Summary:

Copyright and patent laws should be carefully crafted to balance the interests of creators with those of the public. Article 17.4 in the Free Trade Agreement distorts the balance in favour of creators and copyright holders to the detriment of the public's prosperity, freedom and access to knowledge.

Similarly, clauses in Article 17.9 may expand patent law into areas that will stifle competition especially if it includes, as is available in the United States, patents for business processes and software. Consequently, Article 17.9 further distorts the balance away from the interests of the public, private individuals and small business and seem antithetical to the name of the agreement.

The lack of an adequate economic study accounting for the negative impact of these Articles in both direct and indirect terms against any advantages elsewhere may mean that the whole agreement is not in Australia's interest. In any event the scope of 17.9 needs to be significantly reduced and many clauses of 17.4, especially 17.4.4, need to be removed or modified; perhaps by granting the extension to only those copyright holders who ask for it and by creating a registry of copyright holders.

Copyrights (Article 17.4)

As many economists have pointed out extending terms of copyrights on existing material has no economic benefit and only economic costs [VARIAN]. Further, since the duration of existing copyrights is extremely long the additional incentive to create new works offered by extending the duration is so small that it is far out weighed by the economic costs.

Developers of software, and hence creators of intellectual property including copyrighted material, feel the harm of long copyright terms every day, especially in the inability to access and learn from older works. Software is perhaps a little different from other material subject to copyright law in the sense that the preferred form (source code) for learning, enhancing and expanding human knowledge is not the form in which it is distributed (binary code).¹ This difference often means that the copyright holder, when able to be found, often no longer has a copy of the work. Further, in the absence of an agreement to the contrary, copyright law prohibits any other parties from making copies so there is no cost effective legal way of recovering the knowledge. It has to be recreated. Articles 17.4.3, 17.4.4 and 17.4.7 ensure that this situation only gets worse.

The interaction of the law, business practice, and economic realities together make the provisions in Article 17.4 detrimental. In an advancing society all advances must be made from the basis of past advancements. The vast bulk of copyrighted material has a very short (or non existent) commercial life (the time in which money can be made from the material) followed by a very long time in which nothing is done with it. Nothing is done with it because those with the rights have lost interest, it is too difficult to find them, and too hard to know if it is worth finding them. Since copyrighted material is often the tangible form of past advancements, our society progresses more slowly and is less prosperous and dynamic than it should be.

¹ It could be argued that the preferred form for manipulating music is sheet music rather than a recording or performance. Although this argument has many flaws the one that matters here is that a competent musician can convert from the recording or performance into adequate sheet music in reasonable time. The same is not true for software. The time taken to attempt to convert from binary code to source code for any reasonable sized piece of software is many man years and is hence most often not a viable way of recovering the knowledge.

For instance, most software has a commercial life of less than ten years [PERCHAUD].² Thus for the majority of the time it is under copyright protection the copyrights are not protecting an economic interest and creating an incentive to develop. Copyright law is locking up knowledge that could be used in new inventions and drive economic growth. This is of particular importance in Australia since the largest software houses are overseas principally in the United States. Australia's software industry is more service orientated where access to the source code and understanding the mechanism by which the software works is more important. Thus extending and strengthening copyright law is much more in the United States interests than it is in Australia's.

The service nature of Australia's software industry means that, typically, Australian developers and companies write smaller pieces of software to solve particular problems. Such software is likely to have an even shorter commercial life and is even less likely to be retained after this commercial life. Since the code is often not retained and often cannot be copied, it usually has to be recreated. One effect of these laws, exacerbated by the proposed changes, is to ensure that in part the Australian information technology industry is always starting from scratch and reinventing things already invented; while overseas companies, particularly those in the United States, are able to leverage previous work. Thus article 17.4 tends to distort the market in favour of the United States.

One problem in evaluating the impact of these Articles is that only the immediate next generation of possible enhancements can be guessed at. Analysts cannot see the advancements that will result from the interaction of enhancements on each other over many iterations. For instance, the proposed copyright periods are very close to the time period between the invention of the telegraph and today. At the time of the telegraph it was impossible to see the existence and economic potential of the Internet or guess that it would have such a major impact. Hence any estimate of the economic and social cost of allowing a monopoly on the telegraph would have to ignore the Internet and therefore be grossly underestimated. Although this example involves a physical technology that cannot be directly copyrighted, in the information age such relationships must exist between the software of today and the software of the future. As has been pointed out previously, Article 17.4 grants monopolies on software for this long and hence the estimated economic cost of Article 17.4 has not, and cannot be, properly accounted.

Regardless of the type of material copyrighted, the vast majority is of no interest to the original author or their successors of interest well before the term of the copyright expires [LESSIG].³ Article 17.4 seem to favour those comparatively few pieces of material where these is still interest after the expiration of current terms and/or are at the boundaries of the current rules. Thus Article 17.4 seems to be written for these exceptions rather than the majority. At the very least there needs to be a mechanism by which all the material in which there is no commercial interest falls into the public domain at least as quickly as they currently do. One method of achieving this may be confine the term extension to those works for which the rights embodied in copyright have been exercised by the rights holder in the last 14 years.

Finally, Article 17.4.7(c) along with 17.4.8, 17.11.26(i) and 17.11.27(a) can lead to the situation where the penalty of copying a file from a CD onto a hard disk far exceeds the

² All large pieces of commercial software have improved versions release every three to five years and most is no longer supported after ten.

³ For example look at the registration rates of copyrightable material when copyright had to be registered in the United States or the rates of copyright renewal in the jurisdictions where it was necessary.

penalty of stealing the CD from a store.⁴ This type of manifest injustice has a chilling effect on creativity. Most original creativity occurs through individuals or small collections of individuals. Such groups often have very limited funds. If it is not clear a creation is legal many inventors will simply not create, impoverishing us all.

Article 17.11 is full of grounds that can be used to scare citizens and small companies into not creating. For many of them, even the risk that an organization, able to afford long legal fights, might be able to write a credible letter that an action or creation infringes, or ask authorities to seize - before trail – their physical and intellectual property, is enough to stop them attempting to create and add value to the economy.

Copyright protection provisions (Article 17.4.7)

The anti-circumvention laws (Copyright Amendment (Digital Agenda) Act and the enhancements suggested in 17.4.7) further lockup knowledge as they can make it illegal to try and learn and/or recover lost knowledge for commercial purposes. Further since most of the material covered by Copyright will at some point be in an electronic medium and all creative expression must undergo some form of en-coding to place it in electronic form, all created material are potentially under the influence of these provisions. Thus under the proposed Free Trade Agreement a large amount of Australian creative expression of knowledge and inventions will become lost and must remain so. The resultant loss of independent culture must raise questions as to the desirability of Article 17.4.7 and its enforced implementation timetable in Article 17.12.

Patents (Article 17.9)

Article 17.9 allows patents to expand into software and business processes. Because of the very short commercial life of most software, granting patents is practically equivalent to granting a full monopoly. Further, software is, in its purest form, a landscape of ideas. Allowing patents on software is equivalent to allowing land grab in this ideas space.

Given the large number of software patents that exist in the United States it is, as a practical matter, impossible to audit code as being in compliance with all of these patents. Thus under the provisions of Article 17.9 most independent software producers will work in an environment of being subject to law suits at any time.

As a partial mitigation strategy, many software producers refuse to develop software that performs operations similar to any other software. Apart from the obvious reduction in completion this also leads to a reduction in the interoperability of software. The only way to read or create(write) a file the same as another program is to perform an operation similar to the other program. The ideas behind this operation are often patented and hence cannot be used without a licence. Obtaining such licences are often too expensive for a new player in the industry and hence their offering is not able to be compatible with those of others in the industry even if the products main purpose does not overlap any existing product.

An even more frustrating and wasteful situation is where the product of the owner of the patent is flawed or inadequate in some way, and yet the owner will not offer licences to others to make competing products or improvements.

Conclusion

⁴ In the United States the statutory penalty for copying a single copyright protected music file from a CD to a network accessible directory is \$150,000 about 1000 time the likely fine for stealing the CD from a store.

The direct and indirect economic costs of Chapter 17 of the Free Trade Agreement are very large. In a society moving towards the information age these costs could easily out-weigh the benefits of the agreement in other areas. The author is not in a position to perform this analysis but notes that is has not yet been presented. The agreement appears to have been made without a current cost/benefit analysis. How can Australia agree to this agreement without the cost/benefits being fully investigated?

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