

UPDATE: Electronic Frontiers board member attacks trade deal

Abby Dinham, ZDNet Australia

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update: The Centre for International Economics (CIE) has been chosen by the Department of Foreign Affairs and Trade to assess the impact of the proposed Australia-US Free Trade Agreement (AUSFTA).

The final report of the CIE's findings is due on 8 April 2004, with coverage including the implications of the AUSFTA on employment, economic welfare, government procurement and intellectual property issues.

An Electronics Frontiers Australia (EFA) board member had critically assessed the AUSFTA released on 1 March, concluding that the document presents "absolutely no benefit to Australia in the IP sections".

EFA board member, Dale Clapperton, says the proposed agreement will impinge on the rights of ISPs and Internet users in favour of the American copyright holders.

"The rights of average Australians are being traded away to US lobby groups such as the MPAA and the RIAA, in exchange for concessions of dubious worth in other parts of the FTA," said Clapperton.

The AUSFTA will extend the term of copyright in Australia from the current term spanning the life of the author plus 50 years, to a term "not less than" life plus 70 years.

Clapperton says the 50 years following the death of the author afforded by the current Australian law is sufficient, as the term fulfils Australia's obligations under the World Intellectual Property Organization (WIPO) treaties while still promoting growth and reuse of material in the public domain.

"An extension of existing copyrights for another 20 years serves only to benefit large corporations, typically based in the United States, which own copyrights which would otherwise expire during that time," said Clapperton.

According to Clapperton, the FTA will also open the door to so-called "software patents", which he says have been regularly abused by major US software companies to "intimidate and suppress competition and innovation".

"Litigation over the alleged infringement of 'software patents' has become a lucrative business model in the United States, and introducing these patents is a path that Australia would be ill-advised to follow," said Clapperton.

Article 17 of the AUSFTA draft confronts Internet Service Provider (ISP) liability, stating ISPs qualify for safe harbour when facing copyright infringements provided that it complies with specified conditions.

However, the conditions state that an ISP is required to remove copyright-offending content from the Internet upon the demand of the copyright holder and that an ISP must supply the offending subscriber's details.

The agreement states, "each party shall provide for an administrative or judicial procedure administrative or judicial procedure enabling copyright owners who have given effective notification of claimed infringement to obtain expeditiously from a service provider information in its possession identifying the alleged infringer."

A review of the AUSFTA by lawyers Corr, Chamber and Westgarth, said the liability of ISPs was always going to be a "hot topic" in the agreement, as the deal will require a change to the Australian Copyright Act.

Clapperton says the new enforcement powers will be "overly burdensome on ISPs", as he says the AUSFTA will expose providers to undue legal treatment.

"It [the AUSFTA] will create an atmosphere where Internet users accused of copyright infringement are presumed to be "guilty until proven innocent," said Clapperton.

According to Clapperton, the AUSFTA proposes new standards for criminal infringement of copyright, advocating that the average Australian Internet user may be liable for the same fines and imprisonment as a mass-producing bootleg organisation for illegally downloading music.

"The requirements of the FTA, modelled on the infamous US Digital Millennium Copyright Act, serve only to create new liabilities for ISPs, and tip the balance between the rights of copyright holders and the rights of ISPs and Internet users even further in favour of the copyright holders," said Clapperton.

The AUSFTA draft remains subject to legal review for accuracy and consistency. Pending executive approval, the legislation will need to be passed by both houses of government and approved by the US Congress before coming into effect.

Corrs Chambers and Westgarth predict that the AUSFTA is unlikely to come into force before the 1st January 2005, and Clapperton says he hopes the agreement will not be passed by the Senate.