

## ***HOW THE US FORCED AUSTRALIA TO REWRITE ASPECTS OF ITS COPYRIGHT LAW DURING CERTIFICATION OF COMPLIANCE WITH THE AUSFTA***

The US process of certification of compliance with trade agreements, examples of how it has been used in recent years, and issues likely to be raised in the Trans-Pacific Partnership Agreement (TPPA) have been set out on [www.notppcertification.org](http://www.notppcertification.org). This memorandum presents another example of intervention by the United States Trade Representative (USTR) in the passage of a country's laws as a condition of it certifying that country's compliance with a US free trade agreement. This time the country was Australia. The law was the Copyright Legislation Amendment Bill 2004, which was introduced after the US was dissatisfied with the Australian Government's [US Free Trade Agreement Implementing Act](#) (USFTAIA).

The documentation shows:

- The US expressed its view during the passage of Australia's implementing legislation that the law did not fully comply with the AUSFTA;
- The US demanded further legislation to meet its interpretation of compliance, including commitments that were not in the text of the AUSFTA;
- The Australian Trade Minister consequently drafted new legislation that significantly reduced the flexibility that Australia believed was provided by the AUSFTA. He submitted that draft legislation to the USTR as evidence of compliance with the US interpretation of the FTA, so as to secure the exchange of notes that was necessary to bring the agreement into force;
- The USTR agreed to an exchange of letters, on the explicit assumption that the legislation would be passed. However, he expressed concern that aspects may still not comply with the US interpretation of the AUSFTA and reserved the right to take further legal action.

### **This memorandum contains short extracts that set out:**

- the Australian Parliamentary Library's description of the US intervention;
- the timeline of USTR's intervention in Australia's legislative process;
- an academics' account of how the Australian legislative process was affected;  
and
- a practical example of the impact of the temporary protection provision.

***Parliament of Australia, Parliamentary Library***  
***Bills Digest No. 71 2004–05***  
*Passage History*

**Copyright Legislation Amendment Bill 2004**

([http://www.aph.gov.au/Parliamentary\\_Business/Bills\\_Legislation/bd/bd0405/05bd071](http://www.aph.gov.au/Parliamentary_Business/Bills_Legislation/bd/bd0405/05bd071))

The Digest prepared by the Australian Parliamentary Library summarised the process and its implications for democratic government as follows:

“Before the making the exchange of diplomatic notes necessary to bring the Agreement into force, the United States requested that Australia make some additional changes to the Copyright Act on the basis that the USFTA Act had not adequately implemented the relevant provisions of the Agreement. Australia agreed to make certain changes. These were outlined in a [letter from Trade Minister Mark Vaile](#) to US Trade Representative (USTR) Robert Zoellick accepted (with some reservations) in a [return letter](#) on 17 November 2004 (hereafter referred to as the Vaile Zoellick correspondence).

The exchange of diplomatic notes has now occurred with agreement that the AUSFTA will enter into force on 1 January 2005. According to USTR Zoellick, the United States proceeded on the basis of the Australian Government’s commitment to introduce the present Bill and have it enacted into law expeditiously. Nevertheless, the exchange of diplomatic notes was not, itself, conditional on the passage of the Bill. Accordingly, the AUSFTA will come into force on 1 January 2005 regardless of whether this Bill passes. However, given the Vaile Zoellick correspondence and the text of the Agreement itself, the United States would have clear and enforceable remedies under the Agreement against Australia if the Bill is not passed.

Parliament might note that the Vaile Zoellick correspondence has effectively created new obligations for Australia, in addition to those found in the text of Agreement itself. Under the law of treaties, these letters can be used to interpret the Agreement or to justify a particular construction where the Agreement is itself ambiguous. In some areas, the letters have prescribed a particular method for implementation of obligations where the Agreement might have allowed multiple implementation methods. This effectively reduces the flexibility with which Parliament may apply the Agreement through law.

This occurs in the following areas:

- **temporary reproductions:** in the Agreement, the exception for temporary reproductions was based on Australia’s right to develop limited exceptions to copyright consistent with Article 17.4.10. The Vaile Zoellick correspondence agrees that this particular exception will be limited in prescribed ways, as provided by the current Bill;

- **criminal provisions:** the Vaile Zoellick correspondence specifically requires that Australian law provide certain criminal offences to be made out where they are undertaken by way of trade or with the intention of obtaining a commercial advantage or profit. Under the text of the Agreement, only the latter option is required;
- **transitional provisions:** the Vaile Zoellick correspondence provides a specific framework for transitional provisions, where the Agreement was almost silent on the issue; and
- **internet service provider liability:** the Vaile Zoellick correspondence requires Australia to implement certain aspects of the scheme required by AUSFTA in legislation, where previously Australia could enact the scheme using whatever instrument was appropriate.” (see below for additional changes required)

## Concluding Comments

*For the most part, the amendments proposed in this Bill will achieve closer compliance with the Agreement. ...*

*The suggestion that the Bill makes only minor and technical amendments to the Copyright Act understates the significance of the changes. Although they are certainly technical, almost all of the proposed amendments will affect substantive rights and/or increase the likelihood of prosecution for copyright offences. ...*

*As with the USFTA Act, this Bill does not exploit those areas of AUSFTA that would allow Australia to provide new exceptions or limitations as a counter-balance to the new copyright protections.*

*This Bill, like the USFTA Act, makes significant changes to Australia’s copyright regime without rigorous public consultation with stakeholders or experts. As a result of both pieces of legislation, Australia can expect uncertainty in copyright law, at least until courts develop interpretations that make sense of the American law which have been grafted on to the Australian system. As Australia lacks much of America’s legal context such as a constitutional Bill of Rights, the doctrine of fair use, or the narrower test of originality in copyright law these American elements could produce quite different results in Australia to those in the United States.*

*Finally, Parliament might note with concern the process that has preceded this Bill. Through the Vaile–Zoellick correspondence, the Government has effectively created new obligations for Australia. Some of the flexibility in implementation offered under the Agreement has been reduced through Minister Vaile’s detailed assurances to the United States on specific implementation models. The lack of Parliamentary involvement or scrutiny of the negotiations leading to the Vaile–Zoellick correspondence stands in sharp contrast to the involvement in the decision to ratify the Agreement.”*

## Timeline of USTR Intervention in Australia's Legislative Process

AUSFTA [Article 23.4](#): Agreement comes into force 60 days after exchange of notes or on such other date as the Parties may agree.

4 March 2004	AUSFTA authorised for signing by Cabinet (after which text could not be changed), then <a href="#">text released</a>
18 May 2004	Ceremonial signing of AUSFTA
June 2004	<p><a href="#">Joint Standing Committee on Treaties</a> (JSCOT) report <i>“recommends that the changes being made in respect of the Copyright Act 1968 replace the Australian doctrine of fair dealing for a doctrine that resembles the United States’ open-ended defence of fair-use, to counter the effects of the extension of copyright protection and to correct the legal anomaly of time-shifting and space-shifting that is currently absent.”</i></p> <p>USTR expresses concern during passage of the omnibus legislation through Parliament that the law does not comply with its understanding of the AUSFTA.</p>
16 August 2004	The USFTAIA covering the majority of the changes required by the AUSFTA became law.
17 November 2004	<p><a href="#">Australian Trade Minister</a> wrote to the USTR seeking agreement to the exchange of notes bringing the agreement into force. The letter:</p> <ul style="list-style-type: none"><li>• outlined additional legislation relating to copyright, and attached the draft legislative amendments.</li><li>• noted concerns raised by the USTR over patents at the time the implementing law was being debated in Parliament and the USTR had ‘reserved its rights in relation to those provisions’.</li><li>• observed that <i>“Our Governments have the common objective or fully and faithfully implementing our respective commitments under the Agreement, recognizing that reasonable differences may exist over interpretation of those commitments. Thus bringing the Agreement into effect is without prejudice to any future dispute that may arise regarding compliance with our respective laws and other measures with the Agreement, including the laws and other measures referenced in this letter.”</i></li></ul>

- 17 November 2004 [USTR](#) wrote to the Australian Trade Minister saying it was prepared to proceed on the basis that Australia would pass the laws as proposed, but expressed unhappiness about various provisions.
- He described one aspect as ‘unwarranted and burdensome to rights holders’ even after the proposed additional changes. The US would continue to monitor that and other provisions.
- He further urged Australia to review Australia’s safeguards, which were designed to avoid abuse in the patent linkage system for medicines, which was required by the AUSFTA.
- Bringing the Agreement into force was without prejudice to future action by the US under the AUSFTA.
- 17 November 2004 United States and Australia exchanged diplomatic notes certifying that each country respectively has completed its internal requirements to allow the agreement to enter into force on January 1, 2005
- 30 November 2004 Copyright Legislation Amendment Bill 2004 was introduced.
- 6 December 2004 Senate referred the Copyright Legislation Amendment Bill 2004 to the Senate Legal and Constitutional Legislation Committee for inquiry and report by 7 December 2004.
- 6 December 2004 Senate Legal and Constitutional Legislation Committee conducted its inquiry on the Bill and heard submissions on three hours’ notice.
- 7 December 2004 [The Senate Legal and Constitutional Legislation Committee Inquiry](#) stated: *“Given the short timeframe for reporting, the Committee has not had the opportunity to properly consider the issues raised in the inquiry. The Committee presents the proof Hansard transcript of the public hearing, to assist the Senate in its consideration of the Bill. Also presented are answers to questions taken on notice at the hearing, and documents tabled at the hearing (listed at Attachment 2).”*
- 15 December 2004 Copyright Legislation Amendment Bill 2004 entered into force.
- 1 January 2005 AUSFTA came into force.

November 2013

The Australian Law Reform Commission [Copyright and the Digital Economy](#) review reiterated the recommendation of the JSCOT in June 2004 for a ‘fair use’ exception, which had been echoed in various reports and committees since then, but was never adopted because of industry lobbying.

## Impacts on the Australian Legislative Process

The following description is from [Robert Burrell and Kimberlee Weatherall](#), ‘Exporting Controversy? Reactions to the Copyright Provisions of the U.S.- Australia Free Trade Agreement: Lessons for U.S. Trade Policy’, *The Journal of Law, Technology and Policy* 2008, 259-317 (footnotes omitted)

‘The United States Trade Representative (“USTR”) was not satisfied with all aspects of Australia’s implementation of AUSFTA. 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). Negotiations ensued, with Australia required to provide detailed written explanations of how aspects of Australian copyright law operate. In November 2004, the USTR consented to the exchange of diplomatic notes necessary to bring the agreement into effect, on terms that made it clear that U.S. approval was conditional on further amendments. The level of detail in this November exchange is striking: 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. The letter also stated that the United States “remained concerned” about some provisions and “intend[ed] to monitor” their effect, 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.” 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.

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.

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. 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 Parliament. The truncated process once again elicited considerable concern and protest from members of Parliament. ...

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. Media stories again canvassed the copyright problems caused by AUSFTA, raising fears of “bully-boy tactics” and an “avalanche of litigation.” (pp.274-82)

### **Temporary reproductions: an example of the impact on Australians**

Watching a DVD, reading a webpage or streaming a movie all require copies to be made and communicated as part of the technical process of delivery. Under AUSFTA (Art 17.4.10) temporary copies must receive copyright protection, and all copyright exceptions must comply with the ‘Berne three-step test’. The changes required by the US during certification restricted the exceptions designed to allow technical uses by narrowing the type of reproductions that that might fall within the exception. There was no basis for these changes in the text of AUSFTA.

In lay terms, the changes could be seen as a back-door attempt to limit parallel imports by making the playing of legitimate overseas copies an infringement of copyright. All temporary copies (including those made when playing DVDs) are protected by copyright. An exception was made for temporary and necessary copies (such as those made when playing DVD). But that exception was limited to legal copies, and ‘legal’ was defined to mean would be legal *if made in Australia*. This means that legitimately produced DVDs made by companies without authorization to make those DVDs in Australia probably do not fit. If the exception does not apply, the temporary copies made when playing the DVD would be a copyright infringement. In reality, nobody has tried to enforce it – local experts consider it would be political suicide to do so.

The Law Society of Australia in its *Submission* (263) to the Australian Law Reform Commission’s review on [Copyright and the Digital Economy](#) in 2013 described the resulting system as ‘confusing, overlapping, incoherent and in some cases redundant.’ (para 11.20) Australian stakeholders ranging from broadcasters to educational institutions have noted that the current temporary copy exceptions closed off essential processes, required excessive licences to be obtained and put Australia at a disadvantage compared to other trading partners. This includes the US, which as a result of court decisions has less comprehensive protections for temporary copies and, in fair use, has a much broader exception.

28 January 2015

