

How Can Policy Choices Affect FTA Negotiations and Implementation?

Workshop on IP, FTAs and Sustainable
Development

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Overview

- FTA Copyright Agenda
- Negotiation
- Implementation
- Policy responses

TRIPS+ FTA Copyright Provisions

- Technological Protection Measures based on U.S. DMCA.
- Copyright Term - life + 70 years (life + 95 years - Oman FTA).
- Temporary/ transient reproduction.
- ISP secondary liability regime.
- Criminalizing non-commercial infringement
- Statutory damages.

Domestic policy impact on Negotiations

- In certain areas:
 - Limitation on national treatment - Chile FTA; AUS FTA Art.17.1.6 -radio broadcasting, analogue communication of sound recordings
 - Parallel importation - AUSFTA silent
 - Retain additional damages if regularly awarded v. statutory damages, AUS FTA Art. 17.11.7(b)
- Not for key substantive norms:
 - TPMs and Term Extension; ISP liability?

WIPO Copyright Treaty- Art. 11

Contracting Parties shall provide adequate legal protection and effective legal remedies against the circumvention of effective technological measures that are used by authors in connection with the exercise of their rights under this Treaty or the Berne Convention and that restrict acts, in respect of their works, which are not authorized by the authors concerned or permitted by law.

DMCA & Australian TPM Law

- Digital Millennium Copyright Act:
 - U.S.'s implementation of WCT Art. 11 & WPPT Art. 18;
 - Bans (1) act of circumvention and (2) manufacture, distribution, importation of circumvention tools;
 - 7 limited exceptions -reflecting U.S. public policy purposes.

Australian TPM Law

- Australia (2000)- s.116A Copyright Act:
 - No ban on act of circumvention;
 - Regulation of circumvention tools - focus on preparatory acts;
 - Process to petition to make, import, distribute tools for set of “permitted purposes” - certain non-infringing uses under Copyright Act. Eg reproducing and communicating works by libraries and archives to end users.

US-AUS FTA - Art.17.4.7

IFAC-3 Report (page 8):

“.. it was critical to achieve Australia’s agreement to adhere to, and fully implement the provisions of the WCT and WPPT, along the same lines as the U.S. had in the DMCA in 1998. Unfortunately, in consideration of these issues in the last three years, Australia had strayed in a particularly key area from what industry and the U.S. government considered to be **full and correct** implementation of the obligations of those treaties.”

Policy Responses:

- (1) Education and identification of diverging areas in non-U.S. national law;
- (2) Implementation that follows scope of national copyright law. Aust TPM inquiry:
 - Scope of protection/ what is a TPM?
 - Power to regulate anti-competitive impacts
 - Limiting contractual override
 - Procedural burdens for exemption rulemaking
- (3) Create new exceptions and limitations, to balance harmonization of normative standards in U.S. law.

Constraints on New Exceptions

- Limit: Three step test - Art. 17.4.10 AUSFTA:
 - “each party shall confine limitations or exceptions to exclusive rights to certain special cases that do not conflict with a normal exploitation of the work, performance or phonogram, and do not unreasonably prejudice the legitimate interests of the right holder.”
- Limit: Retransmission over Internet
- Berne exceptions

Constraints on New Exceptions

- Dispute Settlement Chapter - non-violation cl.
- IFAC-3 report on AUSFTA
 - “will not hesitate to recommend U.S. action under the provisions of the dispute settlement chapter should Australia’s implementation of the agreement fall short of its commitments made in this agreement.”
- Investment Chapter
- Political - s. 301, GSP

Australian Fair Use Inquiry

- 2004 - The Australian Parliamentary Joint Standing Committee on Treaties recommended replacement of the Australian fair dealing exceptions “with a doctrine that more closely resembles the United States’ open-ended defence of fair use..”
- 2005 Fair Use & Other Copyright Exceptions Inquiry.

Conclusion

- Negotiation: understand US law and likely impact on national law.
- Flexibility for national implementation.
 - Competition regulation.
- Robust set of exceptions to re-calibrate the balance
 - Flexibilities
 - Exceptions and limitations in U.S. law

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