AUSFTA

Submission No: 37

From: Anthony Towns [aj@azure.humbug.org.au] on behalf of Anthony Towns [aj@erisian.com.au]
Sent: Tuesday, 13 April 2004 8:40 PM
To: Committee, Treaties (REPS)
Subject: Submission to JSCT inquiry into Australia/US Free Trade Agreement

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Please consider attached submission in the review of the FTA.

Yours sincerely,
Anthony Towns

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Honourable Committee Members,

I am a voter in the Federal electorate of Ryan in Queensland. I work as an independant Linux consultant, for both local and international clients. I am a lead developer in the Debian project, a collection of volunteers that produces the Debian GNU/Linux distribution, which is consistently rated as the most popular distribution amongst Linux developers, and amongst the top few distributions amongst Linux users worldwide. Among other roles, I have had the privilege of acting as the project's release manager for the past four years, and speaking at a number of Debian conferences, both locally and internationally. I have also had the privilege of assisting in the organisation of each of the last four Australian Linux conferences, which are widely considered some of the best Linux conferences for developers anywhere.

I am writing to you regarding the inquiry into the Free Trade Agreement with the United States of America. I believe stronger ties with the United States are an important measure in improving the well being of both our countries, and the negotiating team deserves congratulations for achieving an outcome which balances both parties' interests as well as it does.

Unfortunately, there are significant problems with the approach to Intellectual Property (IP) in the Free Trade Agreement. I have had the privilege of working with Linux Australia on their response to this issue, and speaking with some of the individuals involved in drafting submissions from the Intellectual Property Research Institude of Australia, and the Australian Digital Alliance, and I would strongly urge the committee to carefully consider the concerns raised in those submissions. Due to the short period between publication of the IP measures in the Agreement and the deadline for submissions to this inquiry, my understanding is that these groups will be making use of the later deadline of the Senate Select Committee reviewing the Agreement to make more detailed submissions, and I encourage the committee to take the opportunity to review those submissions for any further information, if that is at all possible given the committee's deadline.

I fully share and support the concerns of the aforementioned organisations with regards to the IP policy required by the Agreement. In summary, IP rights, including copyright, patents and trademarks, are important features of the legal environment that protects and encourages creativity in Australia; but it is crucial to provide a balanced

regime of protection. By increasing the protection offered by various rights, making it easier to obtain exclusive rights, and restricting the ability of Parliament to dynamically adjust Australia's IP balance on its own merits, the Agreement risks doing serious harm to the creativity IP policy is designed to protect. Again, I refer the committee to the submissions of the aforementioned organisations for further elucidation of these points and their probable and potential affects on Australian consumers and industry.

One area upon that I do not believe is adequately addressed by those submissions is the prospect of successfully balancing Australia's IP policy within the confines of the Agreement. This balance is not a simple matter to achieve even without external restrictions, as evidenced by the effort that has gone into contributions to the review of the Digital Agenda amendments to the Copyright Act; and it is only made harder by the Agreement which requires not merely the retention of IP policies that have not proven themselves to be beneficial to Australia, but their extension. Given that the conclusions of a number of previous government inquiries and reports have been apparently ignored in favour of satisfying the American negotiators, and that the report prepared by the external consultant on the Digital Agenda amendments remains unreleased and apparently ignored, it appears reasonable to conclude that the Parliament will not undertake an effective review of our IP policy should the Agreement be enacted. I hope this line of argument is mistaken, and urge the committee to ensure that changes to our IP policy are carefully and publically reviewed before being put before Parliament.

I would thus like to raise a number of options that the committee may wish to consider in regard to providing an effective Australian IP regime while respecting the boundaries of the Agreement as negotiated.

The primary balance provided by the United States to its citizens against strong IP rights is a broad exemption for "fair use" of works; which is judged based on four aspects: the purpose of the use, the type of the work, the amount of the work used, and the impact on the market. This is a general exemption that is adjudicated by the courts in contrast with the Australian approach of offering specific exemptions. It has the benefit of coping far more flexibly with new technologies, but the drawback that it is difficult to tell when borderline activities are covered by fair use. As it stands, according to the interpretation of the Australian Copyright Council, the Australian approach does not protect families using the VCR to tape a favourite television show while they spend the evening out, let alone address the use of new technologies such as CD burners or the Apple iPod, even for private, personal use. Unfortunately, continuing the Australian approach to providing a balance protecting consumers' interests appears to be severely limited by the Agreement, warranting serious consideration of switching to the American doctrine.

The most well known implementation of an "effective technological measure" is the encryption of the content of DVDs. This issue has been the subject of a number of court cases internationally, as well as the Sony v Stevens case in Australia, which covered the circumvention of technological measures protecting PlayStation games distributed on DVD. These measures have been consistently tied with various protectionist activities, however: particularly notable is that of "region coding" DVDs, so that DVDs bought in any of eight regions, can be played only on equipment also purchased in that same region.

This blocks independent distributors from making use of parallel imports of DVDs, by preventing imported DVDs from being usable by the general public. Due to weaknesses in the protection offered copyright owners in Australia, these measures are only partially successful; but most of these weaknesses will be removed from the Agreement. These technological measures have not been successful at protecting DVDs from large-scale piracy, as evidenced by recent Australian cases that have successfully prosecuted such infringement. As such, another approach towards balancing our IP regime would be for Parliament to ensure that Australians may make use of the exemption provision in section 17.4.7(e)(viii) to, for example, distribute open source software to play DVDs and ensure they can watch imported DVDs. Such an approach would both directly benefit Australians by ensuring the viability and legality of parallel importation of DVDs and development of open source media players, and indirectly by demonstrating the effectiveness of this clause as a balancing influence within our IP regime.

An additional way in which Parliament could exercise its obligation to ensuring Australians' IP interests are successfully balanced would be to ensure that future bilateral and multilateral treaty negotiations provide a forum for raising and addressing concerns created by increased IP protections and stronger rights. The Washington Post reported in August 2003 in an article entitled "The Quiet War Over Open-Source" that the director of international relations for the United States Patent and Trademark Office opposed the consideration of open source with respect to IP policy development at WIPO on the grounds that "open-source software runs counter to the mission of WIPO, which is to promote intellectual-property rights." This refusal to allow any consideration of these concerns – whether deliberately as in the case above, or accidently as appears to have happened in negotiating the Free Trade Agreement – runs counter to the democratic process, and as such is a tendency that should be actively resisted by countries with as proud a democratic tradition as Australia.

Much is often made of "harmonisation" in discussion of global IP policies. In contrast, I would encourage the committee to instead focus on leadership – Australia is already a leader in many fields of creative endeavour, a fact which has only been encouraged by our tradition of applying careful and wide-ranging consideration to how we manage intellectual property in our society. I urge the committee to ensure not only that we are able to develop our own policies on intellectual property in the infromation age, but that we do.

Thankyou for the opportunity to comment, and for your consideration of these matters.

Respectfully submitted,

Anthony Towns