30 April 2004

Senate Select Committee on the Free Trade Agreement between Australia and the United States of America

Submission by
Dr Anthony Place

This treaty is lobotomizing the smart country, and I'm not feel that lucky either.

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Secretary
Senate Select Committee on the Free Trade Agreement
between Australia and the United States of America

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I am a research engineer that is appalled with the FTA, in particular Chapter 17. I see it as an unjustified threat to me doing my work and other things that I like, which are legal and do no involve violating anyone's IP.

The most unjustified sections are those relating to technological protection measure, and the best metaphor I can make for this is:

> ***Your neighbor is threatened by the possibility of theft. So to improve their security, would you as a law abiding citizen accept that your neighbor fencing in your back yard and local public park, locking you out. Further, would you then support a Real Property Act amendment which specifies that; if this fence is built around you back yard and a public park, it is a criminal offence to tamper with it. This is what the TPM and circumvention devise definitions would allow companies to do with intellectual property.***

After examining the submission to date (updated 30/4/2004) I see that all are against the Free Trade Agreement between Australia and the United States of America (FTA). I am concerned as to the extent to which the FTA has progressed without public input and/or full disclosure. I can now only hope that the Senate will effectively block many of the required legislative changes.

The seeming wholesale adoption of the US attitude to IP is wrong. There are many people concerned with the DMCA and believing that it is having the opposite effect to that which it is meant to have. IP law should be seen as a legal exemption to completion law and should only exist for the overall benefit of society. As I will detail, Chapter 17 of the FTA is not for the benefit of the Australian people, or anyone other than the large corporations providing content.

Although I am concerned that the FTA as a whole and it's so called "benefits" to the Australian public, I am particularly aware of the IP related issues outlined in Article Seventeen "Intellectual Property Rights" and will focus on these in my submission.

Background

The Copyright (Digital Agenda) Act (Cth) was introduced around 3 years ago as the "cutting edge" and was found by the Phillips Fox Review commissioned by the Attorney Generals Department to need a bit of sharpening. The report was released to the Government in January 2004, prior to the signing of the FTA, but publicly released 28 April 2004. This report makes 20 specific recommendations, none of them suggesting the adoption of the DMCA interpretation of copyright protection. In fact most of the recommendation suggest the focusing and narrowing of many restriction imposed by Copyright (Digital Agenda) Act.

Since this is the only independent extensive review on this topic, including public comment, I implore the Senate Select Committee to carefully review this report before accepting any legislation to effect the FTA provisions.

I might add that the release of this report was exactly 30 days after my FOI request (the legislative limit) and around 4 months after the Government originally received the report. To me this is just a further non-transparent action by the Government in regard to the evaluation and adoption of the FTA. The Attorney Generals department states[1] that:

> ***In some areas, the copyright provisions of the Free Trade Agreement supersede the recommendations made in the Phillips Fox report. Where relevant the Phillips Fox report is being used to inform the Government's implementation of the Free Trade Agreement obligations.***

The problem is that the Philips Fox report suggests moving in one direction and the FTO says to jump the other way. In effect the Phillips Fox Report was ignored when signing the FTA, and I assume will have little effect on the required legislative changes to bring it to force.

Adopting a DMCA style legislation will mean that the Jon Johansen's[2] and Dmitry Klyarov's[3] of Australia would be criminals under the Copyright Act without ever infringing a single owners' copyright. The case against the DMCA is large with many technical organisations opposing it.

[1] Attorney Generals web site http://www.ag.gov.au/www/securitylawHome.nsf/allDocs/RWP18B3985DD6A0767FCA256D9D00815B56?OpenDocument

[2] Jon Johansen spent 4 years of his life fighting against the entertainment industry to be found not guilty. http://www.theregister.co.uk/2003/01/07/dvd_jon_is_free_official/ . In the mean time the US has determined that DeCSS violates the DMCA.

[3] Dmitry Klyarov developed software, as an employee, that was legal in Russia. He was arrested in the US under the DMCA while attending a conference. He spent around 6 months in the US before being able to return to his family. http://www.eff.org/IP/DMCA/US_v_Elcomsoft/

Specific Issues with the FTA

Chapter Seventeen: Intellectual Property Rights

Article 17.4: Obligations Pertaining to Copyright.

Section 17.4.1 Scope

This section is ambiguous as it pertains to all reproductions, in any manner or form, permanent or temporary (including temporary storage in material form). By its express inclusion of temporary storage in material form suggests temporary reproductions that are not in a material form are also under the control of the authors, performers, and producers.

This has the potential of broadening the scope of the Copyright protection. This has implications for ISP liability and access to works in general.

Section 17.4.4 Term Extension

Term extension is not in the benefit of innovation. In an environment where change rapid is key, the extension of monopoly access to works will only restrict creativity and innovation.

Mickey Mouse is protected for another 20 years.

If Mickey Mouse can be protected by any TPM he will become immortal.

Recommendation
Australian consumers should be granted similar "Fair Use" rights as compensation for this significant term extension.

Section 17.4.7 (a) – (b)

Technological Protection Measure - Circumvention Device

This section closely adopts the US definition of Technological Protection Measure (TPM) as follows;

> Effective technological measure means any technology, device or component that, in the normal course of its operation, controls access to a protected work, performance, phonogram, or other subject matter, or protects any copyright.

and further expands the scope of the current Australian definition of TPM from;

> Technological protection measure means a device or product, or a component incorporated into a process, that is designed, in the ordinary course of its operation, to prevent or inhibit the infringement of copyright in a work or other subject-matter by either or both of the following means…

The new definition, based on the DMCA wording, concentrates on restricting access to a protected work without any regard to infringing any of the owners' copyrights. In contrast to this the Phillips Fox review recommended [4] the interpretation of Sackville J in Stevens which was to directly link the design of the TPM to the inhibiting of copyright infringement.

My interpretation of this is that the sole purpose of a TPM must be the protection of copyrights, and a single system component should be capable of being dissected into functions forming the TPM (the fence around your own property) and those that form a non-copyright related barrier (the fence around others property). Under the current wording of the FTA; if a system component has a function that is a TPM then the whole component is a TPM. This becomes a very important issue when determining whether a device is a circumvention device. Asking the question, does a device primarily circumvent a TPM or some other function bundled with the TPM.

It should be emphasised that in many cases copyright owners, especially the large entertainment industry, can focus a device or process to protect the content and disregard other functions such as regional zoning and access to the hardware. Users should have a right (at least under the Copyright Act) to access non-infringing copies purchased outside of the region coded into the player, as recommended by Philips Fox, ACCC and EFA[5]. In addition owners of any devices should be allowed to access the device for non-infringing purposes such as using then as a standard computing device[6]. In the Stevens case it was

[4] Philips Fox review recommendation seventeen.
[5] Phillips Fox review recommendation seventeen, ACCC http://www.accc.gov.au/content/item.phtml?itemId=88752&nodeId=file3e9a248c0b4f0&fn=Fels_Mel_Bus_61202.pdf , EFA http://www.efa.org.au/
[6] The Open source community continues to place Linux on many custom devices such as Sony XBox, iPaq PDAs etc, enhancing their function and not infringing any owners' copyrights'. http://www.linuxdevices.com/

decided that, since one function of the device was to perform a TPM[7], the whole device was a TPM, and therefore a device that removes this TPM function is a circumvention device even though it has many non-infringing uses.

A further problem is that a single function of the device can not typically be removed in isolation. But this should not restrict people removing the NON-TPM functions of the device (to the possible removal of the TPM). The onus should be on the developers of TPM to only protect copyrights with the process. In Sony v Stevens this approach could have been taken by Sony, but why limit you control if the copyright Act allows unlimited protection.

Recommendation
The interpretation imposed in this section should be specified as:
a) A TPM is the function of controlling access to copyright works and/or protects copyrights. Any deviation from this by protecting or controlling access to non-copyright works will exclude it as a TPM function.
b) A device can be dissected into functions including TPM and any NON-TPM functions. If there are significant reasons for removing a NON-TPM function, then this should exclude any device (or service) used to remove the NON-TPM function being categorised as a circumvention device (or service).

Section 17.4.7 (e) – (f) Exceptions

These section do not allow for any Fair Use/Fair Dealing exceptions as recommended by the Philips Fox Review[8]

In addition this only allows for the possibility of these exceptions and does not require the granting of them. The exceptions are extremely limited and would in general not allow enough scope to genuinely promote the availability circumvention devices or services to adequately facilitate the performance of these acts.

Recommendation
The current “fair dealing” exceptions should be exempt
Additionally “fair use” exceptions in the US should be introduced and exempt.

This would require that copyright owners, relying on TPMs, provide consumers with sufficient access to works.

[7] One function of the device was to restrict access to pirated games. Other functions of the device that do not involve copyrights were to (a) enforce regional zoning and (b) to restrict access to the hardware for third party applications.
[8] Phillips Fox review recommendation seventeen

Section 17.4.8 – Rights management information

This section is similar to the current Australian RMI provisions, which applies if "a person removes or alters any electronic rights management information"[9].

The basis is that the person is responsible for their direct actions on the work. It does not apply to the creation of devices or tools that remove or alter RMI.

Recommendation
This is more in line with how I believe the TPM and circumvention device section should be written. The person directly involved with an infringement should be held responsible.

Section 17.8: Designs

This section is unclear and could mean anything. Basically there is meant to be a convergence of Design Law.

I am hoping that the changes proposed in the Designs Bill 2002 (Cth) are sill possible.

Recommendation
Retain the spare parts provision as proposed in the Designs Bill 2002.

Section 17.9 Patents

I am not that familiar with the current Australian Patent Act but I would like to state my disapproval of software patents, in particular, the rapid growth of software patents in the US.

As a software developer, I believe moving in this direction has a real potential to limit software development in Australia. Software currently has copyright and "trade secret" protection. There is no need to further protect software.

[9] Copyright Act 1968 (Cth) s116B

Conclusion

The FTA chapter 17 does not even come close to providing a balance between consumers' access and owners' rights. There is a strong bias toward the rights holders, who in the case of large entertainment companies already have too much market power. Remember IP is innovation and it is no good for Australia to lock it behind technological protection measures and unjustly restricting access.

I wish to reiterate that IP laws provide an exemption to the competition law and not the other way around. I hope the senate will act in the interest of consumers (the voters) when they vote on any legislative changes.

Yours Sincerely
Anthony Place

2 May 2004

Senate Select Committee on the Free Trade Agreement between Australia and the United States of America

Constitutional concerns with the Free Trade Agreement

Additional Submission by
Dr Anthony Place

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Constitutional concerns with the Free Trade Agreement

I am a research engineer that is appalled with the Free Trade Agreement (FTA), in particular Chapter 17. I see it as an unjustified threat to me doing my work and other things that I like, which are legal and do no involve violating anyone's IP.

I am not a constitutional lawyer, but I have a very strong understanding of the technical consequences of chapter 17 of the FTA in regard to the proposals for defining Technological Protection Measure (TPM) and circumvention devices, and I believe they goes way beyond the scope of 'copyrights'.

After reading the Australian Constitution, I am unsure how the government gets authority to pass laws that limit access to legally obtained information (copyright or otherwise). I would like to see the constitutional justification of the proposed adoption of the FTA in regards to TPM and circumvention devices. The following is my engineering understanding of the constitutional issues, after looking at it for a few hours.

S51(xviii) grants powers to parliament to make laws in respect to copyrights, patents of inventions and designs, and trademarks. It does not grant powers to make laws in respect to access, as this is not an issue of 'copyrights'.

I realize there are High Court cases that have set precedent in determining that; where the Constitution confers a power, that power includes the core power and an implied incidental power to do everything to give effect to the core power.

My understanding is that these implied powers are defined as those which are necessary to exercise their express powers, and can extend beyond those that are just required such that without them the express power is inoperable.

However the incidental power to an enumerable power extends to topics, legislation on which facilitates or is 'appropriate to effeculate' regulation of the topic mentioned in the enumerated power.[1]

This should mean that in order for the topic to fall within the implied incidental power to an enumerated power, it must be shown that the topic bears a sufficiently close connection to the power or 'is directed to the reasonable fulfillment of the power'[2].

Given the tenuous association between the access of a work and copyrights, the proposed definitions provided by the FTA seem unreasonable and inappropriate. Additionally not associating the TPM as specifically (or exclusively) with copyrights, or some other topic specified in the enumerated powers, seem to sit outside these judgments.

Further the broadening of the access controls provided by the FTA definitions of TPA and circumvention device seem to so extend powers way outside the reference of copyrights, patents designs and trademarks.

Recommendation

I would urge the Senate Select Committee to make a full and public investigation into the constitutional issues of any amendment used to effect the provisions for TPM and circumvention device as specified in chapter 17 of the FTA.

Yours Sincerely
Dr Anthony Place

[1] Nationwide News Pty Ltd v Wills (1992) 177 CLR 1
[2] Burton v Honan (1952) 86 CLR 169 Dixon CJ.