A Suggestion for Two Small Additions to Chapter 17 of the USA-Australia Free Trade Agreement

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1 Abstract

The current wording in the free trade agreement of the exceptions which allow breaking copyright protection mechanisms is too restrictive. There are two extra situations which appear to have been overlooked. Firstly, provision needs to be made for when the copyright owner cannot be contacted to authorise access. Secondly, there may be times when it is in the public interest that a protected work may need to be opened. I have provided some sample clauses that could be inserted into the agreement that are likely to satisfy both Australian and USA interests.

2 Background – What are we talking about?

In Article 17.4, subsection 7, paragraph (a) of the March 1st 2004 draft of the USA - Australia Free Trade Agreement, each party enjoins to provide strong legal protection for copyright works. In particular, it would require Australia to enact laws that would make it illegal to "circumvent . . . any . . . effective technological measure that controls access to a protected work".

The subsequent paragraph (e) defines the exceptions for which it would not be illegal. Eight are listed, which could be summarised like this:

1. Reverse engineering
2. Security research
3. Protection for minors
4. Securing computers
5. Keeping privacy
6. Law enforcement
7. Library acquisition decisions
8. Legislatively-reviewed usage

Unfortunately, I think two more were missed – abandonware (section 3) and whistleblowing (section 4).

3 Computer programs that grow old disgracefully

Without stretching my memory too far, I can find examples of games, databases, accounting applications, electronic music systems and numerous small utilities which either myself or my company's clients have used, and which have become abandoned by their copyright owners.

This abandonment can happen in several ways. A common way is when a program ages and no longer provides any significant income to its author. If the original program required a license key before it expired, the original author may well have no interest or capability in producing new license keys for the tiny sums of money they would get in return. Often the original author has moved from their last known address and left no other contact information, making it difficult to even make that request.

Another sadly too-common way for abandonment to happen is when the original author dies, leaving the copyright clearly in the hands of their next-of-kin, who happens to be a non-technically literate grandmother! No discussion on licensing the program can be entered into as the new copyright owner will often not even understand the concepts involved.

And finally, more than once I have seen the rights to an aging piece of software get lost in the legal paperwork as one bankrupt company neglects to define completely which assets were liquidated to which buyers.

The common thread to these situations is:

- There are some works under copyright.
- Even if there is no clear declaration of it, it is clear that the copyright owner has no intention of making a gain (financial or otherwise) from the works.
- The copyright owners would suffer little loss (financial or otherwise) from having their works made more public.
- There is no way of communicating with the copyright owner about the copyrighted work.

We already have a legal framework for dealing with this kind of end-of-life for copyright programs. Although, to be painfully honest, I think for the most part people just ignore the problem and continue to use and copy such works even without the impossible-to-acquire permission of the work owner. The logic seems to be that the user of the copyrighted work can gain some utility from the work which is otherwise unavailable and the owner is not adversely affected either way. Is this illegal? Possibly, but it is a very widespread practice.

Things become more complicated when there is some kind of copy protection mechanism in place over an abandoned copyrighted work. From my experience, I have found that the philosophy of "the original owner doesn't care enough to make a fuss, so I don't mind trying to break the copy

protection" seems to be fairly wide-spread. Most copy or usage protection mechanisms are of such a weak nature that it requires little skill to subvert them. And there is little outcry (in fact, usually the opposite) when someone provides information into the public domain of how to work around (say) a licensing requirement for a long-abandoned product still being used in some specialist niche.

Before I detail my proposed addition, let me make very clear what this is not. I am **not** advocating here that we allow the breaking of any copy protection whenever anyone wants to, nor the subversion of the copyright framework in law. We are only concerned here with products which no-one can derive any value from without some protection mechanism being broken, and where the copyright owner is unable to be contacted to explicitly allow or disallow that activity. Where the free trade agreement would say we should disallow breaking of abandonware protection mechanisms, I propose that we should allow it.

The terms of the free trade agreement are very explicit that Australia would have to pass laws making protection mechanism breaking illegal, and that without the addition below we would also have to enforce it. Whether we actually would enforce it is another matter entirely, but I would like us to be honest in our dealings as a country. I do not expect that there would be much objection to this addition by the USA.

In summary, this is what I propose we add as subparagraph (ix) to paragraph (e) of article 17.4, subsection 7 – an exceptional circumstance under which circumvention of a technological measure may be admitted:

> usage of a work where the copyright owner cannot be contacted and the wishes of the copyright owner for the usage of the work cannot be ascertained.

Paragraph (f) would also have to be updated accordingly.

4 When Andrew McNaughton meets Digital Rights Management

Let us imagine a future protegé of the late great Andrew McNaughton. He returns from the field with the personnel files proving that a sovereign state has had its affairs muddled with in the most dishonest and violent ways. The personnel files are saved in a word processing document with a password on them. Our hero would be committing a crime to try to guess the password algorithm – possibly even just guessing the password would be illegal – and with the sale of tools for subverting it also illegal, would be unable to find any external help either. A truly brave whistleblower will commit the crime, break the document and expose the information to the world, knowing that they can then be prosecuted for copyright protection violation.

This is not a vision for the future which I want to encourage. It is right that at times people should tell the world of the crimes of their bosses, their colleagues and their companies. We need to make life as easy as possible for people to stand up and tell the truth. We cannot structure our system to allow evil to guard itself with a cloak of copyright law.

I found it very hard to enumerate all the different scenarios that a person may find themselves in to be wanting to break a copyright protection mechanism because the protection mechanism hides something that should be widely known. At best I can define a principle: we should allow copyright protection subversion when the gain to the public is much greater than the private loss.

I see no reason why the USA would object to this principle, and therefore expect they would agree with the addition I propose.

With this in mind, I propose we add the following as subparagraph (x) to paragraph (e) of article 17.4, subsection 7:

> any usage of a work where it is clearly in the public interest that the contents of the work be made available to a wider community without some or all of its effective technological protection measures.

Paragraph (f) would also have to be updated to reflect the extra subparagraph.

This document is a submission to the Senate Select Committee on the Free Trade Agreement between Australia and the United States of America in 2004.

It was written by Mr Gregory David Baker, in his capacity as a director and owner of an Australian company (The Institute for Open Systems Technologies Pty Ltd).

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