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AUSFTA.

Submission No: 85.1

21st May 2004

Secretariat
Joint Standing Committee on Treaties

In respect to the Australia-United States of America Free Trade Agreement, agreed at Washington on 8 February 2004 (FTA), the current reference of the Joint Standing Committee on Treaties in respect of that Agreement:

During the public hearing to the Joint Standing Committee on the 20th of April, we were asked to provide further information.

Mr Wilkie requested further information about the likely consequences of bringing Australia's laws in line with the American Digital Millennium Copyright Act (DMCA). American experiences with the DMCA can be read about at the following websites:

The website http://www.chillingeffects.org/ lists a broad range of DMCA-related material. The following page details how the DMCA can be used specifically to halt Open Source software development:

http://www.chillingeffects.org/question.cgi?QuestionID=211

Not strictly related to the DMCA but closely related:
http://www.theregister.co.uk/2003/04/17/ms_legal_threat_derails_foxpro/

The above example of anti-competitive behaviour is the sort of thing which Australian software companies such as ourselves do not have the legal muscle to withstand, even if the legal claims made are invalid.

http://chronicle.com/free/v48/i47/47b00701.htm

Mr Wilkie specifically asked for further details on the Russian programmer Dmitry Sklyarov. Details can be found on many Internet web sites, including:

http://www.techtv.com/news/politicsandlaw/story/0,24195,3365800,00.html
http://www.linuxgazette.com/issue69/orr.html
http://www.eff.org/IP/DMCA/US_v_Elcomsoft/

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In addition, we were also asked to give further details about how the proposed agreement would change Australia's laws in respect to software patents.

To the best we are able to determine, it appears that Article 17.9 varies aspects of current patent practice. It gives a blanket statement that any invention is patentable. This replaces the existing definition "*any manner of new manufacture within the meaning of section 6 of the* Statute of Monopolies 1624" (21-22 James I, c. 3.).

Section 6 of that Statute has explicit limitations that patents "*be not contrary to the law, nor mischievous to the state by raising of the prices of commodities at home or hurt of trade, or generally inconvenient*".

It is our understanding that this clause is frequently used by both the Courts and the Patent Office to limit business method and software patents. The removal of this clause will allow the widespread patenting of software. We have been given advice by solicitors experienced in patent law that this change is a significant change in practice.

I thank you for your time.

Yours sincerely,

Steven D'Aprano
Operations Manager