au/senate-freetrade/submissions/sub54.pdf.

160. For example, Professor John Quiggin, a Federation Fellow at the University of Queensland and a Fellow of the Australian Social Science Academy, was highly critical of the copyright provisions. John Quiggin, *A Completely Misleading Description: The US-Australia Free Trade Agreement*, EVATT FOUNDATIONS, Nov. 5, 2005, http://www.evatt.labor.net.au/publications/papers/128.html.

161. Ross Gittins, economics editor at the *Sydney Morning Herald*, wrote a series of opinion pieces condemning the IP provisions and the copyright provisions specifically. *See, eg.*, ''Ross Gittins, *Selling off a Slice of our Country*, SYDNEY MORNING HERALD, Aug. 11, 2004, at 17; Ross Gittins, *Trade Deal a Free Kick for US Software Racketeers*, SYDNEY MORNING HERALD, Aug. 2, 2004, at 34; Ross Gittins, *Costs Aplenty in "Free" Trade IP Deals with US*, SYDNEY MORNING HERALD, July 24, 2004, at 46.

Trade economist Philippa Dee, who was commissioned to write an independent assessment of the economic impact of AUSFTA for the Senate Committee, described the IP provisions as "pernicious" and "market closing."[162] The former chief economist at the Department of Foreign Affairs and Trade, Peter Urban, was highly critical of the IP provisions of AUSFTA and identified chapter 17 as providing one reason for not accepting the agreement.[163] Independent assessments by both the Parliamentary Library and the international relations think-tank, the Lowy Institute, came to similar conclusions.[164] Dr. John Hewson, a former leader of the (right of centre) governing Liberal Party, singled out the IP chapter as being a key issue of concern in AUSFTA, because it might give rise to "a dramatic change to sovereignty [t]hat will have a medium to long term impact on this country which is very significant and should not be underestimated."[165] Four of the six state governments (New South Wales, Queensland, Victoria, and Western Australia) expressed concern about the copyright provisions, despite having supported the negotiations and despite being in favor of the agreement overall.[166] Leading figures in the legal community, such as Justice Sackville of the Federal Court of Australia, were also critical.[167]

During debates on AUSFTA, Parliamentarian after Parliamentarian referred specifically, and sometimes at length, to the new copyright rules,

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162. PHILIPPA DEE, THE AUSTRALIA-US FREE TRADE AGREEMENT: AN ASSESSMENT 21–25, 39 (2004), *available at* http://www.aph.gov.au/senate_freetrade/rel_links/dee_fta_report.pdf.

163. Ross Gittins, *No Free Trade in So-Called Free Trade Agreement*, SYDNEY MORNING HERALD, July 19, 2004, at 34.

164. *See* DAVID RICHARDSON, INTELLECTUAL PROPERTY RIGHTS AND THE AUSTRALIA-US FREE TRADE AGREEMENT (2004), *available at* http://www.aph.gov.au/Library/pubs/RP/2003-04/04rp14.htm ("The AUSFTA treatment of IPRs seems to be detrimental to Australia's interests," and may have the effect of "defeating any industry development ambitions Australia might have."). *But see* MARK THIRLWELL, THE GOOD, THE BAD AND THE UGLY: ASSESSING CRITICISM OF THE AUSTRALIA-UNITED STATES FREE TRADE AGREEMENT 1–7 (2004) (suggesting that some of these criticisms are overstated but valid criticisms of the free trade agreement exist, nonetheless).

165. Ruth Williams, *Hewson Seeks FTA Debate*, W. AUSTL., Aug. 11, 2004, at 33 (commenting on the AUSFTA in a speech to business leaders in Western Australia).

166. S. SELECT COMM. ON THE FREE TRADE AGREEMENT BETWEEN AUSTL. & U.S.: WESTERN AUSTRALIAN SUBMISSION 4 (2004) (Austl.), *available at* http://www.aph.gov.au/senate_freetrade/ submissions/ sub142.pdf; Letter from Steve Bracks, Primer of Victoria, to Peter Cook, Chair, Senate Select Committee on the Free Trade Agreement between Australia and the United States of America (Apr. 15, 2004), *available at* http://www.aph.au/senate_freetrade/submissions/sub.66.pdf; Letter from Roger B. Wilkins, Director-General, The Cabinet Office of New South Wales, to Peter Cook, Chair, Senate Select Committee on the Free Trade Agreement between Australia and the United States of America (Apr. 13, 2004), *available at* http://www.aph.gov.au/senate_freetrade/submissions/sub69.pdf; Letter from Peter Beattie, Premier of Queensland, to Brenton Holmes, Senate Committee Secretary, Senate Select Committee on the Free Trade Agreement between Australia and the United States of America (May 18, 2004), *available at* http://www.aph.gov.au/senate_freetrade/submissions/sub508.pdf. *Cf.* Press Release, Austl. Gov't Dep't of Foreign Affairs & Trade, Labor Premiers and Chief Minister Support Aust-USA Free Trade Agreement (Oct. 21, 2003) (on file with author) (announcing support for the negotiations by State Premiers).

167. Justice Ronald Sackville, *Monopoly Versus Freedom of Ideas: The Expansion of Intellectual Property*, 16 AUSTL. INTELL. PROP. J. 65, 65–67 (2005); *see also* Honorable Justice Michael Kirby, Address to the 20th Anniversary Celebration of the Arts Law Centre of Australia, Arts and Law in a Whirligig of Time (Oct. 31, 2003), *available at* http://www.hcourt.gov.au/speeches/kirbyj/kirbyj_31oct.html ("We must be alert, as a nation, to the great power of the United States to impose not only its full price pharmaceuticals upon the world but also its culture. It seems inevitable that Mickey Mouse will never come out of copyright protection in the United States. They are foremost in protecting their own culture. We should be equally insistent in protecting ours."). *Id.*

calling the copyright aspects of the agreement "a major concern,"[168] "one of the most significant aspects of the Agreement . . . essentially trade restrictive measures rather than trade liberalising,"[169] "dangerous,"[170] or "one of the worst aspects of this deal."[171] The opposition Labor Party was sufficiently concerned that it drew up a series of proposals for "managing" the copyright issue, which became part of its election platform.[172] On the very last night of debate on AUSFTA implementing legislation, most of the discussion, late into the night, was about the impact of the copyright provisions, as minor parties sought to move amendments to the implementing legislation to reduce what they saw as the negative effects of chapter 17.[173]

For critics such as Dr. Hewson, for media commentators, and for many Parliamentarians, it was not only the immediate costs of the new rules for consumers or educational institutions, nor the concern that adoption of the rules would lead to "litigious bullying" of Australian companies by large American corporations, that worried them.[174] Rather, a consistent theme was one of real disquiet at the loss of sovereignty and freedom to determine matters of economic and social policy. The complex form of the agreement also ensured that the commentary was ongoing: the more time people had to consider the chapter, the more potential problems were identified, giving rise to a steady stream of negative commentary over a period of months.[175]

What is more, the negative reaction engendered by the copyright provisions did not end with the passage of the first round of implementing legislation: chapter 17 is the gift that keeps on giving. In November 2004, when further legislation was passed amending Australia's implementation as required by the United States, the event generated renewed attention and controversy.[176] Media stories again canvassed the copyright problems caused by AUSFTA,[177] raising fears of "bully-boy tactics" and an "avalanche of litigation."[178] Once again, the impact on Australia of "changes to copyright

168. PARL. S. DEB., 40th Parl., 1st Sess. 25681 (Aug. 4, 2004) (remarks of Sen. Lundy) (Austl.).

169. PARL. S. DEB., 40th Parl., 1st Sess. 25710 (Aug. 3, 2004) (remarks of Sen. Cook) (Austl.).

170. PARL. S. DEB., 40th Parl., 1st Sess. 26402 (Aug. 12, 2004) (remarks of Sen. Ridgeway) (Austl.).

171. PARL. S. DEB., 40th Parl., 1st Sess. 25562 (Aug. 4, 2004) (remarks of Sen. Nettle) (Austl.).

172. *See* Bob Burton, *Australia Amends Its Free Trade Deal with US to Lessen Effect on Drug Costs*, 329 BRIT. MED. J. 420 (2004) (discussing how AUSFTA was being delayed by amendments by the Labor opposition in August 2004).

173. PARL. S. DEB., 40th Parl. 1st Sess. 25694-96 (Aug. 4, 2004) (remarks of Sen. Stephens) (Austl.).

174. PARL. H.R. DEB. 40th Parl. 1st Sess. 26402-05 (Aug. 12, 2004) (remarks of Sen. Ridgeway) (Austl.); PARL. S. DEB. 40th Parl. 1st Sess. 25750–51 (Aug. 5, 2004) (remarks of Sen. Harradine) (Austl.); PARL. S. DEB., 40th Parl., 1st Sess. 25572-75 (Aug. 4, 2004) (remarks of Sen. Harris) (Austl.); PARL. H.R. DEB. 40th Parl. 1st Sess. 31511–15 (June 24, 2004) (remarks of Mr. Brendan) (Austl.); Kenneth Davidson, *How the FTA Will Stunt our Industrial Growth*, AGE, Aug. 12, 2004, http://www.theage.com.au/articles/2004/08/11/1092102518345.html ("The agreement involves a voluntary surrendering of a large chunk of Australia's national sovereignty in policy areas such as investment, IP rights, services and government procurement . . . .").

175. Negative commentary appeared first in March 2004, and continued through the debates in August. *See supra* notes 156–67 and accompanying text (commenting that chapter seventeen generated considerable negative commentary).

176. *See supra* Part II.C (discussing Australian implementation of AUSFTA).

177. Ross Gittins, *Labor, and We, Will Live to Regret US Trade Deal*, SYDNEY MORNING HERALD, Nov. 22, 2004 ("In this aspect of the deal, it's all downside").

178. Karen Dearne, *Take-Down Notices Set to Bite*, AUSTRALIAN., Nov. 30, 2004 ("ISPs [would] face

law forced by the U.S. free trade agreement" was debated in Parliament, with members wondering aloud about future possible U.S. demands in the copyright field given the level of detail in the agreement and tone of the accompanying correspondence.[179] Two years later, in late 2006, as the last of the copyright changes were passed by Parliament, both the media and members of Parliament continued to relate many of the "bad things" about Australian copyright law to AUSFTA and the demands of the United States.[180] Nor is this effect of the chapter likely to cease any time in the foreseeable future. Consideration of compliance with AUSFTA is now necessary every time Australia considers any reform to its copyright law (or other laws that may impact on the interests of copyright owners). Because of its detail and inflexibility, AUSFTA will continually be brought up as a barrier to otherwise desirable changes to copyright law. Thus Australian stakeholders, policymakers, and Parliamentarians will repeatedly be reminded of these provisions.

In sum, the Australian reaction to the copyright provisions of AUSFTA was sustained, hostile, and came from a range of sources, many of whom did not have a personal stake in the issue and have not usually participated in copyright reform debates. In our view, this reaction should be counted, from a U.S. perspective, as a cost of the agreement. The constant reiteration—over a period starting in 2004, and continuing even now—that the United States had imposed its copyright rules on Australia, and that it was watching the implementation of those rules with a hostile eye and scant regard for Australia's sovereignty or Parliamentary processes, has contributed to a more general decline in the United States' standing in Australia. The copyright provisions helped to foster the belief that Australia's long-standing, steadfast support of the U.S. foreign policy objectives counted for little in American eyes. This is ironic given that one of the perceived advantages of AUSFTA was that the agreement would strengthen ties with a steadfast ally. If this was the U.S. way of saying "thanks mate,"[181] it felt, to many Australian observers, like a slap in the face, not a pat on the back.

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bullying as the controversial US FTA copyright regime comes here" and that the free trade agreement would have "deleterious impact . . . on libraries, universities, cultural institutions and software developers"); James Riley, *Telcos Accept Copyright Compromise*, AUSTLIAN, Dec. 8, 2004 (stating that concerns about the potential impact caused Labor Members of Parliament to argue for blocking the laws).

179. PARL. H.R. DEB. 41st Parl. 1st Sess. 25-30 (Dec. 9, 2004) (remarks of Mr. Crean) (Austl.); PARL. H.R. DEB. 41st Parl. 1st Sess. 37-40 (Dec. 9, 2004) (remarks of Mr. Andren) (Austl.).

180. *See* PARL. S. DEB. 41st Parl. 1st Sess. 146 (Nov. 30, 2006) (remarks of Sens. Nettle & Green) (Austl.) ("[T]he free trade agreement with the United States has meant that the worst aspects of the American copyright system are being imported into Australian law with none of the consumer safeguards . . . ."); PARL. S. DEB. 41st Parl. 1st Sess. 38-41 (Nov. 29, 2006) (remarks of Sen. Bartlett) (Austl.) (referring to "problems in the free trade agreement itself"); PARL. H.R. DEB. 41st Parl. 1st Sess. 38-41 (Nov. 1, 2006) (remarks of Mr. Kerr) (Austl.) (mentioning the free trade agreement itself is not before the parliament). The renewed debates also gave rise to an opportunity to discuss whether the AUSFTA had generated any benefits for Australia. PARL. H.R. DEB. 41st Parl. 1st Sess. 38-39 (Nov. 1, 2006) (remarks of Mr. Kerr) (Austl.).

181. *See supra* note 28 (discussing U.S. sentiments that the AUSFTA was a way to thank Australia for Australia's previous military support).

B. The Causes of Australian Hostility

Having charted the nature of Australian reaction to the copyright provisions of the agreement, in this section we attempt to explain why the reaction was so negative. As we have already emphasized, we do not believe that Australian reaction can be explained as the consequence of the fact that AUSFTA forced Australia to raise its copyright standards. On the contrary, AUSFTA did very little in this respect. Rather, we believe that the form of the agreement did much to contribute to the sense that the United States had adopted a petty and patronizing attitude towards Australia in the negotiations. These concerns about the form of the agreement need to be viewed in the context of the sometimes strained history of copyright relations between the two countries, alongside the belief that the agreement seeks to lock Australia into various positions at a time when it is too early to say whether these positions are sensible, and the concern that the United States may simply choose to ignore its obligations under the agreement if they subsequently prove to be inconvenient.

In describing chapter 17 as petty, we are referring to the fact that it seems that there is no aspect of IP law or administrative practice too trivial to have found its way into the agreement. One such example that jumps out is a provision in AUSFTA that "neither party may require, as a condition of registration, that [trade] marks be visually perceptible, nor may a Party deny registration of a mark solely on the ground that the sign of which it is composed is a sound or a scent."[182] This provision seems to have been designed to ensure that Australia does not follow the European approach to graphic representation of trade marks, which has made it more or less impossible to register an olfactory mark in Europe.[183] Are scent marks of such overwhelming significance to the United States that they require treaty-level protection—in a context where Australia already allowed such registration and had shown no inclination to follow the European approach?[184]

More relevantly for present purposes, there are similarly petty, nitpicking provisions in the copyright area. This is perhaps most obviously seen in the side letter dealing with ISP liability.[185] This letter sets out model notices and counter-notices—all the way down to requiring that such notices include "the identity, address, telephone number and electronic mail address of the complaining party," "the signature of the person giving notice" (which, a footnote to the letter specifies, includes an electronic signature), and "a statement that the information in the notice is accurate" (as if any of this needed to be stated at the level of a treaty).[186] Another example is the

182. AUSFTA, *supra* note 2, art. 17.2.2.

183. Case C-273/00, Sieckmann v. Deutsches Patent und Markenamt, 2003 E.M.T.R. 37 (2003)

184. There is a strong case that the graphic representation requirement in Australia performs a more limited set of functions than its European counterpart: Robert Burrell & Michael Handler, *Making Sense of Trade Mark Law*, 4 INTELL. PROP. Q. 388, 411–12 (2003).

185. Letter from Robert B. Zoellick, *supra* note 74.

186. *Id.* These requirements are taken more or less directly from U.S. law. 17 U.S.C. §§ 512(c)(3)(A), 512(g)(3) (2000). In defense of this side letter, it could be argued that this level of detail helps reduce regulatory compliance costs for copyright owners and online service providers alike: the same forms of notice

provision relating to border measures. Article 17.11.24 requires that parties "provide that where an application fee or merchandise storage fee is assessed in connection with border measures to enforce a trademark or copyright, the fee shall not be set at an amount that unreasonably deters recourse to these measures,"[187] as if the principle that parties ought in practice to be able to avail themselves of the remedies provided by law needed to be stated. Similarly, AUSFTA provides that "final judicial decisions . . . for the enforcement of intellectual property rights . . . shall be in writing and shall state any relevant findings of fact and the reasoning, or the legal basis on which the decisions or rulings are based."[188] This of a trading partner that has had a common law legal system for more than 200 years.

By seeking to regulate and control relatively trivial matters, AUSFTA helps to create the impression that Australia was being spoken down to on IP matters. This patronizing quality of AUSFTA is amplified by the fact that it looks and feels like a "standard form" agreement (as was described earlier), which conspicuously fails to pay any respect to Australia's legal traditions. AUSFTA and the accompanying official correspondence leave the reader with the impression that the USTR descended, Prometheus-like, to present the torch of IP to the benighted savages of the antipodes. Deviation from American norms is, at best, to be tolerated begrudgingly and certainly the United States has nothing to learn from Australia.

The projection of the United States as a model IP citizen exhorting Australia to provide an appropriate level of protection jars with anyone familiar with the history of IP relations between the two countries. In the early years of the twentieth century, Australian authors and publishers were exasperated by the decision of the United States to remain outside of the international copyright system.[189] Australian copyright owners were particularly aggrieved by the discriminatory effects of the manufacturing clause in the 1909 U.S. Copyright Act, which required English language works to be printed in the United States, in order to attract U.S. copyright protection.[190] It was said that "[t]o an Australian author, unknown in America, this condition amounts to a practical prohibition of copyright in that country, and within a few months of the publication of his book in Australia it becomes fair prey to any enterprising publisher in America, where it is uncopyrighted, and indeed then uncopyrightable."[191] In contrast, American publishers were able to get Australian protection by arranging for their works to be simultaneously published (that is, offered for sale) in the United States and any

and counter-notice can be used in a number of different jurisdictions. However, this justification is rendered entirely unconvincing by the fact that the agreement has largely failed to harmonize the rules governing online service provider liability. *See infra* Part IV.B (detailing how AUSFTA only addressed online service provider liability in the context of copyright, and did not do so in a way that would provide satisfactory protection to online services providers).

187. AUSFTA, *supra* note 2, art. 17.11.24.

188. *Id.* art. 17.11.2.

189. *See* John Henry Keating, *Australian and American Copyright*, AGE, Nov. 5, 1927 (explaining such action required an Australian author to manufacture their work in the United States to receive protection).

190. Copyright Act of 1909, Pub. L. No. 60-349, Ch. 1, §16, 35 Stat. 1078 §15 (1909).

191. Keating, *supra* note 189.

Berne Convention country.[192] Dissatisfaction with the effects of the manufacturing clause led lobbyists to seek to persuade the Australian government either to increase the tariff on imported books[193] or to take more direct retaliatory action against the United States.[194] These demands found a sympathetic audience in government circles, but the position was complicated by the fact that copyright was still seen as an imperial issue and the British government was also seeking to apply pressure to the United States.[195] Part of the standard American response to such pressure was to intimate that the United States might join the Berne Convention "at no distant date," a strategy that gradually began to try the patience of Australian activists.[196]

If copyright relations between Australia and the United States in the early years of the twentieth century were dominated by Australian frustration at the refusal of the United States to comply with the international copyright norms, over more recent years the position has, superficially, been reversed. In the 1990s Australia was placed repeatedly on the special 301 watch lists.[197] On closer inspection, however, it seems that the single most important reason for Australia being categorized by the USTR as a country whose IP system gave cause for concern was Australia's decision to loosen prohibitions on the parallel importation of goods.[198] Australia was targeted primarily over an issue that is left unregulated in the principal international conventions relating to copyright (TRIPS even contains an express provision that makes it clear that Member States are free to determine whether to allow parallel imports),[199]

192. *Id.* More specifically, by virtue of sections 21 and 22 of the Copyright Act 1909, owners had a 30-day grace period in which to arrange for English language works that had been first published abroad to be typeset and printed within the United States (this result did not flow directly, as is now sometimes asserted, from the Berne Convention: a thirty-day grace period was not introduced into Berne until 1948). SAM RICKETSON, THE BERNE CONVENTION FOR THE PROTECTION OF LITERARY AND ARTISTIC WORKS: 1886–1986 ¶ 5.50 (1987).

193. *See* NAA document BB78/1/2, *Memorandum from the Attorney General's Department for the Secretary, Prime Minister's Department*, March 21, 1933 (noting recommendation made by the Combined Printing and Allied Trade Tariff Committee in 1930).

194. *See* NAA document BB78/1/2, *Memorandum from the Attorney General's Department for the Secretary, Prime Minister's Department*, Nov. 5, 1931 (explaining the possible need to take retaliatory actions).

195. *The Copyright Act, 1911*, MUSICAL TIMES, Feb. 1, 1915, at 86 (noting that the Act affects all of Her Majesty's dominions).

196. Keating, *supra* note 189 ("The long, oft and tiresomely alleged disposition of U.S.A. to enter that union recurred and did service to stay Australia's hand.").

197. *E.g.* Identification of Foreign Countries that Deny Adequate and Effective Intellectual Property Protection or Market Access to Persons that Rely on Intellectual Property Protection, 59 Fed. Reg. 26341 (May 19, 1994); Identification of Countries That Deny Adequate Protection, or Market Access, for Intellectual Property Rights Under Section 182 of the Trade Act of 1974, 61 Fed. Reg. 19969 (May 3, 1996); Identification of Countries that Deny Adequate Protection, or Market Access, for Intellectual Property Rights Under Section 182 of the Trade Act of 1974 (Special 301), 63 Fed. Reg. 25539-01 (May 8, 1998); Identification of Countries that Deny Adequate Protection, or Market Access, for Intellectual Property Rights Under Section 182 of the Trade Act of 1974, 64 Fed. Reg. 24438-2, May 6, 1999).

198. RIAA, *RIAA Commends USTR's Announcement on Special 301 and Aggressive Stance on Trading Partners' Trips Violations*, April 30, 1997, *available at* http://www.riaa.com/newsitem.php?news_month_filter=4&news_year_filter=1997&resultpage=&id=C56706FC-21EE-86AD-F88D-0CD8DBDD593A ("Particular note is taken of the inclusion of Australia in the USTR's report because of its present consideration of proposals to eliminate copyright owners' ability to prevent unauthorized importation.").

199. TRIPS, *supra* note 34, art. 6.

despite the fact that there is a good case to be made that allowing parallel importation offers significant economic benefits.[200] Other issues that were identified by the USTR, such as Australian moves to allow decompilation of computer software[201] and the temerity of an Australian court expecting Hollywood studios to prove that they owned copyright in the works in which they were suing for infringement,[202] also tended to be treated in Australia as more evidence of regulatory capture of the USTR by American owner interests than they did of deficiencies in domestic law.

The sense that the United States is not in a position to be lecturing others is further compounded by awareness of the fact that there are a number of respects in which current U.S. copyright law fails to comply with international norms.[203] IP experts and practitioners in other countries pay a great deal of attention to legal developments in the United States. This is partly due to the sheer size and importance of the U.S. market: many dealings with IP rights in Australia require some engagement with U.S. law. In addition, America's decision to project itself as the defender of strong copyright protection attracts attention to its own system.[204] Thus, IP lawyers in Australia are very familiar with U.S. derogations from international norms. Australians, for example, are conscious of the fact that the United States continues to refuse to provide proper moral rights protection for authors, despite article 6*bis* of Berne, and that U.S. law still maintains significant financial penalties for foreign copyright owners who fail to register their works prior to bringing an enforcement action, despite the Berne prohibition on subjecting the enjoyment and exercise of copyright to any formality.[205] Mention might also be made of the method employed for calculating the term of copyright protection in works made for hire,[206] and the long period it took to make the implementation of the Berne Convention properly retrospective.[207] Moreover, in the immediate aftermath of AUSFTA, some commentators began to question whether the United States even complies with all of the provisions of that agreement.[208] For example, AUSFTA contains a provision that requires the parties to define the reproduction right in such a way as to cover all temporary reproductions.[209] But despite this provision, and the fact that identical provisions are to be found

200. *E.g.*, INTELLECTUAL PROPERTY & COMPETITION REVIEW COMMITTEE, REVIEW OF INTELLECTUAL PROPERTY LEGISLATION UNDER THE COMPETITION PRINCIPLES AGREEMENT 7 (2000), *available at* http://www.ipaustralia.gov.au/pdfs/ipcr/finalreport.pdf.

201. ANNE FITZGERALD, INTEROPERABILITY AND COMPUTER SOFTWARE (1997), *available at* http://74.125.113.104/search?q=cache:pncYjicOBSgJ:www.itee.uq.edu.au/~cristina/tr426.rtf+Anne+Fitzgerald,+Interoperability+and+Computer+Software+Protection+in+Australia,+Technical+Report+%23426,+(Dec.+1997)&hl=en&ct=clnk&cd=1&gl=us&client=safari.

202. AUSTRALIAN COPYRIGHT COUNCIL, FILM & COPYRIGHT 2–4 (1977), *available at* http://www.copyright.org.au/information/screen-content/film.htm (click on link for "Film & copyright").

203. Graeme B. Dinwoodie, *The Development and Incorporation of International Norms in the Formation of Copyright Law*, 62 OHIO ST. L.J. 733, 735 (2001).

204. *Id.* at 766–68.

205. Berne Convention, *supra* note 34, art. 5(2).

206. *Cf. id.* art. 7(1); Copyright Ownership and Transfer, 17 U.S.C. § 201(b) (2000).

207. *See* MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT VOL. 1 ¶ 2.03[G] (1997); Berne Convention, *supra* note 34, art. 18(1).

208. Dinwoodie, *supra* note 203, at 733.

209. AUSFTA, *supra* note 2, art. 17.4.1.

in other recent bilateral agreements,[210] it is not clear that under U.S. law, all temporary reproductions fall within the reproduction right.[211]

Thus far, it has been seen that Australian hostility was caused in part by the form of the agreement: its excessively detailed nature made it seem petty and patronizing. The patronizing quality of the agreement was exaggerated by the historical context. Australians resented being lectured to by a country that for many years failed to provide adequate protection for foreign authors, that continues to refuse to comply with a range of international standards, and that had placed Australia under threat of trade sanctions because of Australia's approach to parallel importation, an issue left largely unregulated by international law.[212]

Another, rather different, reason for Australian hostility to the copyright provisions of AUSFTA is that the provisions seek to lock Australia into a series of U.S. domestic law positions at a time when it is still too early to say whether these positions are sensible and, indeed, at a time when the elements of the U.S. position remain to be fully determined.[213] For example, in the immediate aftermath of AUSFTA, much of the concern centered on how the agreement dealt with the relationship between the exceptions and technological protection measures.[214] As was noted above, following the approach adopted in the DMCA, AUSFTA prohibits both the act of circumvention and the manufacture and sale of circumvention devices.[215] However, the agreement does give the parties the freedom to permit users to circumvent protection measures in order to take advantage of a limited range of exceptions and, in an even more limited range of circumstances, gives the parties the freedom to waive the prohibition on the sale of circumvention devices.[216] The problem with this regime is that, for the most part, it restricts the availability of the

210. *See, e.g.*, U.S.-Bahrain Agreement, *supra* note 38, art.14.4.1; U.S.-Chile Agreement, *supra* note 38, art. 17.5.1; U.S.-Singapore Agreement, *supra* note 38, art. 16.4.1.

211. There has been some controversy over the scope of the key precedential ruling in *MAI Systems Corp. v. Peak Computer, Inc*., usually relied on to assert protection of temporary copies in U.S. law. NIMMER & NIMMER, *supra* note 207, VOL. 2 at ¶ 8.08[A][1]. That case concerned the loading of computer software into short term computer memory; the copy, however, was not purely transient, but rather of reasonably sustained duration (minutes, rather than seconds). MAI Sys. Corp. v. Peak Computer, Inc., 991 F.2d 511, 513 (9th Cir. 1993). It is not clear how temporary a copy need be to infringe. *Id.* at 519. The Copyright Act of 1976 confers an exclusive right to reproduce the work in copies. 17 U.S.C. § 106(1) (2000). "Copies" are defined as material objects "in which a work is fixed . . . ." 17 U.S.C. § 101. A work is fixed when its embodiment is "sufficiently permanent or stable to permit it to be perceived, reproduced, or otherwise communicated for a period of more than transitory duration." *Id*. The U.S. Copyright Office has asserted that the reproduction right covers "all reproductions from which economic value can be derived." U.S. COPYRIGHT OFFICE, DMCA SECTION 104 REPORT 111 (2001), *available at* http://www.copyright.gov/reports/studies/dmca/sec-104-report-vol-1.pdf. AUSFTA extends the copyright owner's right to "all reproductions, in any manner or form, permanent or temporary (including temporary storage in material form)," which contains no such limitation. AUSFTA, *supra* note 2, art. 17.4.1.

212. Dinwoodie, *supra* note 203, at 776.

213. *See* Keith E. Maskus & Jerome H. Reichmann, *The Globalization of Private Knowledge Goods and the Privatization of Global Public Goods*, 7 J. INT'L ECON. L. 279, 300-02 (2004) (criticizing international standard-setting); Peter K. Yu, *Currents and Cross Currents in the International Intellectual Property Regime*, 38 LOY. L.A. L. REV. 323, 395–96 (2004) (discussing other countries' adoption of U.S. positions on intellectual property).

214. Maskus & Reichmann, *supra* note 213, at 312.

215. *See supra* text accompanying notes 128–32 (discussing anticircumvention provisions).

216. AUSFTA, *supra* note 2, art. 17.2.5.

exceptions to a small subset of highly, technologically–literate users, that is, to those users who are personally able to decipher a technological protection system.[217] Take, for example, a blind person who needs to circumvent a technological measure in order to make their read-aloud software work with an electronic document. Apparently, the only legal way for this to occur under AUSFTA is for *the blind person personally* to circumvent the technical measure: a self-evidently ridiculous result, which provided grist to AUSFTA opponents' mill.[218]

Even in those rarer cases where the prohibition on the sale of circumvention devices can also be waived, there is still no guarantee that users will be able to access a work—users will ultimately be dependent on third parties being willing and able to manufacture the devices in question.[219] Given these shortcomings, there is a good case to be made that a better system for dealing with the relationship between technological protection measures and non-infringing uses is to adopt a "fair use by design" approach. This approach, which has found favor in Europe, places an emphasis on using regulatory mechanisms to encourage copyright owners to build space for users into their copyright protection strategies and, if all else fails, can result in owners being compelled to make non-encrypted versions of works available to users.[220] The effect of AUSFTA is to prevent Australia from going down the European route, despite the strong case that can be made for the superiority of this model.

If there are elements of the DMCA/AUSFTA scheme for dealing with technological protection measures that are inherently problematic, Australian unease was heightened by the decision of the Court of Appeals for the Federal

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217. This concern has been raised frequently in relation to the equivalent provisions of the DMCA. *See, e.g.*, David Nimmer, *How Much Solicitude for Fair Use Is There in the Anti-Circumvention Provision of the Digital Millennium Copyright Act?*, *in* COMMODIFICATION OF INFORMATION 220 (N. Elkin-Koren & N. Netanel eds., 2002) ("[T]he only users whose interests are truly safeguarded are those few who personally possess sufficient expertise to counteract whatever technological measures are placed in their path."); John Therien, *Exorcising the Specter of a Pay-per-Use Society: Toward Preserving Fair Use and the Public Domain in the Digital Age*, 16 BERKELEY TECH. L. J. 979, 1023 (2001) ("[T]he fail-safe mechanism protects only the constitutional rights of users capable of circumventing TPSs on their own. This group is already an extremely small one. As TPSs become more advanced, even fewer people will possess the programming skills required to crack TPSs in order to exercise their constitutional use rights."); Ryan Van Den Elzen, *Decrypting the DMCA: Fair Use as a Defence to the Distribution of DECSS*, 77 NOTRE DAME L. REV. 673, 689 (2002) ("None of the exceptions allow an ordinary citizen, without the knowledge to develop his or her own circumvention technology, to make fair use, such as excerpting, of an encrypted DVD.").

218. As noted above, even a committee dominated by government had trouble swallowing this problem. *See supra* note 72 and accompanying text. A further point that made this part of the agreement particularly hard to accept is the fact that the selection of exceptions—based as it is on an identical list in the DMCA—is so blatantly the result of interest group lobbying in the United States, as even defenders of the legislation have noted. Jane Ginsburg, *Copyright Legislation for the Digital Millennium*, 23 COLUM. J. L. & ARTS 137, 148 (1999).

219. A third party motivated by commercial ends would not be willing to spend the resources developing a circumvention technology unless there was a sufficiently sizeable market. Even if the desire to develop a technology is present, the would-be manufacturer of the circumvention device must still find a technological solution. *Cf.* WILLIAM LANDES & RICHARD POSNER, THE ECONOMIC STRUCTURE OF INTELLECTUAL PROPERTY LAW 44 (2003) (discussing the problem of a potential "arms race" between copyright owners and the manufactures of circumvention devices).

220. *See* BURRELL & COLEMAN, *supra* note 138, at 70–75.

Circuit in the *Skylink* case.[221] That decision, which recasts anticircumvention liability under the DMCA, placed a higher burden on copyright owners than had previously been appreciated.[222] Although the outcome was broadly welcomed by most Australian commentators, the decision also highlighted the fact that the United States was seeking to export provisions of the DMCA before their meaning had become fixed in domestic law; commentators openly wondered whether Australia would be "allowed" by the United States to take a similar approach in its legislation.[223] Most worryingly, this raised important questions about how the interpretation of AUSFTA is to be approached. It seems clear that the USTR intended the provisions of AUSFTA to bear the same meanings as their counterparts in the 1976 Copyright Act. If, however, those meanings have yet to be fixed, awkward questions arise about Australian interpretation of the agreement: Australia can hardly be expected to be bound by ex-post decisions of U.S. courts, but whether the USTR will be content to see differences in interpretation develop is rather less clear.

A further example of AUSFTA seeking to determine preemptively the response to particular techno-legal problems concerns the provisions of the agreement dealing with new means of accessing television content.[224] AUSFTA contains a provision that is designed to ensure that the compulsory licenses that have been put in place to benefit the operators of cable retransmission services are not extended to operators of Web sites such as YouTube.[225] Given the popularity of such sites and given that, on any interpretation, such sites offer a range of non-infringing content, it seems strange to preclude consideration of the role compulsory licenses might play in this context, particularly given that compulsory licenses have been used to accommodate new technologies within the copyright system for almost a century.[226]

In fairness, it should be acknowledged that in one of the side letters to the principal agreement, it was established that the parties might renegotiate the prohibition on the use of compulsory licenses if, in the opinion of either party, "there has been a significant change in the reliability, robustness, implementability and practical availability of technology to effectively limit

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221. Australian Digital Alliance, *[3] Chamberlain v. Skylink and the AUSFTA—Implications Down Under?, The ADA Monthly Intellectual Property Wrap-Up*, Sept. 2004, http://www.digital.org.au/issue/ipwsept04.htm.

222. Chamberlain Group, Inc. v. Skylink Tech., Inc. 381 F.3d 1178, 1204 (Fed. Cir. 2004) (requiring owners to demonstrate that a defendant's device enables either infringement or an unauthorized act of circumvention).

223. *See* Australian Digital Alliance, *supra* note 221 (discussing uncertainty about how Australia will be affected by the decision).

224. AUSFTA, *supra* note 2, art. 17.4.10(b).

225. *See id.* ("[N]either Party may permit the retransmission of television signals (whether terrestrial, cable, or satellite) on the Internet without the authorisation of the right holder or right holders, if any, of the content of the signal and of the signal."). *Cf. e.g.*, 17 U.S.C. § 111 (2000) ("Limitations on exclusive rights: Secondary transmissions"); Copyright Act, 1968, §§ 135ZZI–135ZZZE (Austl.) (regulating retransmission of free-to-air broadcasts).

226. *See, e.g.*, Madelaine Berg, *Moral Rights and the Compulsory License for Phonorecords*, 46 BROOK. L. REV. 67, 73–77 (1979) (discussing the introduction of the statutory mechanical recording license in the United States).

the reception of Internet retransmissions to users located in a specific geographic market area."[227] A mere willingness to reconsider in the future the role compulsory licenses might play in regulating the access of television content via the Internet is, however, small consolation, given that this is a pressing issue. Moreover, by making renegotiation conditional on the development of technology to limit retransmissions to specific geographic areas, the agreement seeks to reinforce traditional market segmentation and licensing practices.[228] But this runs counter to one of the natural advantages of Internet technologies (i.e., that content can be accessed from anywhere in the world) and, if implemented, will create precisely the sort of artificial barrier to access that causes users so much frustration.[229]

A final reason the IP chapter of AUSFTA has been met with opposition flows from the belief that if the agreement should subsequently prove inconvenient to the United States, it may simply be ignored. Concern of this kind has been expressed both in the Australian media[230] and by members of Parliament.[231] The suggestion that the United States might simply ignore its obligations in the future may well seem unfair to a U.S. audience. But it must be said that U.S. Trade Representative Robert Zoellick did much to add credence to this view by stating in a letter to the Chairman of the House Ways and Means Committee, that "no trade agreement can prevent the U.S. Congress from changing U.S. law by passing another law."[232] Similarly, the introduction of Bills into Congress that would amend the anticircumvention provisions of the DMCA[233] or limit the availability of statutory damages[234] in

227. Letter from Mark Vaile, Austl. Minister for Trade, to Robert B. Zoellick, U.S. Trade Representative (May 18, 2004), *available at* http://www.ustr.gov/Assets/Trade_Agreements/ Bilateral/Australia_FTA/ Final_Text/assets_upload.file948_3913.pdf.

228. AUSFTA, *supra* note 2, art. 17.2.

229. iTunes offers a nice analogy. Users of iTunes who travel or live abroad sometimes encounter and wish to purchase music from performers who are unknown in their home country. CONSUMER COUNCIL OF NOR., COMPLAINT AGAINST ITUNES MUSIC STORE 5 (2006), *available at* http://forbrukerportalen.no/ filearchive/Complaint%20against%20iTunes%20Music%20Store.pdf. When such a user seeks to purchase the track(s) in question from the local iTunes site, she will discover that her access is limited by the place in which her credit card was issued. *Id.* She can then either take the trouble to go to a local music store in the hope of finding a CD that contains the track(s) in question (and possibly find herself having to buy a whole album rather than just track(s) in which she is interested), she can try to persuade someone with a local credit card to purchase the track(s) on her behalf, or she can decide simply to ignore copyright and download the track(s) illegally. Frustration at the market segmentation of iTunes was one of the factors that led the Consumer Council of Norway to bring a complaint (which was upheld) before the Norwegian Consumer Ombudsman. *Id. See generally* Deana Sobel, *A Bite out of Apple? iTunes, Interoperability, and France's Dadvsi Law*, 22 BERKELEY TECH. L.J. 267 (2007) (providing a broader discussion of the legal issues faced by Apple over its iTunes service); Out-Law.com, *Apple DRM Illegal in Norway: Ombudsman*, REGISTER, Jan. 24, 2007, http://www.theregister.co.uk/2007/01/24/apple_drm_illegal_in_norway (describing the Ombudsman's ruling).

230. *See, e.g.*, McCabe, *supra* note 156 ("If Australia deliberately breaks the rules in coming years, much gravity will be attached to the decision. Punitive action from the US is a truly scary prospect. If the US breaks the rules, Australia will jump up and down and, if we shout long and loud enough, the US may suffer some small embarrassment, but nine times out of 10 you can bet that we will end up living with it.").

231. *See, e.g*, PARL. S. DEB., 40th Parl., 1st Sess. 33018 (Aug. 12, 2004) (remarks of Mr. Katter) (Austl.) ("Even if we get agreements, does anyone seriously think th[ese] agreement[s are] going to be kept when we have a giant on one side and tiny little us on the other?").

232. WILLIAM H. COOPER, CONGRESSIONAL RESEARCH SERVICE, THE U.S.-AUSTRALIA FREE TRADE AGREEMENT: PROVISIONS AND IMPLICATIONS CRS-9 (2005).

233. The Digital Media Consumers' Rights Act of 2005, H.R. 1201, 109th Cong. § 1 (2005) (sponsored by Congressman Doolittle and Congressman Barton); Benefit Authors Without Limiting Advancement or Net

ways that are incompatible with AUSFTA, suggests that the agreement is simply not being taken seriously, even by U.S. politicians who voted in its favor.[235]

More generally, it might be noted that Australian concerns have not been allayed by the continuing refusal of the United States to change its law to comply with the adverse ruling of the WTO Dispute Settlement Body in the 110(5) case.[236] Nor have they been allayed by the fact that, in academic debates concerning IP reform in the United States, relatively little attention has been given to the extent to which AUSFTA and the other recent bilateral agreements have closed off certain options.[237] Much the same can be seen at IP conferences in the United States. At such events one simply does not get the sense that America's freedom of movement has been curtailed by the recent agreements, even when representatives from the U.S. government are contributing to the discussion.

IV. THE WISDOM OF CURRENT U.S. POLICY

This Article has thus far sought to demonstrate the costs of the copyright provisions of AUSFTA to U.S. interests: costs that have gone unregarded by U.S. commentators and policymakers. The copyright provisions of AUSFTA played a key role in ensuring that the agreement—rather than promoting good relations with Australia and securing U.S. strategic and political objectives—fed anti-American sentiment in a traditionally friendly country. This effect will persist for the foreseeable future. Given these costs, U.S. policymakers would want to be confident that the economic benefits of including such provisions were sufficient to justify the costs incurred.

Conducting a cost-benefit analysis of AUSFTA is problematic, in no small part because there is no scale against which political costs and economic benefits can be measured: the benefits and costs are largely incommensurable. Consequently, we have elected to focus solely on the benefits that might be

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Consumer Expectations (BALANCE) Act of 2005, H.R. 4536, 109th Cong. § 1 (2005) (sponsored by Congresswoman Lofgren).

234. Freedom and Innovation Revitalizing U.S. Entrepreneurship Act of 2007, H.R. 1201, 110th Cong. § 1 (2007) (sponsored by Congressman Doolittle and Congressman Boucher).

235. Unlike the other sponsors of recent Bills, Congressman Boucher was at least consistent enough to vote against the 2004 United States-Australia Free Trade Agreement Implementation Act (H.R. 4759). House of Representatives, Final Vote Results for Roll Call 375, http://clerk.house.gov/evs/2004/roll375.xml (last visited Sept. 28, 2008).

236. That case, which went in part against the United States, concerned whether certain newly introduced exceptions to the performance right in musical works under U.S. law were compatible with the TRIPS Agreement. Panel Report, *United States—Section 110(5) of the U.S. Copyright Act*, WT/DS160/R at 220 (June 15, 2000), *available at* http://www.wto.org/english/tratpo_e/ dispu_e/1234da.pdf. For detailed analyses of this decision, see Jane Ginsburg, *Toward Supranational Copyright Law? The WTO Panel Decision and the "Three-Step Test" for Copyright Exceptions*, 187 REVIEW INTERNATIONALE DU BROIT D'AUTEUR 2 (2001) (Fr.) (analyzing the WTO's interpretation of the TRIPS agreement); Sarah Henry, *The First International Challenge to US Copyright Law: What Does the WTO Analysis of 17 USC § 110(5) Mean to the Future of International Harmonization of Copyright Laws Under the TRIPS Agreement?* 20 PENN. ST. INT'L L. REV. 301 (2001) (discussing the potential implications of the WTO analysis).

237. *See generally* Matthew Sag & Kurt Rhode, *Patent Return and Differential Impact*, 8 MINN. J.L. SCI. & TECH. 1 (2007) (discussing IP reform).

said to flow to copyright owners from the agreement. Interestingly, these benefits are rarely identified. It is telling that any attempt to analyze the merits of current U.S. trade policy as it relates to IP rights is hampered by the fact that there has been little public justification of the current approach—the desirability of the aims and the wisdom of the means appear, all to often, to be treated as self-evident.[238] But insofar as they are articulated, the principal justifications that are usually given are that the bilaterals through their IP chapters serve to (i) raise the domestic IP standards of trading partners; (ii) harmonize key elements of IP law and practice; and (iii) build a base of support for U.S. objectives in future multilateral negotiations.[239] In the remainder of this section, we argue that if the Australian experience is any guide, none of these justifications are convincing.

Before turning to consider the above justifications, there is a further reason that could be given for the U.S. strategy of imposing long, detailed copyright provisions in bilateral trade agreements: that they are included, not because they are considered necessary to promote U.S. interests, but because U.S. trade negotiators can be confident that an agreement including such provisions will be approved by Congress. Given long-standing protectionist tendencies and the difficulty of generating a consensus on trade in Congress, such approval cannot be assumed.[240] In this context, the USTR, which exists to expand trade and trade agreements, has strong incentives both to recruit lobbyists to support its agreements, and to do whatever it can to reduce the likelihood of Congressional opposition. To this end, the USTR may seek to forestall opposition by modeling copyright (and other) provisions on earlier agreements that have already been approved by Congress. It may also seek to recruit lobbyists to push members of Congress to vote in favor of bilateral agreements by seeking to give those groups—such as copyright owners—the provisions they demand. The bureaucratic imperative to get bilateral agreements through the various veto blocks may well provide a partial *explanation* for the form of the copyright provisions of AUSFTA. However, our purpose in this Article is to assess not explanations, but *justifications*.[241] Thus, in assessing the wisdom of U.S. policy we are concerned with whether the strategy embodied in AUSFTA offers real benefits for U.S. copyright interests. If the strategy does not provide significant benefits, and carries the general political costs already identified and specific copyright-related costs, this suggests that the USTR, Congress, and copyright owners need to re-assess their current strategy.

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238. *See generally* FEDERAL TRADE COMMISSION, TO PROMOTE INNOVATION: THE PROPER BALANCE OF COMPETITION AND PATENT LAW AND POLICY (2003), http://www.ftc.gov/OS/2003/10/innovationrpt.pdf (discussing U.S. IP policy).

239. *See generally* Jerome H. Reichman & Rochelle Cooper Dreyfus, *Harmonization Without Consensus: Critical Reflections on Drafting a Substantive Patent Law Treaty*, 57 DUKE L.J. 85 (2007) (discussing the rationale behind U.S. IP policy).

240. I. M. DESTLER, AMERICAN TRADE POLITICS 175–81 (3rd ed., 1995).

241. The same goes for an argument that the USTR has been "captured" by copyright interests. *See* PETER DRAHOS & JOHN BRAITHWAITE, INFORMATION FEUDALISM 90–93 (2001) (discussing IP and the USTR). This, too, might explain the IP chapters, but it scarcely justifies them when considering whether the chapters are in the interests of the United States.

A. Using Free Trade Agreements to Raise Standards?

The only benefit of chapter 17 identified by the USTR following conclusion of AUSFTA was that it would provide "higher and extended standards" of protection for "authors, performers, inventors, and other producers of creative material . . . ."[242] The raising of IP standards would certainly be an understandable goal in bilateral trade negotiations: the predominant position of the United States as an exporter of cultural goods means that some increases in copyright protection will tend to produce trade benefits. Copyright term extension provides an obvious example. For owners of works that are still being exploited commercially beyond the international minimum standard of fifty years after the author's death, term extension (by providing a further twenty years in which to collect royalties) is likely to secure significant additional returns. In the industrial property context, a similar point can be made about the extension of rights over test data, which has the effect of lengthening the *de facto* period of monopoly enjoyed by the producers of new pharmaceutical products and agricultural chemicals.[243] It would be difficult to argue that these changes have not secured a benefit for IP owners, but this benefit must be weighed against the significant increase in anti-IP sentiment that resulted from the agreement.

Moreover, once we move beyond term extension, the claim that AUSFTA produces benefits for U.S. owners by forcing Australia to raise its standards is much more problematic. To return to a point we made earlier, it is important to bear in mind that much of the IP chapter cannot comfortably be said to be about the raising of standards. Rather, much of the agreement is about requiring Australia to adjust elements of its law and practice to fit the American model. We return to consider the consequences and effectiveness of this dimension of the agreement in the next section, but for present purposes it is important to emphasize the rather obvious point that doing things differently is not to be conflated with providing a lesser standard of protection.

There are two main provisions that have been cited as forcing Australia to raise its standards of copyright protection: (i) those relating to technological protection measures (that is, anticircumvention law) and (ii) those dealing with criminal sanctions for copyright infringement. More specifically, prior to implementation of AUSFTA, Australia proscribed only the sale of circumvention devices (including software).[244] Acts of circumvention were left outside of the legal prohibition.[245] Similarly, implementation of AUSFTA resulted in some widening of the reach of the criminal law. In particular, implementation resulted in criminal liability being extended to cover noncommercial *acts of copying* that have a substantial prejudicial impact on

242. Press Release, Office of the U.S. Trade Representative, U.S. and Australia Complete Free Trade Agreement (Feb. 8, 2004), *available at* http://www.ustr.gov/Document_Library/Press_Releases/2004/February/US_Australia_Complete_Free_Trade_Agreement.html.

243. AUSFTA, *supra* note 2, arts. 17–18.

244. Australian Digital Alliance, *supra* note 221.

245. *Id.*

the copyright owner.[246] In contrast, prior to implementation, criminal liability arose only under Australian law in noncommercial cases where it could be shown that the *distribution* of copies had such an impact.[247] It would, however, be precipitate to conclude that U.S. copyright owners have benefited from these changes. Looking at the actual changes to Australian law in more detail, the details are smaller than they first appear. It must also be borne in mind that unlike extensions of the term of protection or the introduction of new exclusive rights, broadening the scope of criminal sanctions, and, to a large degree, strengthening legal support for technological measures of protection, benefit copyright owners only insofar as they result in a reduction in piracy. Whether the changes foisted upon Australia by AUSFTA will have this effect is doubtful at best.

In relation to changes to Australia's criminal provisions, it is self-evidently true that the criminal law can only deter behavior that is in fact criminalized. But Australia already had criminal provisions in its copyright law covering a very broad range of activities.[248] AUSFTA resulted in only minor extensions to the reach of these provisions.[249] It is much harder to assert with any confidence that these minor extensions—which will pass largely unnoticed by the public—will produce an additional deterrent. Much more important than minor formalistic amendments is the public's perception of the risk that is attached to unauthorized acts of copying. This perception of risk will be shaped primarily by an estimation of the chances of being prosecuted successfully and by the penalties that attach to criminal liability. One response to crimes that carry a low probability of detection is, therefore, to attach draconian penalties to these offences, the idea being that even if the risk of being caught is low, potential offenders may still be deterred if the consequences of being caught are sufficiently severe.[250]

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246. ELECTRONIC FRONTIERS AUSTRALIA, FAIR USE AND OTHER COPYRIGHT EXCEPTIONS: AN EXAMINATION OF FAIR USE, FAIR DEALING AND OTHER EXCEPTIONS IN THE DIGITAL AGE (2005), http://www.efa.org.au/ Publish/efasubm-agd-fairuse2005.html.

247. *Compare* the now repealed Copyright Act of 1968, 2004, § 132(2)(b) (Austl.) (prohibiting the distribution of a work that prejudicially affects the owner of the copyright), *with* the post-implementation Copyright Act of 1968, 2004, §§ 132(5D),(b)–(c) (Austl.) (prohibiting importation and copying of a copyright intended for trade). It should be noted that these latter provisions have also now been repealed as a consequence of the domestic copyright reform agenda and have been replaced by a set of provisions that are differently structured but broadly coterminous in scope. Copyright Act 1968, 2007, §§ 132AA– 133 (Austl.). It is perhaps also worth emphasizing that the pre-AUSFTA criminal provisions caught all acts of commercial copying and commercial possession for the purposes of sale or hire, as well as many of the noncommercial acts of distribution captured in the United States as a result of the No Electronic Theft Act. Copyright Act of 1968, 2004, §§ 132(1)(b), 132(2A)(a); No Electronic Theft (NET) Act Pub. L. No. 105–147, 111 Stat. 2678 (1997).

248. *See* Copyright Act 1968, 2007, § 9A (Austl.) ("[C]hapter 2 of the Criminal Code applies to all offenses against this Act.").

249. *Compare* AUSFTA, *supra* note 2, art. 17.11.26 (defining willful piracy on a commercial scale) *with* Copyright Act 1968, 2003, § 132(5D)(b) (Austl.) (defining criminal offenses).

250. *See generally* Gary Becker, *Crime and Punishment: An Economic Approach*, 78 J. POL. ECON. 169 (1968) (explaining people's rationale for taking or avoiding a risk in terms of chance of being caught and severity of penalty if caught). For a previous discussion in the context of IP rights, *see* FRED WARSHOFSKY, THE PATENT WARS: THE BATTLE TO OWN THE WORLD'S TECHNOLOGY 195–97 (1994) (drawing parallels between the criminalization of IP infringement and drug offences). It must be emphasized that our apparent lamenting of the failure of the AUSFTA to secure an increase in criminal sanctions is to be viewed solely in

In light of the above, it is important to note that implementation of AUSFTA did not result in any increase in the maximum penalties for copyright infringement, which remained set at a term of five years imprisonment and/or a fine of up to $60,500 (AUS) for individuals and $302,500 (AUS) for corporations.[251] These are notably lower than the maximum penalties in other developed countries, including the United States and the United Kingdom.[252] Had the USTR been concerned to negotiate legal changes that would reduce piracy, insisting on an increase in penalties would have been much more significant than securing minor amendments to the scope of the criminal law.

Moreover, if the USTR had taken the trouble to familiarize itself with the details of Australian law, it would have realized that, from a copyright owner's perspective, there are deficiencies with procedures for enforcing criminal copyright provisions in Australia.[253] Most significantly, the effectiveness of Australia's criminal copyright provisions is hampered by the fact that the states and territories continue to have different rules governing the bringing of private prosecutions,[254] and by the fact that in some Australian jurisdictions the rules controlling the bringing of such actions are unduly complex.[255] Experience in other countries suggests that it can be difficult to persuade government to make IP infringement an enforcement priority and, consequently, the ability to bring private prosecutions is an extremely valuable tool.[256] If strengthening private means of criminal enforcement is seen as

terms of our argument about the failure of the USTR to secure meaningful benefits for U.S. copyright owners. We are not, for a moment, suggesting that such an increase would in fact be warranted.

251. *Compare* Copyright Act 1968, 2004, § 132(2)(b) (Austl.) (repealed), *and* inter alia, Copyright Act 1968, 2007, §§ 132AC(2) (setting penalties for commercial-scale, prejudicial copyright infringements), *with* Copyright Act 1968, 2007, § 132AD(2) (setting penalties for making infringing commercial copies), *and* Copyright Act 1968, 2007, § 132AE(2) (setting penalties for selling or hiring out an infringing copy). As to the calculation of fines, see Crimes Act 1914, 2007, §§ 4AA, 4B(3) (Austl.), which assigns a numerical value to a penalty unit and describes pecuniary penalties.

252. 18 U.S.C. §§ 2319(b)(2), 3571 (2000) (prescribing a maximum period of imprisonment of ten years for second or subsequent offences where the copying was motivated by financial gain and maximum fines of $250,000 for individuals and $500,000 for organizations); Copyright Designs and Patents Act, 1988, c. 48, § 107(4) (Eng.) (prescribing unlimited fines and a maximum period of imprisonment of ten years).

253. Again, however, from our perspective, these features of Australian law are not necessarily deficiencies.

254. It should be explained that there are no federal criminal trial courts in Australia, such that even where (as here) the offense is set out in a federal statute, it will be prosecuted in state courts pursuant to local procedural rules. Some types of appeal will, however, be heard by the Full Federal Court. *See, e.g.*, Murray Gleeson, Chief Justice of the High Court of Austl., Address at the Federal Magistrate's Conference: The Federal Judiciary in Australia (Oct. 20, 2005), *available at* http://www.hcourt.gov.au/speeches/cj/cj_20oct05.html ("Federal criminal jurisdiction has been exercised by State courts.").

255. The rules in question vary quite markedly between states and territories. To take Queensland as an example, in the case of indictable offenses, it is possible for a private party to present an indictment directly to the State Supreme Court. Queensl. Crim. Code § 686 (Austl.). However, the leave of the court is required, and case law indicates that the procedure is only to be permitted in "exceptional circumstances." *Ex parte* Marsh (1966) 59 Q.L.R. 357, 363; Gilbert v. Volkers (2004) Q.S.C. 436. Alternatively, would-be private prosecutors can launch committal proceedings for both summary and indictable offenses in the Magistrates Court, but for most indictable offenses such prosecutors must meet certain threshold tests (although this is not true for offenses involving "injury to property," which may or may not include copyright offences). Justices Act, 1886, §§ 102A-G (Queensl.). In addition, the state and commonwealth Directors of Public Prosecutions both have the power to take over (and choose to discontinue) private prosecutions. Director of Public Prosecutions Act, 1984, § 10(1)(c)(ii) (Queensl.); Director of Public Prosecutions Act, 1983, § 9(5) (Austl.).

256. For example, this has proved to be the case in the United Kingdom, where a considerable number of

undesirable, an alternative is to find ways to encourage public authorities to engage in more enforcement. In this respect, recent Australian home-grown initiatives are instructive. In late 2006, Australia introduced strict liability offences and on-the-spot fines for copyright infringement,[257] and in early 2007, the government decided to allocate greater resources specifically to the enforcement of the criminal copyright provisions by government agencies.[258] Neither initiative had anything to do with AUSFTA, but both are likely to provide benefits to copyright owners. The USTR would have been much better advised to have concentrated on issues of this type than on the minute details of the behavior to be criminalized.

In reply, it might be pointed out that the USTR could not have required Australia to introduce the amendments canvassed here, since it might well not have been able to ensure that equivalent changes were made to U.S. law. In particular, Congress might not have been persuaded of the need to allow private prosecutions for copyright offenses, given that such prosecutions are at present entirely unknown in the United States,[259] and given that private prosecutions have long been a contentious subject in the American legal community.[260] The flaw in this argument is that there is nothing that would have prevented the USTR from departing from the principle of reciprocity. Other parts of AUSFTA are based primarily around unilateral obligations[261] and other recent free trade agreements have contained one-sided obligations relating to IP.[262]

In short, the provisions of AUSFTA dealing with criminal enforcement achieved little for U.S. copyright owners. Much the same can be said about the increase in legal support for technological protection measures secured by the agreement. As a practical matter, the imposition of such measures might, in the future, provide owners with additional sources of revenue. For example,

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private prosecutions for copyright offences have been launched, although it might be noted that such prosecutions have attracted controversy. *See* Hugh Laddie, *Copyright: Over-Strength, Over-Regulated, Over-Rated,* 18(5) EUR. INTELL. PROP. REV. 253, 258 (1996) ("The threat of a criminal conviction hanging over an alleged infringer's head and the heads of its directors is much more likely to make them sue for peace than the mere risk of losing in civil proceedings. Like the prospect of being hanged, it does concentrate the mind.").

257. Copyright Regulations 1969, 2005, 23R–23V (Austl.).

258. *See* Press Release, Attorney Gen., More Resources to Stop Piracy and Counterfeiting (May 8, 2007), *available at* http://www.ag.gov.au/www/agd/agd.nsf/Page/Publications_Budgets_Budget2007_MediaReleases_MoreResourcestoStopPiracyandCounterfeiting (announcing funding of $12.4 million (AUS) over two years). This does not, of course, detract from our general point about the relative importance of private prosecutions in the IP field.

259. NIMMER & NIMMER, *supra* note 207, VOL. 4 at ¶ 15.01[A][2] n.40.

260. *See, e.g.*, CHARLES W. WOLFRAM, MODERN LEGAL ETHICS 759 n.35 (1986) (describing such prosecutions as "barbaric"); ALLEN STEINBERG, THE TRANSFORMATION OF CRIMINAL JUSTICE: PHILADELPHIA, 1800–1880, 114, 224–32 (1989) (arguing that historically such prosecutions contributed to self-government); Paul G. Cassell, *Balancing the Scales of Justice: The Case for and Effects of Utah's Victims' Rights Amendment*, 1994 UTAH L. REV. 1373, 1379–80 (arguing that the shift from public to private prosecutions moved the focus of the criminal justice system away from the rights of victims).

261. Most notably, the provisions relating to agriculture.

262. *See, e.g.*, *Piracy of Intellectual Property: Hearing Before the Subcomm. on Intellectual Property of the S. Comm. on the Judiciary*, 109th Cong. (2005) (statement of Marybeth Peters, The Register of Copyrights, U.S. Copyright Office), *available at* http://www.copyright.gov/docs/regstat052505.html ("[S]ome of our FTAs include a side letter imposing a unilateral obligation on our trading partner to regulate the manufacture of optical discs").

this would occur if we were ever to reach the position where copyright owners were able to use technological protection measures to exercise exclusive control over works that had fallen into the public domain. Such a scenario is, thankfully, still some way off. For present purposes, however, the important point is that AUSFTA does almost nothing to expand the (former) copyright owner's protection in such a case. The prohibition on the act of circumvention only applies where the measure being circumvented serves to protect a work that is the subject of copyright. Nothing in AUSFTA would prevent a person from circumventing in order to access a public domain work.[263]

Of potentially more importance is the prohibition on the sale of circumvention devices. If the device in question allowed a commonly used form of technological protection measure to be circumvented, the fact that it had originally been intended to allow users to access public domain works would not save it from the prohibition.[264] But the fact that the prohibition on the sale of circumvention devices might, in practice, afford commercial entities the opportunity to increase their control over public domain works is not a result of AUSFTA. To reiterate, Australian law already contained a prohibition on the sale of circumvention devices.[265] These provisions would also have caught a defendant who was producing or selling a device that allowed users to circumvent a commonly applied technology, even though the defendant's intention may only have been to facilitate access to public domain material.[266]

In reply, it might be pointed out that AUSFTA's approach to technological protection measures serves to broaden (even if it does not serve to lengthen) the scope of the copyright owner's monopoly. In particular, it will be remembered that, similar to the approach adopted in the DMCA, AUSFTA provides few safeguards for users who wish to copy a work for a non-

263. The key provision is section 116AN(1) of the Copyright Act of 1968, which provides:

> "An owner or exclusive licensee of the copyright in a work or other subject-matter may bring an action against a person if: (a) the work or other subject-matter is protected by an access control technological protection measure; and (b) the person does an act that results in the circumvention of the access control technological protection measure; and (c) the person knows, or ought reasonably to know, that the act would have that result."

Copyright Act 1968, § 116 AN(1) (Austl.). The drafting of this provision leaves much to be desired, but the reference to the "owner or exclusive licensee" of a work in the first line of this section makes it tolerably clear that this provision has no application to public domain works *per se*. It might nevertheless be argued that this provision would prevent circumvention in cases where works have been bundled together, that is, where one or more public domain works are only offered together with one or more works that are still in copyright. However, in such circumstances, it is far from clear that a court would be prepared to find against a defendant who acted in good faith to circumvent a technological protection measure solely in order to access the public domain material. More specifically, a court could probably find sufficient ambiguity in the definitions provided by the Act to avoid this conclusion. For discussion of "user friendly" ways of reading the new provisions, see generally Melissa de Zwart, *Technological Enclosure of Copyright: The End of Fair Dealing?* 18 AUSTL. INTELL. PROP. J. 7 (2007) (discussing the balance of power between consumers and copyright owners).

264. This conclusion follows from the general way in which the prohibition in section 116AO(1) of the Copyright Act of 1968 is worded—it is enough if the defendant knows that the device is a circumvention device, there is no need to demonstrate that the defendant intended that the device be used to infringe copyright. Copyright Act 1968, 2007, § 116AO(1)(b) (Austl.).

265. *See* Copyright Act 1968, 2007, § 116AO(1)(b) (Austl.) (prohibiting the sale of circumvention devices—in place before AUSFTA).

266. Copyright Act, 1968, 2004, § 116A(1) (Austl.) (repealed).

infringing purpose. Once more, however, on closer inspection the agreement has done little to secure a meaningful increase in protection for copyright owners. In order to demonstrate this point, it is again necessary to distinguish between acts of circumvention and the sale of circumvention devices.

It has been seen that, following AUSFTA, users are only allowed to circumvent in order to take advantage of a limited range of exceptions, including exceptions that have been privileged as a consequence of an administrative review process.[267] In contrast, under the previous law, acts of circumvention were not regulated at all. In this respect the agreement has clearly brought with it some increase in the level of protection. It seems highly unlikely, however, that this change will produce any noticeable benefit for copyright owners. The existing law already adopted a restrictive approach to the sale of circumvention devices, even in cases where users might wish to circumvent for a non-infringing purpose. This means that the restriction on acts of circumvention will only provide additional protection in situations where the user has the technical expertise to circumvent the technological protection measure personally—if the user lacks such expertise, she would need to purchase a circumvention device from a third party and this was already generally impermissible.[268] Moreover, the copyright owner will still only receive an advantage in cases where the technologically literate user's intention is to take advantage of an exception, but one that does not fall within the list of exceptions for which circumvention is allowed,[269] and if the user does not simply choose to ignore the prohibition, safe in the knowledge that (at least as regards private use and private distribution) the chances of any action being brought against her are miniscule.

Turning to the sale of circumvention devices, the failure of AUSFTA to produce meaningful benefits for copyright owners is perhaps best illustrated by the fact that the agreement failed to overturn the decision of the High Court of Australia in *Stevens v. Sony*.[270] That case concerned the legality of selling "mod chips" for Sony's PlayStation consoles. Sony's consoles utilize region coding technology that is intended to ensure that the consoles will only play legitimate copies of games and DVDs that were sold for use in the same geographical region in which the console was purchased.[271] The mod chips sold by Stevens instructed consoles to accept and play discs that lacked the correct validity and territoriality codes. The case was conducted in such a way that the outcome hinged on whether Sony's system fell within the Act's definition of "technological protection measure."[272] Nevertheless, in finding

267. H. STANDING COMM. ON LEGAL AND CONSTITUTIONAL AFFAIRS, REVIEW OF EXPECTATIONS FOR CIRCUMVENTING TECHNOLOGICAL PROTECTIONS MEASURES 2 (2006) (Austl.), *available at* http://www.aph.gov.au/house/ committee/LACA/protection/infopaper.pdf.

268. *See* Copyright Act, 1968, §§ 116AN(3)-(9) (Austl.) (listing the situations in which the prohibition on acts of circumvention does not apply).

269. *Id*.

270. Stevens v. Kabushiki Kaisha Sony Computer Entm't (2005) 224 C.L.R. 193, 261 (Austl.).

271. Sony's PlayStation 2 console apparently employs region coding for the playback of DVDs but not for games. PlayStation, http://www.au.playstation.com/support/ps2/faqs/ ps2_FAQ_dvd_region.jhtml (last visited Oct. 9, 2008).

272. *Stevens*, 224 C.L.R. at 200.

for Stevens, the High Court recognized the broader issues that were at stake in extending protection for technological protection measures and demonstrated a marked reluctance to allow copyright owners to divide up markets without a clear signal from the legislature that this was to be permitted.[273]

Unsurprisingly, the decision in *Stevens v. Sony* produced highly polarized reactions, but it was also imagined that the decision would have little lasting impact. This was because the decision was handed down in the period between the signing of AUSFTA and Australia amending its anticircumvention provisions (Australia having negotiated a two-year implementation period for this part of the agreement).[274] Most commentators assumed that when the time came for Australia to implement its AUSFTA obligations, the United States would demand that *Stevens* be overturned and that this, combined with domestic pressure from local copyright owners, would force the Australian government's hand.[275] In the event, however, the implementing legislation included specific provision to exclude from the new definition of technological protection measure any "device, product, technology or component" to the extent that, in relation to a film or a computer program, it "controls geographic market segmentation by preventing the playback in Australia of a non-infringing copy of the work or other subject-matter acquired outside Australia."[276] This preserves the thrust of the outcome of *Stevens* (if not the precise reasoning) and means that copyright owners who choose to merge antipiracy and market segmentation strategies and technologies continue to do so at their peril. This is an outcome that we welcome, but it has to be acknowledged that it has dramatic implications for copyright owners who have already taken the decision to build their technological protection strategy around such dual use technology. These owners will find that the legal prohibition on the sale of circumvention devices is, in effect, transformed into a restriction on how technologies can be advertised and marketed.[277]

In light of the above discussion, it can be seen that those changes to Australia's prohibition on the sale of circumvention devices that were occasioned by AUSFTA were minor. Perhaps the main change is that third parties can no longer supply circumvention devices and services to institutions such as libraries and schools in order to allow them to take advantage of an exception.[278] Henceforth, such institutions will have to have the necessary facilities and expertise in-house.[279] This change seems unlikely to have

273. *Id.* at 241, 243.

274. JACOB VARGHESE, COPYRIGHT AND PATENT LAW CHANGES IN THE U.S. FREE TRADE AGREEMENT IMPLEMENTATION BILL CURRENT ISSUE BRIEF NO. 2004–5 (2004*), available at* http://www.aph.gov.au/Library/Pubs/CIB/2004-05/05cib03.htm.

275. *See* Arnotts Lawyers, Chipping at the Mod Chips Case, http://www.arnotts.net.au/mod-chip-case.html (last visited Sept. 29, 2008) (implying that because *Stevens* was decided on old copyright laws, it would have to be overturned to comply with the AUSFTA).

276. Copyright Act, § 10 (Austl.).

277. A dual use device that was advertised or marketed as having the purpose of circumventing and not just as enabling the user to play copies lawfully acquired from other regions would be rendered infringing to the extent that it had the purpose of circumventing. Copyright Act, 1968, § 116AO(2) (Austl.).

278. *Id.* § 116AN(8).

279. Compare the now repealed sections 116A(3), (4), (4A) of the Copyright Act 1968 with new sections 116AN(8), (9) of the same Act, which need to be read together with reg. 20Z and sched. 10A of the Copyright

figured high on copyright owners' list of demands.

In summary, it can be said that it is unlikely that AUSFTA will serve to reduce the level of unauthorized copying or, leaving aside the increase in the term of protection, will provide copyright owners with anything other than marginal new streams of revenue. Our analysis also demonstrates that the agreement did not take advantage of one of the benefits of bilateral agreements touted in the literature: addressing the individual circumstances of the contracting parties.[280]

Moreover, of the increases in copyright protection that did result from AUSFTA, not all were favorable to U.S. copyright industry interests. As was also noted above, implementation led to a dramatic expansion of the rights of performers, who moved from only having rights to prevent the unauthorized fixation of their performances to enjoying a suite of economic and moral rights.[281] In practice, the introduction of new economic rights will probably not cause noticeable disruption: existing contracts are likely to be broad enough to forestall any need to grant performers additional revenue, the expansion of performers' rights was not retrospective and, safeguards were included in the legislation to avoid a proliferation in the number of permissions that will be required to produce and exploit a fixation of a performance.[282] Of greater significance, however, is the decision to introduce performers' moral rights, that is, a right of attribution and rights to prevent derogatory treatment and false attribution. These rights cannot be assigned nor can they be made subject to a blanket waiver. Consequently, the introduction of such rights may well produce a small but significant change in the balance of power between individual performers and the copyright industries, and require redrafting of contracts and care in negotiating new contracts. It seems highly unlikely that this is the sort of change that the U.S. copyright industries had in mind when they were lobbying the USTR to secure increases in copyright protection in other jurisdictions. But by requiring Australia to ratify the WPPT, it was more or less inevitable that Australia would introduce performers' moral rights. The WPPT requires Member States to introduce such rights, and Australia has come to pride itself on ensuring that it complies with the letter (if not always the spirit) of its international obligations in the IP field.[283]

In addition, at some risk of repeating ourselves, we should remind the reader that in some respects, the implementation of AUSFTA actually led to a *lessening* of copyright protection: a result that surely would be an unwelcome

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Regulations 1969 (No. 58, as amended).

280. Yu, *supra* note 213, at 393–94.

281. *See supra* notes 98–110.

282. *See supra* note 98–110(discussing Australian implementation legislation regarding economic and moral rights for performers).

283. *See, e.g.*, Philip Ruddock, Attorney General, Opening Address at the Australian Centre for Intellectual Property in Agriculture's 12th Annual Copyright Conference (Feb. 16, 2007), *available at* http://pandora.nla.gov.au/pan/21248/200711141542/www.ag.gov.au/agd/WWW/MinisterRuddockHome.nsf/Page/Speeches_2007_Speeches_16_February_2007__Speech__Opening_address_at_the_Australian_Centre_for_Intellectual_Property_in_Agriculture%26apos.html (noting "the importance of being a good international citizen" in relation to copyright). In fairness, however, it should be noted that Australia had already committed itself to joining the WPPT in its 2003 Free Trade Agreement with Singapore.

outcome for major U.S. copyright owners. Part of the political compromise that emerged from the process of implementing the agreement was an expansion of copyright exceptions. Consequently, there has been a lessening of the standard of protection in Australia insofar as AUSFTA led to the introduction of new exceptions that permit use for the purposes of parody or satire[284] and certain forms of space-shifting and time-shifting;[285] and, perhaps still more importantly, led to the introduction of an open-ended defense to privilege noncommercial uses by libraries, archives, educational institutions, or by, or for, persons with a disability.[286]

In summary, AUSFTA has achieved little in regards to raising standards and has indirectly produced other legislative changes that are unlikely to be welcomed by the U.S. copyright industries. Moreover, insofar as the agreement did produce a benefit for U.S. copyright owners, in particular, in the form of an extension of copyright term, it is important to reiterate that this came at a cost. Earlier in this Article, we emphasized the broad political costs of the agreement to the United States. But it is important to acknowledge that there might also be a more direct political cost for copyright owners, in the form of increased opposition to the operation of the copyright system. It will be interesting to see whether the new participants in the debate about the expansion of copyright remain engaged with these issues. If they do remain involved, and if they continue to hold the view that the current law is unduly skewed in favor of copyright owners, there could be a significant change in the overall direction of copyright policy in the future in Australia. If such a change of direction does occur, it is most likely to come now that Australia has had a change of government. This is partly because some of the new participants have strong ties with the newly elected Labor Party (most obviously, the unions).[287] But it is also because AUSFTA led to Labor adopting a more pro-user mantle than the Liberal government.[288] While it is too early to say whether Labor will maintain this stance, the injection of a party political dimension into Australian copyright politics is not a development that U.S. copyright owners ought to welcome.[289]

More generally, it is important to take account of the effect of the

284. Copyright Act, 1968, §§ 41A, 103AA (Austl.).

285. *Id.* §§ 43C, 109A, 110AA, 111.

286. *Id.* § 200AB.

287. *See* AUSTRALIAN LABOR PARTY, 2007 NATIONAL PLATFORM AND CONSTITUTION 7 (2007), *available at* http://www.alp.org.au/download/now/2007_platform_chapter 1.pdf (discussing Labor's ties to unions).

288. *See* Ranald, *supra* note 21, at 40 (discussing Labor's general hesitation to embrace AUSFTA).

289. In its 2004 pre-election policy, the Labor Party undertook to examine the impact of copyright on educational institutions, examine options for broadening the exceptions, and raise the standard for originality in copyright law. The 2004 ALP policy on copyright is reproduced in Collette Ormond, *Copyright Overboard? The Debate After the Australia-United States Free Trade Agreement*, INCITE, Oct. 2004, http://alia.org.au/publishing/incite/2004/10/copyright.html. At the time of writing, the new Labor government has not released details of its future copyright policy. But insofar as the ALP has mentioned copyright recently, it has been to suggest amendments that would promote the interests of individual authors, such as the introduction of a *droit de suite* and additional rights for visual artists. *See, e.g.*, PETER GARRETT, AUSTRALIAN LABOR PARTY, FEDERAL LABOR ARTS POLICY DISCUSSION PAPER (2006), *available at* http://www.alp.org.au/download/federal_labor_arts_policy_discussion_paper.pdf (advocating policy that would develop and enable the arts).

controversy surrounding the copyright provisions of AUSFTA on public attitudes towards copyright. A number of commentators have argued over recent years that there has been a loss of public confidence in the copyright system that poses a real threat to its future.[290] There is overwhelming evidence that coercive strategies alone are an ineffective mechanism for securing long-term compliance with legal standards.[291] It is far easier to regulate those who (in broad terms) have respect for the rules in question. The overwhelmingly negative coverage that was given to the copyright provisions of AUSFTA in the media, and the sight of a wide and diverse range of participants in the political process denouncing the new IP rules can only have added to public suspicion and disquiet. In short, AUSFTA has plainly been a disaster when it is judged against how copyright law is perceived by the Australian community.

B. Harmonization and the Freeing of Trade

If AUSFTA did little to raise the standard of protection, it might be thought that a more convincing justification for the USTR's approach lies in the harmonization of legal rules. A desire for harmonization would help explain the form of the agreement, since harmonization might well be thought to require acceptance of very detailed rules and not merely compliance with general standards or principles. Moreover, seeking to harmonize rules would seem to fit well with the overall purposes of a free trade agreement—it has long been recognized that differing national IP regimes can act as a barrier to free trade and can impose artificial costs on business.[292] The potential importance of IP rights to the establishment of a free trade area can be seen in the European Union ("E.U."), where a program of harmonization has been running for over ten years.[293] The E.U. example is also instructive because it provides a reference point against which to test the claim that the recent U.S. bilateral free trade agreements serve to reduce differences in IP law and administrative practice between the United States and its trade partners.

It is important to remember that AUSFTA and the other recent bilaterals purport to create free-trade areas. Indeed, this is the only legal basis on which the bilaterals can avoid triggering the most-favored nation principle, which would otherwise serve to confer the benefits granted to trade partners under bilateral agreements on all other WTO members.[294] In the context of an

290. *See, e.g.*, Jon M. Garon, *Normative Copyright: A Conceptual Framework for Copyright Philosophy and Ethics*, 88 CORNELL L. REV. 1278, 1282 (2003) ("Only after copyright holders identify the root sources of the cultural attitudes toward piracy can they begin to fashion a meaningful response. To the extent that the norms reflect flaws within the legal regime of copyright itself, Congress must address those concerns to eliminate the erosion of copyright.").

291. *See* C. Parker & J. Braithwaite, *Regulation*, *in* THE OXFORD HANDBOOK OF LEGAL STUDIES 133, 133–34 (P. Cane & M. Tushnet eds., 2003) (referencing many sources in support of non-coercive approaches).

292. Maximilia Santa Cruz, *Intellectual Property Provisions in European Union Trade Agreements*, ICTSD INTELL. PROP. & SUSTAINABLE DEV. SERIES, June 2007, at 23, *available at* http://www.iprsonline.org/resources/docs/santa-cruz%20blue20.pdf.

293. *Id.* at 7.

294. *See* General Agreement on Tariffs and Trade, Oct. 30, 1947, 61 Stat. A-11, 55 U.N.T.S. 194 (establishing most-favored nation principle). *But see* TRIPS, *supra* note 34, art. 4 (setting up a stricter most favored nation principle for IP rights).

attempt to create a free-trade area, it might be expected that the feature of IP rights that would attract most attention is their capacity to interfere with the free movement of goods. That is, one would expect most attention to be given to rules that allow owners to control the import, export and resale of goods, rules that can serve to maintain price differentials within a free-trade area.[295] This is precisely what occurred in the E.U., where the earliest European interventions in the IP field came from the European Court of Justice, which developed the doctrine of "exhaustion."[296] The doctrine of exhaustion operates so as to prevent owners from seeking to use IP rights to divide up the European market.[297] By selling or consenting to the sale of goods in any part of the E.U., the owner "exhausts" its rights and thereby loses the ability to prevent goods from being transported to or resold in any other part of the E.U.[298]

The doctrine of exhaustion provides the backdrop against which harmonization has taken place in Europe and, at least initially, the harmonization agenda was driven by the limits of this doctrine. For example, the move to harmonize copyright term in Europe was sparked by the decision of the European Court of Justice in *EMI Electrola v. Patricia.*[299] In that case the court held that the owner of the copyright in a sound recording was entitled to prevent unauthorized copies of that recording from being imported into Germany from Denmark, where copyright protection had expired.[300] The doctrine of exhaustion had no application because the copies in question had not been marketed by or with the consent of the copyright owner.[301] Harmonizing the copyright term removed this potential barrier to free movement of goods.[302]

In contrast, AUSFTA makes no attempt to smooth the flow of IP–protected goods across national boundaries, and contains no attempt to introduce a doctrine of exhaustion or to internationalize the U.S. first sale doctrine. On the contrary, given that the USTR had previously criticized Australia's decision to permit the parallel importation of some copyright protected goods,[303] there was a strong sense that continuing to allow Australia to adopt this approach was a begrudging concession.[304] The absence of any attempt in the agreement to ease the sale of IP protected goods across national

295. *Cf.* INTELLECTUAL PROPERTY AND INTERNATIONAL TRADE: THE TRIPS AGREEMENT 17–18 (Carlos M. Correa & Abdulqawi A. Yusuf eds., 1998) (noting that the incorporation of IP protection into GATT ought naturally to have been accompanied by an international exhaustion rule).

296. GUISEPPE MAZZIOTTI, EU DIGITAL COPYRIGHT LAW AND THE END-USER 44–45 (2008).

297. *Id.* at 45.

298. For a good introduction to these issues, see LIONEL BENTLY & BRAD SHERMAN, INTELLECTUAL PROPERTY LAW 12–15, 43–46 (2d ed. 2004).

299. MAZZIOTTI, *supra* note 296, at 46.

300. *See* Case 341/87, EMI Electrola Gmbh v. Patricia Im und Export, 1989 E.C.R. 79, 97–98. (holding copyright owner of sound recording entitled to prevent unauthorized distribution in areas where copyright protection had expired).

301. *Id.* at 90.

302. MAZZIOTTI, *supra* note 296.

303. *See* COMMONWEALTH OF AUSTL. JOINT STANDING COMM. ON TREATIES, *supra* note 141 and accompanying text.

304. *See also* Andrew L. Stoler, *Australia-US Free Trade: Benefits and Costs of an Agreement*, *in* FREE TRADE AGREEMENTS: U.S. STRATEGIES AND PRIORITIES 95, 98 n.6 (Jeffrey J. Schott ed., 2004) (discussing multiple concerns about Australia's lesser protections for IP rights).

boundaries makes it difficult to argue with the conclusion that the IP chapters of the recent bilaterals "don't deserve the name free trade."[305] But this absence also means that, unlike in Europe, harmonization cannot be seen as a necessary component of a more general policy of ensuring that IP rights do not interfere with the free movement of goods.

In the context of AUSFTA, therefore, harmonization should only be seen as a worthwhile policy goal insofar as it reduces regulatory compliance costs, that is; the costs associated with obtaining and enforcing IP rights in multiple jurisdictions and, more generally, the costs associated with ensuring that transnational business models and strategies are compatible with different sets of legal rules.[306] Yet even when AUSFTA is judged against these aims, the agreement fares poorly. In the case of IP rights that are dependent upon registration, the agreement makes no real attempt to harmonize or even streamline the grant and enforcement processes.[307] The contrast with Europe, where much time and energy has been devoted to developing pan-European grant and enforcement mechanisms for designs and trademarks, as well as a single grant process for patents is, once again, striking.

In the case of copyright, the picture appears, at first, to be more mixed. It might be noted at the outset that AUSFTA does not seek to harmonize copyright subject matter or rules on ownership. It would be a mistake, however, to make too much of this fact. Although, for example, it would be possible to point to differences in the standard of originality that will result in some databases attracting copyright in Australia that fail to attract copyright protection in the United States,[308] in the vast majority of cases, owners can be confident that material that attracts protection in one jurisdiction will also attract protection in the other. Similarly, the rules on ownership in the two countries are already very similar and those differences that do exist can largely be ironed out through contract.

Arguably more serious is the failure of AUSFTA to seek to harmonize copyright exceptions, particularly those that allow for the production of commercially significant derivative works. At present, producers of unlicensed derivative works, be it works with a serious aim, such as Alice Randall's *The Wind Done Gone*,[309] or rather more light-hearted works, such as 2 Live Crew's version of *Pretty Woman*,[310] or Henry Beard and Douglas

305. James Surowiecki, *Exporting IP*, NEW YORKER, May 14, 2007, at 52.

306. For a discussion of these benefits of harmonization, see Yu, *supra* note 213, at 382–83 (noting arguments supporting the harmonization of international IP by norms).

307. It might be noted that the agreement contains a number of very general, and almost certainly meaningless, calls for the parties to "endeavour to reduce differences in law and practice" regarding rights that are dependent upon registration. AUSFTA, *supra* note 2, arts. 17.2.11, 17.8.2, 17.9.14.

308. *Compare* Feist Publ'ns, Inc. v. Rural Tel. Serv. Co., Inc., 499 U.S. 340, 364 (1991) (denying copyright protection for published phone directory because it was simply a listing of uncopyrightable facts), *with* Desktop Mkt'g. Sys. v. Telstra Corp., 192 A.L.R. 433, 538 (2002) (confirming that "sweat of the brow" works do attract copyright protection in Australia).

309. *See generally* Suntrust Bank v. Houghton Mifflin Co., 268 F.3d 1257 (11th Cir. 2001) (discussing whether the work infringed copyright).

310. *See generally* Campbell v. Acuff-Rose Music, 510 U.S. 569 (1994) (discussing whether the song was a parody).

Kenny's *Bored of the Rings*,[311] face considerable uncertainty when operating internationally. There is simply no guarantee that works that fall within an exception in one jurisdiction will not be deemed infringing elsewhere. But again, in defense of AUSFTA, it might be noted that the exceptions are often seen as an aspect of copyright law that is closely bound up with questions of national culture and that attempts to harmonize the exceptions at the international level may fail,[312] as they have already failed within the E.U.[313] Moreover, it is important to bear in mind that many existing national exceptions, and particularly those that allow for the production of derivative works, often provide considerable discretion to the judiciary. Even if identically worded exceptions were to be introduced across different countries, there would be no guarantee that, for example, courts in different jurisdictions would reach the same view as to when a taking is "fair." Finally, it might be remembered in this context that one, albeit unintended, consequence of AUSFTA was that a decision was taken to introduce a new parody and satire defense in Australia, which should make it rather more likely that derivative works that fall within the fair use defense in the United States will also be deemed non-infringing in Australia. [314]

Thus, when thinking about the extent to which AUSFTA manages to harmonize copyright law between the two countries, we believe that it would be wrong to focus on the failure of the agreement to harmonize the rules on ownership, the way copyright subject matter is defined, the test of originality, or the extent to which the law requires works to be fixed in a permanent or semipermanent form in order to attract protection. Nor should too much be made of the failure of the agreement to harmonize the exceptions. In the former case there is already a broad degree of convergence. In the latter case, harmonization would have been extremely difficult to achieve; mere harmonization of statutory rules might not have produced the desired effect and AUSFTA did prompt Australia to expand its exceptions in a way that reduced some of the differences between the two countries. Somewhat counter-intuitively, therefore, we believe that the failure of the agreement to harmonize the fundamentals of copyright (subject matter, ownership, originality, exceptions) is of relatively little consequence. More important are the parts of the agreement dealing with copyright term and liability for the provision of services online. In both cases, AUSFTA appears to be aimed at achieving harmonization, and in both cases harmonization would seem to offer benefits to business. However, on further examination, it becomes clear that the harmonization that has been achieved is little more than superficial.

In relation to copyright term, it has been argued that "[f]rom the copyright owner's perspective, harmonisation of Australia's copyright term with that of major trading partners allows a reduction in costs associated with management

311. THE HARVARD LAMPOON, INC., BORED OF THE RINGS: A PARODY OF J.R.R. TOLKIEN'S LORD OF THE RINGS (1969).

312. BURRELL & COLEMAN, *supra* note 138, at 215–19.

313. *Id.* at 235–36, 303–04.

314. *See supra* Part II.C (discussing Australian implementation of the AUSFTA).

of their intellectual property portfolio as rights will expire at the same time in major markets."[315] It has also been claimed that "[h]armonisation across jurisdictions will reduce tracing costs . . . for those people and organisations who want to use copyright works in subsequent works."[316] Both of these claims have something to them; a unified term will assist in the development of uniform pricing strategies and producers of derivative works will clearly benefit from knowing that the copyright expires at the same time in different jurisdictions. It might also be added that it is not only producers of derivative works who stand to gain from the introduction of a uniform term, but also would-be producers of new editions of public domain works.

The problem is that, on closer inspection, AUSFTA leaves significant differences in how terms of protection are calculated in the two countries. Perhaps most importantly, in the case of works made in the course of employment, the U.S. work for hire doctrine serves to set the term of protection at ninety-five years from the date of publication or 120 years from the date of creation, whichever expires first.[317] In contrast, in Australia the term of protection in works created in the course of employment remains calculated by reference to the life of the author (although the employer will ordinarily be the first owner of the copyright).[318] This difference can produce very significant variations in the date at which copyright expires.[319] Take, for instance, a work written and published in 2000 by a thirty-year-old employee author. In the United States, copyright will expire in 2095. In Australia, the term remains linked to the life of the author, thus, if the author in question were to die in 2050 at the age of eighty, copyright protection in Australia would not expire until 2120, producing a difference of some twenty-five years in the term of protection in the two countries. Moreover, works created in the course of employment do not provide the only example of where the term of protection varies significantly between the two countries. Also notable is the fact that Australia, unlike the United States, confers perpetual protection on most forms of unpublished work.[320]

The fact that AUSFTA fails to harmonize the term of protection in a number of important instances also needs to be viewed alongside evidence that harmonization of term has not been motivating the USTR at all in recent bilateral negotiations. In particular, it is notable that the U.S.-Colombia Trade Promotion Agreement contains, like the other recent bilaterals, a provision that requires the parties to provide a term of protection of "not less than the life of

315. THE ALLEN CONSULTING GROUP, COPYRIGHT TERM EXTENSION: AUSTRALIAN BENEFITS AND COSTS 30 (2003), *available at* http://www.allenconsult.com.au/publications/download.php?id=249&type=pdf&file=1.

316. *Id.* at 31.

317. 17 U.S.C. § 302(c) (2000).

318. Copyright Act 1968, § 33 (Austl.). For subject matter other than works (films, sound recordings, published editions, and broadcasts), copyright subsists for films and sound recordings, seventy years from the date of publication, fifty years for broadcasts, and twenty-five years for published editions. *Id.* at §§ 93–96.

319. *See* Kayleen Manwaring, *The Price of Beef in a Copyright Market: The Effects of Chapter 17 of the Australia-US Free Trade Agreement*, 23 COPYRIGHT REP. 60, 63 (2005) ("[T]erms for copyright between Australia and the U.S. are not in fact harmonised across the board.").

320. Copyright Act 1968, § 33(1) (Austl.) (literary, dramatic and musical works); *id.* § 94(1) (films).

the author and 70 years after the author's death."[321] Given that Colombia's standard term of protection is already eighty years *post mortem auctoris*,[322] the Trade Promotion Agreement will not serve to harmonize the term of protection with the position in the United States. The fact that the USTR was prepared to allow Colombia to continue to provide a longer period of protection provides a strong indication that the USTR is largely unconcerned with the benefits of harmonization.

In relation to the liability of those providing services online, genuine harmonization would also offer clear benefits. The regulatory compliance costs for businesses that, by their very nature, have a transnational reach are potentially enormous. Attempts to standardize rules that clarify and restrict online service provider ("OSP") liability are thus to be welcomed. Once again, however, the devil is in the details. The most significant problem with AUSFTA is that it only attempts to clarify OSP liability in the copyright sphere.[323] Copyright matters are, of course, our principal concern and this is not the place to provide a detailed exegesis of all of the other legal rules that might affect OSPs. Nevertheless, before accepting at face value the argument that AUSFTA has produced significant benefits for OSPs, it is important to bear in mind that AUSFTA would have done far more to assist OSPs if it had provided them with "horizontal" protection, that is, if it had carved out various protections from all potential civil and criminal actions (subject to the OSP meeting and complying with certain conditions). This is precisely what occurred in the E.U., where the E-Commerce Directive regulates service provider liability generally.[324] That Directive establishes three areas in which OSPs enjoy horizontal protection, namely, where the service provider acts as a "mere conduit" for an unlawful transmission,[325] where the service provider has "cached" unlawful material,[326] and where the service provider has "hosted" unlawful material.[327] As long as the OSP acts expeditiously to remove or block access to the material on receiving notice of a complaint, it will be insulated from all financial and criminal liability.[328]

The failure of AUSFTA to secure greater protection for OSPs is particularly significant because Australia's homegrown regime dealing with OSP liability suffers from a number of significant defects. The principal provisions in question are found in the Broadcasting Services Act 1992 (Cth).[329] A superficial examination would suggest that this enactment provides a reasonable level of protection to those offering services online, by virtue of

321. U.S.-Colombia Trade Promotion Agreement, U.S.– Col., art. 16.5.5(a), Nov. 22, 2006, *available at* http://www.ustr.gov/Trade_Agreements/Bilateral/Colombia_FTA/Final_Text/Section_Index.html.

322. STERLING, *supra* note 47, ¶ 11.04.

323. This is despite the fact that the agreement devotes an entire chapter to other electronic commerce issues. AUSFTA, *supra* note 2, art. 16.

324. Council Directive 2000/31, Directive on Electronic Commerce, 2000 O.J. (L 178) 1.

325. *Id.* art. 12, at 12.

326. *Id.* art. 13, at 13.

327. *Id.* art. 14, at 13.

328. *Id.* art. 12–14, at 12–13.

329. Broadcasting Services Act, 1992, sched. 5, cl. 91 (Austl.).

clause 91 to Schedule 5 of the Act.[330] This clause applies to "Internet content hosts" and "Internet service providers" who "host" Internet material.[331] Provided that the content host/ISP "was not aware of the nature of the content," they are immunized from civil and criminal liability.[332] Unfortunately, on closer inspection, it becomes clear that there are a number of significant problems with this provision. First, clause 91 applies to laws of the states and territories and to rules of common law and equity.[333] This provision has no application to federal (that is, in Australian parlance, "Commonwealth") legislation and hence can have no application in, *inter alia*, the copyright field. Second, there is real doubt about the categories of person to whom this provision applies. "Internet service provider" is given a narrow definition in the legislation, albeit one that conforms to how this term is commonly used and understood.[334] Specifically, "[I]nternet service provider" is limited to persons who provide "carriage services" to the public, that is, services concerned with the carrying of communication signals.[335] Consequently, OSPs can only acquire protection if they can bring themselves within the definition of "[I]nternet content host." The legislation makes no attempt to define the concept of "hosting," but there is a strong case to be made that hosting requires the housing and maintaining of files on a server.[336] If this interpretation is correct then all operators of Web sites that are hosted by a third party are excluded from the operation of the exception, including anyone who would be protected but for the fact that they decided to outsource the operation of their Web site. Third, and most significantly for present purposes, "[I]nternet content host" is limited to persons who are engaged in hosting Internet content *in Australia*,[337] thus rendering this provision of extremely limited use to American and other foreign corporations.

If AUSFTA failed to address problems with the general regime that purports to provide OSPs with protection in Australia, the agreement at least attempted to harmonize safeguards for OSPs in the copyright field. Specifically, article 17.11.29 of the agreement requires Australia to introduce limitations on service provider liability that are closely modeled on the DMCA's "safe harbor" provisions.[338] However, although AUSFTA requires protection to be extended to "service providers," this term is left undefined.[339] In implementing this obligation, Australia decided to limit the availability of the safe harbors to "carriage service providers,"[340] thus limiting the provisions

330. *Id.*
331. *Id.*
332. *Id.*
333. *Id.* at cl. 8.
334. *Id.*
335. *Id.*; Telecommunications Act, 1997, s. 7 (Austl.) ("'Carriage service' means a service for carrying communications by means of guided and/or unguided electromagnetic energy.").
336. *See Web Hosting Service*, WIKIPEDIA: THE FREE ENCYCLOPEDIA (Oct. 10, 2008), http://en.wikipedia.org/wiki/Web_hosting_service (describing the scope of hosting services).
337. Broadcasting Services Act, 1992, s. 5, cl. 3 (Austl.).
338. *Compare* AUSFTA, *supra* note 2, art. 17.11.29, *with* Digital Millennium Copyright Act. 17 U.S.C. § 512 (2000).
339. AUSFTA, *supra* note 2, art. 17.11.29.
340. Copyright Act, 1968, s. 116AA (Austl.).

to companies that, in common parlance, would be described as Internet service providers, that is, companies that offer Internet access.[341] In contrast, the position under the DMCA is much more satisfactory, "service provider" being defined, for most purposes, as "a provider of online services or network access, or the operator of facilities therefor [sic]."[342]

The failure of AUSFTA to secure a reasonable level of protection for OSPs generally, or even to require Australia to introduce copyright safe harbor provisions coterminous with those in the DMCA, must also be viewed in light of the approach that has been adopted to jurisdictional issues in Australia over recent years. Australian courts have shown themselves to be remarkably willing to take jurisdiction in Internet cases. Most importantly, in *Dow Jones & Co v. Gutnick,*[343] a defamation case, the High Court allowed a case to proceed in the state of Victoria against the publishers of an online American magazine that had a tiny pool of Australian subscribers. In much the same vein, in cases involving copyright infringement on the Internet, Australian courts have been prepared to grant orders which, on their face at least, have required defendants to change their business practices worldwide.[344] Also noteworthy in this context is the outcome in *Eagle Rock v. Caisley.*[345] That case saw an Australian court being prepared to award damages for unauthorized acts of copying that had taken place in Spain and Brazil, which the court was prepared to treat as infringements seemingly without taking evidence as to the state of copyright law in those countries and without enquiring as to the ownership of copyright in those territories.[346]

C. Using Bilaterals to Create Global Standards

We have argued to this point that justifications for the copyright provisions of AUSFTA based on the promotion of U.S. copyright interests in

341. *Id.* s. 10; Telecommunications Act, 1997, s. 87 (Austl.).

342. 17 U.S.C. § 512(k)(1).

343. (2002) 210 C.L.R. 575 (Austl.); *see, e.g.*, Brian Fitzgerald, *Negotiating "American Legal Hegemony" in the Transnational World of Cyberspace*, 27 MELBOURNE U. L. REV. 590, 604 (2003) (discussing global liability); David Rolph, *The Message, Not the Medium: Defamation, Publication and the Internet in* DOW JONES & CO INC V. GUTNICK, 24 SYDNEY L. REV. 263, 269–71 (2002) (providing commentary on this case).

344. The order issued in the Australian version of the Kazaa litigation is a particularly good example. *See* Graeme W. Austin, *Importing Kazaa—Exporting Grokster*, 22 SANTA CLARA COMP. & HIGH TECH. L. J. 577, 586–592 (2006) (discussing the application of *Universal Music Austl. Pty. Ltd. v. Sharman License Holdings Ltd. (Kazaa)*).

345. Eagle Rock Entm't Ltd. v. Caisley (2005) F.C.A. 1238 (Austl.).

346. In fact, the lion's share of the damages awarded in the case were for the infringements that had occurred overseas. The total damages award was for the amount of $365,000 (AUS), this was made up as follows: $24,000 was awarded for lost sales in Australia; $51,000 for lost sales in Spain; $200,000 for lost sales in Brazil; and $90,000 in the form of additional damages. *Id.* at 1240–42. It should perhaps also be noted that the judge was at pains to emphasize that he was not awarding damages "for infringements that occurred in Spain and Brazil. Rather, the damages are being sought as a measure of the consequences flowing from the making of the infringing master disks and the provision of them to overseas entities with the result that Eagle's sales were lessened in those countries." *Id.* at 1240–42. But it seems to us that this is to draw a distinction without a difference—the court was ultimately prepared to award damages in Australia for lost sales in other jurisdictions, and it did so without first establishing that copyright subsisted in those countries and was owned by the plaintiff.

the Australian market are unconvincing: AUSFTA neither raised copyright standards, nor harmonized U.S. and Australian law. But perhaps this perspective is too narrow: a third argument in favor of AUSFTA is that it forms one plank in a broader U.S. trade strategy, which has, as its ultimate goal, the "multilateralization" of the United States' preferred IP standards.

Some commentators have argued that the IP chapters in U.S. bilateral and regional trade agreements are one element of a strategy described as the "global IP ratchet."[347] That strategy involves the United States using both the "carrot" of bilateral trade advantages and the "stick" of trade sanctions to persuade or coerce countries to agree to higher levels of IP protection.[348] In bilateral dealings, the United States starts from a position of superior negotiating power due to the size and importance of its market, and in addition, is able to offer in return for an agreement on higher IP standards, "side benefits" in other areas of trade, for example access for agricultural goods, which it would not offer generally in a multilateral negotiating round.[349] The element of this ratchet that might justify AUSFTA, however, is the next stage: according to some commentators,[350] the resulting agreements are a precursor

347. *See* DRAHOS & BRAITHWAITE, *supra* note 241, at 85–120 (tracing U.S. strategies to promote national interests through such agreements); RUTH MAYNE, REGIONALISM, BILATERALISM, AND "TRIP PLUS" AGREEMENTS: THE THREAT TO DEVELOPING COUNTRIES 1–3 (2005); Bryan Mercurio, *TRIPS-Plus Provisions in FTAs: Recent Trends*, *in* REGIONAL TRADE AGREEMENTS AND THE WTO LEGAL SYSTEM 215, 216–18 (Lorand Bartels & Federico Ortino eds., 2006) (examining the power structure enforced by IP agreements); Peter Drahos, *BITs and BIPs*, 4 J.WORLD INTELL. PROP. 791, 793 (2001) (discussing U.S. bilateralism strategy).

348. The free trade agreements represent one possible "carrot." Apart from free trade agreements or their precursor, Trade and Investment Agreements, other bilateral mechanisms may also be used: the Generalized System of Preferences (GSP), which provides the benefit of duty free access to the U.S. market for designated beneficiary countries. *See* 19 U.S.C. §§ 2461–2467 (2000) (stating that the President must take into account the "extent to which such country is providing adequate and effective protection of intellectual property rights" in determining whether a country should be designated for GSP benefits); *see also* Caribbean Basin Economic Recovery Act, 19 U.S.C. §§ 2702(b)(2)(B), 2702(c)(9) (2000) (stipulating that duty-free status of a country depends in part on this treatment of IP); Andean Trade Preference Act, 19 U.S.C. §§ 3202(c)(2)(B), 3202(d)(9) (2000) (stipulating that duty-free status of a country depends in part on its treatment of IP). Another mechanism—at the "'stick"' end of the spectrum—is the "special 301" process under which the USTR identifies, annually, countries that "deny adequate and effective protection for IPR" and designates countries that fail that standard as "Priority Foreign Countries," or adding them to the "Priority Watch List" or "Watch List." DRAHOS & BRAITHWAITE, *supra* note 241, at 88–90 (defining the lack of adequate protection of IP rights as an unreasonable practice); *see* Trade Act of 1974, 19 U.S.C. § 2411(d)(3)(B), (C)(ii) (2000) (instructing the Trade Representative to publish in the Federal Register any determination that a foreign country is engaging in a practice that burdens or restricts U.S. Commerce). Inclusion on a list may lead to negotiations, and, in some cases, trade retaliation. *See* DRAHOS & BRAITHWAITE, *supra* note 241 at 89 (noting that the President is authorized under section 301 to withdraw trade benefits from any country found to not provide adequate IP protection).

349. *E.g.*, Yu, *supra* note 213, at 395.

350. A number of commentators have noted the use by the United States of bilateral mechanisms, and "regime-shifting" to achieve U.S. copyright policy aims, without asserting that the multilateralization of bilateral standards is the ultimate goal. *See* Laurence Helfer, *Regime Shifting: The TRIPS Agreement and New Dynamics of International Intellectual Property Lawmaking*, 29 YALE J. INT'L L. 1, 21 (2004) (discussing the shift toward multilateralism); Ruth Okediji, *Back to Bilateralism? Pendulum Swings in International Intellectual Property Protection*, 1 U. OTTAWA L. & TECH. J. 125, 143–44 (2004) (discussing the contrast between bilateralism and multilateralism). For the most part, this literature assesses the impacts on recipient developing countries, and discusses the use of these mechanisms to raise standards in those countries (and tools available to those countries to resist such efforts). These commentators see the bilateral agreement as the *endpoint*, rather than as a steppingstone to a multilateral agreement. However, as Parts IV.A and IV.B should have made clear, the AUSFTA copyright provisions cannot be justified as an endpoint: they neither harmonize

to the eventual incorporation of those same higher IP standards in multilateral treaties that will bind third-party countries. As one commentator has put it, "if enough [free trade agreements] are negotiated containing [multilateral-plus] provisions, these provisions will essentially become the new minimum standard from which any future WTO trade round will proceed."[351] As evidence of the ratcheting process, commentators point to the use of bilateral mechanisms to break down resistance, particularly amongst developing countries, to the negotiation of the TRIPS agreement.[352]

The picture of the United States using its superior bargaining position in bilateral trade relations to convince, cajole, or coerce a series of individual countries into adopting the United States' preferred standards, each individual agreement a steppingstone towards their eventual consolidation in multilateral agreements is simple and at first glance compelling.[353] Admittedly, it is ordinarily critics of U.S. policy who invoke the ratchet argument. Nevertheless, looking at matters from a U.S. perspective, the ratchet could constitute a justification for the copyright provisions of AUSFTA. Moreover, this justification would seem to hold regardless of the impact of the agreement (or lack thereof) on Australian law.

Before turning to explain why, in our view, "AUSFTA as stepping stone [sic]" argument does not stand up to scrutiny, it is worth noting that the eventual goal of "multilateralization" can only justify the form of the copyright provisions of AUSFTA if it is these standards, at this level of detail, that are to be consolidated internationally. If the eventual aim is a multilateral treaty drafted at a higher level of abstraction, then possibly no copyright provisions were required in AUSFTA. Australia already had, and would likely have supported in multilateral negotiations, a level of protection going beyond the provisions of TRIPS. For example, in all likelihood, Australia would have supported the further multilateralization of the standards in the 1996 WIPO treaties. To the extent that some provisions in Australian law fell short in relation to other, particular measures such as copyright term, a shorter copyright chapter dealing with those specific issues would have been sufficient to have achieved U.S. goals, without generating anywhere near the same level of anti-copyright and anti-American sentiment.

In its most simplistic form, the global ratchet argument is presented as if there were a historically repeating cycle of bilateral negotiations, followed periodically by consolidation of the bilateral standards at a multilateral level.[354] As a preliminary, point we note that it is questionable whether the assumption of such a cycle is appropriate: the history of the negotiation of TRIPS and the use of bilateral mechanisms during that process appears, on closer inspection,

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nor raise standards significantly, and thus have little or no demonstrable benefit for U.S. interests, unless they contribute to a multilateral strategy.

351. Mercurio, *supra* note 347, at 223.

352. DRAHOS & BRAITHWAITE, *supra* note 241, at 134. We address whether the historical argument is convincing immediately below.

353. SAM RICKETSON & JANE GINSBURG, INTERNATIONAL COPYRIGHT AND NEIGHBOURING RIGHTS: THE BERNE CONVENTION AND BEYOND 175 (2006).

354. Mayne, *supra* note 347, at 2.

to be only a poor analogy to the more recent (post-2001) U.S. free trade agreements. It may well be the case that U.S. bilateral pressure contributed significantly to the negotiation of TRIPS.[355] However, U.S. bilateral pressure during the lead-up to TRIPS, that is, during the 1980s and early 1990s, occurred against a background where the key goal to be achieved was encouraging countries to recognize, and enforce, existing multilateral copyright standards.[356] Thus, the 1986 "Record of Understanding on Intellectual Property Rights" between the United States and Korea—which is often cited by commentators making the "global ratchet" argument—consists in large part of a series of undertakings on the part of Korea to join existing multilateral conventions.[357] Much of the remainder of that document is concerned with requiring Korea to undertake quite specific enforcement actions; it adds only limited specific new protections.[358] The IP provisions in the North American Free Trade Agreement ("NAFTA"), another agreement frequently pointed to as a kind of "template" for TRIPS, also largely affirmed existing multilateral standards. Perhaps the main extension of copyright found in NAFTA, the Korean Understanding, and other U.S. bilateral agreements at that time, was a requirement to protect computer programs.[359] However, even this was consistent with international trends at the time: in the mid-1980s a joint session between WIPO and the United Nations Educational, Scientific, and Cultural Organization demonstrated that copyright protection for computer programs already existed in most industrialized countries.[360]

The United States may well have experienced success in using bilateral initiatives pre-TRIPS to leverage support for that agreement. However, any success the U.S. bilateral strategy enjoyed pre-TRIPS cannot be assumed to translate to likely success in multilateralizing AUSFTA standards. It is one thing to use bilateral agreements to expand acceptance of standards that were already in place in a large number of countries. It is quite another to use those

355. DRAHOS & BRAITHWAITE, *supra* note 241, at 85–99 (examining U.S. use of bilateralism); *see also* JAYASHREE WATAL, INTELLECTUAL PROPERTY RIGHTS IN THE WTO AND DEVELOPING COUNTRIES 18 (2001) (examining U.S. pressure on Korea); Yu, *supra* note 213, at 361–62, 412–14 (discussing the U.S. "'divide-and-conquer" strategy).

356. *See generally* DANIEL GERVAIS, THE TRIPS AGREEMENT DRAFTING HISTORY AND ANALYSIS (1998) (analyzing and interpreting the history and text of the TRIPS Agreement).

357. *See, e.g.*, DRAHOS & BRAITHWAITE, *supra* note 241, at 103–04 (arguing that the Korean agreement became "the blueprint for other agreements plus the GATT").

358. *See* Communication from the Republic of Korea, *Standards and Enforcement of Intellectual Property Rights*, MTN.GNG/NG11/W/48 at 2 (Oct. 26, 1989), *available at* http://www.wto.org/gatt_docs/english/sulpdf/92080135.pdf ("Protection of IPRs and the use of IPRs should be balanced."). "It is also worth noting in this context that the 1986 agreement did not secure Korea's support for U.S. objectives in TRIPS: during the TRIPS negotiations Korea was part of a group emphasizing the importance of compulsory licensing provisions." GERVAIS, *supra* note 356, at ¶ 1.17.

359. North American Free Trade Agreement, U.S.-Can.-Mex., art. 1705, § 1, Dec. 17, 1992, 32 I.L.M. 671; Record of Understanding on Intellectual Property Rights, U.S.-Kor., § 4, Aug. 28, 1986, 2231 U.N.T.S. 307 (specifically allowing Korea to create its own quasi *sui generis* regime, the Computer Program Protection Law, a separate piece of legislation). *See generally* ELISABETH UPHOFF, INTELLECTUAL PROPERTY AND US RELATIONS WITH INDONESIA, MALAYSIA, SINGAPORE, AND THAILAND (1991) (noting in the case of each country examined that extension of protection to computer programs was important).

360. VICTOR LOPEZ, INTERNATIONAL IP PROTECTION OF SOFTWARE: HISTORY, PURPOSE AND CHALLENGES 1–2 (2007), http://www.wipo.int/edocs/mdocs/copyright/en/wipo_ip_cm_07/wipo_ip_cm_07_www_82537.pdf.

same mechanisms in an effort to set unilaterally new standards based closely on U.S. domestic law. The United States could be confident, pre-TRIPS, that the provisions it was pushing bilaterally would receive support from other major players such as Japan and the E.U.—these provisions reflected, for the most part, the existing multilateral framework.[361] In contrast, there is simply no prospect of the latest round of bilateral agreements forming the basis of a future multilateral agreement, no matter how many countries conclude free trade agreements with the United States.

No future agreement could meaningfully be said to set a new multilateral standard without the agreement of the E.U.[362] But even if (to ignore political realities entirely for the sake of argument) the E.U. were minded to accept the U.S. lead in setting new international IP standards, there are formidable political and cultural obstacles that would render it unable to sign up to the standards laid down in the recent bilaterals. For instance, as we noted earlier, the provisions of AUSFTA that address copyright in the online environment are modeled very closely on the U.S. domestic legislation, the DMCA, which itself sought to give effect to the 1996 WIPO treaties.[363] Europe, which is also party to the WIPO treaties, developed its own scheme for their implementation, a scheme embodied in the Information Society Directive.[364] The E.U. model contains a number of important differences from the U.S. model embodied in AUSFTA, not least of which is the quite different approach to resolving the tension between technological protection measures and the rights of users.[365] It is important to appreciate that the Information Society Directive represented a hard fought compromise among the members of the E.U.: it took some five years to negotiate, and many countries missed the 2003 deadline for implementation.[366] Given the difficulties that accompanied the negotiation and implementation of the Information Society Directive, it is unrealistic in the extreme to suppose that the E.U. could simply abandon this approach in favor of one based on the DMCA.

A second example that illustrates the impossibility of the E.U. signing up to the United States' preferred model is provided by the provisions in recent bilaterals that require economic rights to be freely transferable.[367] Special

361. *See* DRAHOS & BRAITHWAITE, *supra* note 241, at 87 ("The Trade and Tariff Act of 1984 brought the same kind of language that had been used in the Caribbean Basin legislation into the GSP Programme.").

362. It is worth noting that the historians of the TRIPS negotiations note the importance of 'North-North' differences of approach, and of resolving those differences. *Id.* at 143–46; GERVAIS, *supra* note 356, at ¶ 1.20, 1.29–1.30.

363. *See supra* text accompanying notes 53–56 (noting that AUSFTA provisions addressing copyright in the online environment model the DMCA).

364. *See* Council Directive 2001/29, 2001 O.J. (L 167) 10 (outlining a plan for harmonizing EU regulations with TRIPS).

365. *See* LANDES & POSNER, *supra* note 219, at 44 and accompanying text (discussing the problem of a potential "arms race" between copyright owners and the manufacturers of circumvention devices).

366. *See* Jukka Liedes, Director, Division of Culture and Media Policy Ministry of Education and Culture, Keynote Address at the UNESCO Regional Pre-Conference for the World Summit in Information Society (June 27–29, 2002), *available at* http://portal.unesco.org/ci/en/file_download.php/e0ccb6e599cd5281105458ff67c3244dPaper+Liedes.doc (discussing the timeline and the information society directive).

367. *See, e.g.*, AUSFTA, *supra* note 2, art. 17.4.6 (requiring free transferability of copyright); *see also supra* notes 44–46 and accompanying text.

contractual rules designed to protect authors and rules entitling authors to unwaivable rights to equitable remuneration are widespread in Europe.[368] Such rules reflect the fact that European approaches to copyright are based on an authors' rights philosophy, rather than a purely utilitarian or incentives-oriented philosophy. Given these philosophical underpinnings, it is unrealistic to imagine that the E.U. would be prepared to abandon its right to enact protections for individual authors in any future round of multilateral negotiations.[369]

Thus, to summarize, one problem with the argument that the recent bilaterals are a steppingstone to a future multilateral convention is that at least one key player on the international stage could never sign up to the model that the United States is promoting. It must also be remembered that, increasingly, no meaningful new international standard could emerge without the support of key developing countries, such as China, India, and Brazil, and it is at least doubtful whether these countries would be any more willing or able than the E.U. to sign up to the United States' preferred model.

A second problem with the steppingstone/ratchet argument is that it is difficult to imagine any of the key players on the international stage being more convinced of the desirability of the U.S. preferred model on the basis that a number of small countries have already been persuaded. For example, that Australia has been prepared to sign up to this model is likely to be dismissed as irrelevant: in developing countries, because Australia is a developed nation, and in Europe because Australia is culturally relatively close to the United States, has a similar copyright philosophy, and has been prepared to side with the United States against Europe on a number of IP issues over recent years.[370] Moreover, even if the Australian example were to be taken into account, the most cursory examination would reveal that Australia agreed to AUSFTA not because it considered the copyright provisions desirable, but because it sought trade benefits in other areas such as agriculture and government procurement.[371] Australian policy-makers explicitly analyzed the changes that were made as a cost, albeit an unquantifiable one, required to be borne in order to achieve goals in other policy areas.[372]

A third problem with the ratchet argument is that future

368. *See, e.g.*, Cyrill P. Rigamonti, *The Conceptual Transformation of Moral Rights*, 55 AM. J. COMP. L. 67, 73–76 (2007) (discussing the extent of moral rights protections in European civil law systems).

369. It is also worth noting in this context that the United States included a provision requiring that copyright be freely transferable in its initial draft proposal for TRIPS. Communication from the United States, *Draft Agreement on the Trade-Related Aspects of Intellectual Property Rights*, MTN.GNG/NG11/W/70, art. 4 (May 11, 1990), *available at* http://www.wto.org/gatt_docs/English/SULPDF/92100144.pdf. Thus, despite the United States' long-standing desire to multilateralize this standard, it has not been successful in past multilateral negotiations.

370. Most significantly, Australia, like the United States, has been a strong opponent of European attempts to strengthen international protection for geographical indications of origin. *See* Michael Handler, *The EU's Geographical Indications Agenda and Its Potential Impact on Australia*, 15 AUSTL. INTELL. PROP. J. 173, 190–94 (2004) (arguing that the costs to Australia of adopting the E.U.'s protections for geographical indications outweigh the benefits).

371. Ranald, *supra* note 21, at 30–38 (discussing the competing interest involved in AUSFTA trade negotiations).

372. *Id.* at 35–42.

multilateralization would require the United States to insist on uniformity in the copyright standards it is promoting, particularly in those areas that would be most controversial in any future multilateral negotiations. In practice, however, the United States is not insisting on uniformity, rather it is giving ground in bilateral negotiations on precisely those areas that would prove most contentious. For example, the provision banning parallel importation of copyright subject matter, found in the U.S.-Morocco Free Trade Agreement,[373] is found in no other free trade agreement subsequently negotiated. While most of the free trade agreements require countries to introduce a system for statutory damages for copyright infringement, AUSFTA does not.[374] In negotiating the U.S.-Chile Free Trade Agreement, the United States did not insist on full transferability of all copyright economic rights.[375] If the United States has not been able to secure agreement on these contentious issues in bilateral negotiations with weaker countries, there can be little prospect that it will succeed in future multilateral negotiations.

V. CONCLUSION

Two obvious objections to our analysis present themselves. First, insofar as we have argued that current U.S. trade strategy has secured few benefits for U.S. copyright owners, it could be said that Australia is an unrepresentative case study. In other words, it can be objected that it is all very well to demonstrate that the copyright provisions of a bilateral agreement had little impact in a developed country that has long provided a high level of copyright protection; but this tells nothing about the impact of other bilateral agreements. In response, we would point out that AUSFTA has not been singled out by U.S. policymakers as operating differently than other recent agreements. In addition, we are not convinced that AUSFTA is entirely unrepresentative. In particular, it is worth noting that Singapore, which was subject to similar provisions, has had a strong, largely well-enforced, copyright system in place since the late 1980s and that Singapore's copyright system, like Australia's, remains rooted in the British commonwealth tradition.[376] More generally, every agreement must be assessed individually and in detail; even if the copyright provisions in other agreements have produced more benefits for the United States, there may be other costs.

Second, it might be objected that it is not enough to demonstrate that AUSFTA has been achieved at a significant political cost that has not been offset by the benefits secured to copyright owners. This is because economic

373. U.S.-Morocco Free Trade Agreement, U.S. Morocco, art. 15.5 n.2, Jan, 1, 2006, *available at* http://www.ustr.gov/Trade_Agreements/Bilateral/Morocco_FTA/Final_Text/Section_Index.htm.

374. INDUSTRY TRADE ADVISORY COMMITTEE ON INTELLECTUAL PROPERTY RIGHTS, THE U.S.– KOREA FREE TRADE AGREEMENT: THE INTELLECTUAL PROPERTY PROVISIONS 20 (2007), *available at* http://www.ustr.gov/assets/trade_Agreements/bilateral/Republic_of_Korea_FTA/Reports/asset_upload_file196_12780.pdf. This is despite the fact that a system of statutory damages has been described as a "major goal of industry." *Id.*

375. *See supra* note 45 (noting that the U.S.-Chile Free Trade Agreement requires the parties use reasonable limits to protect original copyright holders).

376. *See* UPHOFF, *supra* note 359, at 15, 17–20 (1991) (discussing Singapore's copyright system).

benefits sufficient to justify the political costs incurred may flow from other elements of the agreement. We do not pretend to have a knock-down reply to this objection, but in response we would point out the following. We are confident that similar points can be made regarding the whole of the IP chapter. As we have tried to illustrate in passing, AUSFTA (apart from the expansion of rights over test data, the industrial property analogue of copyright term extension) has had a minimal impact on Australian patent, trademark, and designs law. If the United States has achieved only limited benefits from its IP strategy, a key area in which the United States expects trade gains, there is good cause to question the wisdom of the current approach. It is surely significant that the part of the agreement that caused the most controversy secured only limited benefits for the United States, that those benefits themselves have to be offset against the costs of feeding anti-IP (not just anti-American) sentiment, and that these benefits could have been secured by a very different form of agreement. We, therefore, believe that the case study we have presented should prompt a re-examination of U.S. trade strategy.

It is encouraging to note that there has been some reassessment of U.S. trade policy in political circles over recent months, in particular, in view of a change in administration that is now on the horizon. Ultimately, however, the reassessment that is taking place is fairly limited in scope. Democrats in Congress have insisted on the inclusion of environmental and labor standards in future bilateral agreements, and have required a degree of flexibility in relation to pharmaceutical patents and data exclusivity.[377] There appears, however, to be little interest in abandoning the bilateral route entirely, and little or no interest in fundamentally rethinking the use of IP chapters in the form discussed in this article.[378] Similarly, insofar as copyright and related "information law" policy is being discussed at all, the pressure for change is coming from Google, who, supported by some human rights lawyers and Internet activists, are demanding that freedom of expression be treated as a trade issue.[379] Thus, just as can be seen with attempts to make environmental and labor standards trade issues, we see an attempt to secure in the information law context (what many on the left would characterize as) a progressive agenda through trade negotiations, but no challenge to the use of bilateral agreements as the preferred means of securing U.S. policy goals.

We recognize that calls to have freedom of expression treated as a trade issue are well-meaning, but feel that we can safely predict that this new

377. *See, e.g.*, Letter from Charles B. Rangel, Chairman of the Committee on Ways and Means, and Sander M. Levin, Chairmen of the Subcommittee of Trade, to Susan Schwab, U.S. Trade Representative (May 10, 2007), *available at* http://waysandmeans.house.gov/Media/pdf/110/ 05%2014%2007/05%2014%2007.pdf. This letter represents a congressional compromise negotiated in the first half of 2007 in response to the imminent expiry of trade promotion authority.

378. It is important in this context to emphasize the limited nature of the changes required by the congressional compromise of May 2007 in relation to pharmaceutical patents. The compromise incorporates some flexibility designed to facilitate access to medicines, leaving the text and philosophy of the "standard form" IP chapter otherwise unchanged. I. M. DESTLER, PETERSON INSTITUTE FOR INTERNATIONAL ECONOMICS, AMERICAN TRADE POLITICS IN 2007: BUILDING BIPARTISAN COMPROMISE 10–11 (2007).

379. *See, e.g.* Posting of Andrew McCaughlin to Google Public Policy Blog, http://googlepublicpolicy.blogspot.com/2007/06/censorship-as-trade-barrier.html (June 22, 2007, 15:36).

beneficent form of cultural imperialism will be met with even less enthusiasm than current policy, even amongst many who would otherwise be sympathetic to the aim of reducing censorship.[380] For instance, Australia takes a different approach than the United States to protecting freedom of expression and accords a rather different weight to competing rights and interests.[381] Australia is far from unusual in this respect—"America's free speech law differs from, and is significantly stronger than, that of many other democratic, human-rights-respecting nations."[382] It is all very well for Google et al. to insist that they are not asking for the First Amendment to be internationalized,[383] but if Google's suggestion of making free speech a trade issue were to be taken up, would-be trade partners are entitled to be somewhat skeptical about the willingness of the USTR to tolerate deviance from American norms. After all, the argument that Australia had a different, but equally coherent, legal model for the protection of copyright that complied with international norms is not one that carried any weight in the context of AUSFTA negotiations.

The case study we have presented suggests that trying to add yet more detailed obligations into bilateral agreements to make them more politically "balanced" is not the right way to proceed. Our analysis suggests that there needs to be a fundamental reassessment of the way in which bilateral trade agreements are negotiated. Any such reassessment will, of course, need to consider the economic case for such agreements,[384] but, as we have sought to emphasize, the geopolitical case for such agreements also needs to be re-examined. As was seen in the second section of this paper, one of the principal

380. The authors first encountered the demand that freedom of expression be treated as a trade issue in the Trade Session of the 2007 *Fordham IP Conference*. This demand was put from the floor to a representative from the USTR. In an irony apparently lost on the speaker, this demand was made immediately before the session on India. Depressingly, it seems that history is doomed to repeat itself—the rapacious imperialism of Robert Clive and the East India Company is to be replaced by the "imperialism as social improvement" that marked the utilitarians' subsequent engagement with Indian affairs. For the classic account, see ERIC STOKES, THE ENGLISH UTILITARIANS AND INDIA 1–80 (1959) (discussing imperialism and utilitarianism in India).

381. As to Australia's approach to protecting freedom of expression, see generally Adrienne Stone, *The Limits of Constitutional Text and Structure: Standards of Review and the Freedom of Political Communication*, 23 MELB. U. L. REV. 668 (1999) (reviewing Australia's express and constitutional rights); Dan Meagher, *What is "Political Communication"? The Rationale and Scope of the Implied Freedom of Political Communication*, 28 MELB. U. L. REV. 438 (2004) (discussing constitutionality of political communication).

382. Jed Rubenfeld, *The Freedom of Imagination: Copyright's Constitutionality*, 112 YALE L. J. 1, 31 (2002); *see also* David M. Smolin, *Exporting the First Amendment?: Evangelism, Proselytism, and the International Religious Freedom Act*, 31 CUMB. L. REV. 685, 685, 693 (2000) (proposing a "certain measure of humility regarding the appropriateness of exporting our own confused First Amendment jurisprudence to other nations," and arguing that "[w]hile the American approach to freedom of speech is understandable and defensible, it is not mandated by international human rights norms and is not the only approach compatible with democracy, human rights, or the rule of law.").

383. McLaughlin, *supra* note 379.

384. The question of whether bilateral agreements represent good economic policy has become a fiercely contested issue. *E.g.*, Jagdish Bhagwati, *US Trade Policy: The Infatuation with Free Trade Areas*, *in* THE DANGEROUS DRIFT TO PREFERENTIAL TRADE AGREEMENTS 1–18 (Jagdish Bhagwati & Anne Krueger eds. 1995) ("This policy of, indeed obsession with… creation of free trade areas, instead of multilateralism at the WTO, is a mistake."); Sydney M. Cone III, *The Promotion of Free-Trade Areas Viewed in Terms of Most-Favored-Nation Treatment and "Imperial Preference,"* 26 MICH. J. INT'L L. 563 (2005) (arguing that the interests of the United States and those of global trade generally will not be served by this policy of seeking bilateral free trade agreements); Sanjeev Goyal & Sumit Joshi, *Bilateralism and Free Trade*, 47 INT'L ECON. REV. 749 (2006) (finding that bilateralism is consistent with free trade).

justifications for present strategy is that bilateral agreements can help to secure the United States' foreign policy and security goals. But it has long been recognized in some quarters that trade deals can produce political costs insofar as they breed resentment in countries that are excluded from preferential trade arrangements[385] and/or lead excluded countries to set up rival trading blocs.[386] Our analysis suggests further that bilateral agreements can, unless handled carefully, breed resentment in countries that are included in bilateral arrangements, even when an agreement was negotiated in part in recognition of that country's past support for the United States.

Overall, therefore, we believe that serious consideration needs to be given to abandoning or at least curtailing dramatically the use of bilateral trade agreements. Even if it is ultimately decided that such agreements do have an important place in U.S. trade strategy, there is an extremely strong case for altering the form of future agreements. Trade partners need to be given greater space to implement their obligations in a way that meets their particular circumstances. Attempts to transplant U.S. law wholesale need to be abandoned in favor of more flexible forms of agreement. In this respect, our analysis echoes the call made by David Smolin, in a very different context, for the United States to change the way it conducts its foreign policy:

> the United States needs to define its core values in a way that distinguishes between that which is peculiarly [y]ours and that which [you] believe to have a more universal merit. If [you] wish to export certain core values . . . [you] need to define them in such a way that they can fit more comfortably within a variety of cultures. [You] need to distinguish between the manner in which [you] choose to implement those values at home and the core values themselves. [You] must expect that, even where other nations and cultures share certain of [y]our values, they will implement them in ways different from [y]ours, suitable to their own cultures and histories.[387]

385. *See, e.g.*, R.M. Cambell, *Empire Free Trade*, 39 ECON. J. 371, 376 (1929) (discussing the conversion of the British Empire into a single fiscal unit).

386. *See, e.g*, Congressional Budget Office, *The Pros and Cons of Pursuing Free-Trade Agreements*, ECON. & BUDGET ISSUE BRIEF, Jul. 31, 2003, at 1, *available at* http://www.cbo.gov/ ftpdocs/44xx/doc44581/ 07-31TradBrief.pdf (discussing the United States' objective of trade liberalization); Cone, *supra* note 384, at 575 (discussing AUSTFA).

387. Smolin, *supra* note 382, at 706.