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PCProfile submission on FTA Copyright Provisions <http://www.pcprofile.com>

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**SUBMISSION TO THE JOINT STANDING COMMITTEE
ON TREATIES IN RELATION TO THE AUSTRALIA US
FREE TRADE AGREEMENT (FTA)**

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Introduction;

PCProfile's comments relate to chapter 17 which deals with intellectual property rights and in particular the copyright provisions of the FTA.

Most of our commentary surrounds the BSAA submission <http://www.aph.gov.au/house/committee/isct/usafta/subs/SUB126.pdf> and the failure of the software industry worldwide to adequately assist at the desktop level organisations to protect themselves against being caught with copyright infringement.

A. THE COST OF CREATIVE ENDEAVOUR

In respect of the issues raised by the BSAA at <http://www.aph.gov.au/house/committee/isct/usafta/subs/SUB126.pdf> they point out that;

The Committee made a number of key findings including:

- copyright piracy is a significant and costly burden to many Australian industries that rely on creative endeavour (paragraph 2.45);
- infringement of copyright is likely to increase in the future and a large proportion of infringement is likely to occur though the internet (paragraph 2.45).

PCProfile's Comments on "The Cost Of Creative Endeavour"

The comments about the "costly burden to many Australian Industries that rely on creative endeavour" nearly always refer to the amount of money lost by the "owners of intellectual property" when it comes to copyright infringement.

They overlook the true cost of copyright infringement as it is more likely something in the order of 4 to 5 times the raw sums quoted as industry losses due to the extended costs that include but are not limited to;

1. **System downtime.** What systems were out of commission and for how long whilst the auditors and anti-piracy police gathered the data whilst on premises?
2. **People downtime.** How many staff were unable to work, and how long were they unproductive whilst the anti-piracy raid was being conducted?
3. **Client downtime.** Did clients take their business elsewhere, whilst the anti-piracy raid was being conducted? Were there opportunity costs — lost contracts or business deals — due to systems being interrogated by personnel who weren't part of the organisation?
4. **Additional Hardware and software.** During the anti-piracy raid the solicitors seized hardware and software and records. How much did it cost to replace servers, hard drives, software programs and so on, to keep business operational whilst the raid and investigation was underway?
5. **Consulting Fees.** If extra personnel were required whilst defending a case or for a post mortem analysis, how much was spent on fees and other expenses?
6. **Staff Costs 1.** How much were the salaries for people who were disrupted and had to work extra time to assist in defending and resolving the action? Consider overtime payments as well for staff on wages/award rates.
7. **Cost of information.** What was the value of information — employee, shareholder, customer — which was removed from the premises during the interrogation period? How much effort and cost was involved in ensuring that when it was returned to you it was intact. What was the cost of this extra effort?
8. **Legal costs.** What were the actual costs of investigating and defending the incident?

9. **Software Costs 1.** Add up the costs of the software that you needed to buy as a result of detected discrepancies in counts of licences installed vs licenses paid for and then add a penalty factor payable as punishment for the crime.
10. **Staff Costs 2.** This cost line may be a necessary sum that you pay when terminating the employment of those who caused the infringement in the first place. It may be for the perpetrators who installed the software illegally in the first place or it may be for those who should have been managing and controlling the installation that didn't monitor the activity and protect the company. This cost is a cost of termination of employment.
11. **Cost to your company's reputation.** Did you spend money on a PR campaign to control the damage? It is certain by now that the anti-piracy police have had your name plastered in the papers, magazines and on their web sites, which is not the sort of free advertising you want to have for your organisation!
12. **Software Costs 2.** The cost of Software Asset Control tools that allow you to function as business and yet have the certainty and integrity in your systems that all software being installed is correctly tracked and monitored, so that you don't end up paying huge sums for items 1 to 11 again. If you had this software tool and system installed in the first place and had taken reasonable steps to continue with managing the assets, then steps 1 to 11 and the costs associated may have been minimised or even eliminated altogether!

The sum of these costs can add up to 4 to 5 times the order of magnitude of any published fines and penalties and does not take into account the industry losses that relate to lost revenue due to the theft of the software in the first instance!

These are the real costs that organisations who are caught with copyright infringement can face.

B. PROVING SUBSISTENCE AND OWNERSHIP OF COPYRIGHT

The FTA has an enforcement provision that is inadequate to assist industry to survive a copyright compliance audit program;

The requirement for presumptions to assist in proving subsistence and ownership of copyright (Article 17.11.4). The current onerous requirements for proof of subsistence and ownership of copyright have proved a major obstacle to bring in criminal proceedings.

PCProfile's comments on "presumptions to assist in proving subsistence and ownership of copyright" are;

The software industry, led by Microsoft who has the predominant share of the Operating Systems platforms in use world wide, has not yet made any attempt to provide any organisation with the capability to manage and control the piracy issue at the point of impact (at the desktop level) by providing proof of ownership capability embedded within the software.

The software industry traditionally has focused on maximising revenue from sales and not assisting the organisations who feel the impact of copyright infringement sometimes inadvertently.

Until such time as the software industry adequately assists the organisations with the capability to rapidly prove proof of purchase via electronic means embedded within the operating system software, then the **"onerous provisions of proof of subsistence and copyright" should be retained.**

C. PEER TO PEER FILE SHARING;

In respect of the issue raised by the BSAA of Peer To Peer file sharing;

"additional measures will be needed in both Australia and the US to deal with the more recent and growing phenomenon of peer to peer file sharing which allows internet users to illegally distribute vast quantities of copyright music, film and software."

This is not likely to be overcome by technology that limits the activity, but by enterprises managing the activity by management of the assets under their control. The home user market will be very hard to stop in this manner until the suite of existing P2P file sharing devices are overwritten by more advanced techniques, which have not yet emerged. For this reason; the **"onerous provisions of proof of subsistence and copyright" should be retained.**

Conclusion

PCProfile offers limited support for the copyright provisions of the FTA and believe that they need to be coupled with a direction to the software, music and movie vendors to offer practical assistance through accurate description and logging within the operating systems by identification of the software, music and movies that has been installed to facilitate ease of proof of ownership.

The "onerous provisions of proof of subsistence and copyright" should be retained until such time as the industry provides a more effective means to manage the use at the desktop level and focus on the total picture and not just on lost revenue from creative endeavour.

In the current form the proposed FTA copyright provisions make it "easier to punish" rather than assist organisations who try to "do the right thing", but are caught out by the massive wave of electronic data that is transmitted, often by osmosis into their systems, sometimes via legitimate means, and at other times via illegal means.

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