Electronic Frontiers AUSTRALIA 20 YEARS

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Committee Secretary
Joint Standing Committee on Treaties
PO Box 6100
Parliament House, Canberra ACT 2600

Via email to: jsct@aph.gov.au

16th June 2014

Dear Committee Secretary,

Re: Inquiry into the Free Trade Agreement between Australia and Republic of Korea (KAFTA)

EFA welcomes the opportunity to provide input into this inquiry. Please find our submission on the following pages. Please do not hesitate to contact me should you require any further information.

About EFA

Established in January 1994, Electronic Frontiers Australia, Inc. (EFA) is a national, membership-based non-profit organisation representing Internet users concerned with on-line freedoms and rights.

EFA is independent of government and commerce, and is funded by membership subscriptions and donations from individuals and organisations with an altruistic interest in promoting online civil liberties. EFA members and supporters come from all parts of Australia and from diverse backgrounds.

Our major objectives are to protect and promote the civil liberties of users of computer based communications systems (such as the Internet) and of those affected by their use and to educate the community at large about the social, political and civil liberties issues involved in the use of computer based communications systems.

Yours sincerely,

Jon Lawrence
Executive Officer

Submission re Free Trade Agreement between Australia and Republic of Korea (KAFTA)

Introduction

Electronic Frontiers Australia (EFA) wishes to comment primarily on the content of Chapter 13 of the Korea-Australia Free Trade Agreement (*KAFTA*), which concerns Intellectual Property (IP).

EFA is concerned that the Department of Foreign Affairs and Trade (DFAT):

- has mischaracterised Australia's obligations under *KAFTA* in the National Interest Assessment;
- has failed to consider IP issues in a balanced way, and;
- has introduced many redundant requirements that will serve only to complicate and constrain the evolution of domestic IP policy.

Roadshow Films v iiNet

The National Interest Assessment (NIA) for *KAFTA* states in section 17:

> …to fully implement its obligations under *KAFTA*, the *Copyright Act 1968* will require amendment in due course to provide a legal incentive for online service providers to cooperate with copyright owners in preventing infringement due to the High Court's decision in *Roadshow Films Pty Ltd v iiNet Ltd*, which found that ISPs are not liable for authorising the infringements of subscribers.[1]

EFA believes that the suggestion that the High Court found "that ISPs are not liable for authorising the infringements of subscribers" is inaccurate for a number of reasons.

Firstly, it is clear from the High Court's judgement that whether or not the ISP authorised infringement depends on the facts of the case, and is not necessarily applicable to all ISPs in all circumstances. Secondly, in this case the Court found that iiNet did not authorise the copyright infringements, therefore the Court made no such decision.[2] Thirdly, had iiNet been found to have authorised the infringements, they may indeed have been liable. The Federal Court of Australia's judgement stated:

> I find that iiNet did have a repeat infringer policy which was reasonably implemented and that iiNet would therefore have been entitled to take advantage of the safe harbour provisions in Division 2AA of Part V of the *Copyright Act* if it needed to do so ... However, as I have not found that iiNet authorised copyright infringement, there is no need for iiNet to take advantage of the protection provided by such provisions.[3]

It appears that legal incentives exist for online service providers to cooperate with copyright holders at least to the extent of having repeat infringer policy. The overly broad statement in the NIA is concerning because it indicates excessive legislative change could be implemented, incorrectly justified by the ratification of *KAFTA*.

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[1] National Interest Analysis, Free Trade Agreement between the Government of Australia and the Government of the Republic of Korea (2014), ATNIA 8.
[2] Roadshow Films Pty Ltd v iiNet Limited [2012] HCA 16, paragraph 143
[3] Roadshow Films Pty Ltd v iiNet Limited (No. 3) [2010] FCA 24

Without further explanation from DFAT it is very difficult to assess the impact of this obligation. EFA recommends that what Australia needs to do to meet its obligations under this section be clarified so that the changes can be properly considered and debated.

IP rights of the Public

KAFTA has much to say about recognising various forms of intellectual property, enforcing the exclusive rights of their owners and ensuring liability for those who infringe. Completely absent however are the balancing considerations of the public interest and fair use.

By comparison the *Anti-Counterfeiting Trade Agreement* at least has a stated aim "to address the problem of infringement of intellectual property rights … in a manner that balances the rights and interests of the relevant rights holders, service providers, and users."[4]

EFA believes the Australian Government has failed to act in the national interest – particularly for everyday Australian consumers of copyrighted material – by failing to also negotiate important aspects of IP policy that are required to complement strong enforcement provisions. EFA denounces this omission and suggests that the rights of consumers must be included in future international agreements that concern IP.

Redundant Requirements

KAFTA article 13.1.3 explicitly affirms each Party's rights and obligations under the *TRIPS* Agreement, amongst others. Despite this affirmation the remainder of the chapter proceeds to paraphrase large chunks of existing agreements. For example, compare *KAFTA* section 13.8.1:

> Each party shall make patents available for any invention, whether a product or process, in all fields of technology, provided that the invention is new, involves an inventive step, and is capable of industrial application.

and *TRIPS* Agreement article 27.1:

> ...patents shall be available for any inventions, whether products or processes, in all fields of technology, provided that they are new, involve an inventive step and are capable of industrial application.[5]

In addition, this particular text concerning patents is controversial because it is unclear whether *TRIPS* requires all WTO members to recognise software patents.[6] The damage wrought by software patent trolls, particularly on open source projects and smaller technology businesses makes this possibility especially concerning to EFA.

Repeating these requirements in multiple treaties and agreements serves only to lock in the status quo and make it much more difficult for Australian domestic law to continue to evolve. If the Australian Government were to consider that software patents are not in our national interest,

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[4] Current ACTA text available at: <http://www.aph.gov.au/Parliamentary_Business/Committees/House_of_Representatives_Committees?url=jsct/21november2011/treaties/anti_counterfeiting_text.pdf>

[5] Agreement on Trade-Related Aspects of Intellectual Property Rights ("TRIPS Agreement")

[6] Foundation for a Free Information Infrastructure, *The TRIPS Treaty and Software Patents*, available online at: <https://web.archive.org/web/20130831014536/http://eupat.ffii.org/stidi/trips/index.en.html>

having multiple international treaties at odds with that change that would be a major discouraging factor in making that change.

Matters are complicated further by the fact that small changes have been made to the *TRIPS* wording when included in *KAFTA*. For example, compare *TRIPS* article 16.1 and *KAFTA* article 13.2.3. The legal consequences of these changes are uncertain and will complicate efforts to create legislation that meets all of Australia's foreign obligations as well as to address domestic interests.

Transparency and Consultation

The Australian Government may face a significant challenge in implementing the changes it believes are required for the Intellectual Property chapter, particularly if this requires legislating around the outcome of the *iiNet* trial. The legislation may struggle to pass as the rights and interests of the general public as opposed to "big business" have not been adequately represented.

EFA believes that trade agreements are an inappropriate means for the introduction of controversial or novel intellectual property policies such as these. In future these discussions should be resolved publicly before they are proposed for international agreements.

Conclusion

EFA has concerns both about Australia's intellectual property obligations under *KAFTA* and about the manner in which the text has been drafted. EFA seeks to promote digital consumers' rights and believes that these are not adequately represented in *KAFTA*. EFA believes that the IP aspects of the agreement are not in the national interest and will therefore prove difficult to implement.

EFA recommends that in future the Australian Government looks into ways to consult more widely on negotiating positions for trade agreements in order to minimise poor outcomes for Australian consumers and businesses and allow negotiations to proceed with more confidence.

EFA will gladly answer questions or provide feedback relating to any of these matters.