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Secretary
Senate Select Committee on the Free Trade Agreement
between Australia and the United States of America
Suite S1.30.1
The Senate
Parliament House
Canberra ACT 2600
AUSTRALIA

Email: FTA@aph.gov.au

Dear Sir/Madam

Inquiry into the Free Trade Agreement

Please find attached the submission from Electronic Frontiers Australia in relation to the Committee's inquiry into the Australia

EFA appreciates the opportunity to make a submission and would be pleased to present oral testimony and respond to any questions Committee members may have.

Yours faithfully

Matt Black
Board Member and Secretary
Electronic Frontiers Australia Inc.

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Executive Summary

Electronic Frontiers Australia submits that the implementation of Chapter 17 of the Australia – United States of America Free Trade Agreement would have the result of impeding innovation, hampering the adoption and use of modern information technologies and interfering with the ability of technology users to access and utilise information. We oppose the wide expansion of intellectual property rights and powers embodied within the Agreement and note the unfortunate lack of attention in Chapter 17 to issues of promoting innovation, open flows of information and the further development and acceptance of modern information technologies. On the whole, there are clear and cogent economic and social arguments against the expansion of intellectual property rights. Given the central role of information and related technologies in Australia's continued prosperity, and the likelihood of that role expanding, the value of Australia's interests being given up by Chapter 17 is likely to outweigh any benefits that might be gained in other areas.

About EFA

Electronic Frontiers Australia Incorporated ("EFA") is a non−profit national organisation representing Internet users concerned with on−line rights and freedoms. EFA was established in January 1994 and incorporated under the *Associations Incorporation Act* (S.A.) in May 1994.

EFA is independent of government and commerce, and is funded by membership subscriptions and donations from individuals and organisations with an altruistic interest in promoting online civil liberties. EFA members and supporters come from all parts of Australia and from diverse backgrounds.

Our major objectives are to protect and promote the civil liberties of users of computer based communications systems (such as the Internet) and of those affected by their use and to educate the community at large about the social, political and civil liberties issues involved in the use of computer based communications systems.

EFA policy formulation, decision making and oversight of organisational activities are the responsibility of the EFA Board of Management. The ten elected Board Members act in a voluntary capacity; they are not remunerated for time spent on EFA activities. The role of Executive Director was established in 1999 and reports to the Board.

Introduction

Electronic Frontiers Australia Incorporated (EFA) thanks the Committee for its invitation to make a submission on the purpose or content of the Australia – United States of America Free Trade Agreement (FTA), agreed at Washington on 8 February 2004, due to be signed after 13 May 2004. The purpose of this submission is to express EFA's concerns about the likely impacts of Chapter 17 of the FTA on Australia's economic, technological and cultural position.

Intellectual property issues have increasingly become the concern of computer and Internet users, and developers of related technologies. EFA understands that the Committee has a broad role in examining the FTA in its entirety, but this submission confines itself to certain intellectual property law aspects of the FTA.

This submission is presented in two main parts. First, the submission sets out broad policies and principles of intellectual property which EFA supports and which EFA believes need to be protected in order to promote the national interests of Australia, both as a nation and as a community of individuals. The submission then turns to the specific text of certain provisions of Chapter 17 of the FTA and addresses those of most concern to EFA.

Broad policies and principles of intellectual property

EFA supports balanced intellectual property laws that provide incentives for innovation whilst protecting and building national culture and a rich public domain. Laws that stifle innovation, reduce access to information and constrain the legitimate uses of technologies should be resisted.

In this part, this submission will argue that the proper role of intellectual property law is to provide incentives for innovation in order to enrich the public domain. It will be explained that too much power and protection for rights−holders leads to less rather than more innovation, as the rights

become tools of competitive advantage. This part submits that there are compelling reasons militating against any expansion of intellectual property rights.

The role of intellectual property law

The proper role of intellectual property law is to encourage innovation and creation in order to grow and enrich our cultural and technological public domain. The public domain is rarely mentioned in legal debates about amending intellectual property laws, but it is at the heart of all intellectual property law. For example, the law of patents requires applicants to provide sufficient details of their invention so that others can reproduce it. This information later becomes part of the public domain so that it can be freely used and built upon. Similarly, copyright encourages the creation of works primarily so that those works can become part of the public domain upon which our culture is built.

It has become increasingly common to hear reference to the right of authors, musicians, artists and other creators to be paid for their work. We are told that copyright is the means through which this is achieved, and that those who infringe upon copyrights are 'stealing' from deserving artists. We are informed that without strong property rights, innovation and creativity will be stifled and we will no longer enjoy such a rich array of cultural and technological development.

This is powerful rhetoric. It serves to structure debates about copyright in particular ways. If copyrights are the only way for deserving artists to earn their income, who could argue against strengthening copyright and cracking down on the copyright pirates and thieves? If copyright serves to promote cultural and technological development, then surely more and stronger copyright means more and better development?

There are a number of difficulties with this argument. First, society is not concerned with granting artists and creators a right to income *per se*, but rather a right to an opportunity to earn an income. This is not just a semantic distinction. Talk of a right to an income leads down the path towards arguments saying that existing income streams and business models must be protected, even if it means criminalising a wide range of activities and technologies. On the other hand, granting a right to an opportunity to generate an income leaves open the possibility that with changing technologies and global environments new methods of exploiting income opportunities may need to be found.

A second difficulty is that the argument misleadingly suggests that more protections over intellectual property equates to more innovation. This is a fallacy. As will be discussed below, economics clearly shows that so long as there is some meaningful incentive, innovation will take place. The nature and wealth of Australian society also provides an environment in which much creativity takes place for reasons other than economic gain.

When intellectual property rights are too strong, those rights holders are provided with strong incentives to use their monopoly powers to prop up existing revenue streams and maintain technologically and culturally untenable business models. Overly protective intellectual property regimes fail to allow markets to operate effectively, thereby stifling the adoption and development of superior technologies and methods.

Rather than pursuing an agenda of strengthening the position of existing business models and expanding the power of rights holders to control technologies and innovations, Australia should be designing its intellectual property laws to maintain the minimum necessary incentives for innovation whilst allowing the market to operate effectively in developing modern methods for the distribution and enjoyment of intellectual property.

This approach would ensure that intellectual property rights achieve their proper purpose, which is to encourage innovation and creativity – not just so that income opportunities exist for creators, but more importantly so that our cultural and technological public domain continues to be built upon and enriched.

Incentives and innovation

Once it is accepted that the role of intellectual property rights is to provide incentives for innovation in order to promote a valuable public domain, the focus then becomes how that can most effectively be achieved. There are numerous models and approaches that serve as alternatives to the current intellectual property regime, although their exploration is beyond the scope of this paper. It is also recognised that in the current political and world environment, a dramatic shift in approach is unlikely. In that context, EFA supports achieving the best balance possible in the current legislative framework.

In that balance, it must be remembered that any move towards less protection is a move towards the natural order. On the other hand, more protection signifies further market intervention and a shift away from the natural order. Shifts towards the natural order hardly need a justification, but any legislative move for more protection needs to be underpinned by reasons that are both widely debated and widely accepted.

Given the level of technological and artistic development in contemporary society, and the attendant levels of consumer spending on intellectual property, it is clear that there is no general need for further broad incentives for innovation. Rather, the approach that needs to be taken is the identification of barriers to innovation so that they can be considered, and if appropriate, addressed.

Information economics shows that innovators can achieve returns even if they only have quite limited monopoly rights. The prevention of mere imitation without enhancement is justified and current intellectual property rights achieve a high level of protection against that. Rather than identifying and addressing barriers to innovation, the proposed laws contained in Chapter 17 would simply effect changes that enhance the ability of rights holders to control their content and litigate against alleged infringers.

There is no doubt that these changes would assist those who control intellectual property, particularly well−financed corporations, to protect or enhance revenue streams. However, there is also no doubt that the changes are not designed to either encourage further innovation or to address impediments to innovation.

A more likely outcome of the extensions proposed by Chapter 17 is a stifling of innovation. The proposals would give copyright and patent holders too much control and too much protection. This would limit the ability of others to create and innovate because it would reduce the scope of allowable innovative activities and limit the growth of the public domain.

Expanding intellectual property rights

Chapter 17 of the FTA would commit Australia to substantially expanding the monopoly powers of intellectual property rights holders. Given the market distortion created by intellectual property rights, considerable justification is needed for their existence, let alone their expansion. Copyrights and patents are economic rights granted by society and their justification must be similarly found in economics.

It is central to the notion of intellectual property that raw information, aside from confidentiality considerations, is not and should not be afforded protection. Information has always been the lifeblood of a successful nation and this is true now more than ever. As the value of information to society increases, we must take care to ensure that it remains free rather than allowing it to fall into the control of a select few.

Innovation is being seriously constrained by legal actions initiated by corporations opposed to innovation. Copyright and patent laws provide large rights 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 at all.

Intellectual property rights were used in the Betamax case in an attempt to suppress technology. In an environment reminiscent of current media industry rhetoric regarding peer−to−peer technologies, the movie industry fought against home video recorders, losing with the narrowest of margins in the US Supreme Court. When technological development threatens existing revenue streams and business models, intellectual property rights tend to become weapons used against innovation.

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 extent of control which it provides to rights holders and the manner in which it is being used by its monopolist beneficiaries. It would clearly be against Australia's economic interest for copyright and patent laws to be extended at all, let alone in the manner proposed by Chapter 17.

There are also important cultural and social arguments against the expansion of intellectual property rights. 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 intellectual property holders.

A particular concern is that an extension to the power of intellectual property holders increases 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.

The effect of the proposed changes in Chapter 17 would be even more serious in Australia than they already are in the US. One reason is that Americans enjoy some 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 US copyright law qualifies the rights of copyright−holders with 'fair use' provisions, and a body of well−established case law clarifying those provisions, that are much more substantial than Australian 'fair dealing' clauses. There appears to be nothing in the FTA that requires strengthening of consumer protections, so Australians would suffer the worst excesses of the US legislation without even the limited countermeasures that US consumers have available to them.

The powers are also easily used by corporations 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. The potential for such oppressive behaviour would be greatly increased if the FTA provisions were implemented in Australian law.

These are not mere theoretical or speculative arguments. Provisions similar to those in the FTA have been used in the USA to seriously infringe the freedoms of numerous people. These include Russian Dmitry Skylarov (who was imprisoned for months, but with the charges eventually 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 USA), and American Professor Ed Felton (who was threatened with prosecution if he presented an academic security research paper at a conference; a threat that was later withdrawn).

There are compelling reasons against any expansion of intellectual property rights. Expansion is not required to protect or promote innovation and would be more likely to work against innovation.

Free Trade Agreement, Chapter 17

Although this part of the submission deals in some detail with specific provisions of the FTA, it must be remembered that the approach taken in the FTA assumes a particular ideology. EFA urges the Committee to bear in mind that the promotion of creativity, innovation and related profitable industries does not necessarily depend upon the current legal structures or the proposed shifting of balance found within the FTA.

When the issue of intellectual endeavour is approached with the goal of promoting innovation and creativity in a way that rewards the innovators and creators, a range of alternative models can be found. These models are beyond the scope of the current submission, but it is folly to assume that the systems first established by laws such as the Statute of Anne 1710 are the only or best way of encouraging and rewarding creativity and innovation.

Intellectual property laws are a tool of government that should only be used to promote creativity and innovation. In pursuit of this objective, intellectual property law will sit somewhere between the complete freedom of intellectual products – which is the natural order of things – and the complete control of intellectual products by their creators. EFA believes that shifts towards the natural order are *prima facie* justified, unless evidence shows that society is better off not making that shift. Similarly, shifts away from the natural order are *prima facie* unwarranted, unless evidence clearly shows that the shift would be in society's benefit.

EFA is cognisant of the difficulty inherent in pursuing alternative means of enforcing a right to remuneration, but nevertheless encourages the Committee to approach its consideration of Chapter 17 of the FTA from the perspective of furthering creativity and innovation, rather than punishing "infringers" and strengthening the position of corporations with large−scale intellectual property holdings.

Chapter 17 in the context of free trade

EFA notes that free trade between nations is commonly defined as the absence of barriers to trade in the form of government interventions. The preamble to the FTA speaks of Australia's resolve to "further liberalize [sic] and expand trade and investment" and to "foster creativity and innovation". These are worthy sentiments, but EFA believes that most provisions of Chapter 17 fail to promote these sentiments and are more likely to work against them.

For example, the proposed expansion to the powers of copyright holders and strict bans on circumvention devices are likely to impede free trade rather than promote it. Under these provisions, technological restrictions could more easily be utilised to prevent parallel importing and the freedom of global trade in intellectual property. These proposals could also have serious implications for trade practices regulation and activities such as third line forcing, price maintenance, and other anti−competitive practices.

EFA also draws attention to the notable lack of reference in Chapter 17 to consumer rights and protections. EFA believes that effective trade practices and consumer protection laws should not be sacrificed for the sake of furthering the power of intellectual property holders.

A full consideration of these aspects of the proposed changes in Chapter 17 cannot be properly undertaken in this submission. Nevertheless, EFA urges the Committee to view all proposed intellectual property law expansions within the context of promoting trade liberalisation and fostering creativity and innovation, as is so eloquently called for the FTA's preamble.

Extending the duration of copyright

Paragraph 17.4.4 of the FTA would commit Australia to extending copyright terms from a general length of 50 years after the author's death to "not less than" 70 years after the author's death. In other words, it would commit us to lengthening copyright terms immediately while leaving open the possibility of further extensions. If it's appropriate to extend the term by 20 years now, why not again in 20 years from now? The *de facto* effect of regular extensions would be unlimited copyright protection.

This pressure to extend copyright duration clearly comes not from a desire to promote innovation and enhance our nation's public domain, but rather from a corporate desire to enhance monopoly profits. In practice, given that the extra 20 years would be enjoyed long after the author's passing, it is large corporations that are most likely to benefit from the change. At present, it is those who control aging copyrights which are due to expire who will benefit from an extended term of copyright.

The extension of copyright to 70 years is already well settled in America and there is no evidence that the extension has resulted in increased innovation and creative effort. In fact, there is no evidence suggesting that further incentives are needed at all. Even if such a need were present, the very abstract benefit provided to creators by the proposed 20 year extension would be unlikely to have any real impact on rates of development.

It is more likely the case that any lengthening of copyright terms would tend to impede creativity and development. In the next 20 years, the monopolies over many works are due to expire. Some of the more notable authors whose works will pass into the public domain in this period include JRR Tolkien, Dwight Eisenhowser, Winston Churchill, CS Lewis, Ernest Hemingway, AA Milne, and Albert Einstein[1]. Building upon public domain material is a rich source of creativity and anything that serves to further limit the public domain also serves to impede creativity.

Further consideration of modern uses of copyright also militates against the proposed lengthening of copyright terms. The vast bulk of copyrighted works earn income, if any, for their creators in the years immediately following publication. This is especially so in the case of software. For example, Microsoft's Windows 95 would be protected by copyright until the year 2065 under the FTA proposals. Given the nature of software development, intellectual property such as Windows 95 already has very limited usefulness to society. What contribution would Windows 95 make to the

public domain in 2065? There is simply no need for such extensive protection.

Extension of criminal offences

The criminal law is the state's most severe weapon against its own people. It has a place, but that place is not in intellectual property law. EFA opposes the use of criminal sanctions as a method of enforcing and protecting intellectual property rights. Punishing and labelling those who infringe upon intellectual property rights will not assist in furthering creativity and innovation.

Paragraphs 26 to 28 of Article 17.11 of the FTA would commit Australia to significantly extending the criminal law into the realm of intellectual property. These provisions would impose criminal liability on an expansive range of activities and impose inappropriate burdens upon Australian police agencies. Even worse, it extends the potential of private, profit−chasing companies to take the lead in criminal investigation and prosecution.

Although the argument for extending criminal sanctions in intellectual property law are constructed in the guise of protecting property rights and enforcing artists' right to income, the reality is very different. The effect of the kinds of provisions contained in Chapter 17 would be to further empower large copyright holders to control information, impede innovation and enforce outdated content delivery structures.

Even the briefest consideration of the criminal provisions that Chapter 17 would impose upon Australia demonstrates their inappropriateness. For example, the FTA calls for "criminal procedures and penalties to be applied at least in cases of wilful trademark counterfeiting or copyright piracy on a commercial scale" (paragraph 17.11.26). The language of this text is obviously designed to lend legitimacy to the need for such laws: *wilful … piracy … commercial scale*.

But, then comes the detail. First, "wilful copyright piracy on a commercial scale" is defined to include "significant wilful infringements" even though they have no motivation of financial gain. This would extend criminal copyright infringement to any situation where the infringement was considered 'significant'. There is obviously room for interpretation of the term, but the increasingly common practice among consumers of transferring music CDs to digital files for ease of listening could fall within the definition, particularly as many home collections include thousands of copyright songs.

Second, the FTA would extend criminal infringement to include "wilful infringements for the purposes of commercial advantage or financial gain." This might at first invoke images of profiteering pirates sapping cash out of the pockets of starving artists. But what is financial gain? It's a term unknown in Australian copyright law, but familiar to American law. 3.16.In the US, financial gain is defined to include “receipt, or expectation of receipt, of anything of value, including the receipt of other copyrighted works” (17 U.S.C. § 101).

This broad definition would cover a wide array of situations. Australian consumers could find themselves committing copyright crimes in their everyday lives. Businesses would be subjected to further costs of compliance with copyright laws, and Australian courts would no doubt carry the burden of more and more industry led criminal prosecutions.

In a nation where individuals engaging in hardcore price fixing cartels face no criminal liability and where securities traders can engage in market rigging and be 'punished' by being sent to an ethics training course[2] it would surely be inconceivable to expose people to possible imprisonment for the range of activities covered by the FTA proposal. Modern digital technologies have changed, and

continue to change the way that people use and access intellectual property. The criminal law should not be used as a tool of industry to protect outdated distribution methods and business models.

Circumvention devices

Paragraph 17.4.7 of the FTA would commit Australia to a regime of civil actions and criminal sanctions against circumvention and circumvention devices. First, Australia would be required to make civil actions available where a person knowingly circumvents any technological measure that controls access to a work in which copyright subsists. Certain exceptions to this ban on circumvention are provided for, but these exceptions are far too narrow. There is not even any general exception for circumventing technological protections for non−infringing purposes, such as fair dealing or making backup copies of software as permitted by current Australian copyright law.

This overly broad provision would probably expose a vast range of people engaging in legitimate activities to civil liability. For example, working around copy−prevention measures of a computer game to get pictures for inclusion in published review could be unlawful. Similarly, bypassing copy−protection to make a backup copy of computer software on an aging CD which is regularly inserted and removed from the drive would be banned.

Laws that prevent people from circumventing protection measures for legitimate purposes also encourage restrictive trade practices. For example, if protection measures are used to make music only playable on one type of device or operating system, a *de facto* type of third line forcing could be achieved.

The circumvention provisions of the FTA would also commit Australia to extending bans on dealings in circumvention devices. This treats circumvention devices, and the marketing of devices for the purpose of circumvention as inherently wrong. This would have the effect of stymieing development of any technologies and innovations that are related to circumvention technologies. Further, if copyright ever expires on a work that is protected by technological measures, a complete ban on circumvention devices would restrict the ability of people to use a work which is no longer under copyright.

These provisions would also create a situation where it was lawful to circumvent technological protections in certain circumstances, but unlawful to provide circumvention devices for those lawful purposes. What is the point of a law that allows the circumvention activities of computer security researchers if 'trafficking' in the necessary circumvention devices is unlawful?

The FTA proposals would also require the introduction of criminal sanctions where a person has circumvented a protection or trafficked in circumvention devices "for purposes of commercial advantage or financial gain". As discussed above, financial gain would appear to carry with it a broad definition that would cover many situations. It appears to be the case that

Of course, most consumers have limited ability to "circumvent" any protection measures so that the practical result of the proposed bans would be to deny consumers their rights, including fair dealing and backing up software. Australia already has circumvention bans that go beyond the legitimate purpose of copyright law and give rights−holders unnecessary powers. No expansion of these powers and prohibitions should be allowed.

Rights management information

The provisions contained in paragraph 17.4.8 of the FTA would require Australia to implement a regime of 'rights management information' protection. Rights management information is defined by the FTA as electronic information that identifies things such as the author of a work or the terms upon which a work is licensed, when it is attached or distributed in conjunction with a work. The proposal would provide civil remedies against any person who removes or alters rights management information or distributes works with modified rights management information.

The effect of these 'rights management information' prohibitions appears to be the granting of an extended version of moral rights to corporations. These bans clearly serve no purpose other than to further empower corporations to engage in threatening and manipulative conduct. The proposals would unduly limit the right of consumers to deal with digital products which have been legitimately purchased. If a similar approach was applied to physical distributions of copyright works, it would become unlawful to remove the cover from a book or the jacket from a CD.

Once again, these provisions would also introduce further criminal sanctions based upon the broad 'financial gain' definition. These laws would have the effect of introducing more crimes with which powerful rights−holders can threaten their opponents. There is no justification in even the flimsiest guise to support these authoritarian bans in any form, let alone as criminal offences.

Presumptions in judicial proceedings

The FTA proposals contained in paragraph 17.11.14 would require Australia to create a presumption, in both civil and criminal proceedings, that the person "whose name is indicated in the usual manner is the right holder in the work". There would also be a presumption "of all the factual elements necessary to establish … that copyright subsists" in the work. This would mean that it would be incumbent upon the defendant in a copyright proceeding to prove, if applicable, that either copyright did not subsist in the work or that the complainant was not the owner of the copyright.

This is clearly nothing less than a shortcut for media companies bringing copyright infringement suits. The monopoly granted by copyright law is already a profitable and well protected privilege. It can reasonably be expected that rights holders will properly manage their valuable copyright interests and be able to easily prove subsistence and ownership where that is in dispute.

It is especially concerning that the FTA seeks to impose these presumptions on criminal proceedings. If there is a genuine dispute about whether or not copyright subsists in a work, a defendant would be at a distinct disadvantage if required to prove that copyright did not subsist. After all, it is the party who claims to be the copyright holder who would have access to the information required to prove or disprove subsistence and ownership of copyright.

It would go against the long−standing protection in criminal law that the prosecuting authorities bear the burden of proving each and every element of an offence if that element is challenged. It would simply be unacceptable for criminal convictions to rest upon presumptions of the subsistence and ownership of copyright. There is little, if any, justification for treating copyright related activities as crimes and none at all for fast−tracking around basic protections afforded to those defending accusations of wrongdoing.

Determination of damages

Damages and injunctions are the main remedies when intellectual property rights are infringed. Paragraphs 6 and 7 of Article 17.11 of the FTA propose changes that could significantly alter the characteristic of damages in Australian copyright law. These changes would create an environment where damages are determined on an unrealistic basis and used for purposes beyond their proper scope.

These provisions would require Australian courts to consider the "suggested retail price" of the infringed product when determining damages. This has the potential to skew the assessment of damages beyond any reasonable level and also serves as another method of propping up product prices and business methods that have been outdated by modern technology.

Another aspect of the proposed damages regime is the notion of pre−established damages available to rights holders, which are of a quantum that not only fully compensates the rights holder but also serves as "a deterrent to future infringements". Exemplary damages are, of course, familiar to Australian law. However, Chapter 17 attempts to make exemplary damages standard in copyright infringement cases. Awards of exemplary damages should be left to the discretion of the court, rather than the election of copyright holders.

The overall effect of raising the quantum of damages would be that rights holders gain more power when there litigation, or threats of litigation. The risk of exposure to unrealistically high damages would most likely discourage people from defending cases where there is uncertainty, thereby empowering rights holders to force more and higher out of court settlements. Damages should be assessed in line with the actual loss suffered rather than any notion of suggested retail price, which implies some independent and inherent value in the intellectual property.

Copyright holder demands on ISPs

In broad terms, the provisions in paragraph 17.11.29 of the FTA would limit the liability of internet service providers (ISP) if those providers met certain conditions. Of major concern to EFA is the way in which these provisions would effectively empower large copyright holders to control flows of information and impose various burdens upon ISPs.

The liability of ISPs under current Australian law is uncertain, and sensible legislation is clearly required to ensure that ISPs can safely continue their pivotal role in the provision of modern communication systems. However, the need for certainty should not be used as an excuse to impose unreasonable burdens upon ISPs or to further enhance the extensive powers of copyright holders.

Under the proposal, ISPs would not be liable for infringements where the material is merely stored on their system or for infringements that take place through linking to online locations. However, this would be conditional upon the ISP removing or disabling the allegedly infringing material upon receipt of a take−down notice.

The proposal is apparently based on the American Digital Millenium Copyright Act (DMCA) "safe harbor" provisions. The term service provider, under US law, is given a very broad definition[3]. It encompasses not only providers of dial−up and broadband internet providers, but also any provider of online services, including search engines.

The "Exchange of Letters on ISP Liability" which forms an integral part of the FTA provides details on the form of take−down notices that rights holders could issue to ISPs. These notices would state

that the writer owns copyright interests in certain material and that the writer has a "good faith belief" that the material is infringing material.

The form of the notices would require a statement under penalty of perjury that the complainant is the owner of the copyright; however, this is the only statement made under oath and and the notices require no evidence that the allegedly infringing act occurred at all, or even a statement that such evidence exists. Further, the statement of belief that the material infringes the copyright is not under oath, so there is no real protection against vexatious take−down notices.

Upon receipt of such notices, ISPs would need to remove the allegedly infringing material in order to ensure their own liability was limited. Although there is provision for counter−notification from the person whose material is allegedly infringing, there is no incentive for ISPs to restore material upon receipt of a counter−notification, even if infringement proceedings are not subsequently brought.

EFA notes paragraph 17.11.29(x), which at first glance appears to provide some encouragement to ISPs to take counter−notifications seriously. However, a careful reading of the provision suggests that it will not result in any real incentive for ISPs to restore content over which there is a legitimate dispute. The FTA provision simply states that where content has been removed following a take−down notice, the ISP will not be liable for any "resulting claims" if it (1) notifies the person against whom the complaint was made and (2) restores the content if counter−notification is received and no court action is commenced. It is doubtful that ISPs in this situation would be liable for any claims if they refused to restore content that was removed under a take−down notice anyway.

A Chapter 17 style take−down notice system is currently operating in the US and demonstrates some of the issues that arise. Whatever formalities or balances the take−down notice provisions purport to apply, in practice the notices provide a simple means whereby unsubstantiated allegations can result in a broad array of material being removed from websites. The system proposed by the FTA would provide for monetary remedies against those who make knowing material misrepresentations in notices, but liability for mistakes or negligence is uncertain. EFA is concerned to ensure that any take−down notice system is appropriately balanced so as to prevent it being abused.

There are many US examples where material has been removed on the basis of a take−down notice where there is no clear evidence of infringement, or where the law is unclear. The owners of such material then face substantial difficulties in attempting to have their material restored. The fact that counter−notices do not actually require ISPs to restore the disputed material has led to ISPs in the US simply refusing to do so. This creates an inequitable situation where copyright holders exert far too much power over those whom they make allegations against. The system also lacks judicial oversight, given that most infringement allegations do not reach the trial stage.

Another central concern to EFA is the possibility that mere links to third−party websites by a service provider may be forced offline by allegations of copyright infringement. For example, a famous US example of this is the KaZaa−Google case. KaZaa, a provider of peer−to−peer applications, sent a series of complaints to Google, one of the web's largest search engine providers[4]. KaZaa claimed that Google, through its search engine, was providing links to third−party websites which were allegedly making unauthorised copies of KaZaa's software available for download. Google's response was, naturally enough, to remove the links from its search engine (although it provided a notice to users that the links had been removed and published a copy of the take−down notice from KaZaa).

This example highlights some important issues. EFA is opposed the idea that mere linking to a website which allegedly contains infringing material is or should itself constitute infringement of copyright. EFA is also opposed to a system of take−down notices that allows copyright holders to exert such wide powers over internet content, forcing content offline without any actual evidence of infringement. Access to justice is a pressing issue in Australia already; forcing small website operators and businesses to resort to expensive litigation to challenge take−down notices from copyright holders is not acceptable.

A system of take−down notices like that proposed by Chapter 17 would subject a wide array of internet 'service providers' to burdensome compliance requirements, whilst empowering copyright holders to force content offline without evidence of infringement, and in situations where the law is unclear or untested. Such a system should be rejected, as it simply enhances the power of copyright holders to control the activities of others and, in practice, labels defendants as guilty unless proven innocent.

Extended discovery provisions

The FTA contains two particular provisions that would grant further power to copyright holders alleging infringement. Paragraph 17.11.11 would require Australia to ensure that courts can order alleged infringers to provide "any information that the infringer possesses regarding any person(s) or entity involved in any aspect of the infringement and regarding the means of production or the distribution channel of the infringing material, and to provide this information to the right holder's representative in the proceedings."

The exact effect that such provisions would have is unclear, but EFA is concerned to ensure that discovery procedures are not unduly weighted in favour of those making allegations. In particular, there should be checks and balances to ensure fairness to those accused of infringement and to protect personal and business information in which defendant's have a legitimate interest.

Of even more concern is the apparent potential under paragraph 17.11.29 for the administrative issuing of subpoenas enabling copyright holders to obtain personally identifying information from ISPs. Again, it is unclear what kind of procedure this provision would result in, but EFA opposes any procedure that would force ISPs to disclose personal information about their customers without a court order based on at least a strong *prima facie* case as assessed by a judge.

Patent law

Article 17.9 of the FTA would commit Australia to a number of disturbing requirements. In particular, the FTA would commit Australia to making patents available "in all fields of technology", regardless of whether such monopolies are needed or are in our interests. Australia would only be permitted to exclude from patentability medical treatments and inventions that are against public order or morality.

This would mean that Australia would be committed to a system of patents of processes, software and any yet to be conceived technology. There is no evidence to suggest that patents are at all necessary in order promote innovation in business processes or computer software. The only apparent reason for such patents is to provide profit and power opportunities to those companies able to secure the strongest patents. This is an abuse of the proper purpose of the patent system and serves only to raise the cost of doing business and reduce levels of innovation.

Process patents are an especial concern. Since the Carter Administration, patents have been an explicit weapon of US international competitive strategy. The US Patents Office has lowered the threshold 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 e−commerce is being seriously harmed by assertions of rights in fundamental ideas such as 'one−click shopping', 'reverse auctions', 'automated credit−checking' and the notion of a 'hot−link'.

For example, one recent Australian patent is titled "Universal shopping center for international operation"[5] . The abstract of the patent reads: "An international system for operation over the internet/intranet provides a pre−transactional calculation of all charges involved in any international transaction." So far as EFA can tell, this is a patent for doing simple arithmetic and some database lookups. Patents such as this one are clearly not required to encourage innovation and serve only to raise the costs of doing business.

Software and related patents are also potentially damaging to both commerce and the development of technology. For example, it was recently reported that the US company Compression Labs has initiated a lawsuit against a number of other companies for infringement of a patent that covers the widely used JPEG image format. The JPEG format is commonly used for digital photographs and restrictions on its use would no doubt be an impediment to legitimate commercial and social development. The expansion of copyright to cover software has already resulted in a system that gives too much protection to owners and too little benefit to users and society. The application of patent protection to software and related technologies is clearly unnecessary and against the interests of most Australians.

EFA believes that Australia should not commit itself to a patent system open to all manner of "inventions" that do not need protection. New methods of using patents to extort higher profits are the only innovations likely to be encouraged by the FTA patent provisions.

Summary and conclusion

The proper role of intellectual property law is to encourage innovation in order to enrich the public domain which is at the heart of all cultural and technological development. The traditional way of achieving this has been the provision of economic incentives for innovation, and economics demonstrates that so long as some minimal incentive exists then innovation will take place.

Further expansions to the rights and powers of copyright and patent holders are likely to impede innovation because they empower corporations with entrenched interests in existing business models to restrict the development of innovative processes and technologies. Rather than promoting the proper purpose of intellectual property rights, these expansions serve instead to restrict development, raise the costs of business and prop up outdated regimes.

EFA is opposed to Australia signing or implementing the provisions of Chapter 17 of the FTA. In particular, EFA is concerned that:

- consideration of Chapter 17 should be approached from the perspective of promoting innovation and the public domain, rather than protecting existing business models and punishing infringers
- the Chapter 17 expansions are likely to impede rather than promote free trade and innovation

- there is no justification for extending copyright protection to 70 years
- the criminal law has only a limited role in intellectual property law and should not be expanded
- the proposed circumvention device bans are overly strict and have more potential to be used as weapons against competition and innovation than for it
- the proposed rights management information provisions would unduly extend the power position of copyright holders and impinge upon consumers' rights to deal with legitimately purchased goods
- presumptions towards subsistence and ownership of copyright are unnecessary and weight proceedings too far in favour of those claiming rights as opposed to those defending them
- the provisions relating to damages would result in unrealistic determinations and increase the power of copyright holders
- the take−down notice provisions are unfairly weighted in favour of those making allegations
- ISPs should not be force to divulge personal information about customers except after judicial order
- the FTA would commit to allowing any and all 'technologies' to be patented, regardless of whether a need for patentability is demonstrated

Chapter 17 of the Australia – United States of America Free Trade Agreement contains a range of proposals that would significantly expand intellectual property rights in Australia. These expansions are clearly not in Australia's best interests and must be rejected.

Endnotes

1. Of course, this expiration of copyright does not leave the work totally unprotected – trademark law will continue to provide the Lord of the Rings and Winnie the Pooh businesses with profit opportunities.

2. http://www.asic.gov.au/asic/asic.nsf/lkuppdf/ASIC+PDFW?opendocument&key=008547418

3. See 17 U.S.C. § 512(k)(1).

4. Walker, C. W. (2004), "Application of the DMCA Safe Harbor Provisions to Search Engines, Virginia Journal of Law and Technology, vol. 9, no. 2.

5. Patent number 758864.
