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

Dear Secretary,

I am writing to express deep concern for IP aspects of the Free Trade Agreement between Australia and the United States of America.

Three specific aspects of the agreement which most concern me are:

- I oppose software patents (17.9) on the grounds that they will inhibit innovation, raise the cost and lower availability of computer software, and authors are already protected with copyright on their specific works. I also question the other new forms of patents required under the treaty.
- I oppose extension of copyright duration by 20 years to life+70 (17.4.4) as unnecessary, against public interest, and failing to provide additional incentive to authors and creators;
- Circumvention of a technical protection on copyrighted works (17.4.7) should not in itself be a crime, as the actual infringement of copyright is already illegal and there are numerous fair-use scenarios without copyright infringement.

Indeed, the inclusion of extensive United States Digital Millennium Copyright Act style requirements seems premature given that the DCMA is still controversial and being tested in the courts there.

I believe these terms will have a significant negative long-term impact on the Australian public and businesses. Their inclusion without prior public debate or published impact studies gives an impression of reckless acceptance of terms biased in favour of the United States corporations.

I support the position of Electronic Frontiers Australia regarding the FTA, as detailed in their position paper Intellectual Property and the AU-USA Free Trade Agreement[1].

I also believe that the research of the Foundation for a Free Information Infrastructure[2], in the context of software patents for Europe, could be useful to your inquiry. In particular, *Research on the MacroEconomic Effects of Patents*[3] is of interest.

[1] http://www.efa.org.au/Publish/ipfta-paper.html
[2] http://swpat.ffii.org
[3] http://swpat.ffii.org/archive/mirror/impact/index.en.html

Software Patents

Purpose of Copyright & Patents

What is the intended purpose of copyrights and patents? Authors' existing legal and economic rights extend beyond the natural moral right of ownership of a physical original and any abstract copies. Copyright first began as a form of state censorship, but today we consider the granting of monopolistic IP rights as an incentive for authors to create works of public benefit. The rights afforded to an author are based on the expected common good provided by the author's works, not any intrinsic rights of the author.

On average, the incentive should be just large enough to encourage the author to invest in creating the work, while minimizing the resulting monopoly granted by IP rights.

However, there is a real danger of corruption of these principals by powerful lobby groups protecting monopolistic corporations.

Land Grab for Software Patents

The rush by IT corporations for software patents is like that of the frenzy to stake mining claims during a gold rush. Those corporations are expecting to 'strike it rich' by being the first to lay claim to algorithms that later the industry will depend on. The corporations with the most software patents in their portfolio covering standard industry tasks will have the advantage.

Requirement of Invention for Patents

There is meant to be a requirement of invention, or non-obviousness, for patents but this requirement has totally failed. U.S. and European software patents (although European software patents are of questionable legality) generally *are* obvious solutions.

The nature of modern computer programming and software design is that there are very few problems encountered which are complex enough to be considered non-obvious to a skilled worker in the field after reasonable consideration. The small number which can be considered non-obvious, are generally more like mathematical discoveries than inventions, and they are insignificant in number to other software patents issued. Computer software is constructed as a process to achieve a desired objective, it is not invented.

Some patents apply to protocols or standards, where there is a multitude of possible variations of the solution, but for interoperability the patented protocol then becomes the only valid solution. Again, there is no invention, just application of software engineering principals and some choices.

Then why are so many thousands of software patents issued annually?

There are well-known work-load, subject-mater expertise and pressure problems in patent offices which partially explain how a ridiculous number of such patents are granted, however the largest factor is probably the subjective definitions used for 'invention' and 'obvious'. A brief examination of patents like one-click online shopping[4], paying with a credit card online[5], and timing the duration of a button click[6], shows how subjective this is. One US Patent Office examiner describes patent application as a "bit of luck" in an illuminating article[7].

And perhaps the strongest argument against the real degree of invention in existing software patents is the extent of duplication of patented solutions without any information provided by the patent holders, and usually without knowledge of the prior solutions.

Impact of Software Patents

The exponential growth of U.S. software patents is heavily biased to the largest corporations. This trend is likely to continue for some years, and in that time many significant patents will be claimed by U.S. and, to a lesser extent, European corporations, giving those corporations a significant advantage. In a future world where the software industry is held hostage to huge numbers of patents, with the majority of those held by a relatively limited number of large mostly US based or European corporations, patent licensing will cause a redistribution of wealth from smaller corporations to larger ones. Of Australian companies, only some larger ones might benefit more from their patent portfolio than the costs they incur licensing other patents, and the net trade impact for Australia is most likely to be negative.

However the greatest impact on computer programming related companies will be legal costs, not licensing fees. Growing software patent litigation in the U.S. is not good news to Australian software developers. It is conceivable that in the future, more time could be spent plotting a path through software patents than actually writing computer programs. Only the larger companies will be able to defend patent litigation, and only the larger companies will be able to defend their patents against other large corporations.

The disappearance of the small/medium business from segments of the software industry would be a major loss of the very innovation that IP is meant to encourage. Stories like those of Melbourne based Sausage Software, which grew from a one-man business to 9-

---

[4] USPTO ***5,960,411*** http://patft.uspto.gov/netacgi/nph-Parser?Sect1=PTO1&Sect2=HITOFF&d=PALL&p=1&u=/netahtml/srchnum.htm&r=1&f=G&l=50&s1=5,960,411.WKU.&OS=PN/5,960,411&RS=PN/5,960,411

[5] USPTO ***6,289,319*** http://patft.uspto.gov/netacgi/nph-Parser?Sect1=PTO1&Sect2=HITOFF&d=PALL&p=1&u=/netahtml/srchnum.htm&r=1&f=G&l=50&s1=6,289,319.WKU.&OS=PN/6,289,319&RS=PN/6,289,319

[6] USPTO ***6,727,830*** http://patft.uspto.gov/netacgi/nph-Parser?Sect1=PTO1&Sect2=HITOFF&d=PALL&p=1&u=/netahtml/srchnum.htm&r=1&f=G&l=50&s1=6,727,830.WKU.&OS=PN/6,727,830&RS=PN/6,727,830

[7] http://www.volpe-koenig.com/showarticle.asp?Show=12

digit market capitalisation in just a few years through innovative products, would have had a different outcome if they were forced to withdraw their initial product due to a threat of patent litigation from a large corporation.

The free, open source software segment will likewise struggle. While free software might not directly generate revenue, the support services around it do, and the market efficiencies created by lowered costs associated with free software are a current and growing economic benefit for Australian companies, which would be hurt by software patents.

Furthermore, as the nature of Information Technology advances to intelligent knowledge systems, there is the potential for significant social and economic impacts from applying patent laws to the ownership of information held in knowledge systems.

There are numerous studies of the economic impact of software patents; I hope that this commission will refer to some of these. They show that innovation is increased by software copyright, but diminished by software patents. The inclusion of software patents in the FTA without prior public debate or published economic impact studies specific to Australia seems to be a serious oversight.

Extension of Copyright Duration

The extension of copyright duration by 20 years to author's life + 70 years (17.4.4) seems difficult to justify. It certainly does not afford the author any additional incentive, as the author is long dead. The current copyright duration of life+50 years seems overly generous, and there is no need to extend this.

The inclusion of this speaks to the persuasive ability of the corporations holding significant copyrighted works who wish to extend their monopoly on these works. There is no public utility in granting those organisations such extensions.

There is, however, public benefit in the movement of existing works into the public domain. For example, access to information archives such as Project Guttenburg

Circumvention of Technical Protection

Circumvention of a technical protection on copyrighted works (17.4.7) should not in itself be a crime, as the actual infringement of copyright is already illegal and there are numerous fair-use scenarios without copyright infringement.

While this article of the FTA directly derives from the U.S. DMCA, it is likely that an Australian implementation would have significantly greater force as Australia lacks an equivalent of the Bill of Rights including free speech, which has been used against the DCMA in the U.S.

There are numerous fair-use scenarios which could involve circumvention of a technical protection without copyright infringement. Consider for example the recent CDs encoded to prevent playing those CDs in on a personal computer. Presumably this was intended to prevent copying of those CDs, however it also limited the fair use of just playing those CDs in on a personal computer. A low-tech circumvention of this protection was widely published: marking the edge of the CD with a felt-tipped marker allowed the CD to then be played on a PC. Article 17.4.7a would render this a criminal act! Or just publishing this information could be construed (as a service to readers promoting the circumvention of the protection) as a criminal act. Alternately, the usage or sale of software allowing people to back up a copy-protected CD would be a criminal act.

The motivation for this article is presumably to lower the standard of proof required in prosecuting infringement of copyright, by substituting a new crime of possession, use or trafficking in copy protection circumvention techniques. The cost of this shift is absurd criminal liability of consumers. There is no justification for criminalising such acts without breach of the actual copyright.

Similarly the decryption of a signal (or possession of devices for such) (17.7) should not in itself be a criminal act. The issue should be any subsequent breach of the copyright.

Summary

In summary, I find the extension of copyright duration unfounded and the introduction of software patents strongly against the interests of the people of Australia. The criminalisation of circumventing technical protection measures without breach of copyright is without merit and against the interest of the Australian people. I suggest removal at least of articles 17.4.4, 17.4.7, 17.7 and 17.9, and preferably the entire section on IP. There is no benefit from the FTA that could justify these articles.

I thank the committee for consideration of this document.

Sincerely,

Dr J. Sherring BSc PhD