

Dear Secretary,

Please find following a submission in respect of the Australia-United States of America Free Trade Agreement, agreed at Washington on 8 February 2004 (FTA), the current reference of the Senate Select Committee in respect of that Agreement.

I have earlier made a submission in my capacity as an official representative of Cybersource Pty Ltd. In this instance I wish to make a submission as a private individual.

My name is Steven D'Aprano

I refer to the submissions of:

- Cybersource Pty Ltd (submission number 85)
- Mr Brendan Scott (submission number 81)
- CAUL (submission number 115)
- ALIA (submission number 142)

to the Joint Standing Committee on Treaties reference on the Australia-United States of America Free Trade Agreement.

I have read these submissions and I substantially agree with the statements made in them, especially in relation to the provisions in Chapter 17.

I refer also to the submission by Cybersource Pty Ltd made to the Senate Select Committee (no submission number at this time) and I agree with the statements made in it.

In addition, I wish to make a statement in respect to my position as an Australian consumer. I fear that the proposed changes will have an anti-competitive effect which will limit my choices and increase costs.

In particular, the proposed strengthening of the Digital Agenda Act (2000) to bring it in line with the American DMCA will act to reduce competition by locking in certain vendors.

The DMCA has already been used in the USA to stifle competition in the garage door and printer cartridge industries. It has been used to prevent the playback of legally purchased DVDs.

The DMCA was sold to the American Government as an anti-piracy law. To the best of my knowledge, it has never been used to prevent or punish one single case of piracy or copyright infringement. It has been used to lock out competition, raise prices, and tilt the playing field, and to halt innovation.

When Linux programmers created their own DVD playback programs which run under Linux instead of Windows or Apple Macintosh, the DMCA was

used to threaten that innovation and stifle competition with the entrenched economic incumbents.

For this reason, American distributors of Linux software can not distribute DVD playback software. French and German distributors have no such restriction. This competitive disadvantage is just one of the chilling effects that the DMCA has had on the American software industry, and why the European Union recently voted against software patents and a DMCA-type law.

As a consumer, my choice is artificially limited by such anti-competitive technologies as region encoded DVD players. Under proposed amendments to the Digital Agenda Act, by-passing region encoding so that I could watch legally purchased DVDs could be punished by statutory entitlement to damages which are required to be greater than the actual loss.

In other words, a DVD producers can arbitrarily deny Australian consumers access to certain works on a whim, and if Australians legally purchase those works elsewhere and watch them in Australia, they can be punished, potentially to the tune of thousands of dollars.

The proposed changes will stifle innovation as well as competition. The basis of innovation is to use existing knowledge in new and unexpected ways. The basis of restrictions on technology (eg region encoding on DVDs, or so-called "copyright protection" on CDs that prevent them being played back on certain types of CD players) is to prevent technologies from being used in any way except the known and expected ways. In other words, these restrictions explicitly prevent innovative extensions to technology.

By prohibiting circumvention of such anti-innovation and anti-competition restrictions, the proposed changes to the Digital Agenda Act can not fail to stifle both innovation and competition, precisely as the DMCA has been used to threaten competitors and innovators in the USA.

As a consumer, I ask you to please reject any provisions of the Free Trade Agreement which are so anti-freedom, anti-competition, anti-choice and anti-innovation.

I thank you for your time.

Yours sincerely,

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Steven D'Aprano
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