AUSFTA

Submission No: 93

Wilson, Frances (REPS)

From: Roger Clarke [Roger.Clarke@xamax.com.au]
Sent: Wednesday, 14 April 2004 12:22 PM
To: Committee, Treaties (REPS)
Subject: Fwd: Submission re the US-FTA Inquiry

FTA17-JSCT-04041 3.doc (31 KB)

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BY:.....

Dear JSCT'er

I don;t appear to have received an acknowledgement of receipt of my submission, which I sent last Wednesday.

I'd appreciate a quick emailed reply to confirm it arrived.

Thanks ... Roger Clarke

>Date: Wed, 7 Apr 2004 10:25:43 +1000
>To: jsct@aph.gov.au
>From: Roger Clarke <Roger.Clarke@xamax.com.au>
>Subject: Submission re the US-FTA Inquiry
>X-Attachments: :Egmont:384036:FTA17-JSCT-040413.doc:
>
>Ms Julia Thoener
>Committee Secretary
>Joint Standing Committee on Treaties
>Department of House of Representatives
>Parliament House
>CANBERRA ACT 2600
>AUSTRALIA
>
>Dear Ms Thoener
>
>I attach a submission to the JSCT re the Australia - United States
>Free Trade Agreement.
>
>A version with hotlinks embedded is at:
>http://www.anu.edu.au/people/Roger.Clarke/II/FTA17-JSCT-040413.html
>
>Yours sincerely
>
>
>
>Roger Clarke
>
>P.S. The activity home-page at:
>http://www.aph.gov.au/house/committee/jsct/usafta/index.htm
>states " ... the Committee would appreciate receiving electronic
>copies by email ...", but the link under 'email' does not contain
>the email-address.

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The Free Trade Agreement Provisions in Chapter 17

relating to Copyright and Patent Law

Submission to the Joint Standing Committee on Treaties

Roger Clarke

Principal, Xamax Consultancy Pty Ltd, Canberra

Version of 6 April 2004

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1. This Submission

I am a longstanding consultant in the strategic and policy aspects of eBusiness, information infrastructure, and dataveillance and privacy. My background is detailed at http://www.xamax.com.au/CV/RC.html and http://www.anu.edu.au/people/Roger.Clarke/#Person.

I have Honours and Masters degrees in Commerce (Information Systems) and a doctorate in Information Systems. I spent a decade as a senior academic at the Australian National University. I am currently:

- a Visiting Professor at the University of N.S.W. (in the Baker & McKenzie Cyberspace Law & Policy Centre);
- a Visiting Professor at the University of Hong Kong (in the eCommerce Programme);
- a Visiting Fellow at the A.N.U. (in Computer Science).

Affiliations that are relevant to this submission include:

- Fellow of the Australian Computer Society (since 1986), and sometime Chair of its Economic, Legal & Social Implications Committee;
- Board member of Electronic Frontiers Australia;
- Board Chair of AEShareNet Limited, a Ministerial company that provides copyright services in the education sector, particularly Vocational Education and Training (VET).

Although it is informed by my various affiliations, this is a personal submission. It relates solely to the intellectual property aspects of the FTA.

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2. Summary

The changes that the U.S. Government is seeking to impose on Australia through Chapter 17 of the FTA would be to the significant advantage of copyright-owners and patent-owners. These are overwhelmingly corporations, and overwhelmingly corporations domiciled in the U.S.A.

The Australian Government is of course fully justified in seeking to break down the high levels of U.S. protectionism, and to gain access to the U.S. market for Australian agricultural and pastoral goods on more reasonable terms.

But, in doing so, the Australian Government must not hold to ransom the country's burgeoning information industries, and the rights of its consumers and citizens.

On the basis of the analyses that I and others have conducted, I submit that there would be almost no advantages to the Australian economy or Australian society in implementing the changes imposed by Chapter 17; and there would be very serious disadvantages. The Parliament should therefore not agree to any of them.

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3. The Imposed Changes on Australian Law

Analysis of the impacts has been impeded by the manner in which Chapter 17 is drafted. It is not straightforward to extract from the documents the changes that would be forced on Australian law. Consequently it has been challenging for all parties to work through the implications that those changes would have.

The briefing session with government officers provided little additional information, and no evidence in relation to the impact of the proposed changes to law. What the session did provide, however, was the distinct impression that an agreement between the Prime Minister and the President was regarded as the key act of commitment, and that the Australian Parliament was at best marginally relevant. That in itself is a matter of concern.

This submission focusses on a some key elements of Chapter 17.

(1) In relation to Australian copyright law, the key impositions appear to be as follows:

- **extensions to the powers of copyright-owners** that are concerned about possible breaches of their rights, including extensions to discovery processes available to them (17.11.11); additional impositions on ISPs (17.11.29(a)); extensions of warrants to extract information from ISPs - quite possibly without judicial authority! (17.11.29(b)(xi)); extensions to the powers of injunction and seizure (17.11.9); provisions whose effect would appear to be higher financial liabilities for infringers (17.11.6-8); creation of additional criminal offences (17.11.26); and imposition of the term 'pirated' in a manner inappropriate to Australian law (17.11.19);
- **replacement of the 'Digital Agenda' extensions to copyright law by the** excessive, very widely cast, cumbersome and punitive **U.S. DMCA requirements** in relation to:

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- the use of **'circumvention devices'** (17.11.7);
- **'rights management information'** (17.11.8).

- **extensions to the life of copyright** (17.4.4);

(2) In relation to Australian patent law, the key implication appears to be as follows:

- **extensions to ensure that process patents are approved** (17.9.1).

The remainder of this submission presents brief analyses of the justification for the changes imposed by Chapter 17, of their economic impact on Australia, and of their impact on Australian society and culture.

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4. The Need for I.P. Laws to be Justified

Copyright and patent laws are interventions into the natural order of economic and social activities. They create monopolies, and invite the owners of the monopolies to 'extract rents' from them, i.e. to exploit the law in order to generate higher revenue than they would normally earn, and to impose higher costs on competitors.

Considerable justification is needed for the meddling that **copyright, patent and trademark laws** represent. In the past, moral and ethical justifications have not been considered to be sufficient. The justification has been sought, and needs to be sought, in economics: these laws **exist only to encourage innovation, by enhancing the scope for revenue flows to innovators.**

The proper purpose of copyright and patent laws is emphatically not to create or sustain competitive advantage for one corporation over another, or strategic advantage for one nation over another (even though, depending on the nature of the meddling, that can be their effect). They can be justified solely on the grounds that 'the economy as a whole will work better that way, because there will be more innovation'.

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5. The Lack of an Economic Case For the Changes

No convincing evidence has been presented in support of the argument that the digital era has undermined longstanding arrangements and that change is needed to sustain the status quo.

The U.S. and Australian music industries have invented all manner of statistical arguments, which, when investigated, have been found seriously wanting. The same goes for the U.S. proprietary software industry, or at least for Microsoft. (Many other I.T. companies say that they see patent law in particular as being to the serious detriment of innovation in the industry).

It is of the nature of things that large corporations in mature industries fight against technological change when it is driven by more nimble newcomers. For example, entertainment companies fought very strongly against video-recording; but once they finally adapted to the new technology they made massive profits from it.

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Music companies' aggressive resistance against peer-to-peer (P2P) reticulation of recorded music is finally giving way to adoption of the technology. The corporations were clearly told 10 years ago that they will be able to achieve large turnover and high margins once they adopt a constructive approach to the new opportunities. The early signs from leading initiatives such as Apple's iTunes are that the pundits were right, and that consumers are prepared to pay remarkably high prices for such services.

The equally vicious opposition by Microsoft to open source software is just as ill-informed and unjustified. A healthy marketplace is emerging, based on value-adding by companies to publicly-available code. This has already resulted in reduced costs to user organisations and consumers, even though the movement is relatively new and has been retarded by the aggressive actions of large corporations. Open source software offers additional and important benefits in the form of far earlier discovery of security and integrity problems, and hence improved quality of software products.

The beneficiaries of the features of U.S. law that the U.S. Government wants to impose on Australian law are large U.S. corporations, in particular the large music and multi-media corporations, and Microsoft. But the case put forward by these corporations has been based on misinformation. The proposed extensions to the monopoly rights are not justified.

It is important to note that **the onus is on those corporations to provide that justification**. That is **because copyright and trademark law are anti-competitive measures that intervene in natural market processes**. The Government's own competitive neutrality policy dictates that special privileges can only be granted where substantial evidence has been presented, and has been subjected to critical appraisal.

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6. The Economic Argument Against the Changes

Innovation is dependent on ready availability of information. Especially in the booming digital information industries, innovation rarely occurs in some 'big bang' manner. Rather, it is almost entirely cumulative. Successive small, step-wise refinements are made. Ideas are transported from one context to another, and adapted to new situations.

Moreover, there is seldom a sole-originator of an innovation, because modern industries are symbiotic. Manufacturers are dependent for many of their new product features on:

- their suppliers – through new features in componentry that they incorporate, and their questions and suggestions;
- their customers – through requests, and feedback on previous rounds of new product features;
- their competitors – through observation of one another's products, and comments made by customers about competing products; and
- cross-fertilisation – through common suppliers, common consultants, educational institutions, research laboratories, and employees moving from one company to another.

In short, **innovation is seldom achieved by one organisation making a massive breakthrough, but by many organisations and a great deal of ongoing interaction.** Rather than 'one person standing on the shoulders of giants', most progress is achieved by hordes of busy elves.

Information economics shows that innovators can achieve returns even if they only have quite limited monopoly rights. **Laws to prevent mere imitation without enhancement are readily justified; but that level of protection has been sustained through relatively minor refinements to the law.**

Process patents are an especial concern. Since the Carter Administration, patents have been an explicit weapon of U.S. international competitive strategy. The U.S. Patents & Trademarks Office (USPTO) has lowered the threshhold of innovation required of a patent application to the point that almost anything is approved. The 'contribution' can now be a minor and obvious refinement, it may relate to a mere 'business process' rather than an 'industrial process', and even vague generic claims are accepted. **Progress in eBusiness is being seriously harmed by the USPTO's acceptance of patent applications relating to fundamental ideas** such as 'one-click shopping', 'reverse auctions', 'automated credit-checking' and even the notion of a 'hot-link'.

Innovation is also being seriously constrained by legal actions initiated by large corporations. **Copyright and patent laws provide large copyright-owners and patent-owners with the ability to deflect the attention of innovators from their work, to impose years of delays and very high legal costs, and in some cases even to prevent innovation from taking place.**

There is strong evidence of patent-owners in particular using their legal rights as strategic weapons against competitors. An innovative Australian company recently described patents as "a worthless must-have", because every innovative company needs to have a small collection of them in order to counter-threaten competitors when they seek to delay the implementation of innovative products.

In short, **the longstanding intention of copyright and patent law to stimulate innovation is being frustrated by the manner in which it is being used by its monopolist beneficiaries.**

It is accordingly seriously against Australia's economic interest for copyright and patent laws to be extended at all, let alone in the manner that the U.S. is seeking to impose on Australia through the terms of FTA 17.

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7. The Social and Cultural Argument Against the Changes

Australian society has had a long and strong dependence on open information flows. This has been protected by an orientation towards open accessibility, and significant qualifications on the rights of copyright-holders.

A first concern is that **enhancements to the powers of copyright-holders increase the incentive for organisations and individuals to exercise proprietary power over software, over multi-media, and over information more generally.** This works against open source and open content thinking, increases both the purchase costs and

the transaction costs to software and information consumers, and hence reduces the accessibility of software and information.

A further concern is that **use of the draconian powers that the changes would grant to copyright-owners would result in information suppression through take-down notices**. These are already having the effect in the U.S.A. of causing ISPs to automatically remove the web-pages and even whole web-sites of individuals and small companies, merely because they receive a threatening letter from a lawyer purporting to be acting on behalf of some major corporation.

It is important to note that **the effect of the proposed changes would be even more serious in Australia than they already are in the U.S.A.** One reason is that Americans enjoy a measure of protection because they have a Bill of Rights entrenched in their Constitution which includes freedom of speech provisions.

A second reason is that U.S. copyright law qualifies the rights of copyright-holders with 'fair use' provisions that are much more substantial than the Australian law's 'fair dealings' clauses. There appears to be nothing in the FTA that requires strengthening of consumer protections, and hence Australians would suffer the worst excesses of the U.S. legislation without even the limited countermeasures that U.S. consumers have available to them.

The powers that Chapter 17 seeks to impose would assist corporations in their endeavours to oppress their opponents, including not only their economic competitors but also their economic and social critics. This can be achieved through threats of expensive litigation, and of invocation of the criminal law. In addition, the credibility of that oppressive behaviour would be greatly increased if the U.S.-dictated provisions were implemented in Australian law.

These are not mere theoretical or speculative arguments. The DMCA provisions have been used in the U.S.A. to seriously infringe the freedoms of a number of people. These include Russian Dmitry Skylarov (who was gaoled for months, but the charges were later withdrawn), Norwegian Jon Johansen (who was subjected to many months of prosecution in his homeland, which was eventually rejected by the courts, and who has been advised never to enter the U.S.A.), and American Ed Felten (who was threatened with prosecution if he presented a paper at a conference, another threat that was later withdrawn).

The obligations embodied in the FTA 17 requirements, if they were implemented, would seriously harm the public interest in openness, and hence damage both social processes and Australian culture.

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8. Conclusions

If the Australian Parliament were to comply with the terms of FTA Chapter 17, it would have to make changes to copyright and patent law that are demonstrably against the interests of innovators, because they fundamentally change the character of those laws from being stimulative of innovation to being protective of the existing activities of large corporations.

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Most critical among the many unreasonable U.S. impositions are the following:

- enormously increased powers for copyright-owning corporations, enabling them to disturb the business activities of their competitors, attack normal consumer practices, and suppress information;
- draconian requirements of Internet Services Providers which would be burdensome for those businesses, and intrusive into the activities of their business customers and of the consumer/citizens who have accounts with them;
- extension of the already excessively long life of copyright by a further 20 years;
- issue of patents for mere descriptions of business processes, which is completely at odds with the very notion of patents, and seriously constraining on the conduct of business.

Copyright and patents are legislated monopolies. They enable owners to prevent other organisations and individuals from being creative. Their sole justification has been the stimulation of innovation by providing a window of opportunity during which an innovator can exploit their ideas.

The new philosophy pursued by the U.S.A. in its own economic interests is that owners of copyright should have greatly enhanced powers in order to make profits, and thereby benefit the U.S. economy at the expense of the economies of other countries.

There are well-established multilateral agreements in place concerning copyright and patent. The Australian Government has agreed to undermine those multilateral agreements by including within a bilateral trade agreement fundamental changes to its laws.

Moreover, there are well-established multilateral processes in place to enable debate about copyright, patents, trademark and design laws. These involve consultations, and specialist negotiators. The Australian Government has agreed to undermine those multilateral processes by overriding them with an *ad hoc*, bilateral trade negotiation process.

The Australian Parliament must reject these changes to copyright and patent law. They are economically, socially and culturally harmful to Australia. They serve the interests of U.S. corporations, not Australians.

Resources

This submission has drawn on my series of papers in the intellectual property area, at http://www.anu.edu.au/people/Roger.Clarke/EC/AnnBibl.html#IP.

A very considerable number of Australian organisations have expressed concerns along the lines expressed in this submission. Organisations that deal with the Government across a range of issues naturally express their concerns somewhat gently; whereas those that are not constrained by *realpolitik* are more forthright. An index of expressions of concern is being maintained on my 'working-paper' page, at http://www.anu.edu.au/people/Roger.Clarke/II/FTA17.html#Res.

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